SOUTH AFRICAN LAW REFORM COMMISSION

DISCUSSION PAPER 106

PROJECT 121

CONSOLIDATED LEGISLATION PERTAINING TO INTERNATIONAL CO-OPERATION IN CIVIL MATTERS

Closing date for comments:
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INTRODUCTION

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

The members of the Commission are –

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PREFACE

This discussion paper has been prepared to elicit responses from interested parties and to serve as a basis for the Commission's deliberations. Following an evaluation of the responses and any final deliberations on the matter, the Commission may issue a report on this subject which will be submitted to the Minister of Justice for tabling in Parliament.

The views, conclusions and recommendations in this paper are not to be regarded as the Commission's final views. The paper is published in full so as to provide persons and bodies wishing to comment or to make suggestions for the reform of this particular branch of the law with sufficient background information to enable them to place focused submissions before the Commission.

The Commission will assume that respondents agree to the Commission quoting from or referring to comments and attributing comments to respondents, unless representations are marked confidential. Respondents should be aware that the Commission may in any event be required to release information contained in representations under the Promotion of Access to Information Act 2 of 2000.

Respondents are requested to submit written comments, representations or requests to the Commission by **30 September 2004** at the address appearing on the previous page. Requests for information and administrative enquiries should be addressed to the Secretary of the Commission or the researcher allocated to this project, Ms S Govender.

SUMMARY OF RECOMMENDATIONS

1. Service of process abroad

1.1 The procedures laid down in the Reciprocal Service of Civil Process Act 12 of 1990 should be made applicable to requests from and to all states.

1.2 In order to secure a better guarantee that process emanating from our courts will be served abroad, South Africa should accede to the Hague Convention on the Service Abroad of Judicial and Extra-judicial Documents in Civil and Commercial Matters (1965). When ratifying the Convention a reservation should be entered to state that precedence will be given to the procedures of South African domestic law and that South African courts retain a residual right to determine whether any documents in question serve the ends of civil or criminal justice.

2. Taking evidence abroad

2.1 To assist foreign litigants seeking evidence within South Africa, new legislation is necessary to consolidate this area of law and to provide a uniform procedure with minimal bureaucratic intervention. All requests for evidence should be subject to the procedures available under the Foreign Courts Evidence Act 80 of 1962.

2.2 In order to assist South African litigants to obtain evidence abroad the Hague Convention on Taking of Evidence in Civil or Commercial Matters (1970) must be incorporated into South African domestic law. South Africa entered a reservation to the Convention which excluded letters of request for pre-trial discovery of documents (as is permitted in certain common-law jurisdictions). The legislation incorporating the Convention should specify the implications of this reservation by stating that our courts will not comply with foreign requests unless they are compatible with the South African Bill of Rights. A provision should also be inserted amending sections 1(1)(b) and 1D of the Protection of Businesses Act 99 of 1978 to state that the ‘central authority’ may

refuse compliance with a request to obtain evidence on the grounds that South African sovereignty or security will be violated.

3. Recognition and enforcement of foreign judgments under the common law

3.1 Legislation is necessary to indicate that the original cause of action is extinguished and merged with the foreign judgment, thereby preventing judgment creditors from suing either on the former or the latter at their option.

3.2 For purposes of the common law, a foreign judgment should be defined as 'a judicial determination of a civil or commercial claim, however labelled, in adversarial proceedings'.

3.3 Although our courts should be discouraged from re-examining foreign judgments, they must be allowed to pronounce on the validity of these judgments in certain cases, notably where the original court lacked any jurisdiction to hear a dispute. The forum should not, however, be entitled to investigate minor procedural defects, which do not completely nullify judgments. The discretionary nature of this analysis suggests that legislative provision is not possible.

3.4 If a foreign judgment conflicts with another judgment between the same parties on the same cause of action, whether given in South Africa or elsewhere, legislation is needed to indicate which judgment should prevail. Comment would be appreciated on whether preference should be given to the earlier or later judgment.

3.5 If a foreign judgment was given in a foreign currency, which must then be converted into rands, the forum should be given a discretion in determining the date for conversion. Legislation is needed to indicate that South African courts may depart from the common-law rule that the date for converting is the date of payment.

3.6 The courts need clear statutory authority to enforce non-monetary judgments.

3.7 With regard to the international competence of foreign courts:

3.7.1 Legislative provision is needed to determine the international competence of courts in federal states.

3.7.2 The number and definition of the connecting factors considered appropriate to establish international competence need to be clarified. Residence and submission will clearly suffice but comment would be appreciated on whether domicile and nationality should also be included.

3.7.3 The concept of residence for juristic persons must be expanded to include the principal place of business and possibly even the place of business, provided that the cause of action arose within the same area.

3.7.4 Once it is clear that South African courts may enforce both monetary and non-monetary judgments, legislation must be enacted providing grounds of international competence in cases of commercial judgments that operate ***in rem***. In particular, it must be provided that the ***forum rei sitae*** has exclusive jurisdiction in actions involving rights to property.

3.7.5 The Prescription Act must be amended to provide that, in the event of a conflict between the prescription periods for a judgment under the law of the state in which it was given and South African law, the shortest period shall prevail.

3.7.6 The Protection of Businesses Act 99 of 1978 must be amended to remove the provisions which make enforcement of foreign judgments a matter of ministerial discretion. Instead, provision should be made to allow the Minister to intervene only in circumstances when enforcement of a judgment poses a serious threat to the security or economy of South Africa or constitutes an undue penalty for the judgment debtor.

4. Enforcement of maintenance orders

4.1 South Africa should accede to the Hague Convention concerning Recognition and Enforcement of Decisions Relating to Maintenance towards Children (1958), and the Hague Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations (1973).

4.2 The enforcement of maintenance obligations should not be regulated by two different statutes. The Reciprocal Enforcement of Maintenance Orders (Countries of Africa) Act 6 of 1989 should be preferred over the Reciprocal Enforcement of Maintenance Orders Act 80 of 1963, although amended to preserve designations already made under the 1963 Act and to exclude the requirement of reciprocal treatment when designating new states in the future. Once South Africa accedes to the Hague Conventions, further amendments to the 1989 Act may be necessary.

5. Recognition and enforcement of foreign civil judgments under statutory law

5.1 The Foreign Civil Judgments Act 32 of 1988 appears to be working satisfactorily, and it should therefore be maintained.

5.2 The common law action should be retained as a residual basis for recognizing and enforcing foreign judgments.

5.3 The Foreign Civil Judgments Act must be amended to provide that the High Court is entitled to register foreign judgments. The following additional changes to the Act are necessary:

5.3.1 The concept of judgment must be redefined so as to allow for the enforcement of non-monetary judgments.

5.3.2 Residence of juristic persons, as a ground of international competence, should be redefined so as to include central administration or ‘statutory seat’.

5.3.3 Comment would be appreciated on what grounds of international competence should be deemed acceptable under the Act.

5.3.4 The defence of failure of natural justice must be more clearly defined.

5.3.5 The defence of public policy should be allowed to stand unqualified since an elastic concept in this regard may facilitate arguments based on the Bill of Rights.

5.3.6 Comment would be appreciated on whether the defence of fraud concept should also be left unqualified, thereby allowing the courts freedom to review any allegation of fraud.

5.3.7 A provision is needed to determine under which law a judgment has lapsed.

5.3.8 Provision must be made for a defence of ***lis pendens***.

6. International judicial co-operation and the consolidation of legislation

6.1 South Africa must be committed to a policy of international judicial co-operation.

6.2 All matters of international judicial co-operation should not be dealt with in a single enactment. In particular, statutes governing enforcement of maintenance orders and other civil judgments should not be combined. Further consideration should, nonetheless, be given to combining statutes on service of process, taking evidence abroad and the recognition and enforcement of judgments in a single Act.

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Alley and Prescott (1989) 2 **Leiden J Intl Law** 34

Alley ER and Prescott D 'Recent developments in the United States under the Hague Evidence Convention' (1989) 2 **Leiden Journal of International Law** 34

Berger and Kessedjian **The New German Arbitration Law**

Berger KP and Kessedjian C **The New German Arbitration Law in International Perspective: Jurisdiction and Foreign Judgments in Civil and Commercial Matters** The Netherlands Forum Internationale, Kluwer, 2000

Borchers (1992) 40 **Am J Comp L** 128

Borchers PJ 'Comparing personal jurisdiction in the United States and the European Community: lessons for American reform' (1992) 40 **American Journal of Comparative Law** 128

Briggs **Conflict of Laws**

Briggs A **The Conflict of Laws** Oxford University Press 2002

Castell and Walker **Canadian Conflict of Laws**

Castell J-G and Walker J **Canadian Conflict of Laws** 5th edition Toronto: Butterworths 2003

Clarkson and Hill **Conflict of Laws**

Clarkson CMV and Hill J **Jaffey on the Conflict of Laws** 2nd edition London: Butterworths 2002

Collins (ed) **International Litigation and Conflict of Laws**

Collins L (ed) **Essays in International Litigation and the Conflict of Laws** Oxford: Clarendon Press 1994

Collins et al (ed) **Conflict of Laws**

Collins L et al (ed) **Dicey & Morris on the Conflict of Laws** 13th edition London: Stevens 2000 (Volume 2)

Edwards Vol 2 Part 2 **LAWSA**

Edwards AB 'Conflict of Laws' in Vol 2 Part 2 of **The Law of South Africa** edited by W A Joubert (Updated by Ellison Kahn) 2nd edition Durban: Butterworths, 2003

Forsyth **Private International Law**

Forsyth CF **Private International Law** 4th edition Cape Town: Juta 2003

Garb and Lew **Enforcement of Foreign Judgments**

Garb L and Lew J **Enforcement of Foreign Judgments** The Hague: Kluwer 2002

Hahlo (1969) 86 **SALJ** 354

Hahlo HR 'Finality of foreign default judgments' (1969) 86 **South African Law Journal** 354

Hay (1992) 40 **Am J Comp L** 1001

Hay P 'The recognition and enforcement of American money-judgments in Germany' (1992) 40 **American Journal of Comparative Law** 1001

Huber **Heedendaegse Rechtsgeleertheyt**

Huber U **Heedendaegse Rechtsgeleertheyt** 1768 (translated by P Gane) Durban: Butterworths 1939

Juenger (1988) 36 **Am J Comp L** 1

Juenger FK 'Recognition of money judgments in civil and commercial matters' (1988) 36 **American Journal of Comparative Law** 1

Kerameus (2001) 16 **IECL** 1

Kerameus KD 'Enforcement Proceedings' Ch10 Civil Procedure (2001) 16 **International Encyclopedia of Comparative Law** 1 Tübingen: Mohr Siebeck

Kahn **Husband and Wife**

Kahn E HR Hahlo in **South African Law of Husband and Wife** 4th edition Cape Town: Juta 1975

Lee **Consular Law and Practice**

Lee LT **Consular Law and Practice** 2nd edition Oxford: Clarendon Press 1991

Leon (1983) 16 **CILSA** 325

Leon PSG 'Roma non locuta est: the recognition and enforcement of foreign judgments in South Africa' (1983) 16 **Comparative and International Law Journal of Southern Africa** 325

Lipstein (1993) 42 **ICLQ** 553

Lipstein K **'**One hundred years of Hague Conferences on Private International Law' (1993) 42 **International and Comparative Law Quarterly** 553

Lowe (1981) 75 **Am J Comp L** 257

Lowe AV 'Blocking extraterritorial jurisdiction: the British Protection of Trading Interests Act, 1980' (1981) 75 **American Journal of International Law** 257

McClean (1992 II) **Recueil des Cours** 276

McClean JD 'The contribution of the Hague Conventions to the development of private international law in common law countries' (1992 II) **Recueil des Cours** 276

North (1981) 6 **Dalhousie L J** 417

North P 'Hague Conventions and the reform of English conflict of laws' (1981) 6 **Dalhousie Law Journal** 417

Nygh and Davies **Conflict of Laws in Australia**

Nygh PE and Davies M **Conflict of Laws in Australia** 7th edition Sydney: Butterworths 2000

Pistorius **Pollak on Jurisdiction**

Pistorius D **Pollak on Jurisdiction** 2nd edition Cape Town: Juta 1993

Pitofsky (1999) 2 **J Int Economic L** 403

Pitofsky R 'Competition policy in a global economy – today and tomorrow' (1999) 2 **Journal of International Economic Law** 403

Pollak **South African Law of Jurisdiction**

Pollak W **The South African Law of Jurisdiction** Johannesburg: Hortors Ltd 1937

Radvan (1984) 16 **New York Univ J Int Law & Politics** 1031

Radvan M 'The Hague Convention on Taking Evidence Abroad' (1984) 16 **New York University Journal of International Law & Politics** 1031

Rosenberg, Hay and Weintraub **Conflict of Laws**

Rosenberg M, Hay P and Weintraub RJ **Conflict of Laws: cases and materials** 10th edition Westbury NY: Foundation Press 1996

Scoles and Hay et al **Conflict of Laws**

Scoles EF and Hay P et al **Conflict of Laws** 3rd edition St. Paul, Minn.: West Group 2000

Silberberg **Recognition and Enforcement of Foreign Judgments**

Silberberg H **The Recognition and Enforcement of Foreign Judgments in South Africa** Institute of Foreign and Comparative Law UNISA, Pretoria 1978

Spiro (1967) 84 **SALJ** 295

Spiro E 'Jurisdiction by consent' (1967) 84 **South African Law Journal** 295

Spiro **Conflict of Laws**

Spiro E **The Conflict of Laws, being a collection of the author's articles on the subject brought up to date** Cape Town: Juta 1973

Spiro (1974) 7 **CILSA** 339

Spiro E 'Enforcement of a foreign judgment sounding in money against a fugitive from justice' (1974) 7 **Comparative and International Law Journal of Southern Africa** 339

Spiro **General Principles of the Conflict of Laws**

Spiro E **The General Principles of the Conflict of Laws** Cape Town: Juta 1982

Spiro **Law of Parent and Child**

Spiro E **Law of Parent and Child** 4th edition Cape Town: Juta 1985

Sutherland (1982) 31 **ICLQ** 784

Sutherland PF 'The use of the letter of request (or letter rogatory) for purpose of obtaining evidence for proceedings in England and abroad' (1982) 31 **International and Comparative Law Quarterly** 784

Szászy **Conflict of Laws**

Szászy I **Conflict of Laws in the Western, Socialist and Developing Countries** Leiden: Sijthoff 1974

Thomashausen (2002) 35 **CILSA** 26

Thomashausen A 'The enforcement and recognition of judgments and other forms of legal cooperation in the SADC' (2002) 35 **Comparative and International Law Journal of Southern Africa** 26

Van Leeuwen **Het Roomsch Hollansch Recht**

Van Leeuwen CFS **Het Roomsch Hollandsch Recht** (translated by Kotze C J) 2nd edition London

Vitta (1969) 1 **Recueil des Cours** 167

Vitta E International conventions and national conflict systems (1969) I **Recueil des Cours** 167

Voet **Commentary on the Pandects**

Voet J **Commentary on the Pandects** 1698-1704 (translated by P Gane) Durban: Butterworths 1955

Wolff **Private International Law**

Wolff M **Private International Law** 2nd edition Oxford: Clarendon Press, 1962

TABLE OF CASES

SOUTH AFRICA

Acutt Blaine & Co v Colonial Marine Insurance Co (1882) 1 SC 402

Alexander v Jokl & others 1948 (3) SA 269 (W)

Argos Fishing Co Ltd v Friopesca SA 1991 (3) SA 255 (Nm)

Bafokeng Tribe v Impala Platinum Ltd 1999 (3) SA 517 (B)

Barclays Bank of Swaziland v Mnyeti 1992 (2) SA 425 (W)

Beckett &Co Ltd v Kroomer Ltd 1912 AD

Benidai Trading Co Ltd v Gouws & Gouws (Pty) Ltd 1977 (3) SA 1020 (T)

Binga v Cabinet for SWA 1988 (3) SA 155 (A)

Bisonboard Ltd v K Braun Woodworking Machinery (Pty) Ltd 1991 (1) SA 482 (A)

Blanchard, Krasner & French v Evans 2001 (4) SA 86 (W)

Blanchard, Krasner & French v Evans 2002 (4) SA 144 (T)

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)

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

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 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 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 1983 (4) SA 112 (T)

Jaffe v Salmon 1904 TS 317

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

Jones v Krok 1995 (1) SA 677 (A)

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

Joosub v Taylor 1910 TPD 486

Kommissaris van Binnelandse Inkomste v Absa Bank Bpk 1995 (1) SA 653 (A)

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

Kruger NO v Boland Bank Bpk 1991 (1) SA 107 (T)

Krygkor Pensioenfonds v Smith 1993 (3) SA 459 (A)

Lenders v Lourenco Marques Wharf Co 1904 TH 176

Marendaz v Marendaz 1955 (2) SA 117 (C)

Minister of Native Affairs, ex parte 1941 AD 53

Minister of Transport, Transkei v Abdul 1995 (1) SA 366 (N)

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

National Director of Public Prosecutions & another v Mohamed NO & others 2003 (4) SA 1 (CC) 20

National Milling Co Ltd v Mohammed 1966 (3) SA 551 (R)

Pan American Airways Inc v SA Fire and Accident Insurance Co Ltd 1965 (3) SA 150 (A)

Pohlman & others v Van Schalkwyk & others 2001 (1) SA 690 (E)

Purser v Sales 2001 (3) SA 445 (SCA)

Reiss Engineer Co Ltd v Insamcor (Pty) Ltd 1983 (1) SA 1033 (A)

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

Rood's Trustee v Scott & De Villiers 1910 TS 47

Rosa's Heirs v Inhambane Sugar Estates 1905 TH 11

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

Russell v King (1909) 30 NLR 20

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)

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

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

Standard Bank of SA v Ocean Commodities 1980 (2) SA 175 (T)

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

S v Dolman 1970 (4) SA 467

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

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

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

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

Taylor v Hollard (1886) 2 SAR 78

Tradex Ocean Transportation SA v MV Silvergate 1994 (4) SA 121 (C)

Universal City Studios Inc & others v Network Video (Pty) Ltd 1986 (2) SA 734 (A)

Wolff NO v Solomon (1898) 15 SC 297

Zwyssig v Zwyssig 1997 (2) SA 467 (W)

AUSTRALIA

A-G (UK) v Heinemann Publishers Australia (1988) 165 CLR 30

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

CANADA

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 Int Legal Materials 1025

Nigerian Mask Case 22.6.1972 BGHZ 59

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 (1920) Ltd (1928) 44 TLR 746

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

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

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 323

Travers v Holley [1953] P 246

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)

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)

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 108 of 1996

Cross-border Insolvency Act 42 of 2000.

