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THE HARMONISATION OF RULES  
ON THE RECOGNITION AND ENFORCEMENT OF  
FOREIGN JUDGMENTS  
IN THE SOUTHERN AFRICAN CUSTOMS UNION

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Civil and commercial transactions

Cross-border litigation



## **ABSTRACT**

### ***The harmonisation of rules on the recognition and enforcement of foreign judgments in the Southern African Customs Union***

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The Member States of the Southern African Customs Union (SACU) have set as their objectives, amongst others, the facilitation of cross-border movement of goods between the territories of the Member States and the promotion of the integration of Member States into the global economy through enhanced trade and investment.

Different approaches to the recognition and enforcement of foreign judgments by Member States and the risk of non-enforcement may lead to legal uncertainty and increased transaction cost for prospective traders, which ultimately act as non-tariff barriers to trade in the region. Trade is critical to Southern Africa, and the ideal is that barriers to trade, of which uncertainty concerning the recognition and enforcement of foreign judgments among Member States is one, should be removed. Certainty, predictability, security of transactions, effective remedies and cost are important considerations in investment decision-making; and clear rules for allocating international jurisdiction and providing definite and expedited means of enforcing foreign judgments will facilitate intraregional as well as interregional trade. In addition to trade facilitation, a harmonised recognition and enforcement regime will consolidate economic and political integration in the SACU. An effective scheme for the mutual recognition and enforcement of civil judgments has been regarded as a feature of any economic integration initiative likely to achieve significant integration.

While the harmonisation of the rules on the recognition and enforcement of foreign judgments has been given priority in other regional economic communities, in particularly the European Union, any similar effort to harmonise the rules on recognition and enforcement of Member States have been conspicuously absent in the SACU – a situation which needs to receive immediate attention.

The thesis considers the approaches followed by the European Union with the Brussels Regime, the federal system of the United States of America under the ‘full faith and credit clause’; the inter-state recognition scheme under the Australia and New Zealand Trans-Tasman judicial system; as well as the convention-approach of the Latin American States. It finds that the most suitable approach for the SACU is the negotiation and adoption by all SACU Member States of a multilateral convention on the recognition and enforcement of foreign judgments, comparable to the 1971 Convention of the Hague Conference on Private International Law; the EU Brussels I Regulation and the Latin-American Montevideo Convention, as complemented by the La Paz Convention.

It is imperative that a proposed convention should not merely duplicate previous efforts, but should be drafted in the light of the legal, political and socio-economic characteristics of the SACU Member States. The current legislative provisions in force in SACU Member States are compared and analysed, and the comparison and analysis form the basis of a proposal for a future instrument on recognition and enforcement of foreign judgments for the region. A recommended draft text for a proposed Convention on the Recognition and Enforcement of Foreign Judgments for the SACU is included. This draft text could form the basis for future negotiations by SACU Member States.

May 2013



## DECLARATION

I declare that *The harmonisation of rules on the recognition and enforcement of foreign judgments in the Southern African Customs Union* is my own work, that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

Mandi Rossouw

Signed: .....



May 2013

## **ACKNOWLEDGEMENTS**

I would like to thank my supervisor, Professor Bernard Martin for his valuable guidance and contribution to this thesis.

*Opedra aan my Hemelse Vader, met dank.*



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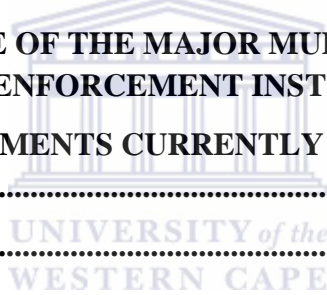
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**1 INTRODUCTION**

Since the inauguration of the European Economic and Monetary Union,<sup>1</sup> questions about whether countries in Africa should work towards a single currency and whether the European Union can be a model for Africa have been coming to the forefront.<sup>2</sup>

The history of regional, and even continent-wide, integration and cooperation initiatives in Africa is fairly long, albeit with very little success.<sup>3</sup> With the launch of the European

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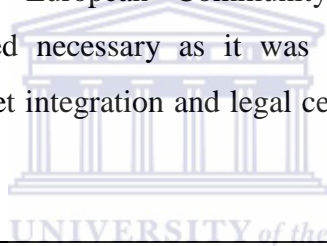
<sup>1</sup> On January 1, 1999 the Euro, the new currency for the eleven Member States was introduced, and at the same time a new single monetary policy was introduced under the authority of the European Central Bank, thus heralding a full fledged European Economic and Monetary Union.

<sup>2</sup> Aziakpono MJ 'Financial and monetary autonomy and interdependence between South Africa and the other SACU countries' (2008) 73(2) *South African Journal of Economics* 189.

Economic Monetary Union in 1999, there has been a rising regional and continent-wide cooperation, and as a mark of this renewed enthusiasm, the African Union (AU) and its implementation plan, the New Partnership for African Development (NEPAD) was launched in 2002, with a view to, amongst others things, increasing African integration.<sup>4</sup>

A long standing example of regional monetary integration<sup>5</sup> in Southern Africa is the Common Monetary Area (CMA), dating back to 1921, of which Lesotho, Namibia, South Africa and Swaziland are Members.<sup>6</sup> In terms of membership, the monetary arrangements in Southern Africa are closely association with a common customs area, the Southern African Customs Union (SACU).<sup>7</sup> Together with Botswana<sup>8</sup> these five States together form the Member States of the SACU.<sup>9</sup>

The recognition and enforcement of foreign judgments has been a central part of regional economic development in the European Community.<sup>10</sup> A unified recognition and enforcement regime was deemed necessary as it was believed that free circulation of judgments<sup>11</sup> could enhance market integration and legal certainty in the European Economic



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<sup>3</sup> Oyejide TA 'Policies for regional integration in Africa' (2000) *Economic research papers No 62*, Abidjan: African Development Bank 7.

<sup>4</sup> Aziakpono (note 2) 189.

<sup>5</sup> Monetary integration can take different forms, ranging from an informal exchange rate union, formal exchange rate union to a full monetary union. Other forms include adoption of another country's currency: see Masson P & Patillo C *The Monetary Geography of Africa* (2004) 7.

<sup>6</sup> Aziakpono (note 2) 190.

<sup>7</sup> Wang J, Masha I, Shirono K and Harris L 2007 'The Common Monetary Area in Southern Africa: Shocks, adjustments and policy challenges' *International Monetary Fund IMF Working Paper WP/07/158* 7 available at <http://www.imf.org/external/pubs/ft/wp/2007/wp07158.pdf> (accessed 7 April 2013).

<sup>8</sup> In 1921, after the establishment of the South African Reserve Bank, the South African currency (initially the pound, since 1962 the rand), became effectively the sole medium of exchange and legal tender in South Africa, Bechuanaland (now Botswana), Lesotho, Namibia and Swaziland. There were no internal restrictions on movements of fund within the area and virtually all external transactions were effected through banks in South Africa and subject to South African exchange controls. The situation continued after Botswana, Lesotho and Swaziland gained political independence in the 1960s. The currency union was formally established on 5 December 1974, with the signing of the Rand Monetary Area Agreement. Botswana, however, opted to withdraw from the Rand Monetary Area in 1975, mainly because it wanted to retain the ability to formulate and implement its own monetary policy and to adjust the exchange rate, if necessary, in response to shocks affecting its economy. However, Botswana has maintained a close link with its national currency and the rand: see Wang et al (note 7) 8.

<sup>9</sup> See para 2.2 below.

<sup>10</sup> See para 4.2 below.

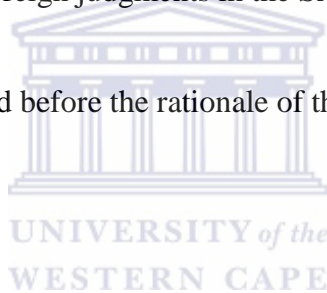
<sup>11</sup> The EU Regulation 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters [2001] *Official Journal* L12/1 ('Brussels I Regulation') provides that, for the purposes of the free movement of judgments, judgments given in one Member State (bound by the Brussels I Regulation) should be recognised and enforced in another Member State, even if the judgment debtor is domiciled in a third State: Recital 10.

Community (EEC).<sup>12</sup> A similar regime governing the recognition and enforcement of foreign judgments among the SACU Member States is conspicuously absent.<sup>13</sup>

The thesis argues that the SACU needs a harmonised recognition and enforcement of foreign judgments regime,<sup>14</sup> and that a harmonised recognition and enforcement regime will not only facilitate regional economic integration, but it will also facilitate trade in the region.<sup>15</sup>

The thesis provides a comparative investigation of selected private international law regimes, focussing specifically on the recognition and enforcement of foreign judgments, and incidentally jurisdiction, in the SACU. The aim of the investigation is to determine whether the differences between these regimes can be reconciled to create a harmonised set of rules that would apply within the region. The conclusions drawn from the comparison are used to determine an appropriate strategy for the harmonisation of the rules relating to the recognition and enforcement of foreign judgments in the SACU.

Certain key concepts are discussed before the rationale of the study is considered.



## 2 KEY CONCEPTS

The key concepts that are discussed in this section include regional economic integration, as regional economic integration on the African continent forms part of the origin and background of the study and the SACU, the specific regional integration initiative and geographical context within which the study takes place. Next, private international law, the field of law of which the recognition and enforcement of foreign judgments takes place, as

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<sup>12</sup> Huang J *Interregional Recognition and Enforcement of Civil and Commercial Judgments: Lessons for China from US and EU Laws* (unpublished SJD Thesis, Duke University School of Law, 2010) 21 available online at <http://scholarship.law.duke.edu/etd/1/>; Fitzpatrick J 'The Lugano Convention and Western European Integration: a Comparative Analysis of Jurisdiction and Judgments in Europe and the US' (1992-1993) *Connecticut Journal of International Law* 699; see also the Preamble to the Convention on Jurisdiction and the Recognition of Judgments in Civil and Commercial Matters 1968 *Official Journal* (L 229) ('Brussels Convention') ('... desiring to implement the provisions ... to secure the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals'); and Jenard P 'Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (signed at Brussels, 27 September 1968)' (1979) *Official Journal of the European Communities* No. C 59/1 (5 March 1979) ('Jenard Report') 38.

<sup>13</sup> See para 3.2 below.

<sup>14</sup> See para 4 below.

<sup>15</sup> See para 4.1 and 4.2 below.

well as the concepts of recognition and enforcement of foreign judgments are discussed. Finally, the concept of legal harmonisation, which is the objective of the study, is discussed.

## 2.1 Regional Economic Integration

One of the first definitions of integration was given by Tinbergen<sup>16</sup> who distinguished between *negative* integration or ‘the removal of discriminatory restrictions and the introduction of freedom for economic transactions’ and *positive* integration, ‘the adjustment of existing and the establishment of new policies and institutions endowed with coercive powers’.<sup>17</sup> Jovanovic<sup>18</sup> suggests that it is easier to advance in the direction of ‘negative’ integration (removal of tariffs and quotas) than towards ‘positive integration’ because the ‘positive’ approach deals with sensitive issues of national sovereignty.<sup>19</sup> Anderson and Blackhurst<sup>20</sup> define regional economic integration as ‘the process of reducing economic significance of national political boundaries within a geographical area’. Pelkmans<sup>21</sup> defines economic integration as ‘the elimination of economic frontiers between two or more economies’.<sup>22</sup> Balassa<sup>23</sup> in turn defines regional economic integration as ‘the removal of obstacles to cross-border trade allowing for the free movement of persons, goods, services and capital across national boundaries’.

Regional economic integration generally passes through four stages before it reaches completion namely: free trade area, customs union, common market and economic union.<sup>24</sup> El-Agraa<sup>25</sup> refers to international economic integration as the discriminatory removal of all

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<sup>16</sup> Tinbergen J *International Economic Integration* (1954) 122.

<sup>17</sup> Tinbergen (note 16) 122.

<sup>18</sup> Jovanovic MN *The Economics of International Integration* (2007) 16.

<sup>19</sup> Jovanovic (note 18) 16.

<sup>20</sup> Anderson K & Blackhurst R *Regional integration and the global trading system* (1993) 1.

<sup>21</sup> Pelkmans J ‘The institutional economics of European integration’ in Cappelliti M & Seccombe M (eds) *Integration Through Law: Europe And The American experience* (1989) 318.

<sup>22</sup> Economic frontiers are separations, often in the form of geo-political and national boundaries, through which the flow of goods, labour and capital is restricted: see Pelkmans (note 21) 318.

<sup>23</sup> Balassa B *The Theory of Economic Integration* (1962) 2.

<sup>24</sup> In a free trade area, tariffs between participating countries are abolished, but each country retains its own tariff against non-participating countries. In a customs union the tariffs of all the member states are equalised against non-participating countries. In a common market, which is a higher form of integration, not only trade restrictions, but also restrictions on factor movements are abolished. An economic union, as distinct from a common market, combines the suppression of restrictions on commodity and factor movements with some degree of harmonisation of national economic policies in order to remove discrimination due to disparities in these policies. Complete economic integration presupposes the unification of monetary, fiscal, social and counter-physical policies and requires the setting up of a supra-national authority whose decisions are binding on member states: see Balassa (note 23) 2.

<sup>25</sup> El-Agraa A *The Economics of the European Community* (1985) 93.



trade impediments between participating nations and the establishment of certain elements of coordination between them. For present purposes the latter definition will be used, as the definition is wide enough to cover *all* trade impediments, including the focus of the thesis, namely diverse rules on recognition and enforcement of foreign judgments as an impediment to trade;<sup>26</sup> and the proposals made towards the harmonisation of the rules on recognition and enforcement would also be covered by ‘elements of coordination’.<sup>27</sup>

Legal integration is critical to the progress of integration and consolidates economic and political integration.<sup>28</sup> Complete economic integration presupposes the unification of monetary, fiscal, social and macroeconomic policies and requires the setting up of a supra-national authority<sup>29</sup> whose decisions are binding on Member States.<sup>30</sup> Economic integration results in the unification of both States and legal systems, and, therefore, private international law, which deals with issues arising from the interaction of legal systems, should form an essential part of integration.<sup>31</sup>

## 2.2 The Southern African Customs Union

The world’s oldest custom union,<sup>32</sup> the Southern African Customs Union (SACU), dates back to a 1889 Customs Union Convention between the British Colony of the Cape of Good Hope and the Orange Free State Boer Republic. A new agreement, signed on June 29, 1910 was extended to the Union of South Africa and the British High Commission Territories, namely

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<sup>26</sup> See para 4.1 below.

<sup>27</sup> See Chapter 4 below.

<sup>28</sup> Conflicts and divergences arising from the laws of different Member States in a Regional Community in matters relating to trade, arbitration and enforcement of judgments rank among the major areas to intra-regional cooperation and integration that Member States will confront as they move towards of integration. The achievement of a number of the objectives of a specific community, such as the elimination of customs duties and adoption of common external customs tariff, and the elimination of non-tariff barriers to trade, will require the taking of legal measures. Differences in linguistic, political, legal and administrative systems must be addressed and solutions sought. The implementation of these solutions will require an effective regulatory framework: see Ndulo M ‘The need for harmonisation of trade laws in the Southern Africa Development Community (SADC)’ (1996) 4 *African Yearbook of International Law* 195, 209; see also para 4.2 below.

<sup>29</sup> See para 2.5 below.

<sup>30</sup> Balassa (note 23) 2.

<sup>31</sup> Oppong RF ‘Private International law in Africa: the past, present and future’ (2007) 55 *American Journal of Comparative Law* 677.

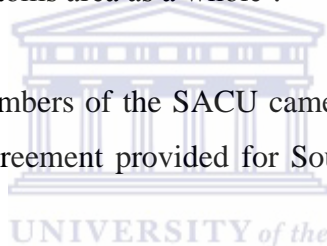
<sup>32</sup> SACU SACU Information Brochure (2008) available online at <http://www.sacu.int/publications/brochures/2008/information.pdf> (accessed 20 February 2013); Draper P, Halleon D & Alves P ‘SACU, Regional Integration and the Overlap Issue in Southern Africa: From Spaghetti to Cannelloni?’ (2007) *South African Institute of International Affairs Trade Policy Report No 15* 16.



Basutoland (Lesotho), Bechuanaland (Botswana), and Swaziland.<sup>33</sup> The primary goal of the Agreement was to promote economic development through regional coordination of trade.<sup>34</sup> This agreement lasted until the British Protectorates received independence in the mid-1960s. It was then renegotiated with the South African apartheid government, culminating in the signing by representatives of the Governments of Botswana, Lesotho, South Africa and Swaziland of a Customs Union Agreement<sup>35</sup> on 12 December 1969, replacing the 1910 Agreement.<sup>36</sup>

The Negotiating Parties to the 1969 Agreement, ‘being desirous of maintaining the free interchange of goods between their countries and applying the same tariffs and trade and regulations to goods imported from outside the common customs area’<sup>37</sup> recognised that the 1969 Agreement required modification to provide for the continuance of the customs union arrangements ‘in the changed circumstances on a basis designed to ensure the continued economic development of the customs area as a whole’.<sup>38</sup>

With the passage of time, all members of the SACU came to consider the 1969 Agreement seriously flawed.<sup>39</sup> The 1969 Agreement provided for South Africa alone to determine the



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<sup>33</sup> High Commissioner Notice 65 of 29 June 1910: *Customs Agreement: Union of South Africa – Territories of Basutoland, Swaziland, and the Bechuanaland Protectorate*. The preamble of the 1910 Agreement provided that ‘whereas it is desirable that an agreement should be entered into between the Government of the Union of South Africa ... and the Territories of Basutoland, Swaziland, and the Bechuanaland Protectorate ... under which -

- a) the territories shall maintain a tariff similar to that which exist in the Union of South Africa;
- b) an equitable share of the duties collected on goods passing through the Union to the Territories shall be paid over to them and vice versa; and
- c) there should be a free interchange of South African products and manufacturers and the between the Union and the Territories’; see 1910 SACU Agreement (note 33) Preamble.

<sup>34</sup> South West Africa was a de facto Member since it was administered as part of South Africa before it became a de jure Member: SACU Brochure (note 32) 3.

<sup>35</sup> See South Africa Government Notice No R3914 – 12 December 1969 *Customs Union Agreement between the Governments of the Republic of South Africa, the Republic of Botswana, the Kingdom of Lesotho and the Kingdom of Swaziland*; Botswana Government Gazette (Gaborone), dated 12 December 1969: *Agreement Between the Government of the Republic of Botswana, the Government of the Kingdom of Lesotho, the Government of the Republic of South Africa, and the Government of the Kingdom of Swaziland Terminating the Customs Agreement of 1910 and Concluding a new Customs Agreement, Together with a New Memorandum of Understanding Relating Thereto*.

<sup>36</sup> Landell-Mills PM ‘The 1969 Southern African Customs Union Agreement’ (1971) 9(2) *Journal of Modern African Studies* 264.

<sup>37</sup> 1969 SACU Agreement (note 35) Preamble.

<sup>38</sup> 1969 SACU Agreement (note 35) Preamble.

<sup>39</sup> Botswana, Lesotho and Swaziland expressed their concern with the following three issues: a) there was no joint decision-making processes – prior to 2002 SACU was administered on a part-time basis by annual meetings of the Customs Union Commission and there were no effective procedures to ensure compliance or disputes; b) revenue sharing formula – the issue of most concern in the 1969 Agreement was the Revenue Sharing Formula, which determined each country’s share of the Common Revenue Pool; and c) the question

external tariff policy of the customs union.<sup>40</sup> The SACU itself was administered on a part time basis by annual meetings of the Customs Union Commission and there were no effective procedures to ensure compliance or to resolve disputes.<sup>41</sup>

Although there had been numerous discussions on the 1969 Agreement prior to 1994, these lacked serious commitment from South Africa and were largely aimed at resolving technical aspects of the 1969 Agreement. The renegotiations of the Agreement in its entirety only began in November 1994, and after eight years of negotiations, South Africa, Botswana, Namibia, Lesotho and Swaziland signed a new Agreement<sup>42</sup> on 21 October 2002.<sup>43</sup>

The objectives of the SACU Agreement are to<sup>44</sup> -

- (a) facilitate the cross-border movement of goods between the territories of the Member States;
- (b) create effective, transparent and democratic institutions which will ensure equitable trade benefits to Member States;
- (c) promote conditions of fair competition in the Common Customs Area;

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of external (outside SACU) trade – Botswana, Lesotho and Swaziland argued that South Africa consistently entered into preferential agreements which benefited only one of five members: SACU Brochure (note 32) 2.

<sup>40</sup> All changes to customs tariffs, rebates, anti-dumping and countervailing duties were affected by the South African Minister of Trade upon the recommendation of the South African Board of Tariffs and Trade. Excise policy was determined by the South African Minister of Finance. The Agreement did require consultation on excise changes but these seldom took place and the four other Member States, namely Botswana, Lesotho, Namibia and Swaziland, usually learned of SACU excise rates during the delivery of the South African National Budget: Kirk R & Steyn M 'The New South African Customs Union Agreement' (2005) 28(2) *The World Economy* 175.

<sup>41</sup> Kirk & Steyn (note 40) 175.

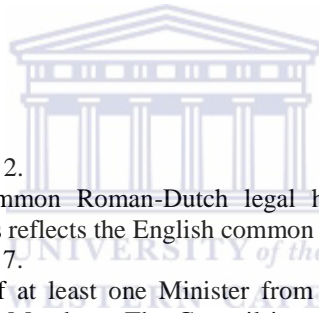
<sup>42</sup> 2002 Southern African Customs Union (SACU) Agreement between the Governments of the Republic of Botswana, the Kingdom of Lesotho, the Republic of Namibia, the Republic of South Africa and the Kingdom of Swaziland signed on 21 October 2002 in Gaborone, Botswana. The 2002 SACU Agreement addressed the following three issues: a) Joint decision making processes – art 3 established an independent Administrative Secretariat to oversee SACU, while art 7 created several independent institutions (see notes 22-27 below); b) revision of the Revenue Sharing Formula to include a customs excise and development component; and c) on the question of external (outside SACU) trade, they identified the need to develop strategies that enhance the political, economic, social, and cultural integration of the Southern African region without jeopardizing the economies of the smaller states: SACU Brochure (note 32) 3.

<sup>43</sup> The 2002 SACU Agreement has been criticised that it did not deal with some of the more fundamental obstacles to economic integration in the region, and deals with very little of the world trade agenda: for example, some attempt to incorporate services or the movement of labour within the SACU would have been appropriate. Finally, little progress was made on industrial policy issues and tax harmonisation, meaning that Member States will continue to compete with each other for investment through tax incentives. Given the extent of free trade within SACU, and the fact that all Member States share common customs and excise tax rates, further tax harmonisation is possible and necessary: Kirk & Steyn (note 40) 188.

<sup>44</sup> Political integration is not mentioned as one of the objectives of the SACU Agreement. This is not anomalous, as a customs union, traditionally the second stage of regional integration, focusses on the equalising of the tariffs of all the member states against non-participating countries (see note 24 above). The Treaty of the African Economic Community includes as the *sixth* stage of integration 'integration of all sectors ... political, social and cultural' (art 6(f)(ii)): see note 175 below.

- (d) substantially increase investment opportunities in the Common Customs Area;
- (e) enhance the economic development, diversification, industrialisation and competitiveness of Member States;
- (f) promote the integration of Member States into the global economy through enhanced trade and investment;
- (g) facilitate the equitable sharing of revenue arising from customs, excise and additional duties levied by Member States; and
- (h) facilitate the development of common policies and strategies.<sup>45</sup>

Since the independence of Namibia from South Africa in 1990, the SACU Member States are therefore South Africa, Namibia, Botswana, Lesotho and Swaziland.<sup>46</sup> The SACU consists of a number of institutions,<sup>47</sup> namely a Council of Ministers,<sup>48</sup> the Customs Union Commission,<sup>49</sup> Secretariat,<sup>50</sup> Tariff Board,<sup>51</sup> Technical Liaison Committees<sup>52</sup> and an ad hoc Tribunal.<sup>53</sup>



<sup>45</sup> 2002 SACU Agreement (note 42) art 2.

<sup>46</sup> Although these States share a common Roman-Dutch legal heritage, their laws on recognition and enforcement in a number of instances reflects the English common law position: see Chapter 4 below.

<sup>47</sup> 2002 SACU Agreement (note 42) art 7.

<sup>48</sup> The Council of Ministers consist of at least one Minister from each Member State and is the supreme decision making authority of SACU Members. The Council is responsible for the overall policy direction and functioning of SACU institutions, including the formulation of policy mandates, procedures and guidelines for the SACU institutions; appoint an Executive Secretary of SACU and the members of the Tariff Board; approve the budgets of the Secretariat, the Tariff Board and the Tribunal; oversee the implementation of the policies of SACU; and approve customs tariffs, rebates, refunds or drawbacks and trade related remedies: see 2002 SACU Agreement (note 42) art 8.

<sup>49</sup> The Commission consist of senior officials at the level of Permanent Secretaries, Directors-General, Principal Secretaries or other officials of equivalent rank, from each Member State. The Commission is responsible to and report to the Council, on the implementation of the SACU Agreement; the implementation of the decisions of the Council; and supervise the work of the Secretariat: see 2002 SACU Agreement (note 42) art 9.

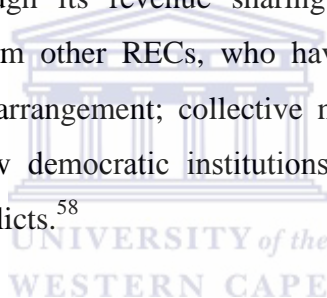
<sup>50</sup> The Secretariat is responsible for the day-to-day administration of SACU, including to coordinate and monitor the implementation of all decisions of the Council and the Commission; to assist in the harmonisation of national policies and strategies of Member States in so far as they relate to SACU; and coordinate and assist in the negotiation of trade agreements with third parties: see 2002 SACU Agreement (note 42) art 10.

<sup>51</sup> The Tariff Board consist of experts drawn from Member States, and is an independent institution made up of full-time or part-time members or both. The Tariff Board makes recommendations to the Council on the level and changes of customs, anti-dumping, countervailing and safeguard duties on goods imported from outside the Common Customs Area, rebates, refunds or duty drawbacks based on the directives given to it by the Council: see 2002 SACU Agreement (note 42) art 11.

<sup>52</sup> There are four Technical Liaison Committees to assist and advise the Commission in its work, namely: Agricultural Liaison Committee; Customs Technical Liaison Committee; Trade and Industry Liaison Committee; and Transport Liaison Committee: see 2002 SACU Agreement (note 42) art 12.

<sup>53</sup> Any dispute regarding the interpretation or application of the Agreement, or any dispute arising thereunder at the request of the Council, is be settled by an ad hoc Tribunal, composed of three members, except as otherwise determined by the Council: see 2002 SACU Agreement (note 42) art 13.

Despite the fact that SACU is the most advanced form of regional integration on the African continent<sup>54</sup> and the world's oldest customs union, the SACU is not one of the eight regional economic communities (RECs) recognised by the AU for the purposes of establishing the African Economic Community (AEC).<sup>55</sup> Formal non-recognition by the AU for the purpose of establishing the AEC does not wish the SACU away. The fact that it is the world's oldest custom union means that its experience with co-operative mechanisms must have some value. Non-recognition of the SACU has raised questions of how seriously the AU processes and objectives should be taken, and whether they resonate with national and regional concerns.<sup>56</sup> Given the SACU's impressive record of longevity, the fact that that it already represents an effective functioning regional trading arrangement, and that it includes South Africa, the region's economic powerhouse, it is necessary for the SACU to be explicitly recognised as a fast-track building block of southern African economic integration.<sup>57</sup> The SACU also has other strengths when compared to other RECs, including a built-in compensation mechanism through its revenue sharing scheme for the less advanced economies, which is absent from other RECs, who have neither the consensus nor the resources to establish such an arrangement; collective negotiating strength with external partners; and provision for new democratic institutions based on 'consensus' decision-making to manage potential conflicts.<sup>58</sup>



The SACU is nevertheless officially recognised to be a building block in the development of a customs union for the Southern African Development Community (SADC).<sup>59</sup> The SADC, in turn, is envisaged, together and after consolidation with other continental integration

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<sup>54</sup> Trade Law Centre (TRALAC) 'An overview of SACU' 5 June 2008 available at [www.tralac.org/2008/06/05/an-overview-of-sacu/](http://www.tralac.org/2008/06/05/an-overview-of-sacu/) (accessed 28 March 2013).

<sup>55</sup> At the Banjul Summit in Gambia in 2006, the AU decided to suspend, until further notice, the recognition of new RECs, with the exception of the following eight, each established under a separate regional treaty: Economic Community of West African States (ECOWAS); Common Market of East and Southern Africa (COMESA); Economic Community of Central African States (ECCAS); Southern African Development Community (SADC); Inter-Governmental Authority for Development (IGAD); Arab Maghreb Union (AMU); Economic Community of Sahelo-Saharan States (CENSAD); and East African Community (EAC): Assembly of the African Union, Seventh Ordinary Session, 1-2 July 2006, Banjul, The Gambia *Decision on the Moratorium on the recognition of Regional Economic Communities* (RECs) DOC.EX.CL/278)IX Assembly/AU/Dec.112(VII): see para 3.4 below.

<sup>56</sup> Draper, Halleson & Alves (note 32) 3.

<sup>57</sup> Draper, Halleson & Alves (note 32) 3, 18.

<sup>58</sup> Draper, Halleson & Alves (note 32) 31.

<sup>59</sup> McCarthy C 'The Southern African Customs Union: Case study prepared for the Food and Agricultural Organisation of the United Nations' (February 2003) available at [www.hubrural.org/fao\\_etude\\_sacu.pdf](http://www.hubrural.org/fao_etude_sacu.pdf) (accessed 28 March 2013) 5.

efforts, to play an important role in the development of the AU.<sup>60</sup> The SACU, it has been argued, 'is likely to form the core of a variable geometry regional trading arrangement covering the whole of southern Africa'.<sup>61</sup>

### 2.3 Private International Law

The recognition and enforcement of foreign judgments form part of private international law.<sup>62</sup> Private international law is not a distinct branch of law<sup>63</sup> and does not deal with one particular topic, but comes into operation whenever the court of a particular State is faced with a claim which contains a foreign element.<sup>64</sup>

Private international law facilitates the settlement of international disputes between private citizens or non-State organisations, including situations in which States act as private individuals.<sup>65</sup>

Private international law has three main objects: first, to prescribe the conditions under which the court is competent, i.e. have jurisdiction, to hear a claim containing a foreign element. Secondly, to determine the particular national system of law by reference to which the rights and duties of the parties must be determined. Thirdly, to specify the circumstances in which

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<sup>60</sup> McCarthy (note 59) 5; Ngwenya S 'Fair deal: the new SACU (Southern African Customs Union) Draft Agreement' The Department of Trade and Industry: South Africa (March 2002) 26.

<sup>61</sup> Gibb R 'Regional Integration in Post-Apartheid South Africa: the Case of renegotiating the South African Customs Union' (1997) 23(1) *Journal of Southern African Studies* 68. See also McCarthy (note 59) 5; Draper, Halleson & Alves (note 32) 18.

<sup>62</sup> Forsyth CF *Private International Law: The Modern Roman-Dutch law including the jurisdiction of the High Courts* 5 ed (2012) 418; Cheshire CG & North PM *Cheshire & North's Private International Law* 14 ed (2008) 3; Symeonides SC *American Private International Law* (2008) 16; Agrawal KB & Vandana S *Private International Law in India* (2010) 54; Collier JG *Conflict of Laws* 3 ed (2001) 3; Myass A *Principles of Conflict of Laws* 3 ed (1999) 1-2.

<sup>63</sup> In *Dynamit Actien Gesselchaft v Rio Tinto Co Ltd* [1918] AC 260 it was observed that: 'Every legal decision of our own courts consists of the application of our own law to the facts of the case as ascertained by appropriate evidence. One of these facts may be the state of some foreign law, but it is not the foreign law but our own law to which effect is given... As has often been said private international law is really a branch of municipal law and obviously there can be no branch of municipal law in which the general policy of such law can be properly ignored.'

<sup>64</sup> Cheshire & North (note 62) 3; Noronha FE *Private International Law in India: Adequacy of Principles in Comparison with Common Law and Civil Law Systems* (2010) 2; O'Brien J *Conflict of Laws* 2 ed (1999) 5-6. Though being a branch of municipal law, private international law is not supposed to furnish direct solution of a dispute as is being done in the case of municipal law. It possesses the unity of a branch through it deals with all the branches: see Agrawal & Vandana (note 62) 54.

<sup>65</sup> Ritaine EC 'Harmonising European private international law: A replay of Hannibal's crossing of the Alps?' (2006) 32(2) *International Journal of Legal Information* 419.



(a) a foreign judgment can be recognised as decisive of the question in dispute, and (b) when the right vested in the creditor by a foreign judgment can be enforced by action.<sup>66</sup>

The reason for being of private international law is the existence of separate systems of national law, whose rules that regulate the various legal relations arising in daily life, differ greatly from each other.<sup>67</sup> Unlike public international law where there is a uniform understanding within the international community as well as a single system, private international law varies among nations, each of which has its own system.<sup>68</sup>

## 2.4 Recognition and enforcement of foreign judgments

The rules for recognition and enforcement of judgments specify both the circumstances in which a judgment rendered by a court outside the geographical boundaries of a State (foreign judgment) will be *recognised* in the courts of that State (domestic court); and when a foreign judgment will be *enforceable* in a domestic court.<sup>69</sup> The distinction between recognition and enforcement rests essentially upon whether the local court, faced with a foreign judgment is required to order the performance, or non-performance, of a particular act in order to give effect to the foreign judgment.<sup>70</sup> Stated differently, recognition implies that the domestic court acknowledges that the judgment has, within the court's own jurisdiction, the legal effect which the foreign court intended it to have, while enforcement requires that the local court will in addition 'compel the judgment debtor to comply with the foreign judgment'.<sup>71</sup> The enforcement procedure is usually left to domestic law and varies greatly among legal systems.<sup>72</sup>

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<sup>66</sup> Cheshire & North (note 62) 3-4; Stone P *EU Private International Law* (2010) 3. Foreign judgments become relevant in litigation not only regarding matters of recognition and enforcement but also regarding the defences (or exceptions) of *res judicata* and issue estoppel: see Barnett PR *Res Judicata, Estoppel and Foreign Judgments: The Preclusive Effects of Foreign Judgments in Private International Law* (2001) 183-4.

<sup>67</sup> Cheshire & North (note 62) 4; Stone (note 66) 4.

<sup>68</sup> Sooksripaisanrkit P 'Harmonisation of private international law – Is it possible at all?' (2012) 1(1) *Journal of Civil Legal Science* 1.

<sup>69</sup> South African Law Reform Commission *Project 121 - Consolidated Legislation Pertaining to International Judicial Co-Operation in Civil Matters: Report* (December 2006) ('SALRC Report') 30.

<sup>70</sup> Forsyth (note 62) 418.

<sup>71</sup> Silberberg H *The recognition and enforcement of foreign judgments in South Africa* (1977) 6.

<sup>72</sup> Michaels R 'Recognition and enforcement of foreign judgments' *Max Plank Encyclopaedia of Public International Law* (2009) 2.

While recognition is, therefore, always a condition sine qua non for enforcement the converse is not necessarily true; judgments may be recognised without being enforced.<sup>73</sup> Declaratory orders and judgments dismissing claims, for example, do not require enforcement.<sup>74</sup>

The rules on enforcement of foreign judgments developed over 200 years ago to deal with the problems of the 'absconding debtor'.<sup>75</sup> If a judgment debtor fled the jurisdiction in which a judgment had been delivered, a judgment creditor could take the judgment to the jurisdiction to which the debtor had fled and attempt to have it satisfied there. Courts treated foreign judgments as evidence of a debt and allowed the judgment creditor to bring the proceedings to recover the debt. Enforcement of foreign judgments was consequently limited to those for a sum of money.<sup>76</sup>

Today, the enforcement of foreign judgments is an area of significant practical importance. The progress of globalisation, including the increased ease with which people and property move across traditional state borders, has led to a corresponding rise in transnational litigation.<sup>77</sup> Dispute resolution does not end with the obtaining of a paper judgment; a plaintiff may have to enforce the judgment in another jurisdiction to obtain an effective remedy.<sup>78</sup> Enforcement of foreign judgments is the application of the local court's powers to give effect to the foreign court's decision, without the plaintiff having to re-litigate the merits of the dispute.<sup>79</sup>

States belonging to the same REC mitigate these disadvantages by concluding bilateral and multilateral treaties.<sup>80</sup> There has been a significant movement in recent years towards the harmonisation of private international law rules between groups of countries, but the process has been rather slow.<sup>81</sup> Africa has generally not participated in this process - no bilateral or

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<sup>73</sup> Schulze C *On Jurisdiction and the Recognition of Foreign Money Judgments* (2005) 17.

<sup>74</sup> SARLC Report (note 69) 30.

<sup>75</sup> Mortensen R 'Judgments Extension under CER' 1999 *New Zealand Law Review* 239 ('CER' in this context refers to 'Closer Economic Region', similar to a Regional Economic Community).

<sup>76</sup> Pham K 'Enforcement of Non-Monetary Foreign Judgments in Australia' (2008) 30 *Sydney Law Review* 664.

<sup>77</sup> McLachlan C 'International Litigation and the Reworking of the Conflict of Laws' (2004) 120 *Law Quarterly Review* 580–582.

<sup>78</sup> Ho HL 'Policies Underlying the Enforcement of Foreign Commercial Judgments' (1997) 46 *International and Comparative Law Quarterly* 457; Pham (note 76) 664.

<sup>79</sup> British Columbia Law Institute ('BCLI') *Report on the Enforcement of Non-Money Judgments from Outside the Province*, Report No 8 (1999) 6.

<sup>80</sup> Such as those in Europe, North America and South America.

<sup>81</sup> Sooksripaisanrkit (note 68) 1.

multilateral convention has yet been concluded on the continent as a whole, nor in the SACU.<sup>82</sup> Consequently, recognition and enforcement is governed by the national laws of the respective States.

## 2.5 Harmonisation

Conflicts between different legal systems can be mitigated through a process of unification of laws, through adoption of uniform rules that are devised by a supranational<sup>83</sup> or international authority<sup>84</sup> and adopted by separate States. Alternatively, differences between legal systems can be mediated by a process of harmonisation.<sup>85</sup>

International unification refers to the adoption of one agreed set of rules, standards or guidelines for application to transnational transactions.<sup>86</sup> Harmonisation in its most complete sense means absolute uniformity of legislation among the adopting jurisdictions.<sup>87</sup> This is also the most difficult to achieve since it presupposes not only unanimity about policies and goals but also on means of implementation, and assumes a continuing willingness to agree on future changes in the uniform legislation and not to adopt unilateral changes in the meantime.<sup>88</sup> International traders achieve this by custom, international practice or by international agreement within the framework of professional organisations,<sup>89</sup> or between States by an international convention.<sup>90</sup>

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<sup>82</sup> Thomashausen A 'The enforcement and recognition and of judgments and other forms of legal cooperation in the SADC' (2005) 35(1) *Comparative and International Law Journal of Southern Africa* 34.

<sup>83</sup> Such as the European Union (EU) or the Organisation for the Harmonisation of Business Law in Africa (OHADA).

<sup>84</sup> Such as the United Nations Commission on International Trade Law (UNCITRAL), or the World Trade Organisation (WTO).

<sup>85</sup> Also referred to as 'approximation' or 'legal integration'; Zamora S 'NAFTA and the harmonisation of domestic legal systems: the side effects of free trade' (1995) 12 *Arizona Journal of International and Comparative Law* 403.

<sup>86</sup> Zaphirou GA 'Unification and harmonisation of law relating to global and regional trading' (1993-1994) 14 *North Illinois Law Review* 407.

<sup>87</sup> Ziegel J 'Harmonization of private laws in federal systems of government: Canada, the USA, and Australia' in Cranston R (ed) *Making Commercial Law: Essays In Honour of Roy Goode* (1997) 133.

<sup>88</sup> Ziegel (note 87) 133.

<sup>89</sup> An example of the attainment of unification by the operation of custom, commercial practice and the activity of professional organisations is the rules that apply to the carriage of goods by sea under bills of lading. Some customs created in the Mediterranean and the Atlantic affected worldwide carriage by sea. Commercial practice contributed to the use of standard clauses in time and voyage charter parties and in bills of lading. Building on these foundations and national legislation, the International Law Association and the Comité Maritime International (International Marine Organisation) drafted a set of rules which were adopted at The Hague in 1921, known as the 'Hague Rules'. They can be incorporated, as such, in any time or voyage charter or bill of lading, and regulate the rights and liabilities of carriers and cargo owners and provide for minimum standards that have to be observed. This led to the International Convention for the



The level of harmonisation is reduced if the adopting jurisdictions are allowed to omit some of the more controversial features, or areas where consensus is less likely to be achieved, of an otherwise acceptable legislative package.<sup>91</sup>

Harmonisation, as distinct from unification, can be loosely defined as ‘making the regulatory requirements or government policies of different jurisdictions identical or at least more similar’.<sup>92</sup> In its most common modern form harmonisation brings about a convergence or co-ordination of different legal provisions or systems by eliminating the major differences between them.<sup>93</sup> Harmonisation can involve the voluntary or compelled adoption of one legal system in place of another. Alternatively, harmonisation may require that all State parties to an agreement are obliged to amend their laws to conform to their mutual agreement, whether such agreement is unanimous, as is the case in the Organisation for the Harmonisation in Business Law in Africa (‘OHADA’),<sup>94</sup> or approved by a majority, which is the method applicable to some forms of legislation in the European Union.<sup>95</sup> Harmonisation, therefore, does not lead to a settled set of agreed rules;<sup>96</sup> but rather refers to the search for common

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Unification of Certain Rules of Law Relating to Bills of Lading Aug 25, 1924, 54 Stat. 233 UNTS 155: see Zaphirou (note 86) 408.

<sup>90</sup> Such as the United Nations Convention on Contracts for the International Sale of Goods Vienna, 1 April 1980 1489 UNTS 3; see Zaphirou (note 86) 407.

<sup>91</sup> Ziegel (note 87) 134.

<sup>92</sup> Leebron D ‘Claims for harmonization: A theoretical framework’ (1996) 27 *Canadian Business Law Journal* 66. He also suggests that the term ‘harmonisation’ is a misnomer insofar as it might be regarded as deriving from the musical notion of harmony, for it is difference, not sameness, which makes for musical harmony.

<sup>93</sup> Backer LC *Harmonizing Law in an Era of Globalization - Convergence, Divergence and Resistance* (2007) 13; Zaphirou (note 86) 71; Elbati B ‘The role of the reciprocity requirement in the harmonization of standards for the recognition and enforcement of foreign judgments’ (2008) *Faculté des sciences juridiques, politiques et sociales de Tunis - Mastère en Common Law* available at <http://www.memoireonline.com/12/08/1678/m-The-role-of-the-reciprocity-requirement-in-the-harmonization-of-standards-for-the-recognition-and-en0.html#fn5> (accessed 12 April 2012).

<sup>94</sup> See para 3.2 below.

<sup>95</sup> Directives are important harmonising instruments, as they used to bring different national laws in line with each other. EU directives are binding as to the result to be achieved, but leaves it to the national authorities the choice of form and methods: Consolidated Treaty on the Functioning of the European Union, 30 March 2010, C83/47 [‘TFEU’] art 288. A Member State is required to incorporate the EU directive into its domestic legal system before it will become effective. However, when a State fails to incorporate a directive within the specified time limit, the directive will have direct effect in its territory, and individuals will be able to derive rights from the directive despite the fact that it still has to be incorporated. Directives are particularly common in matters affecting the operation of the single market: see Mistelis LA ‘Regulatory Aspects: Globalization, harmonisation, legal transplants and law reform – some fundamental observations’ (2000) 34 *The International Lawyer* 312; Backer (note 93) 13-14.

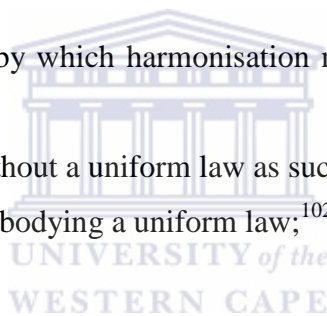
<sup>96</sup> Harmonisation does not entail the adoption of a single, model set of rules, but instead implies a wide range of ways in which legal concepts in different jurisdictions are accommodated. This accommodation can take place by a process of law reform in one or more countries, incorporating influences beyond the jurisdiction’s borders; mediating on private law concepts of two different legal systems for parties caught in between; or

rules which can eliminate differences and create minimum requirements or standards.<sup>97</sup> Harmonisation, therefore, focuses on the means of attaining substantive ends which can lead to the coordination of different policies.<sup>98</sup>

Harmonisation in relation to laws affecting trade is said to have two distinct objectives: the first is to create a separate legal regime that would apply to international transactions while preserving national laws for purely domestic transactions, while the second is to facilitate a common market or political or economic grouping by harmonising the national laws governing domestic transactions, so that State boundaries do not affect commerce either within the specific grouping, or internationally, as is the case with initiatives seeking international harmony such as the International Organisation for the Unification of Private Law (UNIDROIT) and the United Nations Commission on International Trade Law (UNCITRAL).<sup>99</sup>

There are at least nine methods by which harmonisation may either be effected or in some measure induced, namely:<sup>100</sup>

- i) A multilateral convention without a uniform law as such;<sup>101</sup>
- ii) A multilateral convention embodying a uniform law;<sup>102</sup>
- iii) A set of bilateral treaties;<sup>103</sup>



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other contact points between legal regimes, from academic writings, the conceits of law professors, to visits by government officials to neighbouring countries: see Zamora (note 85) 403.

<sup>97</sup> Zaphirou (note 86) 407; Bhatia KL *Textbook on Legal Language and Legal Writing* (2010) 234.

<sup>98</sup> Backer (note 93) xiii.

<sup>99</sup> Goode R 'Reflections on the harmonisation of commercial law – Part I: Activities concerning the unification of Law' (1991) 9 *Uniform Law Review* 54. These organisations are discussed in Chapter 2, para 2.2.1 (UNCITRAL) and para 2.2.2 (UNIDROIT).

<sup>100</sup> Goode (note 99) 57.

<sup>101</sup> See for example the Hague Convention of 1 February 1971 on the Recognition and enforcement of Foreign Judgments in Civil and Commercial Matters: see Chapter 2 para 2 below.

<sup>102</sup> Such as the UNIDROIT Convention relating to a Uniform Law on the International Sale of Goods (1964), and the UNIDROIT Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods (1964).

<sup>103</sup> Before the coming into effect of the Brussels Convention in the EU, for example, a number of bilateral treaties were concluded between Member States to facilitate the recognition and enforcement of foreign judgments between them, and which were subsequently repealed by the Brussels Convention, including, amongst others, the following: the Convention between Belgium and the Netherlands on jurisdiction, bankruptcy, and the validity and enforcement of judgments, arbitration awards and authentic instruments, signed at Brussels on 28 March 1925; the Convention between France and Italy on the enforcement of judgments in civil and commercial matters, signed at Rome on 3 June 1930; the Convention between the United Kingdom and the French Republic providing for the reciprocal enforcement of judgments in civil and commercial matters, with Protocol, signed at Paris on 18 January 1934; the Convention between the United Kingdom and the Kingdom of Belgium providing for the reciprocal enforcement of judgments in civil and commercial matters, with Protocol, signed at Brussels on 2 May 1934; the Convention between Germany and Italy on the recognition and enforcement of judgments in civil and commercial matters, signed at Rome

- iv) Community legislation – typically, a directive;<sup>104</sup>
- v) A model law;<sup>105</sup>
- vi) A codification of custom and usage promulgated by an international non-governmental organisation;<sup>106</sup>
- vii) International trade terms promulgated by an international non-governmental organisation;<sup>107</sup>
- viii) Model contracts and general contractual conditions;<sup>108</sup> and
- ix) Restatements by scholars and other experts.<sup>109</sup>

Different regions have followed different approaches, or a combination thereof, to achieve regional or international harmonisation or unification of the rules on recognition and enforcement of foreign judgments. These conventions typically take the form of double conventions, which address both the issue of recognition and enforcement of foreign judgments and direct jurisdiction in one instrument; and single conventions, addressing only

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on 9 March 1936; the Convention between the Federal Republic of Germany and the Kingdom of Belgium on the mutual recognition and enforcement of judgments, arbitration awards and authentic instruments in civil and commercial matters, signed at Bonn on 30 June 1958; the Convention between the Kingdom of the Netherlands and the Italian Republic on the recognition and enforcement of judgments in civil and commercial matters, signed at Rome on 17 April 1959; the Convention between the United Kingdom and the Federal Republic of Germany for the reciprocal recognition and enforcement of judgments in civil and commercial matters, signed at Bonn on 14 July 1960; the Convention between the Kingdom of Greece and the Federal Republic of Germany for the reciprocal recognition and enforcement of judgments, settlements and authentic instruments in civil and commercial matters, signed in Athens on 4 November 1961: see Brussels Convention (note 12) art 55.

<sup>104</sup> Directives are important harmonising instruments, as they used to bring different national laws in line with each other. EU directives are binding as to the result to be achieved, but leaves the choice of form and methods to the national authorities: see TFEU (note 95) art 288. A Member State is required the incorporate the EU directive into its domestic legal system before it will become effective. However, when a State fails to incorporate a directive within the specified time limit, the directive will have direct effect in its territory, and individuals will be able to derive rights from the directive despite the fact that it still has to be incorporated.

<sup>105</sup> See, for example, the 1985 UNCITRAL Model Law on International Commercial Arbitration; and 2002 UNCITRAL Model Law on International Commercial Conciliation.

<sup>106</sup> See, for example Hague Rules on the carriage of goods by sea under bills of lading. Some customs created in the Mediterranean and the Atlantic affected worldwide carriage by sea: see note 89 above.

<sup>107</sup> For example, the Incoterms (International Commercial Terms) drafted by the International Chamber of Commerce (ICC) which is an internationally recognised standard that are used worldwide in international and domestic contracts for the sale of goods. Incoterms rules provide internationally accepted definitions and rules of interpretation for most common commercial terms, such as FOB (free on board) and CIF (cost-insurance-freight).

<sup>108</sup> See, for example, the International Trade Centre's (ITC) Model Contract for the International Commercial Sale of Goods; ITC Model Contract for the International Long-term Supply of Goods; ITC Model International Contract Manufacture Agreement; ITC Model Contract for the International Distribution of Goods; ITC Model Contract for and International Commercial Agency; and ITC Model Contract for the International Supply of Services, available at [http://www.intracen.org/uploadedFiles/intracenorg/Content/Exporters/Exporting\\_Better/Templates\\_of\\_contracts/3%20International%20Commercial%20Sale%20of%20Goods.pdf](http://www.intracen.org/uploadedFiles/intracenorg/Content/Exporters/Exporting_Better/Templates_of_contracts/3%20International%20Commercial%20Sale%20of%20Goods.pdf) (accessed 8 March 2013).

<sup>109</sup> See, for example the Restatement of the Law, Second: Conflict of Laws, St Paul: American Law Institute.

recognition and enforcement and only indirect jurisdiction.<sup>110</sup> Some of these approaches are discussed in Chapter 2 below, with a view to identifying the most appropriate approach to harmonisation and/or unification in the SACU.

### 3 ORIGIN AND BACKGROUND OF STUDY

This study originates from the following aspects: the lack of a global recognition and enforcement regime; the lack of a regional recognition and enforcement regime; recent international developments in the field; and regional integration efforts on the African continent, which are now discussed.

#### 3.1 The lack of global recognition and enforcement regime

It is generally agreed that a universal judgment recognition and enforcement regime would be beneficial to and enhance international trade, as well as the free movement of people and goods.<sup>111</sup> There is no single international instrument that regulates recognition and enforcement, despite several comprehensive failed attempts to bring about international regulation of this matter, especially in the last three decades.<sup>112</sup>

The absence of a multilateral instrument available for worldwide recognition and enforcement of judicial decisions<sup>113</sup> at a time when the various economic regions in the world are becoming more interdependent on each other, and when the 1958 UN Arbitration

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<sup>110</sup> 'Direct jurisdiction' refers to the jurisdiction of a court adjudicating the merits of a case, as opposed to 'indirect jurisdiction', which is used only where a requested court has to ascertain whether the rendering court had jurisdiction: see Chapter 3, paras 2 and 3 below for a detailed discussion of single and double conventions as well as direct and indirect jurisdiction.

<sup>111</sup> Juenger FK 'Recognition of Money Judgments in Civil and Commercial Matters' (1988) 36 *American Journal of Comparative Law* 1; Juenger FK 'The recognition of Money Judgments in Civil and Commercial Matters' *Selected Essays on the Conflict of Law* (2002) 284; see para 4.1 below.

<sup>112</sup> Oestreicher Y "'We're on a Road to Nowhere" – Reasons for the Continuing Failure to Regulate Recognition and Enforcement of Foreign Judgments' (2008) 42 *The International Lawyer* 69. The situation would have been different if the Hague Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters had become a success. But it has not, most probably for two main reasons: (1) the success of the Brussels Convention (which built to a large extent on the Hague Convention and was negotiated in part by the same persons), followed by the 1988 Lugano Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, and (2) its unusual, complex form: Convention, Protocol of the same date and Bilateral Supplementary Agreements required by the Convention: see Hague Conference 'Some Reflections of the Permanent Bureau on a general convention on enforcement of judgments' *Preliminary Document No 17 of May 1992* (1992) 231. This is discussed in more detail Chapter 2, para 2.1.

<sup>113</sup> Hague Conference (note 112) 231.

Convention<sup>114</sup> demonstrates the viability of worldwide legal frameworks in the commercial area, is certainly anomalous. The anomaly is especially acute when viewed from the perspective of an international businessman who must now sometimes choose between arbitration, with an option of the award being enforceable in over 140 countries,<sup>115</sup> and litigation in a national court without any comparable enforceability option, except if the litigation is concentrated in countries which are parties to a multilateral instrument, such as the EU which is party to the Brussels I Regulation.<sup>116</sup>

Notwithstanding the failure to regulate the problem internationally, several tendencies in the field have been identified in recent years.<sup>117</sup> The law concerning the recognition and enforcement of judgments is growing in importance, and in response to this growing importance, the number of bilateral and multilateral treaties has grown quickly.<sup>118</sup> However, the failure of negotiations for a worldwide Hague Judgments Convention<sup>119</sup> suggests that concluding international agreement in this area has not become easier. Domestic and convention law have diverged more and more from each other, with contemporary laws neither rejecting nor requiring the recognition of foreign judgments; instead, detailed rules for the recognition and enforcement of foreign judgments have emerged in international instruments dealing specifically with recognition and enforcement. Finally, there is a general tendency towards more liberal recognition of foreign judgments, with more treaties requiring recognition and enforcement, and exceptions in treaties and domestic laws being interpreted more narrowly. In response, States appear to rely increasingly on the public policy exception where they regard foreign judgments as incompatible with domestic law.<sup>120</sup>

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<sup>114</sup> United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958, 330 U.N.T.S. 38 ('New York Convention').

<sup>115</sup> UNCITRAL 'Status' available at [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html) (accessed 10 October 2012).

<sup>116</sup> Hague Conference (note 112) 231. The Brussels I Regulation (see note 11) is discussed in detail in Chapter 3, para 4.

<sup>117</sup> Michaels (note 72) 2.

<sup>118</sup> For example the 2005 Hague Convention on Choice of Court Agreements; the Brussels I Regulation (note 11); and the 1983 Riyadh Arab Agreement for Judicial Co-operation (see note 137 below).

<sup>119</sup> This attempt is discussed in detail in Chapter 2, para 2.1.

<sup>120</sup> Michaels (note 72) 2. The public policy exception aims to provide countries with a mechanism that will enable them to refrain from recognising and enforcing foreign judgments, even though all other requirements were met: see Oestreicher Y 'The Rise and Fall of the "Mixed" and "Double" Convention Models Regarding Recognition and Enforcement of Foreign Judgments' (2007) 6 *Washington University Global Studies Law Review* 339. This does not enhance legal certainty for legal traders, as they will be uncertain as to what exactly will constitute public policy in a specific State, and therefore whether their judgment will be recognised and enforced. See Chapter 4, para 4.4.3 for a discussion of public policy as a ground for refusal of recognition and enforcement of foreign judgments.



Arbitration is a popular mechanism for settling disputes arising from cross-border agreements; in some specific sectors and transactions, it is in the interest of the companies or individuals involved to have the option of pursuing litigation as a reliable and efficient dispute settlement mechanism.<sup>121</sup> While arbitration will continue to play an important role in dispute resolution for the foreseeable future, it is unlikely to be an adequate substitute for courts.<sup>122</sup> The expense involved in privately financed dispute resolution is bound to keep arbitration largely beyond the reach of individuals and small businesses.<sup>123</sup> For individuals and small business, the State sponsorship and State regulation of national courts may ultimately make litigation a more affordable, accessible and reliable means of dispute resolution than international commercial arbitration in international transactions.<sup>124</sup>

It is often asserted that international commercial arbitration is the most popular method for resolving international business disputes.<sup>125</sup> Much credit for this situation must be given to the New York Convention<sup>126</sup> which provides a near universally accepted framework for the recognition and enforcement of foreign arbitration agreements and awards.<sup>127</sup> The aim of the Convention is to drastically limit the grounds, under national law, on which an arbitration agreement or award may be denied enforcement.<sup>128</sup>

International commercial arbitration is not without its critics or disadvantages, in particular the cost in the large institutional arbitrations. This fact, combined with the problem that a

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<sup>121</sup> With particular reference to the reasons why businessmen prefer to resort to arbitration in the resolution of their problems instead of the machinery available in the regular courts, 'there is a category of disputes for which the courts seem poorly designed: when two businessmen dispute about a breach of contract, often neither of them wants vindication, or to assuage a feeling of injustice. What they may want is a speedy sensible readjustment of their relations, so that they can resume or maintain their usual mutual business transactions. Because of the difficulty of precise ascertainment by a court of the actual past factors out of which their disputes arose, it may well be that the best mode of settling it is not a court decision in a law suit but arbitration in which the disputants agree to abide by the decision of arbitrators: see Tiewul SA & Tsegah FA 'Arbitration and the settlement of commercial disputes: A selective survey of African practice' (1975) 24 *International & Comparative Law Quarterly* 393.

<sup>122</sup> Dammann J & Hansmann H 'Globalizing commercial litigation' (2008) 94(1) *Cornell Law Review* 25.

<sup>123</sup> Walker J 'The utility of the ALI/UNIDROIT Project on principles and rules of transnational civil procedure' (2001) 6(4) *Uniform Law Review* 803.

<sup>124</sup> Walker (note 123) 804.

<sup>125</sup> Garnett R 'The Hague Choice of Court Convention: Magnum Opus or Much ado about nothing?' (2009) 5(2) *Journal of Private International Law* 162.

<sup>126</sup> UNCITRAL (note 115).

<sup>127</sup> Botswana, Lesotho and South Africa are the only SACU States to have ratified the Convention: see UNCITRAL (note 115).

<sup>128</sup> Garnett (note 125) 169.

number of transnational disputes cannot be submitted to arbitration,<sup>129</sup> means that the need for a uniform global system of jurisdiction and judgment rules remains critical.<sup>130</sup>

While litigation may hold the promise of becoming a more suitable means of dispute resolution for individuals and small business, it has at least two major drawbacks. First, unlike arbitral awards, which, pursuant to the New York Convention are enforceable in more than 140 countries, there is no parallel international convention facilitating the enforcement of foreign judgments.<sup>131</sup> Second, unlike international commercial arbitration, which affords the parties the opportunity to establish a neutral and mutually acceptable forum for their disputes, the differences between national laws can compromise the neutrality of the dispute resolution process, by enabling parties to make outcome-determinative choices of fora (forum shopping). The role of national courts in the new global economy may depend on the extent to which the impact of these two drawbacks can be reduced or eliminated,<sup>132</sup> for example by concluding an international recognition and enforcement of foreign judgments Convention similar to the New York Convention, with clear jurisdiction rules that would limit forum shopping.

### **3.2 The lack of a regional recognition and enforcement regime**

The problems created by diverse private international law regimes, including diverse rules on recognition and enforcement, have been resolved within RECs or regional groupings by creating regulating instruments providing harmonised or unified private international law rules for their Member States.<sup>133</sup>

Some of the instruments which have sought to address the problem, are the Brussels I Regulation adopted by the EU;<sup>134</sup> the Lugano Convention on jurisdiction and recognition and

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<sup>129</sup> New York Convention (note 115) art 5(2)(a) provides that recognition and enforcement of an arbitral award may be refused if the competent authority in the country where recognition and enforcement is sought finds that the subject matter of the dispute is not capable of settlement by arbitration under the law of that country. This is determined by the national law of each country. Examples may include personal injury, consumer and employment cases: Garnett (note 125) 162.

<sup>130</sup> Garnett (note 125) 162.

<sup>131</sup> See para 3.1 above.

<sup>132</sup> Walker (note 123) 804.

<sup>133</sup> Oppong RF 'Private international law and the African Economic Community: a plea for greater attention' (2006) 55 *International Comparative Law Quarterly* 911-912.

<sup>134</sup> The Brussels Convention (note 12) was concluded between Member States of the European Economic Community in 1978. The Brussels I Regulation (note 11) on the same topic replaced the Convention as between Member States, except in limited instances where the Convention continues to apply. The

enforcement adopted by the European Free Trade Area (EFTA) Member States;<sup>135</sup> the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards<sup>136</sup> ('Montevideo Convention'); the Middle East Inter-Arab Convention on Judicial Co-operation;<sup>137</sup> and the Australia-New Zealand Treaty on Trans-Tasman Court Proceedings and Regulatory Enforcement.<sup>138</sup> There have also been proposals for a recognition and enforcement regime between Mainland China, Hong Kong and Macao.<sup>139</sup>

The SACU Member States have, however, been unable to draft and propose, or conclude any regional agreement for the recognition and enforcement of foreign judgments among themselves. This is in contrast with West and East Africa, for example, where some progress in the field of private international law, and specifically the recognition and enforcement of arbitral awards, has been made by the Organisation for the Harmonisation of Business Law in Africa (OHADA).<sup>140</sup>

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Convention/Regulation regulates the jurisdiction which the courts of Contracting States are permitted to exercise, providing Member States with a relatively detailed set of jurisdictional rules according to which a court in a Member State may assert jurisdiction over a defendant who is domiciled in another Member State, and in what situations it should decline to do so; as well as the conditions upon which judgments are to be recognised and enforced. This is discussed in detail in Chapter 2, para 3.1.1.

<sup>135</sup> In the European Economic Area (EEA), the Brussels Regime is supplemented by the Lugano Convention, which is in substance largely similar to the Brussels Convention. The Lugano Convention also facilitates the mutual recognition and enforcement of judgments handed down by the national courts of Contracting States. The rules applicable in EFTA Contracting States to this Convention and EU Members, party to the Brussels I Regulation will therefore be largely similar. This is discussed in Chapter 2, para 3.1.2.

<sup>136</sup> Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards, May 8, 1979, OEA/Ser.A/2818 ILM 1224 (1979). The Montevideo Convention is currently in force in nine countries in Latin America: Argentina, Brazil, Colombia, Ecuador, Mexico, Paraguay, Peru, Uruguay and Venezuela. The purpose of the Convention is to ensure the extraterritorial validity of judgments and arbitral awards in the Member Countries. The Convention applies to all judgments and arbitral awards rendered in civil, commercial or labour proceedings in one of the State Parties. The instrument contains a set of conditions that, if met, gives the judgment extraterritorial effect in all the member countries. This is discussed in Chapter 2, para 3.4.1.

<sup>137</sup> The Inter Arab Convention on Judicial Co-operation was signed in Riyadh, Kingdom of Saudi Arabia in 1983 (known as the Riyadh Convention) is one of the most commonly used treaties in the Middle East for the recognition and enforcement of both court judgments and arbitral awards between Arab nations. The signatory States to the Convention are Algeria, Bahrain, Iraq, Jordan, Libya, Morocco, Oman, Saudi Arabia, Syria, Tunisia, United Arab Emirates and Yemen. See Chapter 2 paragraph 2.1.

<sup>138</sup> Agreement between the Government of Australia and the Government of New Zealand on Trans-Tasman Court Proceedings and Regulatory Enforcement (done at Christchurch, 24 July 2008) ('Trans-Tasman Treaty'). In terms of the agreement, the proposed regime for the recognition and enforcement of judgments between the two States will be modelled on the Australian inter-state scheme, the Service and Execution of Process Act (1992). In short, the Australian model provides for the absolute free circulation of any judgment made in any federal, State or territory court, or tribunal anywhere in the Australian federation. See Chapter 2, para 3.3.

<sup>139</sup> See Huang (note 12).

<sup>140</sup> OHADA Legis 'About OHADA' available at <http://www.ohadalegis.com/anglais/presohadagb.htm#3> (accessed 11 October 2012).



