



SOUTH AFRICAN LAW REFORM COMMISSION

PROJECT 121

**CONSOLIDATED LEGISLATION PERTAINING
TO INTERNATIONAL JUDICIAL
CO-OPERATION IN CIVIL MATTERS**

REPORT

DECEMBER 2006

**TO MS BS MABANDLA, MP, MINISTER FOR JUSTICE AND CONSTITUTIONAL
DEVELOPMENT**

I am honoured to submit to you in terms of section 7(1) of the South African Law Reform Commission Act 19 of 1973 (as amended), for your consideration, the Commission's report on consolidated legislation pertaining to international judicial co-operation in civil matters.

A handwritten signature in black ink, appearing to read 'Y Mokgoro', is positioned above the typed name.

**MADAM JUSTICE Y MOKGORO
CHAIRPERSON: SOUTH AFRICAN LAW REFORM COMMISSION
2006**

INTRODUCTION

The South African Law Reform Commission was established by the South African Law Reform Commission Act 19 of 1973.

The members of the Commission are –

The Honourable Madam Justice Y Mokgoro (Chairperson)
The Honourable Madam Justice L Mailula (Vice-Chairperson)
Adv JJ Gauntlett SC
The Honourable Mr Justice CT Howie
Prof I Maithufi
Ms Z Seedat
The Honourable Mr Justice W Seriti

The Acting Secretary of the South African Law Reform Commission is Mr M Palumbo.

The Commission's offices are on the 12th floor, Sanlam Centre, c/o Pretorius and Schoeman Streets, Pretoria. Correspondence should be addressed to:

The Secretary
South African Law Reform Commission
Private Bag X 668
PRETORIA
0001

Telephone: (012) 392 – 9540
Fax: (012) 320 – 0936
E-mail: mpalumbo@justice.gov.za
Website: www.doj.gov.za/salrc/index.htm

The project leader responsible for this investigation is Adv JJ Gauntlett SC. This report was compiled by Professor Tom Bennett, (UCT).

TABLE OF CONTENTS

	PAGE
INTRODUCTION	iii
SUMMARY OF RECOMMENDATIONS	viii
LIST OF SOURCES AND MODE OF CITATION	xvii
TABLE OF CASES	xxiii
SELECTED LEGISLATION	xxxii
CHAPTER 1: INTRODUCTION	
1.1 Background to the investigation	1
1.2 Scope of the investigation	4
1.3. The historical development of international judicial co-operation	4
1.4 Conclusion	9
CHAPTER 2: SERVICE OF PROCESS	
2.1 Statement of the law	11
2.2 Evaluation	13
(a) Domestic methods for securing service	13
(b) The Hague Convention	14
2.3 Recommendations	17
CHAPTER 3: TAKING OF EVIDENCE	
3.1 Statement of the law	18
3.2 Evaluation	19
3.3 Recommendations	26

**CHAPTER 4: RECOGNITION AND ENFORCEMENT OF FOREIGN
JUDGMENTS UNDER THE COMMON LAW**

4.1	Statement of the law	28
4.2	Evaluation	31
	a) Doctrine: survival of the original cause of action	32
	b) The definition of judgment	34
	c) Non-monetary claims	37
	d) Validity of the original judgment	39
	e) Conflicting judgments	41
	f) The date for converting foreign currencies	42
	g) Interest	43
	h) International competence	44
	i) Residence	45
	ii) Residence of artificial persons	45
	iii) Submission	48
	iv) Domicile	51
	v) Nationality	53
	vi) Attachment of property	54
	vii) Cause of action arising and fugitive from justice	54
	viii) An open or closed list of grounds?	55
	ix) Jurisdiction in federal states	56
	i) Final and conclusive	57
	j) Natural justice, fraud and public policy	59
	(i) Natural justice	60
	(ii) Fraud	62
	(iii) Public policy	63
	k) Judgments that have lapsed or been satisfied	64
4.3.	Recommendations	66
	(a) Survival of the original cause of action	66
	(b) Definition of judgment and grounds of international competence for orders on immovables	67
	(c) Validity of the judgment	67
	(d) Conflicting judgments	68

(e)	The date for converting foreign currencies	68
(f)	Interest	68
(g)	International competence	68

CHAPTER 5: THE PROTECTION OF BUSINESSES ACT 99 of 1978

5.1	Statement of the Law	70
5.2	Evaluation	71
5.3	Recommendations	76

CHAPTER 6: RECOGNITION AND ENFORCEMENT OF JUDGMENTS UNDER STATUTORY LAW

6.1	Statement of the law	78
6.2	Evaluation	81
	(a) Comparison with British law	81
	(b) Application of the Act: designation	83
	(c) Retention of the common law action	85
	(d) Types of judgment	86
	(e) International competence	87
	(f) Defences	88
	(g) Courts for enforcement	90
6.3	Recommendations	91

CHAPTER 7: MAINTENANCE AWARDS

7.1	Statement of the law	92
7.2	Evaluation	95
7.3	Recommendations	100

CHAPTER 8: CONSOLIDATION OF ACTS

8.1	Statement of the problem	101
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8.2	Evaluation	102
	(a) Consolidation of Acts	102
	(b) Service of process and taking evidence abroad	103
	(c) Enforcement of maintenance orders	104
8.3	Recommendations	105

CHAPTER 9: INTERNATIONAL CO-OPERATION

9.1	Introduction	106
9.2.	Evaluation	107
	(a) Guiding principles	107
	(b) Regional conventions	110
	(c) International measures	114
	(d) Applicability of the regional and international initiatives	116
9.3	Recommendations	119

LIST OF ANNEXURES

ANNEXURE A:	LIST OF RESPONDENTS	121
ANNEXURE B:	RECOMMENDATION TO EXTEND LIST OF DESIGNATED COUNTRIES IN TERMS OF RECIPROCAL SERVICE OF PROCESS ACT 12 OF 1990	122
ANNEXURE C:	RECOMMENDED AMENDMENTS TO FOREIGN COURTS EVIDENCE ACT 80 OF 1962 AND RECOMMENDED HAGUE CONVENTION ON THE TAKING OF EVIDENCE ABROAD IN CIVIL OR COMMERCIAL MATTERS ACT	123
ANNEXURE D:	RECOMMENDED AMENDMENTS TO THE RECOGNITION AND ENFORCEMENT OF FOREIGN CIVIL JUDGMENTS UNDER THE COMMON LAW	140
ANNEXURE E:	RECOMMENDED PROTECTION OF BUSINESSES ACT REPEAL BILL	143
ANNEXURE F:	RECOMMENDED AMENDMENTS TO ENFORCEMENT OF FOREIGN CIVIL JUDGMENTS ACT 32 OF 1988	145
ANNEXURE G:	RECOMMENDED AMENDMENTS TO RECIPROCAL ENFORCEMENT OF MAINTENANCE ORDERS 'COUNTRIES IN AFRICA' ACT 6 OF 1989	148
ANNEXURE H:	MODEL BILATERAL TREATY	153

SUMMARY OF RECOMMENDATIONS

A) Service of process

In High Court actions in South Africa, a litigant who wishes to serve process outside the country must transmit the documents, via the registrar of the court, to the Director-General: Foreign Affairs for onward transmission to South African consular officials in the foreign state or to the relevant authorities of that state. This procedure is governed by the Rules of Court and common law. In the case of foreigners wishing to serve process in South Africa, the reverse procedure is necessary. For actions in either the High Court or a magistrate's court, an accelerated procedure is available under the Reciprocal Service of Civil Process Act 12 of 1990.

The Reciprocal Service of Civil Process Act, however, is applicable only to countries designated by the Minister of Justice, and, so far, only one state has been designated. Application of the Act should immediately be extended so that its procedures for serving process are available to litigants in the countries with which South Africans have frequent dealings.

When deciding which countries to designate under the Act, the Minister is advised to take account not only of the promise of reciprocal treatment, but also of the judicial standards prevailing in the selected state so as to ensure compatibility with the South African Constitution 1996.

South Africa should accede to the Hague Convention on the Service Abroad of Judicial and Extra-judicial Documents in Civil and Commercial Matters (1965), partly in order to ensure service of process from our courts in a greater number of states abroad, and partly to promote the cause of international judicial co-operation.

When acceding to the Convention, South Africa should make two reservations: that South Africa may exclude documents that offend its public policy or may lead to a criminal prosecution, and that South African law will be used to determine whether a matter should be deemed civil or criminal.

B) Taking of evidence

A foreigner seeking evidence within South Africa has a confusing range of procedures available, each governed by a different statute: the High Court Act 59 of 1959, the Magistrates' Courts Act 32 of 1944 and the Foreign Courts Evidence Act 80 of 1962. Application may be made to: a consular official in South Africa, the High Court or a magistrate's court, or an official in the Department of Justice (who will refer the request to a judge in chambers). The laws governing these procedures need to be consolidated so as to provide a uniform method with minimal bureaucratic intervention.

The most appropriate vehicle for the consolidated laws is the Foreign Courts Evidence Act 80 of 1962, since it is designed to control requests to and from foreign countries. The High Court Act 59 of 1959 and the Magistrates' Courts Act 32 of 1944 should be left to regulate procedures for gathering evidence in South African domestic law.

Currently, our law makes no particular provision to assist South African litigants wanting to obtain evidence outside this country. (Traditionally, requests were attended to by members of our consular officials abroad.) To facilitate such requests, South Africa should incorporate the Hague Convention on Taking of Evidence in Civil or Commercial Matters (1970) into our domestic law.

When incorporating the Hague Convention into its domestic law, South Africa should alter the terms of its declaration (in terms of article 23) to provide that:

'The Republic of South Africa will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents. The Republic further declares that it understands ... as including any Letter of Request, one which requires a person:

- a. to state what documents relevant to the proceedings to which the Letter of Request relates are, or have been, in his or her possession, custody or power; or
- b. to produce any documents other than particular documents specified in the Letter of Request as being documents appearing to the requested court to be, or to be likely to be, in his or her possession, custody or power.'

Sections 1(1)(b) and 1D of the Protection of Businesses Act 99 of 1978 allow for potential violations of our international obligations. Hence, when the Hague Convention is incorporated into our law, these provisions must be deleted. In their place, a provision may be inserted in the Foreign Courts Evidence Act 80 of 1962 to the effect

that the 'central authority' has the power to refuse compliance with any request that threatens to violate South African sovereignty or security.

The Act incorporating the Hague Convention should specify that our law will be used to characterize the underlying causes of action for requests as criminal (as opposed to civil or commercial).

C) Recognition and enforcement of foreign judgments under the common law

The common-law method for recognizing and enforcing foreign judgments in South Africa is a vital adjunct to the accelerated statutory procedure available under the Enforcement of Foreign Civil Judgments Act 32 of 1988. In the first place, the Act currently applies only to Namibia, and, until it is extended to more countries, the common-law action will remain the only method for enforcing foreign judgments (apart from maintenance awards, which are governed by separate statutory procedures). In the second place, even when the Foreign Civil Judgments Act is made more widely applicable, it will still apply only to judgments emanating from countries designated by the Minister of Justice under the Act. Enforcement of judgments in and from all other countries will remain subject to the common law.

In view of gaps and ambiguities in the rules, amendments to the common law are necessary. Litigants deserve certainty in legal proceedings: they should not be forced to undertake costly litigation in order to establish the precise grounds for an action or defence.

(i) Survival of the original cause of action

At present, it is uncertain whether the English rule, that original debts survive the foreign judgments, is part of South African law. Legislation is needed to declare that, in our law, a foreign judgment is deemed to extinguish the original cause of action. As a result, judgment creditors will not be given the opportunity of suing for a second time on the original debts, and the South African law on foreign judgments will be brought into alignment with the rules governing the effect of domestic judgments on debts.

(ii) Definition of judgment and grounds of international competence for orders regarding immovable property

Because South African law has no clear definition of what constitutes a foreign judgment, legislation is needed to specify what is meant by this term. It is also uncertain whether our courts are competent to enforce non-monetary foreign judgments. The limitation to monetary judgments, which derives from the technicalities of English law, serves no useful purpose, and should now be removed.

These two purposes will be achieved if the amending Act uses a modified version of the definition of 'judgment' given in the Enforcement of Foreign Civil Judgments Act 32 of 1988, together with that in the draft Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters (2002): 'any final decision or order by a court, whatever it may be called, in any civil proceedings, excluding orders affecting personal status, but including orders for the determination of costs, which is enforceable by execution in the country in which it was given or made.'

Because this definition includes declaratory orders, special provision will also be necessary for determining grounds of international competence in cases of judgments concerning immovable property. It should be provided that the *forum rei sitae* has exclusive international competence in actions involving rights to immovable property.

(iii) Validity of the judgment

South African common law has no clear rule indicating whether our courts are competent to pronounce on the validity of foreign judgments. It would be paradoxical; however, if a South African court were to enforce a judgment invalid according to the law of the country in which it was given. Our courts should therefore be given authority to pronounce on the validity of foreign judgments. For this purpose, section 5(b) of the Enforcement of Foreign Civil Judgments Act 32 of 1988 may be used: a foreign judgment will not be enforceable if 'the court of the country concerned had no jurisdiction in the circumstances of the case'. Courts will have discretion in determining what 'the circumstances of the case' may mean.

(iv) Conflicting judgments

When two foreign judgments between the same parties and over the same subject matter are in conflict, the common law provides no rule for deciding whether the forum should give overriding effect to the earlier or later judgment. Legislation is required to

specify that a foreign judgment may not be enforced in South Africa if it conflicts with a judgment already given elsewhere.

(v) The date for converting foreign currencies

Under the common law, judgments in foreign currencies must be converted into their rand equivalent at the original date of payment. To allow for account to be taken of fluctuations in exchange rates, the rule must be amended to stipulate that conversion into rand is to take place at the date when the forum decides to enforce the judgment.

(vi) Interest

The common law must be amended to determine whether the interest rate on a judgment should be prescribed by the foreign law or South African law. The new rule should specify that the interest awarded by the rendering court will run until the date of registration of the judgment in South Africa. Thereafter, the rate will be that laid down by South African law, or the law of the state of origin, whichever is the lower.

(vii) International competence

Except for the rules determining the residence of juristic persons, no amendment is needed to the common law governing international competence. The current rule, which deems a company resident at its registered office, is unduly narrow. A broader concept of residence should be adopted, namely, the principal place of business. The term 'principal place of business' in this definition may be defined to mean 'where the affairs of the enterprise are controlled'.

D) The Protection of Businesses Act 99 of 1978

The Protection of Businesses Act 99 of 1978 must be repealed. First, all parties to the Project on International Judicial Co-operation indicated their clear commitment to achieving the stated aim, and the Act is a major obstacle to this principle. Secondly, the Act frustrates what are, in the great majority of cases, uncontentionous requests for serving process, taking evidence or enforcing foreign judgments. Thirdly, the convoluted and over-detailed language of the Act has had a predictable result: ambiguity and non-compliance. Finally, the Act signals a hostile and defensive attitude to the international community.

The original purpose of the Act was unobjectionable: refusing co-operation when it entailed the enforcement of foreign laws permitting payment of punitive or multiple damages. A straightforward repeal of the Act would leave the courts free to construct new rules to achieve this aim under the rubric of public policy, but, in the interests of certainty and predictability, it is preferable to specify in advance areas in which requests for service, evidence or the enforcement of foreign judgments may be refused.

New legislation for this purpose should be based on an assumption that co-operation by the South African judicial system will be forthcoming. Only if it can be proved that giving effect to a request will entail the award of penal or multiple damages may the courts refuse to co-operate.

The Minister should be entitled to intervene to prohibit further action in the courts, if a particular request for international judicial co-operation poses a serious threat to our national security or economy. These are areas over which executive, rather than judicial, action is appropriate, since the executive is better placed to discern the long-term domestic and international implications.

E) Recognition and enforcement of judgments under statutory law

An accelerated procedure for enforcing foreign judgments in South Africa and for assisting local litigants to enforce the judgments of South African courts abroad is available under the Enforcement of Foreign Civil Judgments Act 32 of 1988. While this Act provides a satisfactory enforcement mechanism, its application is limited to countries designated by the Minister of Justice. So far, only Namibia has been designated.

As a matter of urgency, the scope of the Act needs to be extended to more countries, starting with our major trading partners.

The Act should not be made the exclusive method for enforcement. For reasons given above, the common-law action should be retained as a residual option.

Two amendments to the Act are necessary. The first is deletion of the clause restricting application of the Act to proceedings in magistrates' courts; the High Court

should also be given the power to register and enforce foreign judgments. The second is a redefinition of the concept of judgment so as to allow for the enforcement of non-monetary judgments. In this regard, a further provision is necessary to stipulate that only the *forum rei sitae* is competent to give judgments relating to immovable property.

F) Maintenance awards

Maintenance awards are generally not enforceable under the common law. Hence, the Reciprocal Enforcement of Maintenance Orders Act 80 of 1963 and the Reciprocal Enforcement of Maintenance Orders (Countries in Africa) Act 6 of 1989 provide accelerated procedures for enforcing awards emanating in South Africa and in countries abroad. Of the two Acts, the Countries in Africa Act is considered the most effective, because of its streamlined procedure.

The Acts apply only to countries designated by the Minister of Justice. Although some 27 countries were designated under the 1963 Act, none have been designated under the 1989 Act. Since the latter provides the better procedure, the two Acts should be consolidated (see paragraph 7.3 below), the restriction to 'Countries in Africa' lifted in the 1989 Act, and more countries designated.

In order to facilitate the enforcement of maintenance awards in a greater range of countries, and to obviate the need to negotiate bilateral agreements, South Africa should accede to both the UN Convention on Recovery Abroad of Maintenance (1957) and the Hague Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations (1973).

G) Consolidation of Acts

There is no pressing need to consolidate all Acts governing international judicial co-operation into a single instrument. In particular, Acts governing enforcement of maintenance orders and other civil judgments should be kept separate.

When enacting changes to the Foreign Courts Evidence Act 80 of 1962, the opportunity should be taken to amend the High Court Act 59 of 1959 and the Magistrates' Courts Act 32 of 1944 to produce a uniform procedure for foreigners wishing to obtain evidence in this country.

It is not necessary to have two Acts for the enforcement of maintenance orders. Hence, the Reciprocal Enforcement of Maintenance Orders Act 80 of 1963 should be repealed, although care should be taken to ensure that we do not lose the benefit of reciprocal enforcement in the countries already designated under this Act. The Reciprocal Enforcement of Maintenance Orders (Countries of Africa) Act 6 of 1989 should then be adjusted to become the main vehicle for enforcing maintenance awards, partly because it applies to a wider range of orders and partly because it has a simpler procedure.

H) International judicial co-operation

South Africa should be clearly committed to a policy of international judicial co-operation. In order to achieve this goal, we need to clarify and improve our law. As a starting point, gaps and ambiguities in the common law must be remedied. Reform of this area then provides a good opportunity to consider the state of our statute law. Repeal of the Protection of Businesses Act 99 of 1978, in particular, is essential if the South African legal system is to be opened to international co-operation.

These reforms will obviously redound to the benefit of litigants seeking to serve process, take evidence or enforce foreign judgments locally, but urgent attention must also be given to the plight of litigants in South Africa who wish to perform the same acts abroad. Unless some type of international agreement was negotiated in advance to secure an accelerated procedure under one of our domestic statutes, the judgment creditor is at the mercy of the law of the state in which action is sought.

At present, the scope of application of the following Acts is far too limited: Foreign Courts Evidence Act 80 of 1962, Enforcement of Foreign Civil Judgments Act 32 of 1988, Reciprocal Enforcement of Maintenance Orders (Countries in Africa) Act 6 of 1989 and the Reciprocal Service of Civil Process Act 12 of 1990. Hence, the second stage of reform to our law should concentrate on making our statutory procedures more widely available, and ensuring reciprocal treatment from foreign states. In the short term, the most practical method for achieving this aim is the negotiation of bilateral treaties with our immediate neighbours and major trading partners, an initiative that will require action by the Department of Justice, together with the Department of Foreign Affairs.

The third stage of reform entails South Africa's accession to certain multilateral conventions. Two immediate targets are the UN Convention on the Recovery Abroad of Maintenance (1957) and the Hague Convention on the Recognition and Enforcement of Maintenance Obligations (1973). Moreover, in order to keep abreast of global developments, we should also continue to participate actively in the Hague Conferences on international law.

Finally, in the longer term, South Africa should be taking the lead to encourage closer regional co-operation in the Southern African Development Community. For this purpose, regional conventions in Africa, Europe and South America provide useful models.

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Borough of Finsbury Permanent Investment Building Society v Vogel (1910) 31
NLR 402

Boshoff v Union Government 1932 TPD 345

C Hoare & Co v Runewitsch & another 1997 (1) SA 338 (W)

Cargo Motor Corp v Tofalos Transport Ltd 1972 (1) SA 186 (W)

Cassim, Estate v Cassim (1915) 36 NLR 14

Chinatex Oriental Trading Co v Erskine 1998 (4) SA 1087 (C)

Cohen v Wicherlink (1898) 5 Off Rep 299

Coluflandres Ltd v Scandia Industrial Products Ltd 1969 (3) SA 551 (R)

Commissioner of Taxes for Rhodesia v McFarland 1965 (1) SA 470 (W)

Coppen v Coppen (1908) 29 NLR 416

Dabelstein & others v Hildebrandt & others 1996 (3) SA 42 (C)

Dairy Board v John T Rennie & Co (Pty) Ltd 1976 (3) SA 768 (W)

Dale v Dale 1948 (4) SA 741 (C)

Dawood v C&A Friedlander 1913 CPD 291

De Naamloze Vennootschap Alintex v Von Gerlach 1958 (1) SA 13 (T)

Dickinson & another v Fisher's Executors 1914 AD 424

Duarte v Lissack 1973 (3) SA 615 (D)

Du Preez v Philip-King 1963 (1) SA 801 (W)

Eloff v Grobler's Executor & another 1934 CPD 10

Estate H v Estate H 1952 (4) SA 168 (C)

Fairfield v Fairfield 1925 CPD 297

Foord v Foord 1924 WLD 81

Gabelsberger & Another v Babl & Another 1994 (2) SA 677 (T)

Goodman v Goodman (1903) 20 SC 376

Greathead v Greathead 1946 TPD 404

Himovich, Estate 1951 (2) SA 156 (C)

Holz v Harksen 1995 (3) SA 521 (C)

ISM Inter Ltd v Maraldo & another 1983 (4) SA 112 (T)

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Jones NO v Borland SSC 1969 (4) SA 29 (W)

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Jones, ex parte: in re Jones v Jones 1984 (4) SA 725 (W)

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Kaunda & others v President of the RSA & others 2004 (5) SA 191 (T)

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653 (A)

Kuhne & Nagel AG Zurich v APA Distributors Pty Ltd 1981 (3) SA 536 (W)

Kruger NO v Boland Bank Bpk 1991 (4) SA 107 (T)

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Murata Machinery Ltd v Capelon Yarns (Pty) Ltd 1986 (4) SA 671 (C)

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2003 (4) SA 1 (CC)

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Resnik v Lekhetoa 1950 (3) SA 263 (T)

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Rosa's Heirs v Inhambane Sugar Estates 1905 TH 11

Rubie v Haines 1948 (4) SA 998 (W)

Russell v King (1909) 30 NLR 209

Saunders & another v Minister of Justice & others 1997 (3) SA 1090 (C)

Scorgie v Munnich 1912 EDL 422

Segal v Segil 1992 (3) SA 136 (C)

Seton Co v Silveroak Industries Ltd 2000 (2) SA 215 (T)

Severin v Severin 1951 (1) SA 225 (T)

Skilya Property Investments (Pty) Ltd v Lloyds of London 2002 (3) SA 765 (T)

Society of Lloyd's v Price & Lee [2006] SCA 87

Society of Lloyd's v Ilse 2006 CLR 101 (C)

Sparks v David Polliack & Co 1963 (2) SA 491 (T)

Standard Bank Ltd v Butlin 1981 (4) SA 158 (D)

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Standard Chartered Bank of Canada v Nedperm Bank Ltd 1994 (4) SA 747 (A)

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S v Walraven 1975 (4) SA 348 (T)

Steinberg v Cosmopolitan National Bank of Chicago 1973 (4) SA 564(RA)

Supercat Inc v Two Oceans Marine CC 2001 (4) SA 27 (C)

Swissborough Diamond Mines v Government of the RSA & others 1999 (2) SA 279 (T)

Swadif (Pty) Ltd v Dyke 1978 (1) SA 928 (A)

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Hardie Rubber Co Pty Ltd v General Tire & Rubber Co (1973) 47 ALJR 462

CANADA

Hunt v T&N (1993) 109 DLR (4th) 16 (SCC)

Morguard Investments Ltd v De Savoye (1990) 3 SCR 1077

Old North State Brewing Co v Newlands Services Inc [1999] 4 WWR 537

GERMANY

Corning Glass Works Case (1981) 20 International Legal Materials 1025

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UNITED KINGDOM

A-G of New Zealand v Ortiz [1984] AC 1

Adams v Cape Industries plc [1990] 2 WLR 657 (CA) at 736; [1991] 1 All ER 929 (CA)

Adams v Cape Industries [1990] Ch 433

Ashurst v Pollard [2000] 2 All ER 772 (Ch)

Beatty v Beatty [1924] 1 KB 807 (CA)

Blohn v Desser [1962] 2 QB 116

Buchanan v Rucker [1808] KB 192

Carl Zeiss Stiftung v Rayner & Keeler (No 2) [1967] 1 AC 853 (HL)

Desert Sun Loan Corp v Hill [1996] 2 All ER 847 (CA)

Emanuel v Symon [1908] 1 KB 302

EMI Records Ltd v Modern Music GmbH [1992] 1 All ER 616 (QB)

Felixstowe Dock & Ry Co v United States Lines Inc [1989] QB 360

Godard v Gray LR 6 QB 139 (1870)

Henry v Geopresco International Ltd [1976] QB 726

Huntington v Attrill [1893] AC 150 (PC)

Jet Holdings Inc v Patel [1989] 2 All ER 648 (CA); [1990] QB 335

Kraut AG v Albany Fabrics Ltd [1977] QB 182

Littauer Glove Corp v F W Millington (1928) 44 TLR 746

Miliangos v George Frank (Textiles) Ltd [1976] AC 443 (HL)

Motorola Credit Corporation v Cem Uzan, Aysegul Akaz [2004] WL 3185404 (QBD Comm Ct)

Nouvion v Freeman (1889) 15 App Cas 1

Owens Bank Ltd v Bracco & others [1992] 2 All ER 193 (HL)

Papadopoulos [1930] P 55

Pemberton v Hughes [1899] 1 Ch 781 (CA)

Penn v Baltimore (1750) 1 Ves Sen 444

Raulin v Fischer [1911] KB 93

Rio Tinto-Zinc Corp & others v Westinghouse Electric Corp [1978] AC 547

Russell v Smyth 152 ER 343

Travers v Holley [1953] 2 All ER 794

SA Consortium Textiles v Sun & Sand Agencies Ltd [1978] 1 QB 279

Schibsby v Westenholz (1870) LR 6 QB 155

Sennar, The (No 2) [1985] 1 WLR 490 (HL)

Services Euro Atlantique Sud v Stockholms Redeariaktiebolag SVEA, The Folias [1979] AC 685 (HL)

Showlag v Mansour & others [1995] 1 AC 431 (PC)

Sirdar Gurdyal Singh v Rajah of Faridkote [1894] AC 670

Syal v Heyward [1948] 2 KB 443

USA v Inkley [1988] 3 All ER 144 (CA)

Vogel v R & A Kohnstamm Ltd [1973] QB 133

UNITED STATES

Hilton v Guyot 159 US 113 (1895)

Magnolia Petroleum Co v Hunt 320 US 430 (1943)

Tahan v Hodgson 662 F2d 862 (1981)

Volkswagenwerk AG v Schlunk 486 US 694 (1988)

EUROPEAN COURT OF JUSTICE

Régie nationale des usines Renault SA v Maxicar SpA and Orazio Formento

European Court of Justice of 5 May 2000, C-38/98

SELECTED LEGISLATION

SOUTH AFRICA

Administration of Estates Act 66 of 1965.

Admiralty Jurisdiction Regulation Act 105 of 1983

Companies Act 61 of 1973

Constitution of the Republic of South Africa Act 1996

Cross-border Insolvency Act 42 of 2000

Diplomatic Immunities and Privileges Act 37 of 2001

Domicile Act 3 of 1992

Electronic Communications and Transactions Act 25 of 2002

Enforcement of Foreign Civil Judgments Act 32 of 1988

Foreign Courts Evidence Act 80 of 1962

Magistrates' Courts Act 32 of 1944

Maintenance Act 99 of 1998

Prescription Act 68 of 1969

Protection of Businesses Act 99 of 1978

Reciprocal Enforcement of Civil Judgments Act of 9 of 1966

Reciprocal Enforcement of Maintenance Orders Act 80 of 1963

Reciprocal Enforcement of Maintenance Orders (Countries in Africa) Act 6 of 1989

Reciprocal Service of Civil Process Act 12 of 1990

Recognition and Enforcement of Foreign Arbitral Awards Act 2 of 1977

Supreme Court Act 59 of 1959

AUSTRALIA

Foreign Judgments Act of 1991

Foreign Proceedings (Excess of Jurisdiction) Act of 1984

CANADA

Foreign Extraterritorial Measures Act RS of 1985

NEW ZEALAND

Reciprocal Enforcement of Judgments Act (1934)

UNITED KINGDOM

Administration of Justice Act 1920

Civil Jurisdiction and Judgments Act (1982)

Foreign Judgments (Reciprocal Enforcement) Act 1933

Maintenance Orders (Facilities for Enforcement) Act 1920

Maintenance Orders (Reciprocal Enforcement) Act 1972

Protection of Trading Interests Act 1980

CHAPTER 1: INTRODUCTION

1.1 Background to the investigation

1.1.1 In any legal action, the alleged debtor is unlikely to be a willing party in the proceedings. Hence, procedures for serving process, obtaining evidence from witnesses or executing judgments are critical to the success of the proceedings. If the debtor is living abroad, however, there is every chance of these procedures being frustrated, because considerations of sovereignty preclude direct execution of judicial process outside the territory of the rendering state. Thus service and enforcement procedures in foreign countries require international co-operation.

1.1.2 On 3 November 1999, the Directorate: International Affairs held a departmental workshop to determine how South Africa should co-operate with foreign states to ensure the recognition and enforcement of foreign civil judgments. Concern about this matter arose from the mounting demands for South African courts to speed up action on foreign civil process and for foreign courts to render us the same service. These demands have arisen from the ever-increasing interaction between South Africans and foreigners, especially in commercial matters.

1.1.3 A growth in cross-border trade inevitably leads to an increase in international civil disputes. These disputes, in turn, generate new disputes about jurisdiction, service of process and the recognition and enforcement of foreign judgments. South Africa is not alone in acknowledging the need for clear rules to govern these problems. Most states are now committed to providing fast and inexpensive judicial facilities, especially for the business community, so as to contribute to 'the flow of wealth, skills and people across state lines in a fair and orderly manner'.¹ It is therefore widely acknowledged that:

¹ **Morguard Investments Ltd v De Savoye** (1990) 3 SCR 1077 at 1098.

'the society of nations will work better if some foreign judgments are taken to create rights which supersede the underlying cause of action, and which may be directly enforced in countries where the defendant or his assets are to be found.'²

1.1.4 Unfortunately, because of its years of isolation under the apartheid regime, South Africa has not kept abreast of the developments in the law on international judicial co-operation. This deficiency has become a cause for growing concern among legal practitioners.

1.1.5 The problem is most acute in the case of recognition and enforcement of judgments. Currently, the only course of action for foreign judgment creditors (except those from Namibia) is to sue under the common law, which entails bringing an action to have the judgment made into an order of a local court. Moreover, because the government has not negotiated international agreements with foreign states, South Africans must resort to similar methods for having local judgments enforced abroad. Accelerated procedures are available, but they require the South African government and the foreign government in question to negotiate an agreement in advance; we have very few agreements of this nature.

1.1.6 Apart from the obvious gaps, our law on international judicial co-operation is also dispersed among a number of different sources. The rules on enforcement of civil judgments, for instance, are dealt with in two sets of statutes, one applicable to maintenance³ and the other to ordinary commercial debts.⁴ In the case of service of process and the taking of evidence abroad, the sources are even more difficult to locate: rules are contained in an array of statutes, rules of court and diplomatic practices.

1.1.7 The International Affairs workshop was attended by judges, magistrates, state attorneys, sheriffs, registrars and clerks of court. After discussing the various enactments currently on the statute book, it was decided that all the legislation should be captured in a consolidated act.

² **Adams v Cape Industries** [1990] Ch 433 at 552-3.

³ The Reciprocal Enforcement of Maintenance Orders Act 80 of 1963 and the Reciprocal Enforcement of Maintenance Orders (Countries in Africa) Act 6 of 1989.

⁴ The Enforcement of Foreign Civil Judgments Act 32 of 1988.

1.1.8 On 5 June 2000, the Minister of Justice approved an investigation by the South African Law Reform Commission into Consolidated Legislation Pertaining to International Co-operation in Civil Matters. The terms of this inquiry included recognition and enforcement of foreign judgments, the service of judicial process abroad and the taking of evidence for use in civil proceedings.

1.1.9 On 14 February 2002, this project was given an added impetus by South Africa's participation, for the first time, in the Hague Conference on private international law.⁵ This conference has been held regularly since 1893. It provides a forum for discussion about the harmonization and codification of rules in private international law (a subject which includes the recognition and enforcement of foreign judgments).

1.1.10 By becoming involved in the Conference, South Africa will be better prepared for accession to the various conventions (especially, of course, the Hague conventions) on international judicial co-operation. We are already party to the Hague Convention on the Taking Abroad of Evidence in Civil or Commercial Matters (1970) and the Vienna Convention on Consular Relations (1963). Attention should also be given to acceding to:

- the Hague Convention on Service Abroad of Judicial and Extra-judicial Documents in Civil and Commercial Matters (1965)
- the UN Convention on the Recovery Abroad of Maintenance (1957)
- the Hague Convention on the Recognition and Enforcement of Maintenance Obligations (1973).⁶

⁵ South Africa was the 59th state to participate.

⁶ A watchful eye should also be kept on the draft Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters (1999). **Ms Kruger** alerted the Commission to other Hague Conventions, not mentioned in the Issue Paper, which South Africa could consider ratifying: the Hague Convention on Jurisdiction, Applicable Law, Recognition and Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (1996), the Hague Convention on the International Protection of Adults (2000) and the Hague Convention on International Access to Justice (1980). The latter Convention would ensure that legal aid is made available to South African litigants abroad, but it is questionable whether our own, already stretched resources, would be able to provide for legal aid to the large number of foreigners in South Africa.

1.2 Scope of the Investigation

1.2.1 The Law Commission project reviewed the South African law on the recognition and enforcement of foreign civil judgments, maintenance orders, the service of documents abroad and the obtaining of evidence from abroad. The inquiry was concerned only with civil and commercial matters. Fiscal and criminal matters were excluded,⁷ together with questions about personal status (ie, adoption, custody and guardianship) and marriage (including divorce).

1.2.2 Certain other matters were also excluded on the ground that they are self-contained topics already adequately provided for in existing legislation:⁸ foreign orders of insolvency,⁹ admiralty jurisdiction¹⁰ and the administration of foreign deceased estates.¹¹ In addition, the enforcement of foreign arbitral awards, although an important method for settling commercial disputes, was excluded because it has already been the subject of an intensive investigation by the Commission, and legislation is pending.¹²

1.3 The historical development of international judicial co-operation

1.3.1 The earliest manifestations of international judicial co-operation go back to antiquity, when certain nations consented to foreign process being served within their territories.¹³ In the Roman Empire, however, and later in medieval Europe, because uniform systems of law were applicable, problems of international co-operation hardly

⁷ Persons who escaped prosecution or sentence in criminal proceedings are subject to extradition, either under bilateral treaties or, in the case of such international crimes as drug dealing and aircraft hijacking, under multilateral conventions. Aside from the treaties requiring extradition or prosecution, there are various treaties requiring, for example, the surrender of information and judicial records in possession of requested states, or, where the state does not already have the evidence, a search for, and identification of, it.

⁸ It should be noted that most, if not all, of these matters, are also excluded from domestic legislation abroad and from both the major international instruments dealing with foreign civil judgments. See article 1(2) of the Brussels Regulation (2000) and article 2 of the draft Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters (2000).

⁹ Chapter 3 of the Cross-border Insolvency Act 42 of 2000.

¹⁰ Judgments abroad concerning maritime claims may be enforced by actions *in rem* against the vessel involved: section 1(1)(aa) of the Admiralty Jurisdiction Regulation Act 105 of 1983.

¹¹ Section 45(1) of the Administration of Estates Act 66 of 1965.

¹² South African Law Commission **Report on an International Arbitration Act for South Africa** Project 94 July 1998.

¹³ Sutherland **International and Comparative Law Quarterly** 1982 31 at 785.

ever arose. In Roman times, this law was the *ius civile* (or *gentium*) and, in medieval times, the *ius commune*. A uniformity of laws meant that one court would not consider the proceedings of another 'foreign'.¹⁴

1.3.2 With the gradual divergence of legal systems, and the emergence of the territorial state, however, considerations of sovereignty came to preclude the enforcement of judicial acts outside the borders of the state in which they were rendered. The prevailing attitude was vividly expressed by an English judge, when a plaintiff sought to enforce a judgment from a court of the small Caribbean island, Tobago.¹⁵ The judge asked: 'Can the island of Tobago pass a law to bind the rights of the whole world? Would the world submit to such an assumed jurisdiction?' Hence, if creditors wanted to enforce their claims on debtor's resident abroad, they had to sue in the courts of the debtors' domicile. If they had already litigated on the claim they were forced to sue afresh.¹⁶

1.3.3 The Netherlands was an early exception to this rule. After unification of the provinces in 1579, a decree was passed in Holland providing that local courts were obliged to give effect to process emanating from the other provinces. The same liberality extended to the process of foreign courts. Thus, if enforcement of a judgment was sought, the judgment creditor had only to obtain a letter of request from the rendering court, which would then be regarded by the local courts as sufficient authority to proceed with execution.¹⁷

1.3.4 Other states in Europe were far less willing to co-operate in this manner. In France, for example, the Code Michaut (1629) declared that foreign judgments were not binding on French subjects. Variations of this rule persisted in France, until 1964,¹⁸ and in most of the legal systems based on French law.¹⁹ Hence, in the

¹⁴ As far as judgments were concerned, the principle *res iudicata pro veritate accipitur* prevailed: Justinian's *Institutes* 1.5.25.