Domicile Act 3 of 1992

Electronic Communication and Transaction Act 25 of 2002

Enforcement of Foreign Civil Judgments Act 32 of 1988

Foreign Courts Evidence Act 80 of 1962

Magistrate’s 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

AUSTRALIA

Foreign Judgments Act of 1991

Foreign Proceedings (Excess of Jurisdiction) Act of 1984

CANADA

Foreign Extraterritorial Measures Act of 1985

Foreign Proceedings (Excess of Jurisdiction) Act RSC (1984)

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

(a) Background to the inquiry

1.1 In any legal action, because the losing party is unlikely to be willing to comply with the judgment, an enforcement procedure is a critical adjunct to the suit. This procedure will be frustrated, however, if the judgment debtor then absconds to another state, because considerations of sovereignty preclude execution of the award in that state. It is true that in certain countries a procedure of direct execution has now become available through developments in domestic and, more recently, in international law, but normally the judgment creditor must apply to a court in the foreign state for a special order of execution (generally termed an ***exequatur***) or have the case retried.

1.2 On 3 November 1999 the Directorate: International Affairs held a departmental workshop to discuss how South Africa could co-operate with foreign states to ensure the recognition and enforcement of foreign civil judgments. Concern about this matter arose from the mounting demand for South African courts to take account of foreign civil process and for foreign courts to take account of our process, a situation that has been brought about by the country's improved relationships with other states and our participation in such international organizations as the United Nations, the World Trade Organization and the Commonwealth.

1.3 A growth in cross-border trade inevitably leads to an increase in international civil disputes. These disputes spawn, in turn, 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 globalized business community, so as to contribute to 'the flow of wealth, skills and people across state lines in a fair and orderly manner'.[1]

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

1.4 Unfortunately the law on international judicial co-operation in South Africa has not kept abreast of commercial and political developments within the country, let alone within the international community. This deficiency has become a cause for growing concern among legal practitioners.

1.5 Currently our common law does not permit judgment creditors to execute foreign judgments directly in South Africa. A fresh action must be brought to have the judgment made into an order of a local court. South Africans experience similar difficulties in having their judgments enforced abroad. Countries in which an accelerated procedure would apply have first to give their consent and this must be negotiated in advance by the executive. Because of our blighted international relations during the apartheid era, however, we have very few agreements of this nature.

1.6 Apart from obvious gaps, our law on international judicial co-operation also suffers from fragmentation into a number of unrelated statutes. The enforcement of civil judgments, for instance, is dealt with in two different sets of statutes, the one set applicable to maintenance[2] and the other to ordinary commercial debts.[3]

1.7 In the case of service of process and the taking evidence abroad the situation is even worse: rules must be unearthed from a confusing array of statutes, rules of court and diplomatic practices.

1.8 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.

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

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

1.9 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.

1.10 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.[4] These conferences have been held regularly since 1893 and they provide 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). It is hoped that by becoming involved in this forum South Africa may accede to more of the Hague Conventions promoting international judicial co-operation.

(b) Scope of the inquiry

1.11 The investigation by the Law Reform Commission reviews the South African law, in particular the legislation, 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 is concerned only with civil and commercial matters. Questions about personal status (i.e., adoption, custody and guardianship), marriage (which includes divorce), revenue and criminal matters will not be considered.[5] Persons who have escaped prosecution or sentence in criminal proceedings are subject to extradition, either under bilateral treaties or, in the case of

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4 South Africa was the 59th state to participate.

5 Other topics, however, such as the influence of electronic communication (in particular, the Electronic Communication and Transaction Act 25 of 2002, which was raised by **Mr De la Harpe (University of Potchefstroom)** may be added to the inquiry as it progresses.

typically international crimes, such as drug dealing and aircraft hijacking, under multilateral conventions.[6]

1.12 Certain other matters have been excluded from the inquiry on the ground that they are self-contained topics already adequately provided for in existing legislation:[7] foreign orders of insolvency,[8] admiralty jurisdiction[9] and the administration of foreign deceased estates.[10] In addition, the enforcement of foreign arbitral awards, although an important method for settling commercial disputes,[11] was excluded because it has already been the subject of an intensive investigation by the Commission.[12] At the end of its investigation the Commission proposed a draft Bill which is expected to be enacted soon.

(c) The historical development of international judicial co-operation

1.13 The earliest manifestations of international judicial co-operation stretch back to antiquity where there is evidence of nations allowing foreign process to be served

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6 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.

7 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).

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

9 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.

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

11 Indeed, **Mr Malunga (University of Natal, Durban)**, in response to the Issue Paper, said that international arbitration and civil litigation should not be dealt with separately.

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

within their territories.[13] In the Roman empire and later in medieval Europe, however, the question of international co-operation did not arise. A uniform system of law applied - in Roman times, the ***ius civile*** or ***gentium*** and, in medieval times, the ***ius commune*** - and so the proceedings of one court would not be considered 'foreign' by another.[14]

1.14 With the gradual divergence of legal systems, however, and later with the emergence of the territorial state, considerations of sovereignty came to preclude the enforcement of judicial acts outside the borders of the state in which they were rendered. The objection was vividly expressed in an English case[15] where the plaintiff sought to enforce a judgment given by the court of a small Caribbean island, Tobago. 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 debtors resident abroad, they had to sue in the courts of the debtor's domicile. If they had already litigated on the claim they were forced to sue afresh.[16]

1.15 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 original court. The local court would regard this as sufficient authority to execute the judgment.[17]

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13 Sutherland (1982) 31 **ICLQ** at 785.

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

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

16 Juenger (1988) 36 **Am J Comp L** at 5-6.

17 Voet **Commentary on the Pandects** at 42.1.41.

1.16 In other parts of Europe, willingness to give effect to foreign process was much slower to develop. In France, for example, article 121 of the Code Michaut (1629) provided that foreign judgments were not binding on French subjects. Variations of this rule prevailed in France until 1964;[18] and in many of the legal systems influenced by French law, the same attitude persists.[19] Hence, in the 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.[20]

1.17 A straightforward refusal to pay any attention to foreign judicial acts, however, was rare and, in the seventeenth century, the general approach in Europe began to change. The new policy to emerge was comity.[21] This is a complex concept which implies neither absolute obligation nor mere courtesy. It does, however, suggest deference to foreign interests with a view to co-operation.[22]

1.18 As a reason for enforcing the writs and judgments of other states, comity may easily be seen to entail reciprocity: courts in state A will enforce the judgments given

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18 With the famous *Munzer* decision of 7 January 1964 *Cour de Cassation civile 1re*. 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 persists.

19 A former example was the Netherlands, where article 431(1) of the 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 by the Dutch courts. The Supreme Court, however, progressively interpreted these provisions so that judicial practice came to resemble early English law.

20 In practice, however, French courts very rarely altered foreign decisions.

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

22 Silberberg **Recognition and Enforcement of Foreign Judgments** at 3.

by courts in 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. By the nineteenth century the same principle had spread to certain Anglophone jurisdictions and it formed the basis of **Hilton v Guyot**,[23] a famous decision of the United States Supreme Court.

1.19 Compared with the insular attitude of the civil-law jurisdictions, legal systems based on the common law have been remarkably liberal towards foreign judgments. English courts in the seventeenth century, for instance, were talking about the ***ius gentium*** requiring international assistance in the administration of justice and comity came to exercise a powerful force (although it was not interpreted to mean reciprocity).[24]

1.20 In 1842, however, 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. When judgment creditors sued, however, 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.

1.21 Somewhat later **Schibsby v Westenholz**[26] took this reasoning a stage further.

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23 159 US 113 (1895).

24 Reciprocity became relevant in **Travers v Holley** [1953] P 246 with respect to the recognition of matrimonial judgments. Thus, an 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** 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.

It disavowed comity as the basis for recognizing judgments and said 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]

1.22 The implications of the obligation theory for English law were profound. First, a foreign judgment could be enforced by an ordinary action without the need for executive intervention or the re-examination of the merits (the *révision au fond* of French law). Secondly, English courts accepted foreign judgments as binding proof of debts. Formerly it had been necessary to call fresh evidence to establish the existence of a right adjudicated abroad, but this rule changed with the obligation theory, which ushered in the defence of issue estoppel. 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.[28]

1.23 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 could not be considered perfect, however, because a series of treaties entered into with different states over a period of time creates a web of complex, and often inconsistent, obligations.

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27 Silberberg (***op cit*** at 3); Spiro **Conflict of Laws** 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.

28 **Godard v Gray** LR 6 QB 139 (1870). Previously, English courts worked with a fiction that foreign courts were not courts of record. Hence, foreign judgments could be treated as no more than ***prima facie*** evidence of a debt, and thus subject to being re-opened in the forum. See Nygh & Davies **Conflict of Laws in Australia** at 9.24.

1.24 Multilateral conventions not only have a much wider reach but they also have the advantage of bringing certainty and uniformity to international relations. A good reason for concluding such conventions exists whenever states are bound together by common social, political and economic interests into a regional grouping. The Montevideo Convention,[29] which links several states in South America, is a case in point and so too is the so-called Brussels regime in Europe. The latter is a product of Western European integration after the Second World War.

1.25 The Treaty of Rome, which created the European Economic Community, obliged members to harmonize their laws and an early goal was harmonization of rules on service of process, jurisdiction and the enforcement of judgments. (The current Brussels Convention and the Council Regulation are examined in more detail below.)[30]

1.26 Without the stimulus of a regional grouping, divisions in legal tradition pose a formidable obstacle to international co-operation. Since 1893 this issue has engaged private international lawyers in a series of conferences held at The Hague.[31] As a result of the discussions here, more than thirty conventions have appeared on various aspects of private international law.[32]

1.27 Major items on the agenda of the very first Hague Conference were service of process and taking evidence abroad. The two conventions which followed in 1896 and 1905 were highly successful[33] and they lasted until 1954 when, in the wake of the Second World War, they were replaced by a new, composite convention. In the

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29 On the Extraterritorial Validity of Foreign Judgments and Arbitral Awards (1979). This Convention, which binds Argentina, Brazil, Colombia, Ecuador, Mexico, Paraguay, Peru, Uruguay and Venezuela, is supplemented by the La Paz Convention on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgments (1984).

30 Paras 4.22 – 4.34 below.

31 Lipstein (1993) 42 **ICLQ** at 553.

32 See http://www.hcch.net.

33 Although limited to the states of continental Europe.

1960's, when states with common-law legal systems began to participate in the Hague Conferences, the 1954 Convention had to be adjusted. It was therefore modified and split into the two current Conventions on Service Abroad of Judicial Documents (1965) and Taking Evidence Abroad (1970).

1.28 Efforts at The Hague to secure a convention on the recognition and enforcement of foreign judgments, however, have been less successful. The drive began in 1925 at the Fifth Hague Conference where many problems were posed[34] but only a brief Convention ensued.[35] It was too generalized to attract much support[36] and forty years later a more substantial Convention (and Protocol) appeared on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters (1971). This too, however, was poorly received (by only Cyprus, the Netherlands and Portugal).[37]

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34 Most of which are still relevant to our law. Should accelerated procedures be available for judgments ***in rem***? Could submission be tacit? 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?

35 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.

36 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 (1992 II) **Recueil des Cours** at 276.

37 Hence, as **Ms T Kruger (Institute for International Trade Law, Leuven)** points out, the Convention is now irrelevant. Between the Netherlands and Portugal, its provisions have been replaced by the Brussels I Regulation. From June 2004 this will also be the case for Cyprus, when it joins the EU. 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. At least for ***inter partes*** dealings among members of the EU, the Brussels regime rendered efforts at the Hague redundant.

1.29 Work is, nonetheless, progressing. In 1992 the United States proposed to the Conference that work begin again[38] and in August 2000 a draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters appeared. (This text will be examined below.)

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[38] Kessedjian in Berger & Kessedjian **The New German Arbitration Law** at 45-6.

CHAPTER 2 - SERVICE OF DOCUMENTS AND TAKING OF EVIDENCE

(a) SERVICE OF DOCUMENTS

(i) Problem analysis

2.1 The law on service of documents has two major concerns. The first, which is a matter of domestic law, seeks to implement the ***audi alteram partem*** rule: litigation may not be instituted against an absent defendant who was not informed of the proceedings. A court must therefore be assured that the defendant received proper notice in order to prepare for trial.

2.2 The second concern, which is largely a matter of international law, regulates the mechanisms for transmitting documents to and from foreign states. A judicial order to serve process is a matter of public law and thus an act of sovereignty. As a result, its execution is confined to the territory over which the issuing court has authority. Through considerations of comity and reciprocity, however, whereby states assist one another so that legal actions are not defeated because certain parties happen to be abroad, extraterritorial implementation is made possible.

2.3 For purely domestic purposes, if a defendant is outside the area of a court's jurisdiction, proper service of the documents instituting legal proceedings requires leave of the court to sue by way of edictal citation.[1]

2.4 For service outside South Africa 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 must send them to the Director-General: Foreign Affairs or to a destination indicated by the Director-General for service abroad.[2]

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1 Rule 5(1) of the High Court Rules.

2 Rule 4 of the High Court Rules.

2.5 The actual service in the foreign country is deemed to be sufficient if it was effected by an official of the South African consular staff (assuming that we have consular relations with the country in question)[3] or by an officer of the department dealing with administration of justice in the foreign country.[4] In the case of Australia, Botswana, Finland, France, Hong Kong, Lesotho, Malawi, New Zealand, Spain, Swaziland, the United Kingdom or Zimbabwe, the service may be by an attorney, notary or other legal practitioner.[5]

2.6 Requests from foreign countries for service of documents in South Africa are governed by the High Court Act.[6] 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.[7]

2.7 The Reciprocal Service of Civil Process Act 12 of 1990 provides another method for securing service abroad. 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.[8] 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.[9] Unfortunately, this Act applies only to the former TBVC states (although there is no reason why others should not be designated).

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3 Third states, however, may perform consular functions on our behalf, if South Africa has no mission in a foreign country.

4 Rule 4(3) of the High Court Rules.

5 Rule 4(4) of the High Court Rules

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

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

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

9 Section 3 of Act 12 of 1990.

2.8 International co-operation in securing service abroad depends largely on a long-established international practice which is encoded in the Vienna Convention on Consular Relations (1963).[10] States may send documents to their diplomatic or consular missions abroad for service by officials in those missions and they must, in turn, allow foreign diplomats or consuls to effect service on nationals of the sending states. This entitlement is normally specified in the bilateral treaties establishing consular relations. South Africa is a party to the Vienna Convention[11] and so this practice is available in all cases where we have consular relations with foreign states.

(ii) Evaluation

2.9 The South African law on service both here and abroad is concerned mainly with 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.

2.10 It is noticeable that we have no provisions for service out of magistrates' courts. The Reciprocal Service of Civil Process Act 12 of 1990 provides a quicker procedure which is available in both the High Court and magistrates' courts but it currently applies only to the TBVC states.

2.11 South African law obviously has no concern with what a foreign system might regard as sufficient service. Our only interest is the extent to which we should allow foreigners freedom to effect service within our borders. Even in this regard, however,

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[10] Article 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).

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

it could be argued that sovereignty is not infringed by the mere giving of notice of trial and so prior authorization by treaty is unnecessary.[12]

2.12 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. Hence, a South African wanting to serve process abroad may well discover that we have no consulate in the country in question.

2.13 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 operation – it has been adopted by 39 states (plus ten non-member states) - and is an effective, internationally recognized procedure. Under this Convention, contracting parties are obliged to designate 'central authorities' for purposes of receiving and processing requests for service.[13] 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.[14] Alternatively, the parties may continue to effect service through their consular agents.[15]

2.14 The Convention expressly permits the posting of judicial documents to persons abroad via the appropriate judicial authorities of the state of destination.[16] It also permits contracting parties to agree to allow the service of documents through channels other than those provided for in the Convention.[17]

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12 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** at 289.