In the early 1990s, a number of Central and West African countries, who were facing a reduction in investment, concluded that a lack of judicial and legal security as well as a lack of governance created an unattractive investment environment. To solve this problem, they proposed the creation of a new business law. They intended this new business law to be modern, harmonised, and interpreted by lawyers well trained in business law, while a unique supranational court would secure the application of the law. This idea led to the signing of the Port-Louis Treaty in 1993, which created OHADA, with the purpose of establishing common rules that would be simple, modern and adapted to each country's situation. The OHADA Member States for example adopted a Uniform Act on Arbitration Law, which is directly applicable and mandatory in all Member States; and replaces and overrules any domestic legislation which is contrary to the provisions of the OHADA Treaty.<sup>141</sup> The Act includes provisions for the recognition and enforcement of arbitral awards in Member States.<sup>142</sup> However, this Uniform Act is only applicable to OHADA Member States, which at this stage are mostly civil law states, namely: Benin, Burkina Faso, Cameroon, Central African Republic, Comoros, Congo, Ivory Coast, Gabon, Guinea, Guinea-Bissau, Equatorial Guinea, Mali, Niger, Senegal, Chad and Togo.<sup>143</sup>

The SACU Member States have furthermore, not become part of any of the international agreements and conventions aimed at the unification of private international law - in fact the continent as a whole has been relatively isolated from international developments in the field.<sup>144</sup> The lack of participation in the international sphere is problematic as SACU States need adequate and modern laws which are indispensable to gaining equality in international trade.<sup>145</sup>

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<sup>141</sup> Treaty on the Harmonisation of Business Law in Africa (JO OHADA N° 4), 1 November 1997 available at [http://www4.worldbank.org/afr/ssatp/Resources/HTML/legal\\_review/Annexes/Annexes%20III/Annex%20III-06.pdf](http://www4.worldbank.org/afr/ssatp/Resources/HTML/legal_review/Annexes/Annexes%20III/Annex%20III-06.pdf) accessed on 17 April 2013 ['OHADA Treaty'] art 10.

<sup>142</sup> Rudahindwa JB *International Commercial Arbitration in Africa: The Organization For Harmonization Of Business Law In Africa (OHADA) Sets The Tone* (unpublished LLM Thesis, Indiana University School of Law (2011) 7.

<sup>143</sup> OHADA Legis (note 140).

<sup>144</sup> For example, no Southern African State is party to the 1971 Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters (HCCH Status Table, available at [http://www.hcch.net/index\\_en.php?act=conventions.status&cid=78](http://www.hcch.net/index_en.php?act=conventions.status&cid=78) (accessed 17 September 2012)) or the 2005 Hague Choice of Court Convention on Choice of Court Agreements (HCCH Status Table, available at [http://www.hcch.net/index\\_en.php?act=conventions.status&cid=98](http://www.hcch.net/index_en.php?act=conventions.status&cid=98) (accessed 17 September 2012)).

<sup>145</sup> Sempasa SL 'Obstacles to International Economic Arbitration in African Countries' (1992) 41 *International and Comparative Law Quarterly* 380.

The diversity of laws and the resultant need for the harmonisation of private international laws in Southern Africa has been identified on several occasions.<sup>146</sup> A plea has also been made for greater attention to the subject in the economic community and for greater cooperation with the Hague Conference on Private International Law (hereafter Hague Conference) but despite these pleas little progress has been made in this regard.<sup>147</sup> Various authors have identified the need for research and development in this field:<sup>148</sup> Forsyth<sup>149</sup> described the underdevelopment of the field as ‘the Cinderella subject seldom studied [and] little understood’. Leon<sup>150</sup> also observed that it is not a subject which command great attention amongst South[ern] African lawyers, and remains largely unfamiliar to the older generation of practicing lawyers. Oppong<sup>151</sup> has also on a number of occasions raised the need for greater international engagement with African perspectives on the subject, as well as a need for more research and writing on the subject.

In the absence of a regional instrument the doctrines of comity<sup>152</sup> and respect for party autonomy<sup>153</sup> with regard to choice of applicable law and forum agreements<sup>154</sup> provide the national courts of the different States with the principles for regulating conflicting private international law rules in international commercial litigation. These private international law issues are currently governed by the relevant common law principles, statutory provisions and case law.<sup>155</sup>

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<sup>146</sup> Bamodu G ‘Transnational law, unification and harmonisation of international commercial law in Africa’ (1994) 38 *Journal of African Law* 125; Ndulo M ‘Harmonisation of trade laws in the African Economic Community’ (1993) 42 *International & Comparative Law Quarterly* 107-108; Ndulo (note 28) 211-12.

<sup>147</sup> Oppong (note 133) 911-912; Oppong RF ‘The Hague Conference and the development of private international law in Africa: a plea for greater cooperation’ (2006) 8 *Yearbook of Private International Law* 189-212.

<sup>148</sup> There is also a lack of writing and activity on the subject, with few commentaries, articles, cases and engagement with the international community for the subject’s development is minimal: Oppong (note 31) 678.

<sup>149</sup> Forsyth (note 62) 46-7.

<sup>150</sup> Leon PSG ‘Roma non locuta est: the recognition and enforcements of foreign judgments in South Africa’ (1983) 16 *Comparative and International Law Journal of South Africa* 325.

<sup>151</sup> Oppong RF *Relational issues of law and economic integration in Africa: perspectives from constitutional, public and private international law* (Unpublished Doctoral Thesis, Vancouver: University of British Columbia, 2009) 326; Oppong (note 133) 911.

<sup>152</sup> Comity is a recognition which one nation extends within its own territory to the legislative, executive or judicial acts of another. See para 5.1 below for a discussion of comity.

<sup>153</sup> The principle according to which parties to an international business contract are free to choose the governing law: See Watt HM ‘“Party Autonomy” in international contracts: From the makings of a myth to the requirements of global governance’ (2010) 6(3) *European Review of Contract Law* 251.

<sup>154</sup> Oppong (note 31) 706.

<sup>155</sup> Thomashausen (note 82) 30.

### 3.3 International developments in the field

There have been a number of developments in the field of private international law in recent years, and especially with regard to the recognition and enforcement of foreign judgments. Recent developments and instruments, some of which will be discussed later in the thesis, include:<sup>156</sup>

- i) The revision of the EU Brussels I Regulation.<sup>157</sup> The Regulation lays down rules governing the jurisdiction of courts and the recognition and enforcement of judgments in civil and commercial matters in European Union (EU) Countries and supersedes the 1968 Brussels Convention, which was applicable between EU Countries before the Regulation entered into force. The Convention continues to apply with respect to those territories of EU countries that fall within its territorial scope and that are excluded from the Regulation. The proposed revision extends the Regulation's jurisdiction rules to third country defendants. In terms of the present Regulation, if the defendant is not domiciled in a Member State, the jurisdiction of the courts will be determined by the law of that Member State.<sup>158</sup> This amendment will generally extend the possibilities of companies and citizens to sue third country defendants in the EU because the special rules of jurisdiction which, for example, establish jurisdiction at the place of contractual performance become available in these cases. More specifically, the amendment will ensure that the protective jurisdiction rules available for consumers, employees and insured will also apply if the defendant is domiciled outside the EU.<sup>159</sup>
- ii) The replacement of the 1988 Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters ('Lugano Convention')<sup>160</sup> between Members of the European Free Trade Area, by the 2007 Lugano Convention<sup>161</sup> ('New Lugano Convention').<sup>162</sup>

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<sup>156</sup> Hague Conference 'Ongoing work on international litigation and possible continuation of the Judgments Project' *Preliminary Document No 5* (2012) 10-11, available at <http://www.hcch.net/upload/wop/gap12pd05e.pdf> (accessed 15 October 2012).

<sup>157</sup> Brussels I Regulation (note 11). See Chapter 2 para 3.1.1 for a discussion of the Regulation.

<sup>158</sup> Brussels I Regulation (note 11) art 4.

<sup>159</sup> EUR-Lex 'Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast)' (2010) 8 available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0748:FIN:EN:PDF> (accessed 7 February 2013).

<sup>160</sup> 16 September 1988.

<sup>161</sup> 30 October 2007.

<sup>162</sup> The New Lugano Convention entered into force on 01 January 2010. The objective of the Convention is to unify the rules on jurisdiction in civil and commercial matters and expand the applicability of the Brussels I Regulation (containing a set of rules that create a unified system in this regard) to the relations between Member States of the EC on the one hand and Norway, Iceland and Switzerland on the other. The 2007 Lugano Convention is open to accession by any State subject to the unanimous agreement of Contracting

- iii) The consideration by the Commonwealth States<sup>163</sup> of model legislation on the recognition and enforcement of foreign judgments.<sup>164</sup>
- iv) A renewed focus on international litigation within the League of Arab States as part of the development of a mechanism to improve the implementation of the 1983 Riyadh Arab Agreement for Judicial Co-operation.<sup>165</sup>

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Parties, therefore, it could also be considered as a potential global scheme on international jurisdiction and recognition and enforcement of foreign judgments.

<sup>163</sup> The Commonwealth of Nations, formerly known as the British Commonwealth, is an intergovernmental organisation of 54 independent Member States. Member countries come from six regions: Africa (19); Asia (8); the Americas (3); the Caribbean (10); Europe (3); and the South Pacific (11). All members except Mozambique and Rwanda were part of the British Empire, out of which the Commonwealth developed: see Commonwealth Secretariat 'The Commonwealth Secretariat' available at <http://www.thecommonwealth.org/subhomepage/191086/> (accessed 09 October 2012).

<sup>164</sup> At a meeting of Senior Officials of Commonwealth Law Ministries in 2007, there was general agreement that the present legislation found in most Commonwealth member states required updating, and that serious consideration should be given to the principles found in more recent legislation and reflected in the work of the Hague Conference. Senior Officials identified a number of important and interrelated issues: the place of reciprocity in Commonwealth arrangements; the importance of registration as a part of the recognition procedure; and the scope of recognition in terms of the nature of the foreign court and of the judgment itself. Attention was drawn to further work done in recent bilateral negotiations and by law reform bodies in several member states: see Commonwealth Secretariat 'Meeting of Senior Officials of Commonwealth Law Ministries London, 1-3 October 2007 – Record' available online at [http://www.thecommonwealth.org/shared\\_asp\\_files/GFSR.asp?NodeID=176438](http://www.thecommonwealth.org/shared_asp_files/GFSR.asp?NodeID=176438). At a meeting of Senior Officials of Commonwealth Law Ministries in London on 18-20 October 2010 the Meeting recommended that work should proceed towards the preparation of a draft Model Law on the recognition and enforcement of foreign judgments, taking into account the work already undertaken, together with any written comments submitted to the Secretariat and a draft bill prepared in Ghana on the basis of the paper considered by Law Ministers. It was suggested that the draft Model Law include provisions for enforcement of judgements of courts chosen by the parties. It was agreed that a draft Model Law would need careful preparation for consideration by Law Ministers at their 2014 Meeting. Senior Officials noted with gratitude an offer by Canada to host a further meeting to consider developing work on the draft Model Law in the meantime: Commonwealth Secretariat 'Meeting of Senior Officials of Commonwealth Law Ministries, Marlborough House, London, 18-20 October 2010 Communiqué' available at [http://www.humanrightsinitiative.org/london/lgbt\\_rights/SOLM\\_2010\\_Communicu%20-20\\_%20Oct\[1\]\(1\).pdf](http://www.humanrightsinitiative.org/london/lgbt_rights/SOLM_2010_Communicu%20-20_%20Oct[1](1).pdf) 10.

<sup>165</sup> Hague Conference (note 156) 10. The Inter Arab Convention on Judicial Co-operation was signed in Riyadh, Kingdom of Saudi Arabia in 1983 (known as the Riyadh Convention) is one of the most commonly used treaties in the Middle East for the recognition and enforcement of both court judgments and arbitral awards between Arab nations. Recognition and enforcement without re-examination of the merits is conditional upon leave to enforce being granted by the competent court in the country of origin of the judgment or award. Recognition of a judgment or award may only be refused on certain grounds including: the judgment or award is contrary to Shari'ah or the constitution, public policy or good morals of the country in which enforcement is sought; if there were certain procedural irregularities in the case, such as the losing party not being properly notified of the hearing so that it could not defend itself; if the parties were not properly represented at the hearing in accordance with the laws of the country in which enforcement is sought; or if the dispute has already been the subject of a judgment or award between the same parties on the same facts in the country in which enforcement is sought (or another country if that judgment has been recognised), or if proceedings are ongoing. The signatory States to the Convention are Algeria, Bahrain, Iraq, Jordan, Libya, Morocco, Oman, Saudi Arabia, Syria, Tunisia, United Arab Emirates and Yemen: see Herbert Smith LLP 'Guide to dispute resolution in the Middle East 2010/11' (2011) available at [http://ghazzawilawfirm.com/files/Guide\\_to\\_dispute\\_resolution\\_in\\_the\\_Middle\\_East.pdf](http://ghazzawilawfirm.com/files/Guide_to_dispute_resolution_in_the_Middle_East.pdf) (accessed 09 October 2012). (English translation of the Convention available at <http://www.unhcr.org/refworld/docid/3ae6b38d8.html> (accessed 09 October 2012)).

- v) The continued work by the Hague Conference on the Judgments Project<sup>166</sup> for the drafting of an international convention on the recognition and enforcement of foreign judgments.<sup>167</sup>

It is noteworthy that none of these developments took place within a Southern African, or even African, context or with African participation. The thesis, therefore, discusses the problem of recognition and enforcement with specific reference to the SACU.<sup>168</sup>

The effort of the Hague Conference to create a new international convention on the recognition and enforcement of foreign judgments ('the Judgments Project')<sup>169</sup> resulted in the resurfacing of the very same problems that have been occupying the private international law world for hundreds of years.<sup>170</sup> This was not the first attempt to address this issue from an international perspective and most likely not the last one.<sup>171</sup>

### 3.4 Regional integration on the African continent

The harmonisation of private international law with specific focus on recognition and enforcement rules in the SACU, takes place against the background of the current regional economic integration efforts on the African continent.

The Heads of State of the Organisation of African Unity (OAU), the predecessor of the AU, adopted the Treaty establishing the African Economic Community ('AEC Treaty'),<sup>172</sup> which provides for the establishment of an African Economic Community (AEC) to be through a

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<sup>166</sup> The 'Judgments Project' was a project by the Hague Conference on Private International Law dealing with cross-border litigation in civil and commercial matters in general, which was discontinued in 2002 when the Hague Conference decided that the then ongoing negotiations should focus only on international litigation relating to choice of court agreements, and which resulted in the Convention of 30 June 2005 on Choice of Court Agreements ('the Choice of Court Convention'). The 2011 Council meeting of the Hague Conference concluded that a small expert group should be set up to explore the background of the Judgments Project and recent developments with the aim to assess the possible merits of resuming the Project: Hague Conference (note 156) 5.

<sup>167</sup> Hague Conference (note 156) 10-11.

<sup>168</sup> See para 2.2 above.

<sup>169</sup> This is discussed further in Chapter 3 para 2.1.2 below.

<sup>170</sup> Oestreicher Y *Recognition and Enforcement of Foreign Intellectual Property Judgments: Analysis and Guidelines for a New International Convention* (Unpublished SJD Dissertation, Duke University School of Law, 2004) 7.

<sup>171</sup> Oestreicher (note 170) 7.

<sup>172</sup> Treaty Establishing the African Economic Community (concluded in 1991) 30 ILM 1241 ('AEC Treaty'). The Treaty came into force in 1994.



gradual process of six stages,<sup>173</sup> by harmonising and progressively integrating the activities of the existing RECs in Africa.<sup>174</sup> The ultimate goal of the AEC is to transform the 54 economies of the AU into a single economic and monetary union, with a common currency, free mobility of capital and labour.<sup>175</sup> It is envisaged that when the AEC is fully functional, it will have an African Central Bank, an African Monetary Fund and an African Investment Bank.<sup>176</sup> The objectives of the AEC are to be achieved through the liberalisation of trade by abolishing non-tariff barriers to trade<sup>177</sup> in order to establish a free-trade area; the relaxation and eventual abolition of qualitative and administrative restrictions; the gradual evolution of a common trade policy; and the gradual removal of obstacles to the free movement of persons, goods and services.<sup>178</sup> The final stage will entail the integration of all sectors of society,

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<sup>173</sup> The Community will be established gradually in six stages over a period not exceeding thirty-four years. At each stage, specific activities will be assigned and implemented concurrently as follows:

- (a) First Stage: Strengthening of existing regional economic communities and ... establishing economic communities in regions where they do not exist;
- (b) Second Stage: (i) At the level of each regional economic community ..., stabilising Tariff Barriers and Non-Tariff Barriers, Customs Duties and internal taxes; (ii) Strengthening of sectoral integration at the regional and continental levels in all areas of activity; and (iii) Co-ordination and harmonisation of activities among the existing and future economic communities.
- (c) Third Stage: At the level of each regional economic community ..., establishment of a Free Trade ... and the establishment of a Customs Union by means of adopting a common external tariff.
- (d) Fourth Stage... co-ordination and harmonisation of tariff and non-tariff systems among the various regional economic communities with a view to establishing a Customs Union at the continental level by means of adopting a common external tariff.
- (e) Fifth Stage: ... establishment of an African Common Market.
- (f) Sixth Stage: ... (i) Consolidation and strengthening of the structure of the African Common Market, through including the free movement of people, goods, capital and services...; (ii) Integration of all the sectors namely economic, political, social and cultural; establishment of a single domestic market and a Pan- African Economic and Monetary Union; (iii) Implementation of the final stage for the setting up of an African Monetary Union, the establishment of a single African Central Bank and the creation of a single African Currency; (iv) Implementation of the final stage for the setting up of the structure of the Pan-African Parliament and election of its members by continental universal suffrage; (v) Implementation of the final stage for the harmonisation and co-ordination process of the activities of regional economic communities; (vi) Implementation of the final stage for the setting up of the structures of African multi-national enterprises in all sectors; and (vii) Implementation of the final stage for the setting up of the structures of the executive organs of the Community.

<sup>174</sup> See note 55.

<sup>175</sup> Constitutive Act of the African Union 11 July 2000 reproduced in (2005) 13 *African Journal of International and Comparative Law* 25 art 6.

<sup>176</sup> AEC Treaty (note 172) art 19.

<sup>177</sup> The main barriers to international trade were originally the high tariffs which various states applied to imported goods. As a result of various rounds of negotiations by the World Trade Organisation tariffs were reduced but this resulted in states reverting to non-tariff barriers (barriers that restrict import but are not in the usual form of a tariff) to protect their home industries. By introducing arduous custom procedures and deliberate custom delays, for example, a state can effectively prevent the importation of foreign goods. In such a way home industries can be protected against international competition, but ultimately the consumers will have to pay the price for the protective measures. Dumping (the introduction of products of one country into the commerce of another country at less than the normal value of the products) is a common example of a non-tariff barrier to trade: Booyesen H *Principles of International Trade Law as a Monistic System* (2003) 375-8.

<sup>178</sup> AEC Treaty (note 172) art 4; Ndulo (note 146) 102.

namely economic, political, social and cultural; and the establishment of single domestic market and a Pan-African Economic and Monetary Union.<sup>179</sup>

The implementation of the above measures will require the development of normative rules to give effect to the decisions, and these rules will, in turn, have to be assimilated into the laws of Member States. This will require a great effort in the harmonisation of the trade laws of all Member States, and the modernisation of trade laws that obstruct trade.<sup>180</sup>

The need for harmonisation of the rules on recognition and enforcement of foreign judgments in order to facilitate trade forms part of the rationale for the study, which is now discussed.

#### **4 RATIONALE FOR THE STUDY**

The rationale for the study of recognition and enforcement of foreign judgments in the SACU is two-fold.

Firstly, a harmonised system of rules on recognition and enforcement of foreign judgments will increase trade in the region, by removing some of the non-tariff barriers to trade.<sup>181</sup> The different approaches by SACU Member States to recognising and enforcing foreign judgments, and the risk that a judgment given in one State may ultimately not be enforced in another State may lead to legal uncertainty and increased transaction cost for prospective traders. These ultimately act as non-tariff barriers to trade which harmonisation may remove, thereby facilitating trade.<sup>182</sup>

Secondly, a harmonised recognition and enforcement regime will consolidate economic and political integration, and is necessary for the development of the common market, the final stage in the regional integration process.<sup>183</sup>

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<sup>179</sup> AEC Treaty (note 169) Art 6(2)(f)(ii) and (iii).

<sup>180</sup> Ndulo (note 144) 103.

<sup>181</sup> Traders seek the security provided by the enforcement of legal rights and the provision of an adequate remedy. Without secure means by which that remedy may be given effect, exporters may undervalue the gains from trade. Consequently, they may fail to take advantage of trading opportunities that would otherwise be beneficial: Perez AF 'The international recognition of judgments: The debate between private and public law solutions' (2001) 19 *Berkeley Journal of International Law* 44.

<sup>182</sup> See para 4.1 below.

<sup>183</sup> Ndulo (note 28) 195.

The first aspect of the rationale, namely trade facilitation, is now discussed, followed by the second aspect, namely the facilitation of regional economic integration.

#### 4.1 Trade facilitation

The importance of judgments for free trade was recognised as early as 1911 but its importance was invigorated by the formation of what was then the European Community.<sup>184</sup> The Commission of the European Economic Community was concerned that the economic life of the Community may be subject to disturbances and difficulties, unless it was possible to ensure the recognition and enforcement of the various rights arising from the existence of a multiplicity of legal relationships.<sup>185</sup> The Committee similarly felt that the differences between the bilateral conventions that were in force at that stage<sup>186</sup> would hinder the ‘free movement’ of judgments.<sup>187</sup> One of the primary aims of the Brussels Convention was to ensure that by difficulties in enforcing judgments would not negatively impact on the economy of European Community.<sup>188</sup>

The preamble of the Hague Convention on Choice of Court Agreements<sup>189</sup> (the ‘Hague Choice of Court Convention’) indicates that its purpose, amongst others, is to promote

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<sup>184</sup> Mortensen (note 75) 238–9.

<sup>185</sup> Note sent by Commission of the European Economic Community to Member States on 22 October 1959, in Jenard Report (note 12) 3. The relevant legal relationships at this time were those of the six Member States to the European Economic Community, as follows: In Belgium, the relevant provisions as regards enforcements were Article 10 of the Law of 25 March 1876, which contained Title I of the Introductory Book of the Code of Civil Procedure. In Germany, foreign judgments was recognised and enforced on the basis of reciprocity, and laid down in paragraph 328 of the Code of Civil Procedure (Zivilprozessordnung). In France, Article 546 of the Code of Civil Procedure provided that judgments given by foreign courts and instruments recorded by foreign officials can be enforced only after being declared enforceable by a French court (Articles 2123 and 2128 of the Civil Code). In Italy, the Code of Civil Procedure in principle allowed judgments to be recognised and enforced (Articles 796 and 797 of the Code of Civil Procedure). The Luxembourg Code of Civil Procedure provided that judgments given by foreign courts could be enforced only after being declared enforceable by a Luxembourg Court (Article 546). In the Netherlands, the Code of Civil Procedure laid down the principle that judgments of foreign courts were not enforceable in the Kingdom. Matters settled by foreign courts were allowed to be reconsidered by Netherlands courts (Article 431 of the Code of Civil Procedure). The national laws of the Member States thus varied considerably: Jenard Report (note 12) 5-6.

<sup>186</sup> Article 55 of the Brussels Convention included a list of 18 bilateral treaties dealing with recognition and enforcement amongst the Member States which the Convention superseded: see Brussels Convention (note 12) art 55.

<sup>187</sup> Jenard Report (note 12) 7.

<sup>188</sup> Mortensen (note 75) 238–9.

<sup>189</sup> Hague Convention on Private International Law, Convention on Choice of Court Agreements June 30, 2005 (2005) 44 ILM 1294.



international trade and investment through uniform rules on jurisdiction and recognition and enforcement in civil and commercial matters.<sup>190</sup>

The internationalisation of trade, investment and financing in the last few decades has led to a dramatic increase in the need for foreign judicial assistance, or the administration of justice across a number of jurisdictions.<sup>191</sup> The increased number of international trade transactions, along with increased risks<sup>192</sup> led to an increase in legal disputes which in turn enhanced the need for a satisfactory means of dispute resolution.<sup>193</sup> International trading relations increasingly give rise to the possibility of transnational debts, and the security of commercial transactions calls for a speedy, cheap and uncomplicated process for ensuring that judgments properly obtained against a debtor can be satisfied, even though his assets may be situated in another jurisdiction.<sup>194</sup>

Rules on enforcement of foreign judgments decrease international transaction costs in two ways. First, they reduce the costs required for businesses to secure legal rights: if a company cannot enforce a judgment in a foreign court, it incurs additional costs in bringing separate actions in each state in which it operates to re-secure legal rights and remedies.<sup>195</sup> Second, liberal enforcement laws decrease risk, and, therefore, costs, by increasing certainty and consistency of legal rights: under a liberal enforcement scheme the parties' obligations remain the same in every participating country.<sup>196</sup>

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<sup>190</sup> Hague Convention (note 189) Preamble.

<sup>191</sup> Amado JD 'Recognition and enforcement of foreign judgments in Latin America: An overview and update' (1990) 31 *Virginia Journal of International Law* 99.

<sup>192</sup> The presence of a variety of legal systems and rules can burdens and risks, including uncertainty about the ability to enforce legal rights; additional costs of enforcement; the risks arising from unfamiliarity with foreign legal process; risks arising from unknown and unpredictable legal exposure; risks arising from judicial corruption; risks arising from lower levels of professional competence, including judicial competence; and risks arising from inefficiencies and delays in the administration of justice. Such increased transaction costs impede mutually beneficial exchange by means of trade and investment: see Spiegelman JJ 'The Hague Choice of Court Convention and International Commercial Litigation (2009) 83 *Australian Law Journal* 386-7.

<sup>193</sup> Brand, RA 'Enforcement of foreign money judgments in the United States: In search of uniformity and international acceptance' (1991) 67 *Notre Dame Law Review* 255; Dammann & Hansmann (note 123) 3; Spiegelman (note 189) 386.

<sup>194</sup> Reed A 'A new model of jurisdictional propriety for Anglo-American foreign judgments recognition and enforcement: Something old, something borrowed, something new?' (2003) 25 *Loyilane Los Angeles International & Comparative Law Review* 243.

<sup>195</sup> Childs L 'Shaky Foundations: Criticism of Reciprocity and the Distinction between Public and Private International Law' (2005-2006) 38 *New York University Journal of International Law and Politics* 221, 226

<sup>196</sup> Mortensen (note 75) 240-1.

Dispute resolution in domestic courts requires the respective parties to consider not only the likelihood of a favourable judgment, but also the ability to collect on that judgment.<sup>197</sup> When a judgment creditor fails to obtain satisfaction in the country where it has been granted, the important question for an international trader is whether it is enforceable in another country where the defendant may be found.<sup>198</sup> Collecting on a defendant's extra-jurisdictional assets requires that the second jurisdiction (called the requested court) be willing to recognise and enforce the first jurisdiction's (called the rendering court) judgment.<sup>199</sup>

If investors and traders are not convinced that the law of a particular region gives real protection and remedies, they will not invest or trade there.<sup>200</sup> Traders seek the security provided by the enforcement of legal rights and the provision of adequate remedies.<sup>201</sup> If traders are unable to assert their legal rights through the effective enforcement of judgments, this would distort incentives for trade.<sup>202</sup> It was similarly suggested<sup>203</sup> that as contract law across the EU shows significant diversity on many fundamental points, for traders in the internal market to acquire essential knowledge about foreign law in various Member States always entails the danger of substantial loss of claims or unsuspected liabilities.<sup>204</sup>

Efficient dispute resolution processes are also important for encouraging foreign direct investment.<sup>205</sup> Governments interested in attracting foreign direct investment need to improve the rule of law, including their country's dispute resolution mechanisms.<sup>206</sup>

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<sup>197</sup> Brand (note 193) 255.

<sup>198</sup> Cheshire & North (note 62) 405.

<sup>199</sup> Reed (note 194) 244.

<sup>200</sup> Mistelis (note 95) 1057.

<sup>201</sup> Perez (note 181) 44.

<sup>202</sup> Perez (note 181) 44.

<sup>203</sup> On 11 July 2001 the European commission published a Communication to the Council and the European Parliament on European Contract Law, among other things inviting responses from experts in the field of European legal studies to, inter alia, 'problems for the functioning of the internal market resulting from the co-existence of different national contract laws'. The Commission on European Contract and the Study Group on European Civil Code jointly submitted the above response: Joint Response of the Commission on European Contract Law and Study Group on a European Civil Code 'Communication on European Contract Law' 29 November 2001 (2001) available online at [http://ec.europa.eu/consumers/cons\\_int/safe\\_shop/fair\\_bus\\_pract/cont\\_law/comments/5.23.pdf](http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/comments/5.23.pdf) (accessed 25 February 2013).

<sup>204</sup> Communication on European Contract Law (note 203).

<sup>205</sup> World Bank Group 'Investing across Borders 2010: Indicators of foreign direct investment regulation in 87 economies' (2010) *Investment Climate Advisory Services* available at <http://iab.worldbank.org/~media/FPDKM/IAB/Documents/IAB-report.pdf> (accessed 30 August 2012). The Report specifically discusses the importance of clear and accessible arbitration procedures in promoting foreign investment and the need for national courts to facilitate and support such procedures.

<sup>206</sup> World Bank (note 205).

Legal certainty and predictability stemming from a harmonised private international law regime are, therefore, essential for the promotion of commercial activity within the region: research shows that there is a direct relationship between the legal framework and the attitudes of foreign investors and traders.<sup>207</sup> Certainty, predictability, security of transactions, effective remedies and cost are important considerations in investment decision-making.<sup>208</sup> Rules which provide certain and expedited means of enforcing foreign judgments are an essential part of a private international law regime which is meant to facilitate trade.<sup>209</sup> A jurisdiction where the judicial system is fast and efficient and where security is guaranteed is attractive to local and international investors and traders.<sup>210</sup> In international trade, predictability can be achieved only if the courts of all countries strive to establish private international law rules which are aimed at providing uniform results.<sup>211</sup>

In addition to increasing international trade, harmonised private international law rules - and specifically the rules on the recognition and enforcement of foreign judgments - will also facilitate regional economic integration, which is now discussed.

#### 4.2 Facilitation of regional economic integration

‘In order for an economic union to function efficiently, a legal judgment ... must not have its value impaired merely by crossing a geographic border within the union ... the legal mechanism for enforcing rights in that property interest, must be respected throughout the union.’<sup>212</sup>

A developed private international law regime is an indispensable part of economic integration - an economic community does not function solely on the basis of economic or substantive rules; the procedural rules for resolving issues arising in cross-border transactions are equally

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<sup>207</sup> Mistelis (note 95) 1057.

<sup>208</sup> Oppong (note 133) 915.

<sup>209</sup> Oppong (note 151) 285.

<sup>210</sup> Mistelis (note 95) 1057. However, it has also been argued that people who make decisions about doing or continuing to trade, have a host of immediate concerns. These decisions are often tied to quality, quantity, cost, time of delivery, and other concrete aspects of the transaction. Determining what will happen if something goes wrong is usually a secondary concern. Franklin JA & Morris RJ ‘International Jurisdiction and Enforcement of Judgments in the Era of Global Networks: Irrelevance of, Goals for and comments on the current proposals’ (2001-2002) 77 *Chicago Kent Law Review* 1222.

<sup>211</sup> Hay P Lando O & Rotunda R ‘Conflict of Laws as a Technique for Legal Integration’ in Cappelletti M, Secombe M and Weiler J (eds) *Integration through law, Europe and the American federal experience* (1985) 167.

<sup>212</sup> Brand RA ‘Recognition of foreign judgments as a trade law issue: The economics of private international law’ in Bhandari JS & Sykes AO (eds) *Economic Analysis of International Law* (1997) 593.

important.<sup>213</sup> Perez<sup>214</sup> argues that interregional economic integration and recognition and enforcement of foreign judgments should accompany each other so that all participating regions can achieve the best comparative advantages. True integration should, therefore, not aim not only at the removal of barriers to the movement of persons, goods, services and capital, but also the strengthening of the legal infrastructure for settling cross-border disputes. A developed private international law regime is a key aspect of this infrastructure.<sup>215</sup>

An effective recognition and enforcement scheme must, it has been argued, be a feature of any regional economic integration initiative that is ‘likely to achieve significant integration’.<sup>216</sup> The founders of the United States of America (USA) clearly understood this proposition, as both the Articles of Confederation<sup>217</sup> and the Constitution of the USA<sup>218</sup> contained Full Faith and Credit clauses, requiring that a judgment of a Sister-State must be as conclusive of the rights of the parties in every other court as in that court where the judgment was rendered.<sup>219</sup>

To illustrate the importance of the harmonisation of private international law for the facilitation of economic integration, the examples of two different regions are now discussed, namely the European Economic Community (EEC) and the Central American Common Market.

The regime governing the recognition and enforcement of foreign judgments in the European Community was deemed necessary as it was believed that free circulation of judgments<sup>220</sup> could enhance market integration and legal certainty in the EEC.<sup>221</sup>

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<sup>213</sup> Oppong (note 151) 235.

<sup>214</sup> Perez (note 181) 44-6.

<sup>215</sup> Oppong (note 151) 235.

<sup>216</sup> Casad RC ‘Civil Judgment Recognition and the Integration of Multi-state Associations: A Comparative Study’ (1980-1981) 4 *Hasting International & Comparative Law Review* 1.

<sup>217</sup> Article IV of the Articles of Confederation and Perpetual Union of 1777 provided that ‘full faith and credit shall be given in each of the States to the records, acts and judicial proceedings of the courts and magistrates of every other State’.

<sup>218</sup> The United States of America Constitution Art IV section 4 provides that ‘full faith and credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State and the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved and the effect thereof’.

<sup>219</sup> Casad (note 216) 1; Huang (note 12) 15.

<sup>220</sup> The Brussels I Regulation provides that, for the purposes of the free movement of judgments, judgments given in one Member State (bound by the Brussels I Regulation) should be recognised and enforced in another Member State, even if the judgment debtor is domiciled in a third State: Brussels I Regulation (note 11) Recital 10.

The EEC was founded upon the principle of developing closer economic and political bonds between Member States. The Treaty of Rome establishing the EEC<sup>222</sup> did not contain an express arrangement for judgment recognition among the Member States. However, the Treaty of Rome recognised that the development of a stable economic union would be seriously hampered if enforcement of claims arising from economic transactions were uncertain, time-consuming and complicated.<sup>223</sup> The requirements of the Brussels Convention have been compared to the ‘full faith and credit’ clause in the Constitution of the United States of America and which requires States to give full effect to judicial proceedings of Sister States.<sup>224</sup>

The Community set itself the objective of maintaining and developing an area of freedom, security and justice to ensure the free movement of persons and to offer a high level of protection to citizens.<sup>225</sup> The architects of the EEC were concerned that business confidence would be harmed and economic integration discouraged if a uniform interregional recognition and enforcement of foreign judgments system was absent.<sup>226</sup> The EEC, in order to offer an adequate level of protection to its citizens, deemed it necessary to adopt, amongst other things, measures relating to judicial cooperation in civil matters for the sound operation of the internal market, in order to progressively establish the Common Market.<sup>227</sup> The simplification of formalities and the consequent achievement of a more rapid and simple system for the recognition and enforcement of judgments among Member States, was regarded as essential.<sup>228</sup>

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<sup>221</sup> Huang (note 12) 21; Fitzpatrick (note 12) 699; Preamble to the Brussels Convention (note 12); Jenard Report (note 12) 1, 38.

<sup>222</sup> The Treaty Establishing the European Community signed in Rome on March 25, 1957 (1957) 298 UNTS 11 (hereafter ‘Treaty of Rome’).

<sup>223</sup> Bartlett LS ‘Full faith and credit comes to the Common Market: An analysis of the provisions of the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters’ (1975) 24 *International and Comparative Law quarterly* 44.

<sup>224</sup> Bartlett (note 223) 44.

<sup>225</sup> Treaty of Rome (note 222) arts 2 and 3. It covers policy areas that range from the management of the European Union’s external borders to judicial cooperation in civil and criminal matters, including the mutual recognition and enforcement of foreign judgments. The creation of the area of freedom, security and justice is based on the Tampere (1999-04), Hague (2004-09) and Stockholm (2010-14) programmes. It derives from Title V of the Treaty on the Functioning of the European Union, which regulates the ‘Area of freedom, security and justice’.

<sup>226</sup> Fitzpatrick (note 12) 699; Jenard Report (note 12) 38.

<sup>227</sup> Brussels I Regulation (note 11) Recital 1; see also para 3.1.

<sup>228</sup> Brussels I Regulation (note 11) Recital 2.

The architects of the EEC, therefore, relied on Member States to negotiate treaties with each other to provide for the ‘simplification of the formalities governing the reciprocal recognition and execution of judicial decisions and arbitrational awards’.<sup>229</sup> The Commission, however, decided in favour of the conclusion of a multilateral convention between the countries of the EEC.<sup>230</sup> This resulted in the Brussels Convention on Jurisdiction and the Recognition and Enforcement of Foreign Judgments. Consequently, the development of the EEC interregional recognition and enforcement of foreign judgments mechanism was designed to parallel with European economic integration.<sup>231</sup>

The framework within which the analysis takes place is now discussed.

## **5 FRAMEWORK OF ANALYSIS**

The framework of this analysis is two-fold: First, in accordance with the principle of territorial sovereignty of states, states are free to choose whether or not to recognise and enforce foreign judgments. When they do decide to recognise and enforce foreign judgments, this recognition is generally based on one of three theories, namely obligation, comity or reciprocity. Secondly, irrespective of the theory on which states’ recognition and enforcement of foreign judgments are based, states may have certain interests in recognising and enforcing foreign judgments.

### **5.1 Territorial sovereignty, obligation theory, comity and reciprocity**

Due to the rise of territorial sovereignty, judgments were seen as ‘governmental acts [rather than mere resolutions of private disputes] whose compulsory effect was limited to the Sovereign’s territory’.<sup>232</sup> A sovereign is supreme within its own territory and has exclusive jurisdiction over everybody and everything within that territory and over every transaction that is effected there.<sup>233</sup> The result of the principle of territorial sovereignty is that in the absence of international agreements, countries are under no obligation to recognise and/or

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<sup>229</sup> Treaty of Rome (note 222) art 220; Jenard Report (note 12) 3.

<sup>230</sup> Jenard Report (note 12) 7; see Chapter 2, para 3.1 below.

<sup>231</sup> Huang (note 12) 22.

<sup>232</sup> Juenger (note 111) 6.

<sup>233</sup> Cheshire & North (note 62) 4.



enforce foreign judgments.<sup>234</sup> Therefore, a foreign judgment has no effect extraterritorially, unless and until it is given effect by a local court, and local courts are free to decide not to enforce any foreign judgments, but to retry all disputes within the jurisdiction.<sup>235</sup> A key area in which sovereignty is reflected is that courts will generally not enforce a judgment if to do so would be to enforce foreign penal, revenue or other public law,<sup>236</sup> or if it is based on revenue laws that apply extraterritorially.<sup>237</sup>

In *Commissioner of Taxes, Federation of Rhodesia v McFarland*<sup>238</sup> the acceptance of this rule was based on the ‘argument from sovereignty’.<sup>239</sup> The Court held that fiscal power is an attribute of sovereignty, an assertion of state authority, and its exercise therefore is to be distinguished from a patrimonial claim brought under the ordinary law of the land.<sup>240</sup> Leslie<sup>241</sup> criticises this approach and points out that all law may be considered as the sovereign’s command whether it relates to tax or not. But if one sovereign *voluntarily* permits another sovereign’s law to apply, it involves no loss of sovereignty; therefore, if local courts were permitted by their sovereign to gather taxes for a foreign sovereign, there would be no loss of sovereignty.<sup>242</sup> Forsyth further argues that the local sovereign commands the application of foreign law in his court in certain *circumstances for the protection of individual interests*; and it is not part of his tasks to protect the interest of a foreign sovereign qua sovereign. Penal laws and revenue laws fall into a different category to the ordinary application of foreign law. While *enforcement* of foreign revenue and penal laws will be denied, such laws will be *recognised*.<sup>243</sup> In *Regazonni v K C Sethia Ltd*<sup>244</sup> it was held that

‘it does not follow from the fact that ... the court will not enforce a revenue law at the suit of a foreign State, that ... it will enforce a contract which requires the doing of an act in a foreign

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<sup>234</sup> Cheshire & North (note 62) 405; Michaels (note 72) 3.

<sup>235</sup> Ho (note 78) 448.

<sup>236</sup> The rationale for the exclusion of these laws is that they concern key governmental interests or the exercise of governmental power and should, therefore, not have extraterritorial operation: Pham (note 76) 673. In *Huntingdon v Atrill* [1893] AC 150 the Privy Council held that the rule has its foundation ‘in the well-recognised principle that crimes ... are local in this sense that they are only cognizable and punishable in the country where they were committed’. The penalty must, therefore, be one exacted, directly or indirectly by a foreign State. Contractual penalties, or even statutory penalties imposed in favour of private parties are not ‘exigible by the State in the interests of the community [but by] private persons in their own interests’ and are thus not struck by the rule: *Jones v Krok* 1996(1) SA 504(T) at 515-517H per Kirk-Cohen J.

<sup>237</sup> Kahn E ‘Enforcement of Penal and Governmental Claims’ (1932) 46 *Harvard Law Review* 193.

<sup>238</sup> *Commissioner of Taxes, Federation of Rhodesia v McFarland* 1965 (1) SA 470 (W).

<sup>239</sup> *Commissioner of Taxes v McFarland* (note 238) at 474 A-D.

<sup>240</sup> *Commissioner of Taxes v McFarland* (note 238) at 473H.

<sup>241</sup> Leslie RD ‘Non-enforcement of Foreign Revenue Laws’ (1976) 93 *South African Law Journal* 46.

<sup>242</sup> Forsyth (note 62) 124.

<sup>243</sup> Forsyth (note 62) 124-5.

<sup>244</sup> *Regazonni v K C Sethia Ltd* [1958] AC 301.

country which violates the revenue law of that country. ... This may be seen if for revenue law, penal law is substituted. For an English court will not enforce a penal law at the suit of a foreign State, yet it would be surprising if it would enforce a contract which required the commission of a crime in that State'.<sup>245</sup>

The Dutch Scholar Ulrich Huber, created the notion of 'comity' or 'courtesy among political entities... involving [especially] mutual recognition of legislative, executive and judicial acts'<sup>246</sup> to explain how a country's law or judgments could have force outside their own territory despite strict territorial notions of sovereignty.<sup>247</sup> His explanation of the implications of sovereignty for conflict laws are epitomised in three now well-known axioms, as translated by Davies:<sup>248</sup>

1. The laws of every sovereign authority have force within the boundaries of its state, and bind all subject to it, but not beyond.
2. Those who are found within a sovereign authority's boundaries are held to be subject to it, whether they are there permanently or temporarily.
3. Those who exercise sovereign authority acts from comity, that the laws of every nation having been applied within its own boundaries should retain their effect everywhere so far as they do not prejudice the powers or rights of another state, or its subjects.<sup>249</sup>

Taken together, these axioms are to the effect that acts of foreign sovereigns should, when appropriate, be given effect within another state's territory and that courts of all nations should indulge a presumption against the extraterritorial impact of law.<sup>250</sup> The third axiom emphasises the practical necessity for the forum to recognise appropriate rules to facilitate international economic intercourse.<sup>251</sup> Huber argued that although the laws of one country can have no direct force in another country, 'nothing could be more inconvenient to the

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<sup>245</sup> *Regazonni v Sethia* (note 244) at 322.

<sup>246</sup> Paul JR 'Comity in International Law' (1991) 32 *Harvard International Law Journal* 14-15; Yntema HE 'The comity doctrine' (1966) 65 *Michigan Law Review* 1, 9; Stevens SL 'Commanding International Judicial Respect: Reciprocity and the recognition and enforcement of foreign judgments' (2002-2003) 26 *Hastings International & Comparative Law Review* 117-121 provides a historical perspective of the recognition and enforcement of foreign judgments.

<sup>247</sup> Stevens (note 246) 119.

<sup>248</sup> Yntema (note 246) 306.

<sup>249</sup> Davies L 'The influence of Huber's *De Conflictu Legum* on English private international law' (1937) 18 *British Yearbook of International Law* 57; Maier HG 'Extraterritorial jurisdiction at a crossroads: An intersection between public and private international law' (1982) 76 *American Journal of International Law* 281; Yntema (note 246) 306.

<sup>250</sup> Maier (note 249) 282.

<sup>251</sup> Maier (note 249) 282.

commerce and general intercourse of nations than that transactions valid by the law of one place should be rendered of no effect elsewhere owing to a difference in law'.<sup>252</sup>

Huber did not believe that sovereigns were *required* to apply foreign law, but that they did so as a matter of international courtesy.<sup>253</sup> He argued that 'recognition and enforcement rests upon comity and that it would be declined when the interests of the forum or its subjects are impaired thereby'.<sup>254</sup> Comity is a recognition which one nation extends within its own territory to the legislative, executive or judicial acts of another. It is not a rule of law, but one of practice, convenience and expediency.<sup>255</sup> Although more than a mere courtesy and accommodation, comity does not achieve the focus of an imperative or obligation - rather, it is a nation's expression of understanding which demonstrates due regard to both international duty and convenience and to the rights of persons protected by its own laws. The comity principle was originally developed to explain how a sovereign state, absolutely powerful within its own territory, could give recognition or effect in its courts to another nation's laws without diminishing or denying its own sovereignty.<sup>256</sup> Recognising judgments as *res judicata* enabled sovereigns to minimise the time and inconvenience associated with re-litigating disputes and accorded foreign court decisions respect.<sup>257</sup> To retry cases that has been authoritatively decided 'violates fundamental tenets of judicial economy';<sup>258</sup> and moreover, it would be presumptuous for the courts of one country to review the judgments of another.<sup>259</sup>

Many legal systems of the world accept that a judgment rendered by the courts of one country may be recognised elsewhere, provided certain requirements are met.<sup>260</sup> Although there is no specific requirements acknowledged and accepted internationally and outside Treaties, most States will generally require that the rendering court (court of origin) must have had jurisdiction; that the judgment debtor must have received sufficient notice of the proceedings and that the judgment must not have been obtained by fraud and the enforcement of the

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<sup>252</sup> Translated in Davies (note 249) 56-7.

<sup>253</sup> Paul (note 246) 15; Stevens (note 246) 120.

<sup>254</sup> Naddelman KH 'Non-recognition of American Money Judgments Abroad and what to do about it' (1957) 42 *Iowa Law Review* 237.

<sup>255</sup> *Somportex Lt. v Philadelphia Chewing Gum Corporation* 453 F.2d 435, 440 (3d Cir. 1971).

<sup>256</sup> Maier (note 249) 281.

<sup>257</sup> Stevens (note 246)120; Paul (note 246) 16; Juenger (note 111) 5.

<sup>258</sup> Juenger (note 111) 4.

<sup>259</sup> Juenger (note 111) 4. He argues further that such duplication is not only wasteful but that it punishes private litigants and exacts a toll from international commerce. To protect their interests, parties engaged in multinational transactions must either resort to arbitration or insist on advance payments or guarantees, which increases the transaction costs of doing business abroad: see para 3.1 above.

<sup>260</sup> Forsyth (note 62) 417.

judgment should not be contrary to the public policy of the recognising state.<sup>261</sup> Authors generally identify three theories governing the recognition and enforcement of foreign judgments: the obligation theory, reciprocity and comity.<sup>262</sup> The obligation theory is defined in *Schisby v Westenholz*<sup>263</sup> as follows: ‘the judgment of a court of competent jurisdiction over the defendant imposes a duty or obligation on him to pay ... the sum for which judgment is given, which the courts in [the country of enforcement] are bound to enforce’.<sup>264</sup> In other words, the foreign judgment amounts to an obligation, and the foreign judgment creditor enforces a legal obligation which is recognised and enforced by the court hearing the application for recognition and enforcement.<sup>265</sup>

The premise underlying the second theory, the reciprocity theory, is that the courts of Country A should recognise and enforce the judgments of Country B if, *mutatis mutandis*, the courts of Country B recognise and enforce the judgments of Country A.<sup>266</sup> Reciprocity, or ‘the mutual concession of advantages or privileges for the purposes of commercial or diplomatic relations’<sup>267</sup> was introduced in both civil and common-law countries as a more advanced form of, or in some instances, a foundation for comity.<sup>268</sup>

The third theory is based on the general notion of ‘friendly dealings between nations at peace’ and as such applies not just to the judiciary, but also the policy making bodies of the nation. The best-known definition of comity is arguably given in the US Supreme Court case of *Hilton v Guyot*:<sup>269</sup>

‘Comity, in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one

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<sup>261</sup> See Chapter 4 para 5.2 f or a general discussion of these requirements.

<sup>262</sup> Reed (note 194) 246-8; Von Mehren AT & Trautman DT ‘Recognition of Foreign Adjudications: A Survey and a Suggested Approach’ (1968) 81 *Harvard Law Review* 1602; Casad RC ‘Issue Preclusion and Foreign Country Judgements: Whose Law?’ (1984) 70 *Iowa Law Review* 58; Roodt C ‘Recognition and enforcement of foreign judgments: still a Hobson’s choice among competing theories?’ 2005 *Journal of South African Law* 18.

<sup>263</sup> *Schisby v Westenholz* QB 1870 6 Eng. Re. 155 at 159.

<sup>264</sup> *Schisby v Westenholz* (note 263) 159.

<sup>265</sup> Roodt (note 247) 20; Reed (note 194) 246.

<sup>266</sup> Reed (note 194) 248. There is no consensus on what reciprocity really means and how it should be established, and statutes that include this requirement usually do not define it: see Juenger (note 111) 31. See for example Botswana: Chapter 4 para 3.2.2 below and Namibia: para 3.4.2 below.

<sup>267</sup> Stevens (note 234) 119.

<sup>268</sup> While civil foreign judgment recognition and enforcement jurisprudence required reciprocity, early English common-law and US statutory and common-law did not require reciprocity: Juenger (note 111) 7-11. The reciprocity requirements in the statutes of the selected Southern African States are discussed in Chapter 3, para 4 below.

<sup>269</sup> *Hilton v Guyot* 159 US 113 (1895) 162.

nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.<sup>270</sup>

According to Story,

‘The true foundation on which the administration of international law must rest is, that the rules which are to govern are those which arise from mutual interest and utility, from a sense of inconvenience which would result from a contrary doctrine, and from a sort of moral necessity to do justice, in order that justice may be done to us in return.’<sup>271</sup>

Comity, as used by Story in this context, described an appropriate judicial approach for arriving at private international law decisions.<sup>272</sup> Beale wrote that the doctrine of comity seems to mean only that in certain cases the sovereign is not prevented by any principle of international law, but only by his own choice, from establishing any rule he pleases for the conflict of laws. In other words, it is an ‘enabling principle rather than one which in any particular case would determine the actual rule of law’.<sup>273</sup>

Cheshire and North<sup>274</sup> are critical of the notion of ‘comity of nations’, suggesting that the word itself is incompatible with the judicial function, as comity is a matter for sovereigns, not for judges required to decide a case according to the rights of the parties.<sup>275</sup> Their conclusion is that the application of a foreign law implies no act of courtesy, no sacrifice of sovereignty, but that it merely derives from a desire to do justice.<sup>276</sup>

Whether one nation should ever give effect to the judgments of other nations depends on whether or not it serves that nation’s interests.<sup>277</sup> States’ interest in recognising and enforcing judgments is now discussed.

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<sup>270</sup> *Hilton v Guyot* (note 269) 163-64.

<sup>271</sup> Story *J Commentaries on the Conflict of Laws* (1883) 33.

<sup>272</sup> Maier (note 249) 285.

<sup>273</sup> Beale JA *A Treatise on the Conflict of Laws* (1935) 1965.

<sup>274</sup> Cheshire & North (note 62) 5.

<sup>275</sup> The authors suggest that if the word is given its normal meaning of courtesy it is scarcely consistent with the readiness of English courts to apply enemy law in time of war. Moreover, if courtesy formed the basis of private international law a judgment might feel compelled to ignore the law of Utopia on proof that Utopian courts apply no law but their own, since comity implies a bilateral, not unilateral relationship. If, on the other hand, comity means that no foreign law is applicable in England except with the permission of the sovereign, it is nothing more than a truism: see Cheshire & North (note 62) 5.

<sup>276</sup> Cheshire & North (note 62) 5.

<sup>277</sup> Casad (note 216) 6.

## 5.2 States' interest in recognising and enforcing foreign judgments

Every nation has an interest in seeing to it that justice is done between competing litigants, but that does not mean that every nation has an interest in trying in its own courts the merits of a case that has been adjudicated elsewhere.<sup>278</sup>

Maier<sup>279</sup> suggests that international considerations fall into two general categories: the first category bears on the maintenance of amicable external relations with other nation-states and stresses the importance of extending courtesy to other sovereigns and reciprocal recognition of national government interests. The second category relates to the forum state's self-interest in making choice-of-law decisions that will further the development of an effectively functioning international system.

This situation in which there is uncertainty as to whether a particular judgment will be enforced is often unsatisfactory as parties are interested in having transnational legal certainty and in avoiding repeated litigation and conflicting decisions. The general public has an interest in avoiding resources spent on re-litigation and in international decisional harmonies. States likewise have a common interest in promoting international transactions. On the other hand, States sometimes have valid reasons for denying foreign judgments the same force they grant their own judgments, since the foreign procedure may be viewed as deficient or the outcome of the foreign litigation may be viewed as objectionable, or against the public policy of that State requested to enforce a specific judgment.<sup>280</sup>

Self-interest may play an important role in the enforcement of foreign judgments.<sup>281</sup> The core of that proposition is that enforcing foreign judgments is universally beneficial, and on the contrary, that it is a disadvantage if countries do not enforce each other's judgments.

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<sup>278</sup> However, the Special Commission to the Hague Conference has suggested that it seems mistaken to believe that enforcement on a territory other than that on which a judgment has been rendered is a challenge to State sovereignty. Most of the time, the only interests involved are private ones. Usually, the effect given to a foreign judgment on a territory will have no consequences except for the party who has lost the case abroad. Public interests are rarely in issue: see Hague Conference 'International Jurisdiction and Foreign Judgments in Civil and Commercial Matters' *Preliminary Document 7* (Apr. 1997) 47.

<sup>279</sup> Maier (note 249) 283.

<sup>280</sup> Michaels (note 72) 1.

<sup>281</sup> Reed (note 194) 248.

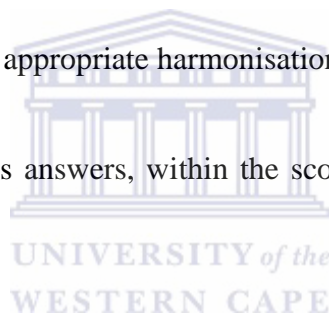


## 6 RESEARCH QUESTIONS

The following research questions have been formulated on the basis of the background provided:

1. What approaches have been followed in other regions to harmonise their recognition and enforcement of foreign judgment regimes, and what lessons can be learnt from their experiences?
2. What is the current statutory recognition and enforcement of foreign judgments regime applicable in SACU Member States and is there a) a need for harmonisation; and b) enough common ground between SACU Member States to render feasible the harmonisation of their recognition and enforcement regimes?
3. What would the content of an appropriate harmonisation instrument for the SACU be?

These are the questions the thesis answers, within the scope of the thesis which is now set out.



## 7 SCOPE AND EXCLUSIONS FROM SCOPE

The study focuses only on the harmonisation of one of the three objects of private international law, namely the recognition and enforcement of foreign judgments, and deals with jurisdiction incidentally. The inclusion of choice of applicable laws would have taken this study beyond manageable proportions.

The study focuses on the recognition and enforcement of foreign *money* judgments, given in civil or commercial proceedings. The enforcement of judgments in matrimonial matters and matters of parental responsibility are, therefore, excluded from the scope of the study. This is firstly because there are existing international instruments on the topic,<sup>282</sup> and secondly the study is situated within the context of the SACU,<sup>283</sup> a regional *economic* community.<sup>284</sup>

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<sup>282</sup> See, for example, the Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations; and the Convention of 15 November 1965 on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions; Convention of 19 October 1996 on Jurisdiction,

The second exclusion is arbitral awards, because of the existing framework in place by virtue of the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards.<sup>285</sup>

The thesis does not deal with procedures of attachment<sup>286</sup> or other procedures by which the decision in the award will be carried out.<sup>287</sup>

## 8 CHAPTER OUTLINE

This chapter presented the origin of and rational for the study; the problem statement and research questions which the thesis discusses, as well as the framework of analysis and scope of the study.

Many of the challenges that will be experienced in the harmonisation of private international law rules, and specifically the rules on recognition and enforcement of foreign judgments are likely to have already been experienced in previous attempts to harmonise these rules on an international or regional level. Chapter 2 therefore considers some past and present international and regional efforts. The international efforts include the 1971 Hague Convention on the Recognition and Enforcement of Foreign Judgments, the 2005 Hague Choice of Court Convention as well as the on-going Judgments Project of the Hague Conference. The regional developments that are discussed include the Brussels/Lugano Jurisdiction Regime in Europe; the full faith and credit clause requirement in the Constitution of the USA; the bilateral Trans-Tasman Judicial Arrangement between Australia and New

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Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children.

<sup>283</sup> See para 2.2 above.

<sup>284</sup> See para 2.1 above.

<sup>285</sup> See note 127 above.

<sup>286</sup> Having obtained a judgment in his favour, the judgment creditor will want to obtain satisfaction of it from the debtor. The process which enables him to enforce a judgment is known as execution. Execution may be effected against the property of the person of the judgment debtor. The appropriate manner of execution in a particular case depends on the type of judgment and the nature of the debtor's available assets. A judgment sounding in money is enforceable by the attachment and sale in execution of the debtor's property – movable, immovable and incorporeal. Herbstein J, Cilliers AC, Loots C, Van Winsen LD & Nel HC *The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* Volume 2 (2009) 1020.

<sup>287</sup> For example, debts, wages, salary and emoluments owing by or accruing from a third person to the judgment debtor may be attached in the hands of the judgment debtor and executed on by means of a 'garnishee order'; or if no (or insufficient satisfaction for a judgment sounding in money is obtained in the ordinary way, the judgment creditor may in certain circumstances apply for the sequestration of the debtor's estate: Herbstein et al (note 286) 1021.

Zealand and finally the multilateral convention approach adopted by the countries of Latin America.

Chapter 3 considers the possible instruments for the harmonisation of recognition and enforcement rules. The examination includes an overview of the traditional types of convention, namely single, double and mixed. These are analysed to determine what would be suitable for the Southern African context.

Chapter 4 considers the statutory instruments on the recognition and enforcement of foreign judgments currently in force in the SACU Member States<sup>288</sup> by providing an overview and comparison of the respective statutes, the scope of each instrument, the requirements and procedure for enforcement, the grounds on which registered judgments<sup>289</sup> may be set aside, and finally the requirement of reciprocity present in the respective statutes. After a comparison of the relevant statutes the Chapter makes proposals for a draft instrument for recognition and enforcement for the SACU Member States, including a draft text for a SACU Convention on the Recognition and Enforcement of Foreign Civil Judgments.

Chapter 5 draws together each chapter's findings on the central research questions into a set of conclusions.

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<sup>288</sup> Swaziland, Lesotho, Botswana, South Africa and Namibia.

<sup>289</sup> None of the statutes on recognition and enforcement of the States compared provide for the automatic, or quasi-automatic, enforcement of relevant judgments from designated countries. The statutes require the registration of the foreign judgment in the local (enforcing) court. See Chapter 3, para 4.2.

## CHAPTER 2

### RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: OVERVIEW OF INTERNATIONAL AND REGIONAL HARMONISATION EFFORTS

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## 1 INTRODUCTION

Internationally, efforts towards the development of harmonised law on the recognition and enforcement of foreign judgments have taken place on two levels, dating back to the 19<sup>th</sup> century,<sup>1</sup> namely regional and global.<sup>2</sup> Local law often impeded enforcement of money

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<sup>1</sup> As early as 1826 a motion was proposed at the Congress of Panama for the preparation of a draft code of international law: see Lorenzen EG 'The Pan American Code on Private International Law (1930) 4 *Tulane Law Review* 499.

judgments from foreign states and bilateral, regional and multilateral treaties have consequently been concluded in a number of regions to remove some of the obstacles.<sup>3</sup> It has been suggested that the treaty law established in this way has become a guide to the principles which should govern recognition and enforcement.<sup>4</sup>

This chapter considers the past and present international and regional harmonisation efforts, with a view to identifying a suitable approach for Southern African Customs Union (SACU). It considers both the global efforts by the Hague Conference on Private International Law (hereafter 'Hague Conference'),<sup>5</sup> and regional developments such as the Brussels/Lugano Regime in Europe;<sup>6</sup> the full faith and credit clause approach adopted by the federal system<sup>7</sup> of the United States of America (USA);<sup>8</sup> the bilateral Trans-Tasman Judicial Arrangement between Australia and New Zealand<sup>9</sup> and finally the multilateral convention approach adopted by some countries of Latin America.<sup>10</sup>

Aside from the full faith and credit clause in the USA Constitution, the facilitation of the rules on recognition and enforcement of judgments amongst the Member States of regional communities have been achieved by means of bilateral,<sup>11</sup> or multilateral agreements or conventions,<sup>12</sup> as will be illustrated below. The desire to protect litigants and international commerce from the problematic consequences of an insistence on juridical sovereignty motivated States to enter into numerous bilateral arrangements for the mutual enforcement of judgments. This gave rise to an entire network of treaties.<sup>13</sup> Two possible approaches for

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<sup>2</sup> Zeller B 'The Significance of the Vienna Convention on the International Sale of Goods for the Harmonisation and Transplantation of International Commercial Law' (2006) 17 *Stellenbosch Law Review* 475.

<sup>3</sup> Nadelmann KH 'Jurisdictionally improper fora in treaties on recognition of judgments: the Common Market Draft' (1967) 67(6) *Columbia Law Review* 995.

<sup>4</sup> Nadelmann (note 3) 995. The specific treaty provisions which would form this 'guide' is discussed in Chapter 4 below.

<sup>5</sup> See para 2.1 below.

<sup>6</sup> See para 3.1 below.

<sup>7</sup> It has been suggested that the rules of the treaty law are also largely in line with the rules developed in federal systems for inter-state recognition purposes under constitutional provisions or through uniform legislation: Nadelmann (note 3) 995. In this regard, see, for example discussion of the 'full faith and credit' in para 3.2 below.

<sup>8</sup> See para 3.2 below.

<sup>9</sup> See para 3.3 below.

<sup>10</sup> See para 3.4 below.

<sup>11</sup> See the Trans-Tasman Judicial System, para 3.3 below.

<sup>12</sup> See EC Brussels Convention/Regulation (para 3.1 below); and OAS Montevideo Convention (para 3.4 below).

<sup>13</sup> Juenger FK 'Recognition of money judgments in civil and commercial matters' (1988) 36 *American Journal of Comparative Law* 8. This was for example the case in Europe before the adoption of the Convention on

SACU Member States to harmonise their rules on and facilitate the recognition and enforcement of foreign judgments may therefore be for Member States to negotiate and adopt either a set of bilateral treaties inter-partes or a single multilateral treaty by all Member States. These alternative approaches are now discussed and a recommendation of the most suitable approach for the SACU is made in the concluding parts of this Chapter.<sup>14</sup>

### **1.1 Bilateral Treaties as Means of Harmonising Enforcement Rules**

Negotiating a bilateral treaty may be significantly less complicated than negotiating a single multilateral one, as the participants need only adhere to the wills and interest of two parties. Negotiating a single international instrument on the recognition and enforcement has proven to be extremely complicated;<sup>15</sup> partly because each participating country has its own agenda and each country has different interests at stake.<sup>16</sup> In addition, negotiating a bilateral treaty rather than a multilateral treaty narrows the scope of controversy and the number of disputed points. Since each country involved in international negotiations tries to promote the inclusion of its own interests in the final draft, it is harder to bridge the gaps between more than two participants and consider all of these interests. Furthermore, in bilateral negotiations there is a better opportunity to address specific issues and gaps, and in certain situations even an opportunity to solve the problems by making certain adjustments in the substantive laws of the negotiating parties. This is more complicated to do in multilateral negotiations.<sup>17</sup>

Bilateralism is, however, not an unmitigated blessing. A series of bilateral treaties would require several rounds of negotiations with each State. Each treaty finally adopted would differ in at least some of its provisions from the treaties on the same subject concluded with each State. This would confront lawyers with a different text for every country that is adopted and enters into force. Every such bilateral treaty would need to be ratified and each might

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Jurisdiction and the Recognition of Judgments in Civil and Commercial Matters 1968 *Official Journal* (L 229) ('Brussels Convention'): Article 55 of the Convention included a list of 18 bilateral treaties dealing with recognition and enforcement amongst the Member States which the Convention superseded: see Brussels Convention art 55; Chapter 1 para 4.1 above.

<sup>14</sup> See para 5 below.

<sup>15</sup> See, for example, the Judgments Project of the Hague Conference on Private International Law, which attempted to conclude a multilateral convention on the recognition and enforcement of foreign civil and commercial judgments: para 2.1.2 below.