¹⁵ **Buchanan v Rucker** [1808] KB 192.

¹⁶ See Juenger **American Journal of Comparative Law** 1988 at 5-6.

¹⁷ Voet **Commentary on the Pandects** at 42.1.41. When the famous *Munzer* decision (7 January 1964) *Cour de Cassation civile 1re* reversed the rule. A similar sense of chauvinism produced a rule protecting French nationals. Thus the *Cour de Cassation* in a decision of 17 March 1830, construed arts 14 and 15 of the Civil Code to confer exclusive jurisdiction on local courts where one of the litigants was French. This rule remained unchanged until the Brussels regime was introduced. An example was the Netherlands, where article 431(1) of the former Code of Civil Procedure provided that, apart from recognition pursuant to treaties or international conventions, the judgments of foreign courts could not be executed locally. Cases had to be adjudicated anew

absence of a treaty with the state from which a judgment emanated, French courts had the right, which was almost invariably exercised, to undertake a complete re-examination of the merits of a claim. This procedure, termed *révision au fond*, was the equivalent of a licence to retry the case.

1.3.5 By the seventeenth century, however, when comity came to be adopted as a guiding principle in international relations, states became more accommodating.¹⁸ The complex concept of comity implied neither absolute obligation nor mere courtesy. Rather, it suggested a state's deference to foreign interests (with a view to co-operation), and due regard both to the interests of its own citizens and to the foreigners who had fallen under its jurisdiction.¹⁹ Although a highly influential principle, which still informs our policy in private and public international law, comity has the disadvantage of being exceedingly vague.

1.3.6 Reciprocity has probably always been one of the grounds for international judicial co-operation. Indeed, the expectation of reciprocal treatment is implicit in comity, and American courts used to interpret the latter to mean reciprocity. Even so, the two concepts are not co-extensive, because comity does not require courts to apply to their own judgment the standards that they apply to others.²⁰ Instead, reciprocity means that the courts of state A will enforce judgments given by the courts of state B, only if B enforces A's judgments. In Europe, reciprocity came to determine a network of bilateral treaties between states to enforce one another's writs and judgments, and, by the nineteenth century, it had spread to certain Anglophone jurisdictions.²¹

1.3.7 Although reciprocity is perhaps an understandable basis for the cut and thrust of international politics, in reality, it is no more than a 'hopeful anticipation ... founded

by the Dutch courts. The Supreme Court, however, progressively interpreted these provisions so that judicial practice came to resemble early English law.

¹⁸ Comity, a product of Dutch jurisprudence, was the very foundation of the Roman-Dutch conflict of laws. See Voet **Commentary on the Pandects** 1955 at 42.1.41. According to Pistorius **Pollak on Jurisdiction** 1993 at 159, the preponderance of South African cases still supports comity.

¹⁹ Silberberg **Recognition and Enforcement of Foreign Judgments** 1978 at 3.

²⁰ Juenger (*op cit* at 10) cited by Roodt **CILSA** 2005 at 19.

²¹ Thus, reciprocity formed the basis of **Hilton v Guyot** 159 US 113 (1895), a landmark decision of the United States Supreme Court.

on a contingency: “We do justice that justice may be done in return.”²² Furthermore, as a guiding principle for the law governing the actions of private individuals, reciprocity has little to recommend it.²³

1.3.8 Compared with the insular attitude of most of the civil-law jurisdictions, legal systems based on the common law were more liberal towards foreign judgments. For instance, even in the seventeenth century, English courts were talking about the *ius gentium* requiring international assistance in the administration of justice.²⁴

1.3.9 Then, in 1842, the English courts introduced an entirely new basis for enforcing foreign judgments. **Russell v Smyth**²⁵ likened them to foreign laws, and said that they created obligations which the English courts could enforce by ordinary actions to recover debts. Hence, when foreign judgment creditors sued in England, the debtors were not allowed to contest the original obligations, because these had already been conclusively established abroad. It followed that, once a judgment creditor had proved the existence of the foreign judgment, a burden then lay on the debtor to show why it should not be executed.

1.3.10 Some thirty years later, **Schibsby v Westenholz**²⁶ took this reasoning a stage further. The court disavowed comity as a basis for recognizing judgments, saying that English courts were bound to enforce ‘a duty or obligation on the defendant to pay the sum for which judgment is given’. By this stage, the doctrine of acquired rights had become the principal rationale for applying foreign laws in England, and, for purposes of foreign judgments, acquired rights could be conveniently re-interpreted as acquired obligations.²⁷

²² Reed **Loyola Los Angeles International & Comparative Law Review** 2003 at 248.

²³ See paragraphs 9.2.1ff below.

²⁴ Comity came to exercise a powerful force, although, unlike their American counterparts, the English courts did not interpret comity to mean reciprocity. The latter was relevant only in **Travers v Holley** [1953] P 246, with respect to the recognition of matrimonial judgments. An earlier attempt, in **Felixstowe Dock & Ry Co v United States Lines Inc** [1989] QB 360 at 373-6, to introduce reciprocity to judgments *in personam* failed. See Rosenberg, Hay & Weintraub **Conflict of Laws** 1996 at 225.

²⁵ 152 ER 323 at 347.

²⁶ (1870) LR 6 QB 155 at 159. See, too, **Adams v Cape Industries plc** [1990] Ch 433.

²⁷ Silberberg (*op cit* at 3); Spiro **Conflict of Laws** 1973 at 104 and the cases cited in fn3. Silberberg (*op cit* at 6) cites **De Naamloze Vennootschap Alintex v Von Gerlach** 1958 (1) SA 13 (T) at 15 to support the view that the doctrines of acquired rights and obligation are similar.

1.3.11 The obligation theory had profound implications. First, a foreign judgment could be enforced by an ordinary action without the need for executive intervention or re-examination of the merits (the *révision au fond* of French law). Secondly, English courts accepted foreign judgments as binding proof of debts, thereby ushering in the defence of issue estoppel.²⁸ Thirdly, the obligation theory drew the entire matter of recognition and enforcement out of the realm of public law (and thus executive action) into the realm of private law.²⁹ The sense it gave of enforcing a private right is perhaps the most attractive quality of this theory. Less appealing was its uncertain juridical basis, for it was unclear how a court order could constitute a private-law obligation.³⁰

1.3.12 The obligation theory was none the less transmitted to other common-law jurisdictions, including the United States. Here, however, the courts of each state were free to determine their own rules for recognizing and enforcing foreign judgments (which, in the main, of course, were those of sister states). Hence, although the grounds for international competence remained very close to those of English law, American courts continued to apply the competing rationales of reciprocity and comity.³¹

1.3.13 By the nineteenth century, the need for international co-operation in judicial matters had become more pressing. Countries such as France transcended the limitations of their domestic laws by concluding bilateral treaties with their major trading partners. This solution, however, could not be considered perfect: when many treaties are entered into with different states over a period of time, the result is an accretion of complex and often inconsistent obligations.

1.3.14 Multilateral conventions have the advantages of a much wider reach, together with certainty and uniformity in international relations. Regional groupings of states

²⁸ A doctrine applicable to evidence. Formerly, it had been necessary to call fresh evidence to establish the existence of a right adjudicated abroad. Under the obligation theory, however, when a foreign court decided on matters of fact or law, a person who had been party to the suit there was barred from contesting the same facts or rules in a later action in an English court. See **Godard v Gray** LR 6 QB 139 (1870).

²⁹ Ho **International and Comparative Law Quarterly** 1997 at 446.

³⁰ See Reed (*op cit* at 246-7) on the problems inherent in this theory.

³¹ In spite of the connection to English law, courts in the United States will generally deny recognition on failure of due process in the foreign court or if jurisdiction had been unreasonably assumed. The complexities of different approaches have been somewhat reduced by a number of states adopting the Uniform Foreign Money-Judgments Recognition Act (1962), which, on the basis of the 'full faith and credit clause' of the Constitution, entitles party states to recognize and enforce a foreign country's judgments. See Reed (*op cit* at 245).

(ie, those that are already share social, political and economic interests) are the most likely to conclude such conventions. A case in point is the South American group of states - Argentina, Brazil, Colombia, Ecuador, Mexico, Paraguay, Peru, Uruguay and Venezuela - which concluded the Montevideo Convention.³² Another is the European Union, which created the so-called Brussels regime.³³

1.3.15 Closer to home, we have the example of the Organisation for Harmonisation of Business Law in Africa (OHBLA or OHADA, which is the more commonly used French acronym).³⁴ This body was established to create a uniform code of substantive and procedural law for all commercial matters in member states.³⁵ Under the founding treaty, a uniform act was passed which applies directly and mandatorily in member states, notwithstanding their existing domestic laws.

1.3.16 Without regional ties and without the background of a shared legal tradition, international co-operation is naturally more difficult to achieve. Nevertheless, participants at the Hague Conferences have been working, since 1893, to establish uniform rules on matters of common concern.³⁶ Over the years, more than thirty conventions have been produced.³⁷

1.4 Conclusion

1.4.1 International judicial co-operation is a broad topic covering a wide range of issues. As **Professor Roodt** observed, it seeks, on the one hand, to achieve determination of private disputes and, on the other, to regulate the exercise of state power. The Law Commission's inquiry therefore involved not only an examination of public, private and procedural law, but also the three branches of government: the

³² On the Extraterritorial Validity of Foreign Judgments and Arbitral Awards (1979). This Convention is supplemented by the La Paz Convention on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgments (1984).

³³ See paragraphs 9.2.11ff below.

³⁴ We are indebted to **Professor Roodt** for drawing our attention to this Organization. See further paragraphs 9.2.22ff below.

³⁵ Initially, the member states were those in francophone Africa, but, under article 53, the OHADA treaty is open to accession by any member state of the Organisation of African Unity.

³⁶ Lipstein **International and Comparative Law Quarterly** 1993 at 553.

³⁷ See <http://www.hcch.net>.

executive (to negotiate international treaties) and the courts and legislature (to reform the common and statute law).

1.4.2 As we have seen, the extent to which states were prepared to compromise their sovereignty in order to assist individual litigants realize their rights in open court was, historically, mediated by three principles: comity, reciprocity and the common-law obligation theory. Today, the preoccupation with state sovereignty is receding in the face of economic globalization, accompanied by new political and ideological forces. Hence, voluntarily or otherwise, states are now finding themselves committed to a principle of uniform decision-making, and, because of the pervasive emphasis on individual human rights, a principle that individuals are entitled to have their disputes heard in a fair trial in open court.

CHAPTER 2: SERVICE OF PROCESS

2.1 Statement of the law

2.1.1 The law on service of documents has two major concerns. The first, which is mainly a matter of domestic law, is the principle of fair trial, more precisely the *audi alteram partem* rule: litigation may not be instituted against absent defendants who had not been informed of the proceedings.

2.1.2 The second concern, which is mainly a matter of international law, regulates the mechanisms for transmitting documents to and from foreign states. A judicial order to serve process is technically a function of state, and thus a sovereign act. As a result, execution of the order is confined to the territory over which the issuing court has authority. Through considerations of comity and reciprocity, however, states have assisted one another to ensure that legal actions are not defeated simply because certain litigants happen to be abroad.

2.1.3 For purely domestic purposes, our law permits service of the documents instituting proceedings by way of edictal citation if a defendant happens to be outside the area of a court's jurisdiction. This form of service requires leave of the court.¹ For service outside the country, however, the Uniform Rules of the High Court provide that the plaintiff may deliver the documents (accompanied by a sworn translation) to the registrar of the High Court, who is then required to send them to the Director-General: Foreign Affairs (or to a destination indicated by the Director-General) for service abroad.¹

2.1.4 The actual service in the foreign country is deemed to be sufficient if it was effected by an official of South Africa's consular staff - assuming that we have consular relations with the country in _ - or by an officer of the department dealing

¹ Rule 4(5) of the High Court Rules.

² If South Africa has no mission in a foreign country, third states may perform consular functions on our behalf.

with administration of justice in the foreign country.³ In the case of Australia, Botswana, Finland, France, Hong Kong, Lesotho, Malawi, New Zealand, Spain, Swaziland, the United Kingdom or Zimbabwe, service may be made by an attorney, notary or other legal practitioner.⁴

2.1.5 The High Court Act, not the Rules, governs requests from foreign countries for service of documents in South Africa.⁵ The relevant authority in the foreign state must direct a request to the Director-General: Justice in South Africa, who then has to send it to a registrar of the High Court, who, in turn, must arrange for service by the sheriff in accordance with the Rules of Court.⁶

2.1.6 The Reciprocal Service of Civil Process Act 12 of 1990 provides another method for securing service abroad. In this case, a registrar of the High Court or a clerk of a magistrate's court may approve a request to have documents served outside South Africa without the need for leave of court or reference to officials in the Department of Justice.⁷ Conversely, those wanting to serve foreign process within South Africa need only approach a magistrate within whose area a document is to be served. If satisfied that the document was lawfully issued, the magistrate may endorse it for service.⁸

2.1.7 In order for litigants to benefit from this accelerated procedure, however, the Minister of Justice must first designate the countries to which the Act will apply.⁹ Unfortunately, when the Act came into operation, only the former TBVC states were designated, and, since, their re-integration into South Africa, the only other state to be gazetted was Namibia.¹⁰

³ Rule 4(3) of the High Court Rules.

⁴ Rule 4(4) of the High Court Rules

⁵ Section 33(2) of the Supreme Court Act 59 of 1959.

⁶ The procedure is governed by Rules 4(11)-(15) of the High Court Rules.

⁷ Section 4 of the Reciprocal Service of Civil Process Act 12 of 1990.

⁸ Section 3 of Act 12 of 1990.

⁹ Section 2.

¹⁰ RGN 489/17881/2 of 1 April 1997.

2.1.8 A final method for securing service abroad is provided by a long-established international practice,¹¹ whereby a state may send documents for service to its diplomatic or consular mission in the country in question. Officials in those missions must, in turn, allow foreign diplomats or consuls to effect service on nationals of the sending state. This entitlement is normally specified in the bilateral treaties establishing consular relations. South Africa is a party to the Vienna Convention on Consular Relations,¹² and so this practice is available in all cases where we have consular relations with foreign states.

2.2 EVALUATION

(a) Domestic methods for securing service

2.2.1 The South African law on service both here and abroad is concerned mainly to ensure the sufficiency of service. The procedure requires submission of a request to a registrar of the High Court for transmission to the Department of Foreign Affairs. Thereafter, service in the foreign country is possible via consular channels or officials in the foreign state.

2.2.2 It is noticeable that we have no provisions for service out of magistrates' courts. Although the Reciprocal Service of Civil Process Act 12 of 1990 provides an accelerated procedure for both the High Court and magistrates' courts, the Act is rendered valueless by the fact that the Minister has proclaimed only one state to which it applies.

2.2.3 South African law obviously has no concern with what a *foreign system* might regard as sufficient service. Our major interest is the extent to which we should allow foreigners freedom to effect service within our borders. While this concern, at least

¹¹ Which is encoded in the Vienna Convention on Consular Relations (1963), see art 5(j) of the Convention. The Vienna Convention on Diplomatic Relations (1961) is less specific. Article 3, which covers the functions of diplomats, makes no mention of serving process (or taking evidence, a matter dealt with in Chapter 3 below).

¹² This Convention was incorporated into South African law by section 2(1) of the Diplomatic Immunities and Privileges Act 37 of 2001.

formally, affects our sovereignty, the mere giving of notice of trial is hardly a serious matter. Thus, it can be argued that prior authorization by treaty is unnecessary.¹³

2.2.4 The problem with the law seems to lie less with the rules on sufficiency of service and more with international co-operation. Currently, this matter is governed by *ad hoc* agreements or by the international rules on consular relations. As a result, a South African wanting to serve process abroad may find it impossible to do so, because we have no consular relations with the country in question.

2.2.5 The scope of the Reciprocal Service of Civil Process Act 12 of 1990 should obviously be extended, so that it becomes applicable to those states with which South Africa has frequent relations. The Act has the great advantage of applying to all courts in South Africa and to requests for service from both within and outside the country. Our principal concern should be with sufficiency of service from our courts' point of view, an issue that can properly be dealt with by reference to the 'fair trial' principle contained in the Bill of Rights.¹⁴ Otherwise, we should have no objection to foreigners making use of our facilities for service of process from their courts. These are facilities for which the South African state receives remuneration, and the call on our facilities is unlikely to be excessive.

2.2.6 Although the title of the Act may suggest reciprocity as the basis for designating new countries to which it will apply, the executive would be advised to take a broader view so that it can take account of foreign judicial standards and the interests of private litigants.¹⁵ Indeed, it would serve both the immediate interests of South Africans and the interests of international co-operation if we were to facilitate service with any country with which we have frequent social and economic ties.

(b) The Hague Convention

2.2.7 The Hague Convention on the Service Abroad of Judicial and Extra-judicial Documents in Civil and Commercial Matters (1965) offers a fairly broad scope of

¹³ The service of a subpoena, on the other hand, is a clear manifestation of state power, and thus cannot be considered in the same terms: See Lee **Consular Law and Practice** 1991 at 289.

¹⁴ Section 34 of the Constitution of South Africa 1996.

¹⁵ See the discussion of reciprocity as a principle governing international co-operation paragraphs 9.2.11ff below.

operation – it has been adopted by 39 states (plus ten non-member states) - and is an effective, internationally recognized service procedure. Under this Convention, contracting parties are obliged to designate ‘central authorities’ for purposes of receiving and processing requests.¹⁶ The central authority must serve documents itself, arrange for service according to its internal law or allow service according to a particular method requested by the applicant.¹⁷ Alternatively, the parties may continue to effect service through their consular agents.¹⁸

2.2.8 The Convention expressly permits the posting of judicial documents to persons abroad via the appropriate judicial authorities of the state of destination.¹⁹ It also permits contracting parties to agree to allow the service of documents through channels other than those provided for in the Convention.²⁰

2.2.9 The Convention does not apply in two important situations: when the address of the person to be served is – or when service would violate the sovereignty or security of the state of destination.²²

2.2.10 So far as sufficiency of service is concerned, the Convention has special provisions to protect defendants from default judgment. It prohibits the giving of judgment until there is proof that process was served in enough time to enable the recipient to defend according to the internal law of the requested state, or that the process was actually delivered to the defendant by another method provided for under the Convention.²³ If a summons was sent abroad and judgment was taken against a defaulting defendant, a judge may relieve him or her from the effect of

¹⁶ Under article 3, all documents must be attached to a model request form, which specifies the particulars of the relevant persons, places, dates, etc.

¹⁷ Article 5 of the Convention.

¹⁸ Article 8. Under article 9, parties may, in any event, use this channel for transmitting judicial and extra-judicial documents.

¹⁹ Article 10.

²⁰ Article 11.

²¹ Article 1.

²² Article 13.

²³ Article 15.

expiration of the time for appealing, provided that the defendant did not know of the document in time to defend or can show a *prima facie* defence on the merits.²⁴

2.2.11 Article 1 of the Convention states that it is applicable only in civil or commercial matters. Judgments concerning the 'status or the capacity of persons' are explicitly excluded,²⁵ and so, too, are criminal matters. The latter, and their associated documents, are governed by an entirely different set of considerations.²⁶ Unfortunately, however, the Convention does not specify the means for determining the nature of the proceedings in question, namely, whether the law of the requesting or requested state should determine whether proceedings are civil or criminal.²⁷

2.2.12 Respondents generally favoured South Africa's accession to the Hague Convention.²⁸ **Professor Forsyth** and **Ms Jesseman**, however, noted that South Africa should take care to ensure that the Convention does not become the exclusive means for serving process abroad. A reservation in this regard will avoid any claim that procedures laid down in the Convention supersede domestic law,²⁹ or, indeed, the traditional consular channels, substituted service or edictal citation. Article 19, however, provides that:

'To the extent that the internal law of a contracting State permits methods of transmission, other than those provided for in the preceding Articles, of documents coming from abroad, for service within its territory, the present Convention shall not affect such provisions.'

²⁴ Article 16.

²⁵ Article 16.

²⁶ In **Rio Tinto-Zinc Corp & others v Westinghouse Electric Corp** [1978] AC 547, the question was whether witnesses' testimony would be used to incriminate them in criminal proceedings in the United States.

²⁷ As it happens, international practice favours the law of the requested state.

²⁸ This was the view of **The Committee on Family Law and Gender of the Law Society of the Cape of Good Hope**, **Ms T Kruger (Institute for International Trade Law, Leuven)** and **Mr K Malunga (University of Natal)**. On accession, see articles 27 and 28 of the Convention.

²⁹ See the problems occasioned in the United States by the case of **Volkswagenwerk AG v Schlunk** 486 US 694 (1988).

In addition, states may conclude bi- or multi-lateral agreements to dispense with certain provisions of the Convention,³⁰ and they are not precluded from entering into separate conventions governing matters covered by the Hague Convention.³¹

2.2.13 Notwithstanding these provisions, when acceding to the Convention, South Africa should take the opportunity to make two reservations:³² that we retain the right to exclude documents that offend our public policy or may lead to a criminal prosecution,³³ and that our law will be used to determine whether a matter should be deemed criminal.

2.3 Recommendations

2.3.1 The scope of application of the Reciprocal Service of Civil Process Act 12 of 1990 should be extended so that its procedures for serving process are available to litigants in the countries with which South Africans have frequent dealings. To do so will serve the interests of international co-operation and ensure that process emanating from our courts will be served abroad in a greater number of states.

2.3.2 When deciding which countries to designate under the Act, the Minister would be advised to take account not only of the promise of reciprocal treatment, but also the judicial standards prevailing in the selected state so as to ensure compatibility with the South African Constitution 1996.

2.3.3 South Africa should also accede to the Hague Convention on the Service Abroad of Judicial and Extra-judicial Documents in Civil and Commercial Matters (1965), partly to ensure service of process from our courts in a greater number of states abroad, and partly to promote the cause of international judicial co-operation.

2.3.4 When acceding to the Convention, South Africa should make two reservations: that we may exclude documents that offend our public policy or may lead to a criminal prosecution, and that our law will be used to determine whether a matter should be deemed civil or criminal.

³⁰ Article 20.

³¹ Article 25.

³² Which are permitted under the Convention, although article 28 allows other states parties to object.

³³ Suggestions made by **Professor Forsyth** and **Ms Jesseman**.

CHAPTER 3: TAKING OF EVIDENCE

3.1 Statement of the law

3.1.1 If a party or court abroad wishes to obtain evidence from a witness present in South Africa,¹ the Foreign Courts Evidence Act 80 of 1962 provides that an application must be lodged with a judge of the High Court. If the evidence is to be used in a magistrate's court in Botswana, Lesotho, Malawi, Namibia, Swaziland or Zimbabwe, the Act allows a magistrate's court in one of those countries to make the application to a magistrate in South Africa.²

3.1.2 The court hearing the application may then grant an order that a witness or witnesses be examined. It may refuse the ... only if furnishing the evidence would provide information in contravention of the Protection of Businesses Act 99 of 1978.⁴ Once the order is granted, the witness may be subpoenaed in the usual way,⁵ and will be entitled to the privileges, fees and expenses prescribed for magistrates' courts in South Africa.⁶

3.1.3 For someone wanting to obtain evidence in South Africa, another method is available, under the High Court Act 59 of 1959.⁷ The foreign authority concerned must send a letter of request to the Director-General: Justice asking for a hearing before a commissioner. The request must then be transmitted to the registrar of a

¹ The evidence may be for use in a civil or criminal trial.

² Section 3 of the Foreign Courts Evidence Act 80 of 1962.

³ Section 2(2).

⁴ Section 1 of Act 99 of 1978.

⁵ Section 4 of the Foreign Courts Evidence Act.

⁶ Section 5.

⁷ Section 33(1).

High Court for submission to a judge in chambers.⁸ The Magistrates' Courts Act 32 of 1944 has a similar, but more cryptic, provision: 'where it is expedient and consistent with the ends of justice',⁹ a magistrate may appoint a person to act as a commissioner for purposes of taking evidence from witnesses, whether they happen to be in South Africa or outside.

3.1.4 So far as litigants in South Africa are concerned, evidence available in a foreign state may be obtained only with the permission of that state,¹⁰ because we obviously cannot compel foreign courts to facilitate proceedings taking place in our own country. The traditional method for obtaining such evidence is via our diplomatic and consular officers,¹¹ who are entitled to execute letters rogatory or evidentiary commissions in the receiving state. This method is not a popular option, however, because, according to the common-law tradition, a witness should be present in court so that he or she can be properly cross-examined under oath.¹²

3.1.5 The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (1970) provides a useful alternative to consular channels, since it obliges states parties to permit the taking of evidence within their borders. South Africa is, in fact, a party to the Convention, but has not yet incorporated it into our domestic law.

3.2 Evaluation

3.2.1 The first problem in our law is the confusing range of possibilities confronting foreigners who want to obtain evidence in South Africa: application may be made directly to the High Court (or a magistrate's court) or to an official in the Department

⁸ Evidence taken before the commissioner becomes part of the evidence before the foreign court. See **Saunders & Another v Minister of Justice & Others** 1997 (3) SA 1090 (C) 1096.

⁹ Section 53.

¹⁰ According to South African law, any evidence which happens to be available outside a domestic court's area of jurisdiction, but none the less still in South Africa, may be obtained in one of two ways: by a commission set up specifically for the occasion or by an interrogatory, namely, a list of questions drawn up by the parties, which is then administered by the court in the requested jurisdiction. Section 32 of the Supreme Court Act 59 of 1959 and section 52 of the Magistrates' Courts Act 32 of 1944.

¹¹ Under article 5(j) of the Vienna Convention on Consular Relations (1963).

¹² See Lee (*op cit* at 290-1).

of Justice (who will refer the request to a judge in chambers).¹³ To simplify matters a uniform procedure is needed, applicable to all courts in South Africa.

3.2.2 The second problem is the preoccupation in South African law with applications by foreigners. South African litigants have been neglected, apart from those proceeding in magistrates' courts. In such cases, local litigants may obtain access to the facilities of Botswana, Lesotho, Malawi, Namibia, Swaziland or Zimbabwe. For High Court actions and for actions requiring evidence in countries other than our immediate neighbours, however, the litigants must proceed through the offices of a South African diplomat or consul. This option tends to limit the range of foreign countries to those with which we have consular relations.¹⁴

3.2.3 The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (1970) facilitates the transmission and execution of letters of request for evidence amongst many countries, and, as **Professor Forsyth** and **Ms Jesseman** said, it represents a positive step in international judicial co-operation (even if the states concerned use very different legal procedures).¹⁵ South Africa acceded to the Convention on 6 July 1997 (shortly before it entered into force on 6 September), but, because it has not yet been incorporated into our domestic law, individuals in this country can claim no rights under it.¹⁶ Admittedly, the Constitution provides that 'a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament',¹⁷ but we have no indication whether the Convention falls within this section.

3.2.4 The Hague Convention applies only to civil or commercial matters. It provides two methods for obtaining evidence: letters of request and commissions of inquiry.¹⁸ Under the Convention, states parties are obliged to comply with letters of request 'to obtain evidence, or to perform some other judicial act ... for use in judicial

¹³ It seems that the requesting court needs no particular status.

¹⁴ As indicated earlier, however, this is not necessarily a problem, because third states may be requested to act in place of South African consular officials.

¹⁵ Quoting Alley & Prescott **Leiden Journal of International Law** 1989 at 34.

¹⁶ For the implications of failing to incorporate a treaty into domestic law, see: **Pan American Airways Inc v SA Fire and Accident Insurance Co Ltd** 1965 (3) SA 150 (A) and **Binga v Cabinet for SWA** 1988 (3) SA 155 (A).

¹⁷ Section 231(4) of the Constitution of the Republic of South Africa Act 1996

¹⁸ Governed by Chapters I and II of the Convention, respectively.

proceedings commenced or contemplated'.¹⁹ The term 'other judicial act' in this clause does not cover service of judicial documents for enforcing judgments or 'orders for provisional or protective measures'.²⁰

3.2.5 It follows from the Convention that a litigant in judicial proceedings in any state party may apply to a court in another state party to have a request issued to secure evidence abroad. The applicant needs to establish the material nature of the evidence, the witness's presence abroad and the fact that his or her attendance cannot be procured.²¹ The court concerned may then request the foreign state to make its facilities available for obtaining testimony.²²

3.2.6 In order to simplify the handling of these requests, a state party to the Convention must indicate a central authority to process the applications.²³ In South Africa's case, the designated authority is the Director-General of the Department of Justice.²⁴

3.2.7 The authority in the requested state may obtain the evidence in accordance with its own law.²⁵ Hence, the method for compelling the attendance of witnesses,²⁶ and the rules of privilege, are governed by the law of the requested state.²⁷ A letter of request may be refused if, in the requested state, execution does not fall within the functions of the judiciary, or, if the requested state considers its sovereignty or security likely to be prejudiced.²⁸

¹⁹ Article 1.

²⁰ Mareva injunctions, for example, fall within the category of provisional or protective measures, since they are interlocutory orders issued *pendente lite* to restrain a defendant (or even a third party) from disposing of valuable assets so as to frustrate a potential plaintiff's action. The order functions, in effect, as an arrest of property that will be the subject of the action.

²¹ See Sutherland (*op cit* at 794-5), citing **Hardie Rubber Co Pty Ltd v General Tire & Rubber Co** (1973) 47 ALJR 462. Whether the court accedes to the applicant's request is a matter of judicial discretion.

²² Article 1.

²³ Article 2. Article 14 provides that execution of a letter of request shall not create any duty to reimburse taxes or costs, apart from those owing to experts and translators.

²⁴ Paragraph 3 of Government Notice R1271 in **GG** 18316 of 3 October 1997.

²⁵ Article 9.

²⁶ Article 10.

²⁷ Article 11, however, also allows for application of the rules of the requesting state.

²⁸ Article 12.

3.2.8 The second method for obtaining evidence under the Convention is for the requesting state to appoint a special commission. An official in the consular staff of that state (or some other duly appointed delegate) may conduct the commission.²⁹ Although the requesting state may take evidence in accordance with its own law, the method must be compatible with the law of the requested state.³⁰ Witnesses may not be compelled to attend unless the requested state gives permission, and, when deliberating the matter, it may impose such conditions as it considers necessary.³¹ The only ground for refusing to allow a commission to operate is incompatibility with the law of the requested state.³²

3.2.9 While it now seems advisable for South Africa to implement the Convention in its domestic law by an act of incorporation, **Professor Forsyth** and **Ms Jesseman** sounded a word of caution. When acceding to the Convention, South Africa entered certain reservations.³³ One excluded letters of request submitted in French.³⁴ Another excluded the operation of articles 15 and 16 of the Convention, thereby prohibiting foreign diplomatic or consular officials from taking the evidence of nationals from the states they represent or of nationals from a third state.³⁵

3.2.10 These reservations are uncontroversial. More serious is a declaration, which was entered under article 23 of the Convention. This provided that: '[l]etters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries, will not be executed as provided for in Article 23.' The effect of the declaration is a complex matter. In our law, an order for discovery is generally permissible only when pleadings have been closed.³⁶ Discovery before an action has commenced constitutes a *prima facie* violation of section 14 of the Constitution 1996, namely, the right to privacy, which includes the right not to have

²⁹ Article 16.

³⁰ Article 21(d).

³¹ Articles 18 and 19.

³² Article 21(a).

³³ See GN R1271 3 in **GG** 18316 of October 1997.

³⁴ In terms of article 4.

³⁵ As a result of these reservations, South Africa will receive reciprocal treatment from other parties to the Convention who accepted the reservations. Thus, while we will not permit a diplomatic or consular official from state X to take evidence from national X, South African consular officials will likewise be barred from taking evidence from South Africans in state party X.

³⁶ Rule 35(1) of the Rules of the High Court.

homes, persons or property searched, possessions seized or the privacy of communications infringed.

3.2.11 Notwithstanding the need to protect privacy, South African courts are prepared to issue Anton Piller orders.³⁷ An applicant must show a *prima facie* cause of action against the respondent, who has certain specific items in his or her possession that will substantiate the cause of action. In addition, the applicant must show that there is a real fear these items will be hidden, destroyed or removed by the time the matter is brought to trial.³⁸ Although Anton Piller orders constitute a violation of the Bill of Rights, they have been allowed on the ground that they are a justifiable limitation.³⁹

3.2.12 The procedure for obtaining an Anton Piller order poses yet another constitutional issue. Because urgent action is necessary, and because secrecy must be preserved, the application is usually heard *in camera* by *ex parte* proceedings, without notice to the affected party. Even non-litigants may be affected. Again, although this type of procedure constitutes a *prima facie* violation of section 34 of the Bill of Rights, which requires disputes to be resolved 'in a fair public hearing', it is allowed as a justifiable limitation.⁴⁰

3.2.13 Unlike our courts, those in the United States are liberal in their granting of pre-trial discovery orders. The Federal Rules of Civil Procedure, for instance, permit applications on terms which amount, in our eyes, to blatant 'fishing expeditions', namely, attempts to find evidence that may provide grounds for *future* actions. Thus, parties may request any information which is 'reasonably calculated to lead to the discovery of admissible evidence'.⁴¹ The evidence may include documents or depositions and may affect even third parties.

³⁷ See Malan et al *TSAR* 1995 110-11.

³⁸ The prerequisites for an Anton Piller order were laid down in **Universal City Studios Inc & others v Network Video (Pty) Ltd** 1986 (2) SA 734 (A) at 755.

³⁹ **Dabelstein & others v Hildebrandt & others** 1996 (3) SA 42 (C) at 61B, **National Director of Public Prosecutions & another v Mohamed NO & others** 2003 (4) SA 1 (CC) at 13F and **Kebble & others v Wellesley-Wood & others** 2004 (5) SA 274 (W), **Krygkor Pensioenfonds v Smith** 1993 (3) SA 459 (A) at 469.

⁴⁰ See **Dabelstein's** case supra and **Mohamed's** case supra at 30.

⁴¹ Rule 26(b)(1).

3.2.14 South Africa's declaration under article 23 of the Hague Convention, was aimed at excluding 'fishing expeditions'. **Ms Kruger** consulted **Mr J H A van Loon** (Secretary General of the Hague Conference on Private International Law) on this issue, and he referred to a Special Commission Report (2003), which commented as follows:

'Article 23 was intended to permit States to ensure that a request for the production of documents must be sufficiently substantiated so as to avoid requests whereby one party merely seeks to find out what documents may generally be in the possession of the other party to the proceeding.'

Our concerns are unnecessary, of course, in the case of requests for orders of the Anton Piller type, but, if a request were received for discovery on terms more detrimental to individual rights, we would be obliged to comply.⁴² Article 12 provides that a state may not refuse compliance 'on the ground that under its internal law the State of execution ... would not admit a right of action on it.'

3.2.15 The Hague Convention permits only a restricted range of reservations, and these may be entered only when states sign, ratify or accede.⁴³ However, although the time for amending the terms of our reservations is passed, the Convention allows for modification of *declarations*.⁴⁴ In this regard, **Mr van Loon** referred the Law Commission to the United Kingdom's declaration as a model to which we can refer.

'The United Kingdom will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents. HMG further declare that HMG understand [the latter phrase] ... as including any Letter of Request which requires a person:

- a. to state what documents relevant to the proceedings to which the Letter of Request relates are, or have been, in his possession,

⁴² For example, because the Convention does not regulate the type of questions to be put to witnesses, there is a lacuna in its provisions, which foreign litigants may exploit to engage in 'fishing expeditions'. In a request from the United States to Germany, for instance, the questions were unspecified. The Munich *Oberlandesgericht*, in the **Corning Glass Works Case** (1981) 20 **International Legal Materials** 1025, declined the request, in part because, under German law, the hearing of witnesses is not left to the parties, but is the task of a judge.

⁴³ Article 33, which contains the same conditions that 'at the time of signature, ratification or accession', a state may exclude application of the provisions contained in article 4(2) (which deals with the language in which the letter of request is written) and Chapter II (which deals with the taking of evidence by diplomatic and consular officials).

⁴⁴ Article 34.

custody or power; or

- b. to produce any documents other than particular documents specified in the Letter of Request as being documents appearing to the requested court to be, or to be likely to be, in his possession, custody or power.'

3.2.16 **Professor Forsyth** and **Ms Jesseman** cautioned against allowing the Convention to become the only means for obtaining evidence abroad, and they suggested that South Africa should continue to use supplementary bilateral agreements to facilitate international co-operation. The Convention, however, makes provision for the respondents' concerns. Article 27(c) provides that the Convention shall not prevent 'a Contracting State from permitting, by internal law or practice, methods of taking evidence other than those provided for in this Convention', and article 28 permits bilateral agreements between states parties to derogate from a range of provisions in the Convention.

3.2.17 **Professor Forsyth** and **Ms Jesseman** also pointed out that the Convention is in conflict with the Protection of Businesses Act 99 of 1978, which was passed with the intention of blocking the enforcement of awards for multiple and punitive damages. Section 1(1)(b) provides that no person shall give 'any information as to any business whether carried on in or outside the Republic' in response to a request emanating from outside South Africa, without the permission of the Minister of Economic Affairs (now, presumably, the Minister of Trade and Industry). Section 1D prohibits the enforcement of any order, interrogatory or letter of request concerned with product liability arising from bodily injuries that may have resulted from the use of any materials in South Africa, unless the same liability would have arisen under South African law. Hence, if South Africa is to fulfil its international obligations, the Protection of Businesses Act will have to be amended.