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

14 Article 5 of the Convention.

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

16 Article 10.

17 Article 11.

2.15 The two most important situations in which the Convention is not applicable are when the address of the person to be served is unknown[18] or when service would violate the sovereignty or security of the state of destination.[19]

2.16 As 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 defendant 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.[20] 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 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.[21]

2.17 Respondents to the Issue Paper generally favoured South Africa's accession to the Convention.[22] **Dr C F Forsyth** and **Ms C Jesseman (University of Cambridge)** noted, however, 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 the argument that procedures laid down in the Convention supersede domestic law,[23] or indeed, the traditional consular channels, substituted service or edictal citation.

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18 Article 1.

19 Article 13.

20 Article 15.

21 Article 16.

22 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)**.

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

2.18 The Convention expressly states that it is applicable only in civil or commercial matters.[24] Criminal matters and the associated documents are governed by an entirely different set of considerations.[25]

2.19 It should be noted, however, that the Convention does not specify the means for determining the nature of proceedings for which documents are to be served, namely, whether the determination is to be made by law of the requesting or requested state.[26]

(iii) Recommendations

2.20 Mere service of process constitutes a minimal violation of state sovereignty. Hence there is no reason why the Reciprocal Service of Civil Process Act 12 of 1990 should not be made applicable to all states. This Act has the advantage of applying to all courts and to requests for service from within and outside South Africa but it is currently of no use because it is applicable only to the former TBVC states. The major South African concern should be with sufficiency of service from our courts' point of view and this concern may be ensured by domestic legislation. Otherwise, we can have no particular objection to foreigners making use of our facilities for service of process from their courts.

2.21 South Africa should accede to the Hague Convention on the Service Abroad of Judicial and Extra-judicial Documents in Civil and Commercial Matters (1965), if only to secure a better guarantee that process emanating from our courts will in fact be served abroad. Because the Convention permits reservations,[27] we should take the

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24 In civil-law jurisdictions, matters of administrative law are also excluded.

25 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.

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

27 Although article 28 allows other parties to object.

opportunity to specify that precedence will be given to South African domestic law, together with the residual right to determine whether any documents in question serve the ends of civil or criminal justice.

(b) TAKING OF EVIDENCE

(i) Problem Analysis

2.22 If a party or court abroad wishes to obtain evidence available from witnesses present in South Africa, the Foreign Courts Evidence Act 80 of 1962 provides the procedures for complying with the request. (It is irrelevant whether the evidence will be used in a civil or criminal action.) An application must be lodged with a judge of the High Court. A similar provision allows applications to be made to magistrates by equivalent courts in Botswana, Lesotho, Malawi, Namibia, Swaziland and Zimbabwe.[28]

2.23 The court may then grant an order that a witness or witnesses be examined. It may refuse the order[29] only if furnishing the evidence will provide information in contravention of section 1 of the Protection of Businesses Act.[30] Witnesses may be subpoenaed in the usual way[31] and they are entitled to the privileges (and the fees and expenses) prescribed for magistrates' courts in South Africa.[32]

2.24 Another method is available to someone wanting to obtain evidence in South Africa under the High Court Act.[33] Here, provision is made for a foreign authority to 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 High Court

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

29 Section 2(2).

30 Act 99 of 1978.

31 Section 4 of the Act.

32 Section 5.

33 Section 33(1) of the Supreme Court Act 59 of 1959.

for submission to a judge in chambers.[34] A similar, but more cryptic, provision is contained in the Magistrates' Courts Act:[35] 'where it is expedient and consistent with the ends of justice', 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.

2.25 So far as the South African litigant is concerned, evidence available in a foreign state may be obtained only with the permission of that state.[36] South Africa obviously cannot oblige foreign courts to provide facilities for our litigants. The traditional method for obtaining such evidence is via our diplomatic and consular officers,[37] who are entitled to execute letters rogatory or evidentiary commissions in the receiving state. According to the common-law tradition, however, witnesses need to be present in court so that they can be fully cross-examined under oath. Hence, allowing a consul to gather evidence is not a popular option.[38]

2.26 The Hague Convention on the Taking Abroad of Evidence in Civil or Commercial Matters (1970) provides an obvious alternative to consular channels. This Convention obliges state parties to permit the taking of evidence within their borders. Although South Africa is party to the Convention,[39] it has not yet been incorporated into our domestic law.

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34 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) at 1096.

35 Section 53 of the Magistrates' Court Act 32 of 1944.

36 According to South African law, any evidence which happens to be available outside a 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 a 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.

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

38 Lee (***op cit*** at 290-1).

39 The date of accession was 8 July 1997, and the date of entry into force was 6 September 1997.

(ii) Evaluation

2.27 The first problem in our law is the confusing range of possibilities confronting the foreigner who wants to obtain evidence in South Africa: application may be made directly 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).[40] To simplify matters a uniform procedure is needed, applicable in all courts in South Africa.

2.28 The second problem is the preoccupation in South African law with applications by foreigners; the interests of South African litigants seem to have been neglected. Apart from co-opting the help of a South African consul, which may limit the range of foreign countries to those with which we have consular relations,[41] litigants in this country have no immediate access to evidence abroad. It is also not clear what law applies to regulate the methods for examining witnesses and the privileges they can claim.

2.29 The Hague Convention on the Taking of Evidence in Civil or Commercial Matters (1970) seeks to facilitate the international transmission and execution of letters of request for evidence. As **Dr C F Forsyth** and **Ms C Jesseman** remarked, the Convention 'represents a very positive step in international legal co-operation between nations which employ considerably different legal procedures'.[42] South Africa is now party to the Convention but, because it has not been incorporated into our domestic law, individuals in this country can claim no direct rights under it.[43] 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

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40 It seems that the court from which the application emanates need have no particular status.

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

42 Quoting Alley & Prescott (1989) 2 **Leiden J Int L** at 34.

43 **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).

Constitution or an Act of Parliament',[44] but we have no indication that the Hague Convention falls within this section.

2.30 The Convention provides two methods for obtaining evidence. The first is by a letter of request.[45] A litigant in judicial proceedings of a civil or commercial nature occurring in a state party may apply to a court in that state to have a request issued for evidence abroad. The litigant 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.[46] The court concerned may then request the foreign state to make its facilities available for obtaining testimony.[47]

2.31 In order to simplify the processing of these requests, states party to the Convention must indicate a central authority.[48] In South Africa's case the designated authority is the Director-General of the Department of Justice.[49]

2.32 The authorities in the requested state obtain the evidence in accordance with their own law.[50] In this case the method for compelling the attendance of witnesses[51] and the rules of privilege are governed by the law of the requested state.[52] A letter of

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44 Section 231(4) of the Constitution of the Republic of South Africa Act 108 of 1996.

45 Article 1.

46 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.

47 Article 1.

48 Article 2.

49 Paragraph 3 of Government Notice R1271 in ***Government Gazette*** 18316 of 3 October 1997.

50 Article 9.

51 Article 10.

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

request may be refused in only two situations: 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.[53]

2.33 The second method for obtaining evidence is through a special commission appointed by a requesting state but intended to operate in the requested state.[54] An official in the consular staff of the requesting state or some other duly appointed delegate may conduct this commission.[55] 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.[56] Witnesses may not be compelled to attend unless the requested state gives permission and, when doing so, it may impose such conditions as it considers necessary.[57] The only ground for refusing to allow a commission to operate is incompatibility with the law of the requested state.[58]

2.34 While it seems clear that South Africa should now implement the Convention, **Dr Forsyth** and **Ms Jesseman** drew attention to several problems. They noted that, when acceding, South Africa appended certain reservations.[59] The two most important were the exclusion of articles 15 and 16 which permit foreign diplomatic or consular officials in South Africa to take evidence from nationals of the states they represent (or the nationals of a third state) and (under article 23) the exclusion of letters of request for obtaining pre-trial discovery of documents, as is permitted in certain common-law jurisdictions.[60]

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53 Article 12.

54 Chapter II.

55 Article 16.

56 Article 21(d).

57 Articles 18 and 19.

58 Article 21(a).

59 Hague Conference on Private International Law at http://www.hcch.net/e/status/stat20e.html#za (accessed on 1 February 2003).

60 This article was inserted at the insistence of the United Kingdom.

2.35 By excluding articles 15 and 16 South Africa has, in effect, ensured reciprocal exclusions by all the other parties to the Convention. Thus South African consular officials will be barred from taking evidence in other states party.

2.36 The effect of excluding pre-trial discovery of documents is more complex. In South African law an order of discovery is generally permissible only when pleadings have been closed.[61] Discovery before an action has commenced constitutes a ***prima facie*** violation of section 14 of the Constitution,[62] namely, the right to privacy, which includes the right not to have homes, persons or property searched, possessions seized or the privacy of communications infringed. In addition, an interference with property constitutes a potential violation of s 25(1) which provides that '[n]o one may be deprived of property except in terms of law of general application'.

2.37 As a matter of exception to this general rule, South African courts may issue an Anton Piller order if an applicant can show that the items sought constitute vital evidence that will substantiate the cause of action and that there is a real fear that these items will be hidden, destroyed or removed by the time the matter is brought to trial.[63] In spite of the constitutional implications of these orders they have been allowed as justified limitations on the Bill of Rights.

2.38 The procedure for obtaining discovery orders poses yet another constitutional issue. Because urgent action is necessary and because secrecy must be preserved, applications for these orders are usually heard ***in camera*** by ***ex parte*** proceedings, without notice to the affected party. (Even non-litigants may be affected.)[64] Again,

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

62 Act108 of 1996.

63 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. The applicant must establish a ***prima facie*** cause of action against the respondent, which it intends to pursue; the respondent must be shown to have specific documents which are vital to substantiate the claim; and there must be a real apprehension that they will be hidden, destroyed or taken outside the court's jurisdiction.

64 **Krygkor Pensioenfonds v Smith** 1993 (3) SA 459 (A) at 469.

prima facie, this type of procedure offends section 34 of the South African Constitution, which requires disputes to be resolved 'in a fair public hearing'. Again, however, the procedure is deemed a justifiable limitation.[65]

2.39 In spite of the exceptions made for pre-trial discovery in our law, it is generally much more conservative than the law in the United States. The Federal Rules of Civil Procedure, for instance, allow courts to entertain applications for pre-trial discovery on terms which amount to 'fishing expeditions'. In other words, the courts will sanction 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'.[66] The evidence may include documents or depositions and may affect even third parties.

2.40 The effect of South Africa's reservation to the Hague Convention under article 23 is both too broad and too narrow. On the one hand, although it protects South African nationals from an American order of pre-trial discovery, they need no protection from foreign orders which were issued on terms similar to those applicable in our courts. On the other hand, the reservation does not necessarily cover so-called Mareva injunctions.

2.41 A Mareva injunction is an interlocutory order which may be issued ***pendente lite*** to restrain a defendant (and even a third party) from disposing of property so as to frustrate a potential plaintiff's action. The injunction functions, in effect, as an arrest of property and hence, according to our law, a court is competent to issue such an order only over property situated within its area of jurisdiction. Even so, South African courts are prepared to interdict persons resident within their areas of jurisdiction from transferring property situated elsewhere, even though the ***forum rei sitae*** will ultimately have to decide the rights to the property. In spite of the potential

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65 **National Director of Public Prosecutions & another v Mohamed NO & others** 2003 (4) SA 1 (CC) 20 at 30.

66 Rule 26(b)(1).

infringement of property rights under the Constitution, South African courts are prepared to grant Mareva injunctions in appropriate circumstances.[67]

2.42 If a South African court were to receive a letter requesting the implementation of a foreign Mareva injunction, granted on terms more generous than those allowed by our courts, it is not clear whether we would have grounds under the Hague Convention for refusing to comply. The only provision that seems relevant in the circumstances is an article providing that states are not bound to implement orders for provisional or protective measures.[68]

2.43 **Dr Forsyth** and **Ms Jesseman** also pointed out that the Convention is in conflict with South African legislation designed to block the enforcement of anti-trust and other such enactments in the United States. Section 1(1)(b) of the Protection of Businesses Act[69] 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. 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. If South Africa is to fulfill its international obligations, these provisions will have to be amended.

2.44 It should, in addition, be noted that because the Hague Convention regulates the taking of evidence in civil actions only, its application requires criminal actions to be clearly distinguished.[70] (As a matter of international practice, it is also agreed that the Convention does not apply to revenue and administrative matters.)[71] The

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67 **Pohlman & others v Van Schalkwyk & others** 2001 (1) SA 690 (E).

68 Article 1.

69 Act 99 of 1978.

70 Article 1.

71 Radvan (1984) 16 **New York Univ J of Int Law & Politics** at 1040-1.

Convention gives no indication, however, which law is to be applied in deciding what is civil or criminal.

2.45 It is also not clear whether the Convention takes precedence over the domestic laws of the state parties (a problem which was noted above in relation to the service of documents).[72] And finally, the Convention does not fully regulate the type of questions to be put to witnesses. Unrestricted questioning may be tantamount to a 'fishing expedition'.[73]

(iii) Recommendations

2.46 For the foreigner seeking evidence within South Africa, the range of statutory procedures is confusing. New legislation is required to consolidate and unify this area of law so as to provide a uniform procedure with minimal bureaucratic intervention. Because the Foreign Courts Evidence Act qualifies, its procedure should govern all requests.

2.47 At the same time, in order to assist South African litigants to obtain evidence abroad, we must incorporate the Hague Convention on Taking of Evidence in Civil or Commercial Matters (1970) into our domestic law.

2.48 Although we are already protected from the worst effects of requests for pre-trial discovery of documents, our courts may still find themselves liable to 'fishing expeditions' of dubious validity under our Constitution. We may also be asked to

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72 Paragraph 2.15 above. In this regard, **Dr Forsyth** and **Ms Jesseman** suggested that South Africa should continue to use supplementary bilateral agreements to facilitate international co-operation. Article 28 of the Convention, in fact, encourages such agreements.

73 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 *Int 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.

enforce Mareva-type injunctions aimed at preserving evidence situated in South Africa. Because the Convention permits only certain reservations, which South Africa has already in fact entered,[74] however, we have limited options if we now attempt to block foreign orders. Hence, when drafting legislation to incorporate the Convention, we may do no more than specify the implications of the reservations by stating that foreign requests will not be enforced unless they comply with our law.

2.49 The Protection of Businesses Act[75] poses different problems. The broad discretion given to the courts and the Minister of Economic Affairs could be invoked to refuse untoward requests for evidence but the Act clearly violates South Africa's international obligations under the Hague Convention. Thus, when the Convention is incorporated into our law, sections 1(1)(b) and 1D must be deleted in favour of a provision that will give the 'central authority' power to refuse compliance with a request on the grounds that South African sovereignty or security will be violated.[76]

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74 Article 33.

75 Act 99 of 1978.

76 This type of condition is permitted under article 13 of the Convention. The provisions of the Protection of Businesses Act are probably not permitted, because article 13 provides that a state party may not refuse to comply on the ground that 'its internal law would not permit the action upon which the application is based'.

CHAPTER 3 - RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS UNDER THE COMMON LAW

(a) INTRODUCTION

3.1. The Issue Paper indicated that the common-law procedures for enforcing foreign judgments were complex, expensive and time-consuming, with the implication that legislative reform was needed. Hence, before proceeding to consider the statutory procedures, we need a clear understanding of the common-law foundations.

3.2 The rules on this topic are awkwardly positioned in our legal system. In so far as they are deemed part of private international law, they fall within the sphere of private law. In so far as they are considered procedural, they are linked to the jurisdiction of the courts, and therefore fall within public law.[1]

3.3 The rules have also had the difficult task of reconciling two potentially conflicting goals. The first was to ensure that judgment creditors obtained what they sued for and the second was the principle of ***res judicata***:[2] once parties contested an issue they should be bound by the result and there should be no further litigation.[3]

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

3 ***Res judicata*** 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). The former maxim 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).

3.4 The early Dutch procedure of simply accepting letters requisitorial from the rendering court has, for a long time, been obsolete.[4] Instead, the current requirements in our common law have been heavily influenced by English law. These requirements (whether for judgments ***in rem*** or ***in personam***)[5] can be summarized as follows:

(i) The foreign court must have been 'internationally competent', which means that it must have exercised jurisdiction on grounds that our courts regard as appropriate.

(ii) The foreign judgment must have been final and conclusive;

(iii) It must not have been fraudulently obtained or have been contrary to our ideas of natural justice or public policy;

(iv) It must not have lapsed or have been satisfied;

(v) It must not have been based on a foreign penal, revenue or public law and

(vi) It must conform to the requirements of the Protection of Businesses Act 99 of 1978.

3.5 The judgment may be enforced by an ordinary action, and if it is for a liquidated sum of money, proceedings may be for provisional sentence.[6] The suit may also be for a declaratory order or a default judgment.[7] 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.[8]

3.6 The plaintiff must first establish that the foreign court was internationally competent. Although it should also, strictly speaking, establish the finality of the

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

5 A judgment operating ***in personam*** determines the rights and duties of the particular parties to an action, whereas a judgment ***in rem*** means an order affecting the rights and duties of third parties.

6 **Jones v Krok** 1995 (1) SA 677 (A) at 685. If the defendant wishes to contest the claim, he or she must pay the full amount, including the costs: Garb & Lew (***op cit*** at 2-2.4).