<sup>16</sup> Oestreicher Y *Recognition and enforcement of foreign intellectual property judgments: analysis and guidelines for a new international convention* (Unpublished SJD Dissertation, Duke University School of Law, 2004) 202.

<sup>17</sup> Oestreicher (note 16) 203.



require enactment of its own implementing legislation.<sup>18</sup> The human and other resources that would need to be devoted to the adoption of a series of bilateral treaties and obtaining authorisation for the ratification of each treaty would be very great.<sup>19</sup> For similar reasons the USA deemed the effort to negotiate a series of bilateral judgment treaties too resource intensive and not worthwhile.<sup>20</sup>

The bilateral negotiation processes are also likely to produce diverse standards for the recognition of judgments from different countries. Creating a single international instrument to regulate the issue of recognition and enforcement of foreign judgments may require participating countries to compromise on some of the issues about which they have very strong feelings. It would require the participants to be attentive to the needs of others, knowing that others would be attentive to theirs. This will not be easy because ‘better the devil we know – and have learned to live with – than the devil we do not know’.<sup>21</sup> Once bilateral treaties flourish, inconsistencies and complexities are unavoidable - only multilateral conventions can truly assure uniformity.<sup>22</sup> Even negotiations between two countries that presumably share similar ideas and values are not always likely to succeed because there will be some differences between even the most similar countries that under certain circumstances may be impossible to bridge.<sup>23</sup> A weakness of international conventions is, therefore, that the degree of unification achieved is often restricted, as they result from compromises between negotiating States.<sup>24</sup>

## **1.2 Multilateral Conventions as Means of Harmonising Recognition and Enforcement Rules**

A further possibility for harmonisation is a multilateral recognition and enforcement agreement or convention, which may offer a feasible possibility for harmonisation or

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<sup>18</sup> Pfund P ‘The Project of The Hague Conference on Private international Law to Prepare a Convention on Jurisdiction and the Recognition/enforcement of Judgments in Civil and Commercial Matters’ (1998-1999) 24 *Brooklyn Journal of International Law* 10.

<sup>19</sup> Pfund (note 18) 10.

<sup>20</sup> Pfund (note 18) 10.

<sup>21</sup> Von Mehren T ‘Drafting a Convention in international jurisdiction and the effects of foreign judgments acceptable world-wide: can the Hague Conference project succeed?’ (2001) 49(2) *American Journal of Comparative Law* 201.

<sup>22</sup> Juenger (note 13) 8.

<sup>23</sup> Oestreicher (note 16) 204.

<sup>24</sup> Mistelis LA ‘Regulatory Aspects: Globalization, harmonisation, legal transplants and law reform: Some fundamental observations (2000) 34 *The International Lawyer* 1060.

unification in SACU. The approach of a multilateral convention has been particularly successful within a Common Market, as the European Brussels Regime demonstrates,<sup>25</sup> but has also been successful in the context of lesser integrated communities such as the European Free Trade Area<sup>26</sup> and Organisation of American States.<sup>27</sup>

Although it may have some disadvantages,<sup>28</sup> a multilateral instrument on the recognition and enforcement of foreign judgments would have three advantages for all parties concerned.<sup>29</sup> First, a convention would roughly ensure equality between the practices of the contracting States. Secondly, a recognition and enforcement convention could deal with the practice of permitting the use of unreasonable or exorbitant jurisdictional bases against persons not domiciled in a contracting State, and requiring that other contracting States recognise and enforce any resulting judgment. Thirdly, treaty regulation would clarify and simplify recognition and enforcement practices and procedures, and as a result a party holding a judgment rendered in, or contemplating initiating litigation in, a contracting State could ascertain relatively quickly and easily the effects that a judgment would have in another contracting State if recognition or enforcement were sought in its courts.<sup>30</sup>

Many challenges that SACU will experience in the harmonisation of the rules on recognition and enforcement of foreign judgments are likely to have already been experienced, and possibly addressed, by previous attempts to harmonise such rules on an international or regional level. The rich jurisprudence in these areas may be able to provide insights for SACU in its efforts to establish a multilateral recognition and enforcement regime.

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<sup>25</sup> Juenger is however cautions that such regional schemes can be faulted for discriminating against outsiders: see Juenger (note 13) 9.

<sup>26</sup> See Lugano Convention, discussed in para 3.1 below.

<sup>27</sup> See Montevideo and La Paz Conventions, discussed in para 3.4 below.

<sup>28</sup> Like any instrument of international law-making process, multilateral treaties has to be negotiated, signed and ratified by the participating States. Reservations and denunciation, to which it may be subject, may make it less attractive as a vehicle of legal integration, and there is also run the risk of it being compromised in the course of its transformation into national law: Lasok D & Stone PA *Conflict of Laws in the European Community* (1987) 85.

<sup>29</sup> Von Mehren AT 'Recognition and Enforcement of Foreign Judgments: A New Approach for the Hague Conference?' (1994) 57(3) *Law and Contemporary Problems* 278.

<sup>30</sup> Von Mehren (note 29) 279.

## 2 HARMONISATION OF RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS AT THE INTERNATIONAL LEVEL

### 2.1 The Hague Conference on Private International Law

#### 2.1.1 Introduction

The Hague Conference on Private International Law ('the Hague Conference') is an inter-governmental organisation with 72 Members: 71 States and one Regional Economic Community, the European Union and was established more than 100 years ago.<sup>31</sup> The Hague Conference was organised to promote the progressive unification of the rules of private international law.<sup>32</sup> It achieves its purpose by negotiating and preparing draft international conventions on private international law matters,<sup>33</sup> including rules on the recognition and enforcement of foreign judgments.<sup>34</sup> The Hague Conference has traditionally been a professional and non-political forum of experts in the area of private international law.<sup>35</sup>

One of the most significant developments by the Hague Conference with regard to the recognition and enforcement of foreign judgments is the Hague Judgments Project.



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<sup>31</sup> Hague Conference 'Parties' available at [http://www.hcch.net/index\\_en.php?act=states.listing](http://www.hcch.net/index_en.php?act=states.listing) (accessed 30 August 2012).

<sup>32</sup> Statute of the Hague Conference on Private International Law, Oct. 31, 1951 (1951) 220 U.N.T.S. 121.

<sup>33</sup> Examples of conventions concluded by the Hague Conference Convention of 1 March 1954 on civil procedure; Convention of 15 June 1955 on the law applicable to international sales of goods; Convention of 15 April 1958 on the jurisdiction of the selected forum in the case of international sales of goods; Convention of 15 June 1955 relating to the settlement of the conflicts between the law of nationality and the law of domicile; Convention of 14 March 1978 on Celebration and Recognition of the Validity of Marriages; Convention of 14 March 1978 on the Law Applicable to Agency; Convention of 25 October 1980 on the Civil Aspects of International Child Abduction; Convention of 25 October 1980 on International Access to Justice; Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children; Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance; and the Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations: see Hague Conference 'Conventions' available at [http://www.hcch.net/index\\_en.php?act=conventions.listing](http://www.hcch.net/index_en.php?act=conventions.listing) (accessed 10 February 2013).

<sup>34</sup> See, for example the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, Feb. 1, 1971, (1971) 1144 U.N.T.S.249, Chapter 3, para 2.

<sup>35</sup> Murphy SD 'Contemporary Practice of the United States Relating to International Law' (2001) 95 *American Journal of International Law* 420.

### 2.1.2 *The Hague Judgments Project*

The Hague Conference concluded its first multilateral international judgments convention in 1971, but this Convention was not widely accepted and ratified.<sup>36</sup> In 1992, more than two decades after the completion of the 1971 Hague International Judgments Convention, there was a renewed interest in negotiating an international judgments Convention, which was largely due to the initiative of the United States of America (USA).<sup>37</sup> The USA proposed that the Hague Conference take up a negotiation of a convention that regulates recognition and enforcement of judgments on a multinational basis.<sup>38</sup> The USA was at that stage not a party to any bilateral or multilateral convention on the recognition of foreign judgments.<sup>39</sup> They accordingly sought to create a basis on which parties could enforce American judgments without American litigants having to re-litigate abroad.<sup>40</sup>

Negotiations at the Hague Conference started at the beginning of 1993 towards the creation of an international convention on jurisdiction and the recognition and enforcement of judgments.<sup>41</sup> The Hague Conference identified three options which would be open to Member States of the Conference that saw the need for a convention on jurisdiction and recognition and enforcement of foreign judgments. The options were: (a) acceding to the Lugano Convention on the Recognition and Enforcement of Foreign Civil Judgments, which is in force between the European Free Trade Area Members, and open to accession by any third State;<sup>42</sup> (b) becoming a party to the 1971 Hague Convention and its Protocol;<sup>43</sup> or (c)

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<sup>36</sup> See note 34 above. This Convention is discussed in Chapter 3, para 2 below, including the possible reasons for the failure of the Convention.

<sup>37</sup> Schulze C 'The 2005 Hague Choice of Court Agreements' (2007) 19 *South African Mercantile Law Journal* 140.

<sup>38</sup> Hague Conference 'Some reflections of the Permanent Bureau on a general convention on enforcement of judgments' *Preliminary Document No 17 of May 1992* (1992) 231.

<sup>39</sup> The USA is not a member of either the Brussels or Lugano Conventions. This raised concerns in the American government that US citizens could be sued in US states while American judgments are not recognised and enforced abroad, thus putting Americans at a disadvantage: see Murphy (note 35) 418-19; Berlin M 'Note and Comment: The Hague Convention on Choice of Court Agreements: Creating an International Framework for recognising foreign judgments' (2006) 3 *Brigham Young University International Law and Management Review* 43; Weintraub RJ 'How substantial is our need for a judgments recognition convention and what should we bargain away to get it?' (1998-1999) 24 *Brooklyn Journal of International Law* 167-8.

<sup>40</sup> Teitz LE 'The Hague Choice of Court Convention: Validating party autonomy and providing an alternative to arbitration' (2005) 53 *The American Journal of Comparative Law* 544.

<sup>41</sup> Schulze (note 37) 40; Woestehoff K *The drafting process for a Hague Convention on jurisdiction and judgments with special consideration of intellectual property and e-commerce* (Unpublished LLM Thesis, University of Georgia School of Law, 2005) 15.

<sup>42</sup> Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (done 16 September 1988, entered into force 1 January 1992) *Official Journal* L319/9 (hereafter '1988 Lugano Convention'). Accession to the Lugano Convention was a possibility for some States; however, accession was only possible on invitation and with the consent of all Contracting States. Unlike the Brussels

negotiating and becoming party to a new convention on jurisdiction and recognition and enforcement of judgments.<sup>44</sup> The third option included the following possibilities: a Lugano type convention, based on direct grounds of jurisdiction;<sup>45</sup> a 1971 Hague Convention type, based on indirect grounds of jurisdiction,<sup>46</sup> or, as suggested in the USA proposal, an

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Regulation (Convention), which is open only to EU members, the Lugano Convention is open to accession, but only on the invitation of a Contracting State and with the consent of all Contracting EC and EFTA States and, even then, any Contracting state can refuse to apply the Convention in the relations to the acceding State (Lugano Convention Article 62, par 1(b) and 4). Moreover, the Lugano Convention's solutions may pose problems to some States. For example, the fact that the requested court would not be able to review the jurisdictional grounds assumed by the rendering court may not be acceptable to some States; the system may be too rigid for some States; and there may be States which find some of the jurisdictional bases either overly broad or overly restrictive: Hague Conference (note 38) 234.

<sup>43</sup> Becoming a party to the 1971 Hague Convention and its Protocol, and concluding the Supplementary Agreements was posed as a second option, 'which should perhaps not be too readily excluded', as the Convention and its Protocol are in force as international instruments and no major objections have been raised against it, except for its complicated form: Hague Conference (note 38) 234.

<sup>44</sup> The original idea for a Judgments Convention came from a letter to the Hague Conference from the Legal Adviser at the US Department of State in May 1992, at which point the idea of a mixed convention was first introduced: Beaumont P 'Hague Choice of Court Agreements Convention 2005: Background, Negotiations, Analysis and Current Status' 2009 *Journal of Private International Law* 128. They proposed the following:

*'While taking account of the 1971 Hague Convention, we would propose that the Hague Conference build on the Brussels and Lugano Conventions in seeking to achieve a convention that is capable of meeting the needs of and being broadly accepted by the larger community represented by the Member States of the Hague Conference. For example, it appears that it might be possible to accept certain of the bases for recognition and enforcement of judgments set out in the Brussels and Lugano Conventions and thereby makes provision for a generally accepted system for use in Europe and beyond. However, other aspects of these Conventions may not be so broadly acceptable and would need change to accommodate the needs and preferences of countries from other regions of the world than Western Europe. It seems to us that we need not necessarily choose between a traité simple dealing essentially only with those judgments that are entitled to recognition and enforcement in party States, and a traité double also dealing with permissible bases of jurisdiction for litigation involving persons or entities habitually resident in party States. We believe that there should be consideration of the possibility for party States to utilise jurisdictional bases for litigation that are not designated as permissible or exorbitant by the convention.'*

Letter from United States Department of State to the Secretary General of the Hague Conference on Private International Law dated 5 May 1992, available at <http://www.state.gov/documents/organization/65973.pdf> (accessed 14 February 2013).

<sup>45</sup> Direct jurisdiction refers to the jurisdiction of a court adjudicating the merits of a case, as opposed to 'indirect jurisdiction', which is used only where a requested court has to ascertain whether the rendering court had jurisdiction: see Chapter 3 para 1. Section 2 of the Lugano Convention provides detailed rules as to where a person domiciled in a Contracting State may be sued in another Contracting State under the Convention, as well as which courts have exclusive jurisdiction, regardless of domicile: Lugano Convention (note 42) arts 5, 16.

<sup>46</sup> Article 10 of the 1971 Hague Convention lists the circumstances when the court of the State of origin will be considered to have jurisdiction for the purposes of recognition and enforcement: see Chapter 3 para 2.3.



intermediate (mixed) type convention,<sup>47</sup> allowing states to assume jurisdiction on grounds that are not designated as either permissible or prohibited (exorbitant)<sup>48</sup> by the convention.<sup>49</sup>

Against this background, the Hague Conference determined that it would be advantageous to draft a broad instrument establishing jurisdiction in almost all fields of civil and commercial law and guaranteeing the recognition and enforcement of resulting judgments.<sup>50</sup> From 1996 to 2001, the Hague Conference conducted negotiations on a Convention that would deal with both the assumption of jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, leaning towards existing double conventions<sup>51</sup> such as the 1968 European Brussels Convention<sup>52</sup> and the Lugano Convention.<sup>53</sup> These efforts resulted in a Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters,<sup>54</sup> and an Interim Text.<sup>55</sup>

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<sup>47</sup> Similar to a double convention, a 'mixed convention' contains a list specifying approved grounds of jurisdiction. Judgments rendered in a contracting state and resting on an approved jurisdictional basis are entitled to recognition and enforcement under the convention. However, unlike a true double convention, the a mixed convention allows contracting states to assume jurisdiction on other jurisdictional bases not listed in the convention and a state may, unless the convention expressly provides otherwise, grant recognition and enforcement under its general law: see Von Mehren (note 29) 283.

<sup>48</sup> Jurisdiction may be regarded as exorbitant when the court seized does not possess a sufficient connection with the parties to the case, the circumstances of the case, the cause or subject of the action, or fails to take into account of the principle of the proper administration of justice. An exorbitant form of jurisdiction is one which is solely intended to promote political interests, without taking into consideration the interests of the parties to the dispute: Hague Conference 'International Jurisdiction and Foreign Judgments in Civil and Commercial Matters' *Preliminary Document No 7 of April 1997* (1997) 8, available at [http://www.hcch.net/index\\_en.php?act=publications.details&pid=3490&dtid=35](http://www.hcch.net/index_en.php?act=publications.details&pid=3490&dtid=35) (accessed 14 February 2013) (hereinafter 'Kessedjian Report').

<sup>49</sup> Hague Conference (note 38) 234. See Chapter 3 para 1 for an overview of multilateral recognition and enforcement of foreign judgment convention types.

<sup>50</sup> For a summary of the history of this project, see Hague Conference 'Continuation of Judgments Project' *Preliminary Document No 14 of February 2010* (2010) 3-5, available at <http://www.hcch.net/upload/wop/genaff2010pd14e.pdf> (accessed 14 February 2013).

<sup>51</sup> A double convention in the context of recognition and enforcement contains rules on both direct jurisdiction and the recognition and enforcement of foreign judgments and can be distinguished from single conventions which only contains rules on the recognition and enforcement of foreign judgments. This is discussed in Chapter 3 para 1.

<sup>52</sup> The Brussels Convention has been replaced by the Brussels I Regulation: see para 3.1.1 below for a discussion of the Brussels Convention/Regulation and Chapter 4 para 2 for an overview of multilateral recognition and enforcement of foreign judgment convention types.

<sup>53</sup> See para 3.1.2 below for a discussion of the Lugano Convention.

<sup>54</sup> This was completed by a Preliminary Document drawn up by Nygh and Pocar: see Nygh P & Pocar F 'Report on the preliminary draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial matters' *Preliminary Document No 11 of August 2000* available at [http://www.hcch.net/index\\_en.php?act=publications.details&pid=3497&dtid=35](http://www.hcch.net/index_en.php?act=publications.details&pid=3497&dtid=35) (accessed 14 Feb 2013) (hereafter 'Nygh & Pocar Report').

<sup>55</sup> This text excluded matters of family law, insolvency, social security, arbitration and maritime matters. Hague Conference 'Interim Text – Summary of the Outcome of the Discussion in Commission II of the First Part of the Diplomatic Conference 6-20 June 2001' available at [http://www.hcch.net/upload/wop/jdgm2001draft\\_e.pdf](http://www.hcch.net/upload/wop/jdgm2001draft_e.pdf) (accessed 14 February 2013).



Following further work the Hague Conference decided in 2003 that the negotiations should be limited to issues of jurisdiction relating to choice of court agreements and the recognition and enforcement of judgments rendered by the agreed court. The negotiations resulted into the Convention on Choice of Court Agreements<sup>56</sup> adopted in June 2005, which was a much narrower product than originally envisaged.<sup>57</sup>

In April 2010, while discussing future work in the area of international litigation to supplement the on-going efforts to ensure wide ratification of the Choice of Court Convention, the Hague Conference recalled ‘the valuable work which has been done in the course of the Judgments Project and noted this could possibly provide a basis for further work’.<sup>58</sup> Three options for future work were presented for consideration: continuing with a convention dealing with both primary grounds of jurisdiction and recognition and enforcement of judgments; continuing with a convention on recognition and enforcement of judgments (i.e. without direct grounds of jurisdiction); and continuing with a model agreement.<sup>59</sup> The Permanent Bureau (the Secretariat of the Hague Conference) proposed as a first step convening a group of experts to advise on the areas where it might be feasible to resume work on judgments, and where consensus might be possible.<sup>60</sup> The expert group’s 2012 meeting recommended that work be undertaken towards a future binding instrument making provision for the recognition and enforcement of judgments, including jurisdictional filters.<sup>61</sup> In addition, a further meeting of the expert group would be convened to consider matters of direct jurisdiction.<sup>62</sup>

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<sup>56</sup> Hague Conference on Private International Law Convention on Choice of Court Agreements, 30 June 2005, 44 I.L.M. 1294.

<sup>57</sup> Hague Conference (note 50) 5; Schulze (note 37) 40.

<sup>58</sup> Hague Conference ‘On-going work on international litigation and possible continuation of the judgments project’ *Preliminary Document 5 of March 2012* (2012) 4.

<sup>59</sup> In 2002 the Hague Conference, being faced with the practical impossibility for lack of time of exploring in more detail the possibility of adding grounds of jurisdiction to choice of court agreements, suggested that these other grounds of jurisdiction might be dealt with in a non-binding model agreement. This possibility was not further explored by the Conference, but the idea was not new. It had also been considered in the 1971 Convention, but was then rejected because it was considered more complicated and less likely to lead to a homogeneous network of treaties than the (bilateralised) uniform Convention system. The Conference concluded that a model agreement is an option to be considered only if it is not possible to proceed along the lines of a binding instrument: Hague Conference (note 50) 7.

<sup>60</sup> Hague Conference (note 50) 7.

<sup>61</sup> The term ‘jurisdictional filters’ refers to jurisdictional criteria for recognition and enforcement of judgments; also sometimes referred to as ‘indirect grounds of jurisdiction’: see Chapter 3, para 1.

<sup>62</sup> Hague Conference ‘Conclusions and recommendations of the Expert Group on possible future work on Cross-border litigation in civil and commercial matters’ *Working Document No 2 of April 2012* (2012).

The Hague Judgments Project ultimately failed in its aim of concluding a global convention for the recognition and enforcement of foreign judgments, to replace the, also unsuccessful, 1971 Hague Convention.<sup>63</sup> The outcome of the Judgments Project was a very narrow Convention,<sup>64</sup> which was also not successful in terms of ratification, although as this is still a relatively new Convention, it may still receive wider ratification.<sup>65</sup> Despite these failures, the negotiations may nevertheless prove valuable and form the basis of negotiations for future attempts at a global recognition and enforcement convention.<sup>66</sup> Should the Hague Conference ultimately succeed in concluding a widely accepted recognition and enforcement of judgments convention this would significantly improve the current situation and create an enforcement regime similar to the New York Convention achieved more than 50 years ago.

The Hague Conference is the primary global organisation focusing on the harmonisation of private international law, but the harmonisation of private international law may also be influenced by the work of other intergovernmental organisations, which is now discussed.

## **2.2 Some Other Intergovernmental and Private Organisations**

International organisation that may play a role in the harmonisation or unification of private international law, include the United Nations Commission on International Trade Law (UNCITRAL) and the International Organisation for Unification of Private Law (UNIDROIT).

### *2.2.1 The United Nations Commission on International Trade Law*

UNCITRAL plays an important role the development of an improved legal framework for the facilitation of international trade and investment.<sup>67</sup> Its mandate is to further the progressive harmonisation and modernisation of the law of international trade by preparing and promoting the use and adoption of legislative and non-legislative instruments in certain

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<sup>63</sup> See note 34.

<sup>64</sup> See note 56; Schulze (note 37) 40.

<sup>65</sup> See Chapter 3, para 3 below for a discussion of the 2005 Hague Choice of Court Convention. See, for example, the La Paz Convention (Chapter 3, para 5 below) as an indication of the long time period certain judgments conventions may take to receive the required ratifications.

<sup>66</sup> Hague Conference (note 58) 4.

<sup>67</sup> UNCITRAL was established by the United Nations General Assembly in 1966.

fields<sup>68</sup> of commercial law.<sup>69</sup> UNCITRAL fulfils its mandate by promoting wider participation and acceptance of existing international conventions,<sup>70</sup> model and uniform laws,<sup>71</sup> as well as preparing and promoting the adoption of new ones; promoting the codification and wider acceptance of international trade terms, provisions, customs and practices; and promoting the means of ensuring a uniform interpretation and application of international trade conventions and uniform laws.<sup>72</sup>

An important instrument that falls within the ambit of recognition and enforcement is the 1958 UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (known as the ‘New York Convention’).<sup>73</sup> The Convention is the most successful multilateral instrument in the field of international trade law.<sup>74</sup> It provides for the recognition and enforcement of arbitral awards made in the territory of another Contracting State.<sup>75</sup> Contracting States have a general obligation to recognise such awards as binding and to enforce them in accordance with their rules of procedure.<sup>76</sup> A party seeking enforcement of a foreign award needs to supply the court with the arbitral award and the arbitration agreement.<sup>77</sup> The party against whom enforcement is sought can object to the enforcement by

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<sup>68</sup> Such as dispute resolution, international contract practices, transport, insolvency, electronic commerce, international payments, secured transactions, procurement and sale of goods.

<sup>69</sup> UNCITRAL ‘Basic facts about the United Nations Commission on International Trade Law’ (2010) 2 available at [http://www.uncitral.org/pdf/english/texts/general/06-50941\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/general/06-50941_Ebook.pdf) (accessed 17 February 2013).

<sup>70</sup> UNCITRAL has prepared a number of important conventions, including on Carriage of Goods by Sea (1978); Contracts for the International Sale of Goods (1980); International Bills of Exchange and International Promissory Notes (1988); Independent Guarantees and Stand-by Letters of Credit (1995); and the Convention on the Use of Electronic Communications in International Contracts (2005): UNCITRAL (note 69) 11.

<sup>71</sup> Various model laws with guide to enactments have also been drafted, including on the subjects of international commercial arbitration, international credit transfers (1992); procurement of goods, construction and services (1994); electronic commerce (1996); cross-border insolvency (1997); electronic signatures (2001); and international commercial conciliation (2002) UNCITRAL (note 69) 39.

<sup>72</sup> UNCITRAL *General Assembly Resolution 2205 (XXI)*, sect. II, para 8. UNCITRAL’s work is organised and conducted at three levels: the first level is UNCITRAL itself, often referred to as the Commission, which works through an annual plenary session. The second level is the intergovernmental working groups, which to a large extent undertake the development of the topics on UNCITRAL’s work programme, while the third is the secretariat, which assists the Commission and its working groups in the preparation and conduct of their work: UNCITRAL (note 69) 5,6.

<sup>73</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958, 330 U.N.T.S. 38 (‘New York Convention’).

<sup>74</sup> International Council for Commercial Arbitration ‘*ICCA’s Guide to the Interpretation of the 1958 New York Convention: A guide for judges*’ (2011) iv available at [http://www.arbitration-icca.org/media/0/13365477041670/judges\\_guide\\_english\\_composite\\_final\\_revised\\_may\\_2012.pdf](http://www.arbitration-icca.org/media/0/13365477041670/judges_guide_english_composite_final_revised_may_2012.pdf) (accessed 22 July 2012) (herein after ‘ICCA’).

<sup>75</sup> New York Convention (note 73) art I.

<sup>76</sup> New York Convention (note 73) art III.

<sup>77</sup> New York Convention (note 73) art IV.

submitting proof of one of the listed grounds for refusal.<sup>78</sup> The court may of its own motion refuse enforcement for reasons of public policy.<sup>79</sup> In addition to recognition of enforcement, one of the actions the Convention contemplates is that a court should refer a matter to arbitration if there is an agreement to that effect. When court of a Contracting State is seized of a matter in respect of which the parties have made an arbitration agreement the court must refer them to arbitration at the request of one of the parties.<sup>80</sup> This will not be required if the arbitration agreement is null and void, inoperative or incapable of being performed.<sup>81</sup> The arbitration agreement must, however, satisfy the requirements laid down in the Convention, which include in particular that the agreement be in writing.<sup>82</sup>

The success of modern international commercial arbitration has been built on the twin pillars of the New York Convention and the UNCITRAL Model Law on International Commercial Arbitration of 1985 (amended 2006).<sup>83</sup> The latter forms the basis for States without an

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<sup>78</sup> Recognition and enforcement of the award may be refused if it is proved that -

- a) The parties to the agreement were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made;
- b) The party against who the award is invoked was not given proper notice;
- c) The award deals with a difference not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration;
- d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or in the absence of an agreement, not in accordance with the law of the country where the arbitration took place; or
- e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority in which, or under whose law, that award was made.

Recognition and enforcement may also be refused if the competent authority in the country where the recognition and enforcement is sought finds that -

- a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
- b) The recognition or enforcement of the award would be contrary to the public policy of that country: New York Convention (note 73) art V(2).

<sup>79</sup> New York Convention (note 73) art V(2).

<sup>80</sup> New York Convention (note 73) art II(3).

<sup>81</sup> New York Convention (note 73) art II(2).

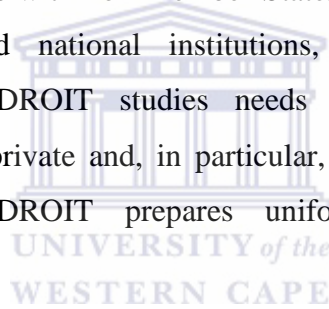
<sup>82</sup> 'Each Contracting State shall recognise an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration': New York Convention (note 73) art II(1),(2).

<sup>83</sup> UNCITRAL adopted the Model Law on International Commercial Arbitration on 21 June 1985. The General Assembly, in its resolution 40/72 of 11 December 1985 recommended that 'all States give due consideration to the Model Law on International Commercial Arbitration, in view of the desirability of the law of arbitral procedures and the specific needs of international commercial arbitration practice'. The Model Law was amended by UNCITRAL on 7 July 2006. The Model Law constitutes a basis for the harmonisation and improvement of national laws. It covers all stages of the arbitral process from the arbitral agreement, the composition and jurisdiction of the arbitral tribunal and the extent of court intervention through to the recognition and enforcement of the arbitral award. Since its adoption by UNCITRAL, the Model Law has come to represent the accepted international legislative standard for a modern arbitration law and a significant number of jurisdictions have enacted arbitration legislation based on the model law: UNCITRAL 'Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial

arbitration law to adopt a ready-made law or to substitute it for a law that is out of date. Some jurisdictions which have not enacted the UNCITRAL Model Law have enacted new legislation, which, although not exactly the Model Law, is based essentially upon it. All this have contributed greatly to achieving the harmonisation of international arbitration law, which in turn, assists in achieving predictability and certainty – qualities much desired by the international business community.<sup>84</sup>

### 2.2.2 *International Organisation for Unification of Private Law*

The International Institute for the Unification of Private Law (UNIDROIT) is an independent intergovernmental organisation operating worldwide. It has since 1926 been preparing international instruments<sup>85</sup> in the fields of international trade law and uniform private law in general.<sup>86</sup> UNIDROIT is based in Rome and operates on the basis of a mandate from its Member States<sup>87</sup> and collaborates with non-Member States, intergovernmental, regional and international organisations, and national institutions, in particular universities and professional associations. UNIDROIT studies needs and methods for modernising, harmonising and co-ordinating private and, in particular, commercial laws between States and groups of States. UNIDROIT prepares uniform rules for the unification



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Arbitration as amended in 2006' available at [http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf) (accessed 15 February 2013).

<sup>84</sup> ICCA (note 74) xi; see also Mistelis (note 24) 1057.

<sup>85</sup> This includes conventions, uniform laws and principles. UNIDROIT previously directed its activities exclusively towards international conventions, but several conventions were never signed or ratified by the required number of states. As a result, the project which originally started out as the 'Progressive Codification of International Commercial Law' was later categorised as a legal guide to show its flexibility for adaptation and termed the 'Principles for International Commercial Contracts'. The Principles are accompanied by comments, which include illustrations of their content and scope and references to other pertinent international instruments of unified law. The Principles may serve as model law that could inspire legislators who strive for law reform and may serve to enlighten parties negotiating a contract in order to identify the problems to be resolved in their contracts. Parties to an international contract could also choose the Principles as the law applicable to their contract: Yuejiao Z 'Harmonization of contract law and its impact on China's contract law' Modern Law for Global Commerce Congress to celebrate the fortieth annual session of UNCITRAL Vienna, 9-12 July 2007 2.

<sup>86</sup> UNIDROIT ('Institut International pour l'Unification du Droit') was founded in 1926 under the auspices of the League of Nations, but is now an independent international organisation.

<sup>87</sup> UNIDROIT has 63 member States from the five continents at different levels of economic development and representing the different legal traditions: see UNIDROIT 'Membership' available at <http://www.unidroit.org/english/members/main.htm> (accessed 8 August 2012).



of substantive law and only includes uniform conflict of law rules incidentally.<sup>88</sup> UNIDROIT has also adopted a number of Conventions and Protocols.<sup>89</sup>

An example of the importance of the work of UNIDROIT is the fact that it assisted the Organisation for the Harmonisation of Business Law in Africa (OHADA)<sup>90</sup> in drafting a Uniform Act on Contract Law for its sixteen Member States.<sup>91</sup> OHADA has now completed eight Uniform Acts<sup>92</sup> and further Acts are being prepared. Following its meeting in Bangui in March 2001 it decided to include contract law in the harmonisation programme. At its meeting in Brazzaville in February 2002 the OHADA Council of Ministers instructed the Permanent Secretariat to approach UNIDROIT for assistance. They specified that the text to be drafted by UNIDROIT should take account of recent international trends in contract law and reconcile the concerns of the romano-germanic and common law legal systems.<sup>93</sup>

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<sup>88</sup> UNIDROIT 'UNIDROIT: An overview' available at <http://www.unidroit.org/dynasite.cfm?dsmid=103284> (accessed 8 August 2012).

<sup>89</sup> These include the Convention relating to a Uniform Law on the International Sale of Goods (The Hague, 1964) (ULIS) and Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods (The Hague, 1964) (ULIF). These two instruments were rendered largely redundant since the adoption of the Convention on Contracts for the International Sale of Goods. Other Conventions include the Convention on Agency in the International Sale of Goods (Geneva, 1983); Convention on International Financial Leasing (Ottawa, 1988); Convention on International Factoring (Ottawa, 1988); Convention on International Interests in Mobile Equipment (Cape Town, 2001); Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment (Cape Town, 2001). UNIDROIT 'Conventions' available at <http://www.unidroit.org/english/conventions/c-main.htm> (accessed 10 August 2012).

<sup>90</sup> OHADA was created by the Treaty on the Harmonisation of Business Law in Africa signed on 17 October 1993 at Port-Louis (Mauritius). It is open to any State in the African continent. The Organisation aims at establishing a unified, secure and up-to-date legal environment with a view to boosting economic activity and investment in its member States. The constitutive treaty states as its objective the harmonisation of business law in the States Party by means of the elaboration and adoption of simple, modern rules geared to the state of their economies, by implementing appropriate judicial procedures, and by promoting recourse to arbitration for the settlement of disputes arising out of contracts: Treaty on the Harmonisation of Business Law In Africa (JO OHADA N° 4), 1 November 1997 available at [http://www4.worldbank.org/afr/ssatp/Resources/HTML/legal\\_review/Annexes/Annexes%20III/Annex%20III-06.pdf](http://www4.worldbank.org/afr/ssatp/Resources/HTML/legal_review/Annexes/Annexes%20III/Annex%20III-06.pdf) accessed on 17 April 2013 ['OHADA Treaty'].

<sup>91</sup> Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Congo, Côte d'Ivoire, Equatorial Guinea, Gabon, Guinea, Guinea-Bissau, Mali, Niger, Senegal, Togo. The accession of the Democratic Republic of the Congo is underway.

<sup>92</sup> On general commercial law (1997); on commercial companies and economic interest groups (1997); on organising securities (1997); on simplified recovery procedures and measures of execution (1998); on organizing collective proceedings for wiping off debts (1998); arbitration law within the framework of the OHADA Treaty (2000); on organizing and harmonizing company accounting systems (2000); on contracts for the carriage of goods by road (2003).

<sup>93</sup> UNIDROIT 'Preparation by UNIDROIT of a draft OHADA Uniform Act on Contract Law' available at <http://www.unidroit.org/english/legalcooperation/ohada.htm> (accessed 10 March 2013).



Against this background, UNIDROIT acceded to the request of the OHADA Council of Ministers by providing the necessary expertise for the preparation of a draft Uniform Act.<sup>94</sup> The objectives and drafting methods were decided jointly by the OHADA and UNIDROIT Secretariats. Following preparatory work and broad consultations with African experts and specialists, UNIDROIT completed a preliminary draft Uniform Act on Contract Law, accompanied by an Explanatory Note. These texts were transmitted for consideration by the UNIDROIT Secretariat to the OHADA Permanent Secretariat in February 2005. Once this round of consultations is complete, the preliminary draft will be finalised at a meeting of the national commissions to be convened by the Permanent Secretariat of OHADA with a view to its adoption by the Council of Ministers of OHADA as soon as the Common Court of Justice and Arbitration of OHADA has issued a favourable opinion on the text.<sup>95</sup>

The cooperation of UNCITRAL with OHADA, a regional economic community of which the Members come from different legal traditions,<sup>96</sup> illustrates the importance and relevance of UNIDROIT. UNIDROIT may, therefore, also offer valuable assistance to the SACU should Member States in future decide to attempt a similar effort to OHADA, and negotiate uniform laws on specific matters falling within the mandate of UNCITRAL.

### **2.3 Evaluation of international harmonisation efforts**

The Hague Conference on Private International Law, despite its failure to conclude a successful recognition and enforcement convention, nevertheless contributes significantly towards the harmonisation of private international law in the fields of international legal cooperation and litigation and international finance law, as can be seen by the work that it produces, including 39 Conventions.<sup>97</sup>

The work of the UNCITRAL is mostly focused on international trade law and, therefore, only impacts on private international law incidentally. It has, however, made a significant

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<sup>94</sup> The expertise was provided in the person of Professor Marcel Fontaine (Emeritus Professor, former Director of the Centre de droit des obligations, Faculty of Law, Catholic University of Louvain-la-Neuve, Belgium, and member of the UNIDROIT Working Group for the preparation of the UNIDROIT Principles), with the financial support of the Swiss Government, Development and Cooperation Office: See UNIDROIT (note 93).

<sup>95</sup> Draft text and explanatory note available at <http://www.unidroit.org/english/legalcooperation/ohada.htm> (accessed 10 March 2013).

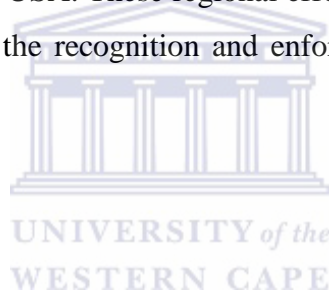
<sup>96</sup> See note 91.

<sup>97</sup> Hague Conference 'Conventions' available at [http://www.hcch.net/index\\_en.php?act=conventions.listing](http://www.hcch.net/index_en.php?act=conventions.listing) (accessed 10 March 2012).

contribution to the harmonisation of private international law in the field of recognition and enforcement of foreign arbitral awards through the New York Convention.<sup>98</sup>

Despite the above successes, however, the present situation remains unsatisfactory due to the lack of an international convention for the recognition and enforcement of foreign judgments comparable to that of the New York Convention.<sup>99</sup>

These global harmonisation and unification efforts, have to some degree been accompanied by the harmonisation of various laws, and especially the rules on the recognition and enforcements have also taken place on a regional level, generally within the context of a regional economic community, such as the European Union (EU) or the Australia New Zealand Closer Economics Relations Trade Agreement (ANZCERTA), or grouping of geographically linked states, such as the Organisation of American States (OAS);<sup>100</sup> as well as within a federation such as the USA. These regional efforts at harmonising or unifying the laws of their Member States on the recognition and enforcement of foreign judgments are now discussed.



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<sup>98</sup> See para 2.2.1 above.

<sup>99</sup> See Chapter 1, para 3.1 above.

<sup>100</sup> The Organisation of American States (OAS) is a regional international organisation that was founded on 30 April 1948. Its Members are the 35 independent States of the Americas. The goal of the member nations in creating the OAS was 'to achieve an order of peace and justice, to promote their solidarity, to strengthen their collaboration, and to defend their sovereignty, their territorial integrity, and their independence' (art 1). The objectives of the OAS is to strengthen the peace and security of the continent [North and South America]; to promote and consolidate representative democracy, with due respect for the principle of non-intervention; to prevent possible causes of difficulties and to ensure the pacific settlement of disputes that may arise among the member states; to provide for common action on the part of those states in the event of aggression; to seek the solution of political, judicial, and economic problems that may arise among them; to promote, by cooperative action, their economic, social, and cultural development; to eradicate extreme poverty, which constitutes an obstacle to the full democratic development of the peoples of the continent; to achieve an effective limitation of conventional weapons that will make it possible to devote the largest amount of resources to the economic and social development of the member states (art 2): Charter of the Organization of American States, 119 U.N.T.S. 3, entered into force December 13, 1951.

### 3 HARMONISATION OF RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS AT THE REGIONAL LEVEL

#### 3.1 European Community Brussels/Lugano Regime

The recognition and enforcement of foreign judgments in European States has a long and complex history,<sup>101</sup> with treaty law playing a prominent role.<sup>102</sup>

The movement for legal unification and harmonisation gained momentum in Western Europe with the internationalisation of trade, investment and financing, assisted by the dynamics of economic integration.<sup>103</sup> The European Community was established in 1957 with the entry into force of the Treaty Establishing the European Community ('Treaty of Rome')<sup>104</sup> between Belgium, Germany, France, Italy, Luxembourg and the Netherlands. Part one of the Treaty sets out the principles of the Community.<sup>105</sup> In terms of article 2, the objective of the Community is to,

'by establishing a common market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it'.<sup>106</sup>

Part two sets out the foundations and is divided into four titles, namely free movement of goods,<sup>107</sup> agriculture,<sup>108</sup> persons,<sup>109</sup> services and capital, and transport.<sup>110</sup> Part three contains

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<sup>101</sup> The starting point for the history of the EU is usually stated to be at the end of World War II, although integration initiatives and ideologies existed long before then. After the war, European countries decided to take the first significant steps towards European integration. The Marshall Plan (American economic aid to Europe, as announced by the US Secretary of State, George Marshall, in June 1947) was of fundamental importance to European Integration, as it provided that recipient states must co-ordinate their activities and planning in order to obtain the maximum benefit from the European Recovery Plan. In 1948 the Organisation for European Economic Cooperation (OEEC) came into being, with the main purposes of meeting the requirements set up by the European Recovery Program. A political body to support European integration, the Council of Europe (CoE), was created in 1949. Its Statute was initially signed by Belgium, Denmark, France, Britain, Ireland, Italy, the Netherlands, Luxembourg, Norway and Sweden. The CoE was not given proper supranational powers, as its decisions required the unanimous votes of government representatives. Its creation is nevertheless seen as a decisive step towards a United Europe: Fazio S *The Harmonisation Of International Commercial Law* (2007) 49-51.

<sup>102</sup> Nadelmann (note 3) 995.

<sup>103</sup> Garro AM 'Unification and harmonisation of private law in Latin America' (1992) 40(3) *The American Journal of Comparative Law* 587.

<sup>104</sup> The Treaty Establishing the European Community signed in Rome on March 25, 1957 (1957) 298 UNTS 11 (hereafter 'Treaty of Rome').

<sup>105</sup> Treaty of Rome (note 104) arts 1-8.

<sup>106</sup> Treaty of Rome (note 104) art 2.

<sup>107</sup> Title I (free movement of goods) consists of Chapter 1: Customs Union (arts 18-29); and Chapter 2: Elimination of quantitative restrictions between Member states (arts 30-37): see Treaty of Rome (note 104).

<sup>108</sup> Treaty of Rome (note 104) arts 38-47.

the policy of the Community;<sup>111</sup> Part four deals with ‘Association of the Overseas Countries and Territories’;<sup>112</sup> Part five with the institutions of the Community<sup>113</sup> and Part six deals with the general and final provisions.<sup>114</sup>

Article 220 of the Treaty of Rome required the then Member States<sup>115</sup> to engage in further negotiations ‘with a view to securing for the benefit of their nationals ... the simplification of formalities governing the reciprocal recognition and enforcement of judgments’.<sup>116</sup> This stipulation was intended to encourage the free movement of judgments within the European Community, in the same manner that there was to be free movement of labour, services, goods and capital. It was, therefore, acknowledged that Europe could not effectively operate as a single market, or a single economic unit, until the laws, court decisions, and the official documents of its Member States were automatically recognised and respected throughout all parts of the region.<sup>117</sup>

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<sup>109</sup> Title III consists of Chapter 1: Workers (arts 48-51); Chapter 2: Right of establishment (arts 52- 58); Chapter 3: Services (arts 59-66); and Chapter 4: Capital (arts 67-73): see Treaty of Rome (note 104).

<sup>110</sup> Treaty of Rome (note 104) arts 74-84.

<sup>111</sup> Articles 85-130 consist of Title I: Common Rules; Title II: Economic Policy; Title III: Social Policy; and Title IV: The European Investment Bank: see Treaty of Rome (note 104).

<sup>112</sup> Treaty of Rome (note 104) arts 131-136.

<sup>113</sup> These include the Assembly (European Parliament) (arts 137-144); the Council (arts 145-154); the Commission (arts 155-163); the Court of Justice (arts 164-188); the Economic and Social Committee (arts 193-198).

<sup>114</sup> Treaty of Rome (note 104) arts 210-248.

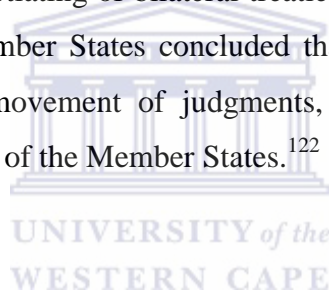
<sup>115</sup> The first enlargement occurred in 1973 when Denmark, Ireland and the United Kingdom formally joined the EEC, followed by Greece in 1981 and Spain and Portugal in 1986: European Union ‘The history of the European Union’ available at [http://europa.eu/abc/history/1980-1989/index\\_en.htm](http://europa.eu/abc/history/1980-1989/index_en.htm) (accessed 10 March 2013). The Treaty on the European Union, which was signed in Maastricht on 7 February 1992, entered into force on 1 November 1993. The Maastricht Treaty introduced new forms of cooperation between the Member States’ governments and in the area of justice and home affairs. By adding this inter-governmental cooperation to the existing Community system, the Maastricht Treaty created a new structure with ‘three pillars’ which formed the European Union: European Union Treaties and law’ available at [http://europa.eu/abc/treaties/index\\_en.htm](http://europa.eu/abc/treaties/index_en.htm) (accessed 10 March 2013). A further enlargement took place in 1995 with the new membership of Finland, Austria and Sweden: European Union ‘The history of the European Union: 1990-1999 A Europe without frontiers’ available at [http://europa.eu/abc/history/1990-1999/index\\_en.htm](http://europa.eu/abc/history/1990-1999/index_en.htm) (accessed 10 March 2013). In 2004, a mainly Eastern enlargement took place when the EU was joined by the Czech Republic, Estonia, Latvia, Lithuania, Hungary, Poland, Slovenia and Slovakia, Cyprus and Malta. Bulgaria and Romania joined the EU in January 2007, bringing the total membership to 27 countries: European Union ‘2000 – Today: a further enlargement’ available at [http://europa.eu/abc/history/2000\\_today/index\\_en.htm](http://europa.eu/abc/history/2000_today/index_en.htm) (accessed 10 March 2013).

<sup>116</sup> Treaty of Rome (note 104) art 220.

<sup>117</sup> Russel KA ‘Exorbitant jurisdiction and enforcement of judgments: the Brussels system as an impetus for the United States action’ (1993) 19 *Syracuse Journal of International Law and Commerce* 57. See also letter dated 22 October 1959 from the European Commission to Member States, in which it was recognised that ‘legal protection and, hence, legal certainty in the common market are essentially dependent on the adoption by the Member States of a satisfactory solution to the problem of recognition and enforcement of judgments’: Jenard P ‘Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (signed at Brussels, 27 September 1968)’ (1979) *Official Journal of the European Communities* No. C 59/1 (5 March 1979) (‘Jenard Report’) 3.

At the time of adoption of the Treaty of Rome domestic recognition and enforcement of foreign judgments rules among European States were restrictive and varied considerably.<sup>118</sup> States adopted bilateral treaties to solve difficulties relating to the recognition and enforcement of foreign judgments, but there were striking differences between the various treaties.<sup>119</sup> The treaties generally allowed the enforcing court to investigate the assertion of jurisdiction by the rendering court according to the enforcing court's own jurisdiction rules, and addressed other questions such as whether the judgment was obtained by fraud, whether there was fair trial, and whether the defendant received due notice of the proceedings.<sup>120</sup>

Although, theoretically, additional bilateral treaties could have been concluded so that the grid of treaties encompassed the entire community, unless all the treaties were re-negotiated, the problems of conflicting treaties and discrimination would have remained.<sup>121</sup> As a result of the problems inherent to the negotiating of bilateral treaties, and the differences between the provisions of existing ones, Member States concluded that only a multilateral Convention would foster the desired free movement of judgments, and would not lead to unequal treatment of the various nationals of the Member States.<sup>122</sup>



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<sup>118</sup> For example, the Netherlands would deny recognition and enforcement in the absence of a recognition and enforcement treaty; both France and Luxembourg permitted revision au fond in some circumstances (French courts abandoned *révision au fond* after 1964); Germany required reciprocity as a condition for recognition and enforcement; Belgium courts were allowed to re-examine foreign judgments. Italy denied judgments by default: Huang J *Interregional Recognition and Enforcement of Civil and Commercial Judgments: Lessons for China from US and EU Laws* (unpublished SJD Thesis, Duke University School of Law, 2010) 21-2; Jenard Report (note 117) 6.

<sup>119</sup> For example some, like those between France and Belgium, and between Belgium and the Netherlands, and the Benelux Treaty, were based on 'direct' jurisdiction, but all the others were based on 'indirect' jurisdiction; some conventions covered judgments given in civil matters by criminal courts, whilst others were silent on this point or expressly exclude such judgments from their scope, such as the Conventions between Italy and the Netherlands, and between Germany and Italy: Jenard Report (note 117) 7.

<sup>120</sup> Oestreicher (note 16) 128.

<sup>121</sup> Bartlett LS 'Full faith and credit comes to the Common Market: An analysis of the provisions of the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (1975) 24 *International and Comparative Law Quarterly* 45. Member States felt that the differences between the existing bilateral conventions would hinder the 'free movement' of judgments and lead to unequal treatment of the various nationals of the Member States, such inequality being contrary to the fundamental EEC principle of non-discrimination, set out, in particular, in art 7 of the Treaty of Rome: Jenard Report (note 117) 7. Article 7 of the Treaty of Rome provides that 'Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited'.

<sup>122</sup> Bartlett (note 121) 45.



The Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters in 1968,<sup>123</sup> was subsequently adopted by Member States, ‘desiring to implement the provisions of Article 220 of [the Treaty of Rome]’,<sup>124</sup> and ‘considering that it is necessary ... to determine the international jurisdiction of their courts, to facilitate recognition and to introduce an expeditious procedure for securing the enforcement of judgments’.<sup>125</sup> The Convention contains detailed provisions on the assumption of jurisdiction by national courts of Member States in matters falling under the Convention,<sup>126</sup> and provides for procedures for the recognition<sup>127</sup> and enforcement<sup>128</sup> of ensuing judgments.

The Brussels Convention has been described as ‘the single most important private international law treaty in history’.<sup>129</sup> The Convention has managed to bridge the gulf between common law and civil law jurisdictions and works well, despite national idiosyncrasies and linguistic difficulties.<sup>130</sup> The Convention has also been called Europe’s ‘full faith and credit clause’,<sup>131</sup> comparing it to the constitutional requirement of USA States to afford full faith and credit to judgments from sister States.<sup>132</sup> Hay<sup>133</sup> suggests that this is an understatement and that the European recognition command is in fact *stronger* than required

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<sup>123</sup> See Chapter 3 para 4 for a discussion of the provisions of the Brussels Convention.

<sup>124</sup> By virtue of which they undertook to secure the simplification of formalities governing the reciprocal enforcement of judgments of courts or tribunals.

<sup>125</sup> Brussels Convention (note 13) Preamble.

<sup>126</sup> The Convention applies in civil and commercial matters, except to the extent that they are excluded by art 1 of the Convention: Brussels Convention (note 13) art 1. The material scope of the Convention is discussed in Chapter 3, para 3.1 below. The Convention includes provisions on special jurisdiction, jurisdiction in matters relating to insurance, jurisdiction over consumer contracts, exclusive jurisdiction, prorogation of jurisdiction, examination as to jurisdiction and admissibility, *lis pendens*-related actions, and provisional, including protective, measures: Brussels Convention (note 13) arts 2-25. The general rule established by the Convention is that persons domiciled in a Contracting State, whatever their nationality, must be sued in the courts of that State, and that persons domiciled in a Contracting State may only be sued in the courts of another Contracting State by virtue of the rules set out in Sections 2-6 of the Convention: Brussels Convention (note 13) arts 2-3.

<sup>127</sup> See Brussels Convention (note 13) Title III arts 25, 26-30. A judgment given in a Contracting State will generally be recognised in the other Contracting States without any special procedure being required, unless it falls under one of the instances listed in art 27 when a judgment will not be recognised, which is discussed in Chapter 3, para 4.3 below.

<sup>128</sup> Title III Section 2 arts 31-45. The Convention generally provides that a judgment given in a Contracting State and enforceable there will be enforced in another Contracting State, of the order for its enforcement has been issued there, after an application to this effect has been made by any interested party, except in the United Kingdom, where a judgment will be enforced if it has been *registered* for enforcement: Brussels Convention (note 13) art 31. See Chapter 3, para 4.3 below for a discussion of these provisions.

<sup>129</sup> Juenger FK ‘Some Comments on European Procedural Harmonization’ (1997) 45 *American Journal of Comparative Law* 933.

<sup>130</sup> Juenger (note 129) 933.

<sup>131</sup> Bartlett (note 121) 44.

<sup>132</sup> This is discussed at paragraph 3.2 below.

<sup>133</sup> Hay P ‘The development of the public policy barrier to judgment recognition within the European Community’ (2007) 6 *The European Legal Forum* 290.



by the US full faith and credit clause, because it is combined with jurisdictional bases that must be observed by rendering courts with respect to EU defendants. Review of jurisdiction is excluded, even for default judgments, except within a limited category of cases.<sup>134</sup>

The Treaty of Amsterdam<sup>135</sup> changed the sphere of harmonising of private international law rules in the EU,<sup>136</sup> by transferring the area private law within the bounds of judicial cooperation from the Third Pillar<sup>137</sup> (intergovernmental cooperation in the field of Justice and Home Affairs) to the First Pillar (Community Law).<sup>138</sup> This had the effect that the

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<sup>134</sup> For example with respect to consumer transactions (arts 15-17); insurance (arts 3-14); and exclusive jurisdiction (arts 32 and 35(1)).

<sup>135</sup> Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Related Acts *Official Journal C340*, 10 November 1997.

<sup>136</sup> Denmark, the United Kingdom and Ireland, however, enjoy a special regime as regards to Title IV of the EC Treaty, which constitute the legal basis for judicial cooperation in civil matters. Legal instruments adopted under Title IV of the EC Treaty are not binding or applicable in Denmark, while Ireland and the United Kingdom are bound by them if they notify the Council to that effect European Union 'Judicial Cooperation in Civil Matters' available at [http://europa.eu/legislation\\_summaries/justice\\_freedom\\_security/judicial\\_cooperation\\_in\\_civil\\_matters/116\\_016\\_en.htm](http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_civil_matters/116_016_en.htm) (accessed 22 October 2012).

<sup>137</sup> The 'three pillars structure' functioned on the basis of different decision-making procedures: the Community procedure for the first pillar, and the intergovernmental procedure for the other two. In the case of the first pillar, only the Commission could submit proposals to the Council and Parliament, and a qualified majority was sufficient for a Council act to be adopted. In the case of the second and third pillars, this right of initiative was shared between the Commission and the Member States, and unanimity in the Council was generally necessary. The Treaty of Amsterdam transferred some of the fields covered by the third pillar to the first pillar (free movement of persons): 'Pillars of the European Union' available at [http://europa.eu/legislation\\_summaries/glossary/eu\\_pillars\\_en.htm](http://europa.eu/legislation_summaries/glossary/eu_pillars_en.htm) (accessed 22 October 2012). The Pillar Structure has since been abolished by the Treaty of Lisbon (Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 *Official Journal C 306 of 17 December 2007*).

The Treaty of Lisbon divides Union competences into three separate groups: exclusive competence, shared competence and supporting competence. When the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts; Member States will only be allowed to do so themselves if empowered by the Union, or for the implementation of Union Acts (Consolidated Treaty on the Functioning of the European Union, 30 March 2010, C83/47 ['TFEU'] art 2(1)). The areas in which the Union has exclusive competence include the customs union, the establishing of the competition rules necessary for the functioning of the internal market and a common commercial policy. The Union also has exclusive competence for the conclusion of an international agreement of which the conclusion is provided for in a legislative act of the Union, or which is necessary to enable the Union to exercise its internal competence: art 3. When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States may exercise their competence to the extent that the Union has not exercised its competence, or to the extent that the Union has decided to cease exercising its competence: art 2(2). Principle areas in which the Union and the Member States share competence include the internal market, economic, social and territorial cohesion, consumer protection and transport (art 5). When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States may exercise their competence to the extent that the Union has not exercised its competence, or to the extent that the Union has decided to cease exercising its competence (art 2(2)). Principle areas in which the Union and the Member States share competence include the internal market, economic, social and territorial cohesion, consumer protection and transport (art 5).

<sup>138</sup> Treaty of Amsterdam (note 135) art 2(15).

competence for coordination of internal rules on jurisdiction and recognition of judgments fell with the Community Institutions,<sup>139</sup> and legislation on matters of private international law no longer had to be in the form of intergovernmental Conventions that had to be ratified and implemented by States, but could become directly applicable through community law.<sup>140</sup> Regulations have, since 1999, been accepted as the most important means for harmonising private international law rules in the EU.<sup>141</sup>

The pre-1999 approach posed a number of challenges. The ratification procedures were generally slow, and each time a new Member joined the group, an accession treaty to each convention had to be negotiated and ratified. In addition, the European Court of Justice's jurisdiction to ensure the uniform interpretation of the conventions was limited.<sup>142</sup> The adoption of the Treaty of Amsterdam removed the risk that Members would fail to meet their obligations and that measures would not come into force, as was the case with, for example, the Insolvency Convention.<sup>143</sup>

On 22 December 2000, the Council of the EU adopted the Brussels I Regulation.<sup>144</sup> The basic framework of the Regulation remains similar to that of the Brussels Convention, although there are numerous changes on points of detail and some on matters of substance.<sup>145</sup> The

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<sup>139</sup> Woestehoff (note 41) 9.

<sup>140</sup> TFEU (note 137) art 288 provides that to exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions. A regulation has general application and is binding in its entirety and directly applicable in all Member States. A directive is binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods. A decision is binding in its entirety. A decision which specifies those to whom it is addressed is binding only on them. Recommendations and opinions have no binding force: see TFEU (note 137) art 288.

<sup>141</sup> Regulations are the most direct form of EU law and as soon as they are passed, they have binding legal force throughout every Member State, on a par with national laws. National governments do not have to take action themselves to implement EU regulations: Boele-Woelki K 'Unification and Harmonization of Private International Law in Europe' in Basedow J, Meier I, Girsberger D, Einhorn T & Schnyder AK (eds) *Private Law in the International Arena - From National Conflict Rules Towards Harmonization and Unification: Liber amicorum Kurt Siehr* (2000) 62.

<sup>142</sup> Bayraktaroglu G 'Harmonisation of private international law at different levels: Communitarization v. international harmonisation' (2003) *European Journal of Law Reform* 134.

<sup>143</sup> The Insolvency Convention failed to receive the required number of ratifications, and therefore never came into effect. However as a result of the changes brought about by the Treaty of Amsterdam, it was possible for the instrument to come into immediate effect immediately as a Regulation: Basedow J 'The communitarization of the conflict of laws under the Treaty of Amsterdam' (2000) 37 *Common Market Law Review* 688.

<sup>144</sup> Regulation 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters [2001] *Official Journal* L12/1 ('Brussels I Regulation').

<sup>145</sup> Although much of the Regulation is the same as the Convention, the similarities are partly obscured by structural changes. Renumbering was inevitable in the light of some of the changes made: the matters regulated in the Protocol to the Convention have been brought into the main text of the Regulation at various points. Other changes have been made with a view to simplifying the structure of the instrument (eg, the

Brussels Convention continues to apply with respect to those territories of EU countries that fall within its territorial scope and that are excluded from the regulation pursuant to art 299 of the Treaty of Rome.<sup>146</sup> The Regulation is the fruit of renegotiations that began in 1997, where the original plan was to amend the Brussels and Lugano Conventions<sup>147</sup> while retaining the parallelism between the two.<sup>148</sup> The entry into force of the Treaty of Amsterdam brought with it the expectation that the new instrument regulating jurisdiction and enforcement would be a Regulation and would pass through the Community law legislative provisions.<sup>149</sup> Regulations contain unconditional mandatory provisions that are directly and uniformly applicable, and by their very nature, require no action by the Member States to transpose them into national law.<sup>150</sup>

Chapter 3 of the Treaty on the Functioning of the European Union ('TFEU')<sup>151</sup> provides for the adoption of measures which have as their object the establishment and functioning of the internal market. Article 81 of the TFEU provides for the development of judicial cooperation in civil matters having cross-border implications - this is based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases, which may include the

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procedure for appeals). The list of exorbitant heads of jurisdiction (art 3), competent authorities to which an application can be made (arts 43 and 44) are contained in Annexes to the Convention; and the various Titles of the Convention are found as Chapters in the Regulation: See Brussels Convention (note 13); Brussels I Regulation (note 144). See also Kennet W (ed) 'Current Developments, Private International law: The Brussels I Regulation' (2001) 50 *International and Comparative Law Quarterly* 725-737 for a detailed comparison of the provisions of the Brussels Convention and Brussels Regulation.

<sup>146</sup> European Union 'Judicial cooperation in civil matters' available at '[http://europa.eu/legislation\\_summaries/justice\\_freedom\\_security/judicial\\_cooperation\\_in\\_civil\\_matters/133\\_054\\_en.htm](http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_civil_matters/133_054_en.htm)' (accessed 6 September 2012).

<sup>147</sup> In 1997 the Council of the EU initiated a simultaneous revision of the Brussels and Lugano Conventions, with the aim of fully harmonising the two Conventions and incorporating changes to resolve certain problems that had emerged in the course of the interpretation of the Conventions by the ECJ. It was felt that the two Conventions ought to be revised together in order, among other things, to keep them abreast of developments in international life and technology, in particular with regard to electronic commerce; to expedite the enforcement of judgments, a need later underlined by art 65 of the Treaty of Amsterdam, which was not yet in force when the work began; to simplify aspects of jurisdiction and coordination between jurisdictions; to clarify points which were imprecise or which had been found problematic on application; and, finally, to adapt certain of the Convention's provisions to case law of the ECJ: see Pocar F 'Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, signed in Lugano on 30 October 2007 Explanatory Report' *Official Journal of the European Union* 2009/C 319/01 (hereafter 'Pocar Report') 1-2.

<sup>148</sup> Kennet (note 145) 725.

<sup>149</sup> Kennet (note 145) 725. The entering into force of the Treaty of Amsterdam on 1 May 1999 gave the European Community new powers with regard to judicial cooperation in civil matters, and prevented the draft proposal from becoming a new version of the Brussels Convention and, in parallel, of a new Lugano Convention. The draft was 'frozen' by the Council on 12 May 1999, pending presentation by the Commission, of a draft Community act which would replace the Brussels Convention in the community framework. On 14 July 1999, the Commission submitted to the Council a proposal for a Community regulation, which was approved on 22 December 2000: see Pocar Report (note 147) 2.

<sup>150</sup> Bayraktaroğlu (note 142) 145.

<sup>151</sup> See note 137.

adoption of measures for the approximation of the laws and regulations of the Member States.<sup>152</sup>

The Brussels Regime is complemented by the Lugano Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters<sup>153</sup> between non-EU European Free Trade Area (EFTA) Member States and is analogous to the Brussels Regulation.<sup>154</sup> The aim of the Convention is to strengthen in the territories the legal protection of persons established therein, and for this purpose to determine the international jurisdiction of the courts, to facilitate the recognition of judgments, and to introduce an expeditious procedure for securing their enforcement.<sup>155</sup> The Convention sets out to extend to the Contracting Parties the principles of the Brussels I Regulation, and substantially reproduces its provisions.<sup>156</sup> The parallelism with the Brussels I Regulation is referred to once again in the introduction to Protocol 2 to the Convention,<sup>157</sup> which stresses the substantial link that exists between the two acts despite the fact that they remain distinct from one another.<sup>158</sup> The structure of the Convention is consequently based on the principles of the Regulation.<sup>159</sup>

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<sup>152</sup> In order to achieve such cooperation, the EU Parliament and Council must adopt measures, particularly when necessary for the proper functioning of the internal market, aimed at ensuring: (a) the mutual recognition and enforcement of judgments and decisions in extrajudicial cases; (b) the cross-border service of judicial and extrajudicial documents; (c) the compatibility of the rules applicable in the Member State concerning conflict of laws and of jurisdiction; (d) cooperation in the taking of evidence; (e) effective access to justice; (f) the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States; (g) the development of alternative methods of dispute settlement; and (h) support for the training of the judiciary and judicial staff: see TFEU (note 137) art 81.

<sup>153</sup> Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (done at Lugano on 30 October 2007) *Official Journal* L339/3 ('2007 Lugano Convention).

<sup>154</sup> The 2007 Lugano Convention replaced the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 16 September 1988, which was concluded between the Member States of the EC and certain Members of the EFTA. This was a 'parallel convention' to the Brussels Convention in 1968, which was concluded between the six original Members of the EC, and was amended several times thereafter to extend its application to new States that has acceded to the Community. After 1988, several States that were parties to the Lugano Convention acceded to the European Community, and became parties to the Brussels Convention, which has since been replaced by the Brussels I Regulation: Pocar Report (note 147) 1.

<sup>155</sup> Lugano Convention (note 153) Preamble.

<sup>156</sup> Pocar Report (note 147) 4.

<sup>157</sup> Protocol 2 on the uniform interpretation of the Convention and on the Standing Committee 21 December 2007 *Official Journal of the European Union* L 339/27.