3.2.18 As mentioned above, article 12 of the Convention does not allow a state party to plead its internal law as a reason for non-compliance, but paragraph (b) of that article continues to provide that: 'The execution of a Letter of Request may be refused only to the extent that - ... (b) the State addressed considers that its sovereignty or security would be prejudiced thereby.' While the Protection of Businesses Act 99 of 1978 may give legitimate protection to our economic security, the open-ended discretion it gives to the courts and the Minister of Trade and

Industry goes even further, and may well constitute a violation of our international obligations.

3.2.19 It should further be noted that, because the Hague Convention regulates the taking of evidence in civil actions only, criminal actions must be clearly distinguished.⁴⁵ (As a matter of international practice, it is also tacitly accepted that the Convention does not apply to revenue and administrative matters.)⁴⁶ The Convention gives no indication, however, which law is to be applied in deciding what is civil or criminal.

3.3 Recommendations

3.3.1 A foreigner seeking evidence within South Africa has a confusing range of procedures available, each governed by a different statute: the High Court Act 59 of 1959, the Magistrates' Courts Act 32 of 1944 and the Foreign Courts Evidence Act 80 of 1962. Application may be made to: a consular official in South Africa, the High Court or a magistrate's court, or an official in the Department of Justice (who will refer the request to a judge in chambers). The laws governing these procedures need to be consolidated so as to provide a uniform method with minimal bureaucratic intervention.

3.3.2 The most appropriate vehicle for the consolidated laws is the Foreign Courts Evidence Act 80 of 1962, since it is designed to control requests to and from foreign countries. The High Court Act 59 of 1959 and the Magistrates' Courts Act 32 of 1944 should be left to regulate procedures for gathering evidence in South African domestic law.

3.3.3 Currently, our law makes no particular provision to assist South African litigants wanting to obtain evidence outside this country. (Traditionally, requests were attended to by members of our consular officials abroad.) To facilitate such requests, South Africa should incorporate the Hague Convention on Taking of Evidence Abroad in Civil or Commercial Matters (1970) into our domestic law.

⁴⁵ Article 1.

⁴⁶ Radvan **New York University Journal of International Law & Politics** 1984 at 1040-1.

3.3.4 When incorporating the Hague Convention into its domestic law, South Africa should alter the terms of its declaration (in terms of article 23) to provide that:

‘The Republic of South Africa will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents. The Republic further declares that it understands, “Letters of request issued for the purpose of obtaining pre-trial discovery of documents”, for the purposes of the foregoing declaration as including any Letter of Request, which requires a person:

- a. to state what documents relevant to the proceedings to which the Letter of Request relates are, or have been, in his or her possession, custody or power; or
- b. to produce any documents other than particular documents specified in the Letter of Request as being documents appearing to the requested court to be, or to be likely to be, in his or her possession, custody or power.

3.3.5 Sections 1(1)(b) and 1D of the Protection of Businesses Act 99 of 1978 allow for potential violations our international obligations. Hence, when the Hague Convention is incorporated into our law, these provisions must be deleted. In their place, a provision may be inserted in the Foreign Courts Evidence Act 80 of 1962 to the effect that the ‘central authority’ has the power to refuse compliance with any request that threatens to violate South African sovereignty or security.

3.3.6 The Act incorporating the Hague Convention should specify that our law will be used to characterize the underlying causes of action for requests as criminal (as opposed to civil or commercial).

⁴⁷ In terms of Article 34 of the Convention, a state may at any time withdraw or modify a Declaration.

CHAPTER 4: RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS UNDER THE COMMON LAW

4.1 Statement of the law

4.1.1 The rules on recognition and enforcement of foreign judgments are awkwardly positioned in our legal system. Because they involve enforcement procedures, they are linked to the jurisdiction of the courts, and are therefore part of our public law. Because they involve taking account of foreign laws, they are part of private international law.¹

4.1.2 From a public-law point of view, we are concerned with matters of state sovereignty. From a private-law point of view, however, our concerns are with obtaining satisfaction for judgment creditors and upholding the principle of *res judicata*. The latter term embraces two maxims: *nemo debet bis vexari pro eadem causa* (no one should be sued twice on the same cause of action) and *interest reipublicae ut sit finis litium* (it is in the public interest that there should be an end to litigation).²

4.1.3 The early Roman-Dutch procedure of accepting letters requisitorial from the rendering court has, for a long time, been obsolete.³ Instead, the current requirements in our common law have been heavily influenced by English law. These requirements can be summarized as follows:

- the foreign court must have been 'internationally competent', which means that it must have exercised jurisdiction on grounds that our courts regard as appropriate;

¹ The actual mode of enforcement, which may entail attachment of property or the imposition of a fine, is generally governed by the law of the forum rather than the law of the state in which the judgment was rendered. This proposition follows from our rules of private international law. Spiro (*op cit* at 55).

² The former seeks to protect private interests (judgment debtors should not be forced to undergo trial a second time), and the latter a more general public interest (that the judicial machinery should not be abused by continuing litigation).

³ **Russell v King** (1909) 30 NLR 209 at 211; **Fairfield v Fairfield** 1925 CPD 297 at 303-4.

- the foreign judgment must have been final and conclusive;
- it must not have been fraudulently obtained or be contrary to our ideas of natural justice or public policy;
- it must not have lapsed or have been satisfied;
- it must not have been based on a foreign penal, revenue or public law; and
- it must conform to the requirements of the Protection of Businesses Act 99 of 1978.

4.1.4 The judgment may be enforced by an ordinary action, and, if it is for a liquidated sum of money, proceedings may be by way of provisional sentence.⁴ Action can be taken in any South African court, whether a magistrate's court or the High Court, provided that the forum is competent to hear the matter according to our internal rules of jurisdiction.⁵

4.1.5 The plaintiff must first establish that the foreign court was internationally competent. Although, strictly speaking, the plaintiff should also establish the finality of the judgment, once international competence is proven, finality is usually presumed.⁶ Thereafter, it is open to the defendant to raise a failure to fulfil one of the other requirements as defences to the action.

4.1.6 It follows that, in practice, plaintiffs need do no more than produce foreign judgments in duly authenticated form.⁷ To this end, they are assisted by South Africa's accession to the Convention Abolishing the Requirement of Legalisation of Foreign Public Documents (1960), according to which a specifically designated office

⁴ **Jones v Krok** 1995 (1) SA 677 (A) at 685 and **Society of Lloyd's v Price & Lee** [2006] SCA 87 para 34.

⁵ These rules are summarized in Pistorius (*op cit* at 166-8).

⁶ **Jones v Krok** 1995 (1) SA 677 (A) at 692; Garb and Lew (*op cit* at 1-2.1).

⁷ Any official document executed outside South Africa is deemed to be properly authenticated if sealed and signed by: an official in the South African diplomatic or consular service abroad; any government authority of the country in question who is charged with authenticating documents; a notary public in the United Kingdom, Zimbabwe, Botswana or Swaziland; or a commissioned officer of the South African defence force.

within each state party is responsible for issuing certificates of authenticity (**apostilles**), thereby avoiding the 'chains of authentication' required by certain systems of law.

4.1.7 South African courts are prepared to enforce foreign judgments giving effect to private rights, but our judicial facilities may not be used to give effect to another state's sovereign acts. In keeping with the rules of public international law, such acts are operative only within the territory of the enacting state.

4.1.8 If South African courts do not give effect to any overt manifestation of foreign sovereignty, it follows that they will not enforce judgments that are based, either directly or indirectly, on foreign penal,⁸ or 'other' public laws. While the first two categories are already well established, the notion of 'other' public law is relatively recent.¹⁰ It functions as a residual category to include any laws which manifest state sovereignty. Typical examples would be laws designed to protect a state's political or economic interests, such as import/export regulations, price controls or prohibitions on monopolies.

4.1.9 The enforcement of judgments must be distinguished from their recognition. The former term denotes the execution of a foreign judicial order through the machinery of the local court system, whereas the latter denotes a local court taking account of the fact that a foreign court has already pronounced on an issue. While enforcement presupposes recognition, the reverse is not necessarily true, ie, judgments may be recognized without being enforced. Declaratory orders and judgments dismissing claims, for example, do not require enforcement.¹¹ Thus, for reasons of international comity, our courts will generally refuse to uphold contractual and other private arrangements designed to evade the laws of friendly states.

⁸ Penal in the sense that a fine in cash or kind accrues to the state: **Huntington v Attrill** [1893] AC 150 (PC). There is no reason, however, why our courts should not enforce the civil aspect of a foreign judgment, if it can be severed from the criminal. See **Raulin v Fischer** [1911] KB 93. This possibility is acknowledged in the definition of 'judgment' in section 1 of the Enforcement of Foreign Civil Judgments Act 32 of 1988.

⁹ **Commissioner of Taxes for Rhodesia v McFarland** 1965 (1) SA 470 (W); **Jones NO v Borland SSC** 1969 (4) SA 29 (W); **Cargo Motor Corp v Tofalos Transport Ltd** 1972 (1) SA 186 (W) at 195-6; **Standard Bank of SA v Ocean Commodities** 1980 (2) SA 175 (T) at 185.

¹⁰ See Collins et al (ed) **Conflict of Laws** 2000 89.

¹¹ Silberberg (*op cit* at 6).

Although the forum is not enforcing the foreign public laws, it is nevertheless recognizing them.¹²

4.1.10 Enforcement and recognition of foreign judgments perform different functions. It is said that the former is a sword, while the latter is a shield. Hence, recognition of a foreign judgment may be raised to defend an action between the same parties, in which regard the classic defences are *lis pendens* and *res judicata*.¹³ These may be invoked whenever the same plaintiff attempts to sue the same defendant on the same cause of action.

4.1.11 Recognition of a foreign judgment may also become relevant, however, when particular facts or rules which were decided upon by the foreign court, arise again in a suit between the same parties. In English law this defence is termed 'issue estoppel'.¹⁴

4.2 Evaluation

4.2.1 Our common law on the recognition and enforcement of foreign judgments is lacunose and somewhat confused. Nevertheless, because it currently provides the only method for enforcing foreign judgments in this country, it is vital for securing international judicial co-operation. Hence, the Law Reform Commission asked, in the first instance, whether the common-law action should be retained in tandem with the statutory enforcement procedure, a question considered in Chapter 6 below. In the second instance, the Commission investigated the need for amending the common law.

4.2.2 Although this chapter concentrates on the common law, it should be noted at the outset that a statutory barrier lies across the path of all actions brought on this

¹² See Huber **Heedendaegse Rechtsgeleertheyt** 1768 at 1.3.20.

¹³ Although *res judicata* is obviously a key principle of this branch of the law, it seldom features in the jurisprudence: **Magnolia Petroleum Co v Hunt** 320 US 430 (1943) at 439-40.

¹⁴ The possibility of raising issue estoppel in respect of foreign judgments was confirmed by the House of Lords in **The Sennar (No 2)** [1985] 1 WLR 490 (HL). See, too, **Desert Sun Loan Corp v Hill** [1996] 2 All ER 847 (CA) at 858. In South Africa, **Boshoff v Union Government** 1932 TPD 345 established issue estoppel in respect of domestic judgments, but we have no clear decision on foreign judgments. In **Kommissaris van Binnelandse Inkomste v Absa Bank Bpk** 1995 (1) SA 653 (A) at 670-1, the leading case, the Appellate Division made no further comment on the question, but it did accept that issue estoppel is compatible with a broader, more flexible conception of *res judicata*.

basis. That barrier is the notorious Protection of Businesses Act 99 of 1978, which was passed during the apartheid years, when South Africa had restricted dealings with the international business community. The Act, which is considered in Chapter 5 below, requires executive approval for the enforcement of any foreign judgment.

(a) Doctrine: survival of the original cause of action

4.2.3 South African common law has no clear doctrinal basis for the recognition and enforcement of foreign judgments. It is true that the courts make frequent reference to *ius cogens* and acquired rights,¹⁶ but they also draw heavily from English precedents, on the understanding that the enforcement of foreign judgments is a matter of procedure, which is an area where English law is considered authoritative.¹⁷

4.2.4 The adoption of rules in this manner, however, always carries the danger of lack of fit. A particular problem in this regard is the ambiguous position of the English doctrine of obligation.¹⁸ According to this doctrine, the original cause of action survived the foreign judgment. Hence, courts in England held that, even though they would enforce foreign judgments as ordinary private-law debts, those judgments did not merge with, and abolish, the original causes of action.¹⁹ In consequence, judgment creditors had the option of suing either on the foreign judgment or on the original cause of action.

4.2.5 In the normal course of events, it would be highly inconvenient to sue on the original claim, because all the evidence would have to be called again. But, if enforcement of the foreign judgment were refused, because, for example, the rendering court had lacked international competence, the judgment creditor could still

¹⁵ **Acutt Blaine & Co v Colonial Marine Insurance Co** (1882) 1 SC 402 at 406; **Duarte v Lissack** 1973 (3) SA 615 (D) at 621.

¹⁶ **Commissioner of Taxes for Rhodesia v McFarland** 1965 (1) SA 470 (W) at 471; Pistorius (*op cit* at 159). Reciprocity is also a strong influence, but only for purposes of legislation: Pistorius (*op cit* at 159 fn12); **Commissioner of Taxes for Rhodesia v McFarland** 1965 (1) SA 470 (W) at 471.

¹⁷ Spiro **General Principles of the Conflict of Laws** 1982 at 24.

¹⁸ See paragraphs 1.3.9ff above.

¹⁹ Conversely, for domestic judgments, English law held that the original cause of action merged with the judgment, and was thereby extinguished.

sue on the original cause. Similarly, a plaintiff who was dissatisfied with an award of damages could try to increase recovery in a new forum.

4.2.6 Certain other common-law jurisdictions, notably the United States,²⁰ inherited the English doctrine, but, in England itself, the survival of the original cause of action was declared 'illogical' and its continued existence 'precarious'.²¹ The doctrine was finally abolished by statute.²²

4.2.7 Although we have no definite authority for rejecting the doctrine,²³ most South African commentators are opposed to it, on the grounds that it derives from the 'ancient technicalities' of English law and that it contradicts our notion of *res judicata*. In the circumstances, there seems to be no good reason for allowing the survival of the original cause of action in our law. Any argument in its favour can be resisted by the South African rule that a judgment novates, and thereby extinguishes, an original debt.²⁵

4.2.8 In order to remove the possibility of a second suit on the original debt, we need legislation to declare that a foreign judgment is deemed to have extinguished the original cause of action. This rule will bring the enforcement of foreign judgments into line with the enforcement of domestic judgments.

²⁰ **Restatement, Second Conflict of Laws** §95. For interstate cases, however, the creditor's original claim is extinguished by the judgment, which thereafter forms the basis of execution in the forum: Scoles & Hay et al **Conflict of Laws** at §24.3.

²¹ **Carl Zeiss Stiftung v Rayner & Keeler (No 2)** [1967] 1 AC 853 (HL) at 966.

²² By section 34 of the Civil Jurisdiction and Judgments Act 1982. As **Mr Polonsky** noted, however, this Act 1982 excepted from its operation situations where the foreign judgment was not enforceable or entitled to recognition in England.

²³ **Cohen v Wicherlink** (1898) 5 Off Rep 299 at 300 left the matter open, although the Judge tended to think that the original cause of action was extinguished. Silberberg (*op cit* 4) says that there is no reported case in which a peregrinus had to rely on the original cause of action. However, see the odd decision in **Steinberg v Cosmopolitan National Bank of Chicago** 1973 (4) SA 564 (RAD) at 579.

²⁴ Forsyth (*op cit* at 408); E Kahn Appendix on 'Jurisdiction and Conflict of Laws in the South African Law of Husband and Wife' in Hahlo **Husband and Wife** at 674; Spiro **Conflict of Laws** (*op cit* at 256). **Mr Polonsky** also noted that the English rule had origins in the 'quirks of English legal history'. Silberberg (*op cit* at 4ff) seems to be the only southern African scholar who is prepared to argue in favour of allowing suit on the original cause of action. His two sources of authority are **Coluflandres Ltd v Scandia Industrial Products Ltd** 1969 (3) SA 551 (R) at 562 and **Steinberg v Cosmopolitan National Bank of Chicago** 1973 (4) SA 564 (RAD) at 577-8, but these cases may be distinguished on the facts, and confined to Zimbabwe.

²⁵ **Swadif (Pty) Ltd v Dyke** 1978 (1) SA 928 (A). The judgment debtor's liability thereafter rests on an implied contract to abide by the judgment. There is also a dictum in **Gabelsberger & another v Babi & another** 1994 (2) SA 677 (T) at 679 that foreign judgments have the same effect. The law cannot, however, be considered settled, because Farlam J, in **Holz v Harksen** 1995 (3) SA 521 (C) at 527 held that **Gabelsberger** was wrongly decided.

(b) The definition of judgment

4.2.9 The law on the recognition and enforcement of foreign judgments assumes that an order issued by an organ of a foreign state required the considered decision of an impartial tribunal, involving application of law to fact, which then became binding on the parties or their privies. Our courts, however, have never had occasion to pronounce on how this order is to be defined.²⁶ Various acts may be called into question:

- state-sanctioned dispute settlements, and those that are purely private (such as arbitration awards);²⁷
- unilateral proceedings,²⁸ such as applications *pendente lite*, and those that are truly adversarial;
- judicial orders, and those that are more properly considered administrative or executive.

4.2.10 When seeking to define what constitutes an acceptable judgment, account must obviously be taken of the foreign law, which is responsible for the character of the matter before the forum. Nevertheless, a strong case can be made for using South African law as the final determinant. The argument would be based on an analogy with the courts' approach to the characterization of foreign penal laws,²⁹ together with the rule that, because matters of definition arise within the context of enforcement proceedings, they are procedural, and therefore governed by the *lex fori*.³⁰

²⁶ For internal purposes, however, a judgment is deemed 'a decision of a court of law upon relief claimed in an action'. See **Dickinson v Fisher's Executors** 1914 AD 424 at 427. An order can therefore be distinguished as 'a similar decision upon relief claimed not by action but by motion, petition or other machinery recognised in practice'.

²⁷ In certain jurisdictions, notably France and Germany, enforcement is possible on the basis of private notarial instruments. The case is not considered *res judicata*, however, and the debtor may deny the existence of the claim or bring a later action for unjust enrichment. This procedure is quite foreign to the common-law systems, such as our own, which discourage extended litigation: See Kerameus **International Encyclopedia of Comparative Law** 2001 at §§22-3.

²⁸ For example, a declaration of *venia aetatis*, the creation of a legal entity (such as a *Stiftung* or *fondation*), the appointment or dismissal of a guardian, the termination of marital power and the validation of a contract or will.

²⁹ As in **Huntington v Attrill** [1893] AC 150 (PC).

³⁰ Certain matters, however, must be determined by the *lex causae*. Determining which party is

4.2.11 Generally speaking, a judgment denotes the state's involvement, via the judiciary, in the enforcement of private rights by application of law to facts. Because the state is concerned, a judgment is an official governmental act. It must be distinguished, however, from legislative, administrative or executive acts, which, according to the act of state doctrine, are normally not subject to scrutiny by our courts.³¹ In order to determine the nature of the act, it may be necessary to inquire into the function of the organ which performed it and the type of proceedings before that organ. Thus, it could be argued that only orders of a court, duly constituted, should be considered judgments.

4.2.12 For reasons of ensuring fair trial and finality, we should be prepared to enforce only conclusive court orders that were issued after both parties were given reasonable opportunity to be heard.³² Hence, we should be on our guard against relief given *pendente* or *ex parte*.³⁴

4.2.13 Even within these constraints, international practice accepts a fairly broad definition of judgment. Under the Brussels Convention (1968), for instance, a 'judgment' means any judicial determination, however labelled, including decrees, orders, decisions or writs of execution, as well as determinations of costs.³⁵ **Mr Polonsky** agreed with this type of approach. He was in favour of including all orders obtained from adversarial proceedings, such as summary or default judgments, even if they had not involved a trial, provided only that the judgment debtor had been given an adequate opportunity to defend. He also suggested including determinations of costs,³⁶ final or permanent injunctions and court approved settlements.

to be bound by a judgment is a matter of substance, and so must be decided by the law of the state where judgment was rendered. Similarly, the law of the state in which judgment was given determines the issues decided by the judgment. See Restatement, Second **Conflict of Laws** §95.

³¹ Spiro **General Principles of the Conflict of Laws** 1982 at 106; Spiro **Conflict of Laws** 1973 at 478.

³² See paragraphs 4.2.78 and 4.2.86 below, on finality and natural justice.

³³ Garb & Lew (*op cit* at 2-2.2).

³⁴ Even if the party affected was given an opportunity to seek stay or reversal: **EMI Records Ltd v Modern Music GmbH** [1992] 1 All ER 616 (QB).

³⁵ Article 25.

³⁶ As is permitted in article 32 of Council Regulation (EC) No 44/2001 and article 23 of the draft Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters.

4.2.14 With regard to the latter, it seems that we can accept contractual settlements which are made orders of court as enforceable judgments. The point was disputed in **Gabelsberger & another v Babl & another**,³⁷ where the defendant argued that, because a Bavarian court had not decided the merits of a matter, an agreed settlement was no more than a record of settlement. The forum, however, held that the German procedure was the equivalent of a South African settlement being made an order of court, on the ground that it created a right to execute.³⁸ A similar position was adopted in the draft Hague Convention on Jurisdiction and Foreign Judgments, which provides that:

‘Settlements to which a court has given its authority shall be recognised, declared enforceable or registered for enforcement in the State addressed under the same conditions as judgments falling within the Convention’

4.2.15 Given the diverse range of orders that may be issued by courts, tribunals and organs of state, the notion of judgment is bound to be ambiguous. Hence, although there is no clear definition of what constitutes a judgment for purposes of our common law, we can afford to adopt the generous approach of the draft Hague Convention on Jurisdiction and Foreign Judgments, where judgment is defined as:

‘any decision given by a court, whatever it may be called, including a decree or order, as well as the determination of costs or expenses by an officer of the court’.³⁹

4.2.16 The statutory definition of ‘judgment’ provided by the Enforcement of Foreign Civil Judgments Act 32 of 1988 allows a similarly expansive definition:

‘any final judgment or order for the payment of money, given or made ... by any court in any civil proceedings or in respect of compensation or damages to any aggrieved part in any criminal proceedings and which is enforceable by

³⁷ 1994 (2) SA 677 (T) at 679.

³⁸ The same argument was raised in **Holz v Harksen** 1995 (3) SA 521 (C) at 525 and 527, but here Farlam J held that the basis was a private-law contract and a procedural transaction with some, but not all, the effects of a judgment.

³⁹ Article 23(a). Paragraph (b) includes decisions ordering provisional or protective measures, provided that they comply with the grounds of jurisdiction stipulated in the draft Convention. This provision makes sense in the context of the draft Convention, which is predicated upon uniform grounds of jurisdiction for the rendering state and forum. We, however, have no basis for going that far.

execution in the country in which it was given or made ...'.

Compared with the draft Hague Convention, the most noticeable difference in this section is the limitation to monetary judgments.

(c) Non-monetary claims

4.2.17 According to English law, the courts may enforce only foreign judgments sounding in fixed sums of money. Orders for specific performance and any judgments operating *in rem* - apart, of course, from those concerned with the status of persons - are excluded. The first problem in our law, which is attributable to the courts' borrowing from English law, is whether this English restriction should apply in South Africa.

4.2.18 Because the English rule derives from the technicalities of that system,⁴⁰ there is no good reason why South African courts should not enforce a wider range of foreign judgments, including those for specific performance (or non-performance, as the case may be).⁴¹ **Mr Polonsky** supported this broader competence.

4.2.19 If we accept that our courts may enforce non-monetary judgments, what criteria should be used to establish the foreign court's international competence? There can be no objection to using the same grounds as for monetary judgments, but, where the foreign judgment *in rem* was concerned with property, a problem arises.

4.2.20 Normally, a court asked to adjudicate rights to property may assume jurisdiction only if the property is situated within its area. Nevertheless, on the basis of an old English decision, **Penn v Baltimore**,⁴² it could be argued that, even in these circumstances, we should enforce judgments given by foreign courts which assumed jurisdiction on the basis of residence (and possibly even submission), provided that

⁴⁰ Namely, that the proper action on a foreign judgment is an action in *indebitatus assumpsit*. Indeed, the common-law restraint never applied to judgments in equity: Nygh & Davies **Conflict of Laws in Australia** 2000 at 9.24. Although foreign injunctions and other equitable remedies may not be enforced, they may none the less be recognized, thereby rendering a matter *res judicata*: Castell & Walker **Canadian Conflict of Laws** 2003 14.10.

⁴¹ Spiro (*op cit* at 55) citing Pollak **South African Law of Jurisdiction** 1937 205ff, on orders for transfer of movables, and Garb & Lew (*op cit* at 2-2.2).

⁴² (1750) 1 Ves Sen 444, cited in Forsyth (*op cit* at 425).

the judgment operated *in personam*, not *in rem*.⁴³ More specifically, whenever a foreign court was in a position to compel the defendant to carry out its order, it could be argued that our courts should recognize its judgment.

4.2.21 The relevant principle here appears to be effectiveness, ie, the power to ensure that the judgment creditor is put in possession.⁴⁴ For example, if a foreign judgment were intended to do no more than compel a defendant to execute a deed of sale within its area of jurisdiction or to pay a sum of money as damages, although the judgment might affect rights to property situated in South Africa (or even elsewhere), it would not operate directly on the property. The draft Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters follows this line of thought. It provides that:⁴⁵

‘In proceedings which have as their object rights *in rem* in immovable property or tenancies of immovable property, the courts of the Contracting State in which the property is situated have exclusive jurisdiction, unless in proceedings which have as their object tenancies of immovable property, the tenant is habitually resident in a different State.’

4.2.22 It is still unclear whether South Africa has a rule equivalent to that in **Penn v Baltimore**, especially where the enforcement of foreign judgments is concerned. **Mr Polonksy, Edwards** and **Forsyth** all argue that the *forum rei sitae* should have exclusive competence.⁴⁶ They say that **Penn v Baltimore** has not been widely accepted elsewhere, and that it is not part of our law on internal jurisdiction.⁴⁷ On the

⁴³ Forsyth (*op cit* at 425). Thus, **Ashurst v Pollard** [2000] 2 All ER 772 (Ch), for instance, held that an English court may enforce an English trust over land situated abroad, because the action operated *in personam*.

⁴⁴ This principle is most obviously applicable to cases involving immovables. See **Rosa's Heirs v Inhambane Sugar Estates** 1905 TH 11 and **Rood's Trustee v Scott & De Villiers** 1910 TS 47 at 60-1.

⁴⁵ Article 12(1).

⁴⁶ Edwards Vol 2 Part 2 **LAWSA** at para 347 p392); Forsyth (*op cit* at 425).

⁴⁷ Cf **Lenders v Lourenco Marques Wharf Co** 1904 TH 176. This decision can be confined to its facts, since the Court held that it had no power to order *incolae* defendants to deliver timber situated outside its area of jurisdiction. Silberberg (*op cit* at 19-20), however, says that the rule in **Penn v Baltimore** was applied in **Estate Cassim v Cassim** (1915) 36 NLR 14 at 22 (a domestic action to compel the defendant to carry out an agreement regarding land in India) and **Eloff v Grobler's Executor** 1934 CPD 10 at 20ff. He concedes, however, that these cases can be distinguished from the general rule (that only the *forum rei sitae* is competent), because they involved an alternative claim for damages, over which the foreign court did have jurisdiction.

other hand, it could plausibly be argued that we should at least *recognize* judgments given by courts which had a separate ground of jurisdiction over the defendant, since no enforcement action is necessary.

4.2.23 **Ms Kruger** argued for a distinction to be drawn between movable and immovable property. She said that the *forum rei sitae* rule is more appropriate for immovables, whereas there is no necessary connection between a movable and the place where it happens to be (which might be impossible to determine when attempting, for example, to locate trade in shares over the internet). In this case, an underlying contractual dispute might be more relevant.

4.2.24 Currently, the statutory method for enforcing foreign judgments applies only to monetary orders,⁴⁸ thus giving no alternative method for enforcing non-monetary judgments in our law. Since there is no good reason for imposing such a limitation on judgments, our courts need clear statutory authority to enforce non-monetary judgments.

4.2.25 In these circumstances, the legislation defining the concept of judgment should provide grounds of international competence in cases of judgments over property operating *in rem*. So far as movable property is concerned, **Ms Kruger's** argument is accepted: the usual grounds of international competence suffice, and, in consequence, no particular provision needs to be made in this regard. So far as immovables are concerned, however, we have no support for adopting the rule in **Penn v Baltimore**. Hence, it should be provided that only the *forum rei sitae* has international competence in actions involving rights to immovable property.⁴⁹

(d) Validity of the original judgment

4.2.26 If a foreign court which lacked jurisdiction under its own law gave a judgment, should the judgment be upheld by our courts merely because the foreign court

⁴⁸ Under the definition of 'judgment' in section 1 of the Enforcement of Foreign Civil Judgments Act 32 of 1988.

⁴⁹ Indirectly, we already have guidance on this point in section 7(5)(a) of the Enforcement of Foreign Civil Judgments Act 32 of 1988, which excludes any foreign judgment from enforcement if the proceedings concerned immovables situated outside the jurisdiction of the rendering court.

happened to have jurisdiction in the international sense?⁵⁰ At first sight, it seems obvious that a judgment which is a nullity in its own system should be refused effect abroad, but, under English law, if the foreign court had jurisdiction according to the forum's rules of international competence, then the judgment was enforceable.⁵¹

4.2.27 The English approach was determined by the policy of putting an end to the re-examination of foreign judgments: when a foreign court had given its decision, the parties should not be allowed to use the forum for an appeal. **Mr Polonsky** supported this approach. He felt that the judgment debtor should seek to set aside the judgment under the legal system which granted it, rather than to invite South African courts to pronounce on the matter.

4.2.28 We have no reported South African cases dealing with this issue. Nevertheless, if a foreign court assumed jurisdiction when it was not entitled to do so, some doctrinal basis for dealing with the problem may be found in the Enforcement of Foreign Civil Judgments Act 32 of 1988. Section 5(b) provides that the forum may refuse to register a judgment if 'the court of the designated country concerned had no jurisdiction in the circumstances of the case'.⁵² Unfortunately, the Act provides no criteria for determining what 'the circumstances of the case' may mean.⁵³

4.2.29 Another, less sweeping, approach would be to allow the courts to refuse enforcement whenever lack of jurisdiction is patent on the face of the foreign judgment. Alternatively, it could be argued that, if the defect in the judgment can be cured by appropriate action in the rendering state, then the forum should have discretion whether to enforce it.⁵⁴

4.2.30 In principle, the forum should, of course, be discouraged from re-examining foreign judgments. None the less, it seems paradoxical that a judgment creditor can

⁵⁰ Spiro **General Principles of the Conflict of Laws** 1982 at 107.

⁵¹ **Pemberton v Hughes** [1899] 1 Ch 781 at 790.

⁵² This provision is taken directly from s 4(1)(a)(ii) of the British Foreign Judgments (Reciprocal Enforcement) Act (1933).

⁵³ In this regard, the Brussels Regulation is helpful, since it provides absolute criteria for deciding jurisdiction in certain categories of action. For example, in disputes arising out of insurance, employment and consumer contracts, the courts of the state in which the policy holder, employee or consumer is domiciled have jurisdiction. Similarly, in cases concerning rights *in rem*, only the *forum rei sitae* is competent.

⁵⁴ Wolff **Private International Law** 1962 at 263.

take action on a manifestly invalid judgment, as, for instance, where the rendering court had lacked any jurisdiction to hear the dispute.

4.2.31 When amending the common law, use can be made of section 5(b) in Foreign Civil Judgments Act that judgments are unenforceable when the rendering courts lacked jurisdiction 'in the circumstances of the case'. Our courts will have discretion in determining what the latter phrase may mean. No doubt, they will have to decide whether the invalidity is manifest or not, and they will have to draw a distinction between major flaws in the rendering court's jurisdiction and minor procedural defects.⁵⁵ This is not an area, however, where their discretion should be restricted by statutory rules.

(e) Conflicting judgments

4.2.32 It may happen (although this is fortunately a rare occurrence) that the same parties litigate on the same cause of action in two different countries, and that the courts give different judgments. A plaintiff, for example, may sue in both Botswana and Namibia to enforce a claim on a debtor resident in both. The Namibian court may dismiss the claim, while the court in Botswana may find for the plaintiff. If the judgment creditor were now to attempt enforcement of the judgment in South Africa, which judgment should prevail?⁵⁶

4.2.33 Generally speaking, legislation abroad and international conventions prefer the earlier judgment.⁵⁷ This approach is supported by **Mr Polonsky**, on the ground that the first judgment creates an estoppel, and by **Professor Forsyth** and **Ms Jesseman**, who cited the rule of **res judicata**. What is more, the Enforcement of

⁵⁵ Because the latter do not completely nullify judgments, they should not be raised in the forum. The distinction is likely to be a subtle one, involving reference to foreign law, and it may overlap with other defences, such as natural justice.

⁵⁶ Provision is made for this matter, however, in section 5 of the Enforcement of Foreign Civil Judgments Act 32 of 1988.

⁵⁷ See, for example, section 5(1)(g) of the British Enforcement of Foreign Civil Judgments Act and article 27(5) of the Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters. See, too, **Showlag v Mansour & others** [1995] 1 AC 431 (PC). In the United States, however, §114 of the Restatement, Second **Conflict of Laws** gives the last-in-time judgment preference and Wolff (*op cit* at 270) proposes that neither judgment should be recognized.

Foreign Civil Judgments Act 32 of 1988 provides that a foreign judgment may not be enforced in South Africa if it conflicts with a judgment already given elsewhere.⁵⁸

4.2.34 **Ms Kruger**, however, felt that the dilemma could not be solved by what might be, in essence, an arbitrary preference for the first or second judgment. She said that, in the first place, a distinction should be drawn between judgments emanating from South African courts and those from courts abroad. The former should be given preference, unless doing so would violate South Africa's international conventional obligations. If both judgments were foreign, then, instead of a hard and fast rule, she proposed giving judges discretion, which would entitle them to consider the reasons for the conflict and the possible existence of an anti-suit injunction.

4.2.35 Giving preference to our own judgments, however, appears unduly partisan, and allowing the courts a complete discretion unduly broad. Rather, on the basis of comparative authority and our own Foreign Civil Judgments Act, the first judgment should be allowed overriding force.

(f) The date for converting foreign currencies

4.2.36 The power to determine the currency of payment for a judgment is a matter of procedure, and, in matters of procedure, the courts must apply the *lex fori*.⁵⁹ When exercising this power, South African courts have held that they have discretion to declare local judgments payable in foreign currencies or their rand equivalent,⁶⁰ and that the same discretion applies when enforcing foreign judgments.⁶¹ The critical issue, in this respect, is the date for conversion. According to the common law, if an original judgment was in a foreign currency, and, if the forum decides that it is to be enforced in rand, then, the conversion should be made at the original date of

⁵⁸ Section 5(1)(g).

⁵⁹ **Miliangos v George Frank (Textiles) Ltd** [1976] AC 443 (HL). Following English precedent, however, there is an argument to be made for the forum taking account of a foreign law, if that law stipulated payment in a particular currency: **Kraut AG v Albany Fabrics Ltd** [1977] QB 182; **Services Euro Atlantique Sud v Stockholms Redeariaktiebolag SVEA, The Folias** [1979] AC 685 (HL)

⁶⁰ **Standard Chartered Bank of Canada v Nedperm Bank Ltd** 1994 (4) SA 747 (A) at 774; **Skilya Property Investments (Pty) Ltd v Lloyds of London** 2002 (3) SA 765 (T) at 815. This rule applies especially, of course, where an underlying contract required payment in a foreign currency: **Murata Machinery Ltd v Capelon Yarns (Pty) Ltd** 1986 (4) SA 671 (C) at 673-4.

⁶¹ **Barclays Bank of Swaziland Ltd v Mnyeketi** 1992 (3) SA 425 (W) at 435.

payment.⁶² Given fluctuations in the exchange rate, however, this rule may work to the prejudice of one of the parties.

4.2.37 Another possibility, which is more sensitive to fluctuations in the exchange rate, is the date of judgment. This happens to be the rule laid down in the Enforcement of Foreign Civil Judgments Act 32 of 1988.⁶³ **Mr Polonksy**, however, supported the common-law rule, unless a dramatic change had occurred in the exchange rate since the date of the original judgment that would prejudice the judgment creditor. In other words, the forum should have discretion in the matter. He said that possible prejudice to judgment debtors is irrelevant, because they can protect their position by discharging the judgment debt as soon as the judgment is granted.

4.2.38 Although prescribing a hard and fast rule in favour of one date or the other may seem arbitrary; allowing the courts unfettered discretion in the matter may entail a lengthy inquiry into the facts of the case, which could amount to a re-examination of the merits. The existing provision in the Foreign Civil Judgments Act appears as a sensible compromise between certainty and sensitivity to changing circumstances. Hence, we need legislation to indicate that currencies should be converted at the date that the forum decides to enforce the judgment.

(g) Interest

4.2.39 Interest is payable on the original debt and on the original judgment. The common law, however, has no rules prescribing the rates of interest due on a foreign judgment which happens to be enforceable in a South African court.

4.2.40 Section 3(5) of the Enforcement of Foreign Civil Judgments Act 32 of 1988 offers a ready answer to the question whether the original or the South African interest rate should apply. It provides that the rendering court may award interest, and that the amount will be calculated to run until the date of registration of the

⁶² **Standard Chartered Bank of Canada v Nedperm Bank Ltd** 1994 (4) SA 747 (A) at 774.