7 Edwards Vol 2 Part 2 **LAWSA** at para 344 p381.

8 These rules are summarized in Pistorius (***op cit*** at166-8).

judgment, this requirement is usually assumed once international competence is proved.[9] Thereafter the other requirements may be raised by the defendant as defences.

3.7 It follows that in practice plaintiffs need do no more than produce the foreign judgments in a duly authenticated form.[10] 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 within each state party is responsible for issuing certificates of authenticity (*apostilles*), thereby avoiding the 'chains of authentication' required by certain systems of law.

3.8 Although South African courts are prepared to enforce foreign judgments they will generally not give effect to the sovereign acts of other states. In keeping with the rules of public international law, these acts are operative only within the territory of the enacting state. For this reason South Africa will not enforce any judgment that purported to give effect, either directly or indirectly, to a foreign penal,[11] revenue[12] or other public law manifesting state sovereignty.[13] There is no reason, however, why our

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

10 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.

11 Penal in the sense that a fine in cash or kind accrues to the state: **Huntington v Attrill** [1893] AC 150 (PC).

12 **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.

13 For reasons of international comity, however, our courts will *recognize* such laws, when considering the validity of contractual and other private arrangements designed to evade the laws of friendly states. SeeHuber **Heedendaegse Rechtsgeleertheyt** at 1.3.20.

courts should not enforce the civil aspect of a foreign judgment if it can be severed from the criminal.[14]

3.9 While the categories of penal and revenue laws are well established in private international law, the category of 'other public law' is a relatively recent addition which is now made in English law (in line with the civil-law distinction between public and private law). It functions as a residual category to include any laws which manifest state sovereignty.[15] These are typically intended to protect a state's political or economic interests such as import/export regulations or price controls and prohibitions on monopolies.[16]

3.10 The enforcement of judgments must be distinguished from their recognition. The former term means the execution of a foreign judicial order through the machinery of the local court system whereas the latter means that a local court takes account of the fact that a foreign court already pronounced on an issue. While enforcement always requires recognition – and in some countries such as Germany, enforcement depends on recognition - the reverse is not necessarily true: a judgment may be recognized without being enforced. Declaratory orders and judgments dismissing claims, for example, do not require enforcement.[17]

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14 **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.

15 See, for example, **A-G of New Zealand v Ortiz** [1984] AC 1 at 20-24 and **A-G (UK) v Heinemann Publishers Australia** (1988) 165 CLR 30.

16 According to German law, the determining factor is the purpose rather than the nature of a law. Formerly, German courts refused the enforcement of all public laws on the ground that they were applicable only within the territory of the enacting states. Today, however, the public character of a law is no longer considered sufficient reason for not applying it, because so many public laws (for instance, rent controls) are designed to protect private interests. Instead, it is felt that enforcement should be denied only when a judgment is based on laws directly affecting state interests.

17 Silberberg (***op cit*** at 6).

3.11 Enforcement of a foreign judgment functions as a sword whereas recognition generally functions as a shield. In other words, the judgment may be used as a defence in an action between the same parties or even between the judgment creditor and a third party. The classic defences are ***lis pendens*** and ***res judicata***, and these may be invoked when the same plaintiff attempts to sue the same defendant on the same cause of action.

3.12 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'.[18]

(b) PROBLEM ANALYSIS

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

3.13 South African common law has never developed a particular doctrinal basis for the recognition and enforcement of foreign judgments although frequent reference is made of the principles of comity[19] and acquired rights.[20] The courts have frequently, however, drawn from English precedents, on the understanding that the enforcement

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18 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***.

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

20 **Commissioner of Taxes 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.

of foreign judgments is a matter of procedure and this is an area in which English law was considered authoritative.[21]

3.14 The problem with appropriating rules in this manner, however, is the possibility that they will be unsuited to their adoptive system. One such problem concerns a curious English rule - which seems to be a legacy of the obligation theory - that the original cause of action survives the foreign judgment. Previously the English courts held that even though they would enforce foreign judgments, those judgments did not merge with and abolish the original causes of action.[22] In consequence, judgment creditors had the option of suing in England either on the foreign judgment or on the original cause of action.

3.15 In the normal course of events it would be 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 sue still on the original cause of action. Similarly, a plaintiff who was dissatisfied with an award of damages could try to increase recovery in a new forum.

3.16 The rule allowing the original cause of action to survive persisted in England until it was abolished by statute.[23] It lingers, however, in other common-law jurisdictions, notably the United States,[24] and the question is whether it is also part of South African law.

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21 Spiro **General Principles of the Conflict of Laws** at 24.

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

23 By section 34 of the Civil Jurisdiction and Judgments Act 1982.

24 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.

i) The definition of judgment

3.17 The law on the recognition and enforcement of foreign judgments assumes that an order before the forum constitutes an acceptable form of judgment (which is binding on the parties or their privies).[25] Although our courts have never had occasion to consider this question,[26] we need a clear idea of what constitutes a foreign judgment. Various acts may come into contention: 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. For various reasons, mainly state sovereignty, not all of these acts are enforceable in our courts.

(iii) Validity of the judgment

3.18 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

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25 As to who is bound by a judgment, the common law provides that judgments are binding only on parties to the action (or at least those made party by service of process). Because this determination is a matter of substance, it 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: Restatement, Second **Conflict of Laws** §95.

26 For internal purposes, however, a judgment is '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. A 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 system, such as our own, which discourages extended litigation: See Kerameus (2001) 16 **IECL** 1 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.

happened to have jurisdiction in the international sense?[29] At first sight it seems obvious that a judgment which is a nullity in its own system should be refused effect abroad, but English law allowed the paradox that, if the foreign court had jurisdiction under English rules of international competence, then the judgment was enforceable.[30] The English approach was determined, however, by a preoccupation with putting a stop to the re-examination of foreign judgments. The courts felt that when a final decision had been given abroad the parties should not be allowed to use an English court as a forum for an appeal. The question is whether we should follow the English approach to this issue.

(iv) Conflicting judgments

3.19 It may happen, although it is fortunately a rare occurrence, that litigation between the same parties on the same cause of action is started in the courts of two countries and that different judgments are given. For example, in order to enforce a claim on the debtor's property in Botswana and Namibia, a creditor may sue in both countries. The Namibian court may dismiss the claim while the court in Botswana may find for the creditor. If the latter were now to attempt to enforce the judgment in South Africa, should the judgment debtor be allowed to plead ***res judicata***? The difficult question of which judgment should prevail has no definite answer in our law.[31]

(v) Currency of payment and interest

3.20 The power to determine a currency of payment for a judgment is a matter of procedure, with the implication that only the ***lex fori*** applies.[32] South African courts

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29 Spiro **General Principles of the Conflict of Laws** at 107).

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

31 Aside from the rules laid down in section 5 of the Foreign Civil Judgments Act 32 of 1988.

32 **Miliangos v George Frank (Textiles) Ltd** [1976] AC 443 (HL). Following English precedent, however, there is an argument to be made that the forum should take account of a foreign law, if that law stipulated payment in a

have held that they have discretion to declare judgments payable in foreign currencies or their rand equivalent.[33] This discretion also applies to foreign judgments.[34]

3.21 When an original judgment was in a foreign currency and when it is to be enforced in rands, according to the common law, the date for conversion is the date of payment.[35] Given fluctuations in the exchange rate, this rule may clearly work to the prejudice one of the parties. The question is whether a more flexible rule should be introduced.

3.22 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 enforced in a South African court. Should the original interest rate continue to apply or should the South African interest rate prevail?

(vi) Non-monetary claims

3.23 According to English law the foreign judgments enforceable by the courts are only those sounding in fixed sums of money. Orders for specific performance and any judgments operating ***in rem***, apart, of course, from those concerned with status, are excluded. The first problem in our law, which is attributable to the courts' borrowing from English law, is whether the English limitation applies in South Africa.

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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)

33 **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 contracts required payment in a foreign currency: **Murata Machinery Ltd v Capelon Yarns (Pty) Ltd** 1986 (4) SA 671 (C) at 673-4.

34 **Barclays Bank of Swaziland Ltd v Mnyeketi** 1992 (2) SA 425 (W) at 435

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

3.24 The second problem will become apparent if it is decided that our courts may enforce non-monetary judgments: we have no clear criteria for establishing the foreign court's international competence. No doubt the grounds of residence or submission will suffice, but in the case of foreign judgments ordering transfer of property, the matter is considerably more complicated. The ***forum rei sitae*** is obviously competent but should it have exclusive jurisdiction?

(vii) International competence

3.25 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 summon defendants and subject them to its jurisdiction, which in turn suggests an appropriate connection between the court and the parties. Although the connection has been defined as the court's ability to give an effective judgment,[36] in practice, effectiveness seldom features in the jurisprudence on this subject.[37]

3.26 The phrase 'international competence' is somewhat misleading because the grounds of competence are not internationally recognized (although the world's legal systems display a remarkable degree of uniformity).[38] What is more, international competence does not mean that the forum will accept a foreign court's exercise of jurisdiction on the basis of that court's own rules of jurisdiction,[39] or even the forum's

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

37 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'.

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

39 **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).

rules,[40] since neither necessarily amounts to *international* competence.[41] Instead, a separate set of rules is applicable to this issue.

3.27 It should be noted that in a case of a conflict between our law's definition of one of the following grounds of international competence and the law of a foreign state, our law must prevail.[42] This proposition follows from the rule that, in private international law, all connecting factors must be defined by the law of the forum.[43]

(1) Residence

3.28 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***. Residence has, of course, been defined for purposes of internal jurisdiction, but we have no absolute definition of it in an international sense although, no doubt, the internal definition will influence the approach to international competence.[44]

3.29 The residence of corporations is especially troublesome, partly because it is necessarily an artificial concept, partly because corporations are the most frequent litigators in international suits, and finally because the concept has been so narrowly defined. According to the leading case, **Bisonboard Ltd v K Braun Woodworking Machinery (Pty) Ltd**,[45] a domestic company (i.e., one incorporated in South Africa) is

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

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

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

43 **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.

44 As happened in **Zwyssig v Zwyssig** 1997 (1) SA 467 (W) at 471.

45 1991 (1) SA 482 (A) at 495

resident at the site of its registered office.[46]

3.30 Another option – which is the rule in other common-law countries as well as international conventions - is the principal place of business, namely, where the affairs of the enterprise are controlled. We used to have authority for attributing residence to a company on this basis[47] but the court in **Bisonboard** overruled it on the grounds of certainty and convenience.[48]

3.31 The questions which emerge are whether residence should be statutorily defined for purposes of establishing international competence and whether the residence of artificial persons should be redefined.

(2) Submission

3.32 The defendant's submission to a foreign court is a good ground of international competence in our law[49] and, probably, in all legal systems. Nevertheless, as in other

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46 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 legal process may be served. **Dairy Board v 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.

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

48 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.

49 ***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 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

cases, submission that is deemed sufficient to found jurisdiction for internal purposes may not suffice for purposes of international competence.

3.33 Submission may be express, namely, by a contract in which the parties agreed to litigate in the courts of a particular country. Provided that the agreement is valid according to its proper law, it is effective.[50]

3.34 Submission may also be tacit in the sense that, while the parties failed to record their intentions in the contract, they nevertheless contemplated litigating in a particular court.[51] Hence, submission can be inferred where a plaintiff chooses a court that would otherwise have lacked jurisdiction[52] or where a defendant brings a counterclaim, and thus becomes a plaintiff in reconvention.[53] Conversely, choice of a ***domicilium citandi et executandi*** does not constitute tacit submission[54] nor does express choice of a proper law in a contract.[55]

3.35 Whenever reference is necessary to a tacit agreement, the 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. Although, in principle,

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than others; once the court chosen by the parties accepts jurisdiction, there is no reason why another should question its powers.

50 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

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

52 Forsyth **Private International Law** at 398 fn60 citing **Zwyssig** 1997 (2) SA 467 (W) at 474.

53 Forsyth (***op cit*** at 398 fn61).

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

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

the forum is obliged to consult only its own law – because the rules of international competence are the forum's[56] – English courts tend to consider the laws of the state in which the judgment was originally given. Forsyth prefers the proper law on the basis of the decision in **Blanchard, Krasner & French v Evans**[57] and it does indeed 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.

3.36 Submission may also be inferred from conduct, usually 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.[58] Appearing in court to argue the merits of a case, for instance, is probably the clearest example of submission (although there is no definite case authority on this point). Conversely, mere failure to object to the foreign court's jurisdiction does not count,[59] nor does accepting a summons and appearing to contest jurisdiction.[60]

3.37 Given the dearth of reported cases on the inference of submission from a defendant's conduct, more detailed rules on the issue may be necessary.

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56 In spite of intimations to the contrary – Spiro (1967) 84 **SALJ** 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 cosmopolitan approach.

57 2002 (4) SA 144 (T) at 149. See the discussion in Forsyth (***op cit*** at 399-401). As he says, the question is not inconsequential, since certain laws, such as German law, deem some submission clauses void.

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

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

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

(3) Domicile

3.38 We have at least three cases as authority for domicile of the defendant providing a ground of international competence.[61] However, before the Domicile Act[62] was passed, domicile alone was probably not sufficient because under the common law it was a technical construct which offered no guarantee that a defendant was actually resident or even physically present within a court's area of jurisdiction. As a result, **Foord v Foord** [63] held that it was unlikely that domicile without residence or presence could confer jurisdiction. Even so, the Appellate Division, in **Bisonboard Ltd v K Braun Woodworking Machinery (Pty) Ltd**,[64] disregarded the doubts expressed in ***Foord's*** case, although only with regard to internal competence.

3.39 More recently, **Purser v Sales**[65] approved the idea of domicile as a ground of international competence, and there is now a better case in its favour. Our Domicile Act[66] departed from the common law by adopting a functional approach, whereby domicile became 'an objective factual relation between a person and the particular territorial jurisdictional area'.[67] If a foreign court assumed jurisdiction on this basis, it would have a significant link with the defendant.

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61 **Acutt Blaine & Co v Colonial Marine Insurance Co** (1882) 1 SC 402 at 406; **Bisonboard Ltd v K Braun Woodworking Machinery (Pty) Ltd** 1991 (1) SA 482 (A) at 471; **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.

62 Act 3 of 1992.

63 1924 WLD 81 at 88. See,Silberberg (***op cit*** at 10 -11) arguing on the basis of effectiveness.

64 1991 (1) SA 482 (A) at 487.

65 2001 (3) SA 445 (SCA) at 451.

66 Act 3 of 1992.

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

(4) Other grounds

3.40 The common-law systems tend to accept little more than the above three grounds of international competence and **Reiss Engineer Co Ltd v Insamcor (Pty) Ltd**[68] is authority for saying that our courts should go no further. There is some doubt, however, whether this list of grounds is closed.

3.41 Nationality might be another ground although it has not been mentioned in any reported case and it gives no guarantee of a genuine connection between the defendant and the foreign court.[69] For instance, a judgment debtor might be a dual national, might have acquired nationality through a parent or grandparent or, for some other reason, might have no close link with the state of nationality.

3.42 In addition, nationality cannot function as a connecting factor with a legal system when a case was heard in a federal state, such as the United States, which is composed of several different systems of private law.

3.43 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.[70] **Acutt Blaine & Co v Colonial Marine Insurance Co**,[71] however, refused to accept attachment and it has been rejected by most other legal systems.[72]

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68 1983 (1) SA 1033 (A) at 1036-7.

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

70 Van Leeuwen **Het Roomsch Hollandsch Recht** 5.2.6.11.

71 (1882) 1 SC 402 at 406 ; **De Naamloze Vennootschap Alintex v Von Gerlach** 1958 (1) SA 13 (T) at 15.

72 See **Emanuel v Symon** [1908] 1 KB 302 at s10.

3.44 The fact that a cause of action arose within a foreign court's area of jurisdiction did not found international competence[73] until the unusual decision in **Duarte v Lissak**.[74] Although Duarte's case accepted this ground, the decision was criticized as incorrect,[75] and cause of action arising has been rejected in common-law systems.[76]

3.45 **Steinberg v Cosmopolitan National Bank of Chicago**[77] accepted the defendant's status as a fugitive from justice as yet another ground. The appellant in this case 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 the judgment should nonetheless be enforced on policy grounds, because the judgment debtor should not be allowed to escape from the consequences of his fraud.[78] This decision has been criticized as incorrect[79] and must represent an aberration from the general rule.

3.46 Although none of the above grounds is likely to qualify in our law as a sufficient connection for purposes of international competence, their status is at present uncertain. We need clarity on this question, together with a related issue: whether the list of grounds of international competence is closed or whether it should remain open and possibly admit the type of indeterminate ground laid down by the Canadian

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

74 1973 (3) SA 615 (D).

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

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

77 1973 (4) SA 564 (RAD).