<sup>158</sup> 'Considering the substantial link between [the] Convention, the 1988 Lugano Convention, and ... Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, as well as any amendments thereof, of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, signed at Brussels on 27 September 1968, and of the Protocol on interpretation of that Convention by the Court of Justice of the European Communities, signed at Luxembourg on 3 June 1971, as amended by the Conventions of Accession to the said Convention and the said Protocol by the States acceding to the European Communities, as well as of the Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of

The Convention is a double convention governing, within its field of application,<sup>160</sup> direct jurisdiction of the courts in the States that are bound by the Convention,<sup>161</sup> coordination between courts in the event of competing jurisdiction, conditions for the recognition of judgment,<sup>162</sup> and a simplified procedure for their enforcement.<sup>163</sup> On each of these points the text of the new Convention diverges from that of the 1988 Convention, either because it has been aligned on the Brussels I Regulation, or because specific provision has been made to take account of subsequent developments in the case-law of the ECJ or to regulate the relationship between the Convention and the Regulation.<sup>164</sup>

The next regional approach that is discussed is that of the USA.

### 3.2 United States full faith and credit approach

Recognition of sister-state judgments in the USA federal system<sup>165</sup> is governed by the full faith and credit clause of the United States Constitution.<sup>166</sup> The need for internal regulation of

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judgments in civil and commercial matters, signed at Brussels on 19 October 2005': see Protocol 2 (note 157) Preamble.

<sup>159</sup> Pocar Report (note 147) 4.

<sup>160</sup> The material scope of the 2007 Convention has not been changed in any way with respect to the Lugano Convention of 1988, and the new wording is identical to that of the Brussels Convention and the Brussels I Regulation: see Pocar Report (note 147) 4.

<sup>161</sup> Lugano Convention (note 153) arts 2-22.

<sup>162</sup> Lugano Convention (note 153) arts 33-37.

<sup>163</sup> A judgment given in a Contracting State and enforceable there will be enforced in other Contracting States, when it has been declared enforceable there, except in the United Kingdom, where it will be enforceable once it has been registered. Annex II lists the courts or competent authorities to whom the applications for enforcement must be submitted, and the procedure for making the application is governed by the law of the State in which enforcement is sought: Lugano Convention (note 153) arts 38-40.

<sup>164</sup> Pocar Report (note 147) 4.

<sup>165</sup> In the United States there are complete systems of both federal and state courts whose work and responsibilities overlap and interrelate in various and complex ways. Thus state courts can apply federal law and federal courts, state law. Each state has, subject to any applicable treaty provisions and to certain controls based on provisions of the Constitution of the United States (in particular, the full faith and credit clause) its own system of procedure, of substantive law and of private international law. Consequently, a judgment rendered in one state of the United States is a product of a legal system that may differ in important respects both substantially and, though the various are portably less great, procedurally from the legal system of the sister state asked to enforce the judgment: see Von Mehren AT 'Recognition and Enforcement in Sister-State Judgments: Reflections on General Theory and Current Practice in the European Economic Community and the United States' (1981) 81 *Columbia Law Review* 1045.

<sup>166</sup> Yntema HE 'The enforcement of foreign judgments in Anglo-American law' (1935) 33(8) *Michigan Law Review* 1148; Fitzpatrick J 'The Lugano Convention and Western European integration: A comparative analysis of jurisdiction and judgments in Europe and the United States' (1992-1993) 8 *Connecticut Journal of International Law* 718; Von Mehren (note 165) 1044; Silberman LJ 'The impact of jurisdictional rules and recognition practice on international business transactions: the US Regime' (2003-2004) *Houston Journal of International Law* 352; Homburger A 'Recognition and enforcement of foreign judgments: A New Yorker reflects on Uniform Acts' (1970) 18 *The American Journal of Comparative Law* 367; Von



recognition of judgments was recognised at an early stage in the USA.<sup>167</sup> Before the American Revolution a requested colony usually imposed very stringent requirements for verifying judgments from a sister colony. This resulted in enforcement proceedings which were tedious, expensive, time-consuming, and ‘at times impossible’, with sister States considering each other as foreign countries.<sup>168</sup> The full faith and credit clause was aimed at establishing an inexpensive and simplified method of proving sister-State judgments, and also reflected the aspiration of uniting independent and sovereign American colonies into a political union.<sup>169</sup> The framers of the Constitution realised that to achieve this, each state needed to forego some degree of its sovereignty for the benefit of establishing a unified country.<sup>170</sup> They recognised that an essential feature of their federal system would be the requirement that the courts of the several States give ‘full faith and credit’ to the judgments of the courts of other States.<sup>171</sup>

Article IV of the Articles of Confederation and Perpetual Union of 1777 provided that ‘full faith and credit shall be given in each of the States to the ... judicial proceedings of the courts and magistrates of every other State’.<sup>172</sup> A full faith and credit clause of almost identical language was included in the USA Constitution, and requires that ‘full faith and credit shall be given in each State to the ... judicial proceedings of every other State’.<sup>173</sup> The purpose of this clause was to establish throughout the federal system the principle that litigation once pursued to judgment will be as conclusive of the rights of the parties in every other court as in that where the judgment was rendered’.<sup>174</sup> The full faith and credit clause contained explicit authorisation for legislative implementation<sup>175</sup> by providing that Congress may ‘prescribe the

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Mehren AT & Trautman DT ‘Recognition of Foreign Adjudications: A Survey and a Suggested Approach’ (1968) 81 *Harvard Law Review* 1601.

<sup>167</sup> Nadelmann (note 3) 995.

<sup>168</sup> Huang (note 118) 15.

<sup>169</sup> Huang (note 118) 17.

<sup>170</sup> Sumner JD ‘The Full-Faith-and-Credit Clause – Its History and Purpose’ (1954-1955) 34 *Oregon Law Review* 241.

<sup>171</sup> Walker ‘The utility of the ALI/UNIDROIT Project on principles and rules of transnational civil procedure’ (2001) 6(4) *Uniform Law Review* 807.

<sup>172</sup> The Articles of Confederation was an agreement among the 13 founding states that established the United States of America as a confederation of sovereign states and served as its first constitution.

<sup>173</sup> United States Constitution, Article IV Section 1.

<sup>174</sup> *Magnolia Petroleum Co v Hunt* 320 US 430, 439 (1943) (indicating that the ‘clear purpose’ of the full faith and credit clause is to “establish throughout the federal system the salutary principle of the common law that a litigation once pursued to judgment shall be as conclusive of the rights of the parties in every other court as in that where the judgment was rendered”); Huang (note 118) 15.

<sup>175</sup> Reese WLM & Johnson VA ‘The Scope of the Full Faith and Credit to Judgments (1949) 49 *Columbia Law Review* 154.



manner in which such acts, records and proceedings shall be proved and the effect thereof'.<sup>176</sup> In 1790 Congress enacted that 'records and judicial proceedings, ... shall have such faith and credit given to them in every Court within the United States, as they have by law or usage in the Courts of the state from whence they are taken or shall be taken'.<sup>177</sup>

The Supreme Court held that a judgment was without force in sister states until reduced to a new judgment there,<sup>178</sup> and that the jurisdiction of the rendering court remained subject to re-examination in the second suit.<sup>179</sup> The Court has enlarged the scope of the clause by limiting the defences which may be made in actions judgments: for example, a judgment must be enforced by the second State despite the fact that the underlying cause of action arose within the latter jurisdiction and is contrary to its public policy;<sup>180</sup> and a state cannot escape its 'constitutional obligations by the simple device of denying jurisdiction in such cases to courts otherwise competent'.<sup>181</sup>

A basic feature of the USA interstate recognition and enforcement system is, therefore, that States need to give effect to the full faith and credit requirement for interstate recognition and enforcement of judgments.<sup>182</sup> The US Code provides that-

'the records and judicial proceedings of any court of any such State... shall be proved or admitted in other courts within the United States ... by the attestation of the clerk and seal of the court annexed ... , together with a certificate of a judge of the court that the said attestation is in proper form. Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State ... from which they are taken'.<sup>183</sup>

The full faith and credit clause create an effective and efficient recognition and enforcement of foreign judgments system among USA sister States.<sup>184</sup> In general, a sister-state judgment

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<sup>176</sup> See note 173.

<sup>177</sup> Act of May 26, 1970.

<sup>178</sup> *M'Elmoyle v Cohen* 13 pet. 312, 324-25 (US 1839)

<sup>179</sup> *D'Arcy v Ketchum* 11 How. 165 (US 1839).

<sup>180</sup> *Fauntleroy v Lum* 210 US 230 (1908).

<sup>181</sup> *Milwaukee County v ME White Co* 296 US 268 (1935).

<sup>182</sup> Interstate recognition and enforcement refers to the recognition and enforcement in one State of the USA in a sister-State. In the international sphere, although the US is not a party to any of the conventions on recognition and enforcement, the Supreme Court in *Hilton v Guyot* 159 US 113 (1895) decided that judgments from foreign countries that are considered to have a reliable legal system should be enforceable both in federal and in state courts under the common law: see Woestehoff (note 41) 20; Murphy (note 35) 419.

<sup>183</sup> United States Code Title 28 Part V Chapter 115 Section 1738.

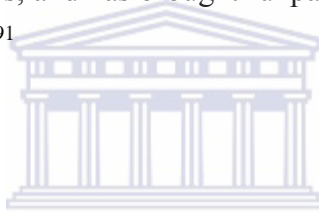
<sup>184</sup> The Uniform Enforcement of Foreign Judgments Act, originally promulgated in 1948 and revised in 1964, is by its terms specifically not applicable to foreign country judgments. Rather, it applies only to sister state

will be recognised in the forum state to the same degree as it would be in the state of origin.<sup>185</sup> Sister-state judgments may only be attacked under the full-faith and credit clause if the defendant did not participate in the original proceedings.<sup>186</sup> However, review of sister-state judgments is precluded on other issues such as review on the merits, a choice of law requirement or a public policy test.<sup>187</sup>

The Trans-Tasman judicial area between Australia and New Zealand is discussed next.

### 3.3 The Trans-Tasman Judicial Area

Australia and New Zealand<sup>188</sup> entered into the Australia-New Zealand Closer Economic Relations Trade Agreement (ANZCERTA),<sup>189</sup> principally with the aim of establishing a free trade area.<sup>190</sup> The ANZCERTA has been the platform for the rapid integration of New Zealand and Australia's economies, and has brought 'unparalleled economic, social and legal integration to the two countries'.<sup>191</sup>



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and federal judgments that are entitled to full faith and credit under Art IV s 1 of the United States Constitution or the applicable federal statute: see Brand RA *Recognition and Enforcement of Foreign Judgments* Federal Judicial Centre Litigation Guide (2012) 38.

<sup>185</sup> Fitzpatrick (note 166) 719.

<sup>186</sup> For example, default judgments can be questioned where the state of origin lacked adjudicatory jurisdiction. *Griffen v Griffen* 327 US 220 (1946), the Court held that '[a] judgment obtained in violation of procedural due process is not entitled to full faith and credit when sued upon in another jurisdiction'. Rather, the Court explained, 'due process requires that no other jurisdiction shall give effect, even as a matter of comity, to a judgment elsewhere acquired without due process' and it "forbids any exercise of judicial power which, but for the constitutional infirmity, would substantially affect a defendant's rights": *Griffen v Griffen* at 224-25.

<sup>187</sup> Fitzpatrick (note 166) 719.

<sup>188</sup> Australia and New Zealand have a shared history stemming from the European settlement of the countries as British colonies through the late 18<sup>th</sup> and 19<sup>th</sup> centuries. This shared history saw occasional co-operation between them, and efforts at improving the enforcement across the Tasman Sea: see Mortensen R 'The Hague and the Ditch: The Trans-Tasman Judicial Area and the Choice of Court Convention' (2009) 5(2) *Journal of Private International Law* 216.

<sup>189</sup> Australia New Zealand Closer Economic Relations Trade Agreement ('ANZCERTA'), and Exchange of Letters (Canberra, 28 March 1983).

<sup>190</sup> Farrar JH 'Harmonisation of business law between Australia and New Zealand' (1989) 19 *Victoria University of Wellington Law Review* 436. The objectives of the Agreement are:

- a) to strengthen the broader relationship between Australia and New Zealand;
- b) to develop closer economic relations between the Member States through a mutually beneficial expansion of free trade between New Zealand and Australia;
- c) to eliminate barriers to trade between Australia and New Zealand in a gradual and progressive manner under an agreed timetable and with a minimum of disruption; and
- d) to develop trade between New Zealand under conditions of fair competition: ANZCERTA (note 189) art 1.

<sup>191</sup> Mortensen R 'Judgment Extension under CER' 1999 *New Zealand Law Review* 237; Mortensen (note 188) 216.

The rationale for the Agreement was that in an environment of flow of people, goods, services and investments, there is a greater possibility of cross-border disputes and that close integration of both countries' civil justice systems could help resolve these.<sup>192</sup> Each country has a significant interest in promoting the effectiveness of existing regulatory regimes to ensure that limits to the reach of each country's regulatory system are not exploited and that consumers have effective redress.<sup>193</sup>

In the Memorandum of Understanding on Harmonisation of Business Laws,<sup>194</sup> the national governments of Australia and New Zealand recognised that it was desirable to remove legal impediments to trade that may arise out of differences between the business laws and regulatory practices of the two countries, and to establish a program for examining harmonising business laws and regulatory practices, including the removal of any impediments that are identified.<sup>195</sup> Among the areas to examine was further recognition and reciprocal enforcement of court decisions in each country.<sup>196</sup>

The early 1990s saw some reforms to the two civil justice systems under the CER umbrella, including the recognition and enforcement of each other's tax judgments, and the recognition and enforcement of judgments from each other's lower courts. Apart from this, Australia and New Zealand handled cross-border civil disputes involving the other country in the same way as for any other foreign country.<sup>197</sup> This did not reflect the special relationship between the two countries, which have a shared common law heritage; or their similar justice systems and the confidence they have in each other's judicial and regulatory institutions.<sup>198</sup> The shared history and special relationship between the countries made many of the safeguards needed

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<sup>192</sup> Trans-Tasman Working Group 'Trans-Tasman Court Proceedings and Regulatory Enforcement: A public discussion Paper by the Trans-Tasman Working Group' Attorney-General's Department (Australia) and Ministry of Justice (New Zealand) August 2005 (2005) 1 (referred to as the Trans-Tasman Working Group discussion paper).

<sup>193</sup> Trans-Tasman Working Group discussion paper (note 192) 1.

<sup>194</sup> Memorandum of Understanding between Australia and New Zealand on Harmonisation of Business Laws Signed at Darwin on 1 July 1988, available at [http://www.dfat.gov.au/fta/anzcerta/memorandum\\_of\\_understanding\\_business\\_law.html](http://www.dfat.gov.au/fta/anzcerta/memorandum_of_understanding_business_law.html) (accessed 3 April 2013). In 1988 negotiations were held between the two governments in Christchurch and agreement was reached to move towards the creation of a single Trans-Tasman market from 1 July 1990 which will cover both goods and services. The Memorandum of Understanding on the Harmonisation of Business Law was one of a number of instruments signed to record the consensus reached in the meetings: Mortensen (note 191) 442.

<sup>195</sup> Memorandum of Understanding (note 194) art 5.

<sup>196</sup> Memorandum of Understanding (note 194) art 5(h).

<sup>197</sup> Trans-Tasman Working Group discussion paper (note 192) 1. See Chapter 1, para 2.4 for a discussion of these problems.

<sup>198</sup> Trans-Tasman Working Group discussion paper (note 192) 1.

with more distant, dissimilar countries unnecessary. It was acknowledged that further reform to create a more coherent legal framework for resolving civil disputes with a trans-Tasman element would have many benefits, including reduced costs, increased efficiency and reduced forum shopping and would build on the success of existing measures and support other current initiatives.<sup>199</sup>

A Trans-Tasman Working Group was accordingly set up<sup>200</sup> to examine the effectiveness and appropriateness of current arrangements that relate to civil proceedings, civil penalty proceedings and criminal proceedings, including recognition and enforcement of court orders and judgments.<sup>201</sup> The Working Group recommended that a treaty on jurisdiction and judgments should extend the present Australian federal model to New Zealand.<sup>202</sup> Support for a free market was one of the motivations for the recommendations made by the Trans-Tasman Working Group.<sup>203</sup>

The proposed regime is modelled on the Australian inter-state scheme, the Service and Execution of Process Act 172 of 1992 ('SEPA'). In short, the Australian model provides for the absolute free circulation of any judgment made in any federal, State or territory court, or tribunal anywhere in the Australian federation. Key elements of the SEPA include that a

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<sup>199</sup> Trans-Tasman Working Group discussion paper (note 192) 1.

<sup>200</sup> In 2003 the Australian and New Zealand governments agreed to review existing trans-Tasman co-operation in court proceedings and regulatory enforcement. They also agreed to investigate the possibility of streamlining and improving existing mechanisms, especially in areas such as service of process, taking of evidence, recognition of judgments in civil and regulatory matters and regulatory enforcement. A working group was set up to undertake this review. The Terms of Reference agreed between Australia and New Zealand require the Working Group to 'examine the effectiveness and appropriateness of current arrangements that relate to civil (including family) proceedings, civil penalty proceedings and criminal proceedings (where those proceedings relate to regulatory matters). Those arrangements include: investigatory and regulatory powers; service of initiating and other process; taking of evidence; and recognition and enforcement of court orders and judgments (including civil penalties and criminal fines). The Working Group was required to identify any problems that exist with the current arrangements; consider a more general scheme for trans-Tasman service of process, taking of evidence and recognition and enforcement of court orders and judgments; consider a more general scheme for trans-Tasman co-operation between regulators; undertake appropriate domestic consultation; and propose options that may be pursued: see Trans-Tasman Working Group discussion paper (note 192) 2-3.

<sup>201</sup> Trans-Tasman Working Group discussion paper (note 192) 2.

<sup>202</sup> Australia (Attorney-General's Department) and New Zealand (Ministry of Justice) *Trans-Tasman Court Proceedings and Regulatory Enforcement – A Report by the Trans-Tasman Working Group* Common Wealth of Australia, Canberra 2006 (referred to as 'Trans –Tasman Working Group Report') 17-24. However, the Trans-Tasman Treaty does not provide for a regime that replicates the existing Australian model in precisely all details. The regime therefore loses some of the efficiency of the Australian model, and also replicates a weakness of the Australian model, namely that it is silent on the treatment of incompatible judgments: see Mortensen (note 188) 223.

<sup>203</sup> Pham K 'Enforcement of Non-Monetary Foreign Judgments in Australia' (2008) 30 *Sydney Law Review* 671.

judgment from one state can be registered in the other and will be of the same force and effect, and can be enforced, as a judgment of the court where it is registered.<sup>204</sup> A judgment can only be varied, set aside or appealed in the court of origin and the court of registration would be able to stay enforcement to allow this to happen. A judgment debtor would be notified if a judgment was registered in the other State.<sup>205</sup> A judgment can only be refused enforcement in the other country on public policy grounds. Grounds such as breach of natural justice would have to be raised with the original court.<sup>206</sup> There is no restriction on the kind of judgment that can be enforced: the Australian model allows enforcement of money-judgments and non-monetary judgments of any kind.<sup>207</sup> It also denies any place to traditional common law defences to the enforcement of foreign judgments when securing interstate registration and enforcement of foreign judgments.<sup>208</sup> The Act will ease enforcement further by allowing registration to take place by faxing a copy of the judgment to the appropriate court registry where enforcement is sought.<sup>209</sup> This scheme effectively gives all State and territory courts an inexpensive, efficient and unchallengeable ability to ensure the enforcement of their judgments anywhere in the federation.<sup>210</sup>

The SEPA abandoned the rule-based jurisdictions within Australia: a writ from any state or territory court can be served anywhere in the federation, and establishes the court's jurisdiction.<sup>211</sup> That court is, however, only to exercise the jurisdiction if it is the forum conveniens (most appropriate forum to hear the case).<sup>212</sup> If it concludes that it is not the forum conveniens, it has discretion to decline jurisdiction in favour of the Australian court that is the forum conveniens.<sup>213</sup>

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<sup>204</sup> A registered judgment has the same force and effect; and, may give rise to the same proceedings by way of enforcement; as if the judgment had been given, entered or made by the court in which it is registered. A judgment is capable of being enforced only if the judgment is capable of being enforced by the rendering court or a court in the rendering state: Service and Execution of Process Act 172 of 1992 ('SEPA') s 105.

<sup>205</sup> SEPA (note 204) s 106.

<sup>206</sup> Trans-Tasman Working Group discussion paper (note 192) 5.

<sup>207</sup> SEPA (note 204) s 3; Mortensen (note 188) 218.

<sup>208</sup> Section 109 provides that: 'If a judgment is registered in a court of a State ..., the courts of the State must not, merely because of the operation of a rule of private international law, refuse to permit proceedings by way of enforcement of the judgment to be taken or continued.'

<sup>209</sup> SEPA (note 204) s 105.

<sup>210</sup> Mortensen (note 188) 218.

<sup>211</sup> SEPA (note 204) ss 12, 15; Mortensen (note 188) 219.

<sup>212</sup> Mortensen (note 188) 219.

<sup>213</sup> Mortensen (note 188) 219.



As part of the economic and legal integration, Australia and New Zealand in 2008 entered into a bilateral treaty on Trans-Tasman Court Proceedings and Regulatory Enforcement.<sup>214</sup>

Australia enacted the Trans-Tasman Proceedings Act<sup>215</sup> in 2010 to, among other things, implement the Trans-Tasman Treaty into law;<sup>216</sup> and streamline the process in resolving civil proceedings with a Trans-Tasman element, and to reduce costs and improve efficiency.<sup>217</sup> Virtually all the provisions of the Act (sections 3 to 110) have not yet commenced operation, and will commence on a single day to be fixed by proclamation.<sup>218</sup> A judgment has to be registered<sup>219</sup> in an Australian court to be enforceable and to be registered, the judgment must be a registrable New Zealand judgment and an application for its registration must be made.<sup>220</sup> Once registered in an Australian court, the judgment has the same force, and may be enforced in the Australian court, as if the judgment had been given by the Australian court.<sup>221</sup> An equivalent Act with the same title has been assented to in New Zealand.<sup>222</sup> Virtually all

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<sup>214</sup> Agreement between the Government of Australia and the Government of New Zealand on Trans-Tasman Court Proceedings and Regulatory Enforcement (done at Christchurch, 24 July 2008) ('Trans-Tasman Treaty').

<sup>215</sup> Trans-Tasman Proceedings Act (Australia) No 35 of 2010. The Act received Royal Assent on 13 April 2010.

<sup>216</sup> The Agreement is unable to enter into force for Australia until it is fully implemented domestically (see Article 16 of the Agreement), that is, Australia is fully capable of carrying out its obligations under the Agreement. Currently, a number of State and Territory courts are working on adopting relevant rules to give effect to the Agreement. Once all these rules are in place, Australia will be in a position to notify New Zealand that its domestic implementation is complete: see Australian Government *Report on Unproclaimed Legislation* (August 2012) available at [http://www.dPMC.gov.au/parliamentary/docs/unproclaimed\\_legislation.pdf](http://www.dPMC.gov.au/parliamentary/docs/unproclaimed_legislation.pdf) (accessed 4 September 2012).

<sup>217</sup> Trans-Tasman Proceedings Act (Australia) s 3.

<sup>218</sup> A proclamation must not specify a day that occurs before the day the Trans-Tasman Agreement enters into force for Australia. However, if the provision(s) do not commence within the period of six months beginning on the day the Agreement enters into force for Australia, they commence on the day after the end of that period: Australian Government (note 216).

<sup>219</sup> An entitled person may apply to register a New Zealand judgment in a superior Australian court, or an inferior court that has power to give the relief that is in the judgment (s 67). A judgment may be set aside if enforcement would be contrary to public policy; it was registered in contravention of the Act; and if the judgment was immovable property that was at the time of the proceeding in the original court, not situated in New Zealand (s72(1)). The latter includes the only jurisdictional provision in terms of which a registered judgment may be set aside. The court may not otherwise set the registration aside (s 72(3)).

<sup>220</sup> Requirements include that the judgment must be final and conclusive. A judgment will not be registrable if, amongst others, it relates to an excluded matter; is a non-money judgment; is an order under proceeds of crime legislation; is an order relating to the administration of the estate of a deceased person, the guardianship or care of a person who is incapable of managing his or her personal affairs; is an order relating to the management of the property of a person who is incapable of managing that property or the care, control, or welfare of a child: Trans-Tasman Proceedings Act (Australia) s 66.

<sup>221</sup> Trans-Tasman Proceedings Act (Australia) s 65. There are some exceptions to this, for example the judgment cannot be enforced during a particular period if notice of the registration has not been given (s 74(2)); or if the judgment could not be enforced in New Zealand (s 75).

<sup>222</sup> Trans-Tasman Proceedings Act No 108 of 2010 (New Zealand).



provisions will come into force on a date appointed by the Governor-General of New Zealand by Order in Council.<sup>223</sup>

The approach in Latin American States is discussed next.

### 3.4 Latin American States

There has for a long time been a series of movements among Latin-American countries<sup>224</sup> to codify their international law rules, both public<sup>225</sup> and private.<sup>226</sup> The most comprehensive effort, by far, to codify principles of private international law, namely choice of law, jurisdiction and judgment recognition on a regional basis was the 1928 Pan American Code on Private International Law<sup>227</sup> ('Bustamante Code').<sup>228</sup>

The Bustamante Code<sup>229</sup> was approved in 1928 at the Sixth International Conference of American States held in Havana, Cuba. Of then then existing twenty-one Latin American States, fifteen have ratified the Convention,<sup>230</sup> six with reservations.<sup>231</sup> A 'general'

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<sup>223</sup> Trans-Tasman Proceedings Act (New Zealand) s 2.

<sup>224</sup> There is a close affinity among Latin American legal systems to the extent that they share a similar socioeconomic structure, political culture and a common civil-law legal heritage: see Garro (note 103) 587.

<sup>225</sup> The Latin American experience in the unification of private substantive law has not been very significant, but has instead focused on the unification of private international law: See Garro (note 103) 587.

<sup>226</sup> A motion was proposed as early as 1826 at the Congress of Panama for the preparation of a draft code of international law: see Lorenzen (note 1) 499.

<sup>227</sup> Convention on Private International Law (Bustamante Code), promulgated as the Final Act of the Sixth International Conference of American States, Feb. 20, 1928, in Havana, Cuba, reprinted in *Treaties and Conventions Signed at the Sixth International Conference of American States* (Pan American Union 1950).

<sup>228</sup> Garro (note 103) 591.

<sup>229</sup> By an international agreement of 23 August 1906 at the Second Pan-American Conference, a commission of jurists was appointed for the elaboration of codes on public and private international law, which began its work in Rio de Janeiro in 1912. The World War interrupted the work of codification, but it was resumed in 1924 when the American Institute of International Law at an extraordinary meeting held at Lima, appointed a commission composed of four of its members, including Dr. Antonio S. de Bustamante of Cuba, to draw up a code of private international law. In 1925 the Pan-American Union associated itself with this work of codification, and on 2 March 1925 its Board of directors requested the American Institute of International Law to prepare a series of drafts on private international law, with a view of their submission to the commission of jurists of Rio de Janeiro. The draft code of private international law, prepared by Dr. Bustamante, was examined by a commission appointed by the American Law Institute, at a meeting of the Institute held in Havana in December, 1925. The draft was approved by the Institute and was thereupon transmitted to the President of the Board of Directors of the Pan-American Union, and through the latter to the governments represented in the Union. The draft was discussed at Rio de Janeiro in 1927 by the Commission of Jurists which had been convoked by the Government of Brazil in agreement with the Pan-American Union, and recommended for adoption. It was finally approved by the Sixth Pan-American Conference held in Havana in 1928: see Lorenzen (note 1) 501.

<sup>230</sup> Bolivia, Brazil, Chile, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Peru and Venezuela. The countries which did not ratify the Convention, in addition to the United States, are Mexico, Argentina, Uruguay, Paraguay and Colombia: see Nadelmann (note 3) 782-3.

reservation was used by Bolivia, Costa Rica, Chile, Ecuador, and El Salvador, providing in substance that the Code rules will apply only if they are not contrary to domestic law.<sup>232</sup> The Code includes provisions on International Civil Law,<sup>233</sup> International Commercial Law,<sup>234</sup> International Criminal Law<sup>235</sup> and International Law of Procedure.<sup>236</sup> The rules of the conflict of laws in the various Latin-American countries although more or less based upon continental models differed considerably and also differed widely from the Anglo-American conception of private international law.<sup>237</sup> The task of drawing up a code which could meet with the approval of Latin-American countries was therefore a task of the greatest delicacy; and the unwillingness of either Brazil or Argentina to yield made it impossible to frame a code of private international law which would operate uniformly in Latin-America. Bustamante was forced, therefore, to allow each state to apply as personal law, either that of the domicile, or that of nationality.<sup>238</sup>

Some of the major weakness of the Bustamante Code was that it deferred excessively to the local interests of the State addressed, providing its courts substantial opportunity to refuse to enforce or recognise the judgments of another State.<sup>239</sup> For example, in matters of enforcement of foreign judgments,<sup>240</sup> the Bustamante Code did not create uniform enforcement procedures, relying instead on the local law of the State where the enforcement was sought.<sup>241</sup> A principal complaint about the Code has been its failure to choose between the national law and the law of the domicile by leaving the decision to the local law:<sup>242</sup> each contracting States is free to apply as 'personal law'<sup>243</sup> either that of the domicile or that of

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<sup>231</sup> Bolivia, Costa Rica, Chile, Ecuador, El Salvador, and Venezuela: Casad RC 'Civil Judgment Recognition and the Integration of Multi-state Associations: A Comparative Study' (1980-1981) 4 *Hasting International & Comparative Law Review* 5.

<sup>232</sup> Nadelmann (note 3) 783.

<sup>233</sup> Bustamante Code (note 227) arts 9-231.

<sup>234</sup> Bustamante Code (note 227) arts 232-295.

<sup>235</sup> Bustamante Code (note 227) arts 296-313.

<sup>236</sup> Bustamante Code (note 227) arts 314-437.

<sup>237</sup> Lorenzen (note 1) 522.

<sup>238</sup> Lorenzen (note 1) 522-3; Bustamante Code (note 227) art 7.

<sup>239</sup> Nadelmann K 'Notes and Comments: The need for revision of the Bustamante Code on Private International Law' (1971) 65 *American Journal of International Law* 782; Amado JD 'Recognition and enforcement of foreign judgments in Latin America: An overview and update' (1990) 31 *Virginia Journal of International Law* 105.

<sup>240</sup> Bustamante Code (note 227) arts 423-437.

<sup>241</sup> Bustamante Code (note 227) art 424; Garro (note 81) 591.

<sup>242</sup> Nadelmann (note 239) 784.

<sup>243</sup> The status and capacity of persons are governed in general in the Convention by 'personal law' (art 27), which also applies to the determination of majority (art 101): Amado (note 239) 501-2. According to the Code, 'capacity' to do juristic acts is governed by the personal law, without regard to the connection in which the question may arise. It includes not only all cases of capacity in the field of domestic relations, but

nationality.<sup>244</sup> In spite of its inadequacies as a vehicle for hemispheric unification of private international law, the Bustamante Code provided the framework for a general plan of judgment recognition within Central America.<sup>245</sup>

Nations were free to adopt the Code with reservations.<sup>246</sup> Uniformity could thus not be achieved under the Code unless all nations voluntarily chose either domicile or nationality as the basis for 'personal' law and accepted the Code without reservations. This did not occur, and even with these concessions to local concerns, not all nations were willing to sign.<sup>247</sup>

The Bustamante Code was followed by the 1979 Montevideo Convention.<sup>248</sup> The Convention provides that a foreign judgment will have extraterritorial validity in the States party to the Convention, provided that the requirements listed in art 2 of the Convention are met.<sup>249</sup> The Convention is supplemented by the 1984 La Paz Convention.<sup>250</sup> The Montevideo and La Paz Conventions, considered together, represent a significant improvement toward greater ease of foreign judgment recognition in Latin America,<sup>251</sup> as it addresses some of the weaknesses of the Bustamante Code, discussed above.<sup>252</sup> The Conventions collectively promotes legal

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also those relating to contracts, to conveyances of land, or to the execution of wills disposing of real property: Lorenzen (note 1) 520.

<sup>244</sup> Bustamante Code (note 227) art 7.

<sup>245</sup> Casad (note 216) 5.

<sup>246</sup> Bustamante Code (note 227) art 3; Casad (note 216) 5.

<sup>247</sup> Argentina, Colombia, Mexico, Paraguay, Uruguay and the United States did not sign the Convention: see Lorenzen (note 1) 501. The Delegation of the United States of America abstained from voting, but made the following declaration: 'The Delegation of the United States of America regrets very much that it is unable at present time to approve the Code of Dr. Bustamante, as in view of the Constitution of the United States of America, the relations among the States, members of the Union, and the powers and function of the Federal Government, it finds it very difficult to do so. The Government of the United States of America firmly maintains its intention not to disassociate itself from Latin-America, and therefore, in accordance with Article 6 of the Convention, which permits any Government to adhere later thereto, it will make use of the privilege extended by this Article in order that, after carefully studying the Code in all its provisions, it may be enabled to adhere to at least a large portion thereof': see Amado (note 239) 520. The explanation given for the unlikelihood of the US to adopt the Code was constitutional restrictions: matters of procedure were largely left to the States, and the Federal Government could not dictate to the States the manner in which they should regulate procedural matters, including international judicial assistance: see Ristau BA 'Overview of International Judicial Assistance' (1984) 18 *International Lawyer* 529.

<sup>248</sup> Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards, May 8, 1979, OEA/Ser.A/2818 ILM 1224 (1979). The contents of the Montevideo Convention is discussed in Chapter 3, para 3 below.

<sup>249</sup> See Chapter 3, para 3 below.

<sup>250</sup> Inter-American Convention on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgments, May 24, 1984, OEA/Ser.A/39 (SEPF), 24 ILM. 468 (1985). According to art 13, the convention enters into force only after the second instrument of ratification has been deposited.

<sup>251</sup> Amado (note 239) 105.

<sup>252</sup> These include the ample opportunities for a state to refuse recognition of enforcement of judgments; the lack of a uniform procedure on recognition and enforcement; and leaving the option of whether to use nationality

certainty by providing clear rules on when foreign judgments will be entitled to recognition and enforcement, and what the grounds are on which a court would be deemed to have had jurisdiction or purposes of jurisdiction.<sup>253</sup>

Although the inter-American conventions do not institute a near-automatic system, such as that of the EU, as evident from the requirements for recognition and enforcement, they considerably ease the recognition and enforcement of foreign judgments by establishing uniform requirements for judgments originating in other Latin American States party to the Convention.<sup>254</sup>

## **4 FEASIBILITY OF THE DIFFERENT APPROACHES FOR THE SOUTHERN AFRICAN CUSTOMS UNION**

### **4.1 Brussels/Lugano Regime**

The EU States did not sign the Treaty of Rome simply to create mutual obligations governed by the law of nations. They in fact transferred some of their sovereign rights to Community institutions over which none of them has direct control. Furthermore, it was not only Member States which were bound by the new rights and obligations, but also their citizens who became subjects of the Community.<sup>255</sup>

They thus created a ‘supranational’ body as opposed to an international body of law and institutions which stood above individual member states. International organisations operate on either an intergovernmental or supranational basis, with it being possible for the intergovernmental organisations to evolve into supranational organisations.<sup>256</sup> The term ‘supranationalism’ has been defined as ‘the development of authoritative institutions of governance and a network of policy-making activity above the nation state’.<sup>257</sup> A supranational organisation is a *sui generis* international organisation which acts independently of its member states. It takes binding decisions and is responsible for the

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or domicile to determine personal law to the requested court, as well as the wide range of areas in which States could make reservations.

<sup>253</sup> See Chapter 3, para 5 for an overview of the Conventions.

<sup>254</sup> Amado (note 239) 123.

<sup>255</sup> Fagbayibo B ‘A supranational African Union? Gazing into the crystal ball’ 2008 *De Jure* 494.

<sup>256</sup> Fagbayibo (note 255) 494.

<sup>257</sup> Rosamond B *Theories of European Integration* (2000) 204.

supervision and implementation of these decisions. The EU is an autonomous legal order, which has been established by the ECJ.<sup>258</sup> Generally speaking, nation-states in a supranational system not only share an overarching constitutional framework, but also enjoy a higher degree of economic, geographical, cultural and historical proximity with one another than with outsiders.<sup>259</sup> Therefore, a State is usually more willing to recognise and enforce a judgment issued by a court in a sister State within a supranational system than a court in a State outside the constitutional framework.<sup>260</sup>

The EU has overcome the problem of implementing international law at a national level by providing for the principle of direct applicability,<sup>261</sup> which allows for the integration of community law into Member States' legal systems without requiring any intervening national implementation procedures or measures.<sup>262</sup> Article 288 TFEU provides that 'a Regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States'.<sup>263</sup>



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<sup>258</sup> Czuczai J 'The autonomy of the EU legal order and the law-making activities of international organisations: Some examples regarding the Council's most recent practice' *Research Papers in Law* 3/2012 (2012) *European Legal Studies* 2 available at [http://www.coleurope.eu/sites/default/files/research-paper/researchpaper\\_3\\_2012\\_czuczai\\_final.pdf](http://www.coleurope.eu/sites/default/files/research-paper/researchpaper_3_2012_czuczai_final.pdf) (accessed 16 February 2013). In *Flaminio Costa v ENEL* [1964] ECR 585 (6/64) the court held that 'By 'By contrast with ordinary international treaties , the EEC Treaty has created its own legal system, which , on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply. By creating a Community of unlimited duration, having its own institutions, its own legal capacity and capacity of representation on the international plan, and more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the states to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have created a body of law which binds both their nationals and themselves. ....the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question' (at 593).

<sup>259</sup> Von Mehren (note 21) 194.

<sup>260</sup> Von Mehren (note 21) 194.

<sup>261</sup> This is significant for the following reasons: once harmonisation instruments are drafted a principal problem may be experienced in the implementation at the national level. In dualist countries (as opposed to monist countries) international law must be implemented nationally using national constitutional procedures or measures. This opens the way to a number of difficulties: states may delay the implementation; they may implement it incompletely or partially; or may not implement international law at all. The principle of direct applicability addresses this problem and allows for the integration of community law into member states' legal systems without requiring any intervening national implementation procedures or measures: Opong RF *Relational issues of law and economic integration in Africa: perspectives from constitutional, public and private international law* (Unpublished Doctoral Thesis, Vancouver: University of British Columbia, 2009) 43.

<sup>262</sup> Opong (note 263) 43.

<sup>263</sup> TFEU (note 137) art 288.



The authorisation of the ECJ to interpret the Brussels Convention and the Regulation is another significant feature of the EU Regime.<sup>264</sup> The ECJ has been deemed essential for the successful operation of the Brussels Convention and the Regulation.<sup>265</sup> In many cases, the ECJ interpreted the terms and phrases in the Convention and Regulation by adopting an autonomous Community definition instead of one favoured by a particular Member State.<sup>266</sup>

The Brussels model which has operated successfully in Europe was originally designed at a time when all Member States belonged to the civil law legal tradition. Its civil law origins mean that it may not be considered the best model for countries with a shared common-law heritage.<sup>267</sup>

The analysis presented, including the absence of a supranationalism and its elements in the region to replicate the Brussels Regime; the lack of direct applicability of laws within the SACU Member States;<sup>268</sup> the absence of a supranational court<sup>269</sup> to ensure uniform

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<sup>264</sup> Protocol on the Interpretation by the Court of Justice of the Brussels Convention, done Jun 3, 1971, 1975 *Official Journal* 1204 28.

<sup>265</sup> Von Mehren AT 'Jurisdictional Requirements: To What Extent Should the State of Origin's Interpretation of Convention Rules Control for Recognition and Enforcement Purposes?' in Lowenfeld AF & Silberman LJ (eds) *The Hague Convention on Jurisdiction and Judgments* (2001) 34.

<sup>266</sup> Reuland RC 'The Recognition of Judgments in the European Community: the Twenty-fifth Anniversary of the Brussels Convention' (1993) 14 *Michigan Journal of International Law* 566.

<sup>267</sup> For example domicile is not used in the same sense as at common law. Under this model a person (especially a company) could potentially have more than one 'domicile'. A further example is the doctrine of *lis pendens* included in art 27 of the Brussels Convention which is applied mainly by civil law countries: Hague Conference 'Convention of 30 June 2005 on Choice of Court Agreements: Explanatory Report by Trevor Hartley & Masato Dogauchi' 2005 ('Hartley Dogauchi Report') 16. The 'first to file' rule, which applies when more than one court has jurisdiction, may be considered undesirable for states from a common law legal tradition; and the doctrine of *forum non conveniens*, which is mainly applied by common law countries is also absent in the Brussels I Regulation: Trans-Tasman Working Group discussion paper (note 192) 12. The Working Group considered a scheme based on the Brussels Model, but did not recommend it for use between Australia and New Zealand, as it was thought unsuitable for two States with common law legal traditions.

<sup>268</sup> Although the objectives of the SACU Agreement includes the facilitation of the cross-border movement of goods between the territories of the Member States; promoting the integration of Member States into the global economy through enhanced trade and investment; and facilitating the development of common policies and strategies (2002 Southern African Customs Union (SACU) Agreement between the Governments of the Republic of Botswana, the Kingdom of Lesotho, the Republic of Namibia, the Republic of South Africa and the Kingdom of Swaziland signed on 21 October 2002 in Gaborone, Botswana Article 3), it does not include the harmonisation of the laws of Member States.

<sup>269</sup> The SACU Agreement provides for an ad hoc SACU Tribunal which is responsible for settling any dispute regarding the interpretation or application of the SACU Agreement, or any dispute arising thereunder at the request of the Council (art 13(1)), whose mandate may possibly be expanded to incorporate this function: see Chapter 4 para 4.6.1.

An alternative long term option is the still to be established African Court of Justice and Human Rights, although this would require an amendment and extension of its mandate: On 1 July 2008, at the AU Summit in Egypt, Heads of State and Government signed a protocol [Protocol on the Statute of the African Court of Justice and Human Rights, 1 July 2008, reproduced in (2009) 17 *African Journal of International and Comparative Law*] on the merger of the African Court of Human and People's Rights with



interpretation and application; and the fact that it was originally designed for Member States when all were civil law countries, suggests that the Brussels Model is not the most suitable model on recognition and enforcement of foreign judgments to adopt for the SACU region.

#### 4.2 United States of America full faith and credit Approach

The full faith and credit approach in the USA was feasible because as a constitutional requirement it created an overarching recognition and enforcement scheme binding for every American state.<sup>270</sup> Each of the States is part of the USA and by virtue in its membership of the federation is obliged to give effect to the clause.<sup>271</sup> This approach, therefore, presupposes the existence of a politico-legal community for purposes of recognition and enforcement of foreign judgments; and therefore suppresses the differences among the political sub-communities whose interests are embedded in the policies on which those judgments are based.<sup>272</sup> A treaty would need to be self-executing,<sup>273</sup> or to achieve a similar effect, enabling all interested individuals to invoke treaty rights to protect their substantive interests in the recognition and enforcement of foreign judgments.<sup>274</sup>

The full faith and credit approach is likely to succeed only in Federations; therefore, it may not be a suitable approach for SACU Member States at present, as they are a group of

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the African Court of Justice, which is still to be created, to form an African Court of Justice and Human Rights. Upon negotiating a recognition and enforcement instrument for the region, consideration could therefore be given to the newly established court to perform functions akin to the European Court of Justice in respect of recognition and enforcement, namely interpretation and dispute resolution..Alternatively, consideration could be given to substantively broaden the mandate of the current African Court on Human and People's Rights. This would require substantive changes to the mandate of the court and rules on access to the Court as, according to the Protocol (art 5) and the Rules of the Court (Rule 33), the Court may only receive complaints and/or applications submitted to it either by the African Commission of Human and Peoples' Rights or State parties to the Protocol or African Intergovernmental Organizations. Non-Governmental Organizations with observer status before the African Commission on Human and Peoples' Rights and individuals from States which have made a Declaration accepting the jurisdiction of the Court can also institute cases directly before the Court. Only five countries had made such a Declaration as at October 2012: Burkina Faso, Ghana, Malawi, Mali, and Tanzania: African Union 'The African Court on Human and People's Rights' available at <http://www.au.int/en/organs/cj> (accessed 15 February 2013).

<sup>270</sup> Huang (note 118) 15.

<sup>271</sup> Sumner (note 170) 245.

<sup>272</sup> Perez AF 'The international recognition of judgments: The debate between private and public law solutions' (2001) 19 *Berkeley Journal of International Law* 49.

<sup>273</sup> A self-executing treaty is a treaty that becomes judicially enforceable upon ratification. As opposed to a non-self-executing treaty, which becomes judicially enforceable through the implementation of legislation. A treaty could be identified as either self-executing or non-self-executing by looking to various indicators, including indeterminate language of the treaty, or if the treaty deals with a matter within the exclusive law-making power of Congress, indicating that Congress must create implementing legislation: Cornell University School of Law Legal Information Institute available at [http://www.law.cornell.edu/wex/self\\_executing\\_treaty](http://www.law.cornell.edu/wex/self_executing_treaty) (accessed 7 March 2013).

<sup>274</sup> Perez (note 272) 50.

sovereign States and not a single politico-legal community, which is a prerequisite for the use of a full faith and credit clause. This approach would, therefore, not likely be the best suited at the current stage of integration, but may become more appropriate as political integration in Africa progresses, perhaps towards a ‘United States of Africa’.<sup>275</sup>

### 4.3 Trans-Tasman Judicial System

The approach of Australia and New Zealand to facilitate the recognition and enforcement of judgments between the two states entailed extending the application of one federal state (Australia)’s recognition and enforcement regime for inter-state judgments to a foreign State (New Zealand).<sup>276</sup> This system therefore goes further than the USA model<sup>277</sup> by treating a foreign judgment of the State party to the agreement as a sister-State judgment, while continuing to treat other States not party to the agreement in a different manner. This scheme effectively extends the inexpensive, efficient and unchallengeable ability to enforce their judgments anywhere in the federation which it gives to states within the federation, to a foreign State with which it shares a close relationship.<sup>278</sup>

The Australian-New Zealand model may be the most suitable for countries which share a common law heritage and very similar justice system.<sup>279</sup> This model requires confidence by the countries in each other’s judicial and regulatory institutions,<sup>280</sup> as it does away with many of the safeguards required for interaction with more distant, dissimilar countries.<sup>281</sup>

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<sup>275</sup> The United States of Africa is a proposed concept for a federation of some or all of the 55 sovereign states of Africa. Nyere suggested that ‘For the sake of all African states, large or small, African unity must come and it must be real unity. Our goal must be a United States of Africa. Only this can really give Africa the future her people deserve after centuries of economic uncertainty and social oppression. This goal must be achieved, and it does not matter whether this is done by ... economic, political or social development’: See Nyere JK ‘A United States of Africa’ 1963 1(1) *Journal of Modern African Studies* 1.

<sup>276</sup> See para 3.3 above.

<sup>277</sup> See para 3.2 above.

<sup>278</sup> See para 3.3 above.

<sup>279</sup> Australia and New Zealand have a shared history stemming from the European settlements of the countries as British colonies through the late 18<sup>th</sup> and 19<sup>th</sup> centuries. This shared history saw occasional cooperation between them, and efforts at improving the enforcement of judgments. From the mid-1930’s, the Australian states and New Zealand adopted legislation based on the UK’s Foreign Judgments (Reciprocal Enforcement) Act. However, the present arrangements between Australia and New Zealand is within the trading cooperative of the ANZCERTA (done at Canberra, 1 January 1983). In 1988 a Memorandum of Understanding between the Governments of Australia and New Zealand (signed at Darwin, 1 July 1988), promising the ‘further recognition and reciprocal enforcement of court decisions in each country’ (art 5(h)): see Mortensen (note 188) 216.

<sup>280</sup> Trans-Tasman Working Group Report (note 202) 6.

<sup>281</sup> Trans-Tasman Working Group Report (note 202) 6.

While this approach may be specifically successful amongst states which share a common legal heritage, it in essence entails extending the recognition and enforcement regime of sister States in a federation, to a foreign State. None of the SACU Member States is a federation; therefore, none of them have a similar recognition and enforcement regime that would be capable of being extended to neighbouring States.<sup>282</sup>

Mortensen<sup>283</sup> suggests that the Australian federal scheme ‘probably represents the purest presentation of a common law model for a double convention that is presently available’,<sup>284</sup> it may offer some lessons to the SACU if a multilateral treaty in the form of a double convention is adopted as the best approach for the Southern African region,<sup>285</sup> amongst others because it is between two States who share a common law heritage, whereas the Brussels I Regulation and Montevideo Convention were negotiated between predominantly civil law States.<sup>286</sup>

#### 4.4 Latin America

A common legal heritage that traces back almost five centuries, that is perpetuated by the reception of the European codification and its scholarly doctrine and strengthened by socio-economic and political structures, has not eliminated the diversity of substantive private law in Latin America and uniformity and harmonisation is still the exception.<sup>287</sup>

The States of Latin America are far less integrated than either a federal system, such as the USA, or a supranational arrangement, like the EC.<sup>288</sup> The treaty law on enforcing and recognising judgments is however well developed. Unlike the EU Brussels Regime,<sup>289</sup> or the full faith and credit clause of the USA Constitution,<sup>290</sup> the Latin American conventions are not specifically concerned with the overall harmonisation of judicial procedures, including

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<sup>282</sup> See Chapter 4, para 3 below.

<sup>283</sup> Mortensen (note 188) 217.

<sup>284</sup> It is a ‘double convention’ because there are common principles of jurisdiction that help to address litigation between courts across the federation.

<sup>285</sup> For example the requirements that a judgment have to meet to be registerable under the judicial system (s 66 of the Australia Trans-Tasman Act 35 of 2010), and when a judgment would not be registerable under the Act (s 66(2)); application requirements (s 66(5)); setting aside registration (s 72); effect of registration and notice of registration (s73 and s74).

<sup>286</sup> See para 3.1 and 3.4 above.

<sup>287</sup> Garro (note 103) 610.

<sup>288</sup> Garro (note 103) 610.

<sup>289</sup> See para 3.1.1 above.

<sup>290</sup> See para 3.2 above.

jurisdiction in international cases, among the Member States. As a result, the judgment Conventions are all ‘single conventions’, which only address recognition and enforcement and are silent on the issue of when courts may assert jurisdiction (direct jurisdiction), but specify jurisdictional conditions that must be satisfied before one State recognises or enforces the judgments of others (indirect jurisdiction).<sup>291</sup>

A number of reasons may be suggested why the countries of Latin America adopted a regionalist approach to establishing uniform laws rather than joining those undertaken by the European Community under the Lugano Convention or under the Hague Conference. First, only a handful of Latin American countries are members of the Hague Conference.<sup>292</sup> More importantly, the prevailing sentiment among Latin American countries has been that Latin America’s political, social, and economic background is sufficiently different from that of Western Europe to justify a distinctive legal approach towards unification of private law.<sup>293</sup> It is not clear that those differences genuinely prevent or inhibit Latin America from joining global unification efforts in the area of private international law.<sup>294</sup> It has also been suggested that the adoption of international instruments may be hindered in developing countries because their legislatures may have more urgent problems<sup>295</sup> to cope with than the ratification of the various uniform laws at the international level.<sup>296</sup>

Ristau is of the view that there appears to be considerable reluctance on the part of Latin America to join any treaty regime developed in Europe, or developed between the USA and other non-Latin American States.<sup>297</sup> Bonnell suggests that the traditional reluctance on the part of developing countries to join international conventions has been due largely to their

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<sup>291</sup> Amado (note 239) 102. See Chapter 3 para 1 for a discussion between single and double conventions and direct and indirect jurisdiction.

<sup>292</sup> Of the 35 Member States of the Organisation of American States, 14 States (Argentina, Brazil, Chile, Costa Rica, Ecuador, Mexico, Panama, Paraguay, Peru, United States of America, Uruguay, Venezuela, Suriname and Canada) are Member States of the Hague Conference on Private International Law: Hague Conference ‘Members’ available at [http://www.hcch.net/index\\_en.php?act=states.listing](http://www.hcch.net/index_en.php?act=states.listing) (accessed 7 March 2013).

<sup>293</sup> Garro (note 103) 597.

<sup>294</sup> It is also not clear which areas would prevent Latin American countries, if given the opportunity to participate in treaty negotiations from reaching workable compromises with the EC and the US: see Garro (note 103) 597.

<sup>295</sup> Such as civil wars, famine, AIDS and excruciating poverty: see Oppong RF ‘The Hague Conference and the development of private international law in Africa: A plea for greater cooperation’ (2006) 8 *Yearbook of Private International Law* 189.

<sup>296</sup> Bonnell MJ ‘International uniform law in practice – Or where the real trouble begins’ (1990) 38 *American Journal of Comparative Law* 870.

<sup>297</sup> Ristau (note 247) 525.

inadequate participation in the preparation of those instruments.<sup>298</sup> Garro suggests that the traditional reluctance, or even hostility, towards the adoption of international conventions has been largely based on the belief that those international instruments favoured the interests of industrialised countries at the expense of developing countries.<sup>299</sup> The more or less favourable impact of any uniform law in a given jurisdiction depends, up to a certain point at least, on the active participation of that country in the preparation of a particular instrument. It is therefore plausible to think that increasing Latin American participation in global unification efforts may result in greater acceptability of uniform and model laws.<sup>300</sup>

Garro<sup>301</sup> has identified a number of factors as impeding legal harmonisation in Latin America, including:

- i. The difficulties encountered by business people and lawyers from developing countries in interpreting and applying legal texts drafted in a style and using terminology with which they are not familiar.<sup>302</sup>
- ii. Inadequate systems of reporting court decisions. Foreign court decisions are not binding and the paramount concern of most courts will be reaching a 'fair' decision, even though not in harmony with decisions in similar cases reached by foreign courts.
- iii. Judicial decisions are not likely to prove an efficient means of Latin American legal unification.<sup>303</sup>
- iv. The efforts to reach harmonisation and unification through the process of law reform.<sup>304</sup>

The fact that law reformers are not likely to compromise what they believe to be a good rule for the cause of unification brings out clearly that the challenges faced by those involved in

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<sup>298</sup> Bonnell (note 296) 878.

<sup>299</sup> He however suggests that this attitude seems to be changing, as reflected in the free trade agreements pursued by most Latin American countries and the willingness of governments to insert themselves into a market oriented internal economy: see Garro (note 103) 614.

<sup>300</sup> Garro (note 103) 614.

<sup>301</sup> Garro (note 103) 614.

<sup>302</sup> See also Farnsworth EA 'Uniform law and its impact on business circles' (1987) *Acts and Proceedings of the 3<sup>rd</sup> Congress on Private Law held by the International Institute for the Unification of Private Law (UNIDROIT), Rome, 7-10 September 1987* 547, who states that business circles are impacted by uniform law; Bonnell (note 296) 871.

<sup>303</sup> The appellate jurisdiction of most Latin American supreme courts is meant to unify the interpretation of law within the country; and despite the compromises in practice and in some instances in theory made to the traditional non-recognition of the binding force of precedents, the lack of easy access to published precedent severely conspires against the use of judicial decisions as a vehicle of unification of law in the same jurisdiction.

<sup>304</sup> A review of the travaux préparatoires of recent codes adopted in Latin America indicates that the emphasis has been on improvement of the law, generally, by adopting a provision of 'modern' European codes, rather than bringing the law in harmony with those other Latin American countries: See Garro (note 103) 613.

the unification of law are not merely to harmonise and restate, but also to choose the best approach among various alternatives.<sup>305</sup> It also indicates that the cause of unification may be promoted not necessarily out of a desire to pursue unification, but rather as a vehicle of sound law reform.<sup>306</sup>

Regional groupings such as the EU have devoted considerable effort to finding solutions to the problems arising out of domestic legal differences. Harmonisation in such groupings creates a multi-layered legal system: at the lowest level are the still diverse municipal systems; on the second level are the harmonised legal norms, and on the third level, international unified rules play an important role.<sup>307</sup> Regional groupings, however, aim primarily for intra-harmonisation, that is harmonisation within the grouping, rather than for inter-group harmonisation as such, and differences will accordingly persist.

In comparison with the approaches followed in other regions to harmonise the rules on recognition and enforcement, Latin American states presently show the most similarities with those of SACU Member States. SACU Member States are far less integrated than either a federal system such as the USA, or to some extent under the Trans-Tasman Judicial Systems of Australia and New Zealand, as well as the supranational arrangement like the EC. The approach followed by the Latin American States will therefore influence the proposals made for the approach to be followed in the SACU, which is now discussed.

## **5 PROPOSED APPROACH FOR THE SACU**

As indicated above<sup>308</sup> two possible approaches for the SACU is to adopt either a set of bilateral treaties, or a single multilateral treaty ratified by all Member States.

A range of bilateral treaties will not necessarily improve the current position in Southern Africa, because as will be indicated below,<sup>309</sup> most States already have similar statutes in place, but these extend to only a limited number of designated States, and rely heavily on reciprocity. The similarity between the Southern African statutes suggest a similar outcome

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<sup>305</sup> Garro (note 103) 613.

<sup>306</sup> Garro (note 103) 613.

<sup>307</sup> Zeller (note 2) 476.

<sup>308</sup> See para 1.

<sup>309</sup> See Chapter 4, para 4.1 below.



to negotiating bilateral treaties could possibly be achieved by States simply designating more States under their statutory regimes.<sup>310</sup> Oppong<sup>311</sup> in fact suggests that, in the context of continental harmonisation, the statutory designation of more African States may be the only feasible option towards harmonisation,<sup>312</sup> at least for the immediate future, given the scarcity of inter-African judgment enforcement cases, the similarities in the provisions of existing national statutes on foreign judgment enforcement, the challenges of negotiating an international convention and the general ambivalence towards private international law issues.<sup>313</sup> Statutory designation may be an easier course to take and can be done immediately. The Executive must designate the foreign territory and only then can a court grant effect to the judgments delivered in that territory.<sup>314</sup>

It is, however, important to note that in the absence of any treaty provisions, States will have no legal obligation to designate any specific States under their statutory enforcement regimes<sup>315</sup> or a time-frame to do it in, which mean even if they do undertake to designate SACU Member States under their respective regimes, it may take number of years for them to actually do so. Designation will also not provide traders with the same degree of legal certainty that a multilateral convention would do.<sup>316</sup> Further, based on the facts that SACU Member States share a common legal tradition; there are only five Member States, in comparison with, for example, the 27 Member States of the EU<sup>317</sup> whose interests and considerations will have to be taken into account; the similarities between their current statutory provisions, which suggest that may not need to be compromises on all issues; as well as the benefits associated with multilateral conventions<sup>318</sup> it is recommended that a multilateral, rather than a series of bilateral conventions on recognition and enforcement of foreign judgments be negotiated amongst SACU Member States.

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<sup>310</sup> See Chapter 4, para 4.1 below.

<sup>311</sup> Oppong (note 261) 279.

<sup>312</sup> This would not attempt to replicate the Trans-Tasman Judicial System as it will not have one system whereby foreign judgments are treated similar as judgments from sister-states in a federal system, but a number of different national laws; it would also not be a 'closed' system applicable only to the SACU – states would also be able to extend (and in fact many of them already have) the application of their respective Statutes to other non-SACU Member States.

<sup>313</sup> Oppong (note 261) 279.

<sup>314</sup> Oppong RF 'Private international law in Africa: Past, present & future' (2007) 55 *American Journal of Comparative Law* 704.

<sup>315</sup> See Chapter 1, para 5.1 above.

<sup>316</sup> See Chapter 3 for a comparison of approaches in this regard.

<sup>317</sup> See para 3.1 above.

<sup>318</sup> See para 5.2 below.

The EU similarly concluded that only a multilateral Convention, rather than a series of additional treaties, would foster the free movement of judgments, and would not lead to unequal treatment of the various nationals<sup>319</sup> of the Member States.<sup>320</sup>

Alternatively, the approach of a multilateral convention has been particularly successful within a Common Market, as the Brussels Regime demonstrates,<sup>321</sup> but has also been successful in the context of lesser integrated communities such as the EFTA<sup>322</sup> and OAS.<sup>323</sup> The EC decided in favour of the multilateral convention, as they felt that the differences between the bilateral conventions would hinder the free movement of judgments and lead to unequal treatment of the nationals of various Member States.<sup>324</sup>

Although it may have some disadvantages,<sup>325</sup> a multilateral instrument on the recognition and enforcement of foreign judgments would have three advantages for all parties concerned.<sup>326</sup> First, a convention would roughly ensure equality between the practices of the contracting States. Secondly, a recognition and enforcement convention could deal with the practice of permitting the use of unreasonable or exorbitant jurisdictional bases against persons not domiciled in a contracting State, and requiring that other contracting States recognise and enforce any resulting judgment. Thirdly, treaty regulation would clarify and simplify recognition and enforcement procedures, and as a result a party holding a judgment rendered in, or contemplating initiating litigation in, a contracting State could ascertain relatively quickly and easily the effects that a judgment would have in another contracting State if recognition or enforcement were sought in its courts.<sup>327</sup>

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<sup>319</sup> This would be contrary to the fundamental EEC principle of non-discrimination: see note 121 above.

<sup>320</sup> See para 3.1 above. Even though the SACU is not a common market like the EU, the differences between the rules on recognition and enforcement of foreign judgments may nevertheless impede international trade, and therefore, it is argued that the harmonisation of the rules on recognition and enforcement of foreign judgments will remove a non-tariff barrier to trade and facilitate international trade by promoting legal certainty and reducing transaction costs: see Chapter 1, para 4.1.

<sup>321</sup> Juenger however cautions that such regional schemes can be faulted for discriminating against outsiders: See Juenger (note 13) 9.

<sup>322</sup> See Lugano Convention, discussed in para 3.1 above.

<sup>323</sup> See Montevideo and La Paz Conventions, discussed in para 3.4 above.

<sup>324</sup> Russel (note 117) 64; see para 3.1 above.

<sup>325</sup> Like any instrument of international law-making process, multilateral treaties has to be negotiated, signed and ratified by the participating States. Reservations and denunciation, to which it may be subject, may make it less attractive as a vehicle of legal integration, and there is also run the risk of it being compromised in the course of its transformation into national law: Lasok & Stone (note 28) 85.

<sup>326</sup> Von Mehren (note 29) 278.

<sup>327</sup> Von Mehren (note 29) 279.

It is, therefore, suggested that the most appropriate instrument to harmonise the rules on recognition and enforcement of foreign judgments in the SACU is a multilateral convention negotiated and concluded amongst all five Member States.<sup>328</sup>

## 6 SOME FACTORS LIKELY TO INFLUENCE HARMONISATION IN SACU

The actual behaviour of the national courts will be decisive in furthering harmonisation after harmonised laws have been adopted.

There is some use of comparative law and a degree of reliance by courts on the private international laws between countries with a Roman-Dutch tradition.<sup>329</sup> Judgments of Southern African courts, mainly those of South Africa, have been relied on frequently in other Southern African countries. In *Silverston Ltd v Lobatse Clay Works*<sup>330</sup> it was held that the courts of Botswana have never been reluctant, in their own adaptation of the common law to the requirements of modern times, to have regard to the approach of the South African courts and to the writings of authoritative South African academics.<sup>331</sup>

The implementation of harmonised laws will require high-level expertise in every field concerned. The availability of trained personnel and resources is of the utmost importance as this will require expenditure, research, implementation and high-quality elaboration of instruments to bring about the desired results.<sup>332</sup> A possible model for training in community instruments is OHADA's Regional Training School for Legal Officers (L'ERUSMA), whose main role is to improve the legal environment in the Member States, in particular by training judges and other legal officers in community (OHADA) law.<sup>333</sup>

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<sup>328</sup> See specific proposals and a proposed draft text in this regard in Chapter 4, para 6 below.

<sup>329</sup> Oppong (note 261) 282. See *Silverston Ltd v Lobatse Clay Works* 1996 Butterworth's Law Reports 190 195; See also *Mutamo v News Company(Botswana) t/a The Gazette* 1997 Butterworth's Law Reports 43 (IC) where the Judge explained why he had used South African case law as authority: 'The reason why the court referred to the aforesaid cases is because they are based on the South African common law which is Roman-Dutch law, which is also the Botswana common law'.

<sup>330</sup> *Silverston v Lobatse Clay Works* (note 329) 195.

<sup>331</sup> *Silverston v Lobatse Clay Works* (note 329) 195.

<sup>332</sup> Bamodu G 'Transnational law, unification and harmonisation of international commercial law in Africa' (1994) 38 *Journal of African Law* 137.

<sup>333</sup> Martor B *Business law in Africa OHADA and the harmonisation process* (2002) 17. The majority of the OHADA Member States are francophone countries, with the result that OHADA's official language is French. Further information on L'ERUSMA was available in French, and, therefore, not accessible.