⁶³ Section 3(4).

judgment in South Africa. Thereafter, the interest rate is that laid down by South African law or the law of the state of origin, whichever is the lower.⁶⁴

4.2.41 Again, in order to establish certainty in the law, legislation is needed to prescribe the appropriate rate. The position taken in the Enforcement of Foreign Civil Judgments Act will suffice.⁶⁵

(h) International competence

4.2.42 A plaintiff wishing to enforce or recognize a foreign judgment must first prove that the rendering court was 'internationally competent'. This requirement is by far the most important element in the common-law action. It denotes the foreign court's entitlement to summons defendants and subject them to its jurisdiction, which, in turn, suggests a sufficiently close connection between that court and the parties. Although the connection has been defined as the court's ability to give an effective judgment,⁶⁶ in practice, effectiveness seldom features in the jurisprudence on this subject.⁶⁷

4.2.43 The phrase 'international competence' is a misleading term. In the first place, the grounds of competence are not internationally recognized, although the world's legal systems do happen to agree on most issues.⁶⁸ In the second place, international competence does not mean that the forum will accept a foreign court's exercise of jurisdiction on the basis of that court's rules of jurisdiction,⁶⁹ or even the forum's own rules,⁷⁰ since neither necessarily amounts to *international* competence.⁷¹ Instead, this issue is governed by a separate set of rules.

⁶⁴ Garb & Lew (*op cit* at 2-16).

⁶⁵ See, too, article 7(b) of the standard British treaty, cited in Annex 2.

⁶⁶ Silberberg (*op cit* at 9), citing Pollak **South African Law of Jurisdiction** 1937 at 207ff.

⁶⁷ Perhaps it is safer to say that 'an ineffective exercise of jurisdiction ought not to be tolerated': Silberberg (*op cit* at 10). As Silberberg says, 'the very fact of a court being asked to consider enforcement of a foreign judgment is in itself the clearest possible proof that such judgment is not effective within the jurisdiction of the court which pronounced it'.

⁶⁸ Szászy **Conflict of Laws** 1974 at 169 lists ten commonly accepted principles governing international jurisdiction.

⁶⁹ **Borough of Finsbury Permanent Investment Building Society v Vogel** (1910) 31 NLR 402; **De Naamloze Vennootschap Alintex v Von Gerlach** 1958 (1) SA 13 (T).

⁷⁰ Although it must be conceded that the rules on international competence are generally influenced by rules of internal jurisdiction.

4.2.44 It should be noted that, in the case of a conflict between our definition of a ground of international competence and the definition accepted by the law of a foreign state, our definition prevails.⁷² This proposition follows from the rule that, in private international law, all connecting factors must be defined by the law of the forum.⁷³

(i) Residence

4.2.45 Residence of the defendant within the foreign court's area of jurisdiction is deemed a sufficient ground, on the basis of the old maxim, *actor sequitur forum rei*. For purposes of internal jurisdiction, residence has, of course, been suitably defined,⁷⁴ and, because the key element is a stable, fairly continuous connection,⁷⁵ this definition can be accepted for purposes of international competence.⁷⁶

(ii) Residence of artificial persons

4.2.46 The residence of artificial persons poses a troublesome problem, partly because it is not a purely factual matter, and, more importantly, because it was so narrowly defined in the leading case, **Bisonboard Ltd v K Braun Woodworking Machinery (Pty) Ltd.**⁷⁷ Here it was held that a domestic company (ie, one incorporated in South Africa) is resident at the site of its registered office.⁷⁸

⁷¹ **Borough of Finsbury** case at 402; **Supercat Inc v Two Oceans Marine CC** 2001 (4) SA 27 (C) at 30.

⁷² **Jones v Krok** 1995 (1) SA 677 (A) at 685; **Blanchard, Krasner & French v Evans** 2002 (4) SA 144 (T) at 147.

⁷³ **Ex parte Jones: in re Jones v Jones** 1984 (4) SA 725 (W); **Chinatex Oriental Trading Co v Erskine** 1998 (4) SA 1087 (C) at 1093.

⁷⁴ Clearly, physical presence on its own is not sufficient: **Ex parte Minister of Native Affairs** 1941 AD 53 at 58-60.

⁷⁵ **De Naamloze Vennootschap Alintex v Von Gerlach** 1958 (1) SA 13 (T) at 14.

⁷⁶ Which, in any event, is influenced by the internal definition. See, for example, **Zwysig v Zwysig** 1997 (2) SA 467 (W) at 471.

⁷⁷ 1991 (1) SA 482 (A) at 495

⁷⁸ Under sections 110(1), 170(1) and 215(4) of the Companies Act 61 of 1973, this is the place where various registers are kept and where legal process may be served. **Dairy Board v**

4.2.47 Another option is available: the principal place of business, namely, the place where the affairs of the enterprise are controlled. Although we used to have authority for attributing residence to a company on this basis,⁷⁹ the Court in **Bisonboard** overruled it on the grounds of certainty and convenience.⁸⁰ This definition is none the less accepted by other common-law jurisdictions,⁸¹ as well as international conventions. In English law, for instance, the leading case, **Adams v Cape Industries plc**,⁸² elaborated the rules of international competence for a corporation: the place where it maintains, whether by servants or agents, a fixed place of business at premises that have been bought or leased for more than a minimal period of time.⁸³ In the case of a subsidiary or associated company, a fixed place of business may be established if the subsidiary organ carried on the parent company's business, not its own.⁸⁴

4.2.48 We have some local authority for taking a more flexible approach to corporate residence than is suggested by the current rule in **Bisonboard**. There is academic support for treating a foreign company (ie, one that was not incorporated in South Africa but does business here) as resident in this country, if has its principal place of business here,⁸⁵ and, according to the Enforcement of Foreign Civil Judgments Act 32 of 1988,⁸⁶ a juristic person is deemed to be resident at its principal place of

John T Rennie & Co (Pty) Ltd 1976 (3) SA 768 (W) held that, because the legislature regarded the registered office as a company's legal home and administrative centre, it should also be accepted as its place of residence.

⁷⁹ **Beckett & Co Ltd v Kroomer Ltd** 1912 AD 324 at 334.

⁸⁰ At 409. Although the possibility of companies having more than one place of residence has not been discussed, **Kruger NO v Boland Bank Bpk** 1991 (1) SA 107 (T) at 112 held that running a branch office does not constitute residence.

⁸¹ See, for example, the American Law Institute in its **Restatement (Third) of Foreign Relations Law** §482(1)(b), as read with §421(2)(h).

⁸² [1990] Ch 433.

⁸³ At 530.

⁸⁴ To this end, a court may consider the extent to which the company contributed to the financing of the representative; the way in which the latter was remunerated (for example, by commission or fixed regular payments); the degree of control over the running of the business; whether the representative displayed the company's name at its premises and on its stationery; and whether the representative contracted in its own name or as agent. See, for example, **Vogel v R & A Kohnstamm Ltd** [1973] QB 133.

⁸⁵ Pollak **South African Law of Jurisdiction** 1937 at 99; Pistorius (*op cit* at 78). **Ms Kruger** supported the principle of a flexible approach, but she recommended building in safeguards to prevent fraud and the evasion of laws.

⁸⁶ Section 7(4)(a)(iii).

business or even at the place where it does only some of its business, provided that the cause of action also arose there.⁸⁷ The latter provision is perhaps too broad, and section 1E(1)(b) of the Protection of Businesses Act 99 of 1978 is helpful in this respect, because it excludes the international competence of a foreign court if the defendant simply 'did business' within the court's area of jurisdiction. By implication, a permanent business establishment within that area suffices.

4.2.49 **Mr Polonksy** recommended adoption of the English rule in **Adams v Cape Industries Plc**,⁸⁸ that a foreign court has jurisdiction over a corporation if it had a fixed place of business in the foreign country and had carried on its business from such premises for more than a minimal period of time; or a representative of an overseas corporation had been carrying on the corporation's business in the foreign country for more than a minimal period at some fixed place of business. Where the foreign corporation does not trade, the same principles should apply, but with the substitution of references to 'carrying on the corporation's corporate activities' for references to 'carrying on of business'. In such cases, he considered that the jurisdiction of the court where the corporation was 'present', in this sense, should be limited to causes of action arising in the place where the corporation carried on business. In the case of trading corporations, however, he considered it appropriate to add more alternative connecting factors, such as the place of incorporation (or the site of the registered office) or the place where the affairs of the enterprise were controlled.

4.2.50 Because the litigants most likely to seek enforcement of judgments in this country are corporate litigants, we need legislation to broaden the grounds of international competence. The former Appellate Division set an unduly restrictive test, and we have considerable authority, both local and foreign, for extending the concept of corporate residence. The broader concept contained in the Enforcement of Foreign Civil Judgments Act will suffice as a model for legislative amendment.

⁸⁷ **ISM Inter Ltd v Maraldo** 1983 (4) SA 112 (T).

⁸⁸ [1990] Ch 433.

(iii) Submission

4.2.51 Both in our law, and probably in all legal systems, the defendant's submission to a foreign court is a good ground of international competence.⁸⁹

4.2.52 Submission may be express, namely, by a contract in which the parties agree to litigate in the courts of a particular country. Provided that the agreement is valid according to its proper law, ie, the law governing the contract, it is effective.⁹⁰

4.2.53 Submission may also be tacit in the sense that, while the parties failed to record their intentions in the contract, the document may nevertheless disclose an intention to litigate in a particular court.⁹¹ Hence, submission may be inferred where a plaintiff chooses a court that would otherwise lack jurisdiction.⁹² Conversely, choice of a *domicilium citandi et executandi* does not constitute tacit submission,⁹³ nor does express choice of a proper law.⁹⁴

4.2.54 Whenever reference is necessary to a tacit agreement, a question arises: which law should be used to draw the appropriate inference? The two main contenders are the *lex fori* and the proper law of the contract in question. Although, in principle, the forum is obliged to consult only its own law – because the rules of international competence are the – English courts tend to consider the laws of the

⁸⁹ **Purser v Sales** 2001 (3) SA 445 (SCA); **Coluflandres Ltd v Scandia Industrial Products Ltd** 1969 (3) SA 551 (R) at 560. In **Argos Fishing Co Ltd v Friopesca SA** 1991 (3) SA 255 (Nm) at 261, the court listed five reasons for accepting submission as a ground of international competence: litigants should be bound by their promises; in a world of rapid communication, parties should be entitled to select, in advance, a forum for settling disputes; parties of different origins might find it convenient to choose the courts of a neutral third country; certain jurisdictions are more amenable to international commerce than others; once the court chosen by the parties accepts jurisdiction, there is no reason why another should question its powers.

⁹⁰ Furthermore, although the issue has never arisen in South Africa, the submission must be voluntary. It can be argued that, in order to determine this question, South African law should be applied rather than the law of the foreign state. See **Desert Sun Loan Corp v Hill** [1996] 2 All ER 847 (CA) at 862

⁹¹ **Standard Bank Ltd v Butlin** 1981 (4) SA 158 (D) at 161; **Reiss Engineer Co Ltd v Insamcor (Pty) Ltd** 1983 (1) SA 1033 (W) at 1038.

⁹² Forsyth (*op cit* at 398 fn60) citing **Zwyssig** 1997 (2) SA 467 (W) at 474.

⁹³ **Standard Bank Ltd v Butlin** 1981 (4) SA 158 (D) held this to be a method of facilitating service of summons and no more.

⁹⁴ **Reiss Engineer Co Ltd v Insamcor (Pty) Ltd** 1983 (1) SA 1033 (W) at 1040; **Benidai Trading Co Ltd v Gouws & Gouws (Pty) Ltd** 1977 (3) SA 1020 (T) at 1033-4.

⁹⁵ In spite of intimations to the contrary – Spiro **SALJ** 1967 at 306; **Silberberg** (*op cit* at 13ff) - Forsyth (*op cit* at 396) says that our law is not the exclusive basis for determining whether parties submitted to a foreign court. Questions of international competence require a more

state where the judgment was originally given.⁹⁶ Forsyth, however, prefers the proper law of the contract, on the basis of the decision in **Blanchard, Krasner & French v Evans**,⁹⁷ and, indeed, it does seem the best option. Of necessity, a proper law is either expressly chosen by the parties or has a significant connection to the parties and their relationship.

4.2.55 Submission may also be inferred from conduct, specifically the defendant's. For purposes of internal jurisdiction, the general rule is that the defendant must have behaved in such a way that acquiescence in a court's jurisdiction is quite unambiguous.⁹⁸ The defendant's appearance in court to argue the merits of a case is the clearest example of submission - although we have no definite case authority on this point - and another is where the defendant brings a counterclaim, and thus becomes a plaintiff in reconvention.⁹⁹ Conversely, mere failure to object to the foreign court's jurisdiction does not count,¹⁰⁰ nor does accepting a summons and appearing to contest jurisdiction.¹⁰¹

4.2.56 We have no decision in our law on whether an implied submission, as in the cases above, is acceptable as a ground for international competence. In fact, our courts have not even had cause to distinguish tacit from implied submission. In English law, on the other hand, an implied submission according to a foreign law is generally not acceptable,¹⁰² although certain cases held that, if a defendant appeared to protest jurisdiction, and the court refused the motion, he could be deemed to submit.¹⁰³

cosmopolitan approach.

⁹⁶ This is also the position taken under article 5 of the draft Hague Convention on Exclusive Choice of Court Agreements (2004).

⁹⁷ 2002 (4) SA 144 (T) at 149. See the discussion in Forsyth (*op cit* at 399-401). As he says, the question is not without importance, since certain laws, such as German law, deem some submission clauses void. There is also oblique support for the proper law in **Society of Lloyd's v Price & Lee** [2006] SCA 87 para 41 regarding use of the proper law to interpret rescission of a submission agreement.

⁹⁸ **Du Preez v Philip-King** 1963 (1) SA 801 (W) at 803.

⁹⁹ Forsyth (*op cit* at 398 fn61).

¹⁰⁰ **Blanchard, Krasner & French v Evans** 2001 (4) SA 86 (W) at 92.

¹⁰¹ **Supercat Inc v Two Oceans Marine CC** 2001 (4) SA 27 (C) at 32.

¹⁰² **Blohn v Desser** [1962] 2 QB 116; **Adams v Cape Industries plc** [1990] Ch 433 at 466.

¹⁰³ See **Henry v Geopresco International Ltd** [1976] QB 726 at 747. This issue had to be clarified by legislation, namely, section 33(1) of the Civil Jurisdiction and Judgments Act 1982.

4.2.57 **Mr Polonksy** supported only explicit submission as a valid ground of international competence, together with the grounds specified in section 33 of the British Civil Jurisdiction and Judgments Act 1982.¹⁰⁴ **Forsyth** agrees. He says that someone who is not clearly subject to a foreign court's jurisdiction should not be deemed bound by that court.¹⁰⁵ He therefore argued that we should take a stricter line on submission, and follow the lead set in the Protection of Businesses Act 99 of 1978.¹⁰⁶ Section 1E(1)(a) provides that appearance before a foreign court (whether conditionally or otherwise) or participating in the proceedings will not be construed as submission if the purpose was to:

- contest the foreign court's jurisdiction;
- apply for dismissal of the action or for the setting aside of a writ or summons on the ground that the court did not have jurisdiction;
- protect or obtain the release of property attached for purposes of the proceedings;
- apply for dismissal or stay of proceedings on the ground that the matter should be referred to arbitration or to the courts of another country; or
- institute a review or appeal.

According to section 1E(2), even a plea to the merits does not amount to submission, if, under the law governing the proceedings, 'such person was not entitled to contest the jurisdiction of the court unless he entered ... appearance ... to defend the merits thereof'.

¹⁰⁴ This section corresponds broadly to section 1E(1)(a) of the Protection of Businesses Act 99 of 1978.

¹⁰⁵ Forsyth (*op cit* at 400). Even so, Clarkson & Hill **Conflict of Laws** 2002 at 156 argue that a judgment debtor may be estopped from denying that the original court was competent. For instance, the debtor may have tacitly accepted the court's jurisdiction, and, before explicitly contesting the existence of consent, the claimant may have relied upon that acceptance to his or her detriment. In this situation, it seems reasonable to imply submission.

¹⁰⁶ Forsyth (*op cit* at 398).

4.2.58 The respondents' major concerns are addressed by the Enforcement of Foreign Civil Judgments Act 32 of 1988. Section 7(4)(a) provides that a foreign court is presumed to have had jurisdiction if the judgment debtor:

- was plaintiff (or plaintiff in reconvention) there or submitted to the court's jurisdiction 'by voluntarily appearing in the proceedings for any purpose other than protecting or obtaining the release of property seized or threatened with seizure in the proceedings or contesting the jurisdiction of that court';
- was a defendant in the proceedings there, and had, before their commencement, agreed to submit to the court's jurisdiction.¹⁰⁷

These provisions can be used as a basis for amending the common law.

(iv) Domicile

4.2.59 Under our common law, domicile alone is probably not a sufficient ground for international competence, because, formerly at least, it was a technical concept offering no guarantee that a defendant was actually resident (or even physically present) within a court's area of jurisdiction. As a result, **Foord v** held that it was unlikely that domicile without residence or presence could confer jurisdiction. Respondents to the Discussion Paper, **Mr Polonksy, Professor Forsyth** and **Ms Jesseman**, took a similar position. They said that domicile should not be accepted as a ground, because the rules governing its acquisition and loss did not ensure that an individual had an actual connection with the state in question.

4.2.60 Nevertheless, several cases provide authority for accepting a defendant's domicile as a ground of international competence.¹⁰⁹ The most important case is **Bisonboard Ltd v K Braun Woodworking Machinery (Pty) Ltd**,¹¹⁰ where the

¹⁰⁷ See, too, Article 5(1)(a)-(c) of the standard British treaty provision, contained in Annex 2.

¹⁰⁸ 1924 WLD 81 at 88. See Silberberg (*op cit* at 10 -11) arguing on the basis of effectiveness.

¹⁰⁹ **Acutt Blaine & Co v Colonial Marine Insurance Co** (1882) 1 SC 402 at 406; **Chinatex Oriental Trading Co v Erskine** 1998 (4) SA 1087 (C) at 1093. Note, however, that **Acutt Blaine's** case contains no more than an obiter dictum in the context of local jurisdiction.

¹¹⁰ 1991 (1) SA 482 (A) at 487.

Appellate Division disregarded the doubts expressed in *Foord's* case, although, admittedly, only with regard to internal competence. More recently, however, *Purser v* gave domicile the stamp of approval.

4.2.61 Moreover, the Domicile Act 3 of 1992 has brought about substantial changes in the common law by introducing a functional approach, whereby it was conceived of as 'an objective factual relation between a person and the particular territorial jurisdictional area'.¹¹² If a foreign court assumed jurisdiction on this basis, it would have a significant link with the defendant in most cases, but not all (notably, where an individual was incapable of forming the required *animus manendi*).

4.2.62 Domicile is accepted for international competence in certain international instruments, such as the Brussels Convention (1968),¹¹³ the European Council ... and by the American Law Institute's **Restatement (Third) of Foreign Relations Law**.¹¹⁵ In the draft Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, however, the concept of habitual residence is used instead.¹¹⁶

4.2.63 The position of domicile in the common law is somewhat uncertain. There is no particularly good authority for using it as a ground of international competence in international or statutory instruments abroad, however, and it attracted no support from respondents to the Issue or Discussion Papers. In the circumstances, the courts should be left to continue their independent assessment of this ground.

(v) Nationality

¹¹¹ 2001 (3) SA 445 (SCA) at 451.

¹¹² **Chinatex Oriental Trading Co v Erskine** 1998 (4) SA 1087 (C) at 1093. Cf Forsyth (*op cit* 403-4), who claims that the statutory rules of domicile still do not necessarily entail a significant connection.

¹¹³ Article 3.

¹¹⁴ Article 8 of Regulation 44/2001.

¹¹⁵ See §482(1)(a), as read with §421(2)(b) and (d).

¹¹⁶ Article 3(1).

4.2.64 Nationality might be another ground of international competence, although it has not been mentioned in any South African cases, and it gives no guarantee of a genuine connection between the defendant and the foreign court.¹¹⁷ A judgment debtor might, for instance, be a dual national or might have acquired nationality through a parent or grandparent, or, for some other reason, might have no close social link with the state of nationality.

4.2.65 In addition, when cases are heard in federal states containing different systems of private law, such as the United States, nationality does not readily function as a connecting factor. (Even so, the problem is more apparent than real, because federal law normally applies to all citizens, whereas the defendant's domicile or residence may be used to establish a connection with a particular state.)

4.2.66 Nationality is accepted in the Hague Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations (1973) and by the American Law Institute in its **Restatement (Third) of Foreign Relations Law**.¹¹⁸ It is not accepted, however, by the draft Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters.¹¹⁹

4.2.67 Because rules governing acquisition and loss of nationality do not entail an actual connection with the state of nationality, **Mr Polonksy, Professor Forsyth** and **Ms Jesseman** rejected it as a ground of international competence.¹²⁰ **Ms Kruger**, too, would not support this ground, unless there were some other significant connecting factor.¹²¹

4.2.68 We have no particular authority abroad for accepting nationality as a ground of international competence, and no doctrinal basis for this connecting factor in our domestic law. Even more important is the fact that an individual's nationality gives no

¹¹⁷ **Foord v Foord** 1924 WLD 81 at 87; Silberberg (*op cit* at 10).

¹¹⁸ See §482(1)(a), as read with §421(2)(b) and (d).

¹¹⁹ Article 18(2).

¹²⁰ The latter two respondents referred the Project Committee to South African (**Foord v Foord** 1924 WLD 81 at 87-8), English and Irish authority.

¹²¹ **Ms Kruger** supported nationality alone only in cases of family law, but not in such situations as the French Code Civil, which would allow a French court to assume jurisdiction merely because one of the parties happened to be a French national.

real guarantee of a close connection with the state in question. Because we have no support for nationality as a ground of international competence, there is no cause for legislative intervention.

(vi) Attachment of property

4.2.69 According to our rules of internal jurisdiction, attachment of a defendant's property may found a court's jurisdiction, and there is Roman-Dutch authority for attachment as a ground of international competence.¹²² **Acutt Blaine & Co v Colonial Marine Insurance Co**,¹²³ however, refused to accept attachment, and it has been rejected by most other legal systems.¹²⁴ It was also rejected in the draft Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters,¹²⁵ and by the respondents to the Issue and Discussion Papers.

(vii) Cause of action arising and fugitive from justice

4.2.70 Apart from the unusual decision in **Duarte v Lissak**,¹²⁶ we have no authority for a cause of action arising within a foreign court's area of jurisdiction as a sufficient ground of international competence.¹²⁷ Although **Duarte's** case accepted this ground, the decision was criticized as incorrect,¹²⁸ and cause of action arising has been rejected in common-law systems.¹²⁹

4.2.71 **Steinberg v Cosmopolitan National Bank of** _ accepted the defendant's status as a fugitive from justice as yet another ground. The appellant in this case

¹²² Van Leeuwen **Het Roomsche Hollandsche Recht** 5.2.6.11.

¹²³ (1882) 1 SC 402 at 406; **De Naamloze Vennootschap Alintex v Von Gerlach** 1958 (1) SA 13 (T) at 15.

¹²⁴ Although formerly part of Scots law, this ground was rejected in English common law. See, for example, **Emanuel v Symon** [1908] 1 KB 302 at s10.

¹²⁵ Article 18(2).

¹²⁶ 1973 (3) SA 615 (D).

¹²⁷ See **Borough of Finsbury Permanent Investment Building Society v Vogel** (1910) 31 NLR 402.

¹²⁸ **Supercat Inc v Two Oceans Marine CC** 2001 (4) SA 27 (C) at 31.

¹²⁹ See **Sirdar Gurdyal Singh v Rajah of Faridkote** [1894] AC 670 at 684.

¹³⁰ 1973 (4) SA 564 (RAD).

had allegedly committed fraud in Illinois, where judgment was taken against him, although he was not present, resident or domiciled within the state. The Rhodesian Appellate Division acknowledged that the Illinois court lacked international competence, but it held that, on policy grounds, the judgment should nevertheless be enforced, because the judgment debtor should not be allowed to escape from the consequences of his fraud.¹³¹ This decision has been criticized as incorrect,¹³² and must represent an aberration.

(viii) An open or closed list of grounds?

4.2.72 In our law, it is uncertain whether residence, submission and domicile are the only grounds of international competence.¹³³ Submission is considered, almost universally, as a sufficient connection. In addition, South Africa accepts residence (whereas the common-law jurisdictions accept mainly – and, sometimes, residence).¹³⁵ We can definitely exclude certain grounds that may suffice for purposes of internal jurisdiction: cause of action arising,¹³⁶ attachment of property and *former* residence (where the defendant was a fugitive from justice).

4.2.73 The question was posed whether such other grounds as domicile and nationality should be added, and whether the list of grounds should be considered open or closed. The first question, regarding domicile and nationality, was answered above in the negative. As to the second, **Ms Kruger, Professor Forsyth and Ms Jesseman** were in favour of leaving the list of grounds of competence open, while **Ms Kruger** recommended stipulating a list of prohibited grounds: the nationality of the plaintiff or the defendant, mere service of process, presence of defendant's property within the foreign court's area of jurisdiction or seizure of such property by

¹³¹ **Chinatex Oriental Trading Co v Erskine** 1998 (4) SA 1087 (C) at 1095.

¹³² Spiro **CILSA** 1974 at 342; Forsyth (*op cit* at 407).

¹³³ **Reiss Engineer Co Ltd v Insamcor (Pty) Ltd** 1983 (1) SA 1033 (W) at 1036-7 is authority for saying that they are.

¹³⁴ Clarkson & Hill (*op cit* at 164) on the parallel development of English rules of internal jurisdiction and international competence.

¹³⁵ English courts are not entirely certain about residence as a ground of international competence. The issue was left open in **Adams v Cape Industries plc** [1990] Ch 433 at 518, but of **Motorola Credit Corporation v Cem Uzan, Aysegul Akaz** [2004] WL 3185404 (QBD Comm Ct).

¹³⁶ Rejected by **Sirdar Gurdyal Singh v Rajah of Faridkote** [1894] AC 670 at 684.

the plaintiff. (Her proposal was consonant with the approach taken by the drafters of the Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, namely, the stipulation of a 'black' list of prohibited grounds of jurisdiction.)¹³⁷ Nevertheless, **Ms Kruger** cautioned against making this a closed list, because of the difficulties of envisaging all possible situations, such as those arising from contracts and delicts via the internet.

4.2.74 No one supported the creation of a generalized ground, as was done by the Canadian Supreme Court, in **Morguard Investments Ltd v De Savoye**.¹³⁸ Here the Court stipulated only a 'real and substantial connection' with the foreign court, in other words, a sufficient territorial connection with the judgment debtor.

4.2.75 In view of the respondents' reaction, it seems sensible to retain the open-ended list of grounds for international competence.

(ix) Jurisdiction in federal states

4.2.76 Our common law gives no guidance as to which court will have international competence in a federal state, where local and federal courts may have quite different or overlapping spheres of jurisdiction. The general view of academic writers abroad is that any question of federal or provincial jurisdiction must be decided by the constitution of the state in which the original judgment was given. Thus, if an action is brought in a local court, then residence or submission within that court's area of jurisdiction is necessary. If the suit occurs in a federal court, however, then residence or submission within the federal area will suffice.¹³⁹

¹³⁷ See paragraphs 6.2.21 and 9.2.28. The following were the main 'black listed' grounds: presence or seizure of property belonging to the defendant (unless the dispute related to that property); nationality of either plaintiff or defendant; domicile, presence or habitual or temporary residence of the plaintiff; carrying on of commercial activities by the defendant; service of writ; unilateral designation of the forum by the plaintiff; temporary residence or presence of the defendant; signing of a contract. Finally, even if the defendant had been habitually resident, jurisdiction would be prohibited if there were no 'substantial connection' between that state and the dispute.

¹³⁸ (1990) 3 SCR 1077. The courts have not conclusively defined what is meant by 'real and substantial', although the Supreme Court has referred to the existence of a connection with the subject matter of the proceeding, the damages suffered, the legal obligation, the transaction or the parties (or, indeed, the defendant alone). In **Hunt v T&N** (1993) 109 DLR (4th) 16 at 42, however, the Court held that a proper assumption of jurisdiction should depend not on a mechanical counting of connections but the 'requirements of order and fairness' (which would thus lay emphasis on whether the defendant was treated fairly).

¹³⁹ In **Adams v Cape Industries plc** [1990] Ch 433 at 491, 555 and 557, an American company was incorporated in Illinois but sued in Texas. No definite answer was given to the question

4.2.77 **Mr Polonsky** supported legislative intervention to deal with this situation.¹⁴⁰ International instruments, however, have no specific provisions in this regard, and, in view of the straightforward answer elsewhere, there seems no particular need to regulate the matter. The problem can be left to the courts to solve.

(i) Final and conclusive

4.2.78 This ‘unnecessarily repetitive phrase’ means that the foreign court, according to its own law,¹⁴¹ must not be permitted to alter, set aside or reconsider a matter on which it had given judgment. The rule works on an assumption that the parties were given an opportunity - although they may not have acted upon it - to debate the merits of a case, and that the dispute was then adjudicated.¹⁴² Once it is clear that the losing party is barred from asking to have the judgment varied or set aside by the court that gave it, the matter is final.¹⁴³

4.2.79 Finality becomes a problem in two situations: provisional judgments and appeals. The former usually result from summary proceedings, which entail restricting the evidence to be called and precluding defendants from arguing certain issues. A classic example is the default judgment, because the judgment debtor is entitled to contest the matter within a set period of time.¹⁴⁴ If this time limit has

whether a Texan court had jurisdiction (although the defendant company was not present there) or whether presence within the United States as a larger political unit was sufficient; but the Court of Appeal supported the proposition made in the text. Clarkson & Hill (*op cit* at 162-3). See, too, **Motorola Credit Corporation v Cem Uzan, Aysegul Akaz** [2004] WL 3185404 (QB Comm Ct) para 29, where it was held that, if presence was an adequate basis for recognition, then residence would certainly suffice. Hence, there could be no objection if the defendant’s main residence was within the foreign court’s jurisdiction, and its absence was merely temporary at the time proceedings were instituted.

¹⁴⁰ Citing in support **Adams v Cape Industries Plc** [1990] Ch 433.

¹⁴¹ **Beatty v Beatty** [1924] 1 KB 807 (CA) at 816.

¹⁴² This requirement was fully considered by the Appellate Division in **Jones v Krok** 1995 (1) SA 677 (A).

¹⁴³ This principle was established in **Nouvion v Freeman** (1889) 15 App Cas 1 at 9, and has been followed in many South African cases, such as **Greathead v Greathead** 1946 TPD 404 at 407-8; **Alexander v Jokl & others** 1948 (3) SA 269 (W) at 279-80; **Sparks v David Polliack & Co** 1963 (2) SA 491 (T) at 493.

¹⁴⁴ A problem may arise - although this fortunately happens infrequently – that the legal system of the rendering state imposed no time limit within which the defendant would be required to take action. The judgment then remains forever inconclusive, and, as a result, may never be sued upon in our courts. Paradoxically, the judgment becomes enforceable abroad only if the judgment debtor decides to bring an application to contest the matter in the rendering court.

expired or if the judgment debtor waived his or her rights, however, the matter is considered final.¹⁴⁵

4.2.80 When a judgment is subject to an appeal in the foreign legal system, then, arguably, it cannot be regarded as final until the appeal is heard.¹⁴⁶ The outcome of this process is often so lengthy and uncertain, however, that such judgments are generally deemed enforceable.¹⁴⁷ Our Enforcement of Foreign Civil Judgments Act 32 of 1988, for example, provides that finality may be presumed even if an appeal is pending in the foreign court and the time prescribed for appealing has not yet expired.¹⁴⁸ If it should happen that the judgment is overturned on appeal, the judgment debtor can be given an order of *restitutio in integrum* on the basis of the creditor's unjustified enrichment.

4.2.81 When an appeal is actually pending, it is open to the debtor to persuade the court not to enforce the judgment, or at least to suspend the proceedings.¹⁴⁹ In making its decision, the forum must obviously take into account all the relevant circumstances, including the consequences of a successful appeal (although not the *likelihood* of success) and whether the debtor is actually pursuing it.¹⁵⁰

4.2.82 Maintenance orders pose a different type of problem. Although they are simply orders declaring that one person must periodically pay another a fixed sum of money, they may be varied or cancelled depending upon changes in the social and economic circumstances of the parties. The variable nature of these orders means that they are not final, and so foreign maintenance orders may not be enforced in our courts.¹⁵¹ To remedy this problem it was necessary to pass special legislation (which is considered below in Chapter 7).

¹⁴⁵ **Dawood v C & A Friedlander** 1913 CPD 291 at 295; **Sparks v David Polliak & Co** 1963 (2) SA 491 (T). See, too, Spiro **Conflict of Laws** at 261ff; Hahlo (1969) 86 **SALJ** at 354.

¹⁴⁶ Kahn (*op cit* at 662); Hahlo **SALJ** 1969 at 354-355.

¹⁴⁷ Even if the court from which an appeal was made suspended the judgment: **Jones v Krok** 1995 (1) SA 677 (A) at 692.

¹⁴⁸ Section 7(1).

¹⁴⁹ **Wolff NO v Solomon** (1898) 15 SC 297; **Dale v Dale** 1948 (4) SA 741 (c) at 744; **Jones v Krok** 1995 (1) SA 677 (A) at 695.

¹⁵⁰ **Jones's** case at 692; Spiro **Conflict of Laws** 1973 at 260.

¹⁵¹ **Estate Himovich** 1951 (2) SA 156 (C); **Estate H** 1952 (4) SA 168 (C).

4.2.83 Although, in practice, judgment creditors very seldom have to prove finality, if they are called upon to do so, the requirements for particular types of default judgment and appeals are not altogether clear. **Mr Polonksy** considered that default judgments should be considered final if the judgment debtor was required to make an interim payment to the judgment creditor (even although the foreign court might, at the trial, order the plaintiff to return the interim payment to the defendant). Similarly, he felt that the courts need to exercise discretion when considering judgments subject to appeal.¹⁵² Given the time and uncertainty involved in appeal proceedings, there is usually no reason why a judgment should not be enforced. In appropriate circumstances, however, the forum should be allowed to suspend enforcement proceedings on such terms as it considers fit (including an order for the provision of security by the judgment debtor).

4.2.84 In determining finality, the common law appears to be satisfactory. Admittedly, we have no hard and fast rules governing either appeals or default judgments, but, bearing in mind the many variables that must be considered, the courts need to retain a measure of discretion.¹⁵³ In the circumstances, there is no need for legislative intervention.

(j) Natural justice, fraud and public policy

4.2.85 These defences express two basic concerns: that foreign courts maintain proper judicial standards and that we retain discretion to protect certain critical interests of the forum.

(i) Natural justice

¹⁵² See, too, article 25(4) of the draft Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, which gives the forum discretion to postpone recognition or enforcement if a judgment is 'the subject of review in the State of origin or if the time limit for seeking a review has not expired'.

¹⁵³ Indeed, it has been said of default judgments that we must take a common-sense approach so that a judgment can be treated as final provided that the defendant had reasonable opportunity to have it set aside: Forsyth (*op cit* at 429-30).

4.2.86 According to common usage today, natural justice usually denotes the principles of fair trial: ***nemo iudex in sua causa*** and ***audi alteram partem***.¹⁵⁴ An earlier meaning of natural justice, which comes down to us from antiquity, includes the rules of substantive justice, and, in this sense, the concept may overlap with the defence of public policy.¹⁵⁵

4.2.87 The rule of ***audi alteram partem*** requires litigants to be given due notice of proceedings, and thus an opportunity to present their cases. In practice, natural justice has rarely been an issue in our courts, and, as a result, precise criteria have not been developed for deciding its application.

4.2.88 A particular issue concerns substituted service of notice of proceedings. If the whereabouts of a defendant is unknown, this procedure is regularly used for internal purposes. (The defendant is then deemed to have constructive notice of the action.) Moreover, in the case of judgments that operate ***in rem***, the requirement of due notice is not strictly applied, because such judgments, by their very nature, affect an indefinite number of defendants, all of whom cannot possibly be advised of the proceedings. In these situations, Forsyth, for one, advocates accepting substituted service in the rendering court, as compatible with natural justice, provided that it was impossible to serve on the defendant personally.¹⁵⁶

4.2.89 Recently, an unusual situation concerning due notice (in the context of a foreign judgment) arose in **Society of Lloyd's v Price & Lee**.¹⁵⁷ In this case, the Society of Lloyd's had used its power to make bye-laws to designate a substitute agent to take over its members' underwriting businesses in order to prevent the avalanche of litigation that was threatening the Lloyd's market. Acting on this authority, the agent then procured a series of contracts with the respondents, although without their direct consent. Part of the scheme entitled the agent to receive service of summons on behalf of respondents. The Supreme Court of Appeal rejected an argument that lack of direct notice to the respondents constituted

¹⁵⁴ **Duarte v Lissack** 1973 (3) SA 615 (D) at 622; **Lissack v Duarte** 1974 (4) SA 560 (N).

¹⁵⁵ As happened in **Adams v Cape Industries plc** [1991] 1 All ER 925 (CA) at 967, where the court held that natural justice is not confined to the ***audi alteram partem*** maxim, since it covers other situations where the forum's concept of substantial justice is infringed, such as taking default judgment without a hearing or a judicial assessment of the evidence. See, too, **Society of Lloyd's v Price & Lee** [2006] SCA 87 below.

¹⁵⁶ Forsyth (***op cit*** at 431; Pollak (***op cit*** at 229-30); Silberberg (***op cit*** at 36-7).

¹⁵⁷ [2006] SCA 87 paras 46-48.

a violation of our public policy (which in this context was co-extensive with natural justice). Aside from being contractually bound by the method set up under the Lloyd's scheme, the respondents were, in fact, fully aware of the proceedings. They had none the less refused to enter an appearance to defend (claiming perpetration of a fraud), and they failed to take any steps to have default judgments against them set aside. What is more, the English courts (and, as it happened, courts in the United States) had upheld the validity of service of process on an agent for persons not domiciled in England.