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

79 Spiro (1974) 7 **CILSA** at 342; Forsyth (***op cit*** at 407).

Supreme Court. Here it was held that the requirement is simply a 'real and substantial connection' between the matter and the foreign court.[80]

(viii) Final and conclusive

3.47 This 'unnecessarily repetitive phrase' means that the foreign court, according to its own law,[81] must not be permitted to alter, set aside or reconsider a matter which was already litigated.[82] The rule rests on an assumption that the parties were given an opportunity - although they may not have used it - to debate the merits of a case, and that the dispute was then adjudicated. 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.[83]

3.48 Finality becomes a problem in two situations: provisional forms of judgment and appeals. Provisional judgments usually result from summary proceedings, which are made available for particular types of case, where the evidence is restricted, delays are shortened and defendants are precluded from arguing certain issues. A classic example is the default judgment. Although these judgments are usually considered final,[84] they are normally given subject to the judgment debtor's right to

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80 **Morguard Investments Ltd v De Savoye** (1990) 3 SCR 1077. The courts have not subsequently 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).

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

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

83 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.

84 Spiro **Conflict of Laws** at 261ff; Hahlo (1969) 86 **SALJ** at 354.

contest the judgment within a set period of time. If this period of time has lapsed or if the judgment debtor waived his or her rights, the matter can be considered final.[85]

3.49 The logic of the rule on default judgments, for example, has an unfortunate consequence: if the legal system of the state in which judgment was given imposed no time limit within which the defendant had to take action, the judgment remains forever inconclusive. As a result, it may never be sued upon in our courts. The paradox then ensues that only an application by the judgment debtor can render the judgment enforceable abroad.

3.50 When a judgment is subject to an appeal in the foreign legal system, then, arguably, it should not be regarded as final until the appeal is heard.[86] The outcome of this process is usually so lengthy and uncertain, however, that the judgments are generally enforced.[87] If it so happens that a 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.

3.51 If 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.[88] 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.[89]

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85 **Dawood v C & A Friedlander** 1913 CPD 291 at 295; **Sparks v David Polliak & Co** 1963 (2) SA 491 (T).

86 E Kahn Appendix on 'Jurisdiction and Conflict of Laws in the South African Law of Husband and Wife' in Hahlo **Husband and Wife** at 662; Hahlo (1969) 86 **SALJ** at 354-355.

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

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

89 **Jones v Krok** at 692; Spiro **Conflict of Laws** at 260.

3.52 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 maintenance orders means that they are not final, and so foreign orders cannot be enforced in our courts.[90] To remedy this problem it was necessary to pass special legislation (which is considered below).[91]

3.53 Although in practice judgment creditors may not have to prove finality, when they are called upon to do so, the requirements are not altogether clear. In the case of particular types of default judgment and appeals, statutory provisions may be necessary to provide greater certainty.

(ix) Natural justice, fraud and public policy

3.54 The three typical defences to an action for the enforcement of a foreign judgment - natural justice, fraud and public policy – express a need to ensure that foreign courts maintained proper judicial standards and a need to protect critical interests within the forum.

3.55 Natural justice implies, in essence, a fair trial, which comprises the principles of impartiality and ***audi alteram partem***.[92] The latter principle implies in turn that litigants must have been given due notice of proceedings and thus an opportunity for

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

91 Paragraphs 4.4 – 4.12.

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

presenting their cases.[93] In practice, natural justice is rarely in issue,[94] and so the courts have not developed precise criteria for deciding its application.

3.56 A particular issue, for which we have as yet no reported cases, concerns substituted service of notice of proceedings. Our courts regularly resort to this procedure if the whereabouts of a defendant is unknown.[95] If a foreign court used the same type of procedure, however, it is questionable whether we would be bound to accept it.

3.57 Fraud is the second ground for attacking the validity of a foreign judgment. In this case, both English law and our law distinguish between intrinsic fraud (which is committed *by* the foreign court, for example, by accepting a bribe) and extrinsic fraud (which is committed *upon* the foreign court, for example, by a party deliberately misleading it as to the truth).[96] The purpose of this distinction is to limit the situations in which the defence can be raised, because arguments of fraud may lead to a re-opening of the merits of the claim. Hence, extrinsic fraud can be argued as a defence to an action for enforcement of a foreign judgment, but intrinsic fraud may not.

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93 **Adams v Cape Industries plc** [1990] Ch 433 at 564-6 noted 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 judicial assessment of the evidence (although the court was required to do so by its own law).

94 Clarkson and Hill **Conflict of Laws** at 174 note that there is no reported case in England where this defence succeeded.

95 The defendant is deemed to have had constructive notice of the action. Our courts do not strictly apply the requirement of due notice in the case of judgments that operate ***in rem***, because such judgments, by their very nature, affect an indefinite number of defendants, all of whom cannot possibly be advised of the proceedings.

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

3.58 In the case of intrinsic fraud, it is reasoned that an aggrieved party must contest the validity of the judgment in the courts of the country which originally had jurisdiction, because they are in a better position to assess the situation.[97] Normally an appeal will be lodged against the judgment in question and, until this process is complete, a South African court will do no more than grant a stay of proceedings.[98]

3.59 Extrinsic fraud, such as giving perjured evidence or suppressing material documents, on the other hand, is a ground for refusing enforcement provided that it was sufficiently serious to deprive aggrieved parties of an opportunity to present their cases. Again, however, it must be clear that the fraud was not raised and decided upon in the foreign court.[99]

3.60 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.[100] Even so, the debtor must show that the foreign court was the victim of or a party to the fraud.[101]

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

98 **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.

99 Except where the foreign court was led to believe that it had jurisdiction: Garb & Lew (***op cit*** at 2-8).

100 **Jet Holdings Inc v Patel** [1989] 2 All ER 648 (CA) and **Owens Bank Ltd v Bracco & others** [1992] 2 All ER 193 (HL), where it was 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: See Nygh & Davies (***op cit*** at 9.36).

101 Briggs **Conflict of Laws** at 140.

3.61 Little needs to be said about public policy. If a foreign judgment contravenes South African ideas of ***boni mores*** or infringes the South African Bill of Rights,[102] our courts will obviously not enforce it. Both here and abroad, however, public policy is invoked as a ground for refusing to enforce orders to pay multiple damages, a type of judgment especially associated with anti-trust laws in the United States. This issue is dealt with in the Protection of Businesses Act,[103] which is discussed below.

3.62 The two questions which arise here are whether substituted service under a foreign legal system should be deemed to give fair notice of trial and whether we should follow the English approach to the defence of fraud.

(x) Judgments that have lapsed or been satisfied

3.63 The judgment debtor may allege that the foreign judgment lapsed or was satisfied. If the judgment was satisfied,[104] an action for enforcement can be met with the defence of ***res judicata***.

3.64 An argument that a judgment has lapsed, however, raises the more difficult question of the law to 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

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102 Note, however, that not all issues of public policy are now determined by the Bill of Rights. In a case such as **Taylor v Hollard** (1886) 2 SAR 78, for instance, a judgment was deemed unconscionable, because it was in conflict with South Africa's laws on usury.

103 Act 99 of 1978.

104 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.

they lapse and can only be revived by application to court.[105] The law of the state in which the judgment was given might have a shorter or longer period.[106] Which law applies?

(xi) Protection of Businesses Act 99 of 1978

3.65 This Act was passed principally to protect South Africans from the draconian effects of legislation in the United States, in particular statutes allowing awards of multiple damages.[107] To this end the Act provides that, without the permission of the Minister of Economic Affairs, 'no judgment, order, direction, arbitration award … emanating from outside the Republic'[108] may be enforced here, if it arises from an 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'.[109]

3.66 Section 1D of the Act contains a specific form of protection. It prohibits the enforcement of foreign judgments based on any of the above acts or transactions, if the judgment was 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.

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105 Section 63 of the Magistrates' Courts Act 32 of 1944 and Rule 66 of the Rules of the High Court. The validity of Rule 66 was questioned, however, in **Segal & another v Segil** 1992 (3) SA 136 (C) at 143 and 157.

106 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).

107 Leon (1983) 16 **CILSA** at 347.

108 Section 1(1)(a).

109 Section 1(3).

3.67 As Forsyth and Leon say,[110] this enactment is a classic example of legislative overkill. Because most judgments touch on the ownership of ‘any matter or material', the Minister’s permission is needed to enforce virtually all foreign judgments. Certain courts have responded by interpreting the meaning of ‘any matter or material' to refer only to raw materials and substances, and, once manufactured goods are excluded, the scope of the Act was considerably narrowed.[111] As it happens, however, the reported cases make no mention of plaintiffs obtaining the Minister's permission,[112] and it may well be that in practice the Act is not applied, unless foreign judgments involve the issues that it was intended to correct, namely, multiple damages.

3.68 Provision is made in section 1(2) for the Minister to 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.

3.69 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, which entitles everyone to administrative action that is ‘lawful, reasonable and procedurally fair’. Forsyth notes 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.[113]

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110 Forsyth (***op cit*** at 435).

111 **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.

112 **Seton Co v Silveroak Industries Ltd** 2000 (2) SA 215 (T) at 225. **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.

113 Forsyth (***op cit*** at 437).

3.70 In its present form, this Act declares to the potential litigant that the enforcement of virtually all judgments obtained abroad is subject to ministerial discretion. Urgent action is necessary to implement the original policy behind the Act, but in more measured terms.

(b) EVALUATION

(i) Survival of the original action

3.71 English law has long provided our courts with ideas but not all aspects of it are welcome. The survival of the original judgment is a case in point. Although there is no definite authority for saying that this doctrine was not received into our law,[114] most academic commentators are opposed to it on the grounds that it derives from the 'ancient technicalities' of English law[115] and, of course, that it contradicts our notion of ***res judicata***.

3.72 In England, the survival of the original cause of action was condemned as 'illogical' and its continued existence as 'precarious'.[116] We are certainly not obliged to

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114 **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 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.

115 Forsyth (***op cit*** at 408); Kahn (***op cit*** at 674); Spiro **Conflict of Laws** (***op cit*** at 256. 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.

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

accept this doctrine, and if need be, an argument in its favour can be resisted by the principle of novation, which is used to explain the effect of judgments in our domestic law.[117] Judgments novate the original debts,[118] thereby extinguishing the obligation.[119]

(ii) Definition of judgment

3.73 When seeking to define a foreign judgment, account must in the first instance, be taken of the foreign law, which is responsible for the character of the order before the forum. Nevertheless, it can be argued on analogy with the characterization of foreign penal laws,[120] that South African law is the ultimate determinant. The question arises within the context of enforcement proceedings and because these are matters of procedure, they are governed by the ***lex fori***.

3.74 Generally speaking, a judgment denotes the state's involvement, via established courts, in the enforcement of private rights by application of law to facts. Because the state is involved, this is an official act, although it must be distinguished from a legislative, administrative or executive act, which, under the act of state doctrine, is normally not subject to scrutiny by our courts.[121] In order to determine the nature of the act, it may be necessary to inquire into the function of the organ which

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117 **Swadif (Pty) Ltd v Dyke** 1978 (1) SA 928 (A). There is also a dictum in **Gabelsberger & another v Babl & another** 1994 (2) SA 677 (T) at 679 holding 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.

118 **Joosub v Taylor** 1910 TPD 486 at 488-9; **Greathead** 1946 TPD 404 at 406; **Resnik v Lekhetoa** 1950 (3) SA 263 (T) at 266; **Commissioner of Taxes v McFarland** 1965 (1) SA 470 (W) at 471.

119 The judgment debtor's liability thereafter rests on an implied contract to abide by the judgment.

120 **Huntington v Attrill** [1893] AC 150 (PC).

121 Spiro **General Principles of the Conflict of Laws** at 106; Spiro **Conflict of Laws** at 478.

performed it and the proceedings before that organ. Thus, it could be argued that only orders of a duly constituted court should be considered judgments.

3.75 Moreover, we should be prepared to enforce only orders issued after hearing both parties. Relief ***pendente lite***, for example, should not count[122] and, according to case law in Britain, applications obtained ***ex parte*** are not entitled to recognition, even if the party affected had an opportunity to seek stay or reversal.[123] Finally, the definition must exclude all but civil or commercial judgments.

3.76 Even within these constraints, a judgment can be defined fairly broadly. According to the definition in 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.[124]

(iii) Validity of the judgment

3.77 Although we have no reported case examining the validity of a foreign judgment, if the court assumed jurisdiction when it had no entitlement to do so, a basis for addressing the problem may be found in Foreign Civil Judgments Act 32 of 1988. Here it is provided 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'.[125] Unfortunately, the Act provides no criteria for assessing 'the circumstances of the case'.

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122 Garb & Lew (***op cit*** at 2-2.2).

123123 **EMI Records Ltd v Modern Music GmbH** [1992] 1 All ER 616 (QB).

124 Article 25.

125 Section 5(b). This provision is taken directly from s 4(1)(a)(ii) of the British Foreign Judgments (Reciprocal Enforcement) Act (1933).

3.78 In this regard, the Brussels Regulation[126] is helpful. It provides that in disputes arising out of insurance, employment and consumer contracts, certain courts have exclusive jurisdiction: mainly, the courts of the state in which the policy holder, employee or consumer is domiciled. Similarly, in cases concerning rights ***in rem***, only the ***forum rei sitae*** is competent. Judgments given in contravention of these rules are deemed invalid.

3.79 An alternative but less precise answer would be to allow the courts to refuse enforcement whenever lack of jurisdiction is patent on the face of the foreign judgment. It could also 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.[127]

(iv) Conflicting judgments

3.80 On an analogy with statutory interpretation, it can be argued that the most recent judgment should supersede the earlier. The more widely accepted solution in national legislation abroad and international conventions, however, is the opposite conclusion: that the earlier judgment prevails.[128] Moreover, s 5(1)(g) of the 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.

(v) Currency of payment and interest

3.81 According to our common law, the time for converting a foreign currency into

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126 Para 4.27 below.

127 Wolff **Private International Law** at 263.

128 Wolff (***op cit*** at 270) proposes a third solution: neither judgment should be recognized.

rands is the date of payment of the debt.[129] Another rule, more sensitive to fluctuations in the exchange rate, however, may be the date of judgment. This, in fact, is the rule laid down in s 3(4) of the Enforcement of Foreign Civil Judgments Act.[130]

3.82 As for interest on the judgment debt, section 3(5) of the Enforcement of Foreign Civil Judgments Act appears to have a ready solution. It provides that the rendering court may award interest, and the amount will be calculated to run until the date of registration of the judgment in South Africa. Thereafter the interest rate is that prescribed by South African law or the law of the state of origin, whichever is the lower.[131]

(vi) Non-monetary judgments

3.83 The English rule specifying only judgments for fixed sums of money derives from technicalities of the English system[132] and there is no reason why South African courts should not be free to enforce a wider range of foreign judgments, including those for specific performance (or non-performance, as the case may be).[133]

3.84 The grounds of international competence should presumably be the same as for monetary judgments except where the foreign judgment operated ***in rem.***

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

130 Act 32 of 1988.

131 Garb & Lew (***op cit*** at 2-16).

132 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 (***op cit*** 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 and Walker **Canadian Conflict of Laws** 14.10.

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

Normally, a court asked to adjudicate rights to property may assume jurisdiction only if the property is situated within its area. On the basis of an old English decision, **Penn v Baltimore**,[134] however, 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 the judgment operated ***in personam***, not ***in rem***.[135] In other words, whenever a foreign court was in a position to compel the defendant to carry out its order, our courts should recognize its judgment. (The salient principle here appears to be effectiveness, i.e., the power to ensure that the judgment creditor is put in possession.)[136] 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.

3.85 South African law on the rule in **Penn v Baltimore** is undecided, however, especially where the enforcement of foreign judgments is concerned. Edwards and Forsyth submit that the ***forum rei sitae*** should have exclusive competence.[137] In the first place, **Penn v Baltimore** has not been widely accepted elsewhere and, in the second, it is not part of our law of internal jurisdiction.[138] It could plausibly be argued,

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134 (1750) 1 Ves Sen 444, cited in Forsyth (***op cit*** at 425).

135 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***.

136 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.

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

138 **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

however, 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.

(vii) International competence

3.86 The analysis of the law on international competence disclosed several gaps and unanswered questions. As to the gaps, it is convenient to start with the question of competence in a federal state, where local and federal courts may have quite different 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]

3.87 In the second place, the grounds of international competence need to be clarified. In essence, a sufficient territorial connection between the judgment debtor and the foreign court is required. In the Canadian Supreme Court this requirement was expressed as a 'real and substantial connection' between the matter and the foreign court.[140] Submission is just about a universal ground. Otherwise we accept

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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.

139 In **Adams v Cape Industries plc** [1990] Ch 433 at 555 and 557, an American company was incorporated in Illinois but sued in Texas. No definite answer was given to the question 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*** at162-3).

140 **Morguard Investments Ltd v De Savoye** (1990) 3 SCR 1077. The courts have not subsequently defined what is meant by 'real and substantial', although the Supreme Court has referred to the existence of a connection with the

residence whereas the common-law jurisdictions accept mainly presence,[141] and sometimes residence.[142] Cause of action arising,[143] attachment of property[144] and even *former* presence where the defendant was a fugitive from justice, can definitely be excluded. The case against nationality and domicile, however, is not as strong since both are accepted in international instruments.[145]

3.88 In our law the residence of natural persons has been adequately defined for purposes of internal jurisdiction[146] and the same definition will serve for purposes of international competence. The key element is a stable habitation.[147]

3.89 The current rule that corporations are resident at their registered offices, is unduly narrow. In English law, for purposes of internal jurisdiction, a corporation is deemed to be physically present where it is carrying on business.[148] The rules of international competence were elaborated in the leading case, **Adams v Cape Industries plc**.[149] A company may be deemed to be directly present in an area where it maintains, whether by servants or agents, a fixed place of business at premises that

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subject matter of the proceeding, the damages suffered, the legal obligation, the transaction or the parties (or, indeed, the defendant alone).