A further factor which may influence harmonisation is the availability of legal literature indigenous to the region.<sup>334</sup> In Southern Africa, law reporting and access to legal materials is fairly up to date in the major states of the region, especially South Africa, Namibia and Botswana, which may support harmonisation.<sup>335</sup> Judicial decisions and recent proposed law reforms, in South Africa, at least,<sup>336</sup> is bringing about a convergence between the Roman-Dutch law and common law jurisprudence.<sup>337</sup> Two recent judgments from South Africa's Supreme Court of Appeal confirmed the possibility of closer convergence between Roman-Dutch law and common law. In *Richman v Ben-Tovim*<sup>338</sup> mere presence was accepted as a basis of international competence,<sup>339</sup> a position which is well entrenched in the common law tradition.<sup>340</sup> In *Bid Industrial Holdings v Strang*<sup>341</sup> the arrest of foreign defendants<sup>342</sup> as a

<sup>334</sup> The borrowing of legal literature in Latin America, for example, has favoured harmonisation: see Garro (note 103) 612.

<sup>335</sup> Oppong (note 261) 282.

<sup>336</sup> South African Law Reform Commission *Project 21 - Report on Consolidated Legislation pertaining to international judicial cooperation Report* (2006) (hereafter 'SALRC Report').

<sup>337</sup> Oppong (note 261) 283.

<sup>338</sup> *Richman v Ben-Tovim* 2007 (2) SA 283. The plaintiff's case was predicated on the proposition that there is international competence in South African law if a defendant is merely physically present in the jurisdiction of the foreign court at the time the action is instituted (at 3).

<sup>339</sup> The South African courts has accepted, for purposes of reciprocal enforcement of a foreign judgment, that the defendant's mere physical presence within the foreign jurisdiction when the action was instituted is sufficient, according to South African conflict of law rules, for finding that the foreign court had jurisdiction: *Richman v Ben-Tovim* (note 338) paras 7-9. This decision has however attracted criticism: Schulze argues that there are no reasons why traditional grounds of international competence should be extended to an extent that they produce an artificial and intolerable result. In this case, the English court did not have international jurisdiction under the principles recognised by South African law. Schulze whether the result according to which a judgment that is ineffective and unenforceable within the jurisdiction of the foreign court that granted it, is fully recognised and made enforceable in South Africa law can be justified by the quest for 'catering for itinerant international businessmen': see Schulze C 'International jurisdiction in claims sounding in money: Is *Richman v Ben-Tovim* the last word?' (2008) 20 *South African Mercantile Law Journal* 73. Oppong is also highly critical of this decision and suggest that it is difficult to reconcile mere presence as a basis of international competence with the theory of obligations that is sometimes seen as the foundation of the common law regime for the enforcement of judgments and further that the doctrine of effectiveness prevents the South African courts from assuming jurisdiction merely on the basis of the foreign defendant's presence within the jurisdiction: see Oppong 'Mere presence and international competence in private international law' (2007) 3(2) *Journal of Private International Law* 326, 328. Oppong further cautions that a court should not fall prey to the illusion of sitting as an 'international judicial tribunal' open to the beck and call of litigants who are exempt from the need to establish a proper nexus between the litigants, the cause of action and the state: see Oppong (note 239) 236.

<sup>340</sup> *Bid Industrial Holdings v Strang* 2008 (3) SA 355 at 49.

<sup>341</sup> See note 340.

<sup>342</sup> In South African domestic law, the procedure of arrest to found jurisdiction may be resorted to where a peregrine is temporarily within the jurisdiction of the court: *Richman v Ben-Tovim* (note 338) para 10. Section 19(1) of the South African Supreme Court Act provides that:

'(a) A [High Court] shall have jurisdiction over all persons residing or being in and in relation to all causes arising ... within its area of jurisdiction and all other matters of which it may according to law take cognisance ...

(b) ...

(c) Subject to the provisions of section 28 ... any High Court may –

basis for jurisdiction was abolished and the court accepted mere presence as a basis for jurisdiction<sup>343</sup> and raised the prospect of applying the principles of forum non conveniens in such cases.<sup>344</sup>

Further factors influencing harmonisation may be the training of lawyers by law schools, and access to research tools.<sup>345</sup> In Southern Africa, the University of Johannesburg, South Africa, recently established an Institute for Private International Law in Africa, and its objectives are to undertake and publish research in the field of private international law, particularly in an African context.<sup>346</sup> The work of this Institute should be encouraged, and possibly made a regional initiative.<sup>347</sup> The Eduardo Mondlane University, Maputo, Mozambique in 2008 organised the First International Conference on Regional Integration Issues and SADC Law.<sup>348</sup> Other academic institutions in Southern Africa which are encouraging research in

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- (i) issue an order for attachment of property or arrest of a person to confirm jurisdiction ... also where the property or person concerned is outside its area of jurisdiction but within the Republic: Provided that the cause of action arose within its area of jurisdiction; and
  - (ii) where the plaintiff is resident or domiciled within its area of jurisdiction, but the cause of action arose outside its area of jurisdiction and the property or person concerned is outside its area of jurisdiction, issue an order for attachment of property or arrest of a person to found jurisdiction regardless of where in the Republic the property or person is situated' (s 19(1)).

The court in *Bidvest Industrial Holdings* referred to the practice in Holland, which allowed resident plaintiffs to arrest foreign nationals and to bring them before a local court in order to compel them to give security or their appearance in court or to pay whatever the judgment might be. This saved the plaintiffs the expense of proceeding in a foreign country; they could obtain judgment and levy execution in their own domicile (at 13-14). The court also referred to *Thermo Radiant Oven Sales Ltd v Nelspruit Bakeries* 1969 (2) SA (A) 295 at 305C-D where it was held that 'the attachment ... served to found jurisdiction and thereby enabled the Court to pronounce a not altogether ineffective judgment'.

<sup>343</sup> It was held that 'it would suffice to empower the court to take cognisance of the suit if the defendant were served with the summons while in South Africa and, in addition, there were adequate connection between the suit and the area of jurisdiction of the South African court concerned from the point of view of the appropriateness and convenience of its being decided by that court. ... Obviously the strongest connection would be provided by the cause of action arising within that jurisdiction: *Bid Industrial Holdings* (note 340) para 56.

<sup>344</sup> Oppong (note 261) 283.

<sup>345</sup> Garro (note 103) 611.

<sup>346</sup> University of Johannesburg 'The Institute for Private International Law in Africa' available at <http://www.uj.ac.za/EN/Research/NewsAnnouncements/ResearchHighlights/2008ResearchHighlights/Pages/TheInstituteforPrivateInternationalLawinAfrica.aspx> (accessed 08 October 2012). Its work will include the drafting of regulations conventions, model laws and other legislative instruments in the field of private international law for use by the various organs and Member States of the AU. It also acts as an information centre for The Hague Conference, providing training and arranging conferences, seminars and workshops. The statutes of the institutes were drafted in collaboration with the legal division of the AU. Research is conducted on an on-going basis in order to draft an African Convention on the Law Applicable to Contractual Obligations for future use by the AU.

<sup>347</sup> Oppong (note 261) 304.

<sup>348</sup> The conference recommendations are grouped in three main areas: harmonisation and unification of national legal systems; implementation of the regional agenda; and institutional architecture. In order to achieve effective harmonisation and unification of national legal systems, the following activities were recommended: a) to set up a Regional Academic Partnership Network in SADC countries, with the main purpose of boosting research on regional integration and run regional capacity programmes. It was



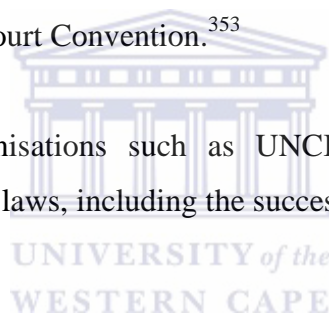
private international law include the Institute for Foreign and Comparative Law<sup>349</sup> at the University of South Africa<sup>350</sup> and the Institute of International and Comparative Law in Africa<sup>351</sup> at the University of Pretoria, South Africa.

The above discussion suggests that there are a number of factors present in the Southern Africa which may render the proposed harmonisation efforts feasible.

## 7 CONCLUDING REMARKS

This Chapter firstly considered the current international harmonisation efforts, specifically those of the Hague Conference on Private International Law.<sup>352</sup> Despite the on-going efforts since 1992 to conclude a global recognition and enforcement convention, the Hague Conference has not succeeded in this regard, but rather produced a much narrower than originally envisaged Choice of Court Convention.<sup>353</sup>

While other international organisations such as UNCITRAL have contributed to the harmonisation of especially trade laws, including the successful New York Convention,<sup>354</sup> the



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recommended that the Faculties of Law of each country should be the driving force of the process and should take on board all the relevant players and stakeholders including civil society; b) establish a Regional Centre of Studies on Integration and SADC Law: Universidade Uduardo Mondlane Faculty of Law 'First International Conference on "Regional Integration Issues and SADC Law": Conclusions and Recommendations' 23-25 April 2008, available at <http://vi.unctad.org/files/mozambique/uemsadcreppt.doc> (accessed 17 February 2013).

<sup>349</sup> The Institute for Foreign and Comparative Law aims to maintain and develop their database of private international law rules; track the development of regional law, particularly within SADC; monitor Africa's participation in the development of public international law; and undertake comparative law studies on various aspects of private, commercial and public law in African states.

<sup>350</sup> UNISA 'Institute for Foreign and Comparative Law' available at <http://www.unisa.ac.za/default.asp?Cmd=ViewContent&ContentID=13490> (accessed 17 April 2011).

<sup>351</sup> The objective of the ICLA is to become a first port of call for those who wish to engage in legal research and legal reform in Africa involving comparative or international law at the advanced level. A central feature of the Institute is the Law of Africa Collection, the most comprehensive and up-to-date collection of primary legal materials of African countries in the world today, which is located in the Oliver R Tambo Law Library of the Faculty of Law. ICLA will be involved in providing technical assistance to African governments and international organisations engaged in legal reform on the continent. It also engages in collaborative projects with researchers on the continent and abroad. The ICLA houses doctoral students and visiting scholars and arrange seminar opportunities for government officials, judges, international civil servants and civil society: University of Pretoria 'Institute for International and Comparative Law in Africa' available at <http://web.up.ac.za/default.asp?ipkCategoryID=15428&subid=15428&ipklookid=10> (accessed 17 February 2013).

<sup>352</sup> See para 2.1 above.

<sup>353</sup> See para 2.1 above.

<sup>354</sup> See para 2.2.1 above.



current position is still that there is no international convention for the recognition and enforcement of foreign judgments.<sup>355</sup>

The Chapter further considered the approaches followed by the EU to harmonise its recognition and enforcement regime under the Brussels I Regulation/Brussels Convention,<sup>356</sup> and concludes that due to the absence of a number of factors which contributed to the success of the Brussels Regime in Europe, including the supranational elements of the EU law, the direct applicability of EU laws in EU Member States and the absence of a supranational court akin to the ECJ to ensure uniform interpretation of the instrument in the SACU, suggest that this may not be the most suitable approach to follow to harmonise the laws on recognition and enforcement of foreign judgments in the SACU.<sup>357</sup>

Secondly, a discussion of the full faith and credit clause requirement in the Constitution of the USA<sup>358</sup> suggest that this approach is likely only to succeed in politico-legal federation, where there is a Constitution which can impose legal obligations on its Member States, and not in the SACU which is a grouping of five independent States who have entered into a Customs Union Agreement with each other.<sup>359</sup>

Thirdly, the approach in Australia-New Zealand entails extending the application of one federal state's recognition and enforcement regime for inter-state judgments to a foreign State.<sup>360</sup> This system therefore goes further than the United States model by treating a foreign judgment of the State party to the agreement as a sister-state judgment, while continuing to treat other States not party to the agreement in a different manner. Although SACU Member States share a common legal heritage, which is required by this approach, none of the SACU Member States are a federation whose federal rules on recognition and enforcement can be extended to other SACU Member States.<sup>361</sup>

The final regional approach considered is that of the Latin American States, which are far less integrated than the USA or the EU, but nevertheless have a well-developed regime for the

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<sup>355</sup> See Chapter 1, para 3.1 above.

<sup>356</sup> See para 3.1 above.

<sup>357</sup> See para 4.1 above.

<sup>358</sup> See para 3.2 above.

<sup>359</sup> See par 4.2 above.

<sup>360</sup> See para 3.3 above.

<sup>361</sup> See para 4.3 above.

recognition and enforcement of foreign judgments amongst Member States based on treaty law, which facilitate the recognition and enforcement of judgments amongst them.<sup>362</sup>

After a comparison of bilateral and multilateral recognition and enforcement conventions,<sup>363</sup> this Chapter concludes that a multilateral recognition and enforcement agreement is the most suitable method to harmonise or unify the rules of SACU Member States; and finally that the presence of a number of factors on the region points toward the feasibility of the proposed harmonisation efforts.<sup>364</sup>

The following Chapter compares a number of multilateral recognition and enforcement agreements that are currently in force, to determine what lessons can be learned from their examples and what the form and content of a proposed recognition and enforcement convention for the SACU should be.



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<sup>362</sup> See para 43.4 above.

<sup>363</sup> See para 5.1 and 5.2.

<sup>364</sup> Such as the use of comparative law and reliance by courts on courts of other Member states; the availability of legal literature indigenous to the region; the fact that law reporting and access to legal materials is fairly up to date in the major states of the region; a number of tertiary initiatives towards the study and harmonisation and laws of the region, and finally the availability of research tools in the region: see para 5.3 above.

## CHAPTER 3

### COMPARISON OF MULTILATERAL CONVENTIONS ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS

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# 1 INTRODUCTION AND OVERVIEW OF TYPES OF MULTILATERAL RECOGNITION AND ENFORCEMENT CONVENTIONS

It was suggested in the previous Chapter<sup>1</sup> that the harmonisation or unification of the rules on recognition and enforcement of foreign judgments may best be achieved by the negotiation and conclusion of a multilateral convention on recognition and enforcement.

This chapter firstly provides an overview of the types of multilateral convention for the recognition and enforcement of foreign judgments.<sup>2</sup> It then focuses on the various aspects that an instrument to regulate the recognition and enforcement of foreign judgments for the region would possibly cover, including the scope and exclusions from scope of such an instrument and exceptions to the general enforcement rule.<sup>3</sup> It compares a number of multilateral conventions on the recognition and enforcement of foreign judgments: the 1971 Hague Convention on the Recognition and Enforcement of Foreign Judgments;<sup>4</sup> the 2005 Hague Choice of Court Convention;<sup>5</sup> the EU Brussels Convention/Brussels I, along with the Lugano Convention;<sup>6</sup> and the Montevideo Convention.<sup>7</sup> The purpose of this comparison is to ascertain whether the various instruments examined evidence any prevailing legal positions; as well as to identify the commonalities and differences between the current international and regional instruments.<sup>8</sup> This will form the background against which proposals for a multilateral convention for the SACU will be made, based on the existing domestic laws in SACU Member States.<sup>9</sup>

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<sup>1</sup> See Chapter 2 para 6 above.

<sup>2</sup> See para 1.1 and 1.2 below.

<sup>3</sup> This coincides with the different aspects that will be compared in the respective statutes of the SACU Member States: See Chapter 4 below.

<sup>4</sup> Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, Feb. 1, 1971, (1971) 1144 U.N.T.S.249 ('1971 Hague Convention'): see para 2 below.

<sup>5</sup> Hague Conference on Private International Law Convention on Choice of Court Agreements, June 30, 2005, 44 I.L.M. 1294: see para 3 below.

<sup>6</sup> EU Regulation (EC) 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters [2001] *Official Journal* L12/1 ('Brussels I Regulation'); Convention on Jurisdiction and the Recognition of Judgments in Civil and Commercial Matters 1968 *Official Journal* L229 ('Brussels Convention'); Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (done 30 October 2007) *Official Journal* L339/3 ('Lugano Convention'): see para 4 below.

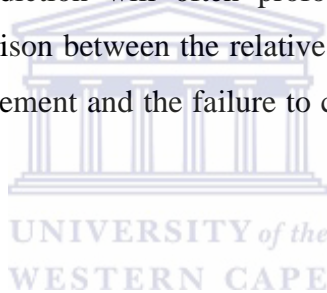
<sup>7</sup> Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards, May 8, 1979, OEA/Ser.A/2818 ILM 1224 (1979) ('Montevideo Convention'): see para 5 below.

<sup>8</sup> See para 6 below.

<sup>9</sup> As discussed in Chapter 2. See Chapter 4, para 5 for proposed recognition and enforcement instrument for the SACU.

Traditionally, each convention dealing with an aspect of private international law have addressed only one subject matter, such as choice of law, jurisdiction or recognition and enforcement, but conventions can also be multi-dimensional in character and address a combination of these subjects or matters in the same instrument.<sup>10</sup> Recognition and enforcement, and jurisdiction are often combined in a single instrument,<sup>11</sup> and choice of law rules in a different instrument.<sup>12</sup> The latter approach for dealing with choice of law rules in a separate instrument is generally accepted as preferable for both theoretical and practical reasons.<sup>13</sup>

There are, however, different opinions on which approach should be adopted for a convention dealing with recognition and enforcement, namely whether it should be combined with rules on jurisdiction, or whether or not jurisdiction should be addressed in a separate instrument.<sup>14</sup> The question whether recognition and enforcement will be addressed in a single instrument, or combined with (direct) jurisdiction will often profoundly affect the drafting of the proposed instrument.<sup>15</sup> A comparison between the relative successes of regional instruments regulating recognition and enforcement and the failure to create an international convention,



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<sup>10</sup> Von Mehren AT 'Enforcing judgments abroad: Reflections on the design of recognition conventions' (1998-1999) 24 *Brooklyn Journal of International Law* 17.

<sup>11</sup> The Brussels I Regulation (note 6) for example combines rules of direct jurisdiction and the recognition and enforcement of foreign judgments in a single instrument.

<sup>12</sup> See, for example Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I Regulation) which addresses choice of law in single instrument.

<sup>13</sup> A forum's choice of law rules and principles generally do not depend either on the basis on which adjudicatory authority is claimed, or on the prospects for the resulting judgment's recognition and enforcement abroad. In addition, since enforcement may be appropriate in several states, each of which holds different views respecting choice-of-law methodologies and solutions, great difficulties would be encountered, at least in multilateral conventions, if choice of law was linked closely with either jurisdiction or recognition and enforcement. To the extent that a legal order takes specific choice-of-law rules into account in deciding whether to enforce a foreign judgment, an indirect control by imposing a choice-of-law test for recognition suffices. Little would be gained by regulating directly the State of origin's choice-of-law rule or methodology so far as these are employed for that State's own purposes or affect possible enforcement in third states. Accordingly, neither a three-dimensional convention nor a two-dimensional one dealing directly with choice of law and either jurisdiction to adjudicate or recognition and enforcement are practical: see Von Mehren (note 10) 17-18.

<sup>14</sup> See for example Oestreicher Y "'We're on a Road to Nowhere" – Reasons for the Continuing Failure to Regulate Recognition and Enforcement of Foreign Judgments' (2008) 42 *The International Lawyer* 61; and Brand RA 'Community Competence for Matters of Judicial Cooperation at the Hague Conference on Private International Law: A View from the United States' (2001-2002) 21 *Journal of Law and Commerce* 191 who supports the idea of a single convention for recognition and enforcement of foreign judgments; and Von Mehren (note 10) who proposes double conventions, or a variant, the mixed convention.

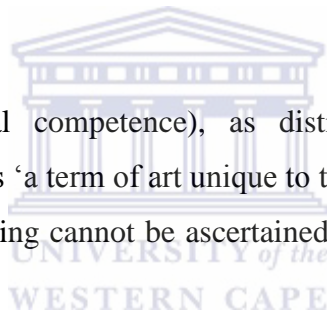
<sup>15</sup> Von Mehren AT 'Leonard J. Theberge Award for Private International Law: Arthur Taylor von Mehren' (1997) 31(3) *International Business Lawyer* 724.

has led to the suggestion that choosing the wrong model is the main reason that the conventions failed.<sup>16</sup>

The traditional distinction, before the introduction of the concept of a mixed convention, for conventions dealing with recognition and enforcement was between single and double conventions, but there are different understandings of these terms.

The first understanding is that a single convention focuses *solely on recognition and enforcement*, listing the bases for jurisdiction that will entitle a judgment to recognition, but permitting judgments on other bases that a contracting State may, in its discretion enforce.<sup>17</sup> Single conventions regulate recognition and enforcement directly and indirect jurisdiction incidentally.<sup>18</sup> A double convention deals with both the question of direct jurisdiction (international competence) and the recognition and enforcement of foreign judgments and indirect jurisdiction.<sup>19</sup>

Direct jurisdiction (international competence), as distinct from internal or domestic jurisdiction, has been described as ‘a term of art unique to the recognition and enforcement of foreign judgments, [which] meaning cannot be ascertained by reference to the rules of other



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<sup>16</sup> Oestreicher suggests that the failure of previous attempts such as the 1971 Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters (see para 2 below) was their attempt to base a recognition and enforcement convention on a mixed or double convention model, thus combining the question of recognition and enforcement with the substantially complicated issue of jurisdiction. He argues that the inability to agree on the jurisdiction question resulted in the inability to regulate the recognition and enforcement issue, as the two were needlessly intertwined: see Oestreicher Y ‘The Rise and Fall of the “Mixed” and “Double” Convention Models Regarding Recognition and Enforcement of Foreign Judgments’ (2007) 6 *Washington University Global Studies Law Review* 341; Oestreicher (note 14) 61.

<sup>17</sup> Weintraub RJ ‘How substantial is our need for a judgments recognition convention and what should we bargain away to get it?’ (1998-1999) 24 *Brooklyn Journal of International Law* 185.

<sup>18</sup> In other words, it does not respond to the question as to when courts have jurisdiction in proceedings instituted for the first time. If a simple convention contains rules on jurisdiction, they are only rules on indirect jurisdiction. These are rules which, only a posteriori, at the stage of the recognition and enforcement of the judgment, serve to verify the jurisdiction of the court of origin in order to ascertain whether its decision may or may not be recognised or enforced in the State addressed: Hague Conference ‘International Jurisdiction and Foreign Judgments in Civil and Commercial Matters’ *Preliminary Document No 7 of April 1997* (1997) 8, available at [http://www.hcch.net/index\\_en.php?act=publications.details&pid=3490&dtid=35](http://www.hcch.net/index_en.php?act=publications.details&pid=3490&dtid=35) (accessed 14 February 2013) (hereinafter ‘Kessedjian Report’) 1. The majority of recognition and enforcement conventions have traditionally been simple conventions, directly addressing only recognition and enforcement. They have an indirect and limited effect on the assumption of jurisdiction: Von Mehren AT ‘Recognition and Enforcement of Foreign Judgments: A New Approach for the Hague Conference?’ (1994) 57(3) *Law and Contemporary Problems* 282.

<sup>19</sup> Kessedjian Report (note 18) 1.



branches of the law'.<sup>20</sup> This concept has been explained as follows in the South African case of *Reiss Engineering*:<sup>21</sup>

'The fact that the [foreign]... court may have had jurisdiction in terms of its own law does not entitle its judgment to be recognised and enforced [in the requested state]. It must have had jurisdiction according to the principles recognised by [the law of the requested] with reference to the jurisdiction of foreign courts.'<sup>22</sup>

The issue whether a court has adjudicatory jurisdiction can become relevant at two different stages: the first stage concerns the proceedings before the court that renders the original decision, the 'rendering court'. The rendering court will not hear a case, unless it determines that it has jurisdiction to do so.<sup>23</sup> The second stage concerns the proceedings before the court requested to recognise and/or enforce the judgment, the 'requested court'. The requested court will not recognise or enforce the decision of the rendering court unless it determines that the rendering court had jurisdiction to decide the case. The use of the same term, 'jurisdiction', at both stages suggests uniformity of concepts, but this suggestion is misleading. French law resolved this concern by distinguishing between two concepts: direct jurisdiction ('compétence directe') and indirect jurisdiction ('compétence indirecte').<sup>24</sup>

Rules on direct jurisdiction are determined by the laws of the State in which the judgment-rendering court is located, and indirect jurisdiction is decided according to the law where the judgment is sought to be recognised or enforced.<sup>25</sup> 'Direct jurisdiction' therefore refers to the jurisdiction of a court adjudicating the merits of a case, as opposed to 'indirect jurisdiction', which is used only where a requested court has to ascertain whether the rendering court had jurisdiction.<sup>26</sup>

There is, however, a second understanding of single and double conventions which refers to the issue whether a convention only *requires* certain bases of jurisdiction (in which case it

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<sup>20</sup> Forsyth CF *Private International Law: The modern Roman-Dutch law including the jurisdiction of the High Courts* 5ed (2012) 420; Nussbaum A 'Jurisdiction and Foreign Judgments' (1941) 41(2) *Columbia Law Review* 223.

<sup>21</sup> *Reiss Engineering Co Ltd v Isamcor (Pty) Ltd* 1983 (1) SA.

<sup>22</sup> *Reiss Engineering Co Ltd v Isamcor* (note 21) 1037H. This was approved in *Purser v Sales* 2001 (3) SA 445 (A) 450C: see Forsyth (note 20) 420.

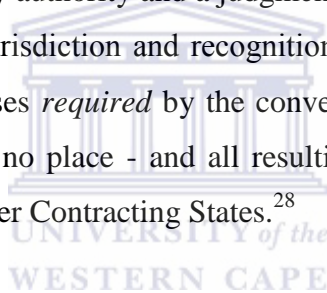
<sup>23</sup> Michaels R 'Some Fundamental Jurisdictional Conceptions as Applied in Judgment Conventions Conflict of Laws in a Globalizing World: A Tribute to Arthur von Mehren' (2006) available at [http://scholarship.law.duke.edu/faculty\\_scholarship/15748](http://scholarship.law.duke.edu/faculty_scholarship/15748) (accessed 28 April 2013).

<sup>24</sup> Michaels (note 23) 8.

<sup>25</sup> Michaels R 'Two paradigms of Jurisdiction' (2007) 27 *Michigan Journal of International Law* 35-6.

<sup>26</sup> Kessedjian Report (note 18) 8.

will be regarded as a single convention), or whether it also *excludes* certain bases of jurisdiction (in which case it will be a double convention).<sup>27</sup> Double conventions regulate both the assumption of (direct) jurisdiction and the recognition and enforcement of the resulting judgment. Such conventions set out a list detailing all the bases on which jurisdiction may be predicated, and all judgments resulting from one of these listed bases automatically satisfy the convention's jurisdictional requirement for recognition and enforcement. In its pure or complete form, the bases for the assumption in a double convention are exclusive; the courts of contracting states can exercise jurisdiction in matters within the convention *only* if a listed basis is present. The distinguishing characteristic of a full-fledged double convention is that each Contracting State *must* exercise adjudicatory authority when a convention basis is present but otherwise must refrain from adjudicating on the merits. In litigation within a double convention's scope, either the litigation proceeds on a convention basis and a judgment entitled to recognition and enforcement results, or litigation is stopped for lack of adjudicatory authority and a judgment on the merits cannot be given. A double convention, combining jurisdiction and recognition, therefore operates in 'either-or' terms. Only the jurisdictional bases *required* by the convention can be invoked – permitted bases that are not required have no place - and all resulting judgments are, subject to rare exceptions, enforceable in the other Contracting States.<sup>28</sup>



It is in within the context of this understanding that the concept of 'mixed convention' has been introduced. Similar to a double convention, a 'mixed convention' contains a list specifying approved grounds of jurisdiction. Judgments rendered in a contracting state and resting on an approved jurisdictional basis are entitled to recognition and enforcement under the convention. However, unlike a true double convention, a mixed convention allows contracting States to assume jurisdiction on other jurisdictional bases not listed in the convention and a State may, unless the convention expressly provides otherwise, grant recognition and enforcement under its general law.<sup>29</sup>

A mixed convention differs from a double convention in that it divides bases of adjudicatory authority into three, rather than two, groups:<sup>30</sup>

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<sup>27</sup> Michaels (note 23) 11-12.

<sup>28</sup> Von Mehren (note 18) 293; Von Mehren (note 15) 723).

<sup>29</sup> Von Mehren (note 18) 283.

<sup>30</sup> Weintraub (note 17) 185.

- i. *Required bases* that each Contracting State must make available if the litigation falls within the scope of the Convention, the use of which results in judgments that are, in principle, entitled to recognition and enforcement under the convention;
- ii. *Prohibited bases* that a Contracting State is not entitled to invoke in litigation that is within the scope of the Convention; and
- iii. *Permitted bases* that a Contracting State is not forbidden to use, but the use of which results in judgments that are not entitled to recognition and enforcement under the Convention – instead, the enforceability of such judgments is determined under the domestic law of recognition and enforcement of the State addressed.<sup>31</sup>

The idea is that where the court has jurisdiction on an approved ground, and the resulting judgment will be recognised and enforced in other Contracting States under the Convention, provided that certain other requirements are met. A court of a Contracting State is not permitted to take jurisdiction on prohibited grounds. Courts are permitted to exercise jurisdiction on the ‘grey area’ grounds, but the provisions of the Convention relating to recognition and enforcement will not apply to the resulting judgment.<sup>32</sup>

Therefore, in the first understanding, a single convention refers to a convention dealing only with recognition and enforcement, and a double convention refers to a convention dealing with both recognition and enforcement and jurisdiction. On this understanding, a ‘mixed convention’ is a sub-category of a double convention. In the second understanding, a single convention contains a white list (required grounds), a double convention white and black lists

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<sup>31</sup> The US Department of State who originally suggested the idea of a global recognition and enforcement convention proposed that the Hague seeks to achieve a convention that is capable of meeting the needs of and being broadly accepted by the larger community represented by the Member States of the Hague Conference. They were of the opinion that the only options need not necessarily be between a simple or double convention, but believed that there should be consideration of the possibility for party States to utilise jurisdictional bases for litigation that are not designated as permissible or exorbitant by the convention: see Von Mehren (note 15) 724.

<sup>32</sup> The European instruments in this area (the Brussels Regulation, the Brussels Convention and the Lugano Convention) are based on a slightly different idea. The Convention contains black and white list that are mandatory if defendant is domiciled in a signatory State, but not if defendant is a non-domiciliary - where the defendant is domiciled in another Member State, there is no grey area: jurisdiction may be exercised only on the required bases. Where the defendant is not domiciled in a Member State, jurisdiction may, subject to certain exceptions, be exercised on any ground permitted by national law (permitted bases), but the resulting judgment must nevertheless be recognised and enforced in the other States: see Hague Conference ‘Convention of 30 June 2005 on Choice of Court Agreements: Explanatory Report by Trevor Hartley & Masato Dogauchi’ 2005 (hereafter ‘Hartley Dogauchi Report’) 16; Weintraub (note 17)185.

(excluded grounds), and a mixed convention white, black and grey (permitted grounds) lists.<sup>33</sup>

Consequently, in terms of the different understandings of single and double conventions, negotiating parties will have to exercise two choices. This first will be between whether to address recognition and enforcement separately (single convention) or whether to combine it with rules on direct jurisdiction (double convention). If the latter approach is adopted, a decision will once again have to be made on whether the instrument would only require certain grounds of jurisdiction, whether it would require some and exclude others or whether it would also include a third category of permitted bases. This is illustrated by the following diagram:<sup>34</sup>

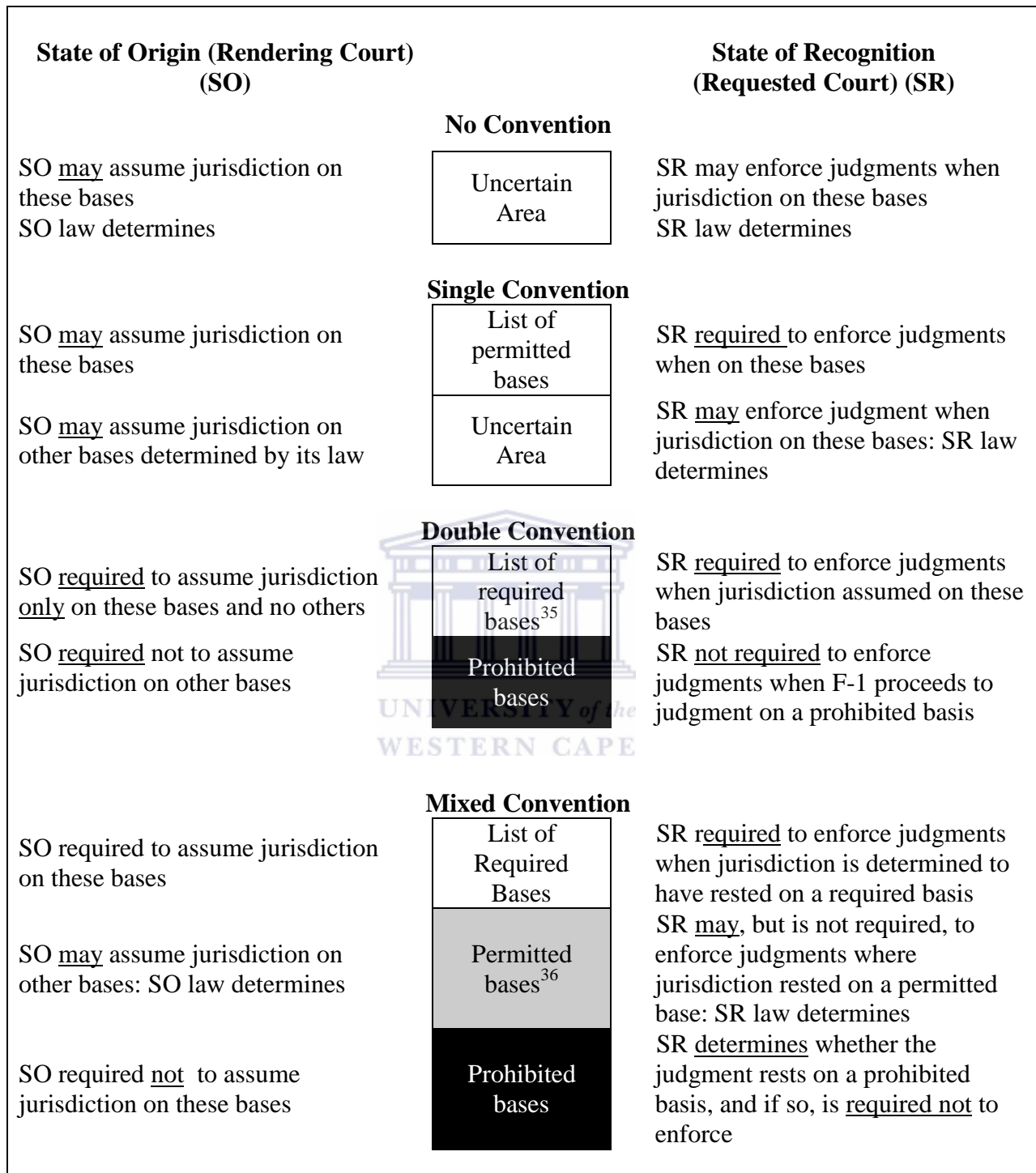


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<sup>33</sup> Michaels (note 23) 13-14.

<sup>34</sup> Prepared by Trooboff PD repeated in Von Mehren (note 10) 29; Von Mehren (note 18) (Original not available).

**Figure 1: Types of Conventions addressing both Jurisdiction and Recognition and Enforcement**



The above diagram provides an overview of the simple, double and mixed convention types. Two traditional types of conventions dealing with the recognition and enforcement of foreign judgments, namely single convention and double convention, with mixed conventions a sub-

<sup>35</sup> All bases not listed as required are prohibited.

<sup>36</sup> All bases not listed as required or prohibited are permitted.

type of double conventions are now discussed, followed by a discussion of possible variations on the traditional convention types.

### 1.1 Single Convention

Double conventions received considerable attention in the recent past, more recently some scholars have suggested moving back to a single convention, regulating only the recognition and enforcement of judgments, and leaving the rules of jurisdiction to national laws.<sup>37</sup> The reason for this is that it is easier to agree on issues relating to the recognition and enforcement of foreign judgments than it is to agree on jurisdiction issues and addressing recognition and enforcement in an instrument separate from potentially complex jurisdiction issues may significantly increase the likelihood of success of a prospective future instrument.<sup>38</sup>

The Hague Conference has suggested a 'reinforced simple instrument',<sup>39</sup> which would include the main characteristics of the single convention. The suggested instrument would deal only with the recognition and enforcement of judgments and not directly regulate jurisdiction; but this could be complemented by additional provisions that regulate the circulation of judgments either at the jurisdiction stage or at the recognition and enforcement stage.<sup>40</sup> For example, the Interim Text of the Hague Convention on Choice of Court Agreements contained a rule allowing the court to suspend enforcement proceedings where it is clearly inappropriate for it to exercise jurisdiction, and another court is clearly the more appropriate forum.<sup>41</sup> This bears resemblance to the common law rule of *forum non conveniens*.<sup>42</sup>

Another consideration is whether it might be useful to include a provision which places the onus on the court of origin to consider whether a judgment is likely to require enforcement abroad, and if so, only accept jurisdiction if it is expected that the judgment will be capable of being recognised and enforced under the terms of the instrument. Such a provision may assist in promoting awareness of the potential hurdles in enforcing judgments abroad and motivate

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<sup>37</sup> Oestreicher (note 16) 349.

<sup>38</sup> Oestreicher (note 14) 61.

<sup>39</sup> Hague Conference 'Ongoing work on international litigation and possible continuation of the Judgments Project' *Preliminary Document No 5 of March 2012* (2012) 12, 15-16.

<sup>40</sup> Hague Conference (note 39) 15.

<sup>41</sup> Hague Conference *Interim Text – Summary of the outcome of the discussion in Commission II of the first part of the Diplomatic Conference 20 June 2001* (2001) Article 22.

<sup>42</sup> See Chapter 2 note 267 above.



originating courts to provide a more comprehensive summary of the reasons for the decision to exercise jurisdiction.<sup>43</sup>

A further possibility to enforce the simple convention would be to include provisions which facilitate judicial communication between courts, both at the jurisdiction stage (e.g. to support the court of origin in deciding to suspend proceedings on grounds of *lis pendens* or clearly inappropriate forum) and the enforcement stage (e.g. to support the court addressed in verifying the jurisdiction of the court of origin).<sup>44</sup> This would support the orderly rendition and recognition of judgments.

Oestreicher suggests that under a simple convention, every foreign judgment should be entitled to recognition and enforcement, unless there is a good reason not to do so – therefore creating a ‘presumption of enforceability’.<sup>45</sup> The party against whom the judgment is to be enforced will have to prove that there is a legitimate reason to refrain from doing so. Legitimate reasons would probably include lack of jurisdiction, fraud and public policy. Consequently, the party objecting to the recognition has to overcome this presumption. The presumption arises as soon as the party seeking recognition or enforcement of the foreign judgment proves that the judgment is genuine, and he or she bears the burden of proof in this regard.<sup>46</sup>

### *1.1.1 Advantages of a single convention*

A single convention on recognition and enforcement, while still being a challenge, would unquestionably be easier and less complicated to negotiate than a double convention.<sup>47</sup> This would be more feasible than reaching consensus on direct grounds of jurisdiction,<sup>48</sup> as it would eliminate the need to agree in advance on the bases for the assertion of jurisdiction.<sup>49</sup> The asymmetric design of direct and indirect jurisdiction leaves States’ direct jurisdiction laws untouched so each State still maintains its freedom in rendering judgments, therefore,

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<sup>43</sup> Hague Conference (note 39) 15.

<sup>44</sup> Hague Conference (note 39) 15.

<sup>45</sup> Oestreicher (note 16) 356.

<sup>46</sup> Oestreicher (note 16) 356.

<sup>47</sup> Huang J *Interregional Recognition and Enforcement of Civil and Commercial Judgments: Lessons for China from US and EU Laws* (unpublished SJD Thesis, Duke University School of Law, 2010) 288.

<sup>48</sup> Hague Conference ‘Continuation of Judgments Project’ *Preliminary Document No 14 of February 2010* (2010) 3-5, available at <http://www.hcch.net/upload/wop/genaff2010pd14e.pdf> (accessed 14 February 2013) para 12.

<sup>49</sup> Oestreicher (note 16) 350-54.

the convention will probably meet less resistance.<sup>50</sup> In a double convention both the jurisdiction which the courts of the Contracting States are permitted to exercise as well as the conditions upon which such judgments are to be recognised are regulated. Such a Convention requires a high degree of consensus on what the required grounds of jurisdiction ought to be. It also requires Contracting States to change their national laws relating to international jurisdiction in accordance with the provisions of the Convention. The obligations facing Contracting States can therefore be substantial. In a single Convention, where jurisdiction is only dealt with as a condition for the recognition of judgments, Contracting States remain free to exercise jurisdiction in accordance with their national laws, which do not require any change.<sup>51</sup> Previous discussions by the Hague Conference have revealed a broad consensus with regards to recognition and enforcement, while consensus relating to the grounds of jurisdiction proved more difficult to achieve.<sup>52</sup>

A single convention may be easier to negotiate than a double convention in a region, or regional economic community where the laws of the States within the region are divergent,<sup>53</sup> and they have not yet established strong mutual trust of each other's judicial institutions amongst themselves. The underlying assumption behind the proposal for a single convention is that a mixed or double convention will not succeed unless there is a very high level of confidence between negotiating parties on the issues of jurisdiction.<sup>54</sup> History has proven that the double convention is likely to succeed only in situations where the participating countries share the same view as well as the same political, social, cultural and economic interests.<sup>55</sup>

For example, the purpose of art 220 of the Treaty of Rome<sup>56</sup> requiring EC Member States to engage in negotiations to simplify formalities governing recognition and enforcement,<sup>57</sup> was to provide the players in the EC with legal protection upon which they can rely should they

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<sup>50</sup> Michaels (note 25) 38-9.

<sup>51</sup> Hague Conference on Private International Law 'Preliminary Draft Convention on jurisdiction and foreign judgments in civil and commercial matters, adopted by the Special Commission and Report by P. Nygh & F. Pocar' *Preliminary Document No 11 of August 2000* (2000) 27 (hereafter 'Nygh & Pocar Report').

<sup>52</sup> Hague Conference (note 39) 13.

<sup>53</sup> This would be the case where the Member States within a regional economic community belong to different legal traditions. This would not be the case in the SACU however, as the laws within the region shows great similarities between the respective statutes dealing with recognition and enforcement: see Chapter 2, para 4.

<sup>54</sup> Oestreicher (note 16) 349.

<sup>55</sup> Oestreicher (note 16) 350.

<sup>56</sup> The Treaty Establishing the European Community signed in Rome on March 25, 1957 (1957) 298 UNTS 11 ('Treaty of Rome'). This requirement resulted in the negotiation and conclusion of the Convention on Jurisdiction and the Recognition of Judgments in Civil and Commercial Matters 1968 *Official Journal* (L 229) ('Brussels Convention').

<sup>57</sup> See Chapter 1 para 4.2.

decide to engage in economic activities. At the time when the EC Member States negotiated the Brussels Convention, they shared a view of a united Europe and their political, social and economic interests were relatively close to each other. There was, therefore, a real incentive for, and interest in, the successful implementation of the Brussels, and related new conventions. The negotiating States did not necessarily agree on all issues, and they sometimes agreed to 'swallow the bitter pill' for the sake of ultimately enjoying the benefits of belonging to this union of countries. The gain they expected from joining the EC compensated them from the concessions they had to make and for the fear and risks involved.<sup>58</sup>

The success the Brussels Convention/Regulation achieved may, to some extent, be compared to the relative success of the 'sister states' recognition and enforcement system in the USA, which is based on the full faith and credit clause.<sup>59</sup> Both the Brussels Convention and the USA Constitution are based on the broader commitment that the participating members have towards one another.<sup>60</sup>

A single convention implies a weak sense of interdependence because it only regulates indirect jurisdiction,<sup>61</sup> therefore, it is best applicable in settings in which there is a lack of strong political and economic commitments.<sup>62</sup> The lack of trust that exists between various countries and legal systems has been offered as one of the explanations for the continuing failure to achieve the goal of creating an international convention for the recognition and enforcement of foreign judgments.<sup>63</sup>

The single convention format may also be more appropriate in the absence of an overarching court of final review, such as the ECJ, and when there are no neutral institutions that can control the interpretation and application of each state's international obligations.<sup>64</sup>

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<sup>58</sup> See Oestreicher (note 16) 350; Struyven O 'Exorbitant Jurisdiction in the Brussels Convention' (1999) *Jura Falconis* 35(4) 521.

<sup>59</sup> Constitution of the United States of America Article IV Section 1.

<sup>60</sup> Oestreicher (note 16) 350.

<sup>61</sup> See para 1, above.

<sup>62</sup> Von Mehren T 'Drafting a Convention in international jurisdiction and the effects of foreign judgments acceptable world-wide: can the Hague Conference project succeed?' (2001) *American Journal of Comparative Law* 197-198.

<sup>63</sup> Oestreicher (note 16) 342.

<sup>64</sup> Von Mehren AT 'Jurisdictional Requirements: To What Extent Should the State of Origin's Interpretation of Convention Rules Control for Recognition and Enforcement Purposes?' in Lowenfeld AF & Silberman LJ (eds) *The Hague Convention on Jurisdiction and Judgments* (2001) 34.

A single enforcement arrangement also has the benefit of its ability to adapt to the changing economic, legal and political situations within regions. If regions become more and more economically interrelated, legally converged, and politically allied in the future, the single enforcement arrangement has the potential to develop into a mixed or double arrangement, and ultimately harmonise regional direct and indirect jurisdiction laws.<sup>65</sup> And while this design unifies regional indirect jurisdiction law, the certainty of the recognition and enforcement of foreign judgments will also increase significantly.<sup>66</sup>

### 1.1.2 *Disadvantages of the single convention*

The jurisdiction of Member States is only dealt with indirectly in a single convention, and Member States remain free to exercise jurisdiction on other grounds in accordance with their national laws, as the convention does not require any change. A single convention is, therefore, described as imperfect, because it does not prevent the exercise of exorbitant grounds of jurisdiction ‘which are as much a hindrance to international commerce as the uncertainty about recognition and enforcement of judgments’.<sup>67</sup> Exorbitant jurisdiction is described as ‘jurisdiction validly exercised under the jurisdictional rules of a State that nevertheless appears unreasonable to non-nationals because of the grounds used to justify jurisdiction’.<sup>68</sup> In other words, jurisdiction is exorbitant when the court seized does not possess a sufficient connection with the parties to the case, the circumstances of the case, the cause or subject of the action, or fails to take account of the principle of the proper administration of justice. An exorbitant form of jurisdiction is one which is solely intended to promote political interests, without taking into consideration of the interests of the parties to the dispute.<sup>69</sup> Indirect jurisdictional rules do not limit the diverse jurisdictional bases of the various rendering courts and a single Convention based on indirect rules preserves the diversity, and assures recognition only for the limited group of cases in which there is substantial consensus in national law.<sup>70</sup>

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<sup>65</sup> Huang (note 47) 290.

<sup>66</sup> Huang (note 47) 288; Michaels (note 25) 38-9.

<sup>67</sup> Nygh & Pocar Report (note 51) 27.

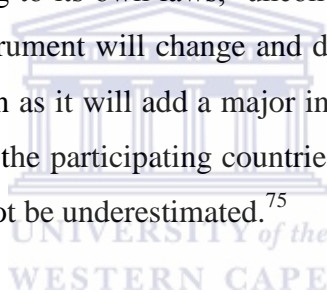
<sup>68</sup> Russel KA ‘Exorbitant jurisdiction and enforcement of judgments: the Brussels system as an impetus for the United States action’ (1993) 19 *Syracuse Journal of International Law and Commerce* 62.

<sup>69</sup> Kessedjian Report (note 18) 138.

<sup>70</sup> Bartlett LS ‘Full faith and credit comes to the Common Market: An analysis of the provisions of the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (1975) 24 *International and Comparative Law Quarterly* 46.

One of the main arguments against the single convention idea is that it does not really solve anything, because the jurisdiction problem does not go away, and much uncertainty remains: leaving the matter of when a rendering court will be deemed to have jurisdiction for the national laws of the requested State to determine, creates uncertainty for prospective traders,<sup>71</sup> and may also promote forum shopping.<sup>72</sup> Refraining from including agreed upon bases of jurisdiction in the convention does not mean that the enforcing court can avoid looking into whether the rendering court was entitled to render the judgment. The court will still need to address this issue before recognising or enforcing the foreign judgment, but it will not have a convention to guide it.<sup>73</sup>

Oestreicher is of the view that the argument that a single convention leaves jurisdiction to uncertainty, and therefore does not improve the situation in which each country recognises and enforces judgments according to its own laws, ‘unconvincing’.<sup>74</sup> He argues that a single recognition and enforcement instrument will change and dramatically improve a situation in which there is no such convention as it will add a major international obligation and a moral commitment on the part of all of the participating countries to recognise and enforce foreign judgments, and that that should not be underestimated.<sup>75</sup>



## 1.2 Double Conventions

A court’s jurisdiction to adjudicate the matter and the recognition of the ensuing judgments are both addressed in a double convention. The reason for this approach is the relationship between adjudicatory authority and enforcement of foreign judgments, as recognition conventions almost invariably impose a jurisdictional test.<sup>76</sup> A universal requirement for enforcement of a judgment is that the rendering court must have had adjudicatory jurisdiction. Von Mehren & Trautman<sup>77</sup> suggest that such a test seem natural since a basic function of jurisdictional standards is to assure that it is fair to require parties to litigate a controversy in the courts of a given community. If the rendering court was a clearly

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<sup>71</sup> Oestreicher (note 16) 355

<sup>72</sup> Von Mehren (note 18) 286.

<sup>73</sup> Nygh & Pocar Report (note 51) 27.

<sup>74</sup> Oestreicher (note 16) 355.

<sup>75</sup> Oestreicher (note 16) 355.

<sup>76</sup> Von Mehren (note 10) 18.

<sup>77</sup> Von Mehren AT & Trautman DT ‘Recognition of Foreign Adjudications: A Survey and a Suggested Approach’ (1968) 81 *Harvard Law Review* 1610.

inappropriate forum in the view of the requested court, policies against duplication of effort and harassment of the parties, as well as considerations of international order, would no longer decisively support recognition. On the other hand, the use of fair standards of adjudicatory jurisdiction may be seen as some indication that the rendering court also dealt fairly with the underlying situation.<sup>78</sup>

The question on whether the rendering court has the right to assert jurisdiction in a specific case is a fundamental factor in determining whether to recognise or enforce a foreign judgment, or refrain from doing so.<sup>79</sup> The Brussels Regime, and its sister instrument, the Lugano Convention, are suggested to have enjoyed the success they have, in comparison with the Hague endeavours, because they have one common characteristic: they are double conventions, in the sense that they primarily regulate the direct jurisdiction of courts, treating this as an important prerequisite to the effects which arise from the resulting judgments.<sup>80</sup> Double conventions provide direct jurisdiction rules applicable in the court in which the case is first brought. It, therefore, addresses the matter from the outset, and pre-empts the need for indirect consideration of the rendering court's jurisdiction (indirect jurisdiction) by the requested court.<sup>81</sup>

The mixed convention is a variation on the double convention, providing rules for both jurisdiction and the recognition of judgments, but also leaves some bases of jurisdiction available under national law.<sup>82</sup> A mixed convention does not entirely pre-empt the Member States' jurisdictional rules, but rather outlaws specified exorbitant jurisdictional bases and, in addition, lays down a set of jurisdictional provisions that, if complied with, would assure the resulting judgments recognition in all member states.<sup>83</sup> Mixed conventions, at the same time, allow Member States to use jurisdictional bases that are neither outlawed, as exorbitant, nor

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<sup>78</sup> Von Mehren & Trautman (note 77) 1610. See, for example, art 4(1) of the 1971 Hague Convention (note 4); Montevideo Convention (note 7) art 2(2); Brussels I Regulation (note 6) art 35. In addition to conventions, the national laws of all SACU Member States provide that a judgment will not be enforced if the rendering court lacked international jurisdiction to do so: see Chapter 2, para 4.4.

<sup>79</sup> Oestreicher Y *Recognition and enforcement of foreign intellectual property judgments: analysis and guidelines for a new international convention* (Unpublished SJD Dissertation, Duke University School of Law, 2004) 188.

<sup>80</sup> Kessedjian Report (note 18) 8.

<sup>81</sup> Brand (note 14) 192.

<sup>82</sup> Brand (note 14) 192.

<sup>83</sup> Juenger KF 'A Hague Judgments Convention?' (1998) 24 *Brooklyn Journal of International Law* 118; Von Mehren (note 10) 19.



listed among those that predestine judgments to recognition.<sup>84</sup> There is consequently a ‘grey zone’ of jurisdictional bases between the recognised and the impermissible heads of jurisdiction.<sup>85</sup>

### 1.2.1 *Advantages of a double convention*

A double convention has certain advantages when compared to a single instrument:

- i. It provides more information and predictability by setting out the acceptable and unacceptable grounds of jurisdiction that would be applicable in each State Party.<sup>86</sup>
- ii. It facilitates the recognition and enforcement of judgments, saving both in time and expense because it relies to a greater extent than a single convention on the findings made by the original court.<sup>87</sup>
- iii. It offers a regime more evenly balanced between plaintiffs and defendants. Single conventions afford defendants no protection where a judgment can be enforced in the State of origin or in another State under the latter’s general law of recognition and enforcement. Double conventions, at the minimum, abort actions based on exorbitant bases of jurisdiction.<sup>88</sup>
- iv. A double convention establishes uniform rules of jurisdiction for all rendering courts and facilitates increased harmonisation of laws,<sup>89</sup> provides greater legal certainty,<sup>90</sup> avoid discrimination and facilitate the free movement of judgments.<sup>91</sup>

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<sup>84</sup> Juenger (note 83) 119.

<sup>85</sup> Von Mehren (note 10) 19; Woestehoff K ‘The drafting process for a Hague Convention on jurisdiction and judgments with special consideration of intellectual property and e-commerce’ *LLM Thesis* University of Georgia School of Law available at [http://digitalcommons.law.uga.edu/stu\\_llm/54](http://digitalcommons.law.uga.edu/stu_llm/54) (accessed 5 September 2012) 36.

<sup>86</sup> Nygh & Pocar Report (note 51) 27.

<sup>87</sup> The judge of a rendering court may not hear the case if the jurisdiction asserted is prohibited by the Convention. Since the rules established by such a Convention apply indirectly of any procedure for recognition and enforcement, the reviewing function of the recognising court is greatly reduced: see Bartlett (note 70) 46.

<sup>88</sup> Von Mehren (note 10) 24.

<sup>89</sup> Conventions based on direct jurisdiction lay down common rules of jurisdiction, thus bringing about the harmonisation of laws, whereas under those based on indirect jurisdiction, national provisions apply, without restriction, in determining international jurisdiction in each State.

<sup>90</sup> Legal certainty is most effectively secured by conventions based on direct jurisdiction since, under them, judgments are given by courts deriving their jurisdiction from the conventions themselves; however, in the case of conventions based on indirect jurisdiction, certain judgments cannot be recognised and enforced abroad unless national rules of jurisdiction coincide with the rules of the convention.

<sup>91</sup> Jenard P ‘Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (signed at Brussels, 27 September 1968)’ (1979) *Official Journal of the European Communities* No. C 59/1 (5 March 1979) (‘Jenard Report’) 7.

- v. Forum shopping is significantly restricted under a double convention as jurisdiction can only be exercised on bases set out in the convention.<sup>92</sup>
- vi. A double convention would by itself in due course provide an important incentive to litigate in courts whose judgments would, under the convention qualify for recognition and enforcement. Consequently, a negative list, which obliges Contracting States to refuse the recognition and enforcement of judgments based on certain grounds of jurisdiction considered to be ‘exorbitant’, would be less necessary.<sup>93</sup>

The mixed model also offers distinct advantages over the single convention model: it offers both parties significant informational advantage: a plaintiff need only consult the ‘white list’ to know where he can sue and where the resulting judgment will be recognised and enforced.<sup>94</sup> Likewise, a defendant can easily ascertain that certain exorbitant jurisdictional bases are not available to the plaintiff. Additionally, a mixed convention provides both plaintiffs and defendants with substantive guarantees with respect to the exercise of jurisdiction; a plaintiff can count on the availability of certain jurisdictional bases; and a defendant is protected against ‘exorbitant’ jurisdictional claims.<sup>95</sup>

A mixed convention best suits participating states within a region that ‘have become to a significant extent economically inter-dependent but do not aspire to political or economic union’.<sup>96</sup> Parties, who initially conclude a single enforcement convention, may, when the States within a region become more integrated with each other, consider developing the convention into a mixed convention.<sup>97</sup> As a further step, regions may consider reducing the permitted jurisdiction grounds in the mixed convention, and change it into a double convention.<sup>98</sup>

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<sup>92</sup> Von Mehren (note 18) 286.

<sup>93</sup> Hague Conference (note 48) para 15.

<sup>94</sup> Von Mehren (note 10) 24.

<sup>95</sup> Von Mehren AT ‘Recognition and Enforcement of Foreign Judgments: A New Approach for the Hague Conference?’ (1994) 57(3) *Law and Contemporary Problems* 287.

<sup>96</sup> Von Mehren AT *Adjudicatory Authority in Private International Law (The Hague Academy of International Law Monographs)* (2007) 355.

<sup>97</sup> Huang (note 47) 290.

<sup>98</sup> Von Mehren (note 96) 355-6; Von Mehren (note 62) 195.

### 1.2.2 *Pure and mixed double conventions: comparative advantages*

Pure double conventions provide clear, easily accessible information as to where an action can be brought and where it cannot be brought, and enjoy an informational advantage over mixed conventions as under a mixed convention's permitted jurisdictional areas, uncertainty will remain as to whether a judgment will be entitled to recognition and enforcement in a particular State.<sup>99</sup> By reading a pure double convention's text potential litigants can determine immediately where they can sue or be sued, subject only to possible questions of interpretation, and the availability of recognition and enforcement of any resulting judgment.<sup>100</sup>

Similar to a double convention, a mixed convention also improves clarity, predictability and simplicity, in two basic situations: (i) where jurisdiction could be assumed on a basis contained in the 'white list'; and (ii) where the only jurisdictional basis available is a 'black-listed' basis. In other situations, study of each potential forum's general law will be necessary to determine where a suit can be brought and whether recognition and enforcement is available under the general law of the jurisdiction where it may be sought. As for the first two grounds, a mixed convention has the same potential for clarity, predictability and simplicity as a double convention. The situation within the 'grey zone' is, however, as muddled as that which exists in the absence of treaty regulation.<sup>101</sup>

Adoption of a mixed convention would leave many difficult issues unresolved; however, these issues arise for pure double-conventions as well. For example, to what extent, if at all, will forum non conveniens stays or dismissals of proceedings be allowed when a required jurisdictional basis is in question? Will the convention accept the lis pendens<sup>102</sup> principle and, if so, how will it apply to proceedings in which a party is seeking a declaratory judgment?<sup>103</sup>

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<sup>99</sup> Von Mehren (note 10) 23.

<sup>100</sup> Von Mehren (note 10) 23.

<sup>101</sup> Von Mehren (note 18) 283.

<sup>102</sup> The doctrine of lis pendens applied mainly by civil law countries and requires a court to stay (suspend) or dismiss proceedings if another court has been seized first in proceedings involving the same cause of action between the same parties. It is not discretionary, does not involve the weighing up of relevant factors to determine the more appropriate court and applies only when proceedings have already been commenced in the other court: Hartley Dogauchi Report (note 32) 44; see for example art 27 of Brussels I Regulation (note 6) which request any court other than the court first seized to stay its proceedings of its own motion and to decline jurisdiction if the jurisdiction of the court first seized is established

<sup>103</sup> Von Mehren (note 10) 28.

A double convention, in contrast to a single convention, is appropriate where the countries involved have relatively common legal traditions and cultures, and where a neutral institution can control the interpretation of the Convention and ensure that all Member States act according to their obligations.<sup>104</sup> This type of arrangement generally requires that member states share strong political alliances and an overarching court that can control the interpretation and application of the convention.<sup>105</sup> A mixed convention, on the other hand, better suits situations where these conditions are lacking. A mixed convention comes into consideration where there is neither a sufficiently compelling sense of interdependence nor a supranational institution that serves as legal guard.<sup>106</sup>

### 1.2.3 Comparative disadvantages of pure and mixed double conventions

In a perfect world, where everyone shares the same interests and follows the same agenda, the double convention model would have been the ultimate solution, because it provides certainty and an element of predictability that is so important in the business world.<sup>107</sup> We do not live in a perfect world and consequently there are many conflicting interests, economic, cultural and political, that make it difficult for countries to reach mutual understanding on the international recognition and enforcement of judgments.<sup>108</sup>

Agreement on the particularised and *exclusive* list of jurisdictional bases that a true double convention requires may be very difficult to obtain: it requires a high degree of consensus on what the required grounds of jurisdiction ought to be and it also requires Contracting States to alter their national laws relating to international jurisdiction in accordance with the provisions of the Convention. The obligations facing Contracting States can, therefore, be substantial.<sup>109</sup> The issue of international competence is one of the major practical stumbling blocks preventing the creation of a successful international recognition and enforcement convention. The lack of agreement on the issue has been ascribed as the most significant reason for why

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<sup>104</sup> In the case of the Brussels regime, this neutral institution is the ECJ, although it did not at the time of concluding the Brussels convention have the power to review jurisdictional issues; it only received this power after the adoption of a Protocol that gave it the power to be the last instance in terms of the interpretation of the Convention: see Woestehoff (note 85) 24; Huang (note 47) 291; Von Mehren (note 62) 43.

<sup>105</sup> Huang (note 47) 291. See also para 1.1.2 above, where it was suggested that in the absence of a court of final review, States will have the power to review the merits of the case.

<sup>106</sup> Von Mehren (note 62) 198.

<sup>107</sup> Oestreicher (note 16) 351.

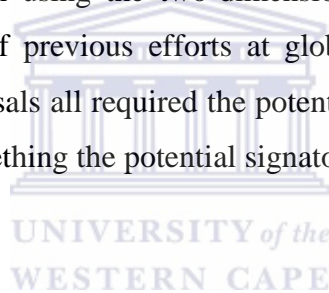
<sup>108</sup> Oestreicher (note 16) 351.

<sup>109</sup> Nygh & Pocar Report (note 51) 27.

we currently do not have an international instrument regulating the recognition and enforcement of foreign judgments.<sup>110</sup> There are some circumstances where one legal order has strong reasons for claiming adjudicatory authority while another has, from its perspective, strong reasons for refusing recognition of the resulting judgment. These tensions may, in many cases, be too deeply rooted to be resolved in the ‘either-or’ fashion of a true double convention.<sup>111</sup>

One of the problems which the Hague Conference foresaw with a double convention when negotiations for a new convention began, is that unless the new grounds of jurisdictions were framed very close to those of the Lugano Convention, some reluctance on the part of some of the Lugano countries could be expected.<sup>112</sup>

Many critics of the double conventions, despite its successes, on a regional level believe that efforts to conclude a convention using the two-dimensional approach is the fundamental mistake leading to the failure of previous efforts at global regulation of recognition and enforcement.<sup>113</sup> The failed proposals all required the potential members to agree on bases for the assertion of jurisdiction, something the potential signatories and participants were not in a position to do.<sup>114</sup>



### 1.3 Analysis

It can be concluded from the discussions above that bilateral arrangements may be the first steps beyond unsatisfactory pure domestic laws on recognition and enforcement. The next

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<sup>110</sup> Oestreicher (note 79) 188. However, that this is in fact possible has been illustrated by the EU example and the Brussels I Regulation. What is therefore to be determined in this instance is whether the same drive and desire for economic integration that resulted in the Brussels I Regulation is in fact present on the sub-continent.

<sup>111</sup> Von Mehren (note 15) 724.

<sup>112</sup> Hague Conference ‘Some reflections of the Permanent Bureau on a general convention on enforcement of judgments’ *Preliminary Document No 17 of May 1992* (1992) 234. The Permanent Bureau felt that the format of a single convention would avoid these difficulties, the EC or EFTA countries would be less under pressure to stick as closely as possible to the Brussels or Lugano Convention texts, and the development of new non-exorbitant jurisdictional grounds could continue. At the same time, if the Convention were to be broadly ratified, the indirect grounds of jurisdiction would acquire international respectability which would have the effect of fostering uniformity. In short, a good simple convention would have many of the same advantage as the mixed convention, while avoiding its inconveniences.

<sup>113</sup> Oestreicher (note 16) 341.

<sup>114</sup> Oestreicher (note 16) 343-4. The reasons for this included the wide differences in the existing rules of jurisdiction in different States and the unforeseeable effects of technological developments, including the internet, on the jurisdictional rules that might be laid down in the Convention: Hartley Doguchi Report (note 32) 16.

stage might be the establishment of a multilateral convention on recognition and enforcement of foreign judgments.<sup>115</sup>

A judgment agreement providing for regularity, and thus ease of enforcement, will transcend different legal systems and national cultures. Signatory countries may have to sacrifice laws or parts of their systems in order to reach an agreement. Such an agreement will represent the common ground of signatory States' legal systems.<sup>116</sup> Negotiating States will be faced with complex challenges on how to resolve the major challenges confronting interregional rules on recognition and enforcement, including conflicts between civil law and common law; and low levels of trust.<sup>117</sup>

What will be of critical importance for the negotiators of a possible recognition and enforcement convention is choosing the most suitable form of the instrument for the Member States of the SACU, taking into account the specific historical, political, cultural and socio-economic differences between the States. The critical importance of these factors can be illustrated by the Brussels I Regulation: while it has achieved tremendous success in the EU, some authors<sup>118</sup> attribute the failure of the 2004 attempt by the Hague Conference to create a mixed convention to the fact that it used the Brussels double convention as model and ignored the economic, political, cultural and social background differences among the negotiating parties.<sup>119</sup> Shared interests may, to a certain extent, also be the very reason for, and explanation of, the success of the Brussels Convention/Regulation and Lugano Convention, of which the participants, at least in recent years, pursued a similar agenda, of social, political, cultural and economic interests.<sup>120</sup> These instruments were fairly successful despite the fact that they were drafted as double conventions, addressing the complex issue of

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<sup>115</sup> Oppong RF *Relational issues of law and economic integration in Africa: perspectives from constitutional, public and private international law* (Unpublished Doctoral Thesis, Vancouver: University of British Columbia, 2009) 279.