4.2.90 Unfortunately, the **Society of Lloyd's** case does not provide conclusive authority on which is sufficient: compliance with the foreign law on due notice or the defendant's actual knowledge of the proceedings.¹⁵⁸ The Enforcement of Foreign Civil Judgments Act 32 of 1988,¹⁵⁹ on the other hand, suggests a formal rather than a substantive test. It provides that a judgment debtor may apply to have the judgment set aside if he or she:

‘did not receive notice of the proceedings in which the judgment was given, as prescribed by the law of the designated country, or, if no such prior notice is so prescribed, that he did not receive reasonable notice of the said proceedings to enable him to defend the proceedings, and did not appear.’

4.2.91 There seems no particular need to amend the common law on natural justice. The practice of substituted service is accepted as sufficient compliance with the ***audi alteram partem*** rule, although the details may not have been clarified.¹⁶⁰ When interpreting natural justice for purposes of enforcing foreign judgments, our courts will no doubt be guided by the general notion of fair trial contained in section 34 of the Bill

¹⁵⁸ A decision in the United States by Court of Appeals for the District of Columbia Circuit, **Tahan v Hodgson** 662 F2d 862 (1981) at 865, takes the matter no further. In this case, the Court held that personal service on a defendant in Israel was sufficient even though the papers were in Hebrew, a language that the defendant did not understand. Apart from compliance with the local law, however, account was also taken of the fact that the defendant had done business in Israel for a number of years and was aware of the nature of the papers. In the circumstances, the Court held that he had ignored the papers at his own peril.

¹⁵⁹ Section 5(1)(c).

¹⁶⁰ Article 28(1)(d) of the draft Hague Convention on Jurisdiction and Foreign Judgments, for example, provides the additional detail as follows: ‘the document which instituted the proceedings or an equivalent document, including the essential elements of the claim, was not notified to the defendant in sufficient time and in such a way as to enable him to arrange his defence.’

of Rights,¹⁶¹ and the case law that has developed around this provision. The same provision will provide a basis for taking account of **Mr Polonksy's** proposal, that the forum should refuse to enforce not only foreign judgments where *audi alteram partem* was infringed, but also cases where the foreign court was not independent or impartial (which may overlap with the defence of fraud).¹⁶²

(ii) Fraud

4.2.92 Fraud is the second ground for attacking the validity of a foreign judgment. In order to limit the situations in which fraud can be raised, and thereby to prevent judgments debtors from re-opening the merits of the claim, both English law and our law distinguish between intrinsic and extrinsic fraud. The former is committed *by* the foreign court (for example, by accepting a bribe), whereas the latter is committed *upon* the foreign court (for example, by a party deliberately misleading it as to the truth).¹⁶³ Only extrinsic fraud can be argued as a defence to an action for enforcement of a foreign judgment.

4.2.93 Matters of intrinsic fraud must be dealt with in the state from which the judgment emanated, because the courts there are in a better position to assess the situation.¹⁶⁴ Normally, the aggrieved party lodges an appeal against the impugned judgment, and, until this process is complete, the South African courts will do no more than grant a stay of proceedings.¹⁶⁵

4.2.94 Extrinsic fraud, on the other hand, such as giving perjured evidence or suppressing material documents, is a ground for refusing enforcement, provided that it was sufficiently serious to have deprived aggrieved parties of the opportunity to present their cases. Even so, it must be clear that the fraud was not raised and decided upon in the foreign court.

¹⁶¹ Constitution of South Africa 1996.

¹⁶² This exceptional ground for refusing recognition or enforcement is provisionally included in article 28(1)(c) of the draft Hague Convention and Jurisdiction and Foreign Judgments in Civil and Commercial Matters. It resulted from concerns that there could be countries where bribes or lack of judicial independence would affect the outcome of litigation.

¹⁶³ **Goodman** (1903) 20 SC 376; **Jaffe v Salmon** 1904 TS 317 at 319; **Rubie v Haines** 1948 (4) SA 998 (W); **Jones v Krok** 1995 (1) SA 677 (A) at 685.

¹⁶⁴ Kahn **Husband and Wife** 1975 at 668; Forsyth (*op cit* at 433).

¹⁶⁵ **Seton Co v Silveroak Industries Ltd** 2000 (2) SA 215 (T) at 229-30 dealt with the effect of fraud on a foreign arbitral award.

4.2.95 In England, in spite of the distinction between intrinsic and extrinsic fraud, the courts have a more relaxed attitude to the defence. They will allow a judgment debtor, whose case was argued before the foreign court and dismissed, to put the same case again. In effect, the debtor may lead the same evidence of fraud in an English court as was led in the foreign court.¹⁶⁶

4.2.96 The respondents showed no inclination to accept the more relaxed English approach to fraud,¹⁶⁷ and there seems to be no good reason for legislative intervention in this area of our law. The one situation in which a judgment debtor should perhaps be allowed to re-open issues in the forum concerns a *mala fide* selection of the foreign court, namely, where the plaintiff fraudulently led that court to believe that it had jurisdiction.¹⁶⁸ Even so, this type of problem arises so seldom that it seems pointless to legislate.

(iii) Public policy

4.2.97 Whereas the defences of natural justice and fraud usually operate to protect individual interests, public policy protects broader state interests. It functions as a residual and discretionary reason for refusing the enforcement of foreign judgments. Hence, if a foreign judgment contravenes South African ideas of *boni mores* or infringes the South African Bill of Rights,¹⁶⁹ our courts will not enforce it.

4.2.98 The only controversial question in this section concerns judgments for multiple or punitive damages. These may not be enforced in terms of the Protection

¹⁶⁶ **Jet Holdings Inc v Patel** [1989] 2 All ER 648 (CA) and **Owens Bank Ltd v Bracco & others** [1992] 2 All ER 193 (HL) held that, even though a foreign court had investigated and rejected an allegation of fraud, its judgment would not be enforced locally, since that court's decision was neither conclusive nor relevant. 'To put it bluntly, the foreign court cannot haul itself up by its own bootstraps.' It is for the forum to examine questions of international competence (**Jet Holdings** at 652). This approach is also followed in Australia (Nygh & Davies (*op cit* at 9.36), but not in the United States (Reed *op cit* 291).

¹⁶⁷ **Professor Forsyth** and **Ms Jesseman** considered that the common-law distinction between extrinsic and intrinsic fraud should be maintained. **Mr Polonksy** said, in addition, that the English approach encourages judgment debtors to re-litigate the merits, although they probably had the opportunity to question the fraud in the original court.

¹⁶⁸ See **Castell & Walker** (*op cit* at 14.8.a); **Garb & Lew** (*op cit* at 2-8).

¹⁶⁹ Constitution of South Africa 1996. Note, however, that not all issues of public policy are necessarily determined by the Bill of Rights. See, **Taylor v Hollard** (1886) 2 SAR 78, for instance, where a judgment was deemed unconscionable, because it was in conflict with South Africa's laws on usury.

of Businesses Act 99 of 1978.¹⁷⁰ (Further discussion of the Act is postponed until Chapter 5 below.)

(k) Judgments that have lapsed or been satisfied

4.2.99 Aside from the above defences, the judgment debtor may allege that the foreign judgment lapsed or was satisfied. If the judgment was satisfied,¹⁷¹ an action for enforcement can be met with the defence of *res judicata*.

4.2.100 Lapsed judgments, however, raise a more difficult question: which law should be used to determine the period of prescription? So far as South African law is concerned, judgments must be acted upon within three years, otherwise they lapse and can be revived only by application to court.¹⁷² The law of the state in which the judgment was given, however, might stipulate a shorter or a longer period.¹⁷³

4.2.101 The Enforcement of Foreign Civil Judgments Act 32 of allows reference to either the *lex fori* or the foreign law, regardless which has the shorter or longer period.¹⁷⁵ Hence, registration of a foreign judgment may be set aside if the forum is satisfied that the judgment has become prescribed 'under either the laws of the Republic or the designated country concerned'.¹⁷⁶

¹⁷⁰ Section 1A(2) of the Act defines 'multiple or punitive' to mean the damages which exceed 'the amount determined by the court as compensation for the damage or the loss actually sustained' by the judgment creditor. This provision was taken from Britain's Protection of Trading Interests Act 1980.

¹⁷¹ We have no indication of what would happen if the first judgment were, for some reason, reversed. The Restatement, Second **Conflict of Laws** §16, however, allows the debtor to appeal from the second judgment or have its enforcement enjoined by means of an independent action in equity.

¹⁷² Section 63 of the Magistrates' Courts Act 32 of 1944 and Rule 66 of the Rules of the High Court. In **Segal & another v Segil** 1992 (3) SA 136 (C) at 143 and 157, however, the validity of Rule 66 was questioned on the ground that it conflicted with the Prescription Act 68 of 1969.

¹⁷³ Civil law systems assimilate this question to the normal statutes on prescription of debts. The common-law systems generally follow this principle, but allow for shorter times of limitation, which may be extended by leave of court: Kerameus (*op cit* at §62).

¹⁷⁴ Section 5(1)(i).

¹⁷⁵ **Mr Polonksy** favoured the shorter period.

¹⁷⁶ C F Forsyth **Private International Law** 1996 at 381 criticizes this section, because it overrides the common-law rule that matters of procedure should, in principle, be decided only by the *lex fori*, and matters of substance by the *lex causae*. The open-ended character of this rule, however, corresponds to that in article 22(2)(c) of the draft Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters.

4.2.102 We have no rule – whether statutory or common law - specifying which legal system to apply. Although there is case authority for applying our law,¹⁷⁷ an argument could be made in favour of the law of the foreign state.¹⁷⁸ The solution entails a complex investigation into both choice of law and the nature of rules of prescription. If the latter extinguish the original right, which is the position under the South African Prescription Act 68 of 1969,¹⁷⁹ they are deemed substantive. If they merely bar the action, they are deemed procedural. An intractable choice of law problem may then arise. The forum must apply its own rules of procedure, and, conversely, may not apply the procedures of a foreign law. It may happen that no rules on prescription are then applicable: a situation of ‘gap’. South African rules on prescription may not be applied, because they are deemed substantive, and, if the foreign rule on prescription is procedural, it too is inapplicable.

4.2.103 Recently, this problem arose before the Supreme Court of Appeal in **Society of Lloyd’s v Price & Lee**,¹⁸⁰ where the issue was whether the appellant could enforce default judgments obtained in England after more than three years (the South African rule) but less than six (the English rule). Because the English rule was procedural and the South African rule substantive, the Court was faced with a problem of ‘gap’.¹⁸¹ In the interests of uniform decision-making, Van Heerden JA held that a claim which was ‘alive and enforceable in terms of the law of the country under which such [claim] arose’ (which also happened to be the law with which it was most closely connected) should also be enforceable in South Africa.¹⁸²

4.2.104 The test proposed by the **Society of Lloyd’s** case - application of the law out of which the claim arose and with which it was most closely connected - is open-ended, but this solution seems preferable to one that arbitrarily opts for a particular

¹⁷⁷ **Coppen** NLR 1908 416 at 418; **Scorgie v Munnich** 1912 EDL 422 at 424; **National Milling Co Ltd v Mohammed** 1966 (3) SA 22 (R) at 23.

¹⁷⁸ Spiro **General Principles of the Conflict of Laws** (*op cit* at 110); Forsyth (*op cit* at 391 fn10).

¹⁷⁹ See **Kuhne & Nagel v APA Distributors Ltd** 1981 (3) SA 536 (W); **Minister of Transport, Transkei v Abdul** 1995 (1) SA 366 (N). It is, of course, questionable whether provisions in the Rules of the High Court and the Magistrates’ Court Act have the same effect.

¹⁸⁰ [2006] SCA 87.

¹⁸¹ Paragraph 22. Cf C F Forsyth **Journal of Private International Law** 2006 (not yet in print).

¹⁸² Paragraph 28. The Court referred in support of this conclusion (para 32) to **Society of Lloyd’s v Ilse** 2006 CLR 101 (C) paras 83-9.

prescription period or a particular system of law. Given the precedent set by the Supreme Court of Appeal, there is no pressing need to amend the common law.

4.3 RECOMMENDATIONS

4.3.1 Until the Enforcement of Foreign Civil Judgments Act 32 of 1988 is extended to apply to more countries,¹⁸³ the common-law action will remain as the only method for enforcing foreign judgments. (The only exception to this rule is judgments for maintenance.) However, even if the statutory procedure is made to apply more widely, it is still applicable only to judgments emanating from countries designated by the Minister of Justice. As a result, judgment creditors from undesignated countries will still have to rely on the common law.

4.3.2 There are significant gaps and ambiguities in the common-law procedure, and litigants deserve certainty in the law: they should not be forced to undertake costly litigation in order to establish the precise grounds for bringing a claim. Rather, the rules should be known in advance. Thus legislative amendments to the common law are necessary.

(a) Survival of the original cause of action

4.3.3 Legislation is needed to declare that, from our point of view, a foreign judgment is deemed to extinguish the original cause of action. This amendment will align the law on foreign judgments with our domestic rules governing the effect of judgments on debts. It will also remove the possibility of suing for a second time on the original debt, thereby giving full effect to the principle of *res judicata*.

(b) Definition of judgment and grounds of international competence for orders on immovables

¹⁸³ Currently, it applies only to Namibia. See further Chapter 6 below.

4.3.4 We have no clear definition of what constitutes a judgment in our law, and it is uncertain whether an English rule, limiting the enforcement of foreign judgments to monetary judgments, is part of South African law. This limitation, which is derived from the technicalities of English law, serves no useful purpose. Legislation is therefore needed to clarify both these issues. The amending act may use a modified version of the definition of 'judgment' given in the Enforcement of Foreign Civil Judgments Act 32 of 1988, together with that in the draft Hague Convention on Jurisdiction and Foreign Judgments: 'any final decision or order by a court, whatever it may be called, in any civil proceedings, excluding orders affecting personal status, but including orders for the determination of costs, which is enforceable by execution in the country in which it was given or made.' 'any final decision or order by a court, whatever it may be called, in any civil proceedings, including a decree or order, as well as the determination of costs, which is enforceable by execution in the country in which it was given or made.'

4.3.5 Because this definition will include judgments *in rem* over property, special provision will also be necessary for determining grounds of international competence in cases of immovable property. In these situations, only the *forum rei sitae* should have international competence.

(c) Validity of the judgment

4.3.6 South African common law has no clear rule indicating whether our courts are competent to pronounce on the validity of foreign judgments. Although, in principle, the forum should be discouraged from re-examining the merits of foreign judgments, it would be paradoxical if a South African court were to enforce a judgment invalid according to the law of the country in which it was given. Our courts should therefore be given authority to pronounce on the validity of foreign judgments. For this purpose, section 5(b) of the Enforcement of Foreign Civil Judgments Act 32 of 1988 may be used: a foreign judgment will not be enforceable if 'the court of the country concerned had no jurisdiction in the circumstances of the case'. Courts will have discretion in determining what 'the circumstances of the case' may mean.

(d) Conflicting judgments

4.3.7 When two foreign judgments between the same parties and over the same subject matter are in conflict, the forum has to decide whether to give overriding effect to the earlier or later judgment. Legislation is required to provide that the first judgment should have overriding force. In this respect, a useful model is available in section 5(1)(g) of the Enforcement of Foreign Civil Judgments Act 32 of 1988: a foreign judgment may not be enforced in South Africa if it conflicts with a judgment already given elsewhere.

(e) The date for converting foreign currencies

4.3.8 Under the common law, judgments in foreign currencies must be converted into their rand equivalent at the original date of payment. To allow for account to be taken of fluctuations in exchange rates, the rule must be amended to stipulate that conversion into rand is to take place at the date when the forum decides to enforce the judgment.

(f) Interest

4.3.9 The common law must be amended to determine whether the interest rate on a judgment should be prescribed by the foreign law or South African law. The new rule should specify that the interest awarded by the rendering court will run until the date of registration of the judgment in South Africa. Thereafter, the rate will be that laid down by South African law, or the law of the state of origin, whichever is the lower.

(g) International competence

4.3.10 No amendment is needed to the common law, except for the rule concerning the residence of juristic persons. The current test for determining the residence of these entities – the place of a registered office - is unduly narrow. Hence, a broader rule should be adopted. Section 7(4)(a)(iii) of the Enforcement of Foreign Civil Judgments Act 32 of 1988 provides a useful model: a juristic person is deemed resident at its principal place of business. The term 'principal place of business' in

this definition may be defined to mean 'where the affairs of the enterprise are controlled'.

CHAPTER 5: PROTECTION OF BUSINESSES ACT 99 OF 1978

5.1 STATEMENT OF THE LAW

5.1.1 The principal aim of the Protection of Businesses Act 99 of 1978 was to protect South Africans from the draconian effects of certain foreign laws, in particular those allowing awards of penal or multiple damages.¹ To this end, any form of international judicial co-operation by South African courts, whether service of process, taking of evidence or enforcement of a judgment, is prohibited. In exceptional cases, however, the Minister of Trade and _ may give permission for compliance.

5.1.2 Section 1 of the Act provides that, without the Minister's permission, 'no judgment, order, direction, arbitration award, interrogatory, commission rogatoire, letters of request or any other request ... emanating from outside the _ may be enforced in South Africa nor may any person comply. Section 1(3) defines the judgment, order, etc in extraordinarily broad terms. It must arise from any act or transaction

'connected with the mining, production, importation, exportation, refinement, possession, use or sale of or ownership to [sic] any matter or material, of whatever nature, whether within, outside, into or from the Republic'.

Any person who complies with the judgment, order, etc is subject to a criminal penalty.⁴

¹ Leon **CILSA** 1983 at 347.

² Previously the Minister of Economic Affairs, the official specified in the Act.

³ Section 1(1)(a).

⁴ Section 1G(2).

5.1.3 Section 1A(1) of the . goes on to prohibit, *regardless of the Minister's consent*, the recognition or enforcement of any foreign judgment for punitive or multiple damages arising out of the activities enumerated in section 1(3). Section 1(2) defines multiple or punitive damages to mean:

'part of the amount awarded as damages which exceeds the amount determined by the court as compensation for the damage or loss actually sustained by the person to whom the damages have been awarded.'

Section 1B allows defendants who have already paid part of such awards to recover their payments from the judgment creditors.

5.1.4 Section imposes, again, a total prohibition on any form of international judicial co-operation in cases of product liability. This provision forbids, regardless of the Minister's consent, the recognition or enforcement of a foreign judgment, order, etc issued outside South Africa and based on any of the acts or transactions listed in section 1(3), if the judgment, order, etc was concerned with product liability arising from bodily injuries that might have resulted from the use of any materials produced in South Africa, unless the same liability would have arisen under South African law.

5.2 EVALUATION

5.2.1 As Forsyth and Leon say,⁷ the Protection of Businesses Act 99 of 1978 is a classic example of legislative overkill. Because most judgments and requests for evidence touch on the ownership of 'matter or material', the Minister's permission is needed in nearly every action for recognition or enforcement of a foreign judgment. Certain courts have responded by interpreting the meaning of 'any matter or material' to refer only to raw materials and substances,⁸ and, once manufactured goods are excluded, the scope of the Act is correspondingly narrowed. Other cases make no

⁵ Which was inserted by Act 71 of 1984.

⁶ Which was inserted by Act 87 of 1987.

⁷ Forsyth (*op cit* at 435).

⁸ **Tradex Ocean Transportation SA v MV Silvergate** 1994 (4) SA 121 (C); **Chinatex Oriental Trading Co v Erskine** 1998 (4) SA 1087 (C) at 1095-6. Forsyth (*op cit* at 436), however, submits that the various restrictions imposed by these cases are inconsistent.

mention of plaintiffs having obtained the Minister's permission,⁹ which seems to suggest that, in practice, the Act is not being applied, unless foreign judgments involve the issues that it was actually intended to correct, namely, multiple and punitive damages.

5.2.2 The Act conveys a discouraging message to foreigners seeking the assistance of our courts: recognition or enforcement of their requests entails all the uncertainties associated with obtaining executive permission. As – and **Ms Kruger** said, the case for reform is overwhelming. **Mr Polonsky** went so far as to say that changing the Act would more generally promote the recognition and enforcement of South African judgments abroad. To the extent that the Act gives (or appears to give) the Minister discretion to deny the enforcement of any foreign judgments, it is unacceptable to countries such as Britain which may be considering bilateral relationships with South Africa. They require evidence that their judgments *will* be (not *may* be) enforced.¹¹

5.2.3 The draconian provisions in the Act are modified, to some extent, by section 1(2), which provides that the Minister may grant blanket permission to certain classes of person for the enforcement of judgments relating to specified goods or businesses, or to classes of such goods or businesses, or to orders emanating from specified countries. The Minister, however, does not appear to have granted any such permissions.

5.2.4 Exercise of the Minister's discretion under the Act is, of course, subject to constitutional review in terms of section 33 of the Bill of Rights,¹² which entitles everyone to administrative action that is 'lawful, reasonable and procedurally fair'. **Professor Forsyth** and **Ms Jesseman** said that denial of ministerial permission or

⁹ **Seton Co v Silveroak Industries Ltd** 2000 (2) SA 215 (T) at 225-6. **Gabelsberger & another v Babl & another** 1994 (2) SA 677 (T) at 679, for instance, said nothing about the Act. **Jones v Krok** 1995 (1) SA 677 (A) at 685 seems to be the only case to consider compliance with the Act necessary for all judgments.

¹⁰ **Forsyth (op cit** at 437).

¹¹ Moreover, he did not consider it appropriate to allow the judgment creditor to rely only on section 33 of the Bill of Rights to limit the effects of the Act.

¹² Constitution of the Republic of South Africa 1996. Moreover, under section 33(2) of the Constitution, a plaintiff seeking to enforce a foreign judgment would also be entitled to written reasons for the Minister's decision to refuse the necessary permission. Any limitation of the right to just administrative action by the Protection of Businesses Act must nevertheless be 'reasonable and justifiable' in accordance with section 36 of the Final Constitution.

the attachment of _ may amount to a violation of section 33. And, elsewhere, Forsyth argues that it would be difficult to conceive of circumstances in which the Minister could validly refuse permission to enforce a foreign judgment, unless that judgment were to inflict severe damage on South Africa's economy or general security.¹⁴ His argument, however, does not apply to sections 1A and 1D, which deal with multiple damages and product liability, where ministerial consent is treated as irrelevant.

5.2.5 No one questioned the need for protection against the payment of multiple or punitive damages, which was the main purpose of the Act.¹⁵ Indeed, courts in other jurisdictions have refused to enforce all judgments designed to inflict penalties,¹⁶ on the ground that enriching plaintiffs beyond the compensation necessary to settle the damage suffered amounts to a private prosecution. To allow an individual such a right has the effect of usurping the state's monopoly on punishment, together with the associated safeguards built into the criminal justice system.¹⁷

5.2.6 The Brussels regime has no specific provision on the subject of punitive or multiple damages, but the Hague draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters declares that 'non-compensatory' damages may be granted, provided that these are permitted by the law of the forum.¹⁸ If there is a difference between the amount granted by the foreign courts and that permissible in the forum, only the lesser may be granted.¹⁹

¹³ The attaching of conditions is permitted under sections 1(1) and (2) of the Act.

¹⁴ Forsyth (*op cit* at 437).

¹⁵ Hence **Professor Forsyth** and **Ms Jesseman** said that the provisions in the Act regarding multiple damages, sections 1A and 1B, were reasonable and acceptable.

¹⁶ If a penalty is in favour of the state, of course, it is not enforceable on the ground that to do so gives effect to another state's penal laws: **Huntington v Attrill** [1893] AC 150 (PC); **USA v Inkleby** [1988] 3 All ER 144 (CA).

¹⁷ This was the argument used by the *Bundesgerichtshof* (IX ZR 149/91) in Germany, reported in (1993) 32 **Int Legal Materials** at 1320; Hay **American Journal of Comparative Law** 1992 at 1001.

¹⁸ Article 33(1).

¹⁹ Article 33(2).

5.2.7 In our law, the principle is clear: damages may be not claimed as punishment for the wrong committed.²⁰ Although the language used by the courts in describing damages can hardly be considered fixed – the terms vary from ‘aggravated’ or ‘exemplary’ to ‘punitive’ – damages should, in principle, allow no more than compensation for harm done.²¹ This rule is not disturbed even by actions under the *actio iniuriarum*, where claims for malicious conduct may generate larger awards.

5.2.8 While everyone was agreed on the policy that our judicial process should not be used for enforcing awards of punitive or multiple damages, there was no unanimity on how best to deal with the issue. **Ms Kruger**, for instance, considered the statutory provision unnecessary, because the courts can always refuse to enforce judgments for multiple damages if they are contrary to our public policy (which, of course, includes our economic policy).²²

5.2.9 **Professor Forsyth** and **Ms Jesseman** had no objection to section 1D of the Protection of Businesses Act, which was aimed at protecting defendants with assets in South Africa from large awards in mainly product liability cases. Although this provision was intended to block undesirable foreign policies, if the defendant had been properly subject to the jurisdiction of a foreign court, the respondents asked why that court should not determine the amount of compensation.

5.2.10 **Professor Forsyth** and **Ms Jesseman** drew attention to statutes in Britain,²³ ... and ... which deal with anti-trust laws, as compelling models of how we might better manage the problem of foreign awards of multiple damages. All these enactments eschew a blanket refusal to co-operate. Instead, they allow the executive to

²⁰ The same principle seems to be true of English law. **Mr Polonksy** noted that it was uncertain whether a foreign judgment for punitive damages would be deemed contrary to public policy on the basis of a dictum by Lord Denning, in **SA Consortium Textiles v Sun & Sand Agencies Limited** [1978] QB 279 at 309. Here it was held that, because English courts have the power to award exemplary damages in certain cases, they could not object to similar foreign judgments on policy grounds. However, such judgments ought not to be enforced to the extent that the foreign court imposed a penalty in order to manifest public criticism of particular forms of conduct, with the plaintiff serving the role of ‘private attorney general’, (although the penalty goes to the plaintiff as compensation rather than to the state as a fine).

²¹ See the Conventional Penalties Act 15 of 1962.

²² She cites the judgment of the European Court of Justice of 5 May 2000, C-38/98, **Régie nationale des usines Renault SA v Maxicar SpA and Orazio Formento**.

²³ Protection of Trading Interests Act (1980).

²⁴ Foreign Proceedings (Excess of Jurisdiction) Act 3 of 1984 (Cth).

²⁵ Foreign Extra-territorial Measures Act RS 1985.

intervene as a matter of exception, not as a rule. Thus, foreign laws and judgments are deemed enforceable, unless a serious threat can be proved to the domestic security or economy.²⁶

5.2.11 **Mr Polonksy** also drew attention to section 5 of the British Protection of Trading Interests Act 1980, which he recommended (with suitable improvements on the wording) as a useful guide for new legislation in South Africa. Where foreign judgments are for multiple damages, the compensatory element should be the only amount recoverable in the forum.

5.2.12 **Professor Forsyth** and **Ms Jesseman** questioned, more generally, the need for regulation by statute, suggesting, instead, the possibility of bi- and multilateral treaty solutions. Although they accepted that comity should not determine the enforcement of foreign judgments with extraterritorial effect or those awarding multiple damages,²⁷ they considered 'positive – an encouraging development in the field of international competition law, and, as a long-term prospect, they said that it holds promise for the future of our policy towards judicial co-operation. Positive comity implies that states should be obliged to notify one another of the effects on their national interests of anti-trust enforcement.²⁹ This concept may be used as a precursor to the traditional determination of the enforceability of foreign judgments in accordance with national legislation.³⁰ In addition, bilateral enforcement and

²⁶ Section 5(4) of the British Act grants the Secretary of State power to declare unenforceable foreign rules 'designed to restrain, distort or restrict competition in the carrying on of business'. See Collins (ed) **International Litigation and the Conflict of Laws** at 348-51. Under the Australian Act, the federal Attorney-General may prohibit the enforcement of a foreign anti-trust judgment, when it is in the national interest, contrary to international law or inconsistent with international comity. The Canadian Act provides that a judgment based on a foreign anti-trust law is not to be deemed contrary to the public policy of Canada until the Attorney-General of Canada decides to invoke the provisions of the Act: **Old North State Brewing Co v Newlands Services Inc** [1999] 4 WWR 537 par 51. This may be done if recognition or enforcement would adversely affect significant Canadian interests in international trade; a business carried on in Canada or would be likely to infringe Canadian sovereignty. The amount of the judgment may be reduced or declared non-recognizable or unenforceable.

²⁷ This principle may be suitable for the diplomatic settlement of economic conflicts, but it is too uncertain in content and method of application to be relied upon to determine the jurisdictional claims of states. See Lowe **American Journal of International Law** at 281.

²⁸ Pitofsky, **Journal of International Economic Law** 1999 at 403.

²⁹ Either within the context of the OECD, for example, or in the context of bilateral agreements. For the former example, see the 1967 OECD Recommendation on Co-operation between Member Countries on Restrictive Business Practices Affecting International Trade, and, for the latter, the Agreement Between the Government of the United States of America and the Government of Australia Relating to Co-operation on Antitrust Matters, reprinted in 4 *Trade Reg Rep* (CCH) para 13,502 (29 June 1982). See, too, Pitofsky (**op cit** at 403).

³⁰ Pitofsky (**op cit** 403).

recognition agreements can be pursued with states which have similar legislation, as was demonstrated by the 1990 Australia-United-Kingdom – and the Canada-United Kingdom Agreement of 1984.³²

5.3 RECOMMENDATIONS

5.3.1 The Protection of Businesses Act 99 of 1978 must be repealed. First, all parties to the Project on International Judicial Co-operation indicated their clear commitment to achieving the stated aim, and the Act is a major obstacle to any co-operative endeavour. Secondly, the Act frustrates what are, in the great majority of cases, uncontentious requests: for service of process, taking of evidence and the recognition or enforcement of foreign judgments (whether in terms of the common or statute law). Thirdly, the convoluted and over-detailed language in the Act has had a predictable result: ambiguity and non-compliance. Finally, the Act signals a hostile and defensive attitude to the international community.

5.3.2 The original purpose of the Act was unobjectionable: refusing co-operation when it entailed the enforcement of foreign laws permitting payment of punitive or multiple damages. A straightforward repeal of the Act would leave the courts free to construct new rules to achieve this aim under the rubric of public policy, but, in the interests of certainty and predictability, it is preferable to specify in advance areas in which requests for service, evidence or the enforcement of foreign judgments may be refused.

5.3.3 New legislation for this purpose should be based on an assumption that co-operation by the South African judicial system will be forthcoming. Only if it can be proved that giving effect to a request will entail the award of penal or multiple damages may the courts refuse to co-operate.

5.3.4 The Minister should be entitled to intervene to prohibit further action in the courts, if a particular request for international judicial co-operation poses a serious

³¹ SI 1994 No 1901.

³² SI 1987 No 468. In fact, **Mr Polonsky** recommended the schedule to the latter treaty as a potential blueprint for a South Africa-United Kingdom Agreement. See Annexure H.

threat to our national security or economy.³³ These are areas over which executive, rather than judicial, action is appropriate, since the executive is better placed to discern the long-term domestic and international implications.

³³ Even so, exercise of executive power will always, of course, be subject to constitutional review on the basis laid down in **Pharmaceutical Manufacturers Association of SA: In re: ex parte President of the RSA** 2000 (2) SA 674 (CC).

CHAPTER 6: RECOGNITION AND ENFORCEMENT OF JUDGMENTS UNDER STATUTORY LAW

6.1 STATEMENT OF THE LAW

6.1.1 The common law can no doubt function on its own to facilitate the recognition and enforcement of foreign judgments, but it entails a potentially slow and cumbersome process. To expedite the procedure, and, at the same time, to obtain reciprocal treatment for South African judgments abroad, our law provides certain statutory procedures. Two Acts govern the enforcement of maintenance orders (which are considered in Chapter 7 below), while a third governs other civil judgments sounding in money.

6.1.2 The Enforcement of Foreign Civil Judgments Act 32 of 1988 provides a procedure specifically designed to reduce the time and costs involved in the common-law action. This procedure is available, however, only for the enforcement of judgments emanating from countries specially designated by the Minister of Justice. Significantly, reciprocal treatment by the chosen states is not formally required.¹

6.1.3 The Act provides an alternative, not an exclusive, method of enforcement. It does not, in other words, exclude the common-law action.²

6.1.4 The Act caters for judgments given in 'civil proceedings or in respect of compensation ... in any criminal proceedings'.³ Non-monetary judgments, and those based on penal or revenue laws, are excluded. Unfortunately, the Act applies only to

¹ Section 2(1), which specifies application of the Act, has no such requirement. This Act was preceded by the Reciprocal Enforcement of Civil Judgments Act of 1966, but the latter never came into force, largely because it required reciprocal treatment, and South Africa was diplomatically isolated at the time.

² Forsyth (*op cit* at 409 fn133). The terms of section 9, however, are not altogether clear, because they refer to *recognition* and not enforcement: 'Nothing in this Act contained shall be construed as preventing any court in the Republic from recognizing ... any judgment ... given by any court of competent jurisdiction outside the Republic in any civil matter'

³ See the definition of 'judgment' in Section 1 of the Act .

enforcement proceedings in the magistrates' courts, where the financial limit on actions is R100 000. Foreign judgments in excess of this amount must be enforced in the High Court, where the procedure is governed by the common law.

6.1.5 The Act provides that a judgment creditor may have a judgment from a designated foreign _ registered in a South African magistrate's court.⁵ A certified copy of this judgment must be lodged with the clerk of the court, who is then obliged to issue a notice to the judgment debtor informing him or her of the registration.⁶

6.1.6 A registered judgment has the same effect as any other judgment issued by a magistrate's court.⁷ Execution, however, is delayed for 21 days, during which time the judgment debtor may apply to have the judgment set aside.⁸

6.1.7 The debtor may attempt to impugn the judgment on grounds broadly corresponding to the common law. The most important grounds are the following:⁹

- the judgment was registered in contravention of the Act;
- the foreign court 'had no jurisdiction in the circumstances of the case';
- the judgment debtor did not 'receive notice of the proceedings in which the judgment was given', as prescribed by the law of the designated country;
- the judgment was obtained by fraud;
- enforcement would be contrary to South African public policy;

⁴ According to the definition provisions in section 1, the foreign court may be 'the Supreme or High Court or any magistrate's court (including a regional court)'.

⁵ The latter court must be in the area where the judgment debtor resides, is employed, carries on business or owns any movable or immovable property. If the debtor is a juristic person, then it is the court of either its registered office or its principal place of business. See the definition of 'court' in section 1 of the Act.

⁶ Section 3.

⁷ Section 4(1).

⁸ Section 4(2).

⁹ Section 5.

- the matter in dispute had, prior to the date of judgment, been subject to a final judgment by a court of competent jurisdiction;
- the judgment had been prescribed by either South African law or the law of the foreign country;
- the judgment was wholly or partly satisfied.

6.1.8 The Act contains several important deeming provisions.¹⁰

- It is presumed that a judgment is final, notwithstanding the existence of a pending appeal.¹¹
- The foreign court is presumed to have had jurisdiction if the judgment debtor was resident there, acted as plaintiff (or plaintiff in reconvention), or agreed to submit to the court's jurisdiction.
- If the judgment debtor was a juristic person, jurisdiction is presumed when the debtor had its principal place of business in the court's area or an office or place of business in the area in which the transaction in question occurred.¹²

A set of negative presumptions provides that the foreign court lacked international competence if,

- In proceedings relating to immovables, the property was situated outside its jurisdiction
- the parties had agreed to have the dispute settled elsewhere

¹⁰ Act 32 of 1988

¹¹ Section 7(1).

¹² Section 7(4).

- the judgment debtor was entitled to immunity under public international law.¹³

6.1.9 After the period for objection has expired, the judgment creditor may demand execution. Where the foreign judgment was payable in a foreign currency, the Act provides that it 'shall be registered as if it were a judgment for such amount in the currency of the Republic, calculated at the rate of exchange prevailing at the date of judgment'.¹⁴

6.2 EVALUATION

6.2.1 The Commission was requested to investigate merging the Enforcement of Foreign Civil Judgments Act 32 of 1988 Act, the Acts governing maintenance and those dealing with service and taking evidence abroad into one statute. This inquiry is pursued in Chapter 8 below. The Commission was also asked to suggest improvements in the law, presumably to ensure a simpler, faster and cheaper procedure for enforcing foreign judgments in South Africa, and to assist those wanting South African judgments enforced abroad.

(a) Comparison with British law

6.2.2 Our legislation on the recognition and enforcement of foreign judgments was derived from earlier British statutes, which themselves provided models for most Commonwealth countries. The British legislation dates back to an Administration of Justice Act of 1920, when an accelerated procedure was introduced for enforcing arbitral awards and judgments from superior courts in Commonwealth countries (and, at the same time, gaining enforcement of British judgments).¹⁵ The Act did little to change (or improve on) the common-law rules, however, nor did it exclude application of the common law. Its major advance was to provide that judgments emanating from the designated states, which had to be proclaimed in advance, could be registered and then directly executed in Britain. To decide which states were to

¹³ Section 7(5).

¹⁴ Section 3(4).

¹⁵ This Act does not apply to certain major Commonwealth countries, however, notably, Australia, Canada, India, Pakistan and South Africa.

be designated, the executive had to be satisfied that British judgments would be given reciprocal treatment.

6.2.3 In 1933, the Foreign Judgments (Reciprocal Enforcement) Act provided for the registration of judgments and arbitral awards emanating from any foreign country, including Commonwealth countries.¹⁶ Like its 1920 predecessor, this Act more or less encoded the common law.¹⁷

6.2.4 The law in Britain underwent a major change when the country joined the Common Market. Under the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (1968) and the Lugano Convention (1988), Britain was obliged to enact the Civil Jurisdiction and Judgments Act (1982).¹⁸ This Act provides for the recognition and enforcement of judgments – whether monetary or non-monetary, and whether derived from maintenance or other civil claims - emanating from states parties to the Conventions.