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

142 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.

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

144 Although part of Scots law, this ground was rejected in English common law.

145 See paras 4.57 – 4.60 below.

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

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

148 **Littauer Glove Corp v F W Millington** (1920) Ltd (1928) 44 Times Law Reports 746 at 747.

149 [1990] Ch 433.

have been bought or leased for more than a minimal period of time.[150] 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.[151]

3.90 Even in our law there is good reason for taking a more flexible approach to corporate residence than the current rule in **Bisonboard Ltd v K Braun Woodworking Machinery (Pty) Ltd**[152] would suggest. When a foreign company (i e one that was not incorporated in South Africa but does business here) has its principal place of business within South Africa, there is academic support for treating it as resident.[153]

3.91 Moreover, according to the Enforcement of Foreign Civil Judgments Act,[154] a juristic person is deemed 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.[155] Section 1E(1)(b) of the Protection of Businesses Act[156] 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. Instead, a permanent business establishment within that area is required.

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150 **Adams v Cape Industries plc** at 530.

151 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.

152 1991 (1) SA 482 (A).

153 Pollak **South African Law of Jurisdiction** at 99; Pistorius (***op cit*** at 78).

154 Section 7(4)(a)(iii) of Act 32 of 1988.

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

156 Act 99 of 1978.

3.92 In the third place, our rules on what constitutes submission need sharper definition, especially in view of the generous approach of the English courts.[157] Forsyth, for one, suggests that we should take a stricter line and follow the lead set in the Protection of Businesses Act.[158] 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:

(i) to contest the foreign court's jurisdiction;

(ii) to apply for dismissal of the action or for setting aside a writ or summons on the ground that the court did not have jurisdiction;

(iii) to protect or obtain the release of property attached for purposes of the proceedings;

(iv) to 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

(v) to institute a review or appeal.

3.93 Section 1E(2) goes on to provide that 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'.

3.94 Finally, it should be noted that submission may be *implied* in the sense that the law may impute an agreement to the parties on the basis of certain given facts. While English law is not prepared to recognize an implied submission according to a foreign law,[159] no such decision has yet been made in South Africa. (Indeed, the courts have

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157 For instance, a defendant could be deemed to submit for appearing to protest jurisdiction, provided the court refused the motion. 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.

158 Act 99 of 1978; Forsyth (***op cit*** at 398).

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

not even had cause to distinguish tacit and implied submission.) Forsyth argues that we should follow English law because it is in line with the general principles of determining international competence, namely, that a party who is otherwise not subject to a foreign court's jurisdiction should not be bound by that court.[160]

(viii) Finality

3.95 In assessing this requirement the courts need to retain a measure of discretion. In the case of default judgments, it has been said that a common-sense approach is needed so that a judgment can be treated as final provided that the defendant had reasonable opportunity to have it set aside.[161] Similarly, the courts need to exercise discretion when considering judgments subject to appeal. In most cases, given the time and uncertainty involved in appeal proceedings, there is no reason why a judgment should not be enforced.

(ix) Natural justice, fraud and public policy

3.96 So far as natural justice is concerned, our courts will no doubt extrapolate principles from their jurisprudence on the Bill of Rights. In cases of substituted service in the foreign court, Forsyth, for one, advocates accepting this practice as compatible with natural justice, provided that the court found it impossible to effect personal service on the defendant.[162]

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160 Forsyth (***op cit*** at 400). Even so, Clarkson & Hill (***op cit*** 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.

161 Forsyth (***op cit*** at 429-30).

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

3.97 The question whether we should follow the more relaxed English approach to the defence of fraud is perhaps best left to the courts to solve, since no definite answer can be given. On the one hand, defendants who had full opportunity to question the fraud in courts of their own choosing should not be entitled to raise the issue again. On the other hand, allowing the issue to be re-opened in the forum has the merit of protecting the defendant from being forced to accept a ***mala fide*** selection of a foreign court by the plaintiff.[163] In addition, a finding by the forum that the foreign judgment is fraudulent does not condemn it to absolute nullity, because the finding is operative only in the forum. The judgment creditor is still entitled to seek enforcement elsewhere.[164]

3.98 Nothing needs to be said about the general category of public policy. It must remain as a residual and discretionary criterion for refusing the enforcement of certain offensive foreign judgments.

3.99 The most controversial question in this area concerns judgments for multiple or punitive damages, which may not be enforced in terms of section 1A of the Protection of Businesses Act.[165] Further discussion of this Act is pursued below.[166] Here it may be noted that courts in other jurisdictions have refused enforcement if the award was

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163 Thus fraud in obtaining jurisdiction over the defendant is generally a good reason for refusing recognition of a foreign judgment, because falsifying jurisdictional facts (especially in cases of default judgment) are so fundamental that they should always be open to attack. See Castell & Walker (***op cit*** at 14.8.a.)

164 Briggs (***op cit*** at 140-1).

165 Act 99 of 1978. This provision was taken from Britain's Protection of Trading Interests Act 1980. Section 1A (2) of our 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.

166 Paras 3.103 – 3.111 below.

designed to inflict a penalty,[167] on the ground that enriching plaintiffs beyond the compensation due to settle a delict constitutes a private prosecution, which infringes the state's monopoly on punishment (with the associated safeguards built into the criminal justice system).[168]

(x) Lapsed judgments

3.100 A rule is necessary to specify which law should determine whether a judgment has lapsed: the law of the forum or that of the state in which the judgment was originally issued. Although there is case authority for applying our law,[169] an argument could be made in favour of the law of the state of the original judgment.[170]

3.101 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 in South African law,[171] 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

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167 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; **USA v Inkley** [1988] 3 All ER 144 (CA).

168 This was the argument used by the *Bundesgerichtshof* in Germany. See **Corning Glass Works Case** (1993) 32 Int. Legal Materials at 1320; Hay (1992) 40 **Am J Comp L** at 1001.

169 **Coppen** (1908) 29 NLR 416 at 418; **Scorgie v Munnich** 1912 EDL 422 at 424; **National Milling Co Ltd v Mohammed** 1966 (3) SA 22 (R) at 23.

170 Spiro **General Principles of the Conflict of Laws** (***op cit*** at110); Forsyth (***op cit*** at 391 fn10).

171 Under the Prescription Act 68 of 1969. 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.

then applicable: 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. There are, unfortunately, no reported cases here or in the other common-law jurisdictions dealing with this issue in the context of foreign judgments.

3.102 Section 5(1)(i) of the Enforcement of Foreign Civil Judgments Act[172] allows reference to either the ***lex fori*** or the foreign law. 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'.[173] This provision poses a further problem, however: should the shorter or longer period of prescription be preferred? In the circumstances, more definite rules are required.

(xi) Protection of Businesses Act 99 of 1978

3.103 Respondents to the Issue Paper saved most of their comments for this Act, which, on the face of it, makes the recognition and enforcement of nearly all foreign judgments dependent on ministerial discretion. As Forsyth[174] and **Ms T Kruger (Institute for International Trade Law, Leuven)** say, the case for reform is overwhelming.

3.104 The Act conveys a discouraging message to judgment creditors: enforcement in South Africa will entail the possibly lengthy and uncertain procedure of obtaining executive permission.

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172 Act 32 of 1998.

173 C F Forsyth **Private International Law** 3rd edition Cape Town: Juta 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***.

174 Forsyth 4th edition (**op cit** at 437).

3.105 The main purpose of the Act – preventing the payment of multiple damages – can be achieved by less drastic means. Indeed, as **Ms Kruger** pointed out, the courts can always refuse such judgments on the ground that they are contrary to our public policy (which includes our economic policy).[175]

3.106 In their response to the Issue Paper, **Dr C F Forsyth** and **Ms C Jesseman** submitted several detailed and useful comments on the Act. They noted that some provisions, such as sections 1A and 1B, are relatively uncontroversial because the policy considerations behind the prohibition on enforcing judgments for multiple or punitive damages is reasonable and acceptable. Their criticisms relate, first, to possible constitutional questions that may arise from exercise of the Minister's discretion under the Act.[176] The denial of permission or the attachment of conditions (which is permitted under s 1(1) and (2)) may amount to a denial of fundamental rights, specifically the right to just administrative action under s 33 of the Constitution.[177]

3.107 Secondly, legislation in other countries - the British Protection of Trading Interests Act (1980), the Australian Foreign Proceedings (Excess of Jurisdiction) Act[178] and the Canadian Foreign Extra-territorial Measures Act[179] - offer compelling models of how we may better deal with the problem of foreign awards of multiple damages and judgments based on anti-trust laws. The acts in these countries generally allow the

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175 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.**

176 Sections 1(1) and (2).

177 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. Although section 24(d) of the Interim Constitution (which required 'administrative action which is justifiable in relation to the reasons given for it') was not retained in section 33 of the Constitution, any limitation of the right to just administrative action by the Act must nevertheless be 'reasonable and justifiable' in accordance with section 36 of the Final Constitution.

178 Act 3 of 1984 (Cth).

179 RSC 1984.

executive to intervene only in exceptional circumstances - when the state's security or economy is threatened - not as a matter of course in every case.

3.108 Thus although the British Act prohibits the enforcement of all foreign judgments for multiple damages, it goes on to grant the Secretary of State the power to designate unenforceable foreign rules 'designed to restrain, distort or restrict competition in the carrying on of business'.[180]

3.109 Under the Australian Act the federal Attorney-General may also 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.

3.110 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.[181] 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 enforceable.

3.111 The respondents' third concern related to the prohibition on the recognition and enforcement of foreign judgments under section 1D of the Protection of Businesses Act. This provision was aimed at protecting defendants with assets in South Africa from large awards in, for example, product liability cases falling within the broad ambit of s 1(3) of the Act. Although the exception may be intended to block undesirable foreign policies, if the defendant was properly subject to the jurisdiction of a foreign

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180 Section 5(4). See Collins(ed) **International Litigation and the Conflict of Laws** at 348-51.

181 **Old North State Brewing Co v Newlands Services Inc** [1999] 4 WWR 537 par 51.

court, **Dr Forsyth** and **Ms Jesseman** ask why that court should not determine the amount of compensation.

3.112 The fourth concern questioned the need for regulation by statute and raised the possibility of bi- and multilateral treaty solutions. Although the respondents accepted that comity should not determine the enforcement of foreign judgments with extraterritorial effect or those awarding multiple damages,[182] they considered 'positive comity'[183] an encouraging development in the field of international competition law. This concept implies that states should notify one another of the effects on their national interests of anti-trust enforcement, either within the context of the OECD[184] or in the context of bilateral agreements.[185] This approach may be used as a precursor to the traditional determination of the enforceability of foreign judgments in accordance with national legislation.[186] In addition, bilateral enforcement and recognition agreements can be pursued with states which have similar legislation as was demonstrated by the 1990 Australia-United-Kingdom Agreement[187] and the Canada-United Kingdom Agreement of 1984.[188]

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182 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 as a self-imposed restraint upon the jurisdictional claims of states. See Lowe (1981) 75 **AJIL** 257 at 281.

183 Pitofsky 1999) 2 ***J Int Economic Law*** at 403.

184 See, for example, the 1967 OECD Recommendation on Co-operation between Member Countries on Restrictive Business Practices Affecting International Trade.

185 See, for example, 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 Pitofsky (***op cit*** at 403).

186 Pitofsky (**op cit** 403**)**.

187 SI 1994 No 1901.

188 SI 1987 No 468.

(d) RECOMMENDATIONS

3.113 Our law on the possibility of suing on either the original cause of action or the foreign judgment must be clarified by legislation providing that the judgment extinguishes the original cause of action.

3.114 An acceptable definition of a judgment would be ‘a judicial determination of a civil or commercial claim, however labelled, in adversarial proceedings’.

3.115 Although the forum should, as far as possible, be discouraged from re-examining foreign judgments, it must be allowed to pronounce on their validity in certain extreme cases, notably where the original court lacked any jurisdiction to hear a dispute. Such major flaws must be distinguished from minor procedural defects, which do not completely nullify judgments. The latter may not be raised before the forum. The discretionary nature of this analysis suggests that legislative provision is not possible.

3.116 In the case of conflicting judgments, legislation is needed to indicate which judgment should prevail. Comment would be appreciated on whether preference should be given to the earlier or later judgment.

3.117 If the foreign judgment was given in a foreign currency, which must then be converted into rands (or vice versa), fluctuations in the exchange rate suggest that the forum should be given a measure of discretion in determining the date for conversion. Hence, legislation is needed to indicate that South African courts may depart from the common-law rule that the date for converting is the date of payment.

3.118 Because of the somewhat uncertain state of the common law, the courts need clear statutory authority to enforce non-monetary judgments. This issue is made more

important by the fact that the statutory method for enforcement applies only to monetary judgments.[189]

3.119 Legislative provision may be necessary to determine the competence of courts in federal states. If an action was brought in a local court then residence or submission within that court's area of jurisdiction suffices, whereas residence or submission within a federation suffices if the suit occurred in a federal court.

3.120 The number and definition of the connecting factors considered appropriate to establish international competence need to be clarified. Residence and submission will clearly suffice but the Commission would appreciate comment on whether domicile and nationality should also be included.

3.121 In order to bring our law into line with other common-law jurisdictions, the concept of residence for corporations must be expanded to include the principal place of business, and possibly even the place of business, provided that the cause of action arose within the same area.

3.122 Once it is clear that our courts may enforce both monetary and non-monetary judgments, legislation must be enacted providing grounds of international competence in cases of judgments that operate ***in rem***. In particular, it must be provided that the ***forum rei sitae*** has exclusive jurisdiction in actions involving rights to property.[190]

3.123 To determine certain issues, notably those concerned with the finality of judgments and the defences of natural justice, fraud and public policy, the courts need

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

190 Provision is already made for the latter issue in section 7(5)(a) of the Foreign Civil Judgments Act 32 of 1988.

discretion. Hence, although the common-law rules are not perfect, legislative intervention would be inadvisable.[191]

3.124 The Prescription Act must be amended to provide that, in the event of a conflict between the prescription periods for a judgment under the law of the state in which it was given and South African law, the shortest period will prevail.

3.125 The Protection of Businesses Act must be amended to remove the provisions which make enforcement of foreign judgments a matter of ministerial discretion. Instead, provision should be made to allow the Minister to intervene only in circumstances when enforcement of a judgment poses a serious threat to the security or economy of South Africa or constitutes an undue penalty for the judgment debtor.

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191 Not, however, that section 7(1) of the Foreign Civil Judgments Act 32 of 1988 presumes a judgment to be final, even if an appeal is pending in the foreign court or the time for appeal has not yet expired.

Because these awards are usually variable according to changes in the parties' social and economic circumstances, they cannot be considered final and therefore enforceable under our common law.[1] As a result, the Act provides a statutory method for enforcing maintenance judgments which emanate from certain countries designated by the State President.[2]

4.5 Under the Act a certified copy of a foreign maintenance order has first to be transmitted, via diplomatic channels, to the 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.[3] After registration the order is deemed to be an order of the registering court and, accordingly, enforceable under the provisions of the South African Maintenance Act.[4] The Act also allows provisional maintenance orders emanating from foreign countries to be confirmed after a full inquiry by the local maintenance court.[5]

4.6 Registration of an order operates only prospectively. As a result, arrears of maintenance incurred before registration cannot be recovered. In this situation the only remedy is to bring an action under the common law, if such is possible.[6]

4.7 Because the process of registration is administrative, 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.[7] Hence, if liability under the foreign system falls away, the order remains in

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

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

3 Section 3.

4 Act 99 of 1998.

5 Section 4.

6 Forsyth 4th edition (***op cit*** at 421).

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

force. The defendant's remedy, in such circumstances, is to apply to the foreign court for alteration or discharge of the order, and the new judgment can then be registered under the Act.[8]

4.8 The Act applies only to countries designated by the Minister of Justice by notice in the *Gazette*.[9] The principal criterion governing exercise of ministerial discretion is reciprocal treatment for South African maintenance orders in the proposed state and, with this end in view, the Act makes provision for our orders to be transmitted to the proclaimed states.[10] According to Forsyth, however, reciprocity is not essential, notwithstanding these provisions and the title of the Act.[11]

4.9 The Reciprocal Enforcement of Maintenance Orders (Countries in Africa) Act 6 of 1989 applies, as its title indicates, to certain African states designated by the Minister of Justice.[12] By omitting two of the steps contained in the 1963 Act - reference to the Minister and transmission by diplomatic channels - it provides an accelerated enforcement procedure. Maintenance orders from the 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.[13]

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

9 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.

10 Sections 7 and 8.

11 **Forsyth** 4th edition (***op cit*** at 420-1). Under a now repealed section 6*bis,* however, reciprocity used to be required.