<sup>116</sup> Fastiff EB 'The Proposed Hague Convention on Recognition and Enforcement of Foreign Judgments: A solution to Butch Reynolds' jurisdiction and enforcement problems' (1995) *Conwell International Law Review* 477.

<sup>117</sup> Huang (note 47) 42.

<sup>118</sup> Oestreicher (note 16) 349; Von Mehren AT 'Drafting a convention on international jurisdiction and the effects of foreign judgments acceptable world-wide: Can the Hague Conference Project succeed?' (2001) 49 *American Journal of Comparative Law* 196.

<sup>119</sup> Oestreicher (note 16) 349; Von Mehren (note 118) 199.

<sup>120</sup> Oestreicher (note 16) 347.



direct jurisdiction, since the signatories shared substantially similar interests and were thus motivated to participate.<sup>121</sup>

Although a simple convention would be the easiest to conclude, and, therefore, the most likely option to succeed, it will not circumvent the issue of jurisdiction in its entirety. Where a double convention *can* be agreed to between States, it is suggested that this should be the preferred solution, as it will offer litigants and traders a great degree of legal certainty. The likelihood and intensity of tensions in reaching agreement upon the exclusive list of jurisdictional bases that a true double convention requires, increases as a function of the differences between the social, sociological, political, and economic cultures of the legal orders in question. Grouping of States that have relatively common backgrounds and cultures can often resolve these conflicts in favour of unqualified acceptance or unqualified rejection of the basis in question; this may be especially so where the States aspire to a more closely knit legal, economic, and political order.<sup>122</sup>

Should agreement not be reached on bases of jurisdiction, a single convention may under the circumstances be a feasible route. Comparatively speaking, a single convention with indirect jurisdiction grounds may be easier for States to agree upon than concluding an arrangement on direct jurisdiction. This is because it leaves direct jurisdiction to national laws, and it can use denying recognition and enforcement to discourage parties from litigating on exorbitant direct jurisdiction grounds.<sup>123</sup> A single convention with indirect jurisdictional bases may pave the way for the regions to develop a mixed or double convention regulating both direct and indirect jurisdiction in the long run.<sup>124</sup> It is, therefore, submitted that this should be the approach followed by the SACU.

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<sup>121</sup> Oestreicher (note 16) 348. The sharing of similar interest and political will will be one of the deciding factors in the relative success in drafting a recognition and enforcement instrument for the SACU. It remains to be seen whether economic integration in the sub-region and the objectives of the African Economic Community will be sufficient to ensure the success of a future instrument.

<sup>122</sup> Von Mehren (note 15) 724.

<sup>123</sup> Kessedjian Report (note 18) 138.

<sup>124</sup> Huang (note 47) 302. Whatever the type of convention adopted, it will present a dramatic improvement of the current recognition and enforcement regime in SACU, as it States' legal obligation will be based on international law, and not the arbitrary designation of States by the administrative under that State's national law: see Chapter 2 para 4.6 above for a discussion of the requirement of reciprocity and designation under the national laws of SACU Member States; Chapter 5 below for proposals for a recognition and enforcement convention for the SACU.

In negotiating a new instrument on recognition and enforcement for the SACU<sup>125</sup> negotiating parties may want to consider whether there is anything to be learnt from other regional or international efforts insofar as recognition and enforcement are concerned.<sup>126</sup> Two international conventions, namely the 1971 Hague Judgments Convention,<sup>127</sup> and the 2005 Hague Choice of Court Conventions,<sup>128</sup> as well as two regional examples, namely the EU Brussels I Regulation/Convention<sup>129</sup> and the 1979 OAS Montevideo Convention<sup>130</sup> are considered.

#### 1.4 Variations on traditional convention types

The above discussion shows that there are three basic forms that a judgments-recognition convention may take: single, double and mixed. A single convention focuses solely on recognition and enforcement, listing the bases for jurisdiction that will entitle a judgment to recognition, but permitting judgments on other bases that a contracting state may, in its discretion, enforce.<sup>131</sup> A double convention lists the exclusive bases for jurisdiction, a 'white list', and may also contain a list of prohibited bases for jurisdiction, a 'black list'.<sup>132</sup> A mixed convention contains a white list, perhaps a black list and also provides that a signatory may, but need not, recognise judgments on bases not on either the white or black lists, the 'grey' list.<sup>133</sup>

Variations on these forms combining both the first and second understanding of the concepts of single and double conventions<sup>134</sup> suggest that there are at least seven major possibilities for recognition and enforcement of foreign judgment conventions, and not only the traditional three convention types:<sup>135</sup>

- i. The issue of jurisdiction is not dealt with and Contracting States agree to recognise any judgment that is valid under the standards of the rendering State, i.e. States agree

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<sup>125</sup> See proposals to this effect made in Chapter 5.

<sup>126</sup> Hague Conference (note 39) 14.

<sup>127</sup> See para 2 below.

<sup>128</sup> See para 3 below.

<sup>129</sup> See para 4 below.

<sup>130</sup> See para 5 below.

<sup>131</sup> See para 1.1 above.

<sup>132</sup> See para 1.2 above.

<sup>133</sup> See para 1.2 above.

<sup>134</sup> See para 1 above.

<sup>135</sup> Weintraub (note 17)185.

to recognise and enforce judgments provided the rendering court had jurisdiction in terms of the domestic laws of the rendering State;<sup>136</sup>

- ii. The issue of jurisdiction is not dealt with and a signatory State must recognise a foreign judgment that meets the requested State's domestic jurisdictional standards, i.e. States agree to recognise and enforce judgments provided the rendering court had jurisdiction in terms of the domestic laws of the requested State;
- iii. The Convention contains no black list, but an exclusive white list, and judgments on other bases may not be recognised. This is the traditional pure double convention form, but negotiating parties would not necessarily be required to agree on specific jurisdictional grounds to be on the black list – everything not on the white list is on an 'implied' black list;
- iv. The Convention contains no black list and permits recognition of judgments that are not on its white list (therefore, containing only a 'white' and an implied 'grey' list);
- v. The Convention contains a black list and a white list and these lists apply exclusively to judgments entitled to recognition, but for domestic purposes, signatories are free to exercise jurisdiction even on black lists basis;
- vi. The Convention contains black and white lists that are mandatory if the defendant is domiciled in a signatory State, but not if the defendant is a non-domiciliary (the Brussels Convention is in this form);<sup>137</sup>
- vii. The Convention contains a black list and a white list, but signatories free to adjudicate on other bases not on the black list and other signatories may, but need not, enforce such judgments ('grey' jurisdiction) – this is the traditional 'mixed convention' form.

The larger number of types available for recognition and enforcement conventions may increase the likelihood of success for negotiating parties attempting to conclude a new judgment-enforcement convention. For example, if States are unable to reach agreement on the prohibited bases of jurisdiction required for a traditional double or mixed convention, the fourth or fifth examples above may be considered as alternative options.<sup>138</sup>

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<sup>136</sup> It may be unlikely that any country would ratify such a convention: see Weintraub (note 17) 185.

<sup>137</sup> Weintraub (note 17) 185.

<sup>138</sup> See Chapter 4 below.

## 2 THE HAGUE CONVENTION ON RECOGNITION AND ENFORCEMENT

The Hague Convention adopted the Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters on 1 February 1971 (hereafter the ‘1971 Hague Convention’),<sup>139</sup> which was the first attempt at harmonising the recognition and enforcement of foreign judgments at an international level.

The 1971 Hague Convention, complemented by a Supplementary Protocol of the same date, deals with judgments in civil and commercial matters generally. The Convention provides for mutual recognition and enforcement of judicial decisions rendered in the respective Contracting States. It does not directly regulate the assumption of jurisdiction<sup>140</sup> by the rendering court.<sup>141</sup>

The Convention and its Protocol have remained inoperative, however, due to the fact that the Contracting States have not concluded the Supplementary Agreements required by Article 21 of the Convention, a necessary condition for the recognition and enforcement of judgments between State Parties.<sup>142</sup> The failure of the 1971 Hague Convention to come into effect was most likely not due to any intrinsic qualities of the Convention, but influenced by a number of factors, the first of which is the complicated formal structure of the Convention (Convention, Protocol and Bilateral Supplementary Agreements) some aspects of which is explained below.<sup>143</sup>

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<sup>139</sup> See note 4.

<sup>140</sup> Conventions dealing with the recognition and enforcement of foreign judgments are generally categorised into two forms, based on whether they regulate the assumption of jurisdiction in the rendering (original) court (in which case it would be a double convention), or whether the convention only regulate the recognition and enforcement of the judgment, and incidentally the circumstances in which a court would have deemed to have had jurisdiction for the purposes of recognition and enforcement, in which case it would be a simple convention. See Chapter 4, para 2.

<sup>141</sup> Hague Conference (note 39) 3-4.

<sup>142</sup> Article 21 provides that decisions rendered in a Contracting States will not be recognised or enforced in another Contracting State unless the two States, being Parties to the Convention, have concluded a Supplementary Agreement to this effect. There are only five Contracting States to this Convention, namely Albania, Cyprus, the Netherlands, Portugal, and Kuwait: see Hague Conference ‘Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters’ available at [http://www.hcch.net/index\\_en.php?act=conventions.status&cid=78](http://www.hcch.net/index_en.php?act=conventions.status&cid=78) (accessed 20 May 2013). Only Cyprus, Netherlands and Portugal Ratified the Convention. As between the Netherlands and Portugal, the provisions of the Hague Convention have been replaced by those of the Brussels I Regulation: see Michaels R ‘Recognition and enforcement of foreign judgments’ *Max Plank Encyclopaedia of Public International Law* (2009) 4.

<sup>143</sup> See para 6 below.

The material scope of the Convention; the procedural requirements for recognition and enforcement, and the grounds for refusing to recognise or enforce a foreign judgment are now discussed.

## **2.1 Material scope of application of Convention**

The 1971 Hague Convention applies to decisions rendered in civil or commercial matters by the courts of Contracting States.<sup>144</sup> The Convention applies to all decisions given by the courts of a Contracting State, irrespective of the name given by that State to the proceedings which gave rise to the decision or of the name given to the decision itself, be it judgment, order or writ of execution.<sup>145</sup> The Convention applies irrespective of the nationality of the parties.<sup>146</sup>

It does not apply to a decision which has as its main object determining the status or capacity of persons or questions of family law;<sup>147</sup> the existence or constitution of legal persons or the powers of their officers;<sup>148</sup> maintenance obligations;<sup>149</sup> questions of succession;<sup>150</sup> questions of bankruptcy, compositions or analogous proceedings;<sup>151</sup> questions of social security;<sup>152</sup> and questions relating to damage or injury in nuclear matters.<sup>153</sup> The Convention also does not apply to decisions for the payment of any customs duty, tax or penalty.<sup>154</sup>

## **2.2 Procedural requirements for enforcement**

A decision rendered in a Contracting State will be entitled to recognition and enforcement in another Contracting State, provided that the decision was given by a court considered to have jurisdiction within the meaning of the Convention (indirect jurisdiction); and that it is no longer subject to ordinary forms of review in the State of origin. In addition, to be

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<sup>144</sup> Hague Convention (note 4) art 1.

<sup>145</sup> Hague Convention (note 4) art 2. However, it does not apply to decisions which order provisional or protective measures or to decisions rendered by administrative tribunals.

<sup>146</sup> Hague Convention (note 4) art 3.

<sup>147</sup> Hague Convention (note 4) art 1(1).

<sup>148</sup> Hague Convention (note 4) art 1(2).

<sup>149</sup> Hague Convention (note 4) art 1(3).

<sup>150</sup> Hague Convention (note 4) art 1(4).

<sup>151</sup> Hague Convention (note 4) art 1(5).

<sup>152</sup> Hague Convention (note 4) art 1(6).

<sup>153</sup> Hague Convention (note 4) art 1(7).

<sup>154</sup> Hague Convention (note 4) art 1.

enforceable in the State addressed, a decision must also be enforceable in the State of origin.<sup>155</sup>

Article 13 of the 1971 Hague Convention lists the documents that a party seeking recognition or applying for enforcement must furnish.<sup>156</sup> The article further provides that no legalisation or other like formality may be required.<sup>157</sup>

The procedure for the recognition or enforcement of foreign judgments is governed by the law of the State addressed, in so far as the Convention does not provide otherwise.<sup>158</sup>

### **2.3 Grounds for refusal to recognise or enforce**

Recognition or enforcement of a decision may be refused under the Convention if the decision is manifestly incompatible with the public policy of the State addressed; resulted from proceedings incompatible with the requirements of due process of law; either party had no adequate opportunity to fairly present his case; or if the decision was obtained by fraud in connection with a matter of procedure.<sup>159</sup> Recognition and enforcement may also be refused if proceedings between the same parties, based on the same facts and having the same purpose -

- a) are pending before a court of the State addressed and those proceedings were the first to be instituted;
- b) have resulted in a decision by a court of the State addressed; or

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<sup>155</sup> Hague Convention (note 4) art 4. Recognition and enforcement may nevertheless be refused in a number of cases, discussed in para 2.3

<sup>156</sup> The party seeking recognition or applying for enforcement must furnish –

- (1) a complete and authenticated copy of the decision;
- (2) if the decision was rendered by default, the originals or certified true copies of the documents required to establish that the summons was duly served on the defaulting party;
- (3) all documents required to establish that the decision fulfils the conditions of sub-paragraph (2) of the first paragraph of Article 4, and, where appropriate, of the second paragraph of Article 4; (Article 4 provides that a decision rendered in one of the Contracting States shall be entitled to recognition and enforcement in another Contracting State under the terms of this Convention – (1) if the decision was given by a court considered to have jurisdiction within the meaning of this Convention, and (2) if it is no longer subject to ordinary forms of review in the State of origin. In addition, to be enforceable in the State addressed, a decision must be enforceable in the State of origin.)
- (4) unless the authority addressed otherwise requires, translations of the documents referred to above, certified as correct either by a diplomatic or consular agent or by a sworn translator or by any other person so authorised in either State: art 13.

<sup>157</sup> Hague Convention (note 4) art 13.

<sup>158</sup> Hague Convention (note 4) art 14.

<sup>159</sup> Hague Convention (note 4) art 5.



- c) have resulted in a decision by a court of another State which would be entitled to recognition and enforcement under the law of the State addressed.<sup>160</sup>

The 1971 Hague Convention includes rules on indirect jurisdiction, providing that in questions relating to the jurisdiction of the rendering court, the requested State is bound by the findings of fact on which the court based its jurisdiction, unless the decision was rendered by default.<sup>161</sup> The Convention includes both grounds in which the rendering courts will be considered to have had jurisdiction,<sup>162</sup> as well as grounds on which the requested court need not recognise the jurisdiction of the rendering court.<sup>163</sup> The Supplementary Protocol requires the Contracting States to refuse recognition and enforcement of judgments based on certain exorbitant grounds of jurisdiction, rendered against persons located in a Contracting State.<sup>164</sup>

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<sup>160</sup> Hague Convention (note 4) art 5.

<sup>161</sup> Hague Convention (note 4) art 9.

<sup>162</sup> The grounds are as follows:

- (1) If the defendant had his habitual residence in the State of origin, or, if the defendant is not a natural person, its seat, its place of incorporation or its principal place of business in that State;
- (2) if the defendant had, in the State of origin a commercial, industrial or other business establishment, or a branch office;
- (3) if the action had as its object the determination of an issue relating to immovable property situated in the State of origin;
- (4) in the case of injuries to the person or damage to tangible property, if the damage occurred in the territory of the State of origin;
- (5) if the parties agreed to submit to the jurisdiction of the court of origin, unless the law of the State addressed would not permit such an agreement because of the subject-matter of the dispute;
- (6) if the defendant has argued the merits without challenging the jurisdiction of the court except to resist the seizure of property or to obtain its release, or if the recognition of this jurisdiction would be contrary to the law of the State addressed because of the subject-matter of the dispute;
- (7) if the person against whom recognition or enforcement is sought was the plaintiff in the proceedings in the court of origin and was unsuccessful in those proceedings: see Hague Convention (note 4) art 10.

<sup>163</sup> These are the following:

- (1) If the law of the State addressed confers upon its courts exclusive jurisdiction;
- (2) if the law of the State addressed recognises a different exclusive jurisdiction by reason of the subject-matter of the action;
- (3) if the authority addressed considers itself bound to recognise an agreement by which exclusive jurisdiction is conferred upon arbitrators: see Hague Convention (note 4) art 12.

<sup>164</sup> Supplementary Protocol to the Hague Convention on the Recognition and Enforcement of Foreign Judgments (1971) art 2. The grounds of jurisdiction in which instance the recognition of a judgment will be refused, are the following:

- a) the presence in the territory of the State of origin of property belonging to the defendant, or the seizure by the plaintiff of property situated there, unless –
  - the action is brought to assert proprietary or possessory rights in that property, or arises from another issue relating to such property,
  - the property constitutes the security for a debt which is the subject-matter of the action;
- b) the nationality of the plaintiff;
- c) the domicile, habitual residence or ordinary residence of the plaintiff within the territory of the State of origin unless the assumption of jurisdiction on such a ground is permitted by way of an exception made on account of the particular subject-matter of a class of contracts;
- d) the fact that the defendant carried on business within the territory of the State of origin, unless the action arises from that business;

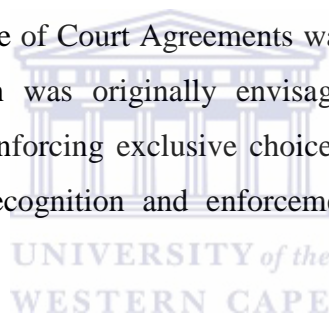
A decision rendered by default will not be recognised or enforced unless the defaulting party received notice of the institution of the proceedings, in accordance with the law of the State of origin in sufficient time to enable him to defend the proceedings.<sup>165</sup>

Recognition or enforcement may not be refused for the sole reason that the court of the State of origin has applied a law other than that which would have been applicable according to the rules of private international law of the State addressed.<sup>166</sup>

Review of the merits of the decision rendered by the court of origin is not allowed.<sup>167</sup>

### 3 THE HAGUE CHOICE OF COURT CONVENTION

The Hague Convention on Choice of Court Agreements was finally born on 30 June 2005: a much narrower instrument than was originally envisaged.<sup>168</sup> The Convention provides uniform international rules for enforcing exclusive choice of court commercial agreements between parties, and for the recognition and enforcement of judgments resulting from



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*e)* service of a writ upon the defendant within the territory of the State of origin during his temporary presence there;

*f)* a unilateral specification of the forum by the plaintiff, particularly in an invoice (art 4).

<sup>165</sup> Hague Convention (note 4) art 6.

<sup>166</sup> Hague Convention (note 4) art 7. Nevertheless, recognition or enforcement may be refused if, to reach its decision, the court of the State of origin had to decide a question relating either to the status or the capacity of a party or to his rights in other matters excluded from this Convention by sub-paragraphs (1)-(4) of the second paragraph of Article 1, and has reached a result different from that which would have followed from the application to that question of the rules of private international law of the State addressed.

<sup>167</sup> Hague Convention (note 4) art 8.

<sup>168</sup> The origins of the project that eventually led to the Convention can be traced to the proposal of the USA (see Chapter 2, para 2.1.2). After initial discussions, it was decided that a worldwide convention on jurisdiction and judgments, negotiated within the framework of the Hague Conference was the best way forward. Although the mixed convention approach originally suggested by Von Mehren was supported by the initial Working Group on the project, it became apparent as work proceeded that it would not be possible to draw up a satisfactory text for a mixed convention within a reasonable period of time. In order to draw a way forward, it was decided that the Permanent Bureau should prepare a text to submit to a Special Commission, and that the starting point for this process should be such core areas such as jurisdiction based on choice of court agreements in business-to-business cases, (which became the core scope of the final convention); submission; defendant's forum; counterclaims; trust; physical torts and certain other possible grounds. After further meetings, the Informal Working Group proposed that the objectives should be scaled down to a convention on choice of court agreements in commercial cases. In general, the Member States viewed this proposed Convention as achieving for such agreements and the resulting judgments what the New York Convention accomplishes for agreements to arbitrate and the resulting awards: Hartley Doguchi Report (note 32) 16-17.

proceedings based on such agreements.<sup>169</sup> As Mexico is at this stage the only Contracting State which has ratified the Convention, it has not yet entered into force.<sup>170</sup>

As was the case with the previous instrument, the scope of the Convention, the procedural requirements for recognition and enforcement of a judgment under the Convention, and the grounds for refusing to recognise or enforce a foreign judgment are now discussed.

### 3.1 Material scope of Choice of Court Convention

The substantive scope of the Convention is limited in a number of ways: it only applies in ‘international cases’;<sup>171</sup> ‘exclusive choice of court agreements’;<sup>172</sup> and ‘agreements concluded in civil or commercial matters’.<sup>173</sup> The placement of non-exclusive choice of court agreements outside the ambit of the Convention is, however, to some extent mitigated by the fact that the Convention presumes agreements to be exclusive unless the parties have expressly provided otherwise,<sup>174</sup> and that Contracting States may make a declaration that they will recognise and enforce judgments given by courts of other Contracting States designated in a non-exclusive choice of court agreement.<sup>175</sup>

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<sup>169</sup> Heiser WW ‘The Hague Convention on Choice of Court Agreements: The impact on forum non conveniens, transfer of venue, removal, and recognition of judgments in United States Courts’ (2010) 31(4) *University of Pennsylvania Journal of International Law* 1033.

<sup>170</sup> In terms of Article 31, the Convention will enter into force on the first day of the month following the expiration of three months after the deposit of the second instrument of ratification. Although the EU and USA have both signed the convention, they have not yet ratified it. Hague Conference ‘Status Table 37: Hague Convention on Choice of Court Agreements’ available at [http://www.hcch.net/index\\_en.php?act=conventions.status&cid=98](http://www.hcch.net/index_en.php?act=conventions.status&cid=98) (accessed 1 October 2012).

<sup>171</sup> Hague Convention (note 5) art 1(1). A case is international unless the parties are resident in the same Contracting State and the relationship of the parties and all other elements relevant to the dispute, regardless of the location of the chosen court, are connected only with that State: see art 1(2).

<sup>172</sup> This term is defined as an agreement by two or more parties that is concluded or documented in writing; or by any other means of communication which renders information accessible so as to be usable for subsequent reference; and designates, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, the courts of one Contracting State or one or more specific courts of one Contracting State to the exclusion of the jurisdiction of any other courts. A choice of court agreement which designates the courts of one Contracting State or one or more specific courts of one Contracting State shall be deemed to be exclusive unless the parties have expressly provided otherwise: Hague Convention (note 5) art 3.

<sup>173</sup> The concept has an autonomous meaning: it does not entail a reference to national law or other instruments. The limitation to civil or commercial matters is common in international conventions dealing with recognition and enforcement. However, certain matters that clearly fall within the class of civil or commercial matters are nevertheless excluded from the scope of the Convention under art 2: Hartley Dogauchi Report (note 32) 30. Article 2(5) however provides that proceedings are not excluded from the scope of the Convention by the mere fact that a State, including a government, a governmental agency or any other person acting for the State is a party thereto.

<sup>174</sup> Hague Convention (note 5) art 3(b).

<sup>175</sup> Hague Convention (note 5) art 22; Garnett R ‘The Hague Choice of Court Convention: Magnum Opus or Much ado about nothing?’ (2009) 5(2) *Journal of Private International Law* 164.

There are additional matters specifically excluded from the ambit of the Convention,<sup>176</sup> but art 2(3) makes it clear that these exclusions apply only where one of the matters referred to is an ‘object’ of the proceedings. This means that proceedings are not excluded from the scope of the Convention if one of these matters arises as a preliminary question in proceedings that have some other matter as their object or subject.<sup>177</sup> The reasons for these exclusions are that in some cases the public interest or that of third parties is involved, so that the parties may not have the right to dispose of the matter between them. In such cases a particular court will often have exclusive jurisdiction that cannot be ousted by means of choice agreement. There are also cases in which other multilateral legal regimes apply; so the Convention is not needed on those particular matters and it may complicate deciding which instrument would prevail if the Convention were to cover such an area.<sup>178</sup>

Recognition of regional economic and legal integration taking place around the world has resulted in the Convention specifically providing that Regional Economic Integration Organisations (REIOs) constituted solely by sovereign States and having competence over the matters governed by the Convention, may accede to the Convention.<sup>179</sup> The Convention also provides for accession by a REIO without its Member States.<sup>180</sup>

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<sup>176</sup> The Convention does not apply to the following matters: a) the status and legal capacity of natural persons; b) maintenance obligations; c) other family law matters; d) wills and succession; e) insolvency, composition and analogous matters; f) the carriage of passengers and goods; g) marine pollution, limitation of liability for maritime claims, general average, and emergency towage and salvage; h) anti-trust (competition) matters; i) liability for nuclear damage; j) claims for personal injury brought by or on behalf of natural persons; k) tort or delict claims for damage to tangible property; l) rights in rem in immovable property; m) the validity, nullity, or dissolution of legal persons, and the validity of decisions of their organs; n) the validity of certain intellectual property rights; o) infringement of intellectual property rights; and p) the validity of entries in public registers: Hague Convention (note 5) art 2(2)).

<sup>177</sup> Hartley Dogauchi Report (note 32) 31.

<sup>178</sup> Hartley Dogauchi Report (note 32) 31-33. Examples include the UN New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards on arbitration; the Hague Bills of Lading (‘Hague-Visby Rules’) on carriage of passengers or goods; and the Paris Convention in Third Party Liability in the Field of Nuclear Energy 1960, and its 2004 amendment, the Vienna Convention on Civil Liability for Nuclear Damage 1963; and the Convention on Supplementary Compensation for Nuclear Damage.

<sup>179</sup> Hague Convention (note 5) art 29. This might occur if the REIO and its Member States enjoy concurrent external competence over the subject matter of the Convention (joint competence), or if some matters fall within the external competence of the REIO and others within that of the Member States (which would result in shared or mixed competence for the Convention as a whole). To the extent that it has such external competence, the REIO has the same rights and obligations as a Contracting State.

<sup>180</sup> Hague Convention (note 5) art 30. This might occur where the REIO has exclusive competence over the subject matter of the Convention. In such a case the Member States would be bound by the Convention by virtue of the agreement of the REIO: Hartley Dogauchi Report (note 32) 81. For example, the EU, who as a REIO signed but not yet ratified the Convention, declared in accordance with art 30 of the Convention ‘exercises competence over all the matters governed by this Convention. Member States [excluding Denmark] will not sign, ratify, accept or approve the Convention, but shall be bound by the Convention by

### 3.2 Procedural requirements for recognition and enforcement

A judgment given by a designated court must be recognised and enforced in other Contracting States if it is enforceable in the State of origin.<sup>181</sup> Recognition and enforcement may be refused only on exceptional grounds.<sup>182</sup>

A court designated in an exclusive choice of court agreement must hear the case when seized of a dispute, and cannot refuse to hear it on the ground that a court of another State is more appropriate or that such a court was seized first.<sup>183</sup> The main exception is that the chosen court need not hear the case where the choice of court agreement is null and void under its law, including its choice-of-law rules.<sup>184</sup> A court in a Contracting State other than that of the chosen court must suspend or dismiss proceedings to which an exclusive choice of court agreement applies, subject to specific exceptions.<sup>185</sup>

The procedure for recognition, declaration of enforceability or registration for enforcement, and the enforcement of the judgment are governed by the law of the requested state unless the Convention provides otherwise, provided that the court addressed must use the most expeditious procedure available to it.<sup>186</sup> Where the law of the requested State makes no provision for the recognition (as distinct from enforcement) of a foreign judgment, a foreign judgment will be recognised automatically by operation of law, based on art 8 of the

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virtue of its conclusion by the European Community': see EU 'European Union Treaties Database' available online at <http://ec.europa.eu/world/agreements/reserveText.do?treatyId=7662> (accessed 15 February 2013).

<sup>181</sup> Hague Convention (note 5) art 8.

<sup>182</sup> Hague Convention (note 5) arts 8 and 9.

<sup>183</sup> Hague Convention (note 5) art 5. There are two legal doctrines on the basis of which a court might consider that the dispute should be decided in a court of another state: *forum non conveniens* and *lis pendens*, but none of these are permitted by the Convention. The *forum non conveniens* is mainly applied by common law countries, and although its precise formulation varies from country to country, it generally permits a court having jurisdiction to stay (suspend) or dismiss proceedings if it considers that another court would be a more appropriate forum. The granting of a stay or dismissal is discretionary and involves weighing up all the factors in the particular case. It applies irrespective of whether or not proceedings have been commenced in the other court, although this is a factor that may be taken into account. The second doctrine is that of *lis pendens* (see note 97 above).

<sup>184</sup> Hartley Dogauchi Report (note 32) 21; Heiser (note 169) 1034.

<sup>185</sup> A court of a Contracting State other than that of the chosen court must suspend or dismiss proceedings to which an exclusive choice of court agreement applies unless – the agreement is null and void under the law of the State of the chosen court; a party lacked the capacity to conclude the agreement under the law of the State of the court seized; giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to the public policy of the State of the court seized; for exceptional reasons beyond the control of the parties, the agreement cannot reasonably be performed; or the chosen court has decided not to hear the case: Hague Convention (note 5) art 6.

<sup>186</sup> Hague Convention (note 5) art 14; Hartley Dogauchi Report (note 32) 61.



Convention.<sup>187</sup> The grounds on which recognition or enforcement may be refused are governed exclusively by the Convention.<sup>188</sup>

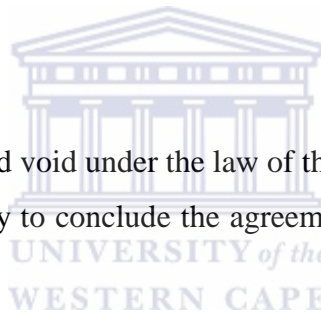
Article 13(1) lists the documents that must be produced by the party seeking recognition or enforcement of a judgment under the Convention.<sup>189</sup> If the documents are not in an official language of the requested State, they must be accompanied by a certified translation into an official language, unless the law of the requested State provides otherwise.<sup>190</sup>

### 3.3 Grounds for refusal to recognise or enforce

The Convention provides seven exceptions to the principle of recognition and where the exceptions apply the Convention do not require the court addressed to recognise or enforce the judgment, though it does not preclude it from doing so.<sup>191</sup> This is indicated by the use of ‘may’ rather than ‘shall’ in art 9.<sup>192</sup>

Recognition may be refused if -

- a. the agreement was null and void under the law of the State of the chosen court;<sup>193</sup>
- b. a party lacked the capacity to conclude the agreement under the law of the requested State;<sup>194</sup>



<sup>187</sup> Recognition or enforcement may be refused only on the grounds specified in the Convention. There will be no review of the merits of the judgment given by the court of origin. The court addressed is bound by the findings of fact on which the court of origin based its jurisdiction, unless the judgment was given by default. A judgment will be enforced only if it is enforceable in the State of origin. Recognition or enforcement may be postponed or refused if the judgment is the subject of review in the State of origin or if the time limit for seeking ordinary review has not expired. However, where the chosen court had discretion as to whether to transfer the case to another court, recognition or enforcement of the judgment may be refused against a party who objected to the transfer in a timely manner in the State of origin: see Hartley Dogauchi Report (note 32) 62).

<sup>188</sup> Hague Convention (note 5) art 8(1); Hartley Dogauchi Report (note 32) 62.

<sup>189</sup> (1) The party seeking recognition or applying for enforcement must produce –

- a) a complete and certified copy of the judgment;
- b) the exclusive choice of court agreement, a certified copy thereof, or other evidence of its existence;
- c) if the judgment was given by default, the original or a certified copy of a document establishing that the document which instituted the proceedings or an equivalent document was notified to the defaulting party;
- d) any documents necessary to establish that the judgment has effect or, where applicable, is enforceable in the State of origin;
- e) a certificate of a court of the State of origin that the judicial settlement or a part of it is enforceable in the same manner as a judgment in the State of origin.

<sup>190</sup> Hague Convention (note 5) art 13(4).

<sup>191</sup> Hague Convention (note 5) art 9.

<sup>192</sup> Hartley Dogauchi Report (note 32) 53.

<sup>193</sup> The purpose of this is to avoid conflicting rules on the validity of the agreement among different Contracting States: they are all required to apply the law of the State of the chosen court, and they must respect any ruling on the point by that court: Hartley Dogauchi Report (note 32) 54.



- c. the defendant did not receive proper notice of the proceeding to enable him to arrange for his defence; or the notification was delivered in a manner that is incompatible with fundamental principles of the requested State;
- d. the judgment was obtained by procedural fraud;<sup>195</sup>
- e. recognition or enforcement would be manifestly incompatible with the public policy of the requested State;
- f. the judgment is inconsistent with a judgment given in the requested State in a dispute between the same parties; and
- g. the judgment is inconsistent with an earlier judgment given in another State between the same parties on the same cause of action, provided that the earlier judgment fulfils the conditions necessary for its recognition in the requested State.<sup>196</sup>

Some of these grounds mirror the exceptions in art 6, for example, that the choice of court agreement is null and void under the law of the State of the chosen court, including its choice-of-law rules.<sup>197</sup>



<sup>194</sup> The wording of art 9(b) follows the wording in art 6(b), and although in both of these capacity is determined by the law of the forum, in art 9, unlike art 6 where it is a court before which proceedings inconsistent with the agreement are brought, the relevant forum is the court asked to recognise or enforce the judgment of the chosen court. This provision was included as the Conference considered it too ambitious to lay down choice-of-law rules on capacity: Hartley Dogauchi (note 32) 47. Since lack of capacity would also make the agreement null and void in terms of art 9(a), capacity is determined both by the law of the chosen court and by the law of the court seized: the choice of court agreement is null and void if a party lacked capacity under either law: Hartley Dogauchi (note 32) 54.

<sup>195</sup> Examples would be where the plaintiff deliberately serves the writ, or cause it to be served, on the wrong address; where the plaintiff deliberately gives the defendant wrong information as to the time and place of the hearing; or where either party seeks to corrupt a judge, juror or witness, or deliberately conceals key evidence: Hartley Dogauchi Report (note 32) 55.

<sup>196</sup> Hague Convention (note 5) art 9. Both subparagraphs (f) and (g) deal with the situation where there is a conflict between the judgment for which recognition and enforcement are sought under the Convention and another judgment given between the same parties. However, there is a difference in the way that they operate: sub-paragraph f) is concerned with the case where the inconsistent judgment was granted by a court in the requested State. In such a situation, that judgment prevails, irrespective of whether it was given first – the court addressed is permitted to give preference to a judgment from a court in its own State, even if that judgment was given after the judgment under the choice of court agreement. For this provision to apply, the parties must be the same, but it is not necessary for the cause of action to be the same. Sub-paragraph g) is concerned with the situation in which both judgments were given by foreign courts. Here, the judgment given under the choice of court agreement may be refused recognition and enforcement only if the following requirements are satisfied: first, the judgment under the choice of court agreement must have been given after the conflicting judgment, secondly, the parties must be the same, thirdly, the cause of action must be the same, and fourthly, the conflicting judgment must fulfil the conditions necessary for its recognition in the requested state: see Hartley Dogauchi Report (note 32) 55-6.

<sup>197</sup> Article 6(a) is reflected in art 9(a); art 6(b) is reflected in art 9(b); and art 6(c) is reflected in art 9(e): see Hague Convention (note 5).

The Interim Text left a number of issues unresolved failing consensus,<sup>198</sup> but it nevertheless contains some interesting provisions on which agreement was achievable, and which could be the basis for future work, such as *lis pendens*<sup>199</sup> and exceptional circumstances<sup>200</sup> for declining jurisdiction.<sup>201</sup>

Although the 2005 Convention is yet to enter into force, it may nevertheless offer valuable lessons as to the major stumbling blocks and possible solutions in the drafting of a recognition and enforcement instrument: it has been criticised as being too ambitious in the sense that the negotiators did not adequately comprehend the fundamental cultural, historical, and economic differences among societies, which form a barrier to agreement, and specifically on the jurisdiction issue, since many countries view the adoption of pre-determined jurisdiction rules as potential interference with their sovereignty.<sup>202</sup>

The Special Commission in its work presumed a higher degree of consensus among the Hague Conference Members than existed. They ignored the full implication of the

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<sup>198</sup> Areas in respect of which a lack of consensus created obstacles to progress include the internet and e-commerce, consumer and employment contracts, intellectual property rights, the relationship with other double Conventions, in particular the European instruments (the Brussels and Lugano Conventions), as well as the question of bilateralisation, i.e. whether the treaty relations under the multilateral instrument should be subject to a requirement of reciprocal acceptance between the State parties: see Hague Convention ‘Some reflections on the present state of negotiations on the judgments project in the context of the future work programme of the Conference’ *Preliminary Document No 16 of February 2002* (2002) 428-435 available online at [http://www.hcch.net/upload/wop/gen\\_pd16e.pdf](http://www.hcch.net/upload/wop/gen_pd16e.pdf) (accessed 15 February 2013).

<sup>199</sup> Article 21 provides that when the same parties are engaged in proceedings in courts of different Contracting States and when the proceedings are based on the same causes of action, irrespective of the relief sought, the court second seized must suspend the proceedings if the court first seized has jurisdiction under [the white list of permitted bases for jurisdiction] [or under a rule of national law which is consistent with these articles] and is expected to render a judgment capable of being recognised under the Convention in the State of the court second seized, unless the latter has exclusive jurisdiction and. The court second seized must decline jurisdiction as soon as it is presented with a judgment rendered by the court first seized that complies with the requirements for recognition or enforcement under the Convention: Interim Text (note 40) arts 21(1) and (2).

<sup>200</sup> Article 22 provides that in exceptional circumstances, when the jurisdiction of the court seized is not founded on an exclusive choice of court agreement the court may, on application by a party, suspend its proceedings if in that case it is clearly inappropriate for that court to exercise jurisdiction and if a court of another State has jurisdiction and is clearly more appropriate to resolve the dispute. Such application must be made no later than at the time of the first defence on the merits. The court must take into account, in particular –

- a) any inconvenience to the parties in view of their habitual residence;
- b) the nature and location of the evidence, including documents and witnesses, and the procedures for obtaining such evidence;
- c) applicable limitation or prescription periods;
- d) the possibility of obtaining recognition and enforcement of any decision on the merits: Interim Text (note 41) arts 22(1) and (2).

<sup>201</sup> Hague Conference (note 48) 5.

<sup>202</sup> Oestreicher (note 14) 61.

fundamental differences in the economic, political and institutional situation that made the Brussels and Lugano Conventions workable, and the global setting of a Hague Convention.<sup>203</sup>

The political, economic and cultural characteristics peculiar to the region as well as prevailing trends in areas such as legal education, access to basic tools of legal research, legal scholarship and judicial decisions will play a significant role as contributing or retarding factors of legal harmonisation and unification.<sup>204</sup> These peculiarities will need to be taken into account when an appropriate approach for the Southern African region is identified, whether or not it is one of the approaches discussed above. An approach succeeding in another region may not necessarily result in the same success in Southern Africa.

The EU Brussels I Regulation is now discussed.

#### **4 THE EU BRUSSELS CONVENTION/REGULATION**

The Brussels Convention, which preceded the Brussels I Regulation on the same topic<sup>205</sup> came into force on 1 February 1973, after it was ratified by the then EU Member States. The Brussels Convention regulates the jurisdiction which the courts of Contracting States are permitted to exercise, as well as the conditions upon which judgments are to be recognised and enforced.<sup>206</sup> The greatest novelty in the structure of the Brussels Convention was the fact that it provided Member States with a relatively detailed set of jurisdictional rules according to which a court in a Member State may assert jurisdiction over a defendant who is domiciled in another Member State, and in what situations it should decline to do so.<sup>207</sup>

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<sup>203</sup> Von Mehren AT 'Drafting a Convention on International Jurisdiction and the Effects of Foreign Judgments Acceptable World-Wide: Can the Hague Conference Project Succeed?' (2001) 49 *American Journal of Comparative Law* 200.

<sup>204</sup> Garro AM 'Unification and harmonisation of private law in Latin America' (1992) 40(3) *The American Journal of Comparative Law* 588.

<sup>205</sup> The connection and relationship between the Brussels Convention and the Brussels I Regulation is discussed in Chapter 2 para 4.1 above.

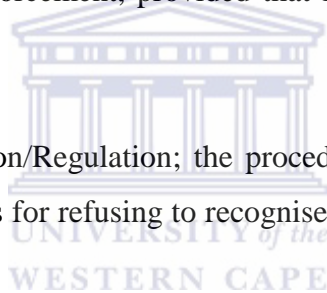
<sup>206</sup> Nygh & Pocar Report (note 51) 5.

<sup>207</sup> Oestreicher (note 77) 129.

The Regulation<sup>208</sup> establishes common rules on jurisdiction in civil and commercial matters for EU Member States and thereby clarifies which court has international competence in a cross-border dispute. The Regulation also includes rules that facilitate the enforcement of a judgement issued by the courts in one EU Member State in another Member State.<sup>209</sup> The Regulation provides for the quasi-automatic enforcement of judgments with few procedural obstacles.<sup>210</sup> A judgment given in a Member State is recognised in other Member States without any special procedure being required.<sup>211</sup>

The obligation to recognise is subject to a very limited number of exceptions relating to public policy, insufficient service, or irreconcilability with another judgment.<sup>212</sup> In particular, lack of jurisdiction of the rendering court is no defence.<sup>213</sup> Only in exceptional cases is the court addressed permitted to review the jurisdiction of the original court,<sup>214</sup> and it is never allowed to review the substance or merits of the judgment.<sup>215</sup> A judgment which qualifies for recognition also qualifies for enforcement, provided that it is enforceable in the country of origin.<sup>216</sup>

The application of the Convention/Regulation; the procedural requirements for recognition and enforcement, and the grounds for refusing to recognise or enforce a foreign judgment are now discussed.



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<sup>208</sup> The Regulation supersedes the Brussels Convention except with respect to those territories of EU countries that fall within its territorial scope and that are excluded from the regulation pursuant to art 299 of the TEC: see Chapter 3, para 4.1.

<sup>209</sup> EUROPA 'Civil Justice: The Reform of the "Brussels I" Regulation and the European Commission's Green Paper on the Free Circulation of Public Documents: Frequently Asked Questions'. Available at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/10/677> (accessed 15 November 2012).

<sup>210</sup> A judgment is defined as given by a court or tribunal in an EU country, including a decree, order, decision or writ of execution: Brussels I Regulation (note 6) art 32.

<sup>211</sup> Brussels I Regulation (note 6) art 33.

<sup>212</sup> Brussels I Regulation (note 6) art 34.

<sup>213</sup> Brussels I Regulation (note 6) art 35.

<sup>214</sup> Article 35(3) provides that subject to paragraph 1, the jurisdiction of the court of the Member State of origin may not be reviewed. Paragraph 1 provides that 'a judgment shall not be recognised if it conflicts with sections 3 [jurisdiction in matters relating to insurance] 4 [jurisdiction over consumer contracts], or 6 [exclusive jurisdiction] of Chapter 2, or in a case provided for in art 72 [dealing with agreements which Member States undertook prior to the entry into force of the Regulation pursuant to art 59 of the Brussels Convention]': Brussels I Regulation (note 6).

<sup>215</sup> Brussels I Regulation (note 6) art 36; Stone P *EU private international law: harmonization of laws* (2006) 21.

<sup>216</sup> Brussels I Regulation (note 6) art 38(1): 'A judgment given in a Member State and enforceable in that State shall be enforced in another Member State when, on the application of any interested party, it has been declared enforceable there.'

#### 4.1 Material Scope of Brussels Convention/Regulation

The Brussels Convention applies automatically, and covers all civil and commercial matters, apart from an exhaustive list of exceptions.<sup>217</sup>

The Convention does not specify what is meant by ‘civil and commercial matters’, or determine the law according to which that expression should be interpreted.<sup>218</sup> However, it follows from the text of the Convention that civil and commercial matters are to be classified as such according to their nature, and irrespective of the character of the court or tribunal which is seized of the proceedings or which has given judgment.<sup>219</sup>

Rather than providing a positive definition of the scope of the Convention, a formula was adopted which excludes certain matters from the scope of the Convention, while acknowledging that the ideal situation would be to apply the Convention to all civil and commercial matters.<sup>220</sup> All judgments relating to contractual or non-contractual obligations, excluding those which involve the status or legal capacity of natural persons, wills or succession, rights in property arising out of a matrimonial relationship, bankruptcy or social security, fall within the scope of the Convention.<sup>221</sup> The scope of the Brussels Convention was duplicated in the Brussels I Regulation.<sup>222</sup> Each of the exclusions from the scope of the convention is discussed in detail in the Explanatory Report on the Brussels Convention.<sup>223</sup>

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<sup>217</sup> Jenard Report (note 91) 8.

<sup>218</sup> Jenard Report (note 91) 9.

<sup>219</sup> Article 1 provides that the Convention shall apply in civil and commercial matters ‘whatever the nature of the court or tribunal’: Brussels I Regulation (note 6).

<sup>220</sup> Jenard Report (note 91) 10.

<sup>221</sup> Article 1 provides that: “This Convention shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters. The Convention shall not apply to: 1. the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession; 2. bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings; 3. social security; and 4. arbitration: see Brussels Convention (note 6) art 1.

<sup>222</sup> Brussels Regulation (note 6) arts 1 and 2. The Brussels I Regulation is complemented by Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (Brussels II Regulation). Regulation II applies to civil proceedings relating to divorce, separation and marriage annulment, as well as to all aspects of parental responsibility. Parental responsibility refers to the full set of rights and obligations in relation to a child’s person or property. In order to ensure equality for all children, the regulation covers all judgments on parental responsibility, including measures to protect the child, independently of any matrimonial proceedings.

The regulation does not apply to civil proceedings relating to maintenance, which are covered by the Brussels I Regulation. The following are also excluded from the scope of the regulation: establishing and challenging paternity; judgments on adoption and the related preparatory measures, and annulment or revocation of adoption; the child’s first and last names; emancipation; trusts and inheritance; measures taken following criminal infringements committed by children: EUROPA ‘Jurisdiction, recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility (“Brussels II”)

## 4.2 Procedural requirements for recognition and enforcement

The Convention seeks to facilitate as far as possible the free movement of judgments.<sup>224</sup> This approach is evidenced by the simplification of the enforcement procedure which is common to all Contracting States to the Convention.<sup>225</sup>

A judgment given in a Member State and enforceable in that State, will be *recognised* in other Member States without any special procedure being required.<sup>226</sup> Recognition is, therefore, automatic, and does not require a judicial decision in the enforcing State to enable the party in whose favour the judgment has been given to invoke that judgment against any party concerned. This provision means that certain legal provision which in some countries make the recognition of a foreign judgment subject to a special procedure will be abolished.<sup>227</sup> This system differs from earlier conventions, according to which foreign judgments are recognised only if they fulfil a certain number of conditions. The foreign judgment must, however, in terms of the Brussels system, be enforceable in the State in which enforcement is sought.<sup>228</sup>

A judgment that is given in a Member State and enforceable there will be *enforced* in another Member State when it has been declared enforceable there, on the application on any interested party.<sup>229</sup> However, in the United Kingdom, a judgment will be enforced in England and Wales, in Scotland or in Northern Ireland if it has been registered in the United Kingdom.<sup>230</sup>

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available at ([http://europa.eu/legislation\\_summaries/justice\\_freedom\\_security/judicial\\_cooperation\\_in\\_civil\\_matters/l33194\\_en.htm](http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_civil_matters/l33194_en.htm))(accessed 15 November 2012).

<sup>223</sup> Jenard Report (note 91) 10-13.

<sup>224</sup> Jenard Report (note 91) 42.

<sup>225</sup> Jenard Report (note 91) 42.

<sup>226</sup> Brussels I Regulation (note 6) art 33(1).

<sup>227</sup> Jenard Report (note 91) 43.

<sup>228</sup> Jenard Report (note 91) 48.

<sup>229</sup> Brussels I Regulation (note 6) art 38(1).

<sup>230</sup> Brussels I Regulation (note 6) art 38(2). This requirement is inherent in countries with a common law tradition, and illustrates how the Brussels Regime accommodated both civil and common law legal traditions: see the UK Foreign Judgments (Reciprocal Enforcement) Act, 1933, discussed in the following Chapter.



The Regulation also prescribes the enforcement procedure.<sup>231</sup> The procedure for making an application for recognition or enforcement is governed by the law of the Member State in which enforcement is sought.<sup>232</sup>

A party seeking recognition or applying for a declaration of enforceability must provide an authentic copy of the judgment. A party applying for a declaration of enforceability must also produce a certificate as provided for in the Regulation.<sup>233</sup>

The judgment will be declared enforceable immediately on completion of the formalities described above.<sup>234</sup> The application may be refused only for one of the reasons specified, and under no circumstances may the foreign judgment be reviewed as to its substance.<sup>235</sup>

Some international developments relating to the procedural aspects of recognition and enforcement include the proposal made by the European Parliament in 2009 for the reform of the Brussels I Regulation.<sup>236</sup> It was proposed to do away with the intermediary court

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<sup>231</sup> The application, accompanied by the documents required under articles 53 and 54 must be submitted to the authority specified in art 37. The applicant must give an address for service of process or appoint a representative ad litem in the jurisdiction of the court applied to (art 40(2)).

The court applied to must give its decision without delay, and is not able to summon the other party. The applications may be refused only for one of the reasons specified in arts 34 and 35.

If enforcement is authorised - the party against whom enforcement is sought may appeal against the decision within one month of service of the decision (art 43); the appeal must be lodged, in accordance with the rules governing procedure, with the court specified in art 43; the court with which an appeal is lodged may, on the application of the party against whom enforcement is sought, stay the proceedings if an ordinary appeal has been lodged against the judgment in the Member State of origin, or if the time for appeal has not yet expired. The court may also make enforcement conditional on the provision of security: see Brussels I Regulation (note 6) art 46); the judgment given on the appeal against the decision authorising enforcement may not be contested by an ordinary appeal. It may be contested only by an appeal in cassation, as referred to in Annex IV of the Regulation (art 44); during the time specified for an appeal against the decision authorising enforcement, the decision authorising enforcement, the applicant may take only protective measures; the decision authorising enforcement carries with it the power to proceed to such measures (art 46).

If enforcement is refused - the applicant may appeal to the court specified in art 43; the procedure before that court is contentious, the other party being summoned to appear (art 47); the judgment given on this appeal may be contested only by the appeal referred to in Annex IV to the Convention (art 44). Annex IV lists the appeal which may be lodged pursuant to Article 44 and include the following: in Belgium, Greece, Spain, France, Italy, Luxembourg and the Netherlands, an appeal in cassation and in the United Kingdom, a single further appeal on a point of law.

<sup>232</sup> Brussels I Regulation (note 6) art 40(1). Reference must therefore be made to the national laws for the particulars which the application must contain, the number of copies which must be submitted to the court, the authority to which the application must be submitted and also, where necessary, the language in which it must be drawn up, and whether a lawyer should be instructed to appear: see Jenard Report (note 86) 49.

<sup>233</sup> Brussels I Regulation (note 6) arts 53-54.

<sup>234</sup> Brussels I Regulation (note 6) art 41.

<sup>235</sup> Brussels I Regulation (note 6) art 36.

<sup>236</sup> European Parliament Committee on Legal Affairs (2011) *Draft Report on the proposal for a regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)* 28 June 2011.

proceedings that are still needed before a judgment from one Member State will be recognised in another. It was suggested that intermediary proceedings make cross-border litigation more cumbersome, time-consuming and costly than national litigation.<sup>237</sup> The intermediary proceedings may take several months to occur, thereby delaying cross-border enforcement, and the procedure is also expensive.<sup>238</sup> If the proposed revisions are accepted, there will in future no longer be a need to go through a special procedure for judgments in civil and commercial matters issued by a court in another EU Member State. The abolition of the intermediary proceedings for recognition and enforcement will lead to a situation where judgments issued in other EU Member States falling within the scope of the Regulation, will be treated like domestic judgments.<sup>239</sup>

The ad hoc Working Party on the new Lugano Convention<sup>240</sup> acknowledged that in a single judicial area a free circulation of judgments would be achieved by abolishing any intermediary (exequatur) proceedings required for recognition and enforcement in Contracting States, so that judgments could be enforced directly, without a need for a declaration of enforceability.<sup>241</sup> They considered this possibility, but found it premature, in the light of the prerogatives of national sovereignty that still characterise the (non-EU) European States.<sup>242</sup> Title III of the Lugano Convention is accordingly founded on the

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<sup>237</sup> EUROPA 'Civil Justice: The Reform of the "Brussels I" Regulation and the European Commission's Green Paper on the Free Circulation of Public Documents: Frequently Asked Questions' (2010) available at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/10/677> (accessed 26 November 2012).

<sup>238</sup> The average cost for straightforward cases in the EU is €2,200, ranging from €1,100 in Bulgaria to €3,800 in Italy. For more complex cases, the costs can reach €12,700: EUROPA (note 237).

<sup>239</sup> EUROPA (note 237).

<sup>240</sup> In 1997 the European Union initiated a simultaneous revision of the Brussels Convention and of the Lugano Convention of 1988, with the aim of fully harmonising the two Conventions and incorporating changes to resolve certain problems that had emerged in the course of the interpretation by the ECJ. It was felt that the two Conventions should be revised together in order, amongst other things, to expedite the enforcement of judgments: see Pocar F 'Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, signed in Lugano on 30 October 2007' Explanatory Report *OCJ C319/1* 23.12.2009 ('Pocar Report') 2. At a meeting on 4 and 5 December 1997, the Council of the European Union set up an ad hoc working party of experts, composed of the EU Member States and representatives of the EFTA States that were parties to the Lugano Convention (Switzerland, Norway and Iceland); the working party was to examine amendments to the Brussels and Lugano Conventions that would be proposed by the Member States and by the European Commission, taking into account the case-law of the Court of Justice and certain decisions made by the national courts, with the aim of drawing up a draft convention that would improve on the current texts and harmonise them: see Pocar Report (note 240) para 3.

<sup>241</sup> After the ad hoc working party had completed its work, the intermediary (exequatur) proceedings were abolished within the Community for certain types of judgments: Regulation (EC) No 805/2004 of 21 April 2004 creating a European Enforcement Order for uncontested claims (*Official Journal* I 143, 30.4.2004); regulation (EC) No 1896/2006 of 12 December 2006 creating a European order for payment procedure (*Official Journal* I 399, 30.12.2006); and Regulation (EC) No 861/2007 of 11 July 2007 establishing a European Small Claims Procedure (*Official Journal* I 199, 31.7.2007): see Jenard Report (note 91) 36.

<sup>242</sup> Pocar Report (note 240) 36.

principle that the declaration of enforceability must be in some measure automatic, and subject to merely formal verification,<sup>243</sup> with no examination at the initial stage of the proceedings of the grounds for refusal of recognition provided for in the Convention.<sup>244</sup> A judgment given and enforceable in a State bound by the Convention will be enforced in another Contracting State when, on the application of any interested party,<sup>245</sup> it has been declared enforceable in that State.<sup>246</sup> The procedure for making the application is governed by the law of the State in which enforcement is sought,<sup>247</sup> provided that the articles listed in art 53<sup>248</sup> must be attached to the application.<sup>249</sup> At the first stage, therefore, the State of origin is trusted to act properly. Examination of the grounds for refusal is deferred until the second stage, at which a party against whom a declaration of enforceability has been obtained, and who decides to challenge it, must show that such grounds exist.<sup>250</sup>

### 4.3 Grounds for non-recognition

The Brussels Regulation seeks to facilitate the free movement of judgments as far as possible; consequently, there are a reduced number of grounds on which the recognition and enforcement of judgments can be refused.<sup>251</sup>

A judgment will not be recognised or enforced -

- (i) if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought;
- (ii) 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

<sup>243</sup> Lugano Convention (note 6) art 38(1), 39.

<sup>244</sup> Lugano Convention (note 6) art 4.

<sup>245</sup> Made to the court or competent authority listed in Annex II to the Convention: See Lugano Convention (note 6) art 39(1).

<sup>246</sup> Lugano Convention (note 6) art 38(1).

<sup>247</sup> Lugano Convention (note 6) art 40(1).

<sup>248</sup> A party seeking recognition or applying for a declaration of enforceability must produce a copy of the judgment which satisfies the conditions necessary to establish its authenticity. A party applying for a declaration of enforceability shall also produce the certificate referred to in Article 54 (the court or competent authority of a State bound by this Convention where a judgment was given must issue, at the request of any interested party, a certificate using the standard form in Annex V to the Convention.) If this certificate referred is not produced, the court may specify a time for its production or accept an equivalent document or, if it considers that it has sufficient information before it, dispense with its production. If the court or competent authority so requires, a translation of the documents shall be produced. The translation shall be certified by a person qualified to do so in one of the States bound by this Convention: See Lugano Convention (note 6) arts 53-55.

<sup>249</sup> Lugano Convention (note 6) art 40(3).

<sup>250</sup> Pocar Report (note 240) para 129.

<sup>251</sup> Jenard Report (note 91) 42.

- enable him to arrange for his defence (unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so);
- (iii) if it is irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought; and
  - (iv) if it is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed.<sup>252</sup>

The intervention of the requested court is limited: it is required to declare that it does not have jurisdiction if there are rules which give exclusive jurisdiction to the courts of another State.<sup>253</sup> Where a defendant domiciled in one Member State is sued in a court of another Member State and does not enter an appearance, the court is required to declare of its own motion that it has no jurisdiction, unless its jurisdiction is derived from the provisions of the Regulation.<sup>254</sup>

The Brussels Regime is supplemented by the Lugano Convention.<sup>255</sup> The convention entered into force on 1 January 2010 between the EU, Denmark, Iceland, Norway and Switzerland,<sup>256</sup> and succeeded the 1988 Lugano Convention.<sup>257</sup> The Convention serves as a parallel agreement to the Brussels I Regulation in the European Economic Area (EEA),<sup>258</sup> as the Convention was concluded between the Member States of the European Community (now EU) and certain Member States of the European Free Trade Association<sup>259</sup> (EFTA).<sup>260</sup> The

<sup>252</sup> Brussels I Regulation (note 6) art 34.

<sup>253</sup> Brussels I Regulation (note 6) art 25.

<sup>254</sup> Brussels I Regulation (note 6) art 26.

<sup>255</sup> See note 6.

<sup>256</sup> EUROPA ‘Summary of Treaty’ available online at <http://ec.europa.eu/world/agreements/prepareCreateTreatiesWorkspace/treatiesGeneralData.do??step=0&redirect=true&treatyId=7481> (accessed 16 February 2013). It has applied for Switzerland since 1 January 2011, and for Iceland since 1 May 2011: [http://www.ejpd.admin.ch/content/ejpd/en/home/themen/wirtschaft/ref\\_internationales\\_privatrecht/ref\\_lugue\\_2007.html](http://www.ejpd.admin.ch/content/ejpd/en/home/themen/wirtschaft/ref_internationales_privatrecht/ref_lugue_2007.html) (accessed 16 February 2013).

<sup>257</sup> Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, signed in Lugano on 16 September 1988 (‘1988 Lugano Convention’).

<sup>258</sup> The EEA comprises the countries of the EU, plus Iceland, Liechtenstein and Norway. It was established on 1 January 1994 following an agreement between the Member States of the European Free Trade Association (EFTA) and the European Community (which became the EU), and allows these countries to participate in the EU’s internal Market without being Members of the EU. The EFTA is a free trade organisation between Switzerland, Norway, Iceland and Denmark that operate in parallel to the EU. One EFTA Member, Switzerland, has not joined the EEA, but has a similar agreement with the EU.

<sup>259</sup> Norway, Iceland and Denmark.

Convention is in substance largely similar to the Brussels I Regulation.<sup>261</sup> The rules applicable in EFTA Contracting States to this Convention and EU Members, party to the Brussels I Regulation will, therefore, be largely similar.<sup>262</sup>

## 5 THE MONTEVIDEO CONVENTION

The Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards<sup>263</sup> ('Montevideo Convention') was ratified by ten countries in Latin America.<sup>264</sup> The purpose of the Convention is to ensure the extraterritorial validity of judgments and arbitral awards in the Member Countries.<sup>265</sup>

The Convention applies to all judgments and arbitral awards rendered in civil, commercial or labour proceedings in one of the State Parties. The instrument contains a set of conditions that, if met, gives the judgment extraterritorial effect in all the member countries.<sup>266</sup> The preamble of the Convention acknowledges that -

‘the administration of justice in the American States requires ... mutual cooperation for the purposes of ensuring the extraterritorial validity of judgments and arbitral awards rendered in their respective territorial jurisdictions’.<sup>267</sup>

The scope of the Convention; the procedural requirements, and the grounds for refusing to recognise or enforce a foreign judgment are now discussed.

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<sup>260</sup> European Union 'Judicial cooperation in civil matters' available at [http://europa.eu/legislation\\_summaries/justice\\_freedom\\_security/judicial\\_cooperation\\_in\\_civil\\_matters/l16\\_029\\_en.htm](http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_civil_matters/l16_029_en.htm) (accessed 30 July 2012).

<sup>261</sup> This is already suggested by the Preamble of the Lugano Convention which provides that 'persuaded that the extension of the principles laid down in Regulation (EC) No 44/2001 to the Contracting Parties to this instrument will strengthen legal and economic cooperation, desiring to ensure as uniform an interpretation as possible of this instrument, have in this spirit decided to conclude this Convention'. As a result, the material provisions are almost identical, including the scope, the rules on jurisdiction as well as the rules on recognition and enforcement.

<sup>262</sup> Oestreicher (note 79) 142.

<sup>263</sup> See note 7.

<sup>264</sup> Argentina, Bolivia, Brazil, Colombia, Ecuador, Mexico, Paraguay, Peru, Uruguay and Venezuela: OAS 'Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards: Signatories and Ratifications' available at [www.oas.org/juridico/english/treaties/b-41.htm](http://www.oas.org/juridico/english/treaties/b-41.htm) (accessed 28 April 2013).

<sup>265</sup> Montevideo Convention (note 7) Preamble.

<sup>266</sup> Oestreicher (note 16) 353.

<sup>267</sup> Montevideo Convention (note 7) Preamble.

## 5.1 Material scope

The Convention applies to the substance of ‘judgments and arbitral awards rendered in civil, commercial or labour proceedings in one of the State Parties’<sup>268</sup> subject to reservations they may make.

## 5.2 Procedural requirements

Articles 3 and 5 provide the only general rules of procedure in the Montevideo Convention.<sup>269</sup> Article 3 lists the documents that are required to request execution of judgments, awards and decisions.<sup>270</sup> Article 5 requires the courts of the State addressed to recognise a declaration of the courts of the State of Origin that a party is litigating in forma pauperis.<sup>271</sup>

The procedures for ensuring the validity of foreign judgments, awards and decisions are governed by the law of the State in which execution is sought. This includes the jurisdiction of the respective judges and tribunals.<sup>272</sup>

The La Paz Convention was adopted by Member States of the OAS ‘desirous of improving the administration of justice through greater judicial cooperation among the American States’<sup>273</sup> and considered that for the effective application of art 2(d) of the Montevideo Convention, provisions were necessary to prevent jurisdictional disputes among the States Parties.<sup>274</sup>

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<sup>268</sup> Montevideo Convention (note 7) art 1.

<sup>269</sup> Amado JD ‘Recognition and enforcement of foreign judgments in Latin America: An overview and update’ (1990) 31 *Virginia Journal of International Law* 106.

<sup>270</sup> These documents are certified copies of the judgment; documents proving that the plaintiff has been summoned in due legal form and that the parties had an opportunity to present their defence; and a document stating that the judgment, award or decision is final or has the force of res judicata: See Montevideo Convention (note 7) art 3.

<sup>271</sup> Montevideo Convention (note 7) art 5. Cases filed in forma pauperis (‘in the manner of the pauper’) are on behalf of individuals too poor to afford the usual paid advocates and amenities: Ducat CR *Constitutional Interpretation* Volume 1 (2009) 31.

<sup>272</sup> Montevideo Convention (note 7) art 6.

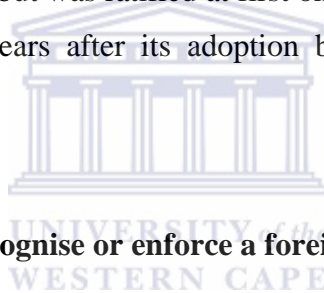
<sup>273</sup> Inter-American Convention on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgments, May 24, 1984, OEA/Ser.A/39 (SEPF), 24 ILM. 468 (1985) (‘La Paz Convention’) Preamble.