6.2.5 In 2002, the Brussels and Lugano Conventions,¹⁹ together with the Civil Jurisdiction Act, were, in their turn, superseded by a European Council Regulation ('the Brussels I Regulation').²⁰ The latter is now the primary method for recognizing and enforcing judgments of members of the European Union.

6.2.6 Before Britain's entry into the Common Market, both English common law and the British statutes reflected a political concern with comity/reciprocity and a jurisdictional concern with international competence. The Brussels regime operates on completely different premises. By becoming members of the EU, European states opted for uniform standards and a consequential sacrifice of certain sovereign

¹⁶ In fact, this Act was extended to very few countries. These were mainly Commonwealth countries, to which the Administration of Justice Act 1920 did not apply, and certain European states (where the Act has since been superseded by the Brussels regime).

¹⁷ Neither of the Acts applied to judgments *in rem*, ie, matrimonial matters, administration of deceased estates, bankruptcy, winding up of companies, lunacy or the guardianship of infants.

¹⁸ In 1991, this Act had, in turn, to be amended to include the Lugano Convention.

¹⁹ The Brussels Convention remains the instrument for enforcing judgments emanating from Denmark, and the Lugano Convention governs relations with Norway, Iceland and Switzerland. The rules of these Conventions are similar to those contained in the Regulation, differing only in matters of detail.

²⁰ 44/2001, which entered into force on 1 March 2002. Because the wording of the Regulation is permissive, as far as the United Kingdom is concerned, the common law probably remains an alternative, if an applicant fails to meet the criteria laid down in the Regulation. For cases that do comply with the Regulation, however, it provides the only regime, because article 34 is mandatory in this regard.

interests. Preoccupations with reciprocity and international competence could be put aside.

6.2.7 Because South Africa's Enforcement of Foreign Civil Judgments Act 32 of 1988 is so closely modelled on British precedents of the pre-Brussels era, the statutory procedures in Britain provide no significant advance on what we already have. What is more, our existing procedure appears to be satisfactory, judging by the fact that none of the respondents to the Issue and Discussion Papers questioned its efficiency.

6.2.8 The statutory procedure is simple and direct. In the first stage, a judgment creditor needs to produce only an authenticated copy of the original judgment,²¹ which is registered by the clerk of court. In the second stage, the judgment debtor is given a specific period of time within which to apply to have the registration set aside.²² This process clearly saves judgment creditors considerable time and cost, because they do not need to prove the rendering court's international competence. (It can be assumed that the rendering court had jurisdiction on grounds compatible with our ideas of international competence.) Once an authenticated copy of the judgment is produced, the onus is then cast on the judgment debtor to contest its validity on grounds similar to those of the common law (international competence, validity, fraud, public policy, etc). After 21 days, execution can take place.

(b) Application of the Act: designation

6.2.9 The problem with the Enforcement of Foreign Civil Judgments Act 32 of 1988 lies not with its procedures but with its extremely limited range of application. As **Professor Roodt** pointed out, the Minister has designated only Namibia, with the result that judgments emanating from any other country must be enforced under the common-law action.

6.2.10 The failure to designate foreign countries places both foreign and South African litigants at a disadvantage. In order to extend the scope of the Act, a good

²¹ This is the same approach as in articles 27(2) of the Hague draft Convention and 35(2) and 36 of the Brussels Regulation, which require the forum to do no more than verify the jurisdiction of the original court. In doing so, it is bound by any findings of fact made by that court.

²² This clear two-stage procedure was recommended by **Mr Polonksy**.

starting point would be to begin negotiations with certain of our major trading partners. **Mr Polonsky**, for instance, believes that any amendment to the Enforcement of Civil Judgments Act 9 of 1966 should be considered both from the viewpoint of how it might improve South African domestic law and from the viewpoint of how it might affect Britain's attitude to extending the Foreign (Reciprocal Enforcement) Judgments Act of 1933 to South Africa.

6.2.11 Accepting that our Act is to be made applicable to more countries, the major question we face is whether they should still be 'designated' - a process that involves an exercise of executive discretion - and, if so, what criteria should be employed in the selection of suitable candidates.²³

6.2.12 At the outset, we should bear in mind that, under the common law, no particular countries are favoured. The only requirement, so far as we are concerned, is that foreign judgments, from whatever states, comply with South African notions of international competence and due process. Because of the accelerated procedure under the Enforcement of Civil Judgments Act, however, local courts have no opportunity to examine these issues. Instead, judgment debtors have the task of proving the absence of competence or due process.

6.2.13 If we are committed to international judicial co-operation, together with the principles of free access to court and fair trial,²⁴ we should be prepared to open our courts on a liberal basis. Nevertheless, judgment debtors who, under the statutory procedure, must contest due process in the rendering court, together with its overall competence to give judgment, need some degree of protection. In these circumstances, the quality of the judicial process in the selected state must be assured before judgment creditors can take the benefit of the quicker procedure under the Act.

6.2.14 These considerations suggest that, although reciprocity is relevant as a criterion for deciding whether to designate foreign countries, the basic demands of jurisdictional competence and fair trial cannot be ignored. The general philosophy

²³ No help can be expected from the major Commonwealth countries, since their statutory procedures also rely upon designation: in New Zealand under the Reciprocal Enforcement of Judgments Act (1934), in Australia under the Foreign Judgments Act (1991) and, in Canada, under provincial enactments applied by the Lieutenant Governors of the relevant provinces.

²⁴ See Chapter 9 below.

underlying international judicial co-operation is explored in more detail in Chapter 9 below. Here, however, it may be noted that, although reciprocity is an accepted principle in most – and civil-law jurisdictions,²⁶ it was opposed by nearly all respondents to the Issue and Discussion Papers.²⁷ **Professor Roodt** supported neither the doctrines of comity nor reciprocity (nor, for that matter, the process of designation, because these criteria concern the sovereign, not the individual). She said that the main guiding principles should be conclusive litigation, convenience and simplified administration. Moreover, she said that the requirements for enforcement – or, what is even more important, the grounds for denying recognition - must be well-defined.

(c) Retention of the common-law action

6.2.15 Should the accelerated statutory procedure provide the exclusive means for enforcing foreign judgments, or should the common-law action be retained? As became apparent from the earlier analysis, deficiencies in the common law require legislative intervention, but this is no reason to abolish the entire action.

6.2.16 There is no uniform approach to this question in other common-law jurisdictions: Canada and New – retain the common-law option, but not Australia or Britain (under the 1933 Act). Most of the respondents to the Discussion Paper, however, felt that abolition of the common-law action would be unwise. If the scope of the present legislation on enforcement of foreign judgments continues to be restricted to certain designated countries, and only to monetary matters, then an alternative procedure is essential. Furthermore, procedure by way of the common law need not be unduly lengthy. The plaintiff must establish only a ground of jurisdiction. If the foreign judgment was for a liquidated sum of money, which is

²⁵ At least for the statutory enforcement procedures, although, in the United States, reciprocity also influenced the common law: **Hilton v Guyot** 159 US 113 (1895) at 217.

²⁶ In Germany, for instance, para 328 of the *Zivilprozessordnung* provided that a German court could not recognize a foreign judgment if it was uncertain whether the state concerned would grant German judgments reciprocal treatment. Subparagraph 5 did not preclude the *recognition* of a foreign judgment if that judgment concerned a non-monetary matter and jurisdiction of a German court could not be established. Reciprocity would be ensured when, on the basis of an overall assessment, a foreign state followed the same principles as the German courts. Margin nr 20 citing *BGH NJW* 99, 3198/3201.

²⁷ **Ms Kruger** was the only person to consider it a satisfactory way of regulating international co-operation.

²⁸ Section 8 of the Reciprocal Enforcement of Judgments Act (1934).

usually the case, immediate application can be made for summary judgment. The burden then passes to the defendant to dispute finality or to show denial of natural justice, fraud, and so forth.²⁹

(d) Types of judgment

6.2.17 In line with earlier British legislation, the Act applies only to monetary judgments. This limitation was omitted from the Australian and New Zealand Acts, however, and it now seems unduly restrictive. The Brussels Regulation and the Hague draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial ... have a more generous scope than our Act, but this follows from the fact that regulation of jurisdiction in the rendering courts allows many of the restrictions on recognition to be lifted. Article 23 of the draft Convention, for instance, defines 'judgment' to mean 'any decision given by a court, whatever it may be called ... provided that it relates to a decision which may be recognized or enforced under the Convention'.³¹ If reform of the common law is delayed or refused in this regard, then there is good reason for removing the limitation in the Act.

6.2.18 In relation to the reforms proposed for the common-law action, however, **Professor Forsyth** and **Ms Jesseman** cautioned that removal of the limitation to monetary judgments would require careful consideration of whether the **forum rei sitae** should be the only appropriate court for claims sounding in property (especially immovable property). A somewhat broader scope may be possible for the statutory procedure, whereby residence of the judgment debtor will suffice if the action operates *in personam* rather than *in rem*. The draft Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters supports this approach,³² whereas the Brussels Regulation gives the **forum rei sitae** exclusive

²⁹ Collins et al **Conflict of Laws** 2000 at 14-009.

³⁰ Article 32 of the Brussels Regulation and art 23 of the draft Hague Convention.

³¹ Articles 31 of the Brussels Regulation and 23(1) of the draft Hague Convention also include judgments for provisional and protective measures.

³² Article 12(1) provides that: 'In proceedings which have as their object rights *in rem* in immovable property or tenancies of immovable property, the courts of the Contracting State in which the property is situated have exclusive jurisdiction, unless in proceedings which have as their object tenancies of immovable property, the tenant is habitually resident in a different State.'

jurisdiction.³³ In the circumstances, we have no particular reason to extend jurisdiction beyond the latter ground for immovables.

(e) International competence

6.2.19 The Act gives no direct indication of what grounds of international competence suffice. Instead, it talks of a 'court' which is defined in terms of having 'competent jurisdiction'.³⁴ The forum is then left with the task of defining exactly what is meant by this phrase, although it is helped by a series of presumptions in section 7 of the Act. Here residence and submission are specified as two basic grounds of competence. Moreover, a juristic person is deemed to be resident at its principal place of business or at the place where it does only some of its business, provided that the cause of action also arose there.³⁵ These provisions are not, however, exclusive, which implies that the forum may also rely on the common law.³⁶

6.2.20 In determining international competence, we look for a suitably close connection between the judgment debtor and the rendering court. The international instruments are not especially helpful in this regard, because they prescribe the grounds of jurisdiction for the rendering courts (mainly domicile in the case of the Brussels Regulation,³⁷ and habitual residence in the draft Hague Convention).³⁸ National legislation of common-law countries prescribes residence as a general requirement, which, in the case of companies, is defined broadly to include the principal place of business, central administration or 'statutory seat'.³⁹ Submission,

³³ Article 22(1).

³⁴ Section 6.

³⁵ Section 7(4)(a)(iii) of Act 32 of 1988. See, too, **ISM Inter Ltd v Maraldo** 1983 (4) SA 112 (T).

³⁶ In terms of section 7(4)(c). **Mr Polonksy** did not support this understanding. He recommended a combination of section 4(2)(a) and section 4(2)(b) of the UK 1933 Act, together with section 33 of the UK 1982 Act, with the omission of the third exception in the latter section (appearance to protect or obtain the release of property seized or threatened with seizure in the proceedings), on the ground that it is uncertain in scope and not justified in principle.

³⁷ Article 3. Article 59 provides that this concept is to be defined by the *lex fori*.

³⁸ Article 3.

³⁹ Section 4(2)(a) of the 1933 British Act; article 60(1) of the Brussels Regulation; article 3(2) of the draft Hague Convention.

too, is obviously accepted in both the national legislation and international instruments.⁴⁰

6.2.21 Statutory and international instruments usually have certain grounds 'black-listed'. In the draft Hague Convention, these include: attachment of defendant's property; nationality of the plaintiff or defendant; domicile, habitual or temporary residence of the plaintiff; the carrying on of commercial activities by the defendant; service of a writ on the defendant; temporary residence or presence of the defendant.⁴¹

6.2.22 Abroad, both residence and submission function satisfactorily for purposes of accelerated enforcement proceedings, and so these grounds should be retained in their present form in the Enforcement of Foreign Civil Judgments Act. If the scope of the Act is extended, however, to include non-monetary judgments involving property, then an additional ground of jurisdiction should be included. The location of immovable property would be the obvious choice.

(f) Defences

6.2.23 The Act makes provision for all the usual defences to enforcement of a foreign judgment: natural justice, fraud, public policy, prior inconsistent judgment, and the satisfaction, lapsing or setting aside of the judgment. These grounds reflect national legislation abroad and the international instruments.⁴² Amendments are needed only in matters of detail.

6.2.24 The provision in the Act on natural justice is admittedly brief - 'the judgment debtor did not receive notice of the ...' - but it attracted no comment from the respondents to the Discussion Paper. The Brussels Convention (1968) contained a

⁴⁰ Article 4 of the draft Hague Convention and article 23 of the Brussels Regulation. The Australian Act and the draft Hague Convention specifically define counterclaiming to mean submission.

⁴¹ Article 18(1).

⁴² For instance, along the same lines as article 17(1) of the Brussels Regulation and article 25(4) of the draft Hague Convention, section 7(1) of the Act presumes a judgment to be 'final', although an appeal is pending.

⁴³ Section 5(1)(c).

more detailed provision, whereby a judgment was not recognized 'where it was given in default of appearance, if the defendant was not duly served with the document which instituted the proceedings or with an equivalent document in sufficient time to enable him to arrange for his defence'. The case law that grew up around this provision prompted a revision in the Council Regulation, which did away with the phrase 'duly served' in favour of service 'in sufficient time and in such a way as to enable him to arrange for his defence'.

6.2.25 The draft Hague Convention, which was influenced by the Brussels regime, also provides some further detail on what constitutes failure of natural justice: 'the judgment results from proceedings incompatible with fundamental principles of procedure of the State addressed, including the right of each party to be heard by an impartial and independent court'; and 'the document which instituted the proceedings or an equivalent document, including the essential elements of the claim, was not notified to the defendant in sufficient time and in such a way as to enable him to arrange for his defence'.⁴⁴ The refinements in the two Conventions are partly attributable to a narrowing of the grounds for objecting to the rendering court's judgment, and so they need not concern us unduly.

6.2.26 The Act does not specify the nature of the fraud to be raised as a defence, which may well allow the courts discretion to maintain the common-law distinction between extrinsic and intrinsic fraud. Neither the Brussels Regulation nor the draft Hague Convention is particularly helpful in this regard. The former does not mention fraud specifically as a defence, and the latter allows it to be raised only in connection with the procedures in the foreign court.⁴⁵

6.2.27 The defence of public policy is universally accepted. For purposes of encouraging acceptance of international conventions, it has been described as a 'safety valve', because it gives states a residual and flexible means for arguing their own changing domestic conditions as a reason for refusing to enforce foreign judgments. This defence can be left as it is in the Enforcement of Foreign Civil Judgments Act, although it is perhaps noteworthy that the international instruments

⁴⁴ Article 28(1)(c) and (d).

⁴⁵ Article 28(1)(e) of the draft Hague Convention.

have tended to restrict the scope by inserting terms such as ‘manifestly’ contrary to public policy.⁴⁶

6.2.28 The Act makes satisfactory provision for conflicting judgments: the first judgment prevails.⁴⁷ No provision, however, is made for situations of *lis pendens*.⁴⁸ Nevertheless, legislative amendment would not seem to be necessary, because the courts always retain their common-law powers to suspend proceedings so that the action in the first court may go ahead.

6.2.29 It is unclear which law should apply to determine whether a judgment has lapsed: the law of the forum or that of the state in which it was originally issued? In view of the discussion above on the common law,⁴⁹ however, there are now grounds for preferring the law out of which the claim arose and with which it was most closely connected. An amendment to this effect should be inserted into the Act.

(g) Courts for enforcement

6.2.30 **Mr Polonksy, Professor Forsyth and Ms Jesseman and The Committee on Family Law and Gender of the Law Society of the Cape of Good Hope** all consider that the Enforcement of Foreign Civil Judgments Act 32 of 1988 should be applicable in both magistrates’ courts and the High Court. Indeed, whatever the earlier justification for limiting application of the Act to the lower courts, it no longer applies. Legislation in Commonwealth countries allows enforcement in both superior and inferior courts, which is also the approach of the Brussels – and the draft Hague Convention.

⁴⁶ Article 34(1) of the Brussels Regulation and article 28(1)(f) of the draft Hague Convention.

⁴⁷ See paragraphs 4.2.32ff above.

⁴⁸ Articles 27 and 21 of the Brussels Regulation and the Hague draft Convention, respectively, deal with this matter.

⁴⁹ See paragraphs 4.2.32ff above.

⁵⁰ Article 1(1).

6.3 RECOMMENDATIONS

6.3.1 An accelerated procedure for enforcing foreign judgments in South Africa and for assisting local litigants to enforce the judgments of South African courts abroad is available under the Enforcement of Foreign Civil Judgments Act 32 of 1988. While this Act provides a satisfactory enforcement mechanism, its application is limited to countries designated by the Minister of Justice. So far, only Namibia has been designated. As a matter of urgency, the scope of the Act needs to be extended to more countries, starting with our major trading partners.

6.3.2 Although the Act appears to be a satisfactory method for enforcing foreign judgments, it should not be made the exclusive enforcement method. In other words, the common-law action should be retained as a residual option.

6.3.3 Two amendments to the Act are necessary. The first is deletion of the clause restricting application of the Act to enforcement proceedings in only magistrates' courts. The High Court should also be given the power to register and enforce foreign judgments. The second is a redefinition of the concept of judgment so as to allow for the enforcement of non-monetary judgments. In this regard, another provision is necessary to stipulate that only the *forum rei sitae* is competent to give judgments relating to immovable property.

CHAPTER 7: MAINTENANCE AWARDS

7.1 STATEMENT OF THE LAW

7.1.1 Maintenance awards are subject to variation, according to changes in the parties' social and economic circumstances. Because they cannot be considered final, they are unenforceable under the common law.¹ To remedy this problem, we have the Reciprocal Enforcement of Maintenance Orders Act 80 of 1963.² While the primary purpose of this Act was to fill a gap in the common law, it also provides a simplified method for enforcement.

7.1.2 The Act applies only to countries designated by the Minister of Justice by notice in the *Gazette*.³ On the face of it, the principal criterion governing exercise of ministerial discretion is reciprocal treatment. Hence, judgment creditors from South Africa can expect similar treatment in the courts of the designated states,⁴ and, with this end in view, the Act makes provision for our orders to be transmitted to the proclaimed states.⁵ Notwithstanding these provisions, and the title of the Act, however, the Minister does not appear to exercise powers purely on the basis of reciprocal treatment.⁶

¹ **Abrahams** 1981 (3) SA 593 (B) at 596

² Which replaced the Maintenance Orders Act 15 of 1923.

³ Section 2(1). The designated countries are Australia (Capital Territory, NSW, Northern Territory, Queensland, South Australia, Victoria, Western Australia and Tasmania), Botswana, Canada (Alberta, British Columbia, Manitoba, NW Territories and Ontario), Cocos (Keeling) Islands, Cyprus, Fiji, Germany, Guernsey, Hong Kong, Jersey, Isle of Man, Kenya, Lesotho, Malawi, Mauritius, Namibia, New Zealand, Nigeria, Norfolk Island, St Helena, Sarawak, Singapore, Swaziland, United Kingdom, USA (California, New Jersey and Florida), Zambia and Zimbabwe.

⁴ Spiro **Law of Parent and Child** 1995 at 544-8.

⁵ Sections 7 and 8.

⁶ **Forsyth** (*op cit* at 420-1). Under a now repealed section 6 *bis*, however, reciprocity used to be required.

7.1.3 The Act covers any order (other than that of affiliation) 'for the payment, including the periodical payment, by any person of sums of money towards the maintenance of any other person whom he or she is liable to maintain in accordance with the law of the country in which the order is made'.⁷

7.1.4 According to the procedure specified by the Act, a foreign judgment creditor must arrange to have a certified copy of the maintenance order given by the rendering court transmitted, via diplomatic channels, to the South African Minister of Justice. Thereafter, the Minister or an official in the Department of Justice must send the order to an appropriate maintenance court, which is then obliged to have it registered.⁸ There is no inquiry into grounds of international competence, and the Act makes no mention of possible defences. After registration, the judgment is deemed to be an order of the registering court, and, for certain purposes, an order under the Maintenance Act 99 of 1998.

7.1.5 When a South African court issues a maintenance order against a person resident in a designated country, the Act makes provision for the same procedures to apply, namely, transmission to a court in that country via the Minister and diplomatic channels.⁹

7.1.6 Registration of an order operates only prospectively. Hence, judgment creditors cannot recover any arrears of maintenance incurred before registration. In this situation, the creditor's only remedy is to bring an action under the common law, if such is possible.¹⁰

7.1.7 Provisional maintenance orders from the designated countries may also be registered under the Act. After receiving a certified copy of such an order, together with depositions of witnesses and a statement of the grounds on which the order might have been opposed, the Minister must transmit the documents to a local maintenance court. Here, an officer of the court must institute a full inquiry. The

⁷ See the definition of 'maintenance order' in section 1.

⁸ Section 3.

⁹ Section 7.

¹⁰ Forsyth (*op cit* at 421).

forum is then entitled to remit the case for further evidence, confirm the order, vary it or make no order.¹¹

7.1.8 The Act also provides that the provisional orders of South African courts may be transmitted to the designated countries. For this purpose, the local courts are entitled to make inquiries about a person liable to pay maintenance, and who happens to be resident in a designated country, even if he or she is not present at the hearing.¹²

7.1.9 Because registration is an administrative act, the order is not open to appeal in the South African courts. Provided that the prescribed procedures were followed, a registered order remains enforceable until it is set aside by a South African court.¹³ Hence, if liability under the foreign system falls away, the order remains in force. In these circumstances, the judgment debtor's only remedy is to apply to the foreign court for alteration or discharge of the order, after which the new judgment can be registered under the Act.¹⁴

7.1.10 The Reciprocal Enforcement of Maintenance Orders (Countries in Africa) Act 6 of 1989 applies, as its title indicates, to those African states designated by the Minister of Justice.¹⁵ By omitting one of the steps contained in the 1963 Act - transmission by diplomatic channels - it provides an even more streamlined enforcement procedure. Maintenance orders from designated states may be sent directly to the Director-General: Justice for onward transmission to a South African maintenance court within whose area the debtor resides.¹⁶

7.1.11 Likewise, orders emanating from South African courts may be transmitted to the designated states for enforcement against debtors who are employed or in receipt of salaries there.¹⁷ A South African maintenance court may also, after due

¹¹ Section 4.

¹² Section 8.

¹³ **Severin** 1951 (1) SA 225 (T) at 228; **Marendaz** 1955 (2) SA 117 (C) at 127.

¹⁴ **S v Dolman** 1970 (4) SA 467 at 471; **S v Walraven** 1975 (4) SA 348 (T) at 351.

¹⁵ Section 2(1).

¹⁶ Section 3.

¹⁷ Section 8.

inquiry, issue a provisional order against a person resident in a proclaimed state in his or her absence.¹⁸ The order is then sent to that state for confirmation and enforcement,¹⁹ after which it is deemed to have been made under the South African Maintenance Act 99 of 1998.²⁰

7.1.12 Formerly, only the former TBVC states were proclaimed under this Act, and its already restricted scope was even further reduced by a practice of designating African countries under the earlier 1963 Act. When the TBVC states were absorbed back into South Africa, the designations lapsed. Since then, however, no new countries have been proclaimed.

7.2 EVALUATION

7.2.1 Our existing statutes on the enforcement of maintenance awards appear to provide generally satisfactory means for achieving their aims. (The question whether these Acts should be consolidated into a single instrument is dealt with below in Chapter 8.)

7.2.2 The Acts provide two avenues for securing international co-operation. Another is available in the form of two multilateral conventions: the UN Convention on the Recovery Abroad of Maintenance (1957)²¹ and the Hague Convention on the Recognition and Enforcement of Maintenance Obligations (1973).²²

7.2.3 If we are to expand the scope of enforcement proceedings by way of the two statutes, the executive will be required to secure bi-lateral agreements with each of the countries to be proclaimed. The Conventions, however, offer a more expeditious strategy. South Africa's accession would open our courts to the enforcement of

¹⁸ Section 5.

¹⁹ The depositions of witnesses at the inquiry, a statement of the grounds on which the order might have been opposed and information needed to identify and locate the debtor must also be sent. If need be, the foreign court may remit the case to South Africa for further evidence.

²⁰ Section 7.

²¹ This Convention has 57 parties and 21 signatories. We are indebted to **Professor Roodt** for drawing our attention to the omission of this Convention.

²² This Convention was adopted by 22 states and, as regards states parties to it, was designed to replace the more limited Hague Convention concerning Recognition and Enforcement of Decisions Relating to Maintenance towards Children (1958). A companion Convention on the Law Applicable to Maintenance Obligations (1973) falls outside the scope of this inquiry.

maintenance awards from all other states parties to the Conventions, and, simultaneously, ensure reciprocal treatment for our maintenance awards in the foreign courts.

7.2.4 South Africa is free to accede to the Conventions. Article 17 of the UN Convention provides that a party wishing to accede must deposit notice of its intention with the Netherlands' Ministry of Foreign Affairs. The Convention then takes effect between the acceding state and other contracting states which declare that they accept the accession. A similar accession procedure is available under Article 31 of the Hague Convention.²³

7.2.5 On accession, South Africa would be entitled to enter reservations. In this respect, the UN Convention provides fairly generous terms: an acceding state may make a reservation 'concerning the recognition and enforcement of decisions rendered by an authority of another Contracting State which had jurisdiction by virtue of the residence of the party entitled to maintenance'.²⁴ The Hague Convention, on the other hand, allows only certain specified reservations, namely, to awards where: the maintenance creditor attained 21 years or married (except where the creditor was a spouse of the debtor); the obligation was between persons related collaterally or by affinity; the award did not provide for periodic payment.²⁵

7.2.6 As to whether South Africa should accede to only one or both of the Conventions, the answer seems to be that accession to both is necessary. The scope of application of the two Conventions differs considerably, as does the mechanism for recovering maintenance debts. The UN Convention is designed to regulate only the enforcement of maintenance obligations towards children,²⁶ whereas the Hague Convention applies to any 'maintenance obligation arising from a family relationship, parentage, marriage or affinity, including a maintenance

²³ In this case, however, the effect of accession is different: the Convention is brought into operation between the acceding state and other contracting parties 'which have not raised an objection to its accession in the twelve months after receipt of the notification ...'.

²⁴ Article 18.

²⁵ Article 26, as read with article 34.

²⁶ Article 1 states that the Convention provides 'for the reciprocal recognition and enforcement ... of decisions rendered on applications, whether international or domestic, relating to maintenance claimed by a legitimate, illegitimate or adopted child who is unmarried and under twenty-one years of age'.

obligation towards an infant who is not legitimate'.²⁷

7.2.7 With regard to the mechanism for enforcement, the UN Convention requires a state party to designate a judicial or administrative body under its jurisdiction that will act as both a 'transmitting' and 'receiving' agency.²⁸ Thereafter, individual claimants simply apply to the transmitting agency of their state, which, if satisfied that the applications were made in good faith,²⁹ must send the applications to the relevant receiving agency. The latter must then take 'all appropriate steps to recover' the debts. The receiving state applies its own law to determine any questions arising out of the action,³⁰ and is obliged to give claimants the same treatment as its residents and nationals. The Convention exempts claimants from the need to pay security for costs or any fees to the transmitting or receiving agents.³¹

7.2.8 The 1973 Hague Convention was intended to replace a similar Hague Convention of 1958, as between states parties to the latter.³² Its procedure is quite different to the UN Convention in the sense that it does not require the designation of a particular state agency to manage the transmission and reception of applications. Instead, a claimant simply submits the required documents (*inter alia*, a copy of the decision, proof that it is not subject to review, and a translation) to an appropriate authority in the receiving state.³³

7.2.9 Some provisions in the 1973 Convention are similar to, or the same as, those in the UN Convention, such as the benefits of legal aid and exemption from fees and security for costs.³⁴ Otherwise, the 1973 Convention fleshes out certain matters that

²⁷ Article 1.

²⁸ Article 2. The Treaty also involves the United Nations, in that parties must inform the Secretary-General of the Organization of these acts.

²⁹ Article 4. The transmitting agency may make recommendations to the receiving agency on the merits of the application and exceptions to be made as to costs and legal aid.

³⁰ Article 6.

³¹ Article 9.

³² Article 29. The reason for doing so was to provide a more extensive framework for recognizing and enforcing maintenance awards, by, for example, allowing more grounds of international competence. Article 3 of the 1958 Convention, for instance, stipulates only the habitual residence of the party liable for or entitled to maintenance.

³³ See article 17.

³⁴ Articles 15 and 16.

are left unspecified in the earlier UN Convention. For instance, maintenance obligations are defined as awards emanating from judicial or administrative authorities in states parties, provided that the obligations arise from a family relationship, parentage, marriage or affinity.³⁵ Express provision is made for the enforcement of default judgments, provided that notice was served on the defaulting party giving him or her enough time to defend the proceedings.³⁶ Payments already due and future payments may be claimed.³⁷

7.2.10 Furthermore, because claimants are to enforce awards directly, the Convention lays down grounds of international competence:

- nationality of either the maintenance debtor or creditor of the state which gave the original judgment;
- habitual residence of either party in that state;
- the debtor's submission to a court in that state;³⁸ or
- the fact that the obligation to pay maintenance arose from a divorce or separation order which was issued by a court of the state in which the original award was given.³⁹

7.2.11 The Hague Convention also specifies the available defences: fraud (although only in connection with matters of procedure), public policy, a conflicting judgment already given in another court and *lis pendens*. The recognition and enforcement procedure is governed by the law of the forum state.⁴⁰

7.2.12 In the view of **Professor Roodt, Ms Kruger, Professor De Vos** and the **Committee on Family Law and Gender of the Law Society of the Cape of Good**

³⁵ Article 1. The maintenance creditor may be a public body claiming reimbursement for benefits given to a maintenance creditor.

³⁶ Article 6.

³⁷ Article 11.

³⁸ Article 7.

³⁹ Article 8.

⁴⁰ Article 13.

Hope, South Africa should ratify both the UN Convention on the Recovery of Maintenance (1957) and the Hague Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations (1973). **Professor Forsyth** and **Ms Jesseman** were also generally in favour of South Africa's accession, on the ground that an international convention is the best method for dealing with maintenance awards.

7.2.13 If South Africa is to accede to the Conventions, minimal disruption will be caused to our domestic law. In the first place, neither Convention purports to regulate substantive laws on maintenance obligations, and, in the second, both Conventions provide that procedures for recognition and enforcement are to be governed by the laws of the state addressed, unless the Conventions provide otherwise.⁴¹ As it happens, the conventional enforcement procedures are all compatible with the requirements of our law.⁴²

7.2.14 If South Africa were to accede to both the Conventions, a problem arises concerning conflicts between their provisions, and between an obligation under a Convention and South Africa's obligations to states under prior bilateral arrangements. The Conventions make a generous concession in this regard: all conflicts are to be resolved in favour of obtaining maximum recognition and enforcement of maintenance awards.⁴³

7.2.15 It is, of course, possible to continue enforcing orders under the existing Reciprocal Enforcement of Maintenance Orders Act 80 of 1963, in terms of which South Africa has already designated a fair number of states. If the Reciprocal Enforcement of Maintenance Orders (Countries in Africa) Act 6 of 1989 is to be retained in its present form, and respondents indicated that this is the preferred Act,⁴⁴ then more countries need to be designated.

7.2.16 Accession to the Conventions, on the other hand, will enable local maintenance creditors to enforce awards in an even wider range of foreign countries, and, of course, we will be extending our facilities to the enforcement of foreign

⁴¹ Article 6 of the UN Convention and article 13 of the Hague Convention.

⁴² In fact, article 27 the Hague Convention goes so far as to contain special provision for plural legal systems, which would be an important consideration in South Africa.

⁴³ See articles 11 and 23 of the UN and Hague Conventions, respectively.

⁴⁴ See paragraph 8.2.7 below.

awards. Moreover, the Conventions obviate the politically sensitive process of designating particular states, since most (if not all) parties to the Conventions will become reciprocating partners. The only disadvantage with this course of action is the preclusion of opportunities to scrutinize judicial standards of parties to the Conventions on a country-by-country basis. However, certain minimal performance standards are set in the Conventions themselves, which offer a sufficient guarantee of due process.

7.3 RECOMMENDATIONS

7.3.1 Maintenance awards are generally not enforceable under the common law. Hence, the Reciprocal Enforcement of Maintenance Orders Act 80 of 1963 and the Reciprocal Enforcement of Maintenance Orders (Countries in Africa) Act 6 of 1989 provide accelerated procedures for enforcing awards emanating in South Africa and in countries abroad. Of the two Acts, the Countries in Africa Act is considered the most effective, because of its streamlined procedure.

7.3.2 The Acts apply only to countries designated by the Minister of Justice. Although some 27 countries were designated under the 1963 Act, none have been designated under the 1989 Act. Since the latter provides the better procedure, the two Acts should be consolidated, the restriction to 'Countries in Africa' lifted in the 1989 Act, and more countries designated.

7.3.3 In order to facilitate the enforcement of maintenance awards in a greater range of countries, and to obviate the need to negotiate bilateral agreements, South Africa should accede to both the UN Convention on Recovery Abroad of Maintenance (1957) and the Hague Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations (1973).

CHAPTER 8: CONSOLIDATION OF ACTS

8.1 STATEMENT OF THE PROBLEM

8.1.1 The Commission's inquiry into international judicial co-operation was initiated by a belief that it would be advantageous to have all our laws on the subject consolidated in a single enactment. At present, the rules are located in both the common law and the following statutes:

- Foreign Courts Evidence Act 80 of 1962

- Reciprocal Enforcement of Maintenance Orders Act 80 of 1963

- Enforcement of Foreign Civil Judgments Act 32 of 1988

- Reciprocal Enforcement of Maintenance Orders (Countries in Africa) Act 6 of 1989

- Reciprocal Service of Civil Process Act 12 of 1990

8.1.2 So far as this proposal served the convenience of the practitioner, it seemed sensible, for a single act would obviously allow quicker access to the law, and, of course, consolidation always presents an opportunity for long-awaited reforms.

8.2 EVALUATION

(a) Consolidation of Acts

8.2.1 As the inquiry progressed, however, the benefits of consolidation diminished. The Commission had no evidence of any country producing consolidated legislation of the type originally contemplated, nor are there any international conventions attempting to deal with all matters of judicial co-operation in a single instrument.¹ Of all the respondents to the Issue and Discussion Papers only **Mr Malunga** seemed to be in general support of a consolidated act. **Ms Kruger** felt that separate issues were dealt with in the legislation, and so a single act was unnecessary. **Professor Forsyth** and **Ms Jesseman**, who took a pragmatic approach to the question, said that there was no pressing need to consolidate, other than the convenience of having all relevant provisions in one place.

8.2.2 As to whether the two statutes on maintenance should be kept separate from the Enforcement of Foreign Civil Judgments Act, the respondents were in clear agreement: the matters should be dealt with in different acts.² **Professor Schoeman** said that different considerations underlie commercial and family matters: the former are easier to agree on and regulate, whereas the latter are always informed by the specific legal framework from which they originate. **The Committee on Family Law and Gender of the Law Society of the Cape of Good Hope** supported this position, with the further observation that family-law matters may be subject to a different system of courts. **Professor Forsyth** and **Ms Jesseman** noted that maintenance orders will always require special treatment, partly because they are not final, and partly because they are usually for small sums. Despite the amount, however, these awards are vital for those seeking enforcement, and there is a strong social need for inexpensive but effective enforcement procedures.

8.2.3 In Britain, maintenance orders have always been segregated from other foreign civil judgments, first in the Maintenance Orders (Facilities for Enforcement) Act (1920),³ and later in the Maintenance Orders (Reciprocal Enforcement) Act

¹ Cf the Brussels regime paragraphs 9.2.11ff below.

² This was the view of **Professor De Vos**, **Professor Schoeman**, **Mr Malunga** and **Professor Forsyth** and **Ms Jesseman**.

³ This Act provided for the reciprocal enforcement of maintenance orders from designated Commonwealth countries.

(1972).⁴ In Canada, too, where most of the provinces passed their own legislation for enforcing foreign money judgments, maintenance orders were excluded.⁵ Similarly, the Australian Family Law Act (1975) regulates the enforcement of foreign maintenance orders separately from other civil judgments.

8.2.4 The draft Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters also excludes maintenance from its sphere of operation, unless maintenance arises as an incidental issue.⁶ (Maintenance is, in any event, dealt with in an existing Hague Convention on the Recognition and Enforcement of Maintenance Obligations (1973).) The Brussels I Regulation presents a complete contrast, since it deals with maintenance orders on a par with other civil judgments.⁷ This approach was possible, however, because of the bold integration of rules on jurisdiction and enforcement within the context of the EU.

(b) Service of process and taking evidence abroad

8.2.5 The argument for consolidation is perhaps strongest in the case of serving process and taking evidence abroad, but, even here, there is no compelling precedent elsewhere for collecting these two subjects together into one source.

8.2.6 Nevertheless, there is a pressing need to consolidate the various laws on taking evidence abroad into a single instrument. A foreigner seeking evidence within South Africa is confronted with a confusing range of procedures: application to the High Court or to a magistrate's court or to an official in the Department of Justice (who will refer the request to a judge in chambers). Each of these applications is governed by a different act:

- the Foreign Courts Evidence Act 80 of 1962 governs applications to the High Court

⁴ This Act provided for the reciprocal enforcement of maintenance orders between the United Kingdom and designated foreign countries.