12 Section 2(1).

13 Sections 3 and 4.

4.10 The principle of reciprocity finds expression in provisions allowing orders made by South African courts to be transmitted to the designated states for enforcement against debtors who are employed or in receipt of salaries there.[14] A South African maintenance court may also, after due inquiry, issue a provisional order against a person resident in a proclaimed state in his or her absence.[15] The order is then sent to that state for confirmation and enforcement,[16] after which it is deemed to have been made under the South African Maintenance Act.[17]

4.11 Unfortunately, only the former TBVC states were designated under this Act and its already restricted scope has been further reduced by a practice of designating African countries under the 1963 Act.

4.12 Finally, on the issue of maintenance it must be noted that South Africa is free to accede to the Hague Convention concerning Recognition and Enforcement of Decisions Relating to Maintenance towards Children (1958),[18] and the Hague Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations (1973).[19] By doing so we shall gain reciprocal access to the courts of all other states party to the Conventions.

(ii) Other civil judgments

4.13 Civil judgments apart from maintenance are dealt with in the Enforcement of Foreign Civil Judgments Act 32 of 1988. This Act provides a procedure specifically

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14 Section 8.

15 Section 5.

16 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.

17 Section 7.

18 This Convention has been adopted by 22 states.

19 This Convention has also been adopted by 22 states.

designed to reduce the time and costs involved in the common-law enforcement action, although it does not exclude use of the common law.[20] Significantly, although the Act applies only to countries designated by the Minister of Justice, reciprocal treatment by the chosen states is not required.[21]

4.14 The Act caters for judgments given in 'civil proceedings or in respect of compensation … in any criminal proceedings'. Non-monetary judgments and those based on penal or revenue laws are excluded.[22] Unfortunately, the Act applies only to 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 will be governed by the common law.

4.15 The Act provides that a judgment creditor may have a judgment from a designated foreign state[23] registered in a South African magistrate's court.[24] A certified copy of this 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.[25]

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20 Forsyth 4th edition (***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 ….'

21 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.

22 See the definition of 'judgment' in section 1 of the Act.

23 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)'.

24 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.

25 Section 3.

4.16 A registered judgment has the same effect as any other judgment emanating from a magistrate's court.[26] Execution, however, is delayed for 21 days, which is the period of notice given to the judgment debtor to have the judgment set aside.[27] The debtor may attempt to impugn the judgment on grounds broadly corresponding to the common law. The most significant grounds are the following:[28]

(i) The judgment was registered in contravention of the Act;

(ii) The foreign court 'had no jurisdiction in the circumstances of the case';

(iii) 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;

(iv) The judgment was obtained by fraud;

(v) Enforcement is contrary to South African public policy;

(vi) The matter in dispute had, prior to the date of judgment, been subject to a final judgment by a court of competent jurisdiction;

(vii) The judgment had been prescribed by either South African law or the law of the foreign country;

(viii) The judgment was wholly or partly satisfied.

4.17 The Act contains several important deeming provisions. It is presumed that a judgment is final notwithstanding the existence of a pending appeal.[29] The foreign court is presumed to have had jurisdiction if the judgment debtor was resident there, acted as plaintiff (or plaintiff in reconvention) there, or agreed to submit to the court's jurisdiction. If the judgment debtor was a juristic person, jurisdiction is presumed, provided that 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.[30] A set of negative presumptions provides that the foreign court lacked international

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26 Section 4(1).

27 Section 3(2).

28 Section 5.

29 Section 7(1).

30 Section 7(4).

competence if, in proceedings relating to immovables, the property was situated outside its jurisdiction, the parties had agreed to have the dispute settled elsewhere, or the judgment debtor was entitled to immunity under public international law.[31]

4.18 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'.[32]

(c) EVALUATION

(i) Comparative materials: Commonwealth, European and international instruments

4.19 The South African legislation on recognition and enforcement of foreign judgments was derived from earlier British statutes (which have provided models for many Commonwealth countries). Hence, a convenient place to start an assessment of the South African law is with this legislation.

4.20 Britain introduced an accelerated procedure for enforcing arbitral awards and judgments from the superior courts of Commonwealth countries (and, at the same time, gaining enforcement of its own judgments) under the Administration of Justice Act of 1920.[33] This Act did little to change (or improve on) the common-law criteria for determining the validity of judgments, however, nor in fact did it exclude application of the common law. But it did provide that judgments emanating from the designated

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31 Section 7(5).

32 Section 3(4).

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

states (which had to be proclaimed in advance) could be directly executed in Britain once they had been registered. To decide which states were to be designated, the executive had to be satisfied that British judgments would be given reciprocal treatment.

4.21 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.[34] Like its 1920 predecessor, this Act more or less encoded the common law.[35]

4.22 The next significant round of reforms occurred when Britain joined the Common Market. Under the Treaty of Rome, members of the organization were obliged to harmonize their laws,[36] and an early product of this obligation 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), which almost exactly repeated the provisions of the Brussels Convention, followed. It catered for relations between EEC members and states belonging to the European Free Trade Association.

4.23 In order to implement the Brussels Convention, Britain enacted the Civil Jurisdiction and Judgments Act (1982) (which had to be amended in 1991 to include the Lugano Convention). This Act provides for the recognition and enforcement of judgments – whether money or non-money, and whether derived from maintenance or other civil claims - emanating from states parties to the Conventions.

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

35 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.

36 Article 220.

4.24 On 1 March 2002, however, the Conventions[37] and the Civil Jurisdiction Act were, in their turn, superseded by a European Council Regulation ('the Brussels I Regulation').[38] Although the Regulation does not differ significantly from the Conventions, it now provides the primary method[39] for recognizing and enforcing judgments of all but one of the EU member states ***inter se***.[40] When the next round of admissions to the Union occurs, as will happen later in 2004,[41] the new states will be automatically bound by it.

4.25 The so-called Brussels regime is a prime example of regional co-operation in judicial matters. It therefore serves as a useful, albeit ambitious, model for other regional groupings such as the Southern African Development Community.

4.26 The Brussels regime developed from a realization that international litigation is mainly about contractual and delictual disputes between companies and individuals

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37 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.

38 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 binds Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom.

39 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.

40 The exception is Denmark, which has a special status under the Treaty of Amsterdam, and therefore continues to be bound by the Brussels Convention.

41 Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia.

involved in international commerce.[42] With the exception of maintenance, the Conventions and the Regulation therefore apply mainly to commercial matters.[43]

4.27 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 under which courts would, in the first instance, be entitled to assume jurisdiction. According to this line of thinking, once all courts were bound by the same rules of jurisdiction, a court called upon to enforce a foreign judgment would have no need to inquire into international competence. Hence, in the Brussels and Lugano Conventions and in the Regulation, an entire chapter is devoted to the rules on jurisdiction.[44]

4.28 Another feature of this regime is the set of special provisions on exclusive jurisdiction. In matters of insurance,[45] consumer contracts,[46] contracts of employment[47] or claims to immovable property,[48] for instance, only particular courts are competent. If any others purport to exercise jurisdiction, their judgments are deemed nullities.

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42 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).

43 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).

44 The two main grounds are domicile and submission.

45 Articles 8-14 of the Regulation.

46 Articles 15-17 of the Regulation.

47 Articles 18-21 of the Regulation.

48 Article 22(1) of the Regulation.

4.29 The Regulation defines 'judgment' broadly as any judgment, however labelled, given by a court or tribunal of a member state, including a decree, order, decision or writ of execution, as well as a determination of costs or expenses by an officer of the court.[49] No distinction is made between judgments ***in rem*** or ***in personam***. All judgments given by a court (or tribunal) of a member state on a civil or commercial matter must be recognized or enforced in other member states without the need for any special procedure.[50] Quite obviously, ***révision au fond*** is not permitted.[51]

4.30 Although the provisions on jurisdiction were intimately linked to those on the recognition and enforcement of judgments, the grounds of jurisdiction specified in the Regulation are not the only ones on which the original court is entitled to hear a case. The goal of complete uniformity is upset by article 4, which allows a state to apply its own internal rules of jurisdiction over defendants domiciled in a non-party state. 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.[52]

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49 Article 32. The provisions of Chapter III of the Convention, however, do not apply to interlocutory decisions on procedural matters, provisional measures granted without notice or court settlements. Judgments by consent, on the other hand, do fall within the scope of art 32.

50 Article 33.

51 Article 36.

52 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. The ensuing judgment then is enforceable in all courts in the EU. The exercise of jurisdiction in this manner has been strongly criticized by Borchers (1992) 40 **Am J Comp law** 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.

4.31 The Regulation does not require the foreign judgment to be final or for a fixed sum of money.[53] It must simply be enforceable in the country of origin.[54]

4.32 Chapter III of the Regulation governs the enforcement procedure. The provisions in this respect were kept to a minimum.[55] The forum's rules on international competence are obviously irrelevant because the Regulation assumes that the original court decided whether it had jurisdiction in terms of Chapter II. Courts can therefore assume that nearly all judgments from EU states were rendered on the basis of an agreed set of rules governing jurisdiction. A judgment creditor needs only to approach a court in the recognizing state with a copy of the judgment; an order of enforcement will then be issued.[56] This order is served on the debtor, who may appeal to the recognizing court. On points of law, either party may subsequently appeal to a higher court.[57]

4.33 The judgment debtor may, in limited circumstances, raise the defence of public policy.[58] For this purpose, the foreign judgment must constitute a breach of a fundamental principle considered essential to the legal order of the state in which

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53 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'.

54 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.

55 Article 33 provides that judgments must be recognized 'without any special procedure being required'.

56 Under article 37, if an appeal is pending in the original court, proceedings in the forum may be stayed.

57 Articles 43 and 44.

58 Article 34(1) provides that the judgment must be 'manifestly' contrary to the forum's public policy.

recognition is sought. Although there is no separate defence of fraud, it is generally accepted that this issue may be argued under the rubric of public policy.

4.34 In practice, the defence of natural justice has proved to be more important than fraud or public policy. 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'.[59] The crux of this article is 'default of appearance'.[60] A defendant who played any part in the original proceedings – if only to contest the court's jurisdiction or to request a stay of proceedings – is deemed to have 'appeared'. It is for the court in which enforcement is sought to decide whether service was in sufficient time and effected in an appropriate manner.

4.35 A judgment will not be recognized if it is 'irreconcilable' with a judgment given in a dispute between the same parties in the state where recognition is sought or another member state, whether the judgment was handed down earlier or later.[61] The same principle applies to judgments emanating from non-EU states.

4.36 Aside from the regional grouping in South America,[62] states outside the confines of Europe have no international arrangement equivalent to the Brussels regime to facilitate the enforcement of judgments. Currently, the Hague Conference –

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59 Article 34(2).

60 The equivalent provision in the Brussels Convention offered defendants a convenient method for challenging judgments on largely technical grounds, and it generated a significant body of case law in Britain.

61 Article 34(3) and (4). Cf the position in the United States, where, according to §114 of the Restatement, Second **Conflict of Laws**, the last-in-time judgment is given preference.

62 Where certain states adopted the Montevideo Convention on the Extraterritorial Validity of Foreign Judgments and Arbitral Awards (1979) and the La Paz Convention on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgments (1984).

in which South Africa now participates - is sponsoring a draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters.[63]

4.37 This draft convention is in many ways similar to the Brussels regime. It is intended to regulate not only recognition and enforcement of foreign judgments, but also jurisdiction.[64] Hence, all judgments are enforceable, provided that the original court was competent according to the conventional rules on jurisdiction. Matrimonial issues, wills or succession, insolvency, arbitral awards or admiralty matters are excluded.[65] Judgment is broadly defined to include decrees or orders, however termed, determinations of costs and any provisional or protective measures.[66]

4.38 The procedure for enforcement is simple: the forum must verify the jurisdiction of the rendering court, although it may postpone proceedings if the judgment is subject to review or appeal. Enforcement may be refused if:

(i) an inconsistent judgment was already given elsewhere;

(ii) the proceedings of the court of origin are incompatible with the 'fundamental principles of procedure' in the forum;

(iii) the document instituting proceedings was not notified to the defendant in sufficient time to arrange the defence;

(iv) the judgment was obtained by fraud in relation to a matter of procedure; or

(v) the judgment is manifestly incompatible with the forum's public policy.

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63 In the view of **Ms T Kruger (Institute for International Trade Law, Leuven)**, South Africa should be part of this global development, and, if a convention is adopted, South Africa should ratify it.

64 Under article 3, a court has jurisdiction over the defendant, if that person is habitually resident within the court's area. Although, technically, this ground of jurisdiction differs markedly from the Brussels regime, which requires domicile, the two concepts may well be interpreted to mean much the same. An artificial person is deemed to be habitually resident in the state where it has its statutory seat (if it was incorporated under that state's law), where it has its central administration or where it has its principal place of business.

65 Unlike the European instruments, however, article 1(2) it also excludes maintenance obligations, which are dealt with in two separate conventions.

66 Article 23.

4.39 Because the principles in the Brussels regime and the draft Hague Convention have been internationally agreed, they provide a useful guide for South African law- and policy-makers, both for purposes of immediate domestic law reform and for possible long-term goals of creating a regional regime for SADC.

(ii) South Africa's accession to the Hague Conventions on maintenance

4.40 In the view of Professor Roodt (UNISA), Ms T Kruger (Institute for International Trade Law, Leuven), Prof W L de Vos (University of Stellenbosch) and the Committee on Family Law and Gender of the Law Society of the Cape of Good Hope, South Africa should ratify the Hague Convention concerning Recognition and Enforcement of Decisions Relating to Maintenance towards Children (1958) and the Hague Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations (1973). As Ms Kruger notes, although the 1958 Convention is mostly covered by the 1973 Convention, not all states are parties to both, and so both Conventions should be ratified. Dr C F Forsyth and Ms C Jesseman (University of Cambridge) were also generally in favour of South Africa's accession, on the ground that an international convention is the best method for dealing with the issue of maintenance. Before a decision to accede is made, however, they recommended a study of the conventions and the impact they will have on South African law.

4.41 The 1973 Convention applies to maintenance awards emanating from judicial or administrative authorities in states parties, provided that the obligation arises from a family relationship, parentage, marriage or affinity.[67] The grounds of international competence are:

(i) nationality of either the maintenance debtor or creditor of the state which gave the original judgment;

(ii) habitual residence of either party in that state;

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[67] Article 1. The maintenance creditor may be a public body claiming reimbursement for benefits given to a maintenance creditor.

(iii) the debtor's submission to a court in that state;[68] or

(iv) 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.[69]

4.42 The usual defences are available: fraud (although only in connection with a matter of procedure), public policy, a conflicting judgment already given in another court and ***lis pendens***. Default judgments qualify as enforceable, provided that notice was served on the defaulting party giving him or her enough time to defend the proceedings.[70] The recognition and enforcement procedure is governed by the law of the forum state.[71]

4.43 Accession to the Conventions will involve minimum disruption to South Africa's domestic law on maintenance, since not only the rules for the enforcement procedure but also those for the enforceability of foreign judgments, are compatible with the requirements in our law.

4.44 It is possible to continue enforcing orders under the existing Reciprocal Enforcement of Maintenance Orders Act, in terms of which South Africa has already designated a fair number of states, but it is always to the advantage of local judgment creditors to be able to enforce judgments in as many countries abroad as possible. Accession to the Conventions has the added benefit of avoiding the case-by-case process of designating certain states, since all parties to the Conventions will become reciprocating partners. The disadvantage with this approach is the preclusion of opportunities to scrutinize judicial standards of parties to the Conventions, and thus the possibility of refusing the enforcement of their judgments.

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68 Article 7.

69 Article 8.

70 Article 6.

71 Article 13.

(iii) Retention of the two Acts on maintenance

4.45 Most respondents agreed that two different statutes on maintenance should not be retained. **Professor Roodt** said that there should be no difference in the procedures for enforcing maintenance orders from African and other countries. **Ms Kruger** said that the Reciprocal Enforcement of Maintenance Orders (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 Act and said 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.

4.46 **Dr Forsyth** and **Ms Jesseman** also considered the Countries of Africa Act a dead letter but they said that it had substantial merits, because it allowed for the registration of maintenance orders by an administrative process without having to resort to diplomatic channels. The Act also provides for the enforcement of provisional orders and orders for attachment of earnings, which were significant advances 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.

4.47 **The Committee on Family Law and Gender of the Law Society of the Cape of Good Hope** shared the above 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 overseas orders, which have been enforced in South Africa, because the defendants must make application to courts of the countries from which the orders originate.

(iv) Amendments to legislation on enforcement of civil judgments

4.48 The Foreign Civil Judgments Act 32 of 1988 attracted little comment from the respondents to the Issue Paper. The terms of the Act, however, are in line with both

national legislation abroad and international conventions, and so it provides a generally satisfactory legislative framework. Nevertheless, certain amendments should be made, especially if a new act is passed, to include the existing legislation on service of documents and taking of evidence abroad.

(1) Designation of countries and criteria for designation

4.49 Under the common law, provided a foreign judgment complies with South African notions of international competence and due process, it can be enforced regardless of the state from which it emanates. The Issue Paper posed the question whether statutory enforcement procedures should apply to only certain designated countries. Legislation in Britain,[72] Canada,[73] New Zealand[74] and Australia[75] preserve this rule but it has obviously been omitted in the international and regional conventions because all states party to the conventions are, of necessity, bound.

4.50 The question of designating particular countries is closely linked to the criterion to be used for deciding which states to choose. Although reciprocity is the generally accepted criterion in both common-law[76] and civil-law jurisdictions,[77] it was opposed by

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72 Para 4.20 above.