<sup>274</sup> La Paz Convention (note 273) Preamble. The La Paz Convention is primarily devoted to elaborating the meaning of the phrase ‘competent in the international sphere’ under art 2(d) of the Montevideo Convention. It lists the instances when the requirement of jurisdiction in the international sphere is deemed to be fulfilled (art 1: see note 276 below). Article 2 further provides that jurisdiction will be satisfied if the court in the state addressed believes that the State of origin ‘assumed jurisdiction in order to avoid a denial of justice because of the absence of a competent judicial or other judicatory authority: see Amado (note 264) 108.



In addition to the jurisdictional rules in terms of art 2(d), the La Paz Convention contains two provisions conceived to clarify the enforceability rules of the Montevideo Convention. Article 5 introduces a new requirement to those listed in art 2 of the Montevideo Convention: in order to be enforced in the State addressed, the judgment must not only be *res judicata*, but it must also be entitled to enforcement within the territory of the State of origin. Article 4 of the La Paz Convention, on the other hand, states that the extraterritorial validity of the judgment may be denied if the court in the State addressed believes that the foreign court infringed its exclusive jurisdiction in rendering a judgment in the matter.<sup>275</sup> Article 6 further provides a number of instances when the La Paz Convention will not apply.<sup>276</sup>

Oestreicher suggests that the period of time it took for the La Paz Convention to come into force may indicate the superiority of the simple convention model.<sup>277</sup> The La Paz Convention was signed by thirteen countries, but was ratified at first only by Mexico in 1987, and did not come into effect until twenty years after its adoption by the ratification of Uruguay in 2004.<sup>278</sup>



### 5.3 Grounds for refusal to recognise or enforce a foreign judgment

The Montevideo Convention does not list the instances in which a foreign judgment will not be recognised.<sup>279</sup> It instead provides a number of requirements that has to be met for a judgment to be enforceable under the Convention, namely that:

- a) they fulfil all the formal requirements necessary for them to be deemed authentic in the rendering State;
- b) the judgment, award or decision and the required documents<sup>280</sup> are translated into the official language of the requested State;

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<sup>275</sup> La Paz Convention (note 273) arts 4 and 5.

<sup>276</sup> The convention does not apply to personal status and capacity of natural persons; divorce, annulment, and marital property; child support and alimony; decedents' estates (testate or intestate); bankruptcy, insolvency proceedings, composition with creditors, or other similar proceedings; liquidation of business enterprises; labour matters; social security; arbitration; torts, and maritime and aviation matters: art 6.

<sup>277</sup> Oestreicher (note 14) 69.

<sup>278</sup> Oestreicher (note 14) 69.

<sup>279</sup> See Montevideo Convention (note 7). Article 2 provides that 'the foreign judgments ... shall have extraterritorial validity... if they meet the following conditions', and no other article provides for any further conditions on which a judgment will not be recognised.

<sup>280</sup> The documents of proof required to request execution of judgments, awards and decisions are as follows:

- c) they are presented duly legalised in accordance with the law of the requested State;
- d) the judge or tribunal rendering the judgment is competent in the international sphere to try the matter;<sup>281</sup>
- e) the plaintiff has been summoned or subpoenaed in due legal form substantially equivalent to that accepted by the law of the requested State;
- f) the parties had an opportunity to present their defence;
- g) they are final or, where appropriate, have the force of *res judicata* in the rendering State; and
- h) they are not manifestly contrary to the principles and laws of the public policy of the requested State.<sup>282</sup>

An exploration of some of the factors that contributed to the relative successes or failures of each of the instruments follow.

## 6 OVERVIEW OF THE CONVENTIONS DISCUSSED

### 6.1 Hague Convention on Recognition and Enforcement of Foreign Judgments

The 1971 Hague Convention is a single convention, as it does not prescribe on which grounds a court should assume jurisdiction in international matters, but it provides the grounds of jurisdiction that would be recognised for a judgment to be enforced under the Convention.<sup>283</sup>

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- (i) A certified copy of the judgment, award or decision;
  - (ii) A certified copy of the documents proving that the plaintiff has been summoned or subpoenaed in due legal form substantially accepted by the law of the requested State; and the parties had an opportunity to present their defence; and
  - (iii) A certified copy of the document stating that the judgment, award or decision is final or has the force of *res judicata*: Montevideo convention (note 7) art 3.

<sup>281</sup> In an action in *persona* for a money judgment, any of the following bases will satisfy the jurisdiction requirement:

- (i) At the time the action was initiated, the defendant, if a natural person, had his domicile or habitual residence in the territory of the State Party in which judgment was rendered or, if a juridical person, had its principal place of business in that territory;
- (ii) In an action against a private non-commercial or business enterprise, the defendant had its principal place of business at the time the action was initiated in the State Party in which judgment was rendered or was organized in that State Party;
- (iii) In an action against a specific branch, agency, or affiliate of a private non-commercial or business enterprise, the activities that gave rise to such action took place in the State Party in which judgment was rendered; or
- (iv) In the case of non-exclusive fora permitting submission to the jurisdiction other fora, the defendant either consented in writing to the jurisdiction of the judicial or other adjudicatory authority that rendered the judgment or, despite making an appearance, failed to submit a timely challenge to the jurisdiction of that authority: La Paz Convention (note 273) art 1.

<sup>282</sup> Montevideo Convention (note 7) art 2.

<sup>283</sup> See para 2.2 above.

The 1971 Hague Convention has been subject to a number of criticisms: For countries to achieve mutual recognition and enforcement of foreign judgments, in addition to subscribing to the Convention, each country had to negotiate a Supplementary Agreement with every other country.<sup>284</sup> In the Supplementary Agreement, States were able to reach agreement on a number of matters not regulated in the Convention.<sup>285</sup> This requirement, combined with the extensive list of optional items which States may include in the Supplementary Agreements listed in art 23,<sup>286</sup> has led to a complicated system.<sup>287</sup> The ‘method of bilateralisation’ adopted by the Convention is considered as one of the major obstacles preventing countries from contracting the 1971 Hague Convention.<sup>288</sup>

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<sup>284</sup> Hague Convention (note 4) art 21.

<sup>285</sup> Article 23 of the Convention provides that in the Supplementary Agreements referred to in Article 21 the Contracting States may agree- (1) to clarify the meaning of the expression "civil and commercial matters", to determine the courts whose decisions shall be recognised and enforced under this Convention, to define the expression "social security" and to define the expression "habitual residence"; (2) to clarify the meaning of the term "law" in States with more than one legal system; (3) to include within the scope of this Convention questions relating to damage or injury in nuclear matters; (4) to apply this Convention to decisions ordering provisional or protective measures; (5) not to apply this Convention to decisions rendered in the course of criminal proceedings; (6) to specify the cases under which a decision is no longer subject to ordinary forms of review; (7) to recognise and enforce decisions upon which enforcement could be obtained in the State of origin even if such decisions are still subject to ordinary forms of review and in such a case to define the conditions under which a stay of proceedings for recognition or enforcement is possible; (8) not to apply art 6 if the decision rendered by default was notified to the defaulting party and the latter had the opportunity to lodge a timely appeal against such a decision; (8 bis) that the Authority addressed shall not be bound by the findings of fact on which the court of the State of origin based its jurisdiction; (9) to consider the courts of the State in which the defendant has his "domicile" as having jurisdiction under art 10; (10) that the court of origin shall be considered as having jurisdiction under the terms of this Convention in cases where its jurisdiction is admitted by another Convention in force between the State of origin and the State addressed if that other Convention contains no special rules relating to the recognition or enforcement of foreign judgments; (11) that the court of origin shall be considered as having jurisdiction under the terms of this Convention either when its jurisdiction is admitted by the law of the State addressed relating to the recognition or enforcement of foreign judgments, or on grounds additional to those in art 10; (12) to define, for the purposes of the application of art 12, the bases of jurisdiction which are exclusive by reason of the subject-matter of the action; (13) to exclude, in cases where jurisdiction is based on an agreement between the parties, the application of sub-paragraph (1) of art 12 as well as to exclude that of sub-paragraph (3) of art 12; (14) to regulate the procedure for obtaining recognition or enforcement; (15) to regulate the enforcement of judgments other than those which order the payment of a sum of money; (16) that the enforcement of a foreign judgment may be refused when a specified period has elapsed from its date; (17) to fix the rate of interest payable from the date of the judgment in the State of origin; (18) to adapt to the requirements of their legal systems the list of documents required by art 13, but with the sole object of enabling the authority addressed to verify whether the conditions of this Convention have been fulfilled; (19) to subject the documents referred to in art 13 to legalisation or to a similar formality; (20) to depart from the provisions of art 17 and to depart from the provisions of art 18; (21) to make the provisions of the first paragraph of art 20 obligatory; (22) to include within the scope of this Convention "*actes authentiques*", including documents upon which immediate enforcement can be obtained, and to specify those documents: art 23.

<sup>286</sup> See note 285 above.

<sup>287</sup> Hague Conference (note 112) 232.

<sup>288</sup> Kessedjian Report (note 18) 8. This reports considers, amongst others, why the 1971 Hague Convention on the Recognition and Enforcement of Foreign Judgments was unsuccessful.

A second factor that affected the willingness of countries to join the 1971 Hague Convention, was the signing of the Brussels Convention.<sup>289</sup> Many of the negotiating parties to the 1971 Hague Convention were also Members of the Brussels Convention and/or the Lugano Convention, and joining those two Conventions to a great extent eliminated the need for such an international instrument when viewed from their perspective.<sup>290</sup>

Another suggested explanation for the failure of the 1971 Hague Convention to accomplish its goals is the fact that it failed to address the issue of jurisdiction, and that the European States objected to the idea that the Convention could not deal with provisions regulating the jurisdiction of each State.<sup>291</sup> The Kessedjian Report compares the relative success of the Brussels and Lugano Conventions and the failure of the 1971 Hague Convention, and suggest that the first two Conventions primarily regulate the direct jurisdiction of courts in the subjects with which they deal, treating jurisdiction as a vital preliminary to the effects (including recognition and enforcement) which arise from the resulting judgments; and that recognition and enforcement are merely the natural extension of such jurisdiction. It is because the court which rules on the merits of the case possesses jurisdiction,<sup>292</sup> that its judgment will, except in limited cases, take effect in the territory of all the other States Parties.<sup>293</sup> In contrast, the 1971 Convention sought only to regulate recognition and enforcement, without first regulating when the courts giving the judgment would have jurisdiction to which the European States objected.

## **6.2 Hague Choice of Court Convention**

The 2005 Hague Convention may be typified as a double convention as it addresses the jurisdiction of the chosen court. The Convention confers jurisdiction upon the courts of a Contracting State; as such it does not contain a list of jurisdictional bases.<sup>294</sup>

The following arguments, amongst others, have been raised in favour of the implementation of the Convention.<sup>295</sup> First, the Convention will increase legal certainty and lower the risk for

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<sup>289</sup> Oestreicher (note 79) 145.

<sup>290</sup> Oestreicher (note 79) 145.

<sup>291</sup> Oestreicher (note 79) 146.

<sup>292</sup> Usually by virtue of the Convention, in the absence of some error on the part of the court seized.

<sup>293</sup> See Kessedjian Report (note 18) 298; Struyven (note 58) 521-548; Juenger (note 83) 112.

<sup>294</sup> Convention on Choice of Court Agreements, June 30, 2005, 44 I.L.M. 1294 art 5.

parties to international commercial transactions, both at the transaction planning and dispute resolution stages, as parties will be able to assume more readily that their choice of court agreements and resulting judgments will be enforced. Secondly, although the Convention is narrow in scope and contains significant exclusions, any multilateral instrument in the area of jurisdiction and judgments is preferable to the status quo as any harmonisation of law, by definition, brings greater predictability and certainty. The accomplishment of the Convention should also pave the way, and provide momentum, for further multilateral instruments in the area of jurisdiction and enforcement of foreign judgments.<sup>296</sup> Thirdly, the adoption of the Convention will redress the current imbalance in favour of international commercial arbitration as the preferred dispute resolution method for cross-border business transactions.<sup>297</sup> The expectation is that if there is a convention with respect to choice of court agreements which is as equally broadly accepted as that with respect to arbitral awards, parties will have an alternative to choosing arbitration in their contracts. If they have the assurance that a judgment will be recognised and enforced in a large number of States, some might be more inclined to insert a choice of court clause instead of an arbitration clause.<sup>298</sup> All in all, the Convention would become the litigation equivalent of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.<sup>299</sup>

Beaumont<sup>300</sup> argues that the Convention has a real chance of success which is evidenced by the fact that both the US and the EC signed it in early 2009 (although they have not yet

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<sup>295</sup> Teitz LE 'The Hague Choice of Court Convention: Validating party autonomy and providing an alternative to arbitration' (2005) 53 *The American Journal of Comparative Law* 543; Berlin M 'Note and Comment: The Hague Convention on Choice of Court Agreements: Creating an International Framework for recognising foreign judgments' (2006) 3 *Brigham Young University International Law and Management Review* 43; Black V 'The Hague Choice of Court Convention and the Common Law (2007) *Uniform Law Conference of Canada Civil Section 3* available at [www.ulcc.ca/en/poam2/Hague\\_Choice\\_of\\_Court\\_Convention\\_Common\\_Law\\_En.pdf](http://www.ulcc.ca/en/poam2/Hague_Choice_of_Court_Convention_Common_Law_En.pdf) (accessed 5 September 2012); Mortensen R 'The Hague and the Ditch: The Trans-Tasman Judicial Area and the Choice of Court Convention' (2009) 5(2) *Journal of Private International Law* 213; Garnett (note 170) 161.

<sup>296</sup> Teitz (note 290) 544; Berlin (note 295) 43.

<sup>297</sup> See Chapter 1 para 4.1 where reference was made to the perspective of an international businessman who is faced with a choice between arbitration with an option of the award being enforceable in over 140 countries and litigation in a national court without any comparable enforceability option, except if the litigation is concentrated in countries which are parties to a multilateral instrument.

<sup>298</sup> Kruger T 'Current developments: Private International Law' (2006) 55 *International and Comparative Law Quarterly* 447.

<sup>299</sup> Garnett, however, argues that if the Hague Convention fails to replicate the New York Convention in at least three significant ways: first, there is a wider range of excluded subject matter under Article 2 compared to international arbitration, secondly, in the potentially wider defences to enforcement of agreements and thirdly, in the scope for member states to remove certain areas from the Convention by declaration under Article 21: see Garnett (note 175) 169.

<sup>300</sup> Beaumont P 'Hague Choice of Court Convention 2005: Background, Negotiations, Analysis and Current Status (2009) 5 *Journal of Private International Law* 126.

ratified it). The strong signals of support from two of the major trading powers in the world would encourage many other States to become parties to the Convention. Latin America and other areas of the developing world will be inspired to believe the Convention is advantageous to them by the early example of Mexico in acceding to the Convention. The Convention has the potential to enhance world trade by creating the necessary legal certainty to parties to commercial contracts to control the risks they are exposed to in court litigation. They can keep costs down by being sure that any disputes between them will be resolved in their chosen forum.<sup>301</sup> Mortensen also suggests that since the Convention was negotiated at the Hague Conference, it promises the broadest international adoption that a double convention has yet secured, and for that reason, its ratification and implementation is something that should be encouraged.<sup>302</sup>

### 6.3 EU Brussels Regulation/Convention

The Brussels I Regulation is a clear example of a double convention, as it provides express and clear rules for the assumption of jurisdiction of the rendering court under the Regulation.<sup>303</sup>

Four factors are generally recognised as being responsible for the success of the Brussels Convention/Regulation:

- i. The Convention and Regulation govern both the issues of direct jurisdiction and recognition and enforcement, and are, therefore, double conventions. This was promoted by the idea that the ‘fair and reasonable jurisdiction’ of the judgment-rendering court is the precondition for recognition and enforcement of foreign judgments.
- ii. Recognition and enforcement can be denied only for explicitly specified grounds under the Convention and the Regulation, so the outcome of is highly predictable.
- iii. The ECJ was authorised to interpret the Brussels Convention and the Regulation.<sup>304</sup>
- iv. The accompanying explanatory report<sup>305</sup> serves as a useful instrument to understand the Brussels Convention and is still a good reference for the Brussels I Regulation.<sup>306</sup>

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<sup>301</sup> Beaumont (note 300) 126.

<sup>302</sup> Mortensen (note 295) 213.

<sup>303</sup> See Brussels I Regulation (note 6) Chapter II arts 2 – 31.

<sup>304</sup> Protocol on the Interpretation by the Court of Justice of the Brussels Convention, done Jun 3, 1971, 1975 *Official Journal* (L204) 28.

<sup>305</sup> ‘Jenard Report’: see note 91.

<sup>306</sup> Huang (note 47) 25.



Mutual trust in the administration of justice between Member States justified judgments given in one Member State being recognised automatically without the need for any procedure except in cases of dispute.<sup>307</sup> The same principle of mutual trust demands that the procedure for making a judgment given in one Member State enforceable in another must be efficient and rapid. To that end, the declaration that a judgment is enforceable should be issued virtually automatically after purely formal checks of the documents supplied, without there being any possibility for the court to raise of its own motion any of the grounds for non-enforcement provided by the Regulation.<sup>308</sup>

The ECJ has as a result been deemed essential for the successful operation of the Brussels Convention and the Regulation.<sup>309</sup> In many cases, the ECJ interpreted the terms and phrases in the Convention and Regulation by adopting an autonomous Community definition instead of one favoured by a particular Member State.<sup>310</sup>

Finally, harmonisation has been achieved with a great degree of success in the field of enforcement of arbitral awards,<sup>311</sup> which is highly comparable with that of enforcement of judgments. Since harmonisation has worked well for enforcement of arbitral awards worldwide, it should also be able to work for enforcement of judgments, so as to accommodate the growing interdependence of courts<sup>312</sup> and other adjudicatory bodies, as a result of the increase in transnational litigation.<sup>313</sup>

#### 6.4 Montevideo Convention

Most pertinent is the fact that the Montevideo Convention does not regulate the issue of jurisdiction. The only reference to jurisdiction is found in art 2, which requires the enforcing

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<sup>307</sup> Brussels I Regulation (note 6) Recital 16.

<sup>308</sup> Brussels I Regulation (note 6) Recital 17.

<sup>309</sup> Von Mehren AT 'Jurisdictional Requirements: To What Extent Should the State of Origin's Interpretation of Convention Rules Control for Recognition and Enforcement Purposes?' in Lowenfeld AF & Silberman LJ (eds) *The Hague Convention on Jurisdiction and Judgments* (2001) 34.

<sup>310</sup> Reuland RC 'The Recognition of Judgments in the European Community: the Twenty-fifth Anniversary of the Brussels Convention' (1993) 14 *Michigan Journal of International Law* 566.

<sup>311</sup> The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards June 10, 1958 330 U.N.T.S. 38 is a typical example. More than 140 States have become party to it and the success of arbitration worldwide has much to owe to its worldwide enforceability regime: see Chapter 1 note 147 above.

<sup>312</sup> Not only are courts often requested to enforce foreign judgments, they are also often faced with choice-of-law clauses in international contracts requiring the application of foreign law: see Chapter 1 para 3 above.

<sup>313</sup> Lussier L 'A Canadian perspective' (1998-1999) 24 *Brooklyn Journal of International Law* 60-61.

court to verify that the rendering judge or tribunal was competent ‘in the international sphere’ (i.e. had international competence, or indirect jurisdiction) to provide the judgment according to the laws of the requested state as a condition for enforcement of the foreign judgment.<sup>314</sup> Any debate regarding the potential bases for the assertion of jurisdiction is absent.<sup>315</sup> The La Paz Convention was subsequently adopted to ensure an effective application of this article.<sup>316</sup>

The Organisation of American States (OAS)<sup>317</sup> recognised that provisions were necessary to prevent jurisdictional disputes among the States Parties and consequently adopted the La Paz Convention to ensure an effective application of art 2(d) of the Montevideo Convention.<sup>318</sup> The Convention lays down the circumstances under which the requirement of jurisdiction in the international sphere is deemed to be satisfied.<sup>319</sup> It was, therefore, regarded as necessary to supplement the single convention dealing with only recognition and enforcement of foreign judgments with a supplementary convention regulation jurisdiction for the effective application of the Montevideo Convention.

## 7 CONCLUDING REMARKS

A crucial aspect for a prospective instrument to harmonise the rules on recognition and enforcement in the SACU will be the identification of the most suitable type of the instrument to be adopted, taking into account the specific historical, political, cultural and socio-economic differences between the States.<sup>320</sup> This aspect has contributed to the relative failures and successes of previous efforts.<sup>321</sup>

A simple convention may be easier to conclude than a double convention but it will not address the issue of jurisdiction, with the result that much uncertainty will remain. A double

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<sup>314</sup> Montevideo Convention (note 7) art 2.

<sup>315</sup> Oestreicher (note 14) 69.

<sup>316</sup> La Paz Convention (note 273) art 1: see para 5.3 above.

<sup>317</sup> See Chapter 2 note 100.

<sup>318</sup> La Paz Convention (note 273) Preamble. The judge or tribunal rendering the judgment is competent in the international sphere to try the matter and to pass judgment on it in accordance with the law of the State in which the judgment, award or decision is to take effect.

<sup>319</sup> La Paz Convention (note 273) art 1.

<sup>320</sup> See para 1.3 above.

<sup>321</sup> See, for example, the attempt of the Hague Conference to create a mixed convention based on the Brussels I Regulation and ignoring the economic, political and cultural differences among negotiating parties: see para 1.3 above.

convention should be the starting point for negotiations among Member States as it will offer litigants and traders a greater degree of legal certainty.<sup>322</sup>

In the light of the political, cultural and social and sociological differences between Member States, conflicts may potentially arise in negotiating grounds of direct jurisdiction. This may be especially the case if the provisions of the Convention require an amendment of Member States' national laws relating to international jurisdiction in accordance with the provisions of the Convention.<sup>323</sup> However, given the common grounds between SACU Member States and their long history of collaboration, dating from 1910,<sup>324</sup> SACU Member States should from the outset attempt to resolve any potential conflicts in favour of unqualified acceptance or rejection of specific jurisdictional issues.

Should States be unable to reach agreement on bases of direct jurisdiction, a single convention may under the circumstances be easier to agree upon.<sup>325</sup> A single convention with indirect jurisdictional bases may pave the way for the regions to develop a mixed or double convention regulating both direct and indirect jurisdiction in the long run,<sup>326</sup> in a manner similar to the Montevideo Convention which was later complemented by the La Paz Convention to address the issue of indirect jurisdiction.<sup>327</sup>

The 1971 Hague Convention, despite being a in the form of a perceived single Convention, was nevertheless a massive failure, which suggests that other factors aside from the type of Convention contribute to the likelihood of success of a Convention.<sup>328</sup> The downfall of the Convention was likely the complex form of the Convention and requirement for the conclusion of supplementary agreements.<sup>329</sup> This should serve as warning for SACU Member States not to over-complicate the form and structure of any proposed instrument for the region.

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<sup>322</sup> See para 1.3 above.

<sup>323</sup> See para 1.1.1 above.

<sup>324</sup> See Chapter 1, para 2.2.

<sup>325</sup> Kessedjian Report (note 18) 138.

<sup>326</sup> See para 1.3 above.

<sup>327</sup> See para 5.1 above.

<sup>328</sup> See para 2.1 above.

<sup>329</sup> See para 2 above.

The 2005 Hague Choice of Court Convention deals with a much narrower scope than the 1971 Convention and with a single ratification, it has also not been a huge success. From the original idea of a worldwide convention on jurisdiction and judgments, the Convention now only applies to exclusive choice of court agreements, subject to a number of exclusions.<sup>330</sup> Although the final scope is limited, the preparatory work by the Hague Conference may be of great value in negotiations for a proposed instrument for the SACU region.

In contrast, the Brussels I Regulation was a resounding success.<sup>331</sup> As an example of a double convention, the Regulation provides a detailed set of jurisdictional rules according to when the courts of Contracting States are permitted to exercise jurisdiction, and also provides rules on recognition and enforcement, thereby achieving a great deal of legal certainty.<sup>332</sup> In addition, a judgment given in a Member State is recognised in the other Member States without any special procedure being required.<sup>333</sup> The factors that have contributed to the success of the Regulation should be duly noted by negotiating parties to a prospective SACU instrument. This includes the role of an overarching court to ensure uniform interpretation of the convention and the value of an accompanying explanatory report.<sup>334</sup>

The most pertinent of the Montevideo Convention is the fact that on its own it was not regarded as sufficient to facilitate the recognition and enforcement of foreign judgments and to prevent jurisdictional disputes among the States Parties.<sup>335</sup> OAS Member States saw the need to complement the provisions of the Montevideo Convention, providing no rules on jurisdiction, with the La Paz Convention, providing a set of jurisdictional grounds ‘for the purposes of the extraterritorial validity of foreign judgment’.<sup>336</sup> However, the time it took for the La Paz Convention to come into effect<sup>337</sup> once again alludes to the difficulties associated with agreeing on jurisdictional bases.

A comparison of the provisions of the above provisions further suggests that a recognition and enforcement convention should - :

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<sup>330</sup> See para 3.1 above.

<sup>331</sup> See para 4 above.

<sup>332</sup> See para 4 above.

<sup>333</sup> See para 4.2 above.

<sup>334</sup> See para 6.3 above.

<sup>335</sup> See para 5.2 above.

<sup>336</sup> La Paz Convention (note 273) art 1; see para 5.3 above.

<sup>337</sup> See para 5.3 above.

- define the scope and exclusions from scope of the Convention;<sup>338</sup>
- establish procedural requirements for recognition and enforcement under the Convention;<sup>339</sup>
- determine those instances when recognition and enforcement would be refused under the Convention;<sup>340</sup> and
- establish the recognised bases on which the rendering court will have jurisdiction for the purpose of recognition and enforcement under the Convention.<sup>341</sup>

Specific proposals for a recognition and enforcement convention for the SACU are made in the next chapter,<sup>342</sup> following a comparison of the existing statutory regimes for recognition and enforcement in the region.<sup>343</sup>




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<sup>338</sup> See Hague Convention (note 4) art 1; Hague Convention (note 5) arts 1-2; Brussels I Regulation (note 6) art 1; Montevideo Convention art 1; see para 2.1, 3.1, 4.1 and 5.1 above.

<sup>339</sup> See para 2.2, 3.2, 4.2 and 5.2 above.

<sup>340</sup> See para 2.3, 3.3, 4.3 and 5.3 above.

<sup>341</sup> See Hague Convention (note 4) art 10 (para 3.3 above); La Paz Convention (note 273) art 1 (para 5.3 above).

<sup>342</sup> See Chapter 4, para 6 below.

<sup>343</sup> See Chapter 4, para 3 and 4 below.

## CHAPTER 4

### COMPARISON OF EXISTING LAWS ON RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN THE SACU AND PROPOSALS FOR DRAFT CONVENTION

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## 1 INTRODUCTION

Chapter 2 considered the various approaches adopted by different regional economic communities and concluded that the best approach at present for the SACU is the adoption of a multilateral double convention by all SACU Member States providing uniform rules on the recognition and enforcement of foreign judgments.<sup>1</sup> Chapter 3 compared a number of international and regional multilateral conventions on recognition and enforcement in order to identify the principal matters that should be covered by such an instrument, and what lessons could be learnt from their examples.<sup>2</sup>

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<sup>1</sup> See Chapter 2, para 5 above.

<sup>2</sup> See Chapter 3, para 7 above.



This Chapter draws on the previous Chapters and proposes a draft text for proposed Convention for SACU Member States. The chapter sets out general principles underlying such a convention, as derived from the multilateral instruments discussed above, including the scope of a proposed instrument,<sup>3</sup> the procedural requirements for enforcement,<sup>4</sup> when recognition and refusal should be refused under a Convention,<sup>5</sup> and finally measures ensuring uniform interpretation of the Convention.<sup>6</sup> Some additional matters that a recognition and enforcement Convention may include are also discussed.<sup>7</sup>

This chapter makes a comparison of the statutory instruments regulating the recognition and enforcement of foreign judgments in the SACU Member States. The enforcement of a foreign money judgment at common law generally requires the institution of an action before the local court.<sup>8</sup> Such a step evidently involves trouble, expense and delay; therefore, many countries have made statutory provision to facilitate the enforcement of such foreign judgments.<sup>9</sup> The purpose of the comparison is to determine the extent of the differences and similarities between the statutory regimes currently in force in the region in order to ascertain the feasibility of a proposed harmonisation effort. The first provisions compared are the scope of application of each statute, which specifies which types of judgments are enforceable under that statute. The requirement of reciprocity lies at the heart of many enforcement schemes in Africa;<sup>10</sup> therefore, the reciprocity requirements under the statutes are also compared. The second sets of provisions that are compared are the requirements with which a judgment of a rendering have to comply to be enforceable in the state in which enforcement is sought (the requested state).

Judgments are not automatically enforceable in a foreign state once they meet all the requirements for enforcement: the respective statutes prescribe certain procedural requirements for enforcement, which are also compared. Once a judgment is registered (one of the procedural requirements for enforcement under most of the statutes) registration of the

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<sup>3</sup> See para 2.1 below.

<sup>4</sup> See para 2.2 below.

<sup>5</sup> See para 2.3 below.

<sup>6</sup> See para 2.4 below.

<sup>7</sup> See para 2.5 below.

<sup>8</sup> Forsyth CF *Private International Law: The Modern Roman-Dutch Law including the Jurisdiction of the High Courts* 5ed (2012) 438.

<sup>9</sup> Forsyth (note 8) 438.

<sup>10</sup> See para 4.1.6 below.

judgment may nevertheless be set aside under a number of circumstances listed in each of the statutes. These circumstances are also compared.

The relevant statutes that are compared are listed in the following table (in chronological order):

TABLE 1: STATUTORY INSTRUMENTS ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN SACU

Country	Statute
Swaziland	Reciprocal Enforcement of Judgments Act, 1922
Lesotho	Reciprocal Enforcement of Judgments Proclamation, 1922
Botswana	Judgments (International Enforcement) Act, 1981
South Africa	Enforcement of Foreign Civil Judgments Act, 1988
Namibia	Enforcement of Foreign Civil Judgments Act, 1994

The influences of the European colonisers on the private international law regimes in Southern Africa remains so strong that Thomashausen notes that ‘one is left with the uneasy feeling that 19<sup>th</sup> century European nationalism is surviving chiefly in the private international law and international procedures on the African continent’.<sup>11</sup> The statutes of many of the former British colonies, for example, are heavily influenced by the English law: in the case of *Achamat Essack Adam v Nairoon Adam*<sup>12</sup> the Lesotho High Court decided that the private international law rules of Lesotho are the same as those of England.<sup>13</sup> The current statutory provisions for recognition and enforcement of the SACU States are in many instances analogous to those contained in earlier United Kingdom statutes, whether the 1922 Administration of Justice Act<sup>14</sup> or the 1933 Foreign Judgments (Reciprocal Enforcement) Act.<sup>15</sup>

<sup>11</sup> Thomashausen A ‘The enforcement and recognition and of judgments and other forms of legal cooperation in the SADC’ (2005) 35(1) *Comparative and International Law Journal of Southern Africa* 33.

<sup>12</sup> *Achamat Essack Adam v Nairoon Adam* CIV/APN/327/94.

<sup>13</sup> *Adam v Adam* (note 12) citing *Webber v Webber* 1915 AD 239.

<sup>14</sup> See, for example, Swaziland and Lesotho.

<sup>15</sup> See, for example, Botswana. The South African and Namibian statutes also contains a number of provisions which are analogous to the 1933 Act, such as the grounds for setting aside a registered judgment: see paras 3.3.4 and 3.4.4 below.

Against this background, the recognition and enforcement of foreign judgments under the common law tradition in England merits some discussion,<sup>16</sup> after which the relevant recognition and enforcement of foreign judgment statutes of each of the SACU Member States will be discussed.

Once the general principles have been discussed, specific recommendations for a Draft Convention on the Recognition and Enforcement of Foreign Judgments in the SACU are made in a proposed text.<sup>17</sup>

## **2 RECOGNITION AND ENFORCEMENT UNDER THE COMMON LAW TRADITION**

The earliest common law decisions held that foreign judgments were not conclusive on the merits but were prima facie evidence of an obligation.<sup>18</sup> The common law required a foreign judgment creditor to bring a fresh action to enforce a judgment.<sup>19</sup>

The general common law rule was that the law of the forum (*lex fori*) determines the procedure for enforcement of foreign judgments. Therefore, in an action upon a foreign judgment, the form in which the action had to be brought was covered by the local law of the court in which the judgment was sought to be enforced.<sup>20</sup> Modes of execution were determined by the laws of the Forum State, often without giving regard to rights in terms of the foreign judgment which are comparable to domestic judgments.<sup>21</sup> Since a foreign judgment was regarded as no more than the basis of a claim asserted in action in the forum, it fell into the category of evidence. It was, therefore, necessary to be pleaded and proved under

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<sup>16</sup> Even though South Africa is a mixed tradition comprising both Roman-Dutch and common law, there is generally adherence to the common law tradition in matters on private international law: see para 3.4 below.

<sup>17</sup> See para 3 below.

<sup>18</sup> Sumner JD 'The Full-Faith-and-Credit Clause – Its History and Purpose' (1954-1955) 34 *Oregon Law Review* 226; Oppong RF 'Recognition and enforcement of foreign judgments in Ghana: A second look at a colonial inheritance' (2008) 31(4) *Commonwealth Law Bulletin* 20; Barnett PR *Res Judicata, Estoppel, and Foreign Judgments* (2001) 35.

<sup>19</sup> Yntema HE 'The Enforcement of Foreign Judgments in Anglo-American Law' (1935) 33(8) *Michigan Law Review* 1136.

<sup>20</sup> Yntema (note 19) 1135.

<sup>21</sup> Fowks RJ 'Foreign Money Judgments: Enforcement by Registration' (1972-1973) 11 *Washburn Law Journal* 375.

the general rules applicable to written evidence and, in particular, had to be properly authenticated.<sup>22</sup>

The first English statute<sup>23</sup> providing efficient enforcement procedures instituted a system in 1801 whereby reciprocal enrolment of decrees for monetary payment was made between the chancery and exchequer courts of England and Ireland.<sup>24</sup> When the decree of one was enrolled, it was to be 'enforced as if originally pronounced in such court'.<sup>25</sup> Direct enforcement by registration of money judgments was provided for in the Judgments Extension Act of 1868 ('Extensions Act'), which applied to judgments rendered in any part of the UK. A judgment for 'debt, damages or costs' was to have the same effect, and be executed in a like manner as a judgment rendered by the Superior Court in which the certificate had been registered.<sup>26</sup>

In 1908 a series of ordinances modelled after the Extensions Act were put into effect in all West African and various East and Central African colonies and protectorates of Great Britain.<sup>27</sup> These provided for the reciprocal enforcement of judgments and include the Ghana Foreign Judgments Extension Ordinance No 4 of 1907; Gambia Foreign Judgments Extension Ordinance No 5 of 1908; Northern Nigeria: Foreign Judgment Extension Ordinance No 21 of 1908; Southern Nigeria: Foreign Judgment Extension Ordinance No VI of 1908 and Sierra Leone: Foreign Judgment Extension Ordinance No 4 of 1908.<sup>28</sup>

In 1920, comparable enforcement procedures were extended to judgments rendered in British territories outside the UK by means of the Administration of Justice Act,<sup>29</sup> which is now discussed.

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<sup>22</sup> This is the case in England, where it is provided that foreign judgments shall be proved by sealed or signed or examined copies thereof: see Yntema (note 19) 1137.

<sup>23</sup> Crown Debts Act 1801 Chapter 90 41 Geo 3, an 'Act for the more speedy and effective Recovery of Debts due to his Majesty, his Heirs and Successors, in the right of the Crown of the United Kingdom of Great Britain and Ireland; and for the better Administration of Justice within the same': Long title. The Preamble and sections 1-8 were repealed by Civil Jurisdiction and Judgments Act 1982 (c.27), s. 54, Sch. 14.

<sup>24</sup> Fowks (note 21) 376.

<sup>25</sup> Fowks (note 21) 376.

<sup>26</sup> Fowks (note 21) 376.

<sup>27</sup> Yntema (note 19) 1157. Notably, the Union of South Africa was one of the most important parts of the Empire to which the Act did not apply.

<sup>28</sup> Oppong (note 18) 19.

<sup>29</sup> United Kingdom Administration of Justice Act, 1920; Yntema (note 19) 1151.

## 2.1 Administration of Justice Act, 1920

### 2.1.1 Application

The 1920 Administration of Justice Act establish a scheme for enforcement in the UK of certain judgments<sup>30</sup> from colonial and Commonwealth countries to which Part II of the Act extends.<sup>31</sup> Application of the Act to a territory was subject to a declaration by Order in Council,<sup>32</sup> provided that UK judgments would be given reciprocal treatment in that State.<sup>33</sup>

‘Judgment’ is defined as -

‘any judgment or order given or made by a court in any civil proceedings, whether before or after the passing of [the] Act, whereby any sum of money is made payable, and includes an award in proceedings on arbitration if the award has, in pursuance of the law in force in the place where it was made, become enforceable in the same manner as a judgment given by a court in that place’.<sup>34</sup>

The Administration of Justice Act contained a reciprocity requirement, and provided that

‘where His Majesty is satisfied that reciprocal provisions have been made by the legislature of any part of His Majesty’s dominions outside the UK for the enforcement within that part of His dominions of judgments obtained in the High Court of England, the Court of Session Scotland, and the High Court in England and Wales, His Majesty may by Order in Council declare that Part II of the Act shall extend to that part of His dominions, and on any such Order being made, this Part of the Act shall extend accordingly’.<sup>35</sup>

### 2.1.2 Requirements for Enforcement

A judgment could not be registered under the Act if –

- a) the original court acted without jurisdiction;
- b) the judgment debtor, being the person who was neither carrying on business nor ordinarily resident within the jurisdiction of the original court, did not voluntarily appear or submit to the jurisdiction of that court;

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<sup>30</sup> See definition of judgment, in text above.

<sup>31</sup> The Act extended to many of the States of the Commonwealth, including Botswana, Lesotho and Swaziland but not Namibia or South Africa: See Reciprocal Administration of Judgments Act, 1920, Pt II (Consolidation) Order 1984 SI 1984/129, as amended by 1985 SU 1985/1994.

<sup>32</sup> Orders in Council are used by Parliament when an ordinary Statutory Instrument would be inappropriate, such as for transferring responsibilities between government departments. Orders in Council are issued "by and with the advice of Her Majesty's Privy Council". Orders in Council were used to transfer the powers from Ministers of the UK government to those of devolved assemblies: UK Parliament ‘Orders in Council’ available at <http://www.parliament.uk/site-information/glossary/orders-in-council/> (accessed 28 May 2013).

<sup>33</sup> Administration of Justice Act (note 29) s 13.

<sup>34</sup> Administration of Justice Act (note 29) s 12(1).

<sup>35</sup> Administration of Justice Act (note 29) s 14(1).

- c) the judgment debtor, being the defendant in the proceedings, was not duly served with the process of the original court and did not appear, notwithstanding that he was ordinarily resident or was carrying on business within the jurisdiction of that court or agreed to submit to the jurisdiction of that court;
- d) the judgment was obtained by fraud;
- e) the judgment debtor satisfied the registering court either that an appeal was pending, or that he was entitled and intends to appeal, against the judgment; or
- f) the judgment was in respect of a cause of action which for reasons of public policy or for some other similar reason could not have been entertained by the registering court.<sup>36</sup>

### 2.1.3 Procedure for Enforcement

The Act provided that where a judgment was obtained in a superior court to which the Act applied, the judgment creditor may apply to the High Court in England or Ireland or to the Court of Session in Scotland, to have the judgment registered in the court. The application must be made at any time within twelve months after the date of the judgment, or such longer period as may be allowed by the court. The court may, if in all the circumstances of the case they think it is 'just and convenient' that the judgment should be enforced in the UK, order the judgment to be registered accordingly.<sup>37</sup> Section 9(2) indicated how the court was to assess what is 'just and convenient' which broadly, although not precisely, follows the common law.<sup>38</sup>

A registered judgment was, from the date of registration, of the same force and effect, and proceedings may have been taken thereon, as if it had been a judgment originally obtained or entered upon the date of registration in the rendering court. In so far as it relates to execution the registering court had the same control and jurisdiction over the judgment as it had over its own similar judgments.<sup>39</sup> Rules of court could provide for, amongst others, the serving of notice on the judgment debtor that the judgment has been registered; enabling the registering court to set aside a registered judgment; and for suspending the execution of a judgment.<sup>40</sup>

<sup>36</sup> Administration of Justice Act (note 29) s 9(2).

<sup>37</sup> Administration of Justice Act (note 29) s 9(1).

<sup>38</sup> See para 2.1.2 above.

<sup>39</sup> Administration of Justice Act (note 29) s 9(3).

<sup>40</sup> Administration of Justice Act (note 29) s 9(4).



Registration under the Act was not obligatory; the privilege of instituting a common law action instead of registering was reserved.<sup>41</sup>

#### 2.1.4 *Setting aside of registered judgment*

Section 9(4) of the Act provided that Rules of court may provide for, amongst others, enabling the registering court to set aside a registered judgment.

## 2.2 Foreign Judgment (Reciprocal Enforcement) Act, 1933

England applied the direct enforcement principle to judgments rendered outside Her Majesty's Dominions via the Foreign Judgments (Reciprocal Enforcement) Act.<sup>42</sup> The Act provided for the enforcement in the UK of judgments given in foreign countries which accord reciprocal treatment to judgments given in the UK.<sup>43</sup>

### 2.2.1 *Application*

The Act extended the possibility of enforcement to foreign judgments generally, not only to those from within the Empire. Its application, however, was not automatic, but depended upon an Order in Council of the British government,<sup>44</sup> which was conditional upon the jurisdiction to which it was applied extending substantially equal recognition to UK judgments.<sup>45</sup> If a judgment was not from a recognised court or tribunal, it may have been enforced and/or recognised according to the common law rules.<sup>46</sup>

The Act, however, only applied to judgments as defined in the Act, namely any 'judgment or order given or made by a court in any civil proceedings, or a judgment or order given or made by a court in any criminal proceedings for the payment of a sum of money in respect of

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<sup>41</sup> Fowks (note 21) 376.

<sup>42</sup> Foreign Judgments (Reciprocal Enforcement) Act, 1933 (hereafter 'Foreign Judgments Act'); Fowks (note 21) 377.

<sup>43</sup> Foreign Judgments Act (note 42) Preamble.

<sup>44</sup> These countries include Commonwealth countries (Australia, Canada (except Quebec), Guernsey, India, Pakistan, Tonga, Jersey, Isle of Man); non-European countries (Israel, Suriname); and European countries where the judgment is not otherwise enforceable under the Brussels Convention/Regulation or Lugano Convention (Austria, Belgium, France, Germany, Italy, the Netherlands, Norway): Barnett (note 18) 56.

<sup>45</sup> Leflar RA 'The New Uniform Foreign Judgments Act' (1949) 24 *New York University Law Review* 336.

<sup>46</sup> Barnett (note 18) 56.

compensation or damages to an injured party'.<sup>47</sup> Section 10A<sup>48</sup> of the Act extended the relevant provisions to arbitral awards.<sup>49</sup>

The Act provided that if 'His Majesty' was satisfied that should the registration of foreign judgments be extended to judgments given in the superior courts of any foreign country, substantial reciprocity of treatment would be assured for the enforcement in that country of UK superior court judgments, he was able to direct by Order in Council -

- a) that Part I of the Act will extend to that foreign country; and
- b) that the courts of that foreign country as specified in the order will be deemed superior courts of that country for the purposes of the Act.<sup>50</sup>

### 2.2.2 Requirements for enforcement

To be enforceable under the Act a judgment must have been from a superior court of a foreign country, to which the Act extends, if –

- a) it was final<sup>51</sup> and conclusive as between the parties thereto;<sup>52</sup>
- b) a sum of money was payable in terms of the judgment, excluding sums payable for taxes or similar charges or a fine or other penalty; and
- c) it was given after the coming into force of the Order in Council which made that court a recognised court.<sup>53</sup>

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<sup>47</sup> Foreign Judgments Act (note 42) section 11(1).

<sup>48</sup> Inserted by Civil Jurisdiction and Judgments Act 1982 (c. 27, SIF [Statutes in Force] 45:3), s. 35(1), Sch. 10 para. 4.

<sup>49</sup> Section 10A provides that 'The provisions of [this] Act ... shall apply, as they apply to a judgment, in relation to an award in proceedings on an arbitration which has, in pursuance of the law in force in the place where it was made, become enforceable in the same manner as a judgment given by a court in that place. The definition of 'court' in section 11 was accordingly included to 'include a tribunal': Foreign Judgments Act (note 42) s 11.

<sup>50</sup> Foreign Judgments Act (note 42) s 1(2).

<sup>51</sup> In the English case *Nouvion v Freeman and Another* (1890) 15 App Cas 1 (HL) Lord Herschell and Lord Watson held that: 'in order to establish that such a judgment has been pronounced it must be shown that in the Court by which it was pronounced it conclusively, finally and forever established the existence of the debt of which it is sought to be made conclusive evidence in this country, so as to make it res judicata between the parties. If it is not conclusive in the same Court which pronounced it, so that notwithstanding such a judgment the existence of the debt may between the same parties be afterwards contested in that Court, and upon proper proceedings being taken and such contest being adjudicated upon, it may be declared that there existed no obligation to pay the debt at all, then I do not think that a judgment which is of that character can be regarded as finally and conclusively evidencing the debt, and so entitling the person who has obtained the judgment to claim a decree from our Courts for the payment of that debt (Per Lord Herschell at 9).

<sup>52</sup> In terms of the Act a judgment will be deemed to be final and conclusive notwithstanding that an appeal may be pending against it, or that it may still be subject to appeal, in the courts of the country of the original court: Foreign Judgments Act (note 42) s 1(4).

Section 2A, which was subsequently added,<sup>54</sup> provided that the following judgments of a recognised court were not enforceable under the Act:

- a) a judgment given by that court on appeal from a court which is not a recognised court;
- b) a judgment or other instrument which is regarded for the purposes of its enforcement as a judgment of that court but which was given or made in another country; and
- c) a judgment given by that court in proceedings founded on a judgment of a court in another country and having as their object the enforcement of that judgment.<sup>55</sup>

### 2.2.3 Procedure for enforcement

A judgment creditor was able to apply to the High Court at any time within six years after the date of the judgment, or after the date of the last judgment given in appeal proceedings, to have the judgment registered in the High Court.<sup>56</sup> A judgment will not be registered if, at the date of the application –

- a) it was wholly satisfied; or
- b) it could not have been enforced by execution in the country of the original court.<sup>57</sup>

The effect of registration was to place a registered judgment on the same basis as an original judgment of the registering court in respect to execution and judicial control. A registered judgment was, for the purpose of execution, of the same force and effect; proceedings may have been taken thereon; the sum for which it was registered carried interest; and the registering court had the same control over the execution of a registered judgment, as if the judgment was a judgment ordinarily given in the registering court and entered on the date of registration.<sup>58</sup> Execution did not issue on the judgment so long as it was competent for any party to have the registration of the judgment set aside, or, where such application was made, until after the application has been finally determined.<sup>59</sup>

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<sup>53</sup> Foreign Judgments Act (note 42) s 4(2).

<sup>54</sup> Foreign Judgments Act (note 42) s 1(1)(2)(2A) substituted for s 1(1)(2) by Civil Jurisdiction and Judgments Act (note 48).

<sup>55</sup> Foreign Judgments Act (note 42) s 2A.

<sup>56</sup> Foreign Judgments Act (note 42) s 2(1).

<sup>57</sup> Foreign Judgments Act (note 42) s 2(1).

<sup>58</sup> Foreign Judgments Act (note 42) s; Fowks (note 21) 377 .

<sup>59</sup> Foreign Judgments Act (note 42) s 2(2).

#### 2.2.4 *Setting aside of registered judgments*

The registration was set aside, on an application made by any party against whom a registered judgment may be enforced, if the registering court was satisfied that –

- a) the judgment was not a judgment to which the Act applies or was registered in contravention with the Act;
- b) the courts of the country of the original court had no jurisdiction in the circumstances of the case;
- c) the judgment debtor, being the defendant in the proceedings in the original court, did not receive notice of those proceedings in sufficient time to enable him to defend the proceedings and did not appear;<sup>60</sup>
- d) the judgment was obtained by fraud;
- e) the enforcement of the judgment would have been contrary to public policy in the country of the registering court; or
- f) the rights under the judgment are not vested in the person by whom the application for the judgment was made.<sup>61</sup>

A registered judgment could also have been set aside if the registering court was satisfied that the matter in dispute in the proceedings in the original court had prior to the date of the judgment in the original court been the subject of a final and conclusive judgment by another court having jurisdiction in the matter.<sup>62</sup>

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<sup>60</sup> Notwithstanding that process may have been duly served on him in accordance with the law of the country of the original court.

<sup>61</sup> Foreign Judgments Act (note 42) s 4(1)(a).

<sup>62</sup> Foreign Judgments Act (note 42) s 4(1)(b).

The Act stipulated the instances in which the foreign court would have been deemed to have had jurisdiction,<sup>63</sup> as well as when it would have been deemed not to have had jurisdiction.<sup>64</sup> It expressly excepted from the rule that voluntary appearance confers jurisdiction upon the original court, except in cases in which the appearance is made to protect or release from seizure property seized or threatened with seizure, and cases in which a special appearance is made to contest the jurisdiction of the court.<sup>65</sup> The Act also declared the original court without jurisdiction if the bringing of the proceedings in the original court was contrary to an agreement under which the dispute in question was to be settled otherwise than by proceedings in the courts of the country in which that court had its seat.<sup>66</sup> The possible grounds of jurisdiction based upon citizenship or upon personal service within the jurisdiction were not recognised in the Act, as they were deemed to be of doubtful validity.<sup>67</sup> If admissible at all, judgments in such situations could be registered under the Act only under

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<sup>63</sup> A court would be deemed to have had jurisdiction in the case of a judgment given in an action in personam -

- a) if the judgment debtor, being a defendant in the original court, submitted to the jurisdiction of that court by voluntarily appearing in the proceedings [*otherwise than for the purpose of protecting or obtaining the release of property seized, or threatened with seizure, in the proceedings or of contesting the jurisdiction of that court*] – these words in the original Act have been repealed by the Civil Jurisdiction and Judgments Act 1982 (c. 27, SIF 45:3), ss. 35(1), 53, Sch. 13 Pt. II para. 9(2), Sch. 14;
- b) if the judgment debtor was plaintiff in, or counter-claimed in, the proceedings in the original court;
- c) if the judgment debtor, being a defendant in the original court, had before the commencement of the proceedings agreed, in respect of the subject-matter of the proceedings, to submit to the jurisdiction of that court or of the courts of the country of that court;
- d) if the judgment debtor, being a defendant in the original court, was at the time when the proceedings were instituted resident in, or being a body corporate had its principal place of business in, the country of that court; or
- e) if the judgment debtor, being a defendant in the original court, had an office or place of business in the country of that court and the proceedings in that court were in respect of a transaction effected through or at that office or place.

In the case of a judgment given in an action of which the subject-matter was immovable property or in an action in rem of which the subject-matter was movable property, if the property in question was at the time of the proceedings in the original court situate in the country of that court. In the case of a judgment given in an action other than any such action as is mentioned in the previous two paragraphs, if the jurisdiction of the original court is recognised by the law of the registering court (s 4(2)). An action in personam does not include any matrimonial cause or any proceedings in connection with any of the following matters, that is to say, matrimonial matters, administration of the estates of deceased persons, bankruptcy, winding up of companies, lunacy or guardianship of infants: see Foreign Judgments Act (note 42) s 11(2).

<sup>64</sup> A court would be deemed not to have had jurisdiction if the subject-matter of the proceedings was immovable property outside the country of the original court; except in the cases mentioned in subparagraphs (a) to (c) above, or in an action not mentioned above, if the bringing of the proceedings in the original court was contrary to an agreement under which the dispute in question was to be settled otherwise than by proceedings in the courts of the country of that court; or if the judgment debtor, being a defendant in the original proceedings, was a person who, under the rules of public international law, was entitled to immunity from the jurisdiction of the courts of the country of the original court and did not submit to the jurisdiction of that court: see Foreign Judgments Act (note 42) s 4(3).

<sup>65</sup> Foreign Judgments Act (note 42) s 4(2).

<sup>66</sup> Foreign Judgments Act (note 42) s 4(3)(b).

<sup>67</sup> Yntema (note 19) 1163.

the general provision that the original court would have been deemed to have had jurisdiction, if its jurisdiction was ‘recognised by the law of the registering court’.<sup>68</sup>

The court had the power either to set aside the registration, or to adjourn an application to set it aside, on such terms as it may deem just.<sup>69</sup> The registration proceedings under the Act were obligatory for securing the enforcement of a judgment which can be registered.<sup>70</sup> No court in the UK could entertain proceedings for the recovery of a sum payable under a foreign judgment to which the Act applied, other than proceedings by way of registration.<sup>71</sup>

### 2.2.5 Analysis

The 1933 Act is similar to the 1920 Act in that both justify the recognition, not by the doctrine of obligation,<sup>72</sup> but by the principle of reciprocity.<sup>73</sup> The 1933 Act differs from the 1920 Act in two important respects: First, the 1933 Act provided that the court ‘shall, subject to proof of the prescribed matter and to the other provisions of this Act, order the judgment to be registered’.<sup>74</sup> Thus, there was no ‘just and convenient’ discretion similar to the 1920 Act.<sup>75</sup> Secondly, while the 1920 Act facilitated registration for the purposes of reciprocal enforcement, it did not provide for registration for the sole purpose of procuring preclusive effects,<sup>76</sup> the 1933 Act made provision for the preclusive effect of all judgments, including unenforceable judgments that cannot be registered for enforcement under Part I of the Act.<sup>77</sup> In other words, while the 1933 Act was primarily intended to facilitate *enforcement* foreign judgments, s 8 was included to ensure that preclusive effects would nonetheless obtain for

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<sup>68</sup> Foreign Judgments Act (note 42) s 4(2)(c).

<sup>69</sup> Fowks (note 21) 377. If an applicant satisfies the registering court either that an appeal is pending, or that he is entitled and intends to appeal against the judgment, the court may either set aside the registration or adjourn the application to set aside the registration until after the expiration of such period reasonably sufficient to enable the applicant to take the necessary steps to have the appeal.

<sup>70</sup> Fowks (note 21) 377.

<sup>71</sup> Foreign Judgments Act (note 42) s 6.

<sup>72</sup> The doctrine of obligation provides the theoretical bases for recognition and enforcement at English common law: see Chapter 1 para 3.1 above.

<sup>73</sup> See para 2.1.5 and 2.1.6 above.

<sup>74</sup> Foreign Judgments Act (note 42) s 2(1).

<sup>75</sup> Foreign Judgments Act (note 42) s 9(1).

<sup>76</sup> The rules of claim preclusion prevent re-litigation of the same claim once that claim has ‘had its day in court’.

<sup>77</sup> The Foreign Judgments Act (note 42) s 8(1) provides that ‘Subject to the provisions of this section, a judgment to which Part I of [the] Act applies or would have applied of a sum of money had been payable thereunder, whether it can be registered or not, and whether, if it can be registered, it is registered or not, shall be recognised in any court in the United Kingdom as conclusive between the parties thereto in all proceedings founded on the same cause of action and may be relied on by way of defence or counterclaim in any such proceedings’.



judgments that fell within the registration scheme, and also for those non-money judgments that would fall within the scheme were they money judgments and therefore enforceable.<sup>78</sup>

The rules of jurisdictional competence under s 4(2) of the 1933 Act, which are absent under the 1920 Act, followed the common law,<sup>79</sup> except that residence (or principal place of business for corporate defendants)<sup>80</sup> replaced presence.<sup>81</sup>

Similarly, the requirements ‘final and conclusive’ and ‘on the merits’<sup>82</sup> were also reflected in the Act, as the minimum conditions for enforcement by registration.<sup>83</sup> It is, therefore, generally clear that once a judgment was registered under the 1933 Act, and thus verified as a *res judicata*, the judgment was treated as if it were an English judgment.<sup>84</sup>

The recognition and enforcement of foreign judgments according to the English common law, and largely reflected in the 1920 and 1933 Acts,<sup>85</sup> requires -:

- (i) the foreign court to possess jurisdictional competence, which is generally satisfied if the defendant was present<sup>86</sup> within or submitted<sup>87</sup> to the jurisdiction of the foreign court; and
- (ii) that the foreign judgment must be final and conclusive<sup>88</sup> and on the merits.<sup>89</sup>

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<sup>78</sup> Barnett (note 18) 57.

<sup>79</sup> The bases of jurisdiction were considered in *SA Consortium General Textiles v Sun & Sand Agencies Ltd* [1978] QB 279, CA. They are exclusive: no other ground of jurisdiction will render a foreign judgment registerable under the Act: *Societe Co-operative Sidmetal v Titan International Ltd* [1966].

<sup>80</sup> ‘Residence’ in the case of corporations is not merely a requirement of carrying on business (as it is at common law or under the 1920 Act, but rather the *principal* place of business be in the foreign country: Barnett (note 18) 58.

<sup>81</sup> See, also, Foreign Judgments Act (note 42) s 4(2)(a)(v) for the jurisdictional rules as to presence of a corporate defendant with an office or place of business in the foreign country: ‘if the judgment debtor, being a defendant in the original court, had an office or place or business in the country of that court and the proceedings in that court were in respect of a transaction effected through or at that office or place’: see Foreign Judgments Act (note 42) s 4(2)(a)(v).

<sup>82</sup> Foreign Judgments Act (note 42) s 2(1).

<sup>83</sup> Provided that the judgment has not been satisfied: Foreign Judgments Act (note 42) s 2(1)(a); and the judgment is capable of enforcement by execution in the country of the original court: see Foreign Judgments Act (note 42) s 2(1)(b).

<sup>84</sup> Barnett (note 18) 59.

<sup>85</sup> Barnett (note 18) 35.

<sup>86</sup> Barnett (note 18) 35; Administration of Justice Act (note 29) s 9(2)(b); Foreign Judgments Act (note 42) s 4(2)(a)(iv).

<sup>87</sup> Submission may be actual, contractual or voluntary: see *Schibsby v Westenholz* (1870) LR 6 QB 155; Foreign Judgments Act (note 42) s 4(2)(a)(ii); see Barnett (note 18) 36.

<sup>88</sup> *Blohn v Dresser* [1962] QB 116; *Berliner Industriebank AG v Jost* [1971] 2 QB 463.

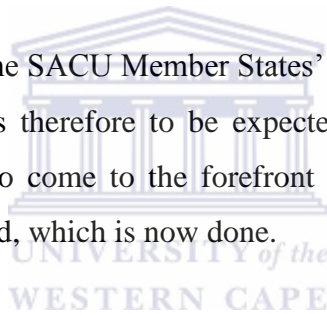
<sup>89</sup> *DSV Silo-und Vewaltungsgesellschaft mbH v Owners of the Sennar and 13 Other Ships* [1985] 1 WLR 490, HL; *Desert Sun Loan Copr v Hill* [1996] 2 All ER 847, CA.

In addition, there must be no defence to recognition, the main defences to recognition being that the foreign judgment suffered from one of the following defects:

- (i) it was obtained in breach of a jurisdiction or arbitration agreement;<sup>90</sup>
- (ii) it was procured by fraud;<sup>91</sup>
- (iii) the proceedings in which it was obtained were in breach of natural justice;<sup>92</sup>
- (iv) its subject-matter is *res judicata*<sup>93</sup> in the recognising State;<sup>94</sup>
- (v) it is contrary to public policy of the recognising state;<sup>95</sup>
- (vi) the sum is in respect of a tax or a like charge,<sup>96</sup> or a fine or other penalty;<sup>97</sup> and
- (vii) it offends section 5 of the Protection of Trading Interests Act 1980.<sup>98</sup>

The comparison and analysis of the Acts therefore reveal that even though there are certain similarities between the 1920 Administration of Justice Act and 1933 Foreign Judgments Act, there are nevertheless noteworthy differences between these Acts.

As is illustrated below, some of the SACU Member States' statutes are based on the 1920 Act, and some on the 1933 Act. It is therefore to be expected that the underlying differences between these two Acts will also come to the forefront when the relevant statutes of the SACU Member States is discussed, which is now done.



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<sup>90</sup> Civil Jurisdiction and Judgments Act (note 48), s 32; *Tracom SA v Sudan Oil Seeds Co Ltd* [1983] 1 All ER 404.

<sup>91</sup> *Sayal v Heyward* [1948] 2 KB 433, CA; *Blohn v Dessler* (note 88); *Jet Holdings Ltd v Pater* [1990] 1 QB 335 CA; *House of Spring Gardens Ltd v Waite* [1991] 1 QB 241, CA; *Owens Bank Ltd v Bracco* [1992] 2 AC 443, HL.

<sup>92</sup> *Adams v Cape Industries PLC* [1990] Ch 433, CA; *Herzberg v Manipna* (1984) 38 RF (2d) 412 (Man).

<sup>93</sup> A final and conclusive judicial decision on the merits by a judicial tribunal having competent jurisdiction over the matter in disputes and the parties: Barnett (note 18) 31.

<sup>94</sup> *Verwacke v Smith* [1983] 1 AC 145, HL.

<sup>95</sup> Foreign Judgments Act (note 42) s 4(1)(a)(v). See also *General Textiles v Sun & Sand Agencies* (note 79).

<sup>96</sup> *Government of India v Taulor* [1955] AC 491; *Rossano v Manufacturer's Life Insurance Co Ltd* [1963] 2 QB 352; *USA v Harden* (1963) 41 DLR (2d) 721 (Sup Ct Can); *Commissioner of Taxes v McFarland* 1965 (1) SA 470.

<sup>97</sup> *Huntington v Attril* [1893] AC 150, PC; *USA v Inkley* [1989] QB 255, CA; *Raulin v Fischer* [1911] 22 KB 93; *General Textiles v Sun & Sand Agencies* (note 79).

<sup>98</sup> Similar legislation has been enacted in South Africa: Protection of Businesses Act 1978 – see para 3.4.2 below; Australia: Foreign Proceedings (Excess of Jurisdiction) Act 1984; Canada: Foreign Extraterritorial Measures Act 1984: Barnett (note 18) 37.

### 3 OVERVIEW OF RELEVANT STATUTES

This part of the Chapter compares the statutes regulating the recognition and enforcement of foreign judgments in each of the selected SACU Member States, in the chronological order in which the statutes were enacted.

#### 3.1 Swaziland

##### 3.1.1 *Reciprocal Enforcement of Judgments Act (1922)*

The Reciprocal Enforcement of Judgments Act<sup>99</sup> of Swaziland was meant to facilitate the reciprocal enforcement of judgments and awards in the UK and Swaziland.<sup>100</sup> The Act, other than differences in numbering and arrangement, corresponds largely with Part II (dealing with the reciprocal enforcement of judgments in the UK and in other parts of His Majesty's dominions) of the UK Administration of Justice Act of 1920.<sup>101</sup> The Act is supplemented by the Reciprocal Enforcement of Judgment Rules<sup>102</sup> which regulates the practice and procedure in respect of the enforcement of foreign judgments.<sup>103</sup>

##### 3.1.2 *The scope of application*

The application of the Act is limited to judgments from the UK, and specifically judgments obtained in the High Court of England or Ireland, or the Court of Session in Ireland.<sup>104</sup>

The definition of 'judgment' is identical to that in s 12 of the UK Administration of Justice Act 1920, discussed above.<sup>105</sup>

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<sup>99</sup> Reciprocal Enforcement of Judgments Act No. 4 of 1922 ('Swaziland Act') came into effect on 27 January 1922.

<sup>100</sup> Swaziland Act (note 99) Preamble.

<sup>101</sup> Administration of Justice Act (note 29) (Sections 9-14); para 2.1 above.

<sup>102</sup> Rules of Court promulgated under Section 3(4) of the Reciprocal Enforcement of Judgments Act, 1922, commenced operation on 16 June 1923 ('Swaziland Rules').

<sup>103</sup> Schulze C *On Jurisdiction and the Recognition of Foreign Money Judgments* (2005) 118.

<sup>104</sup> Swaziland Act (note 99) s 3.

<sup>105</sup> 'Judgment' is defined as 'a judgment or order given or made by a court in any civil proceedings, whether before or after the taking effect of [the] Act, whereby any sum of money is made payable, and includes an award in proceedings on arbitration of the award has, in pursuance of the law in force in the place where it was made, become enforceable in the same manner as a judgment given by a court in that place': see Swaziland Act (note 99) s 2.