⁵ Castell & Walker (*op cit* at 14).

⁶ Article 4.

⁷ Partly on this basis, **Ms Kruger** supported the idea of consolidated legislation in this regard.

- the High Court Act 59 of 1959 governs applications for a hearing before a commissioner and directs the request to the Director-General: Justice
- the Magistrates' Courts Act 32 of 1944 governs applications to magistrates' courts

Legislative amendment is required to provide a uniform procedure with minimal bureaucratic intervention. Provision should be made for this possibility in the Foreign Courts Evidence Act 80 of 1962.

(c) Enforcement of maintenance orders

8.2.7 Respondents supported the idea of consolidating the Reciprocal Enforcement of Maintenance Orders Act 80 of 1963 and the Reciprocal Enforcement of Maintenance Orders (Countries of Africa) Act 6 of 1989. **Professor Roodt** said that there should be no difference in the procedures for enforcing maintenance orders from African and other countries, while **Ms Kruger** said that the Countries of Africa Act served no purpose, and that it was confusing to have two acts regulating the same matter. She therefore called for repeal of the latter Act, adding that co-operation in this area could be better achieved by international treaties, whether bi- or multilateral, specifically within the context of the African Union and the SADC, but also within the framework of the Hague Conference.

8.2.8 **Professor Forsyth** and **Ms Jesseman** also considered the Countries of Africa Act a dead letter, but they said that it had considerable merit, because it allowed for registration of maintenance orders by an administrative process without having recourse to diplomatic channels. What is more, the Act provides for the enforcement of provisional orders and orders for attachment of earnings (which are improvements on the 1963 Act). Hence, subject to changes that might be necessary following accession to the Hague Conventions, the respondents' preference was for amendments to the 1989 Act, thereby making its procedures available for all countries.

8.2.9 **The Committee on Family Law and Gender of the Law Society of the Cape of Good Hope** shared the latter opinion. It considered retention of the

Countries of Africa Act advisable, because of its streamlined enforcement procedure.

The Committee noted that South African defendants have difficulty in applying for variation of foreign orders that were enforced in South Africa, because they must apply to courts of the countries from which the orders originated.

8.3 RECOMMENDATIONS

8.3.1 There is no pressing need to consolidate all matters of international judicial co-operation in a single enactment. In particular, statutes governing enforcement of maintenance orders and other civil judgments should not be combined.

8.3.2 When enacting changes to the Foreign Courts Evidence Act 80 of 1962, the opportunity should be taken to amend the High Court Act 59 of 1959, the Magistrates' Courts Act 32 of 1944 to produce a uniform procedure for foreigners wishing to obtain evidence in this country.

8.3.3 It is not necessary to have two Acts for the enforcement of maintenance orders. Hence, the Reciprocal Enforcement of Maintenance Orders Act 80 of 1963 should be repealed, although care should be taken to ensure that we do not lose the benefit of reciprocal enforcement in the countries already designated under this Act. The Reciprocal Enforcement of Maintenance Orders (Countries of Africa) Act 6 of 1989 should then be adjusted to become the main vehicle for enforcing maintenance awards, partly because it applies to a wider range of orders and partly because it has a simpler procedure.

CHAPTER 9: INTERNATIONAL CO-OPERATION

9.1 INTRODUCTION

9.1.1 The present enquiry was prompted by the need to end South Africa's legal isolation so that the country could begin to participate in global attempts to improve judicial co-operation. Three issues were involved:

- assisting litigants in South Africa to serve process, obtain evidence and enforce judgments abroad;
- allowing foreigners to use our courts and procedures do the same things; and
- determining our future approach to international judicial co-operation.

9.1.2 All the respondents to the Issue and Discussion Papers supported the goal of international judicial co-operation. Indeed, this topic is attracting growing support world-wide, and hence an ever-increasing number of international conventions.

9.1.3 Given South Africa's position as a leader of the African continent and an economic hub of the sub-Saharan region, we should also be considering closer co-operation within regional groupings. Indeed, South Africa is well placed to initiate the process in the Southern African Development Community.¹

9.1.4 These international initiatives pose two problems. The first is the additional burden that will be imposed on South Africa's already stretched judicial resources. The Commission did not explore this problem, which, in any event, is unlikely to reach serious proportions when compared with local demands.

¹ Based on the SADC Treaty (1992), which calls for economic growth, political stability and security for all members by means of 'collective self-reliance and inter-dependence of member states'. See Thomashausen **CILSA** 2002 at 26.

9.1.5 The second problem is the absence of any fixed principle on which to base the development of our law.² Traditionally, the courts' approach to international judicial co-operation has been governed by comity and acquired rights. A concern with the maintenance of proper judicial standards, especially the principle of fair trial, is also present, but is less explicit. Legislative action and treaty-making, on the other hand, have been guided by the principle of reciprocity, or, apparently, simply left to the discretion of the executive. We now need to consider the basis for future action.

9.2 EVALUATION

(a) Guiding principles

9.2.1 While South African courts have mainly drawn on principles derived from Roman-Dutch law, our legislation has relied upon British statutes, such as the Administration of Justice Acts of 1920 and 1933.³ Application of these Acts was determined by the principle of reciprocity. Hence, to decide which states were to be proclaimed, the executive had first to be satisfied that British judgments would be given reciprocal treatment. The fact that South Africa followed this approach is evident in the term 'reciprocal' appearing in the titles of three of our acts:

- Reciprocal Enforcement of Maintenance Orders Act 80 of 1963
- Reciprocal Enforcement of Maintenance Orders (Countries in Africa) Act 6 of 1989
- Reciprocal Service of Civil Process Act 12 of 1990

9.2.2 Notwithstanding the repeated reference to reciprocity, it is not clear what the concept has meant in our law. Historically, it formed no part of the common law,⁴ and the Acts based on it contained no definition. What is more, the actual application of

² Kahn (*op cit* at 645) describes the various rationales as 'chimerical.'

³ See paragraphs 6.2.2 and 6.2.3 above.

⁴ Malan et al **TSAR** 1995 at 282.

the Acts did not always depend on reciprocal treatment.⁵ Instead, the choice of partner state was left to executive discretion.

9.2.3 The principle of reciprocity is most readily applicable by the executive at a diplomatic level, but it is far from clear how this principle is to be applied by the courts. How, for instance, is a judge to decide whether a foreign state is prepared to accord reciprocal treatment to the orders of South African courts?⁶ As **Professor Forsyth** and **Ms Jesseman** said, which party should prove reciprocal treatment? Must reciprocity exist *de facto* or *de jure*?

9.2.4 **Professor Forsyth** and **Ms Jesseman** also said that reciprocity does nothing to guarantee the quality of the proceedings under the foreign system of justice. Yet, if South African private international law is about achieving justice for private litigants, then to insist upon reciprocal treatment before enforcing a foreign judgment is to deny justice to the parties. Instead, a certain group of people is preferred purely on the basis of their nationality, in the (probably vain) hope that a foreign sovereign will thereby be induced to grant justice to future litigants in its own courts. In this way, the judiciary becomes an instrument of international politics, which have nothing to do with individual interests. In spite of these concerns, it should be noted that the two respondents acknowledged some measure of reciprocity is a fact of life, and an inevitability when states negotiate bilateral treaties.

9.2.5 Comity clearly animates the common law, and, as a guiding principle, it is easier for courts to apply than reciprocity. Not only is it suitably generalized, but it also more of an attitude than a policy. The application of comity is thus not dependent on the foreign state, but rather on the forum itself. Even so, comity is exceedingly vague. It has been described as a 'never-never land whose borders are marked by fuzzy lines of politics, courtesy and good faith'.⁷

⁵ The Reciprocal Enforcement of Maintenance Orders Act 80 of 1963 is a case in point. See Roodt **CILSA** 2005 at 19 citing Forsyth (*op cit* at 421).

⁶ The simplest approach would be, presumably, for the court to apply for an executive order indicating the state of South Africa's international relations with the country in question.

⁷ Maier **American Journal of International Law** 1982 at 281. Cf Reed (*op cit* at 250) whose 'revivified' concept of comity provides the basis for his proposed reform of the law on recognition and enforcement. He argues that the notion of comity entails the encouragement of 'goodwill, cooperation, courtesy and mutual respect among states', which are values that conduce to the 'maintenance of a stable international community'.

9.2.6 International judicial co-operation, however, depends on more than mere comity and reciprocity. The principle of *res judicata*, for instance, has always been at play, partly to prevent abuse of the local judicial process and partly to protect the individual litigant. This principle, in turn, implies a need to conserve our judicial resources and to maintain certainty in the administration of justice.

9.2.7 Even more important is the need to maintain proper judicial standards in order to ensure fair trial. This requirement is evident in the traditional defences of public policy and natural justice, and it is in line with section 34 of the Bill of Rights.⁸

9.2.8 In the case of service of process, different principles become relevant. Because sovereignty is less of an issue, we can afford to take a more tolerant approach, and be more willing to assist foreign litigants. Nor do we need to concern ourselves unduly with judicial standards in the foreign state. Conversely, in the case of enforcing foreign judgments, the forum must have faith in the quality of justice in the country of origin, since judgments are generally registered in *ex parte* proceedings, thus giving judgment debtors minimal opportunity to contest proceedings in the rendering court.⁹

9.2.9 From these various concerns, it is impossible to identify only one principle, which should then determine the future development of our law. What is more, we need a flexible approach, given the fast changing conditions of international relations, not to mention the internal conditions of states with which South Africa might, in the future, engage.¹⁰

9.2.10 One issue, however, is certain. The Constitution 1996 now provides the principle source for our law, at least in so far as individual justice is concerned.¹¹ For

⁸ Which provides that individuals are guaranteed that their disputes will be given 'a fair public hearing before a [South African] court'. Constitution of South Africa 1996.

⁹ Other safeguards to ensure that the foreign court had international jurisdiction and that the judgment was not contrary to public policy become relevant only later, if the judgment debtor decides to challenge the enforcement action.

¹⁰ See, too, Reed (*op cit* at 276).

¹¹ Although it is argued that the Constitution must dictate even executive action in foreign relations (Lehmann **SA Public Law** 200168), there is no clear provision to that effect. As a result, the act of state doctrine applies to preclude judicial scrutiny of executive acts. See **Swissborough Diamond Mines & Others v Government of RSA & Others** 1992 (2) SA 279 (T) and **Kaunda & Others v President of the RSA & Others** 2004 (5) SA 191 (T).

the purposes of this Project, the most important provision in the Constitution is section 34 of the Bill of Rights, which provides that:

‘Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.’

A right such as this, guaranteeing both access to justice and proper judicial standards, is available to foreigners on the same terms as South Africans.

(b) Regional conventions

9.2.11 Any reform of South African law should, as **Professor Roodt** pointed out, be suitably structured to take advantage of existing international conventions, and, at the same time to initiate regional co-operation. If we are looking to develop a model for regional co-operation, the most striking example is that of the European Union.

9.2.12 Under the Treaty of Rome, members of what was then the Common Market were obliged to harmonize their laws.¹² An early product of this requirement was the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (1968). All existing and new members of the EEC were required to accede to the Convention. The Lugano Convention (1988) followed to cater for relations between EEC members and states belonging to the European Free Trade Association. This Convention almost exactly repeated the provisions of the Brussels Convention.

9.2.13 On 1 March 2002, these two Conventions were, in their turn, superseded by a European Council Regulation (‘the Brussels I Regulation’).¹³ Although the Regulation

¹² Article 220.

¹³ 44/2001, which entered into force on 1 March 2002. A Council Regulation has the advantage of applying directly in the laws of member states, unlike treaties, which require ratification and incorporation. The Regulation flowed from art 65 of the Treaty of Amsterdam, which consolidated other treaties constituting the European Union. This Treaty bound Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom.

does not differ significantly from the Conventions, it now provides the primary method for recognizing and enforcing judgments of the EU member states *inter se*.¹⁴

9.2.14 The Brussels regime developed from a realization that international litigation is mainly about contractual and delictual disputes between the companies and individuals involved in international commerce.¹⁵ With the exception of maintenance obligations, the Conventions and the Regulation therefore apply mainly to commercial matters.¹⁶

9.2.15 In order to achieve the goal of a free movement of judgments among members of the EU, the drafters of the various instruments laid down uniform rules determining which courts were entitled to assume jurisdiction. This principle, which presupposes states' willingness to compromise a significant aspect of their sovereign powers, is the major principle driving the Brussels regime. Thus, once all courts are bound by the same rules of jurisdiction, a court called upon to enforce a foreign judgment has no need to inquire into international competence. Quite simply, all judgments given by courts and tribunals of member states on civil or commercial matters must be recognized or enforced in other member states without the need for any special procedure.¹⁷ *Révision au fond* is obviously not permitted.¹⁸

9.2.16 Not surprisingly, an entire chapter in the Brussels and Lugano Conventions, not to mention the Council Regulation, is devoted to rules on jurisdiction.¹⁹ Certain courts are given exclusive jurisdiction. Hence, in matters of insurance,²⁰ consumer contracts,²¹ contracts of _ or claims to immovable property,²³ for instance, only

¹⁴ The exception is Denmark, which has a special status under the Treaty of Amsterdam, and therefore continues to be bound by the Brussels Convention.

¹⁵ Proceedings for declaratory judgments are also increasing, as is the demand for provisional judgments and protective measures. See Kessedjian in Berger & Kessedjian (*op cit* at 46).

¹⁶ Non-commercial matters are governed separately: Brussels Regulation II on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility for children (EC Regulation no 1347/2000, 29 May 2000), which entered into force on 1 March 2001; Regulation III on insolvency proceedings (EC Regulation no 1346/2000, 29 May 2000), which entered into force on 31 May 2002. Insolvency is also governed by an EU Convention on Insolvency Proceedings (1995).

¹⁷ Article 33.

¹⁸ Article 36.

¹⁹ The two main grounds are domicile and submission.

²⁰ Articles 8-14 of the Regulation.

²¹ Articles 15-17 of the Regulation.

particular courts are considered competent. If any others purport to exercise jurisdiction, their judgments are deemed nullities.

9.2.17 Article 4 of the Regulation, however, upsets the goal of completely uniform grounds of jurisdiction. It allows states to apply their own internal rules of jurisdiction over defendants domiciled in non-party states. What is more, article 4 extends this rule in favour of any natural or legal person having the nationality of a contracting state who is domiciled within the territory of another contracting state.²⁴

9.2.18 The enforcement procedures under the Regulation are, predictably, kept to a minimum.²⁵ A judgment creditor needs only to approach a court in the recognizing state with a copy of the judgment for an order of enforcement to be issued.²⁶ This order is served on the debtor, who may appeal to the recognizing court. On points of law, but not of fact, either party may subsequently appeal to a higher court.²⁷

9.2.19 The foreign judgment does not have to be final or for a fixed sum of money.²⁸ It must simply be enforceable in the country of origin.²⁹ In certain limited

²² Articles 18-21 of the Regulation.

²³ Article 22(1) of the Regulation.

²⁴ These provisions have the unfortunate effect of allowing courts to continue exercising 'exorbitant' jurisdiction, and the French courts have been notorious offenders. For example, a court in France may give judgment against a New Yorker on the basis of article 14 of the French Civil Code, which allows French courts to assume jurisdiction simply because the claimant is a French national. Under the Regulation, the ensuing judgment is then enforceable in all courts in the EU. The exercise of jurisdiction in this manner has been strongly criticized: Borchers **American Journal of Comparative Law** 1992 at 132-3; Clarkson and Hill (*op cit* at 186). Special provision was made in both the Brussels and Lugano Conventions for parties to enter into separate agreements with third states not to recognize judgments given in pursuance of article 4. Britain and France, for example, have special agreements with Canada on this basis.

²⁵ Article 33 provides that judgments must be recognized 'without any special procedure being required'.

²⁶ Under article 37, if an appeal is pending in the original court, proceedings in the forum may be stayed.

²⁷ Articles 43 and 44.

²⁸ It follows that orders for specific performance and orders for periodic payments 'by way of a penalty' (article 49) are enforceable. Where payment accrues to the state, however, the judgment will be deemed penal and thus not 'civil or commercial'.

²⁹ If the original court made a mistake in assuming jurisdiction, the error is irrelevant to enforcement of the judgment, except in the special cases laid down in article 35. It was reasoned that the defendant should have made the relevant argument in the original court, and, having had the chance to make it once, should not be allowed to raise it a second time.

circumstances, the judgment debtor may raise a defence of public policy.³⁰ (Although there is no separate defence of fraud, it is generally accepted that this issue may be argued under the rubric of public policy.) Alternatively, the judgment debtor may argue a prior conflicting judgment,³¹ or the defence of natural justice (which, in practice, has proved to be more important than either fraud or public policy).³²

9.2.20 The Brussels regime was a dramatic attempt to achieve uniformity in jurisdiction and enforcement. It therefore served as a useful, albeit ambitious, model for other regions. In Africa, it yielded the Harmonisation of Business Law in Africa regime.³³ (The French acronym is OHADA, and the English equivalent OHBLA.) This body was established in 1993 in order to create a uniform business law in francophone Africa.

9.2.21 In terms of article 10 of the founding treaty on the Harmonisation of Business Law II, a uniform act was passed which is mandatorily and directly applicable in member states, notwithstanding their existing domestic laws. The OHADA treaty is not limited to francophone states; under article 53, it is open to accession by any member state of the Organisation of African Unity (now, of course, the African Union).

9.2.22 OHADA is an impressive attempt to generate an entirely uniform set of substantive and procedural laws for all aspects of business. These include corporations and the definition and classification of legal persons engaged in trade, proceedings for recovery of debts, means of enforcement, bankruptcy, arbitration, employment law, transportation and sales laws. The Council of Ministers, which is

³⁰ Article 34(1) provides that the judgment must be 'manifestly' contrary to the forum's public policy.

³¹ Article 34(3) and (4) provides that the judgment must be 'irreconcilable' with a judgment given in a dispute between the same parties in the forum or another member state, whether the judgment was handed down earlier or later.

³² Article 34(2) provides that a judgment may not be recognized 'where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings ... in sufficient time and in such a way as to enable him to arrange for his defence'.

³³ We are indebted to **Professor Roodt** for drawing our attention to this Organisation.

one of the organs of the organization,³⁴ may decide to extend this list to include any other matter it chooses under the definition of 'business law'.

9.2.23 The Uniform Act Organizing Simplified Recovery Procedures and Measures of Execution lays down the procedures for recovering debts and property arising from contracts and negotiable instruments. Based on typical French civil-law principles, the Act is in many ways similar to the Brussels regime. Hence, uniform rules regulate the jurisdiction of the rendering court (the debtor's residence, place of abode or submission). Lack of jurisdiction may therefore not be pleaded in the court hearing the enforcement action.³⁵ Any defence must be brought to the originating court.³⁶ Further detailed rules govern the enforcement procedures.

(c) International measures

9.2.24 The Hague Conference – in which South Africa now participates – has been active since 1893 in promoting international judicial co-operation. Major items on the agenda of the very first Hague Conference were service of process and the taking of evidence abroad. Two conventions followed in 1896 and 1905, and both were highly successful (although limited to the states of continental Europe). They lasted until 1954, when, in the wake of the Second World War, they were replaced by a new, composite convention. In the 1960's, however, the composite Convention had to be adjusted in its turn, when states with common-law legal systems began to participate in the Hague Conferences. This Convention was again modified and again split into a Convention on Service Abroad of Judicial Documents (1965) and a Convention on Taking Evidence Abroad (1970). As we have seen, South Africa is party to the latter.

9.2.25 Efforts at The Hague to secure a convention on the recognition and enforcement of foreign judgments have been less successful. The drive began in 1925, at the Fifth Hague Conference. Many problems were posed,³⁷ but only a brief

³⁴ Established under article 3 of the Treaty, together with a common Court of Justice and Arbitration.

³⁵ Article 3.

³⁶ Article 9.

³⁷ Most of which are still relevant to our enquiry. Should accelerated procedures be available for judgments *in rem*? Should implied submission be accepted? What was the jurisdictional test for companies? Was domicile to be the only test for individuals? Were special provisions on default judgments and fraud necessary to prevent a review on the merits?

Convention ensued.³⁸ It was too generalized to attract much support,³⁹ and, forty years later, a more substantial Convention appeared (together with a Protocol) on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters (1971). This too, was poorly received, so far by only Kuwait, Cyprus, the Netherlands and Portugal.⁴⁰

9.2.26 At the 1992 Conference, the United States proposed that work begin again, and, in August 2000, a draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters appeared. This draft was inspired by the Brussels regime, in that it sought to regulate not only recognition and enforcement of foreign judgments, but also internal rules of jurisdiction. Hence, all judgments of members are enforceable, provided that the original court is competent according to rules laid down in the Convention. Matrimonial issues, wills or succession, insolvency, arbitral awards or admiralty matters are excluded from the ambit of the draft Convention.⁴¹ Judgment is broadly defined to include decrees or orders, however termed, determinations of costs and any provisional or protective measures.⁴²

9.2.27 The procedure for enforcement is simple: the forum has to verify the jurisdiction of the rendering court, and it may postpone proceedings if the judgment was subject to review or appeal. Enforcement may be refused if:

- an inconsistent judgment was already given elsewhere

³⁸ Judgments or arbitral awards in civil and commercial matters were to be recognized (with the force of *res judicata*) unless the rules of international competence in the recognizing state excluded them, and provided that the judgments were not contrary to the latter's public policy or public law.

³⁹ Lipstein (*op cit* at 570-2). At this stage the Hague conferences were limited to states working in the civil-law tradition. The common-law countries entered only later. See McClean **Recueil des Cours** 1992 II at 276.

⁴⁰ Hence, as **Ms T Kruger (Institute for International Trade Law, Leuven)** points out, the Convention is now irrelevant for all but one of the parties, because its provisions have been replaced by the Brussels I Regulation. Arguably, the Hague Convention was pre-empted by the New York Convention on Foreign Arbitral Awards (1958), which has 118 parties, and the Brussels Convention (1968), which was being negotiated at the same time that preparations were under way to produce the Hague Convention.

⁴¹ Unlike the European instruments, however, article 1(2) also excludes maintenance obligations, which are dealt with in two separate conventions.

⁴² Article 23.

- the proceedings of the court of origin are incompatible with the 'fundamental principles of procedure' in the forum
- the document instituting proceedings was not notified to the defendant in sufficient time to arrange the defence
- the judgment was obtained by fraud in relation to a matter of procedure
- the judgment is manifestly incompatible with the forum's public policy.

9.2.28 Initially, the draft was intended to produce a 'mixed' convention, meaning that grounds of jurisdiction were to be divided into three categories: a 'white' and a 'black' list, and a 'grey area'. The white list contained the stipulated grounds for courts assuming jurisdiction; the black list contained prohibited grounds; the grey area consisted of all other grounds under the national laws of member states. If a court had taken jurisdiction on a ground included in the white list, its judgment would be enforced in all member states, whereas, if jurisdiction had been taken on grounds in the black or grey lists, the judgment would be refused recognition.

9.2.29 The draft Convention was an ambitious proposal, and its acceptance has been hindered by the considerable differences in the rules of jurisdiction of member states (together with the unforeseeable effects of technology, especially the Internet). Further work on the draft has been postponed. Instead, in 2002, the Commission on General Affairs and Policy of the Hague Conference decided to pursue a more manageable goal: exclusive choice of court agreements as a basis for jurisdiction and enforcement. A preliminary draft convention appeared in 2004.

(d) Applicability of the regional and international initiatives

9.2.30 **Professor Roodt** remarked that the Issue and Discussion Papers revealed 'a chauvinist preoccupation with provisions that apply nationally', and that we were neglecting the implications of our actions both nationally and regionally. While not entirely 'chauvinist', the initial inquiry was indeed concerned primarily with the interests of South African litigants, and it is fully conceded that international concerns

must be kept in mind. In this regard, **Ms Kruger** felt that South Africa should keep abreast of developments at The Hague, since the draft Convention on Jurisdiction and Foreign Judgments was based on a thorough comparative study, and negotiations have been attended by a range of influential states, including the United States and Japan.

9.2.31 The principles underlying the draft Hague Convention are similar to those driving the Brussels and OHADA regimes, and they are obviously relevant as guides for future South African policy. In particular, these principles are useful for the possible long-term goal of creating a regional regime for the SADC.

9.2.32 Particular provisions in the Brussels regime may be instructive for the South African law-maker, but the overall scheme is too ambitious for our present purposes. The regime rests on the high degree of political and economic integration of the EU, accompanied by a sacrifice of sovereignty in key areas of the administration of justice. These factors put it beyond the immediate reach of South Africa and the SADC.

9.2.33 For similar reasons, the OHADA regime is also beyond our immediate means. It is an attractive and accessible option for its participants, because it is based on the relative uniformity of substantive and procedural laws of the francophone bloc. However, no matter how desirable the goal of harmonizing SADC laws, agreement will face considerable obstacles, not least of which are the substantial divisions in language and legal traditions.⁴³

9.2.34 **Mr Polonksy** also considered the Brussels regime and the draft Hague Convention to be inappropriate for the immediate purposes of South African law-makers. He noted that the broad content of the Council Regulation was derived from the Brussels Convention (1968), which was drafted at a time when the only members of the European Union were countries with a civil-law tradition. Hence, the approach was heavily influenced by the civilian system, including a desire for clear, simple rules and for the exclusion of all forms of discretion in issues of jurisdiction.

⁴³ The legal traditions of member states are more likely to draw them towards Belgium, Portugal, England or South Africa, not towards one another: Thomashausen (**op cit** at 26-7).

9.2.35 Instead, **Mr Polonksy** urged the negotiation of bilateral treaties, as a more promising course of action for the immediate development of South African law. He recommended starting with the United Kingdom, which is one of our major trading partners, with similar legal principles governing this area of law. That treaty can thereafter be used as a model for negotiating further bilateral agreements with the many countries of the Commonwealth with which the United Kingdom already has bilateral treaties.⁴⁴

9.2.36 Our immediate task, which also happens to be the most readily attainable goal, is to make changes to our domestic laws in order to facilitate international judicial co-operation by our own courts and to assist litigants from South Africa to serve process, take evidence and enforce judgments abroad. Domestic reform does not, however, preclude paying attention to international developments. Although the three main regimes considered above – OHADA, Brussels and the draft Hague Convention – cannot be acted upon now, they should not be ignored. The issue is one of timing.

9.2.37 The first stage of the project on international judicial co-operation, which will involve our courts and primarily the legislature, should be reform of South Africa's domestic laws. The second stage, which will involve the executive (in particular the Department of Foreign Affairs), should be negotiation of bilateral treaties at an international level and South Africa's accession to multilateral conventions. The third stage should be the formation of closer regional ties.

9.2.38 Although not a desirable policy from the point of view of the individual litigant, reciprocity will no doubt continue to play a role in the formation of international ties. Nevertheless, the most important criteria to guide our policy should be a commitment to uniform decision-making, ready access to justice for the private litigant and maintenance of proper judicial standards.

⁴⁴ As an example of the type of treaty considered here, **Mr Polonsky** recommended the Convention between The United Kingdom and Canada on the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters (1984). This can be found in Annexure H.

9.3. RECOMMENDATIONS

9.3.1 South Africa should be clearly committed to a policy of international judicial co-operation. In order to achieve this goal, we need to clarify and improve our law. As a starting point, gaps and ambiguities in the common law must be remedied. Reform of this area then provides a good opportunity to consider the state of our statute law. Repeal of the Protection of Businesses Act 99 of 1978, in particular, is essential if the South African legal system is to be made more amenable to international co-operation.⁴⁵

9.3.2 These reforms will obviously redound to the benefit of litigants seeking to serve process, take evidence or enforce foreign judgments locally, but urgent attention must also be paid to the plight of South African litigants who wish to perform the same acts abroad. Unless an international agreement is negotiated in advance to secure an accelerated procedure under one of our domestic statutes, the judgment creditor is at the mercy of the domestic law of the state in which enforcement is sought.

9.3.3 Currently, the scope of application of the following Acts is far too limited:

- Foreign Courts Evidence Act 80 of 1962
- Enforcement of Foreign Civil Judgments Act 32 of 1988
- Reciprocal Enforcement of Maintenance Orders (Countries in Africa) Act 6 of 1989
- Reciprocal Service of Civil Process Act 12 of 1990

Hence, the second stage of the reforms to our law should concentrate on applying our statutory procedures to more countries, and ensuring reciprocal treatment from foreign states. The most practical method for achieving this aim, in the short term, is the negotiation of bilateral treaties with our immediate neighbours and major trading partners, an initiative that will require action by the Department of Justice, together with the Department of Foreign Affairs.

⁴⁵ See paragraphs 5.3.1ff above.

9.3.4 The third stage of ensuring wider co-operation entails South Africa's accession to certain multilateral conventions. The two most immediate targets are:

- the UN Convention on the Recovery Abroad of Maintenance (1957)
- the Hague Convention on the Recognition and Enforcement of Maintenance Obligations (1973).

Moreover, in order to keep abreast of global developments, we should continue to participate actively in the Hague Conferences on international law.

9.3.5 Finally, in the longer term, South Africa should take the lead in encouraging closer regional co-operation in the SADC. For this purpose, regional conventions in Africa, Europe and South America may be used as guides.

ANNEXURE A**LIST OF RESPONDENTS**

1. Ms D De Andrade
2. Prof W de Vos (University of Stellenbosch)
3. Prof C F Forsyth and Ms C Jesseman (University of Cambridge)
4. Mr J Fourie (International Sheriffs' Association)
5. Mr S de la Harpe (University of Potchefstroom)
6. Hofmeyr Herbstein & Gihwala Inc
7. Ms T Kruger (Institute for International Trade Law, Leuven)
8. Law Society of the Cape of Good Hope
9. Law Society of the Northern Provinces
10. Law Society of South Africa
11. Mr K Malunga (University of Natal, Durban)
12. Prof J Neels (Rand Afrikaans University)
13. Provincial Administration: Western Cape
14. Prof H C Roodt (University of South Africa)
15. Prof E Schoeman (University of Auckland)
16. Society of Advocates of Kwazulu-Natal
17. Mr J B Zowa (Zimbabwe Law Development Commission)

ANNEXURE B

It is recommended that the Minister of Justice and Constitutional Affairs should, in terms of Section 2(1) of the **Reciprocal Service of Process Act 12 of 1990**, extend the list of designated countries, to which the Act applies; starting with South Africa's major trading partners.

In this regard the Minister is also advised to take account not only of the promise of reciprocal treatment but also of the judicial standards prevailing in the selected countries so as to ensure compatibility with the Constitution of the Republic of South Africa, Act 108 of 1996.

In addition, every effort should be made to accede to the Hague Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil or Commercial Matters (1965).

When acceding to this Convention South Africa should make the following reservations:

That the Republic of South Africa excludes the following in terms of Article 13 of the Convention -

- (a) documents that offend its public policy or may lead to criminal prosecution; and that
- (b) South African law will be used to determine whether a matter should be deemed civil or criminal.

ANNEXURE C

RECOMMENDED AMENDMENTS TO FOREIGN COURTS EVIDENCE ACT 80 OF

GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments.

_____ Words underlined with a solid line indicate insertions in existing enactments

BILL

To amend the **Foreign Courts Evidence Act 80 of 1962** so as to insert or further define expressions and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:-

Amendment of section 1 of Act 80 of 1962

1. Section 1 of the Foreign Courts Evidence, 1962 (in this Act referred to as the principal Act), is hereby amended –

(a) by the insertion of the following definition;

“Central Authority” means the Central Authority designated in terms of Article 2 of the Convention; and

(b) by the insertion after the definition of ‘Central Authority’ of the following definition;

¹ This amendment Bill is dependent on the incorporation into South African domestic law of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (1970) - see in this regard p125-139 of this Report.

“Convention’ means the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (1970) as incorporated into South African law by the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters Act;”

Amendment of section 2 of Act 80 of 1962

2. Section 2 of the principal Act is hereby amended by the substitution for subsection (2) of the following subsection;

[Such an order shall not be granted if it appears to the court or judge that the evidence required is the furnishing of information in contravention of the provisions of section 1 of the Protection of Businesses Act, 1978 (Act No 19 of 1978)] Such an order shall not be granted if the Central Authority has refused compliance with any request on the basis that it threatens to violate South Africa’s sovereignty and security.

Short title and commencement

3. This Act shall be called the Foreign Courts Evidence Amendment Act 20..(Act No....of 20..) and will come into operation on a date fixed by the President by proclamation in the *Gazette*.

**RECOMMENDED HAGUE CONVENTION ON THE TAKING OF EVIDENCE
ABROAD IN CIVIL OR COMMERCIAL MATTERS**

BILL

To provide for the application in the Republic of the **Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (1970)**; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:-

Definitions

1. In this Act, unless the context otherwise indicates –

‘Central Authority’ means the Central Authority designated in terms of section 3 of the Act;

‘Competent Authority’ means the Competent Authority designated in terms of section 4 of the Act;

‘Convention’ means the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters entered into force on 7th October 1972 at the Hague and set out in the Schedule;

‘Minister’ means the Minister of Justice;

‘regulation’ means a regulation made under this Act;

‘this Act’ includes the regulations.

² When South Africa acceded to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters it made certain declarations (as set out in the Gazette, No 18316, Notice No 1271, 3rd October 1997). It is recommended that South Africa should modify the terms of its original declaration (see p26-27 of this Report), when incorporating the Convention into domestic law.

Application of the Convention

2. (1) The Convention shall, subject to the provisions of this Act, apply in the Republic.

(2) South African law will be used to characterize the underlying causes of action for requests as criminal, as opposed to civil or commercial.

Designation of Central Authority

3. For the purposes of Article 2 of the Convention the Director-General of the Department of Justice and Constitutional Affairs, is hereby designated as the Central Authority for the Republic.

Designation of Competent Authority

4. (1) For the purposes of Article 8 of the Convention the Director-General of the Department of Justice and Constitutional Affairs, is hereby designated as the Competent Authority for the Republic.

(2) For the purposes of Articles 17 and 18 of the Convention the division of the High Court that has jurisdiction is designated as the Competent Authority for the Republic.

Regulations

5. (1) The Minister may make regulations –

(a) to give effect to any provision of the Convention as applicable in the Republic; and

(b) to prescribe fees, and provide for the recovery of any expenditure incurred, in connection with the application of the Convention in the Republic.

(2) A regulation made under subsection (1) may prescribe a penalty of a fine or imprisonment for a period not exceeding 12 months for any contravention thereof or failure to comply therewith.

(3) Any regulation made under subsection (1) shall be laid upon the table in Parliament within 14 days after the publication thereof in the *Gazette* if Parliament is in ordinary session, or, if Parliament is not in ordinary session, within 14 days after the commencement of the next ensuing ordinary session.

(4) Any regulation referred to in subsection (3) or any provision thereof may, by resolution passed by both houses of Parliament during the session in which such

regulation has been laid upon the table, be rejected, and, if the said regulation or provision is so rejected, the provisions of section 12(2) of the Interpretation Act, 1957 (Act No 33 of 1957) shall apply as if such resolution were a law repealing the regulation or provision in question.

Short title and commencement

6. This Act shall be called the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters Act 20.. (Act No....of 20..) and will come into operation on a date fixed by the President by proclamation in the *Gazette*.

Schedule

The text of the Convention is published in this Schedule for general information.

Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (1970)

(In the relations between the Contracting States, this Convention replaces Articles 8 to 16 of the Conventions on civil procedure of 1905 and 1954)

HAGUE CONVENTION ON THE TAKING OF EVIDENCE ABROAD IN CIVIL OR COMMERCIAL MATTERS

(Concluded 18 March 1970)

(Entered into force 7 October 1972)

The States signatory to the present Convention,
Desiring to facilitate the transmission and execution of Letters of Request and to further the accommodation of the different methods which they use for this purpose,
Desiring to improve mutual judicial co-operation in civil or commercial matters,
Have resolved to conclude a Convention to this effect and have agreed upon the following provisions:

CHAPTER I – LETTERS OF REQUEST

Article 1

In civil or commercial matters a judicial authority of a Contracting State may, in accordance with the provisions of the law of that State, request the competent authority of another Contracting State, by means of a Letter of Request, to obtain evidence, or to perform some other judicial act.

A Letter shall not be used to obtain evidence which is not intended for use in judicial proceedings, commenced or contemplated.

The expression "other judicial act" does not cover the service of judicial documents or the issuance of any process by which judgments or orders are executed or enforced, or orders for provisional or protective measures.

Article 2

A Contracting State shall designate a Central Authority which will undertake to receive Letters of Request coming from a judicial authority of another Contracting State and to transmit them to the authority competent to execute them. Each State shall organize the Central Authority in accordance with its own law.

Letters shall be sent to the Central Authority of the State of execution without being transmitted through any other authority of that State.

Article 3

A Letter of Request shall specify

- a) the authority requesting its execution and the authority requested to execute it, if known to the requesting authority;
- b) the names and addresses of the parties to the proceedings and their representatives, if any;
- c) the nature of the proceedings for which the evidence is required, giving all necessary information in regard thereto;
- d) the evidence to be obtained or other judicial act to be performed.

Where appropriate, the Letter shall specify, *inter alia* –

- e) the names and addresses of the persons to be examined;
- f) the questions to be put to the persons to be examined or a statement of the subject-matter about which they are to be examined;
- g) the documents or other property, real or personal, to be inspected;
- h) any requirement that the evidence is to be given on oath or affirmation, and any special form to be used;

i) any special method or procedure to be followed under Article 9.

A Letter may also mention any information necessary for the application of Article 11.

No legalization or other like formality may be required.

Article 4

A Letter of Request shall be in the language of the authority requested to execute it or be accompanied by a translation into that language.

Nevertheless, a Contracting State shall accept a Letter in either English or French, or a translation into one of these languages, unless it has made the reservation authorized by Article 33.