73 In Canada, these are generally provincial enactments applied by the Lieutenant Governors of the relevant provinces to designated states on the basis of reciprocal treatment.

74 The Reciprocal Enforcement of Judgments Act (1934).

75 Foreign Judgments Act (Cth) (1991).

76 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.

77 In Germany, for instance, para 328 of the *Zivilprozessordnung* provides that a German court should not recognize a foreign judgment if it is uncertain whether the state concerned will grant German judgments reciprocal treatment. Subparagraph 5 does not preclude the *recognition* of a foreign judgment if that judgment concerns a non-monetary matter and jurisdiction of a German court could not be established. Reciprocity will be ensured when, on the basis of an

most respondents to the Issue Paper. **Ms T Kruger** was the only person to consider it a satisfactory way of regulating international co-operation.

4.51 **Professor Roodt** supported neither the doctrines of comity nor reciprocity (nor, for that matter, the policy of specifically designating countries for purposes of enforcement), because these criteria concern the sovereign, not the individual. She said that the main guiding principles should be conclusive litigation, convenience and simplified administration. She felt that the requirements for enforcement – or, what is even more important, the grounds for denying recognition - must be well-defined.

4.52 **Dr C F Forsyth** and **Ms C Jesseman** also said that South African private international law is about achieving justice for private litigants, and that to insist upon reciprocal treatment before enforcing a foreign judgment is to deny justice to private litigants, and to prefer a certain group purely on the basis of nationality in the (probably vain) hope that a foreign sovereign will thereby be induced to grant justice to future litigants in its own courts. The courts thereby become instruments of retaliation, and extraneous political factors, having nothing to do with individual interests, can influence a state's decision whether to grant reciprocal treatment. Moreover, the scope and application of reciprocity is difficult to define: it is unclear which party should prove reciprocal treatment and whether it must exist ***de facto*** or ***de jure***. Finally, **Dr Forsyth** and **Ms Jesseman** said that reciprocity does nothing to guarantee the quality of the proceedings under the foreign system of justice.

4.53 Even so, **Dr Forsyth** and **Ms Jesseman** acknowledged that a measure of reciprocity is a fact of life and it is inevitable when seeking agreement in bilateral treaties.[78] If reciprocity is not a guiding criterion, what other should be used? The answer is far from simple. In the case of service of process, a liberal attitude may be

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overall assessment, a foreign state follows the same principles as the German courts. Margin nr 20 citing *BGH NJW* 99, 3198/3201.

78 They also note that reciprocity is a good deal less offensive to the sense of justice than a blanket disregard of all foreign judgments.

justified because service from practically any country should be possible. In the case of enforcing foreign judgments, however, where the judgment is generally registered in ***ex parte*** proceedings, the court must have faith in the quality of justice in the country of origin.[79]

4.54 In summary, although a policy of reciprocal treatment may have undesirable implications for individual litigants, it seems unavoidable. The alternative is to open the courts to enforcement of any judgment issued abroad, in the hope that South Africans will be given a like dispensation.

(2) Retention of the common law action

4.55 Should an 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, there are several deficiencies in the common law which need legislative intervention but this does not necessarily imply the desirability of abolishing the entire action. Legislation abroad gives no conclusive answer to this question: Canada and New Zealand[80] retain the common-law option, but not Australia or Britain (under the 1933 Act).

4.56 It is submitted 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 to only monetary matters, then an alternative procedure is essential. What is more, procedure by way of the common law need not be unduly lengthy. The plaintiff must establish only a ground of jurisdiction; the finality of the judgment may be presumed. The burden then passes to

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79 Other safeguards to ensure that the foreign court had international jurisdiction and the judgment was not contrary to public policy become relevant only later, if the judgment debtor decides to challenge the enforcement action.

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

the defendant to dispute finality or to show denial of natural justice, fraud, etc. It should also be noted that, if the foreign judgment is for a liquidated sum of money, which is most likely to be the case, application can be made for summary judgment.[81]

(3) Courts in which the Act applies

4.57 Both **Dr C F Forsyth** and **Ms C Jesseman** and **The Committee on Family Law and Gender of the Law Society of the Cape of Good Hope** consider that the Foreign Civil Judgments Act should be applicable in both magistrates' courts and the High Court. Indeed, the current limitation to the lower courts seems to have no justification. Legislation in Commonwealth countries allows enforcement in both superior and inferior courts, which is also the approach of the Brussels Regulation[82] and the Hague draft Convention.

(4) Types of judgment

4.58 In line with earlier British legislation, the Act applies only to monetary judgments. This limitation, which was omitted from the Australian and New Zealand Acts and plays no part in the international instruments, seems unwarranted. The Brussels Regulation and the Hague draft Convention[83] apply to any judgment and they specifically include judgments for provisional and protective measures.[84]

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81 Collins et al **Conflict of Laws** at 14-009. **Dr Forsyth** and **Ms Jesseman**, however, contend that, although the common-law requirements for enforcing foreign judgments are becoming clearer, and thus the need for legislation is not as pressing, there are substantial procedural advantages provided by a statutory scheme.

82 Article 1(1).

83 Article 32 of the Brussels Regulation and art 23 of the draft Hague convention.

84 Articles 31 of the Brussels Regulation and 23(1) of the draft Hague convention.

(5) International competence

4.59 The Act gives no positive statement of the grounds of international competence. Instead, it talks of 'competent jurisdiction',[85] leaving the courts with the task of defining exactly what is meant by this phrase. Admittedly, they are helped by a series of presumptions in section 7 of the Act, where two basic grounds of competence are specified: residence and submission. Thereafter, however, the courts may rely on the common-law grounds.[86] Not only is this an awkward formulation, but it is unnecessarily vague.

4.60 The international conventions do not need to define the competence of the rendering court, because they prescribe its grounds of jurisdiction: mainly domicile in the case of the Brussels Regulation,[87] and habitual residence in the case of the draft Hague convention.[88]

4.61 In the national legislation of common law countries, residence is a general requirement, and in the case of companies, it is defined broadly to include the principal place of business, central administration or 'statutory seat'.[89] Submission, too, is obviously accepted in both the national legislation and international instruments.[90] Significantly, however, the draft Hague convention excludes the typical 'exorbitant

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85 Section 6(1)(h).

86 In terms of section 7(4)(c).

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

88 Article 3.

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

90 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.

grounds' of jurisdiction.[91] And when a foreign judgment deals with property, the international instruments provide that the ***forum rei sitae*** has exclusive jurisdiction.[92]

4.62 Courts and litigants need clear guides on expected connections between foreign courts, the parties and causes of action. Elsewhere, residence (whether ordinary or habitual), submission, domicile and even nationality are considered acceptable. Comment would be appreciated on what grounds should be specified.

(6) Defences

4.63 The Act makes provision for all the usual objections 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.[93] Amendments are needed only in matters of detail.

4.64 The provision in the Act on natural justice is perhaps unduly cryptic ('the judgment debtor did not receive notice of the proceedings'),[94] although failure of due process could also, presumably, be raised under the heading of public policy. The provisions of the draft Hague Convention are useful in this respect: 'the judgment results from proceedings incompatible with fundamental principles of procedure of the

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91 Article 18(1). 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.

92 Article 22(1) of the Brussels Regulation and article 12 of the draft Hague convention.

93 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.

94 Section 5(1)(c).

State addressed, including the right of each party to be heard by an impartial and independent court' and 'the document which instituted the proceedings … was not notified to the defendant in sufficient time and in such a way as to enable him to arrange his defence'.[95]

4.65 Public policy can probably be left as it is although it is significant that the international instruments have tended to restrict the scope of this defence by inserting terms such as 'manifestly' contrary to public policy.[96]

4.66 The Act does not specify the nature of the fraud to be raised as a defence, which may give the courts discretion to maintain the common-law distinction between extrinsic and intrinsic fraud. Neither the Brussels Regulation nor the draft Hague Convention are 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.[97] A decision needs to be made whether the common-law distinction should be retained (in the interests of curtailing proceedings in the forum)[98] or whether the forum should be given latitude to review any judgment tainted with fraud. In addition, special provision may be necessary for judgments based on fraudulently procured grounds of jurisdiction.

4.67 Although the Act makes provision for conflicting judgments – the first judgment prevails – a further section is necessary to cater for the problem of ***lis pendens***. Consistent with the rule on conflicting judgments (and provisions in the Brussels Regulation and the Hague draft convention),[99] it seems advisable to require the forum to suspend its proceedings so that the action in the first court may go ahead.

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95 Article 28(1)(c) and (d).

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

97 Article 28(1)(e) of the draft Hague convention.

98 Paras 3.57 – 3.60 above.

99 Articles 27 and 21, respectively.

4.68 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?

4.69 On the controversial subject of multiple damages, the Brussels regime has no specific provision. The Hague draft Convention declares that 'non-compensatory' damages may be granted if these are permitted by the law of the forum,[100] but if there is a difference in the amounts, the enforcing court may grant only the lesser.[101] At present the South African courts are bound by the Protection of Businesses Act, which, as indicated previously,[102] is in need of radical change. A straightforward repeal of the objectionable features of the Act would leave the courts free to construct new rules on the basis of public policy but it seems preferable to make legislative provision for this question. In this regard, we have useful guides in the statutes of other Commonwealth countries.[103]

(7) Procedure for enforcement

4.70 The Act sensibly provides a straightforward procedure, whereby a judgment creditor need only produce an authenticated copy of the original judgment,[104] which will be registered by the clerk of court. It should be noted, however, that according to legislation elsewhere, the Brussels Regulation and the Hague draft Convention, applications must be processed by a court, not simply a court official. Comment would be appreciated on whether our act should be changed accordingly.

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100 Article 33(1).

101 Article 33(2).

102 Paras 3.103 – 3.111 above.

103 Para 3.107 above.

104 The international instruments provide that the forum does no more than verify the jurisdiction of the original court, and, in doing so, is bound by any findings of fact made by that court. See articles 27(2) of the Hague draft convention and 35(2) and 36 of the Brussels Regulation.

(d) RECOMMENDATIONS

4.71 South Africa should accede to the Hague Convention concerning Recognition and Enforcement of Decisions Relating to Maintenance towards Children (1958), and the Hague Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations (1973).

4.72 The enforcement of maintenance obligations should not be regulated by two different statutes. Although associated with the apartheid regime, the Reciprocal Enforcement of Maintenance Orders (Countries of Africa) Act 6 of 1989 should be retained, although possibly amended to exclude the requirement of reciprocal treatment, partly because it applies to a wider range of maintenance orders and partly because it allows for enforcement by a simple administrative procedure. It follows that the Reciprocal Enforcement of Maintenance Orders Act 80 of 1963 should be repealed, and, subject to whatever changes might be necessary following accession to the Hague Conventions, the 1989 Act may be amended to allow its procedure to be applied for a wider range of countries.

4.73 With a few exceptions, the Foreign Civil Judgments Act 32 of 1988 appears to be satisfactory. On the question whether it be made an exclusive method for enforcing foreign judgments, it seems sensible to leave the common-law action as a residual basis for enforcement.

4.74 The major amendment needed for the Act is a provision that the High Court is entitled to register foreign judgments.

4.75 Otherwise, the following smaller changes may also be made, although they are less pressing:

(i) The concept of judgment must be redefined so as to allow for the enforcement of non-monetary judgments.

(ii) Residence of juristic persons, as a ground of international competence, should be redefined so as to include central administration or ‘statutory seat’.

(iii) Comment would be appreciated on what grounds of international competence should be deemed acceptable under the Act.

(iv) The defence of failure of natural justice must be more clearly defined.

(v) The defence of public policy should be allowed to stand unqualified, since an elastic concept in this regard may facilitate arguments based on the Bill of Rights.

(vi) Comment would be appreciated on whether the defence of fraud concept should also be left unqualified, thereby allowing the courts freedom to review any allegation of fraud.

(vii) A provision is needed to determine under which law a judgment has lapsed.

(viii) Provision must be made for a defence of ***lis pendens***.

4.76 The Protection of Businesses Act must be reconsidered, although to serve the same purpose. Thus the Minister of Justice or Economic Affairs should be given discretion to intervene to prohibit the enforcement of a foreign judgment on grounds specified above.

CHAPTER 5 - INTERNATIONAL CO-OPERATION AND CONSOLIDATED LEGISLATION

(a) PROBLEM ANALYSIS

5.1 The present inquiry originated in a concern to end South Africa's isolation and to participate in the global attempt to improve procedures for international judicial co-operation. Currently, however, there is no particular principle in our law giving direction and coherence to the rules in the various subjects considered above.[1] Important principles should nevertheless be a reduction in the time and expense of litigation and the upholding of proper judicial principles. These considerations must, in turn, be linked to the broader task of harmonizing rules of domestic law in order to realize international standards.

5.2 The main question posed in the Issue Paper was whether all our laws on international judicial co-operation should be brought together in a single enactment. As a matter of practical convenience this proposal certainly has merit, since it would provide ready access to our law for both local and foreign practitioners. At present the rules must be found in the common law and a variety of statutes, some of which are now clearly out of date. Consolidation of this legislation would present an ideal opportunity to modernize and revise the law.

5.3 There is no evidence, however, of any country producing consolidated legislation to the type contemplated in the Issue Paper. Similarly, there are no international conventions attempting to deal with all matters of judicial co-operation in a single instrument.[2]

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1 Kahn (***op cit*** at 645) describes the various rationales as 'chimerical'.

2 The European Council Regulations are something of an exception, but they must be interpreted in terms of the peculiar conditions of the EU.

(b) EVALUATION

5.4 None of the respondents to the Issue Paper questioned the desirability of promoting international judicial co-operation. Indeed, in this general cause, **Ms T Kruger (Institute for International Trade Law, Leuven)** alerted the Commission to other Hague Conventions, not mentioned in the Issue Paper, which South should 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);[3] the Hague Convention on the International Protection of Adults (2000) (not yet in force);[4] and the Hague Convention on International Access to Justice (1980).[5]

5.5 In the long term, South Africa should consider closer co-operation not only with the international community but also with states in the SADC union. This is a regional grouping, within which transnational commercial activities may be expected to increase.[6] No matter how desirable the latter goal, however, agreement on the harmonization of domestic laws will face considerable obstacles, not least of which are the divisions in language and legal traditions.[7]

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3 Which addresses a matter that will become increasingly important with the growing effect of AIDS in South Africa.

4 Which applies to the protection of adults who, by reason of an impairment or insufficiency of their personal faculties, are in no position to protect their own interests.

5 Which ensures that legal aid is made available to alien litigants.

6 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 (2002) 35 **CILSA** at 26.

7 Moreover, 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).

5.6 As to the general proposal that rules governing service of process, taking of evidence and the recognition and enforcement of judgments should be consolidated in a single enactment, **Ms T Kruger** felt that these were separate issues, and so a single act was unnecessary. **Dr C F Forsyth** and **Ms C Jesseman,** who took a pragmatic approach to this question, said that there was no pressing need to consolidate, other than the convenience of having all relevant provisions in one place. **Mr K Malunga**, on the other hand, seemed to be in general support of a consolidated Act which would provide for international co-operation in civil matters.

5.7 As to whether maintenance orders should be kept separate from other civil judgments, the respondents to the Issue Paper were in general agreement: the two should be dealt with in different acts. This was the view of **Professor W L de Vos, Professor E Schoeman**, **Mr K Malunga** and **Dr C F Forsyth and Ms C Jesseman.**

5.8 **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. **Dr 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.

5.9 In Britain, foreign maintenance orders have always been segregated from other foreign civil judgments, first in the Maintenance Orders (Facilities for Enforcement) Act (1920),[8] and later in the Maintenance Orders (Reciprocal Enforcement) Act (1972).[9] In

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[8] This Act provided for the reciprocal enforcement of maintenance orders from designated Commonwealth countries.

Canada, too, where most of the provinces passed their own legislation for enforcing foreign money judgments, maintenance orders were excluded.[10] Similarly, the Australian Family Law Act (1975) regulates the enforcement of foreign maintenance orders, separately from other civil judgments.

5.10 By contrast, under the Brussels I Regulation, maintenance orders are dealt with on a par with other civil judgments. Partly on this basis, **Ms T Kruger** supported the idea of consolidated legislation in this regard. The draft Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, however, excludes maintenance, which is dealt with in two earlier Hague Conventions.

5.11 The argument for consolidation is perhaps strongest in the case of serving process, taking evidence and enforcing judgments. Although there is no tradition of collecting these subjects together into one source – presumably because they fall into different academic disciplines – the convenience factor is not inconsiderable – and may be strengthened by a general reform of the existing legislation. The arguments against including maintenance in this consolidation seem stronger, but again they are not necessarily decisive.

(b) RECOMMENDATIONS

5.12 South Africa should be committed to a policy of international judicial co-operation.

5.13 All matters of international judicial co-operation should not be dealt with in a single enactment. In particular, statutes governing enforcement of maintenance orders

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9 This Act provided for the reciprocal enforcement of maintenance orders between the United Kingdom and designated foreign countries.

10 Castell & Walker (***op cit*** at 14.14).

and other civil judgments should not be combined. Further consideration should, nonetheless, be given to combining statutes on service of process, taking evidence abroad and the recognition and enforcement of judgments in a single Act.

ANNEXURE

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)