A Contracting State which has more than one official language and cannot, for reasons of internal law, accept Letters in one of these languages for the whole of its territory, shall, by declaration, specify the language in which the Letter or translation thereof shall be expressed for execution in the specified parts of its territory. In case of failure to comply with this declaration, without justifiable excuse, the costs of translation into the required language shall be borne by the State of origin.

A Contracting State may, by declaration, specify the language or languages other than those referred to in the preceding paragraphs, in which a Letter may be sent to its Central Authority.

Any translation accompanying a Letter shall be certified as correct, either by a diplomatic officer or consular agent or by a sworn translator or by any other person so authorized in either State.

Article 5

If the Central Authority considers that the request does not comply with the provisions of the present Convention, it shall promptly inform the authority of the State of origin which transmitted the Letter of Request, specifying the objections to the Letter.

Article 6

If the authority to whom a Letter of Request has been transmitted is not competent to execute it, the Letter shall be sent forthwith to the authority in the same State which is competent to execute it in accordance with the provisions of its own law.

Article 7

The requesting authority shall, if it so desires, be informed of the time when, and the place where, the proceedings will take place, in order that the parties concerned, and their representatives, if any, may be present. This information shall be sent directly to the parties or their representatives when the authority of the State of origin so requests.

Article 8

A Contracting State may declare that members of the judicial personnel of the requesting authority of another Contracting State may be present at the execution of a Letter of Request. Prior authorization by the competent authority designated by the declaring State may be required.

Article 9

The judicial authority which executes a Letter of Request shall apply its own law as to the methods and procedures to be followed. However, it will follow a request of the requesting authority that a special method or procedure be followed, unless this is incompatible with the internal law of the State of execution or is impossible of performance by reason of its internal practice and procedure or by reason of practical difficulties.

A Letter of Request shall be executed expeditiously.

Article 10

In executing a Letter of Request the requested authority shall apply the appropriate measures of compulsion in the instances and to the same extent as are provided by its internal law for the execution of orders issued by the authorities of its own country or of requests made by parties in internal proceedings.

Article 11

In the execution of a Letter of Request the person concerned may refuse to give evidence in so far as he has a privilege or duty to refuse to give the evidence –

a) under the law of the State of execution; or

b) under the law of the State of origin, and the privilege or duty has been specified in the Letter, or, at the instance of the requested authority, has been otherwise confirmed to that authority by the requesting authority.

A Contracting State may declare that, in addition, it will respect privileges and duties existing under the law of States other than the State of origin and the State of execution, to the extent specified in that declaration.

Article 12

The execution of a Letter of Request may be refused only to the extent that –

a) in the State of execution the execution of the Letter does not fall within the functions of the judiciary; or

b) the State addressed considers that its sovereignty or security would be prejudiced thereby.

Execution may not be refused solely on the ground that under its internal law the State of execution claims exclusive jurisdiction over the subject-matter of the action or that its internal law would not admit a right of action on it.

Article 13

The documents establishing the execution of the Letter of Request shall be sent by the requested authority to the requesting authority by the same channel which was used by the latter. In every instance where the Letter is not executed in whole or in part, the requesting authority shall be informed immediately through the same channel and advised of the reasons.

Article 14

The execution of the Letter of Request shall not give rise to any reimbursement of taxes or costs of any nature. Nevertheless, the State of execution has the right to require the State of origin to reimburse the fees paid to experts and interpreters and the costs occasioned by the use of a special procedure requested by the State of origin under Article 9, paragraph 2. The requested authority whose law obliges the parties themselves to secure evidence, and which is not able itself to execute the Letter, may, after having obtained the consent of the requesting authority, appoint a suitable person to do so. When seeking this consent the requested authority shall indicate the approximate costs which would result from this procedure. If the requesting authority gives its consent it shall reimburse any costs incurred; without such consent the requesting authority shall not be liable for the costs.

CHAPTER II – TAKING OF EVIDENCE BY DIPLOMATIC OFFICERS, CONSULAR AGENTS AND COMMISSIONERS

Article 15

In civil or commercial matters, a diplomatic officer or consular agent of a Contracting State may, in the territory of another Contracting State and within the area where he exercises his functions, take the evidence without compulsion of nationals of a State which he represents in aid of proceedings commenced in the courts of a State, which he represents. A Contracting State may declare that evidence may be taken by a diplomatic officer or consular agent only if permission to that effect is given upon application made by him or on his behalf to the appropriate authority designated by the declaring State.

Article 16

A diplomatic officer or consular agent of a Contracting State may, in the territory of another Contracting State and within the area where he exercises his functions, also take the evidence, without compulsion, of nationals of the State in which he exercises his functions or of a third State, in aid of proceedings commenced in the courts of a State which he represents, if –

- a) a competent authority designated by the State in which he exercises his functions has given its permission either generally or in the particular case, and
- b) he complies with the conditions which the competent authority has specified in the permission.

A Contracting State may declare that evidence may be taken under this Article without its prior permission.

Article 17

In civil or commercial matters, a person duly appointed as a commissioner for the purpose may, without compulsion, take evidence in the territory of a Contracting State in aid of proceedings commenced in the courts of another Contracting State, if–

- a) a competent authority designated by the State where the evidence is to be taken has given its permission either generally or in the particular case; and
- b) he complies with the conditions which the competent authority has specified in the permission.

A Contracting State may declare that evidence may be taken under this Article without its prior permission.

Article 18

A Contracting State may declare that a diplomatic officer, consular agent or commissioner authorized to take evidence under Articles 15, 16 or 17, may apply to the competent authority designated by the declaring State for appropriate assistance to obtain the evidence by compulsion. The declaration may contain such conditions as the declaring State may see fit to impose. If the authority grants the application it shall apply any measures of compulsion which are appropriate and are prescribed by its law for use in internal proceedings.

Article 19

The competent authority, in giving the permission referred to in Articles 15, 16 or 17, or in granting the application referred to in Article 18, may lay down such conditions as it deems fit, *inter alia*, as to the time and place of the taking of the evidence. Similarly it may require that it be given reasonable advance notice of the time, date and place of the taking of the evidence; in such a case a representative of the authority shall be entitled to be present at the taking of the evidence.

Article 20

In the taking of evidence under any Article of this Chapter persons concerned may be legally represented.

Article 21

Where a diplomatic officer, consular agent or commissioner is authorized under Articles 15, 16 or 17 to take evidence –

- a) he may take all kinds of evidence which are not incompatible with the law of the State where the evidence is taken or contrary to any permission granted pursuant to the above Articles, and shall have power within such limits to administer an oath or take an affirmation;
- b) a request to a person to appear or to give evidence shall, unless the recipient is a national of the State where the action is pending, be drawn up in the language of the place where the evidence is taken or be accompanied by a translation into such language;
- c) the request shall inform the person that he may be legally represented and, in any State that has not filed a declaration under Article 18, shall also inform him that he is not compelled to appear or to give evidence;

- d) the evidence may be taken in the manner provided by the law applicable to the court in which the action is pending provided that such manner is not forbidden by the law of the State where the evidence is taken;
- e) a person requested to give evidence may invoke the privileges and duties to refuse to give the evidence contained in Article 11.

Article 22

The fact that an attempt to take evidence under the procedure laid down in this Chapter has failed, owing to the refusal of a person to give evidence, shall not prevent an application being subsequently made to take the evidence in accordance with Chapter I.

CHAPTER III – GENERAL CLAUSES

Article 23

A Contracting State may at the time of signature, ratification or accession, declare that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries.

Article 24

A Contracting State may designate other authorities in addition to the Central Authority and shall determine the extent of their competence. However, Letters of Request may in all cases be sent to the Central Authority. Federal States shall be free to designate more than one Central Authority.

Article 25

A Contracting State which has more than one legal system may designate the authorities of one of such systems, which shall have exclusive competence to execute Letters of Request pursuant to this Convention.

Article 26

A Contracting State, if required to do so because of constitutional limitations, may request the reimbursement by the State of origin of fees and costs, in connection with the execution of Letters of Request, for the service of process necessary to compel the appearance of a person to give evidence, the costs of attendance of such persons, and the cost of any transcript of the evidence. Where a State has made a

request pursuant to the above paragraph, any other Contracting State may request from that State the reimbursement of similar fees and costs.

Article 27

The provisions of the present Convention shall not prevent a Contracting State from—

- a) declaring that Letters of Request may be transmitted to its judicial authorities through channels other than those provided for in Article 2;
- b) permitting, by internal law or practice, any act provided for in this Convention to be performed upon less restrictive conditions;
- c) permitting, by internal law or practice, methods of taking evidence other than those provided for in this Convention.

Article 28

The present Convention shall not prevent an agreement between any two or more Contracting States to derogate from –

- a) the provisions of Article 2 with respect to methods of transmitting Letters of Request;
- b) the provisions of Article 4 with respect to the languages which may be used;
- c) the provisions of Article 8 with respect to the presence of judicial personnel at the execution of Letters;
- d) the provisions of Article 11 with respect to the privileges and duties of witnesses to refuse to give evidence;
- e) the provisions of Article 13 with respect to the methods of returning executed Letters to the requesting authority;
- f) the provisions of Article 14 with respect to fees and costs;
- g) the provisions of Chapter II.

Article 29

Between Parties to the present Convention who are also Parties to one or both of the Conventions on Civil Procedure signed at The Hague on the 17th of July 1905 and the 1st of March 1954, this Convention shall replace Articles 8-16 of the earlier Conventions.

Article 30

The present Convention shall not affect the application of Article 23 of the Convention of 1905, or of Article 24 of the Convention of 1954.

Article 31

Supplementary Agreements between Parties to the Conventions of 1905 and 1954 shall be considered as equally applicable to the present Convention unless the Parties have otherwise agreed.

Article 32

Without prejudice to the provisions of Articles 29 and 31, the present Convention shall not derogate from conventions containing provisions on the matters covered by this Convention to which the Contracting States are, or shall become Parties.

Article 33

A State may, at the time of signature, ratification or accession exclude, in whole or in part, the application of the provisions of paragraph 2 of Article 4 and of Chapter II. No other reservation shall be permitted.

Each Contracting State may at any time withdraw a reservation it has made; the reservation shall cease to have effect on the sixtieth day after notification of the withdrawal.

When a State has made a reservation, any other State affected thereby may apply the same rule against the reserving State.

Article 34

A State may at any time withdraw or modify a declaration.

Article 35

A Contracting State shall, at the time of the deposit of its instrument of ratification or accession, or at a later date, inform the Ministry of Foreign Affairs of the Netherlands of the designation of authorities, pursuant to Articles 2, 8, 24 and 25.

A Contracting State shall likewise inform the Ministry, where appropriate, of the following-

- a) the designation of the authorities to whom notice must be given, whose permission may be required, and whose assistance may be invoked in the taking of evidence by diplomatic officers and consular agents, pursuant to Articles 15, 16 and 18 respectively;
- b) the designation of the authorities whose permission may be required in the taking of evidence by commissioners pursuant to Article 17 and of those who may grant the assistance provided for in Article 18;
- c) declarations pursuant to Articles 4, 8, 11, 15, 16, 17, 18, 23 and 27;

- d) any withdrawal or modification of the above designations and declarations;
- e) the withdrawal of any reservation.

Article 36

Any difficulties which may arise between Contracting States in connection with the operation of this Convention shall be settled through diplomatic channels.

Article 37

The present Convention shall be open for signature by the States represented at the Eleventh Session of the Hague Conference on Private International Law.

It shall be ratified, and the instruments of ratification shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

Article 38

The present Convention shall enter into force on the sixtieth day after the deposit of the third instrument of ratification referred to in the second paragraph of Article 37.

The Convention shall enter into force for each signatory State which ratifies subsequently on the sixtieth day after the deposit of its instrument of ratification.

Article 39

Any State not represented at the Eleventh Session of the Hague Conference on Private International Law which is a Member of this Conference or of the United Nations or of a specialized agency of that Organization, or a Party to the Statute of the International Court of Justice may accede to the present Convention after it has entered into force in accordance with the first paragraph of Article 38.

The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force for a State acceding to it on the sixtieth day after the deposit of its instrument of accession.

The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession. Such declaration shall be deposited at the Ministry of Foreign Affairs of the Netherlands; this Ministry shall forward, through diplomatic channels, a certified copy to each of the Contracting States.

The Convention will enter into force as between the acceding State and the State that has declared its acceptance of the accession on the sixtieth day after the deposit of the declaration of acceptance.

Article 40

Any State may, at the time of signature, ratification or accession, declare that the present Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect on the date of entry into force of the Convention for the State concerned. At any time thereafter, such extensions shall be notified to the Ministry of Foreign Affairs of the Netherlands. The Convention shall enter into force for the territories mentioned in such an extension on the sixtieth day after the notification indicated in the preceding paragraph.

Article 41

The present Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 38, even for States which have ratified it or acceded to it subsequently. If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Netherlands at least six months before the end of the five year period.

It may be limited to certain of the territories to which the Convention applies.

The denunciation shall have effect only as regards the State which has notified it.

The Convention shall remain in force for the other Contracting States.

Article 42

The Ministry of Foreign Affairs of the Netherlands shall give notice to the States referred to in Article 37, and to the States which have acceded in accordance with Article 39, of the following –

- a) the signatures and ratifications referred to in Article 37;
- b) the date on which the present Convention enters into force in accordance with the first paragraph of Article 38;
- c) the accessions referred to in Article 39 and the dates on which they take effect;
- d) the extensions referred to in Article 40 and the dates on which they take effect;
- e) the designations, reservations and declarations referred to in Articles 33 and 35;
- f) the denunciations referred to in the third paragraph of Article 41.

In witness whereof the undersigned, being duly authorized thereto, have signed the present Convention.

Done at The Hague, on the 18th day of March, 1970, in the English and French languages, both texts being equally authentic, in a single copy which shall be

deposited in the archives of the Government of the Netherlands, and of which a certified copy shall be sent, through the diplomatic channel, to each of the States represented at the Eleventh Session of the Hague Conference on Private International Law.

ANNEXURE D

**RECOMMENDED AMENDMENTS TO THE RECOGNITION AND ENFORCEMENT
OF FOREIGN CIVIL JUDGMENTS UNDER THE COMMON LAW**

BILL

To provide for the recognition and enforcement of foreign civil judgments in magistrate's courts and High courts in the Republic and for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:-

Definitions

1. In this Act, unless the context otherwise indicates -

'judgment' means any final decision or order by a court, whatever it may be called, in any civil proceedings, excluding orders affecting personal status, but including orders for the determination of costs which is enforceable by execution in the country in which it was given or made;

'judgment debtor' means the person against whom a judgment was given in the court of a foreign state, including any person against whom such judgment is enforceable under the law of that country;

'principal place of business' means the place where the affairs of an enterprise are controlled.

Exclusive jurisdiction

2. The courts of the state in which immovable property is situated shall have exclusive jurisdiction in proceedings which have as their object rights *in rem* or tenancies in that property.

Validity of foreign judgments

3. (1) A foreign judgment will not be enforceable in the Republic if the court of the country concerned had no jurisdiction in the circumstances of the case.

(2) A foreign judgment is deemed to extinguish the original cause of action.

Registration of judgments

4. (1) Whenever a certified copy of a judgment given against any person by any court in a foreign country is lodged with the registrar of a High Court or with the clerk of a magistrates' court in the Republic, such registrar or clerk shall register the judgment in the prescribed manner in respect of –

(a) the balance of the amount payable thereunder, including the taxed costs awarded by the court of the foreign country;

(b) the interest, if any, which by the law or by order of the court of the designated country concerned is due on the amount payable thereunder up to the time of such registration.

(2) If any amount payable under a judgment registered under this section is expressed in a currency other than the currency of the Republic, the judgment shall be registered as if it were a judgment for such amount in the currency of the Republic, calculated at the rate of exchange prevailing at the date of registration.

(3) The amounts referred to in subsection (1)(a) shall bear interest from the date of the original judgment until the date of registration in the Republic, calculated at the rate prescribed under section (1)(2) of the Prescribed Rate of Interest Act, 1975 (Act No. 55 of 1975), or at the rate fixed by the court of the foreign country, whichever is the lower.

Setting aside of a registered judgment

5. A foreign judgment may not be enforced in South Africa if the court at which the judgment is registered is satisfied that the matter in dispute in the proceedings had, prior to the date of the judgment, been the subject of a final judgment in civil proceedings by another court of competent jurisdiction.

Presumptions

6. The court of the foreign country in which a judgment was given shall be deemed to have jurisdiction if the judgment debtor;

(i) was the plaintiff or plaintiff in reconvention in the proceedings or submitted to the jurisdiction of the court by which the judgment was given by voluntarily appearing in the proceedings for any purpose other than protecting or obtaining the release of property seized or threatened with seizure in the proceedings or contesting the jurisdiction of that court; or

(ii) was a defendant in the proceedings and had agreed before the commencement of the proceedings to submit to the courts jurisdiction; or

(iii) was a defendant and, at the institution of the proceedings, resident in or being a juristic person, had its principal place of business in, the foreign state, or at anytime had an office or place of business in such a foreign state through or at which the transaction to which the proceedings relate, was effected.

Short title and commencement

7. This Act shall be called.....20..(Act No....of 20..) and will come into operation on a date fixed by the President by proclamation in the *Gazette*.

ANNEXURE E**RECOMMENDED PROTECTION OF BUSINESSES ACT REPEAL BILL****BILL**

To repeal the **Protection of Businesses Act Act 99 of 1978**; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows: -

Definition

1. In this Act, unless the context otherwise indicates –
“Protection of Businesses Act” means the Protection of Businesses Act, 1978 (Act 99 of 1978).

Repeal of Law

2. (a) The Protection of Businesses Act is hereby repealed.
(b) The laws specified in the schedule are hereby repealed to the extent set out in the third column of that schedule.

Short title and Commencement

3. This Act is called the Protection of Businesses Act Repeal Act, [] and comes into operation on a date to be fixed by the President by proclamation in the *Gazette*.

Schedule

Laws repealed in terms of Section 2(b).

No and year of law	Title or subject	Extent of Repeal
Act 80 of 1962	Foreign Courts Evidence Act, 1962	Section 2(2)

Act 114 of 1979	Protection of Businesses Amendment Act, 1979	The repeal of the whole
Act 71 of 1984	Protection of Businesses Amendment Act, 1984	The repeal of the whole
Act 87 of 1987	Protection of Businesses Amendment Act, 1987	The repeal of the whole

ANNEXURE F

RECOMMENDED AMENDMENTS TO ENFORCEMENT OF FOREIGN CIVIL JUDGMENTS ACT 32 OF

GENERAL EXPLANATORY NOTE:

[] **Words in bold type in square brackets indicate omissions from existing enactments.**

_____ **Words underlined with a solid line indicate insertions in existing enactments**

BILL

To amend the **Enforcement of Foreign Civil Judgments Act 32 of 1988** so as to amend the long title of the Act; to insert certain new definitions and amend certain definitions; to provide that foreign civil judgments may be enforced in High Courts; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:-

Amendment of the long title of Act 32 of 1988

1. The long title of the Enforcement of Foreign Civil Judgments Act, 1988 (in this Act referred to as the principal Act), is hereby amended by the inclusion of the following words;

To provide that civil judgments given in designated countries may be enforced in magistrates' courts and High Courts in the Republic; to repeal the Reciprocal Enforcement of Civil Judgments Act, 1966; and to provide for matters incidental thereto.

¹ The scope of the principle Act should be extended to major trading partners, at present the Act has a limited range of application and only applies to Namibia.

Amendment of section 1 of Act 32 of 1988

2. Section 1 of the principal Act is hereby amended -

- (a) by the inclusion in the definition of "court" of the following words "the High Court or" after the words "in relation to any court in the Republic, means"; and
- (b) by the substitution of the definition of "judgment" with the following definition;

any final judgment or order [**for the payment of money**] given or made before or after the commencement of this Act by any court in any civil proceedings which is enforceable by execution in the country in which it was given or made.

Amendment of section 3(1) and section 3(2) of Act 32 of 1988

3. Section 3(1) of the principal Act is hereby amended by the insertion of the following;

Whenever a certified copy of a judgment given against any person by any court in a designated country is lodged with the registrar of a High Court or with the clerk of a magistrate's court in the Republic, such registrar or clerk of the court shall register such judgment in the prescribed manner.

4. Section 3(2) of the principal Act is hereby amended by the insertion of the following;

The registrar or clerk of the court registering the judgment shall forthwith issue a notice directed to the judgment debtor informing him of such registration.

Amendment of section 7 of Act 32 of 1988

5. Section 7(4)(b) of the principal Act is hereby amended by the substitution for the section of the following section;

- (b) **[if]** In any action relating to immovable property;
 - (i) if the property was at the institution of proceedings situated in the designated country in which the proceedings were instituted; and therefore

(ii) in proceedings which have as their object rights *in rem* over, or tenancies in, immovable property, only the courts of the country in which the property is situated are competent to give judgments relating to that property.

Short title and commencement

6. This Act is called the Enforcement of Foreign Civil Judgments Amendment Act 20..(Act No....of 20..) and will come into operation on a date fixed by the President by proclamation in the *Gazette*.

ANNEXURE G

**RECOMMENDED AMENDMENTS TO RECIPROCAL ENFORCEMENT OF
MAINTENANCE ORDERS 'COUNTRIES IN AFRICA' ACT 6 OF**

GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments.

_____ Words underlined with a solid line indicate insertions in existing enactments

BILL

To amend the **Reciprocal Enforcement of Maintenance Orders 'Countries in Africa' Act 6 of 1989** so as to amend the long title of the Act; to insert definitions; to substitute the short title of the Act; to repeal the Reciprocal Enforcement of Maintenance Orders Act, 1963; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:-

Amendment of the long title of Act 6 of 1989

1. The long title of the Reciprocal Enforcement of Maintenance Orders 'Countries in Africa' Act, 1989 (in this Act referred to as the principal Act), is hereby amended by the substitution of the following;

To provide for the reciprocal enforcement of maintenance orders made in the Republic and in designated countries [**in Africa**], and for matters incidental thereto.

¹ South Africa should also accede to the Hague Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations (1973) and the UN Convention on the Recovery of Maintenance (1957).

Amendment of section 1 of Act 6 of 1989

2. Section 1 of the principal Act is hereby amended by the substitution of the definition of 'designated country' with the following definition;

'designated country' means **[a country in Africa]** a country or territory in respect of which this Act applies in terms of section 2.

Amendment of section 2 of Act 6 of 1989

3. The amendment of section 2(1) and the inclusion in section 2 of subsection 2(3) of the principal Act;

'2(1) This Act shall apply in respect of any country **[in Africa]** designated by the Minister by notice in the *Gazette*.

(2) The Minister may by like notice withdraw any such notice.

(3) This Act shall apply to those countries already designated as a proclaimed country by the Minister under the Reciprocal Enforcement of Maintenance Orders Act 80 of 1963 by notice in the *Gazette*.

Substitution of section 14 of Act 6 of 1989

4. The following section is hereby substituted for section 14 of the principal Act;

'Short title

14. This Act shall be called the Reciprocal Enforcement of Maintenance Orders Act **['Countries in Africa']** 6 of 1989.'

Repeal and amendment of laws

5. (1) The laws mentioned in the schedule are hereby repealed or amended to the extent indicated in the third column thereof.

(2) Notwithstanding the repeal of any law by subsection (1), anything done under such law and which could be done under a provision of this Act, shall be deemed to have been done under such provision.

(3) Any proclaimed country or territory in respect of which the provisions of the Reciprocal Enforcement of Maintenance Orders Act, 1963 (Act 80 of 1963) applied

immediately prior to the commencement of this Act shall be deemed to be a designated country in terms of section 1 of this Act.

Short title and commencement

6. This Act shall be called the Reciprocal Enforcement of Maintenance Orders (Countries in Africa) Amendment Act 20..(Act No...of 20..) and will come into operation on a date fixed by the President by proclamation in the *Gazette*.

Schedule

Acts repealed or amended in terms of Section 5.

No and year of Act	Title or subject	Extent of amendment or repeal
Act 80 of 1963	Reciprocal Enforcement of Maintenance Orders Act, 1963	The repeal of the whole
Act 40 of 1970	Reciprocal Enforcement of Maintenance Orders Amendment Act, 1970	The repeal of the whole
Act 18 of 1996	Justice Laws Rationalization Act, 1996	The amendment of section 10 by the substitution in subsection (1), of the expression 'Reciprocal Enforcement of Maintenance Orders (Countries in Africa) Act, 1989 (Act 6 of 1989)' with the expression 'Reciprocal Enforcement of Maintenance Orders Act, 1989 (Act 6 of 1989)'
Act 33 of	Children's Act, 1960	The amendment of section 62 by the substitution of subparagraph (2) with the following paragraph;

² The whole of this Act has been repealed by section 313 of the Children's Act 38 of 2005 but this will only come into operation on a date to be fixed by the President by proclamation in the *Gazette*.

		<p>'A provisional contribution order may be made against a respondent resident in any country which is a 'designated country' within the meaning of section one of the Reciprocal Enforcement of Maintenance Orders Act, 1989 (Act 6 of 1989)',</p> <p>The amendment of section 63 by the substitution of subparagraph (1) with the following paragraph;</p> <p>'(1) A contribution order and a provisional contribution order made under this Chapter shall have the effect respectively of a maintenance order and of a provisional maintenance order in terms of the Reciprocal Enforcement of Maintenance Orders Act, 1989 (Act 6 of 1989).'</p>
Act 74 of	Child Care Act, 1983	<p>The amendment of section 43 by the substitution of subparagraph (2) with the following paragraph;</p> <p>'A provisional contribution order may be made against a respondent resident in any country which is a 'designated country' within the meaning of section 1 of the Reciprocal Enforcement of Maintenance Orders Act, 1989 (Act 6 of 1989)',</p> <p>The amendment of section 44 by the substitution of subparagraph</p>

³ The whole of this Act has been repealed by section 313 of the Children's Act 38 of 2005 but this will only come into operation on a date to be fixed by the President by proclamation in the Gazette.

		<p>(1) with the following paragraph;</p> <p>‘A contribution order and a provisional contribution order made under this Chapter shall have the effect, respectively, of a maintenance order and of a provisional maintenance order in terms of the Reciprocal Enforcement of Maintenance Orders Act, 1989 (Act 6 of 1989).’</p>
Act 38 of 2005	Children’s Act, 2005	<p>The amendment of section 162 by the substitution of subsection (2)(1)(b) with the following paragraph;</p> <p>‘a provisional contribution order maybe made by a children’s court having jurisdiction in terms of subsection (1)(b) against a respondent resident in a designated country within the meaning of section one of the Reciprocal Enforcement of Maintenance Orders Act, 1989 (Act 6 of 1989).’</p> <p>The amendment of section 163 by the substitution in subsection (1), of the expression ‘Reciprocal Enforcement of Maintenance Orders Act, 1963 (Act 80 of 1963)’ with the expression, ‘Reciprocal Enforcement of Maintenance Orders Act, 1989 (Act 6 of 1989).’</p>

ANNEXURE H**MODEL FOR SOUTH AFRICA OF A BILATERAL CONVENTION BETWEEN TRADING PARTNERS PROVIDING FOR THE RECIPROCAL RECOGNITION AND ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS****CONVENTION BETWEEN THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AND CANADA**

The Government of Great Britain and Northern Ireland and the Government of Canada, Desiring to provide on the basis of reciprocity for the recognition and enforcement of judgments in civil and commercial matters, have agreed as follows:

PART I**Definitions****Article I**

In this Convention

- (a) "appeal" includes any proceeding by way of discharging or setting aside a judgment or an application for a new trial or a stay of execution;
- (b) "the 1968 Convention" means the Convention of 27th September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters as amended;
- (c) "court of a Contracting State" means
 - (i) in relation to the United Kingdom, any court of the United Kingdom or of any territory to which this Convention extends pursuant to Article XIII;
 - (ii) in relation to Canada, the Federal Court of Canada or any court of a province or territory to which this Convention extends pursuant to Article XII
 and the expressions "court of the United Kingdom" and "court of Canada" shall be construed accordingly;
- (d) "judgment" means any decision, however described (judgment, order and the like), given by a court in a civil or commercial matter, and includes an award in proceedings on an arbitration if the award has become enforceable in the territory of origin in the same manner as a judgment given by a court in that territory;
- (e) "judgment creditor" means the person in whose favour the judgment was given, and includes his executors, administrators, successors and assigns;

- (f) "judgment debtor" means the person against whom the judgment was given and includes any person against whom the judgment is enforceable under the law of the territory of origin;
- (g) "original court" in relation to any judgment means the court by which the judgment was given;
- (h) "registering court" means a court to which an application for the registration of a judgment is made;
- (i) "territory of origin" means the territory for which the original court was exercising jurisdiction.

PART II

Scope of the Convention

Article II

1. Subject to the provisions of this Article, this Convention shall apply to any judgment given by a court of a Contracting State after the Convention enters into force and, for the purposes of Article IX, to any judgment given by a court of a third State which is party to the 1968 Convention.
2. This Convention shall not apply to;
 - (a) orders for the periodic payment of maintenance;
 - (b) the recovery of taxes, duties or charges of a like nature or the recovery of a fine or penalty;
 - (c) judgments given on appeal from decisions of tribunals other than courts;
 - (d) judgments which determine
 - (i) the status or legal capacity of natural persons;
 - (ii) custody or guardianship of infants;
 - (iii) matrimonial matters;
 - (iv) succession to or the administration of the estates of deceased persons;
 - (v) bankruptcy, insolvency or the winding up of companies or other legal persons;
 - (vi) the management of the affairs of a person not capable of managing his own affairs.
3. Part III of this Convention shall apply only to a judgment whereby a sum of money is made payable.
4. This Convention is without prejudice to any other remedy available to a judgment creditor for the recognition and enforcement in one Contracting State of a judgment given by a court of the other Contracting State.

PART III**Enforcement of Judgments****Article III**

1. Where a judgment has been given by a court of one Contracting State, the judgment creditor may apply in accordance with Article VI to a court of the other Contracting State at any time within a period of six years after the date of the judgment (or, where there have been proceedings by way of appeal against the judgment, after the date of the last judgment given in those proceedings) to have the judgment registered, and on any such application the registering court shall, subject to such simple and rapid procedures as each Contracting State may prescribe and to the other provisions of this Convention, order the judgment to be registered.

2. In addition to the sum of money payable under the judgment of the original court including interest accrued to the date of registration, the judgment shall be registered for the reasonable costs of and incidental to registration, if any, including the costs of obtaining a certified copy of the judgment from the original court.

3. If, on an application for the registration of a judgment, it appears to the registering court that the judgment is in respect of different matters and that some, but not all, of the provisions of the judgment are such that if those provisions had been contained in separate judgments those judgments could properly have been registered, the judgment may be registered in respect of the provisions in respect of the provisions aforesaid but not in respect of any other provisions contained therein.

4. Subject to the other provisions of this Convention

(a) a registered judgment shall, for the purposes of enforcement, be of the same force and effect,

(b) proceedings may be taken on it, and

(c) the registering court shall have the same control over its enforcement, as if it had been a judgment originally given in the registering court with effect from the date of registration.

Article IV

1. Registration of a judgment shall be refused or set aside if

(a) the judgment has been satisfied;

(b) the judgment is not enforceable in the territory of origin;

(c) the original court is not regarded by the registering court as having jurisdiction;

(d) the judgment was obtained by fraud;

(e) enforcement of the judgment would be contrary to public policy in the territory of the registering court;

(f) the judgment is a judgment of a country or territory other than the territory of origin which has been registered in the original court or has become enforceable in the territory of origin in the same manner as a judgment of that court; or

(g) in the view of the registering court the judgment debtor either is entitled to immunity from the jurisdiction of that court or was entitled to immunity in the original court and did not submit to its jurisdiction.

2. The law of the registering court may provide that registration of a judgment may or shall be set aside if

(a) the judgment debtor, being the defendant in the original proceedings, either was not served with the process of the original court or did not receive notice of those proceedings in sufficient time to enable him to defend the proceedings and, in either case, did not appear;

(b) another judgment has been given by a court having jurisdiction in the matter in dispute prior to the date of judgment in the original court; or

(c) the judgment is not final or an appeal is pending or the judgment debtor is entitled to appeal or to apply for leave to appeal against the judgment in the territory of origin.

3. If at the date of the application for registration the judgment of the original court has been partly satisfied, the judgment shall be registered only in respect of the balance remaining payable at that date.

4. A judgment shall not be enforced so long as, in accordance with the provisions of this Convention and the law of the registering court, it is competent for any party to make an application to have the registration of the judgment set aside or, where such an application is made, until the application has been finally determined.

Article V

1. For the purposes of Article IV(1)(c) the original court shall be regarded as having jurisdiction if

(a) the judgment debtor, being a defendant in the original court, submitted to the jurisdiction of that court by voluntarily appearing in the proceedings;

(b) the judgment debtor was plaintiff in, or counterclaimed in, the proceedings in the original court;

(c) the judgment debtor, being a defendant in the original court, had before the commencement of the proceedings agreed, in respect of the subject matter of the

proceedings, to submit to the jurisdiction of that court or of the courts of the territory of origin;

(d) the judgment debtor, being a defendant in the original court, was at the time when the proceedings were instituted habitually resident in, or being a body corporate had its principal place of business in, the territory of origin;

(e) the judgment debtor, being a defendant in the original court, had an office or place of business in the territory of origin and the proceedings were in respect of a transaction effected through or at that office or place; or

(f) the jurisdiction of the original court is otherwise recognised by the registering court.

2. Notwithstanding anything in sub-paragraphs (d), (e) and (f) of paragraph (1), the original court shall not be regarded as having jurisdiction if

(a) the subject matter of the proceedings was immovable property outside the territory of origin; or

(b) the bringing of the proceedings in the original court was contrary to an agreement under which the dispute in question was to be settled otherwise than by proceedings in the courts of the territory of origin.

PART IV

Procedures

Article VI

1. Any application for the registration in the United Kingdom of a judgment of a court of Canada shall be made

(a) in England and Wales, to the High Court of Justice;

(b) in Scotland, to the Court of Session;

(c) in Northern Ireland, to the High Court of Justice.

2. Any application for the registration in Canada of a judgment of a court of the United Kingdom shall be made

(a) in the case of a judgment relating to a matter within the competence of the Federal Court of Canada, to the Federal Court of Canada;

(b) in the case of any other judgment, to a court of a province or territory designated by Canada pursuant to Article XII.

3. The practice and procedure governing registration (including notice to the judgment debtor and applications to set registration aside) shall, except as otherwise provided in this Convention, be governed by the law of the registering court.

4. The registering court may require that an application for registration be accompanied by

- (a) the judgment of the original court or a certified copy thereof;
- (b) a certified translation of the judgment, if given in a language other than the language of the territory of the registering court;
- (c) proof of the notice given to the defendant in the original proceedings, unless this appears from the judgment; and
- (d) particulars of such other matters as may be required by the rules of the registering court.

Article VII

All matters concerning

- (a) the conversion of the sum payable under a registered judgment into the currency of the territory of the registering court, and
- (b) the interest payable on the judgment with respect to the period following its registration, shall be determined by the law of the registering court.

PART V

Recognition of Judgments

Article VIII

Any judgment given by a court of one Contracting State for the payment of a sum of money which could be registered under this Convention, whether or not the judgment has been registered, and any other judgment given by such a court, which if it were a judgment for the payment of a sum of money could be registered under this Convention, shall, unless registration has been or would be refused or set aside on any ground other than that the judgment has been satisfied or could not be enforced in the territory of origin, be recognised in a court of the other Contracting State as conclusive between the parties thereto in all proceedings founded on the same cause of action.

PART VI

Recognition and Enforcement of Third State Judgments

Article IX

1. The United Kingdom undertakes, in the circumstances permitted by Article 59 of the 1968 Convention, not to recognise or enforce under that Convention any judgment given in a third State which is a Party to that Convention against a person domiciled or habitually resident in Canada.
2. For the purposes of paragraph (1)

(a) an individual shall be treated as domiciled in Canada if and only if he is resident in Canada and the nature and circumstances of his residence indicate that he has a substantial connection with Canada; and

(b) a corporation or association shall be treated as domiciled in Canada if and only if it is incorporated or formed under a law in force in Canada and has a registered office there, or its central management and control is exercised in Canada.

PART VII

Final Provisions

Article X

This Convention shall not affect any conventions, international instruments or reciprocal arrangements to which both Contracting States are or will be parties and which, in relation to particular matters, govern the recognition or enforcement of judgments.

Article XI

Either Contracting State may, on the exchange of instruments of ratification or at any time thereafter, declare that it will not apply the Convention to a judgment that imposes a liability which that State is under a treaty obligation toward any other State not to recognise or enforce. Any such declaration shall specify the treaty containing the obligation.

Article XII

1. On the exchange of instruments of ratification, Canada shall designate the provinces or territories to which this Convention shall extend and the courts of the provinces and territories concerned to which application for the registration of a judgment given by a court of the United Kingdom may be made.

2. The designation by Canada may be modified by a further designation given at any time thereafter.

3. Any designation shall take effect three months after the date on which it is given.

Article XIII

1. The United Kingdom may at any time while this Convention is in force declare that this Convention shall extend to the Isle of Man, any of the Channel Islands, Gibraltar or the Sovereign Base Areas of Akrotiri and Dhekelia (being territories to

which the 1968 Convention may be applied pursuant to Article 60 of that Convention).

2. Any declaration pursuant to paragraph (1) shall specify the courts of the territories to which application for the registration of a judgment given by a court of Canada shall be made.

3. Any declaration made by the United Kingdom pursuant to this Article may be modified by a further declaration given at any time thereafter.

4. Any declaration pursuant to this Article shall take effect three months after the date on which it is given.

Article XIV

1. This Convention shall be ratified; instruments of ratification shall be exchanged at London.

2. This Convention shall enter into force three months after the date on which instruments of ratification are exchanged.

3. This Convention may be terminated by notice in writing by either Contracting State and it shall terminate three months after the date of such notice.