The Prime Minister may only declare the extension of the Act to other *Commonwealth* countries if he is satisfied that that Commonwealth legislature has made reciprocal provision for the enforcement of judgments obtained in the court of Swaziland.<sup>106</sup> This has been done by means of Notice No 97 of 1922, in terms of which if reciprocal provisions have been made by the legislatures for the enforcement of judgments obtained in the High Court of Swaziland, within the territories specified, the Act extends to judgments obtained from those territories in like manner as it extends to judgments obtained in a superior court in the UK, as from the respective dates listed in the Schedule.<sup>107</sup>

### 3.1.3 *Requirements for recognition and enforcement*

The requirements and procedure for enforcement are identical to those provided for in the UK Administration of Justice Act, 1920,<sup>108</sup> and the same six defences are available against the registration of a judgment.<sup>109</sup>

### 3.1.4 *Procedure for enforcement*

The judgment creditor must apply to the High Court in Swaziland to have the judgment registered.<sup>110</sup> Once registered under the Act, a judgment will from the date of registration be of the same force and effect and proceedings may be taken thereon, as if it had been a judgment originally obtained or entered upon the date of registration by the court. The court will have the same control and jurisdiction over the judgment as it has over similar judgments given by it, but only in so far as it relates to execution.<sup>111</sup>

A creditor in terms of a judgment obtained from one of the stipulated High Courts must apply to the High Court of Swaziland within twelve months of the date of judgment, or such longer

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<sup>106</sup> Swaziland Act (note 99) s 5.

<sup>107</sup> Notice No 97 of 1922 on the Reciprocal Enforcement of Judgments. The Schedule lists the territories of Lesotho, Botswana, Southern Rhodesia (now Zimbabwe), Zambia, Zanzibar, Malawi, Kenya, New Zealand, Western Australia, Tanzania, Uganda, New South Wales, Victoria, Territory of North Australia, and the Territory of Southern Australia; see also Schulze (note 103) 169.

<sup>108</sup> See Administration of Justice Act (note 29) s 9.

<sup>109</sup> Swaziland Act (note 99) s 3(2); see para. 2.1.2 above.

<sup>110</sup> Swaziland Act (note 99) s 3(1).

<sup>111</sup> Swaziland Act (note 99) s 3(3).

period as may be allowed by such Court, to have the judgment registered there.<sup>112</sup> The Court may ‘if in all the circumstances of the case it thinks it is just and convenient that the judgment should be enforced in Swaziland’, order the judgment to be registered.<sup>113</sup> The Act does not provide any guidance as to when it would be ‘just and convenient’ to have a foreign judgment registered.<sup>114</sup> This provision vests a considerable degree of discretion in the High Court.<sup>115</sup> However, a judgment will not be registered if it satisfies one of the grounds on which no judgment will be registered.<sup>116</sup>

The Rules prescribe the procedures to be followed, and provides amongst others, that application must be made *ex parte* or by summons;<sup>117</sup> the details of the supporting affidavit of facts which must be provided;<sup>118</sup> and the requirement of service of notice.<sup>119</sup> Notice of the registration of the judgment must be served on the judgment debtor within a reasonable time, after such registration,<sup>120</sup> but no definition of the term ‘reasonable’ is given.<sup>121</sup> The notice must state that the defendant is entitled, if he has grounds for doing so, to apply to set aside the registration. The notice must also state the number of days for applying to set aside the registration.<sup>122</sup>

No execution will issue on a judgment until after the expiry after service on the judgment debtor of notice of the registration thereof of the time stated in the order giving leave to register. The Court may at any time order that execution be suspended for a longer time.<sup>123</sup>

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<sup>112</sup> According to the wording of s 3(1), the application may be also be made within a period longer than twelve months, as may be allowed by the court, but it remains unclear under what circumstances the court may grant a period longer than twelve months: See Schulze (note 103) 117.

<sup>113</sup> Swaziland Act (note 99) s 3(1); this is *mutatis mutandis* the same as the Administration of Justice Act (note 29) section 9(1): see para 2.1.3 above.

<sup>114</sup> Schulze (note 103) 117.

<sup>115</sup> This does not necessarily promote the certainty and predictability of the law in general and leaves the judgment creditor uncertain as to whether his judgment will be registered, and thus become enforceable in the relevant court: see Schulze (note 103) 126. In these cases the courts will likely rely on the common law and decided cases to determine when it would not be ‘just and convenient’ for the judgment to be registered.

<sup>116</sup> See para 3.1.4 below.

<sup>117</sup> Swaziland Rules (note 102) rule 1.

<sup>118</sup> Swaziland Rules (note 102) rules 2-4.

<sup>119</sup> Swaziland Rules (note 102) rules 10-14.

<sup>120</sup> Swaziland Rules (note 102) rules 10.

<sup>121</sup> Schulze (note 103) 119.

<sup>122</sup> Swaziland Rules (note 102) rules 12.

<sup>123</sup> Swaziland Rules (note 102) rules 17.

### 3.1.5 *Setting aside of registered judgments*

A judgment debtor may at any time within the time stated in the order<sup>124</sup> apply by summons to the Court to set aside the registration or to suspend execution on the judgment. The Court may, if satisfied that one of the six defences listed is present<sup>125</sup> or that or that it is not just and convenient that the judgment should be enforced order that the registration be set aside.<sup>126</sup> The Act does not specify on which bases a court will be deemed to have had jurisdiction for the purpose of enforcement.<sup>127</sup>

An assessment of this statute and comparative analysis with the other relevant Statutes is given below.<sup>128</sup>

## 3.2 **Lesotho**

### 3.2.1 *Reciprocal Enforcement of Judgments Proclamation (1922)*

The Lesotho Reciprocal Enforcement of Judgments Proclamation<sup>129</sup> was meant to facilitate the reciprocal enforcement of judgments and awards between the UK and Lesotho (previously Basutoland).<sup>130</sup> The Proclamation, other than for differences in numbering and arrangement corresponds largely with Part II of the UK Administration of Justice Act of 1920,<sup>131</sup> as well as with the Swaziland Act discussed above. The Act is supplemented by the Reciprocal Enforcement of Judgment Rules of Court.<sup>132</sup>

### 3.2.2 *Scope of application*

The application of the Proclamation is limited to judgments from the UK, and specifically judgments obtained in the High Court of England or Ireland, or the Court of Session in

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<sup>124</sup> Rule 12 provides that the notice of registration must state that the defendant is entitled, if he has grounds for doing so, to apply to set aside the registration, and must state the number of days for applying to set the registration: see Swaziland Rules (note 102) rule 12.

<sup>125</sup> Swaziland Act (note 99) s 3(2): see para 2.1.2 above.

<sup>126</sup> Swaziland Rules (note 117) rules 15.

<sup>127</sup> See Swaziland Act (note 99).

<sup>128</sup> See para 4 below.

<sup>129</sup> Reciprocal Enforcement of Judgments Proclamation 2 of 1922 ('Lesotho Proclamation').

<sup>130</sup> Lesotho Proclamation (note 129) Preamble.

<sup>131</sup> See Administration of Justice Act (note 129) s 9-14; para 2.1 above.

<sup>132</sup> Lesotho Reciprocal Enforcement of Rules of Court, date of commencement: 16 June 1923 ('Lesotho Rules').



Ireland.<sup>133</sup> The definition of ‘judgment’ is identical to that in s 12 of the UK Administration of Justice Act 1920, discussed above.<sup>134</sup>

Section 6(1) of the Proclamation empowers the High Commissioner to extend the Proclamation, by Notice in the Gazette to judgments in a Superior Court of other parts of Her Majesty’s Dominions if he is satisfied that reciprocal provisions have been made there for the enforcement within that part of Her Dominions of judgments obtained in the High Court.<sup>135</sup> This has been done by means of Notice No 96 of 1922 in terms of which the Act extends to judgments obtained from the specified territories in the same manner as it extends to judgments obtained in a superior court in the UK, if reciprocal provisions have been there made by the legislature for the enforcement of judgments obtained in Lesotho.<sup>136</sup>

### 3.2.3 *Requirements for enforcement*

The relevant judgment creditor must apply to the High Court in Lesotho to have the judgment registered.<sup>137</sup> Once registered, a judgment will be of the same force and effect and proceedings may be taken thereon, as if it had been a judgment originally obtained or entered up on the date of registration by the court. The court will have the same control and jurisdiction over the judgment as it has over similar judgments given by it, but only in so far as it relates to execution.<sup>138</sup>

The requirements and procedure for enforcement are identical to those provided for in the UK Administration of Justice Act, 1920,<sup>139</sup> and the same six defences are available against the registration of a judgment.<sup>140</sup>

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<sup>133</sup> Lesotho Proclamation (note 129) s 3(1).

<sup>134</sup> ‘Judgment’ is defined as ‘a judgment or order given or made by a court in any civil proceedings, whether before or after the taking effect of [the] Act, whereby any sum of money is made payable, and includes an award in proceedings on arbitration of the award has, in pursuance of the law in force in the place where it was made, become enforceable in the same manner as a judgment given by a court in that place’: Lesotho Proclamation (note 129) s 2.

<sup>135</sup> Lesotho Proclamation (note 129) s 6(1).

<sup>136</sup> High Commissioner Notice No 96 of 1922 Extension of Reciprocity. The Schedule lists the territories of the Bechuanaland Protectorate, Swaziland, Southern Rhodesia, Northern Rhodesia, Zanzibar, Nyasaland, Kenya, New Zealand, Tanganyika, Uganda, New South Wales, Victoria, North Australia and Central Australia.

<sup>137</sup> Lesotho Proclamation (note 129) s 3(1).

<sup>138</sup> Lesotho Proclamation (note 129) s 3(3).

<sup>139</sup> See Administration of Justice Act (note 29) s 9.

<sup>140</sup> Lesotho Proclamation (note 129) s 3(2); see para. 2.1.2 above.

### 3.2.4 Procedure for enforcement

A creditor in terms of a judgment obtained in the High Court in England or Ireland or in the Court of Session in Scotland must apply to the High Court of Lesotho within twelve months of the date of judgment, or such longer period as may be allowed by such Court, to have the judgment registered there. The Court may ‘if in all the circumstances of the case it thinks it is just and convenient that the judgment should be enforced in [Lesotho]’, order the judgment to be registered.<sup>141</sup> The Act does not provide any guidance as to when it would be ‘just and convenient’ to have a foreign judgment registered.<sup>142</sup>

The Rules prescribe the procedures to be followed, and provides, amongst others, that application can be made *ex parte* or by summons.<sup>143</sup> The application must be supported by an affidavit of the facts of the judgment,<sup>144</sup> or an authenticated copy of the judgment, and stating that to the best of the information and belief of the deponent, the judgment creditor is entitled to enforce the judgment and the judgment does not fall within any of the cases in which a judgment cannot be properly ordered or registered.<sup>145</sup> An order giving leave to register must be drawn up and served on the debtor unless the order is made on *ex parte* application, in which case no service is required.<sup>146</sup> It must state the time within which the judgment debtor is entitled to apply to set the registration of the judgment aside.<sup>147</sup> After registration, notice of the registration of the judgment, containing all the particulars of the judgment registered,<sup>148</sup> must be served<sup>149</sup> on the judgment debtor within a reasonable time, but no definition of the term ‘reasonable’ is given.<sup>150</sup>

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<sup>141</sup> Lesotho Proclamation (note 129) s 3(1); this is *mutatis mutandis* the same as the Administration of Justice Act (note 29) s 9(1); see para 2.1.3 above.

<sup>142</sup> See note 115 above, where it was stated that this affords the High Court discretion and does not improve legal certainty and predictability.

<sup>143</sup> Lesotho Rules (note 132) rule 1.

<sup>144</sup> The affidavit must also, as far as the deponent can, give the full name, title, trade or business and usual or last known place of abode or business of the judgment creditor and judgment debtor, respectively: see Lesotho Rules (note 132) rule 2.

<sup>145</sup> Lesotho Proclamation (note 129) s 3(2); see para. 2.1.2 above.

<sup>146</sup> Lesotho Rules (note 132) rule 5.

<sup>147</sup> If the judgment debtor is ordinarily resident within twenty miles from Maseru (the capital of Lesotho), the time will ordinarily 14 days, any adjustment in other the time will depend on the distance from Maseru of the place where the judgment debtor resides and the postal facilities between Maseru and that place: see Lesotho Rules (note 136) rule 6.

<sup>148</sup> This includes the name and address of the judgment creditor, and must also state that the defendant is entitled, if he has grounds for doing so, to apply to have the registered judgment set aside, and the number of days for applying to have the registration set aside: see Lesotho Rules (note 132) rule 10.

<sup>149</sup> In the absence of an order by the court as to the mode of service thereof, the notice must be served on the judgment debtor in the same manner as a summons is required to be served: see Lesotho Rules (note 132) rule 9.

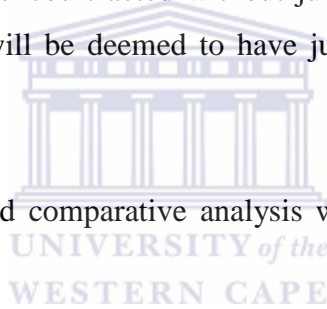
<sup>150</sup> Lesotho Rules (note 132) rule 10.

No execution will issue on a judgment<sup>151</sup> until the period specified in the order has lapsed as from the date of serving notice of registration on the judgment debtor, provided that the Court may order that execution be suspended for a longer time.<sup>152</sup>

### 3.2.5 *Setting aside of registered judgments*

A judgment debtor may within the time stated in the order, or after such time as the Court allows<sup>153</sup> apply by summons to the Court to have the registration of a judgment set aside, or to suspend execution on the judgment. If the Court is satisfied that one of the six grounds on which a judgment cannot be registered<sup>154</sup> is present; or that or that it is not just and convenient that the judgment should be enforced in Lesotho; or for other sufficient reasons,<sup>155</sup> order that the registration be set aside.<sup>156</sup> One of the grounds on which a registered judgment may be set aside is if the original court acted without jurisdiction,<sup>157</sup> but the Proclamation does not specify when a court will be deemed to have jurisdiction for purposes of setting aside a registered judgment.<sup>158</sup>

An assessment of this statute and comparative analysis with the other relevant Statutes is given below.<sup>159</sup>



## 3.3 Botswana

### 3.3.1 *Judgments (International Enforcement) Act (1981)*

The Judgments (International Enforcement) Act<sup>160</sup> makes statutory provision for the recognition and enforcement of foreign judgments in Botswana.<sup>161</sup> The Act consolidates the

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<sup>151</sup> Any party wanting to issue execution on a registered judgment must produce an affidavit of the service of the notice of registration: see Lesotho Rules (note 136) rule 15.

<sup>152</sup> Lesotho Rules (note 132) rule 14.

<sup>153</sup> Rule 10 provides that the notice of registration must state that the defendant is entitled, if he has grounds for doing so, to apply to set aside the registration, and must state the number of days for applying to set the registration: see Lesotho Rules (note 132) rule 10.

<sup>154</sup> Lesotho Proclamation (note 129) s 3(2): see para 2.1.2 above.

<sup>155</sup> No indication is given of when it would not be deemed to be 'just and convenient' to register a judgment, or what the 'other sufficient reasons' may be to have registration set aside, or execution suspended.

<sup>156</sup> See Lesotho Rules (note 132) rule 12.

<sup>157</sup> Lesotho Proclamation (note 129) s 3(2).

<sup>158</sup> See Lesotho Proclamation (note 129).

<sup>159</sup> See para 4 below.

law relating to the enforcement of judgments given in countries which accord reciprocal treatment to judgments given in Botswana.<sup>162</sup>

If the President is satisfied that substantial reciprocity of treatment will be given to the Botswana High Court judgments in a specific country, the President may, by statutory instrument, order that the Act extends to that country; and the specified courts will be the superior courts of that country for those purposes.<sup>163</sup>

On the other hand, if it appears to the President that the treatment in respect of recognition and enforcement is substantially less favourable than that accorded by the courts of Botswana to judgments of the superior courts of that country, the President may by statutory instrument order that no proceedings shall be entertained in any court of Botswana for the recovery of any sum alleged to be payable under a judgment given in a court of that country.<sup>164</sup>

### 3.3.2 *Scope of application*

The Act applies to any superior court judgment of a country to which the Act extends,<sup>165</sup> other than a judgment given on appeal from a court which is not a superior court. The judgment must be final and conclusive between the parties; it must provide for the payment of a sum of money; and it must have been given after the coming into operation of the order directing that the Act extends to that country.<sup>166</sup>

The term judgment is defined as –

‘a judgment or order given or made by a court in any civil proceedings or ... any criminal proceedings for the payment of a sum of money in respect of compensation or damages to an injured party, and includes an award in proceedings on arbitration if the award has, in

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<sup>160</sup> Judgments (International Enforcement) Act Chapter 11:04; the Act came into force on 25 September 1981 (‘Botswana Act’).

<sup>161</sup> The general principles of recognition and enforcement of foreign judgments under the Botswana common law are identical with the principles under the South African common law: see Kiggundu J *Private International Law in Botswana – Cases and Materials* (2002) 343-9, 364-5; Schulze (note 103) 111.

<sup>162</sup> Botswana Act (note 160) long title.

<sup>163</sup> Botswana Act (note 160) s 3(1).

<sup>164</sup> Botswana Act (note 160) s 11. Thus, the reciprocity of treatment requirement that was already spelt out in s 3 is reiterated in s 11: see Schulze (note 103) 113

<sup>165</sup> In *Elia Aminieli Mtui v Ednester Mtui* Civ Appeal No 33 of 2000, for example, the court held that a decree from Tanzania was not enforceable under the Judgment (International Enforcement Act) Cap 11:04, but that the decree was recognisable and enforceable by common law of Botswana: at 6 per Lord Weir JA.

<sup>166</sup> Botswana Act (note 160) s 3(2).

pursuance of the law in force in the place where it was made, become enforceable in the same manner as a judgment given by a court in that place'<sup>167</sup>

Designation of any particular country is only possible if the President is satisfied that 'substantial reciprocity of treatment'<sup>168</sup> is extended to the judgments of the High Court of Botswana in that country.<sup>169</sup>

### 3.3.3 Requirements for enforcement

A judgment creditor who wishes to enforce a judgment must apply to the High Court of Botswana to have the judgment registered and the court may so order, subject to proof of the prescribed matters.<sup>170</sup> A judgment will not be registered if, at the date of application, it has been wholly satisfied; or it could not be enforced by execution in the country of the original court.<sup>171</sup> Judgments which are eligible for registration are not enforceable by other means.<sup>172</sup>

A registered judgment is, for the purposes of execution, of the same force and effect as if the judgment had been a judgment originally given in the registering court and entered on the date of registration.<sup>173</sup>

With regards to the *recognition* of judgments,<sup>174</sup> a judgment to which the Act applies or would have applied if a sum of money had been payable thereunder, will be *recognised* in any court in Botswana as conclusive between the parties thereto in all proceedings founded on the same cause of action and may be relied on by way of defence or counter-claim in any such proceedings.<sup>175</sup> The Act does not prevent any court in Botswana from recognising any

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<sup>167</sup> Botswana Act (note 160) s 2(1)).

<sup>168</sup> There is no consensus on what reciprocity really means and how it should be established, and statutes that include this requirement usually do not define it: see Juenger FK 'Recognition of money judgments in civil and commercial matters' (1988) 36 *American Journal of Comparative Law* 31; Botswana Act (note 161) s 3(1). See also, for example Namibia Act (s 2(1)): para 3.4.2 below.

<sup>169</sup> Botswana Act (note 160) s 3(1).

<sup>170</sup> Botswana Act (note 160) s 5(1).

<sup>171</sup> Botswana Act (note 160) s 5(2).

<sup>172</sup> Botswana Act (note 160) s 9.

<sup>173</sup> Botswana Act (note 160) s 5(3).

<sup>174</sup> Declaratory orders and judgments dismissing claims, for example, do not require enforcement: see Chapter 1, para 2.4 above.

<sup>175</sup> This would however not be the case where the judgment has been registered and the registration thereof has been set aside on some ground other than that a sum of money was not payable under the judgment; that the judgment had been wholly or partly satisfied; that at the date of the application the judgment could not be enforced by execution in the country of the original court; or where the judgment has not been registered, it is shown (whether it could have been registered or not) that if it had been registered the registration thereof

judgment as conclusive of any matter of law or fact decided therein if that judgment would have been recognised before the commencement of the Act.<sup>176</sup>

#### 3.3.4 Procedure for enforcement

A judgment creditor may apply to the High Court within six years of the date of the judgment, or, where there have been proceedings by way of appeal against the judgment given in those proceedings, after the date of the last judgment given in those proceedings, to have the judgment registered and on the application the court may, subject to proof of the prescribed matters order the judgment to be registered.<sup>177</sup>

The judgment may not be executed as long as it is possible for any party to apply to have the registration of the judgment set aside, or, where an application is made, until after the application has been finally determined.<sup>178</sup>

Where the sum payable under a judgment which is to be registered is expressed in a currency other than the currency of Botswana, the judgment will be registered on the basis of the rate of exchange prevailing at the date of the judgment of the original court.<sup>179</sup>

The Act stipulates that Rules of Court may provide for, amongst others, the matters to be proved on an application for the registration of a judgment and for regulating the mode of providing such proof.<sup>180</sup> A notice of the registration of the foreign judgment must be served on the debtor, who may then apply to have the registration set aside.<sup>181</sup> Rules of Court may also provide for the service on the judgment debtor of notice of the registration of a judgment; and the fixing of the period within which an application may be made to have the registration of the judgment set aside and the extension of the period so fixed.<sup>182</sup>

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would have been set aside on an application for that purpose on some ground other than one of the grounds specified in paragraph (a): see Botswana Act (note 160) s 10.

<sup>176</sup> Botswana Act (note 160) s 10(3).

<sup>177</sup> Botswana Act (note 160) s 5(1).

<sup>178</sup> Botswana Act (note 160) s 5(4).

<sup>179</sup> Botswana Act (note 160) s 5(5). 'Original court', in relation to any judgment, means the court by which the judgment was given: Botswana Act (note 160) s 2.

<sup>180</sup> Botswana Act (note 160) s 6(1).

<sup>181</sup> Botswana Act (note 160) s 6(1)(c).

<sup>182</sup> Botswana Act (note 160) s 6(1).

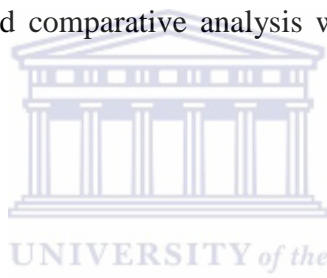


### 3.3.5 *Setting aside of registered judgments*

The grounds on which registration must be set aside are analogous to the 1933 UK Foreign Judgments Act.<sup>183</sup> One of the grounds is that the judgment debtor, being the defendant in the proceedings in the original court, did not received notice of those proceedings in sufficient time to enable him to defend the proceedings.<sup>184</sup> A judgment *may* be set aside if the registering court is satisfied that the matter in dispute in the proceedings in the original court had before the date of the judgment in the original court been the subject of a final and conclusive judgment by a court having jurisdiction in the matter.<sup>185</sup>

The Act sets out the ground under which, for the purposes of having a registered judgment set aside, the courts of the country of the original court, will be deemed to have jurisdiction.<sup>186</sup> It also sets out when the courts will be deemed *not* to have had jurisdiction.<sup>187</sup>

An assessment of this statute and comparative analysis with the other relevant Statutes is given below.<sup>188</sup>



## 3.4 South Africa

### 3.4.1 *Enforcement of Foreign Civil Judgments Act (1988)*

Statutory provision to facilitate the enforcement of foreign money judgments in South Africa has been made by means of the Enforcement of Foreign Civil Judgments Act.<sup>189</sup> The Act provides for the enforcement of civil judgments given in designated countries in the

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<sup>183</sup> Botswana Act (note 160) s 7(1)(a); see para 2.2.3 above.

<sup>184</sup> In *Sarah Mothusi v Attorney General* Civ. App. No 15/93 (1993) the court held that ‘a right to be heard must be meaningful, in that its exercise should involve the possibility of a change in a contemplated decision.

<sup>185</sup> Botswana Act (note 160) s 7(1)(b).

<sup>186</sup> Botswana Act (note 160) s 7(2); see para 2.2.3 above.

<sup>187</sup> Botswana Act (note 160) s 7(3)(1); see para 2.2.3 above.

<sup>188</sup> See para 4 below.

<sup>189</sup> Enforcement of Foreign Civil Judgments Act 32 of 1988 (‘South Africa Act’). The South African Law Reform Commission in a review of the legislation has found that the Foreign Civil Judgments Act appeared to be working satisfactorily, and should be maintained. The Commission further recommended that the common law action should be maintained as a residual basis for the recognition and enforcement of foreign judgments. The Commission recommended that the Act must provide that the High Court should also be made entitled to register foreign judgments: see South African Law Reform Commission *Project 121 - Consolidated Legislation Pertaining to International Judicial Co-Operation in Civil Matters: Report* (December 2006) (‘SALRC Report’) 11.

magistrates' courts of the Republic, and repeals the earlier Reciprocal Enforcement of Civil Judgments Act.<sup>190</sup>

### 3.4.2 *Scope of application*

The Act applies to foreign judgments from countries designated by the Minister of Justice.<sup>191</sup>

'Judgment' is defined as:

'any final<sup>192</sup> judgment or order for the payment of money, given or made before or after the commencement of [the] Act by any court in any civil proceedings,<sup>193</sup> which is enforceable by execution in the country in which it was given or made, but does not include any judgment or order given or made by any court on appeal from a judgment or order of a court other than a court as defined in [the] Act, or for the payment of any tax or charge of a like nature or of any fine or other penalty, or for the periodical payment of sums of money towards the maintenance<sup>194</sup> of any person'.<sup>195</sup>

'Court', in relation to the court of the designated country, is defined as 'the Supreme or High Court or any magistrate's court (including a regional [magistrates] court) of that country.'<sup>196</sup>

However, in relation to a local court, court is defined as:

'the *magistrate's court* of the district where (a) the person against whom the judgment was given (i) resides, carries on business or is employed; or (ii) owns any movable or immovable property; (b) any juristic person against which the judgment was given has its registered office, or its principal place of business; (c) any partnership against which the judgment was given has its business premises or any member thereof resides'.<sup>197</sup>

The fact that an expedited enforcement procedure is only available for foreign judgments with a value of R100,000 is a serious shortcoming and is likely to impede trade integration.<sup>198</sup>

It is therefore suggested that the Foreign Civil Judgments Act be amended to provide that the High Court is entitled to register foreign judgments.<sup>199</sup> The legislature had an option to

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<sup>190</sup> Reciprocal Enforcement of Civil Judgments Act 9 of 1966: see South Africa Act (note 189) s 11.

<sup>191</sup> South Africa Act (note 189) s 2(1). At this stage Namibia is the only country designated in terms of the Act: *Government Gazette* 17881 GN R 487/1997 of 1 April 1997; Schulze (note 103) 26.

<sup>192</sup> The South African courts have applied the English principles laid down by the House of Lords in *Nouvion v Freedman* (note 51).

<sup>193</sup> 'Civil proceedings' is not defined in the Act.

<sup>194</sup> South Africa has enacted a separate Reciprocal Enforcement of Maintenance Orders Act 80 of 1963, to consolidate and amend the laws relating to the reciprocal enforcement of maintenance orders made in the Republic, and proclaimed countries (preamble). Reciprocal Enforcement of Maintenance Orders (Countries in Africa) Act 6 of 1989 which provides for the reciprocal enforcement of maintenance orders made in the Republic and in designated countries in Africa (preamble).

<sup>195</sup> South African Act (note 189) s 1.

<sup>196</sup> South African Act (note 189) s 1.

<sup>197</sup> South African Act (note 189) s 1: emphasis added.

<sup>198</sup> See Chapter 1, para. 3.1.

<sup>199</sup> See SARLC Report (note 189) 6

improve the current position to some extent with the drafting of the Jurisdiction of Regional Courts Amendment Act 2008, in which jurisdiction was conferred on regional courts in respect of certain civil matters;<sup>200</sup> however no jurisdiction was conferred on the Regional Courts by this Act.<sup>201</sup> Such an amendment would have made some improvements to the present scenario, as the jurisdiction of the Regional Courts was raised to R300,000.<sup>202</sup>

The Act, therefore, only applies to enforcement proceedings in magistrate courts, of which the Minister may from time to time determine the monetary limit in civil claims.<sup>203</sup> Any action in excess of this amount would, therefore, have to be enforced under the common law procedure.<sup>204</sup>

The recognition and enforcement in South Africa is subject further to statutory limitations provided by the Protection of Businesses Act.<sup>205</sup> The Act provides that, except with the permission of the Minister of Justice, no judgment, order, direction, arbitration award, letter of request or any other request delivered, given or issued or emanating from outside South Africa in connection with any civil proceedings will be enforced.<sup>206</sup> The requirement of ministerial consent is applicable if the judgment or order is connected with the mining, production, importation, exportation, refinement, possession, use or sale of ownership of any matter or material, of whatever nature, whether within, outside, into or from the Republic.<sup>207</sup> These provisions were aimed at preventing the recovery of excessive damages awarded in foreign courts to externally-based companies doing business with South African citizens.<sup>208</sup> The ambit of these provisions, is so wide that it embraces almost all ranges of human activity and only rarely will a judgment escape the tight net of section 1(2); this means it will be

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<sup>200</sup> See e.g. s 7 'jurisdiction in respect of causes of action'.

<sup>201</sup> Jurisdiction of Regional Courts Amendment Act 31 of 2008 Schedule.

<sup>202</sup> In terms of the Regional Courts Act (note 201).

<sup>203</sup> The current financial limit on civil actions in the Magistrates Courts is R100,000: Government Notice R1411 in *Government Gazette* 19435 of 30 October 1998; See also *Malachi v Cape Dance Academy* 14830/09 2011 (Western Cape High Court) 38; Forsyth (note 8) 439.

<sup>204</sup> *Malachi v Cape Dance Academy* (note 203) 38; SALRC Report (note 189) 11.

<sup>205</sup> Protection of Businesses Act 99 of 1978. This Act has been severely criticized and it has been argued that the case for legislative reform in this area is overwhelming. In the absence of legislative reform the refusal of permission by the Minister may give rise to constitutional issues concerning the denial of fundamental rights, and having to obtain permission from the Minister leads to unnecessary delay: see SALRC Report (note 189) 21.

Similar legislation has been enacted in the UK: Protection of Trading Interests Act 1980; Australia: Foreign Proceedings (Excess of Jurisdiction) Act 1984; Canada: Foreign Extraterritorial Measures Act 1984: see Barnett (note 18) 37

<sup>206</sup> South African Act (note 189) s 1(1) and 1(2).

<sup>207</sup> South African Act (note 189) s 1(3).

<sup>208</sup> SALRC Report (note 189) 21.

possible to enforce only very few judgments without the permission of the Minister.<sup>209</sup> South African courts have consistently adopted a restrictive approach to the interpretation of the Act,<sup>210</sup> and there is no recorded instance in which the Act has been successfully invoked as a defence to enforcement.<sup>211</sup>

The doctrine of reciprocity forms no part of South African law<sup>212</sup> as the Act does not require reciprocity as a condition for recognition.<sup>213</sup> The Minister designates States by means of an administrative process regardless of whether enforcement will be reciprocal.<sup>214</sup>

### 3.4.3 Requirements for enforcement

The Act is not exclusive, since the option of having a judgment enforced under the common law remains.<sup>215</sup> The Act facilitates enforcement by providing for the registration of foreign judgments rendered in designated countries by the clerk of the relevant magistrate's court.<sup>216</sup>

A judgment (or order) must be final to be enforceable under the Act,<sup>217</sup> be one for the payment of money, and be made in any civil proceedings by a court, as defined in the Act. It

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<sup>209</sup> Schulze (note 103) 31.

<sup>210</sup> Forsyth (note 8) 466. In *Tradex Ocean Transportation SA v MV Silvergate* 1994 (4) SA 121 (C), the court considered the dictionary definition of the words 'any matter or material', and having regard to the earlier words 'mining, production, importation, exportation [and] refinement', concluded that that 'matter or material' was limited to raw materials or substances from which physical things are made and not a manufactured thing'. In *Jones v Krok Jones v Krok* 1995 (I) SA 677 (A), the court was of the view that the 'act or transaction' in section 3(1) did not apply to a contractual dispute over a joint venture which sold a 'ladies hair removal product'; the objective of the relevant Act was limited to what 'may loosely be termed product liability claims' (510G).

<sup>211</sup> Schulze (note 103) 31; Forsyth (note 8) 466.

<sup>212</sup> The predecessor of the 1988 Act, the Reciprocal Enforcement of Civil Judgments Act 9 of 1966, which was intended to facilitate the recognition and enforcement of foreign civil judgments, was founded on reciprocity. However, the hope that the government will conclude mutually acceptable agreements concerning recognition and enforcement of judgments failed in the context of the Act, and this fact was largely, if not solely, responsible for the Act never entering into force: see SALRC Report (note 189) 23.

<sup>213</sup> South African Act (note 189) s 2(1); Schulze (note 103) 26; Malan FR, Neels JL, O'Brien PH & Boshoff, A et al 'Transnational litigation in South African Law (2)' 1995 *Journal of South African Law* 282.

<sup>214</sup> Roodt C 'Recognition and enforcement of foreign judgments: still a Hobson's choice among competing theories?' 2005 *Journal of South African Law* 21.

<sup>215</sup> Section 9 of the Act provides that nothing in the Act shall prevent 'any court in the Republic from recognising ... any judgment ... given by a court of competent jurisdiction outside the Republic'. Section 9 therefore leaves open the possibility that enforcement at common law may be prevented by the 1988 Act. However, no words of the Act suggest the creation of an exclusive avenue for enforcement: see Forsyth (note 8) 439.

<sup>216</sup> South African Act (note 189) s 3. Similar to the case in South Africa, the fact that the Act provides for registration of the *magistrates court* limits the monetary value of cases that can be registered in the court to that of the jurisdiction of the magistrates court, and may therefore diminish the value of the statute, as debtors of judgments with a significant monetary value will not have the expedited procedure available to them, but will have to revert to the common law procedure: see para 3.4.2 above.

must also be enforceable by execution in the country in which it was given or made.<sup>218</sup> A judgment must not be given or made on appeal from a judgment other than a court as defined, and not be for the payment of any tax or charge or like nature; any fine or other penalty, or the periodical payment of sums of money towards the maintenance of any person.<sup>219</sup>

Once a judgment has been registered in terms of the Act, it will have the same effect as a civil judgment of the court at which the judgment has been registered.<sup>220</sup> A registered judgment may not be executed before the expiration of 21 days after service of the notice, or until the relevant court has finally disposed of an application for the setting aside of the judgment.<sup>221</sup>

#### 3.4.4 Procedure for enforcement

A certified copy of a judgment given against any person by a court in a designated country must be lodged with a clerk of the relevant court.<sup>222</sup> The clerk of the Court will register the judgment in the prescribed manner, in respect of –

- a) the balance of the amount payable thereunder, including the taxed costs awarded by the court of the designated country;
- b) the interest, if any, which is due on the amount payable thereunder up to the time of such registration; and
- c) the reasonable costs of, and incidental to, registration, including the costs of containing a certified copy of the judgment.<sup>223</sup>

The clerk of the court registering the judgment must issue a notice directed to the judgment debtor informing him of the registration. This must be served on the judgment debtor by the judgment creditor in the manner prescribed for the service of process.<sup>224</sup>

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<sup>217</sup> A judgment will be deemed to be final notwithstanding that an appeal against such judgment is pending in a court of the designated country or that the time prescribed by the law of such country for appealing against such judgment has not expired: see South African Act (note 189) s 7(1).

<sup>218</sup> South African Act (note 189) s 1.

<sup>219</sup> South African Act (note 189) s 1.

<sup>220</sup> South African Act (note 189) s 4(1); Roodt (note 215) 21.

<sup>221</sup> South African Act (note 189) s 4.

<sup>222</sup> The Magistrate's court of the district where the judgment debtor resides, carries on business, or is employed or owns any movable or immovable property. If the judgment was given against a juristic person, the court of either its registered office or its principle place of business has jurisdiction to register the foreign judgment.

<sup>223</sup> South African Act (note 189) s 3(1).

<sup>224</sup> South African Act (note 189) s 3(2)-3(3).

If any amount payable is expressed in a currency other than the currency of the Republic, the judgment will 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 the judgment.<sup>225</sup> The amount will bear interest from the date of registration of the judgment until the date of payment of the said amount, calculated at the rate set out in the Prescribed Rate of Interest Act,<sup>226</sup> or at the rate fixed by the court of the designated country, whichever is the lowest.<sup>227</sup>

If, on an application by any judgment debtor, the court at which the judgment is registered is satisfied that an appeal against the judgment is pending in a court of competent jurisdiction or that the applicant is entitled, and intends, to appeal against the judgment to a court of competent jurisdiction, it may postpone the execution of such judgment.<sup>228</sup>

#### 3.4.5 *Setting aside of registered judgment*

Any application to have a registered judgment set aside must be brought within 21 days after the service of notice to the judgment debtor.<sup>229</sup>

The registration of a judgment will be set aside if the court at which the judgment is registered is satisfied that -

- a) the judgment was registered in contravention with the Act;
- b) the courts of the designated country had no jurisdiction in the circumstances of the case;
- c) the judgment debtor did not receive notice of the proceedings in sufficient time to enable him to defend the proceedings as prescribed by the designated country, or if no such notice is prescribed, that he did not receive reasonable notice of the proceedings to enable him to defend the proceedings, and did not appear;
- d) the judgment was obtained by fraud;
- e) the enforcement of the judgment would be contrary to public policy in the Republic;<sup>230</sup>

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<sup>225</sup> South African Act (note 189) s 3(4).

<sup>226</sup> Prescribed Rate of Interest Act No. 55 of 1975. Section 1 of the Prescribed Rate of Interest Act provides that if a debt bears interest and the rate at which the interest is to be calculated is calculated at the rate prescribed by the Minister of Justice by notice in the Gazette (s 1(1)-(2)) which is currently 15,5% per annum: See General Notice R1814 in *Government Gazette* 15143 of 1 October 1993.

<sup>227</sup> South African Act (note 189) s 3(5).

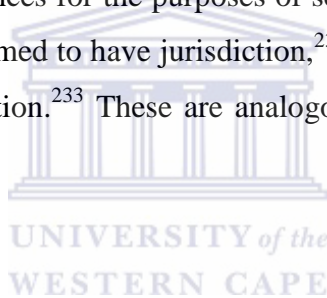
<sup>228</sup> South African Act (note 189) s 6.

<sup>229</sup> South African Act (note 189) s 5(2).



- f) the certified copy of the judgment lodged was lodged at the request of a person other than the judgment creditor;
- g) the matter in dispute in the proceedings had, prior to the date of the judgment, been the subject of a final judgment in civil proceedings by a court of competent jurisdiction;
- h) the judgment has been set aside by a court of competent jurisdiction;
- i) the judgment has become prescribed under either the laws of the Republic or the designated country concerned;
- j) the judgment has been wholly satisfied;
- k) the judgment has been partly satisfied, to the extent in which it was satisfied; or
- l) the judgment is a judgment or order which in terms of any law may not be recognised or enforced in the Republic.<sup>231</sup>

The Act also prescribes the instances for the purposes of setting aside a registered judgment, when a court shall have been deemed to have jurisdiction,<sup>232</sup> as well as when the court would be deemed *not* to have had jurisdiction.<sup>233</sup> These are analogous to the UK Foreign Judgments Act of 1933.<sup>234</sup>



<sup>230</sup> A foreign judgment will not be recognised if it was obtained contrary to the rules of natural justice: see Forsyth CF 'The eclipse of private international law principle? The judicial process, interpretation and the dominance of legislation in the modern era' (2005) 1(1) *Journal of Private International Law* 111.

<sup>231</sup> South African Act (note 189) s 5(1).

<sup>232</sup> a) If the judgment debtor –

- i) Was the plaintiff or plaintiff in reconvention in the proceedings or submitted to the jurisdiction of the court by which the judgment was given voluntarily appearing in the proceedings for any purpose other than protecting or obtaining the release of property seized or threatened with seizure in the proceedings or contesting the jurisdiction of that court;
- ii) Was a defendant in the proceedings and had, before the commencement of the proceedings, agreed, in respect of the subject matter of the proceedings, to submit to the jurisdiction of any court of the designated country; or
- iii) Was a defendant and, at the institution of the proceedings, resident in, or being a juristic person, had its principal place of business in, such designated country, or at any time had an office or place of business in such designated country through or at which the transaction to which the proceedings relate, was effected;

b) If, in any action relating to immovable property, the property was at the institution of the proceedings situated in the designated country in which the proceedings were instituted;

c) if in any proceedings other than proceedings referred to in a) or b), the jurisdiction of the court by which the judgment was given is recognised by the law of the Republic (s 7(4)).

<sup>233</sup> The court of the designated country in which the judgment was given will be deemed not to have jurisdiction:

- a) in proceedings relating to immovable property situated outside such designated country;
- b) except in the cases of (a)(i) and (ii) above, in proceedings instituted in contravention of an agreement under which the dispute in question was to be settled otherwise than by proceedings in the courts of such designated country; or

With regard to submission, Schulze suggest that one seems to be left with the dilemma of having to decide whether the principles of domestic law or the principles of foreign law should be applied in determining whether there has been submission to jurisdiction to a particular court.<sup>235</sup> Forsyth, however, emphasises that ‘since it is fundamental to this branch of the law that international competence does not mean complying *mutatis mutandis* with the rules for the jurisdiction of the South African court, the principles of domestic law should *not* be applied.’<sup>236</sup> Further, that the law relating to what amounts to submission for the purpose of international competence is not identical to that which deals with submission to the jurisdiction of the South Africa court.<sup>237</sup> This is, however, not supported by case law<sup>238</sup> and the mere fact that the foreign court may have had jurisdiction under its own laws is not conclusive. In the recent case of *Foize Africa v Foize Beheer*<sup>239</sup> the court<sup>240</sup> held that ‘it can now be regarded as well settled’ that a foreign jurisdiction clause does not exclude the court’s jurisdiction.<sup>241</sup> The court held that no hard and fast rule can be laid down as to the stage when a court should exercise its discretion to enforce a foreign jurisdiction or arbitration clause, but that in each given case much will depend upon its own particular facts and circumstances as well as the stage at which and the manner in which the issue of enforcement of the clause in question is raised.<sup>242</sup> Although the court did not deal in detail with what the relevant factors are, it nevertheless referred to *The Eleftheria*<sup>243</sup> where a number of matters which may be regarded when an action should be stayed by reason of a foreign jurisdiction clause were

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c) in proceeding in which the person against whom the judgment was given was under the rules of public international law entitled to immunity from such designated country and did not submit to such jurisdiction: see South Africa Act (note 189) s 7(5).

<sup>234</sup> See para 2.2.4 above.

<sup>235</sup> Schulze (note 103) 21.

<sup>236</sup> Forsyth (note 8) 424.

<sup>237</sup> Forsyth (note 8) 424.

<sup>238</sup> See Schulze (note 103) 21.

<sup>239</sup> *Foize Africa v Foize Beheer* (752/2011) [2012] ZASCA 123 (20 September 2012).

<sup>240</sup> Citing *Commissioner for Inland Revenue and another v Isaacs NO* 1960 (1) SA 126 (A) at 134B-H; *Yorigami Maritime Construction Co Ltd v Nissho- Iwai Co Ltd* 1977 (4) SA 682 (C); *Butler v Banimar Shipping Co SA* 1978 (4) SA 753 (SE) and *Universiteit van Stellenbosch v J A Louw (Edms) Bpk* 1983 (4) SA 321 (A) at 333GH.

<sup>241</sup> Parties to a contract cannot exclude the jurisdiction of a court by their own agreement, and where a party wishes to invoke the protection of a foreign jurisdiction or arbitration clause, it should do so by way of a special or dilatory plea seeking a stay of proceedings. That having been done, the court will then be called on to exercise its discretion whether or not to enforce the clause in question: *Foize Africa v Foize Beheer* (note 239) 10.

<sup>242</sup> *Foize Africa v Foize Beheer* (note 239) 10.

<sup>243</sup> *The Eleftheria* [1969] 2 All ER 641 (PDA).

listed.<sup>244</sup> The question of jurisdiction therefore has to be determined in the light of the principles of South African law on the jurisdiction of foreign courts.<sup>245</sup>

An assessment of this statute and comparative analysis with the other relevant Statutes is given below.<sup>246</sup>

### 3.5 Namibia

#### 3.5.1 Enforcement of Foreign Civil Judgments Act (1994)

Namibia enacted the Enforcement of Foreign Civil Judgments Act<sup>247</sup> to provide that civil judgments granted in designated countries may be enforced in magistrate courts in Namibia.<sup>248</sup> The Act is analogous to the South African Enforcement of Foreign Civil Judgments Act, except that the Namibian Act requires reciprocity of treatment.<sup>249</sup>

#### 3.5.2 Scope of application

The Act provides for the enforcement of civil judgments from courts in designated countries.<sup>250</sup>

The definition of 'judgment' is similar to that contained in the South African Act,<sup>251</sup> except that the Namibian Act also applies to judgments in respect of compensation or damages to an



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<sup>244</sup> 'In particular . . . the following matters, where they arise, may properly be regarded: (a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the (local) and foreign courts; (b) Whether the law of the foreign court applies and, if so, whether it differs from (local) law in any material respects; (c) With what country either party is connected, and how closely; (d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages; (e) Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would — (i) be deprived of security for that claim, (ii) be unable to enforce any judgment obtained, (iii) be faced with a time-bar not applicable (locally), or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial' (645C-E).

<sup>245</sup> *Reiss Engineering Co Ltd v Insamcor (Pty) Ltd* 1983(1) 1033 (WLD) 1037 per Van Dijkhorst J; *De Naamloze Venootschap Alintex v Von Gerlach* 1958(1) 13 (TPD) 15-16 per Bresler J; *Benidai Trading Co Ltd v Gouws & Gouws (Pty) Ltd* 1977(3) 1020 (TPD) 1038 per Viljoen J.

<sup>246</sup> See para 4 below.

<sup>247</sup> Enforcement of Foreign Civil Judgments Act 28 of 1994 ('Namibia Act').

<sup>248</sup> Namibia Act (note 247) long title.

<sup>249</sup> Namibia Act (note 247) s 2(a). The 'countries' designated under the enabling legislation are the former Transkei, Bophuthatswana, Venda and Ciskei (TBVC) states, as well as the various 'self-governing territories', which 'countries' no longer exist. South Africa therefore remains the only country designated under the Act: see Schulze (note 103) 116.

<sup>250</sup> Namibia Act (note 247) long title.

<sup>251</sup> See para 3.3.2 above.

aggrieved party in criminal proceedings.<sup>252</sup> The definition of ‘court’, both in relation to the court of a designated country and in relation to a court in Namibia, is *mutatis mutandis* the same as the definition contained in the South African Act.<sup>253</sup>

The Minister may by notice in the Gazette declare as a designated country, any country with which Namibia has in terms of the Namibian Constitution entered into an agreement providing for the reciprocal enforcement of foreign judgments.<sup>254</sup> This is an important difference from the South African Act.<sup>255</sup>

### 3.5.3 Requirements for enforcement

A certified copy of a judgment granted against any person by any court in a designated country must be registered with the clerk of the court in Namibia.<sup>256</sup> Whenever a judgment has been registered in terms of the Act, it will, insofar as enforcement is concerned, have the same effect as a civil judgment of the court at which the judgment has been registered.<sup>257</sup>

In order to be enforceable under the Act, a judgment must be final,<sup>258</sup> for the payment of money, and be made in any civil proceedings, or in respect of compensation or damages by an aggrieved party in criminal proceedings. It must also be enforceable by execution in the country in which it was given or made.<sup>259</sup> A judgment must not be given or made on appeal from a judgment other than a court as defined, and not be for the payment of any tax or charge or like nature; any fine or other penalty, or the periodical payment of sums of money towards the maintenance of any person.<sup>260</sup>

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<sup>252</sup> Namibia Act (note 247) s 1.

<sup>253</sup> Namibia Act (note 247) s 1; See para 3.3.2 above.

<sup>254</sup> Namibia Act (note 247) s 2(a).

<sup>255</sup> South Africa Act (note 189) s 2.

<sup>256</sup> Namibia Act (note 247) 3(1).

<sup>257</sup> Namibia Act (note 247) 4(1).

<sup>258</sup> A judgment will be deemed to be final notwithstanding that an appeal against such judgment is pending in a court of the designated country or that the time prescribed by the law of such country for appealing against such judgment has not expired: Namibia Act (note 247) s 7(1). See also *Westdeutsche Landesbank Girozentrale v Horsch* 1992 NR 313 (HC) where it was held that ‘it is essential to prove that the foreign judgment is final and enforceable according to the foreign law concerned and that it has been handed down by a court of competent jurisdiction’ (14 F- I); *Bekker N.O v Kotze and Another* 1994 NR 345 (HC) ‘it is trite law that the Namibian Courts can only recognise final foreign judgments and orders and not provisional orders’ (348I-349B); *Estate H v Estate H* 1952 (4) SA 168 (C) 171A: ‘It is common cause that this Court will only enforce the order of a foreign Court if it is a final judgment’.

<sup>259</sup> Namibia Act (note 247) 1.

<sup>260</sup> Namibia Act (note 247) 1.

#### 3.5.4 Procedure for enforcement

The procedure for enforcement of a foreign judgment under the Namibian Act is the same as the procedure under the South African Act.<sup>261</sup>

The clerk of the court registering the judgment must issue a notice directed to the judgment debtor informing him of such registration, which must be served on the judgment debtor by the Messenger<sup>262</sup> of the Court in the manner prescribed for the service of process.<sup>263</sup>

A registered judgment may not be executed before the expiration of 21 days after service of the notice, or until an application for the setting aside of the judgment has been finally disposed of.<sup>264</sup>

If any amount payable under a judgment registered under the Act is expressed in a currency other than the currency of Namibia, the judgment will be registered as if it were a judgment for such amount in the currency of Namibia, calculated at the rate of exchange prevailing at the opening rate of exchange on the date of such registration,<sup>265</sup> as advised by the Bank of Namibia.<sup>266</sup> The amount will bear interest from the date of registration of the judgment until the date of payment of the required amount, calculated at the rate prescribed by section 1(2) of the (South African) Prescribed Rate of Interest Act,<sup>267</sup> or at the rate determined by the court of the designated country, whichever is the lowest.<sup>268</sup>

If the court is satisfied that an appeal against the judgment is pending or that the applicant is entitled and intends to appeal against the judgment to a court of competent jurisdiction, it may, on such conditions as it may deem fit, suspend the execution of such judgment.<sup>269</sup>

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<sup>261</sup> Namibia Act (note 247) 3; see para. 3.3.4 above.

<sup>262</sup> The South African Act (note 190) provides that the judgment creditor must serve the notice of registration to the judgment debtor (s 3(2)); see para. 3.3.4 above.

<sup>263</sup> Namibia Act (note 247) s 3(2) and 3(3).

<sup>264</sup> Namibia Act (note 247) s 4(2).

<sup>265</sup> The South African Act provides for the calculation of the amount payable by using the rate of exchange prevailing at the date of judgment (s 3(4)); see para 3.3.4 above.

<sup>266</sup> Namibia Act (note 247) s 3(4).

<sup>267</sup> See note 226. This is a South African Act which applies to Namibia.

<sup>268</sup> Namibia Act (note 247) s 3(5).

<sup>269</sup> Namibia Act (note 247) s 6.

### 3.5.5 *Setting aside of registered judgments*

The grounds on which the court will set a registered judgment aside is the same as those provided for in the South African Act.<sup>270</sup>

The Act also provides the instances for the purposes of registration of a foreign judgment, when a court shall have been deemed to have jurisdiction,<sup>271</sup> as well as when the court shall for the purposes of setting aside registered judgments, deemed *not* to have had jurisdiction, which coincides with the provisions in the South African Act.<sup>272</sup>

Any application to have a registered judgment must be brought within 21 days after the service of notice to the judgment debtor.<sup>273</sup>

An assessment of this statute and comparative analysis with the other relevant Statutes is given below.<sup>274</sup>

## 4 COMPARATIVE ANALYSIS

The preceding paragraphs of this chapter provide an overview of the statutory provisions in force in each of the SACU Member States. The following analysis compares the respective provisions of each of the Statutes under discussion, namely the application of the different statutes; requirements for enforcement; procedural requirements; setting aside of registered judgments, and the reciprocity and designation requirement present in most statutes. This comparison and analysis form the basis of recommendations for harmonisation in Chapter 5.

### 4.1 Scope of application

The application of the statutes is limited to foreign judgments from countries specifically provided for in the particular Act, or that have been designated under it. The Statutes of Botswana,<sup>275</sup> South Africa and Namibia provide for their application to any country

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<sup>270</sup> Namibia Act (note 247) s 5(1): see para. 3.3.5 above.

<sup>271</sup> Namibia Act (note 247) s 7(4): see para 3.3.5 above.

<sup>272</sup> Namibia Act (note 247) s 7(5): see para 3.3.5 above.

<sup>273</sup> Namibia Act (note 247) s 5(2).

<sup>274</sup> See para 4.

<sup>275</sup> See para 3.2.



designated under the particular Act.<sup>276</sup> The application of the Swaziland and Lesotho statutes are limited to the UK,<sup>277</sup> and may be extended only to other territories of the Commonwealth if reciprocal arrangements have been made for the enforcement of judgments by the legislature of that territory.<sup>278</sup> The designation of States in most instances depends on reciprocal treatment by the courts of that State. The South African statute is the only one which does not require reciprocal treatment for it to be extensible to a foreign country.<sup>279</sup>

A major weakness of the current statutory regimes is their limited application, not as much as in scope as in limited number of States to which they extend. A number of the statutes for recognition and enforcement rely on designation,<sup>280</sup> in which instances a judgment debtor will be able to enforce his judgment under the statutory regime only if that country is specifically designated by the Act.<sup>281</sup> Despite their shared common legal tradition<sup>282</sup> and their membership in the Customs Union, dating from 1889,<sup>283</sup> Member States do not designate all

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<sup>276</sup> South Africa Act (note 189) s 2(1); Namibia Act (note 248) s 1.

<sup>277</sup> South Africa Act (note 189) s 3.

<sup>278</sup> Lesotho Proclamation (note 129) s 6(1); Swaziland Act (note 99) s 3.

<sup>279</sup> The principle of reciprocity and requirement of designation are discussed below: see para. 4.6 below. Despite the fact that the South African Act is the only Act which does not require reciprocity there are however a number of recommendations for improvement of the Act, as recommended by the South African Law Reform Commission: In its report the Commission also suggested that:

- (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) Clarity should be given 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) Clarity should be given 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; and
- (viii) Provision must be made for a defence of *lis pendens*: see SALRC (note 189) 11.

<sup>280</sup> Botswana Act (note 160) s 3(1); South Africa Act (note 189) s 2(1); Namibia Act (note 247) s 1. See also Roodt (note 214) 22. The theories the author is referring to are the traditional competing theoretical basis for recognising and enforcing foreign judgments, namely the obligation theory, reciprocity and comity. However, she further suggests that nothing prevents the development of a different rationale to guide the revision of a recognition statute, for example codification of the foreign law. (Hobson's choice refers to a situation in which there are only bad possibilities that have such poor results that there is no real choice at all.)

<sup>281</sup> In the Swaziland case of *Mamba v Mamba* [2011] SZHC 43 (13 January 2011) for example the court held that a judgment from the Circuit Court for Montgomery County, Maryland, USA could not be registered because the USA was not designated under s 5 of the Reciprocal Enforcement of Judgments Act of 1922.

<sup>282</sup> All five SACU Member States have a Roman-Dutch legal tradition, as influenced by common law: Thomashausen (note 11) 34.

<sup>283</sup> See Chapter 1, para 2.2 above.

other Member States under their statutory regimes.<sup>284</sup> In *Barclays Bank v Koch*<sup>285</sup> a judgment from Swaziland could not be enforced under Botswana's Judgments (International Enforcement) Act since it was not registerable under the Act.<sup>286</sup> The present position is a major impediment to the facilitation of judgments in the region and can also serve as a non-tariff barrier to trade,<sup>287</sup> which warrants immediate attention. Specific proposals are made in this regard below.<sup>288</sup>

In instances where the designation of States under the relevant statute is not conditional upon the negotiation of bilateral agreements designation (and thus recognition) remains an administrative decision, taken on a discretionary basis.<sup>289</sup> The respective SACU Acts provide that, should the relevant Minister or President be satisfied that reciprocal treatment will be given in a foreign country to the judgments of that country, he *may* extend the application of the Act to that country.<sup>290</sup> South Africa does not require reciprocal treatment, but it provides that the Act only applies to judgments given in any country outside the Republic which the Minister of Justice has designated for the purposes of the Act.<sup>291</sup> There are no further requirements or rules indicating on how these countries should be designated; what the requirements are, and how often this list should be reviewed. This severely undermines the purpose of the statutory procedure for foreign judgments, namely to provide an expedited means of enforcing foreign judgments. This means that a judgment of any country not designated by the Act (and Namibia and South Africa for example only designated each other), would have to rely on the common law procedure for enforcement, which may act as a non-tariff barrier to trade.<sup>292</sup> To insist upon reciprocal treatment before enforcing a foreign judgment is denying justice to private litigants, and to prefer a certain group on the basis of

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<sup>284</sup> The Swaziland Act designates Botswana, Kenya, Lesotho, Malawi, New South Wales, Victoria, New Zealand, Southern Rhodesia (now Zimbabwe), Tanzania (except Zanzibar), Territory of North Australia, Territory of South Australia, Uganda, Western Australia, Zambia, Zanzibar (Notice No 97 of 1922). South Africa designates only Namibia; Namibia designates only South Africa.

<sup>285</sup> *Barclays Bank of Swaziland v Koch* 1997 B.L.R. 1924.

<sup>286</sup> In this case the plaintiff argued that it could not register its judgment under the above Judgments (External Enforcements) Act because no order specifying the countries to be specified under s 3 of the Act has been published. The court confirmed that the judgment was not one that was registered under terms of s 3 of the Act, and therefore it has no force as a judgment in Botswana: see *Barclays Bank v Koch* (note 285) 1924 H. Section 3 provides that the President may by statutory instrument order that the Act extend to a country which affords reciprocal treatment to Botswana: see para 3.2.2 above.

<sup>287</sup> See Chapter 1, para 4.1.

<sup>288</sup> See para 5 below.

<sup>289</sup> SALRC Report (note 189) 91.

<sup>290</sup> See e.g. Botswana Act (note 160) s 3.

<sup>291</sup> See South Africa Act (note 189) s 2.

<sup>292</sup> See Chapter 1, para. 3.

nationality in the (probably vain) hope that a foreign sovereign will thereby be induced to grant justice to future litigants in its own courts.<sup>293</sup> The courts thereby become instruments of retaliation, and extraneous political factors 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 the reciprocal treatment must be de facto or de jure.<sup>294</sup>

The designation process has been criticised of easily becoming flawed, as wide discretion creates opportunities for discrimination: designation singles out sovereign territories to which an enactment should apply and as such private litigants in non-designated countries have no hope of having judgments in their favour recognised.<sup>295</sup> If statutory enforcement hinges upon bureaucratic designation of the rendering state, and this action is impeded or interrupted, costly common law enforcement remains the only real option in the case of civil judgments.<sup>296</sup> While the statutory regime provides for an expedited and simplified procedure for enforcing foreign judgments and by designating only one or two other States, litigants from other States are in fact denied this expedited and simplified procedure.<sup>297</sup>

The designation of States under the statutory regimes of some SACU States is complicated by the element of reciprocity,<sup>298</sup> which is a requirement for designation of all SACU Member States, save for South Africa.<sup>299</sup> Notably, globally reciprocity no longer enjoys the popularity it did in the nationalistic nineteenth century, and courts and legislatures increasingly reject this impediment. Juenger<sup>300</sup> suggest that it seems unfair to penalise private litigants, who are neither to blame nor in a position to change matters, for the rendering state's lack of comity;<sup>301</sup> this is true especially if the judgment creditor is a national of the requested state.<sup>302</sup>

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<sup>293</sup> SALRC Report (note 189) 91.

<sup>294</sup> SALRC Report (note 189) 91.

<sup>295</sup> Roodt (note 214) 22.

<sup>296</sup> These standards include the grounds on which a registered judgment may be set aside, as contained in sections 4 and 5 of the Act: see Roodt (note 214) 26.

<sup>297</sup> Oppong RF 'A decade of private international law in African courts 1997-2007 (Part II)' (2008) X *Yearbook of Private International Law* 393.

<sup>298</sup> The mutual concession of advantages or privileges for the purposes of commercial or diplomatic relations: See Chapter 1, para 5.1 for a discussion of reciprocity.

<sup>299</sup> See South Africa Act (note 189) s 2(1); Swaziland Act (note 99) s 5; Lesotho Proclamation (note 129) s 5; Botswana Act (note 160) s 3(1); Namibia Act (note 247) s 2(1).

<sup>300</sup> Juenger (note 168) 32-3.

<sup>301</sup> This is discussed in Chapter 1, para 5.1.

<sup>302</sup> For example, only seven of the United States that have enacted the 1962 Uniform Foreign Money-Judgments Recognition Act; and one that has enacted the 2005 Uniform Foreign-Country Money Judgments Recognition Act, have included reciprocity as a ground for recognition: specifically, Florida, Idaho, Maine,

The non-recognition of judgments in these States is in many cases due to the absence of reciprocal agreements in place for the recognition and enforcement of judgments.<sup>303</sup> There is no consensus on what reciprocity really means and how it should be established, and statutes that include this requirement usually do not define it.<sup>304</sup> Presumably the justification for States adopting the reciprocity test is the pressure that it may enable them to exert on countries to grant recognition without revision to that State's judgment.<sup>305</sup>

The unsatisfactory present situation can be addressed by concluding a multilateral convention among SACU Member States to provide for the recognition and enforcement of foreign judgments from Contracting States if certain requirements are met.<sup>306</sup> One would have expected, given the availability of a more simplified and expedited procedure for enforcing foreign judgments through the registration of judgments under national laws, that this procedure would have been made available to judgments from neighbouring African countries.<sup>307</sup> This would be in accordance with States' 'determination to promote unity, solidarity, cohesion and cooperation among the peoples of Africa and African States'.<sup>308</sup> However, as this is presently not the case, concluding a multilateral convention is recommended to bind States to make the expedited procedures for recognition and enforcement of judgments available to Member States.

A comparison of the statutes suggests that a recognition and enforcement convention should address the following issues:

- i. What the scope and exclusions from scope of the instrument would be.

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North Carolina, Ohio and Texas make reciprocity a discretionary ground for recognition, while Georgia and Massachusetts make it a mandatory ground: see Brand RA *Recognition and Enforcement of Foreign Judgments* Federal Judicial Centre International Litigation Guide (2012) 15.

<sup>303</sup> Oppong RF 'Private international law and the African Economic Community: A plea for greater attention' (2006) 55 *International and Comparative Law Quarterly* 918; Oppong (note 18) 393.

<sup>304</sup> Juenger (note 168) 31. See for example Botswana Act (note 160) s 3(1): para 3.2.2; Namibia Act (note 247) s 2(1): para 3.4.2.

<sup>305</sup> Casad RC 'Civil Judgment Recognition and the Integration of Multi-state Associations: A Comparative Study' (1980-1981) 4 *Hasting International & Comparative Law Review* 15.

<sup>306</sup> See para 5 below for proposals for a Multilateral Recognition and Enforcement Convention for the SACU.

<sup>307</sup> Oppong (note 18) 394.

<sup>308</sup> Preamble, Constitutive Act of the African Union reprinted in (2005) 13 *African Journal of International and Comparative Law* 25.

Conventions dealing with recognition and enforcement of foreign judgments are generally confined to judgments arising from civil and commercial transactions.<sup>309</sup> It is the practice of existing conventions not to specify what is meant by ‘civil and commercial matters’ or to determine which law is to be used to interpret that expression.<sup>310</sup> Lowenfeld<sup>311</sup> however urges abandoning the term ‘civil and commercial’, or defining the terms simply by excluding criminal matters, arbitral awards and matters relating to status. He does not believe that there is justification for excluding final judgments relating to succession, bankruptcy, or judgments of administrative tribunals rendered in circumstances assuring fairness and independent decision.<sup>312</sup> The SALRC recommended that a foreign judgment should be defined as ‘a judicial determination of civil or commercial claim, however labelled, in adversarial proceedings’.<sup>313</sup> It has been suggested that a judgment is not civil or commercial if it relates to an obligation between parties where one is required by the law to use the other’s service or equipment, and the price, place, or procedure of that service or equipment is unilaterally decided by the latter, or when the latter is a government agency or is entrusted by a government agency to exercise public power.<sup>314</sup> The statutes of some SACU Member States contain a number of exclusions<sup>315</sup> while the Swaziland and Lesotho statutes are limited to civil judgments.<sup>316</sup> According to the Hague Conference, it appears to be settled that the following would be excluded from a judgments convention: civil status and capacity of natural persons; matrimonial property regimes; wills; succession to the estates of deceased persons; bankruptcy and other similar procedures; social security and arbitration will be excluded. It further suggests

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<sup>309</sup> See, for example, EU Regulation (EC) 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters [2001] *Official Journal* L12/1 (‘Brussels I Regulation’); Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, Feb. 1, 1971, (1971) 1144 U.N.T.S.249 (‘1971 Hague Convention’); Hague Conference on Private International Law Convention on Choice of Court Agreements, June 30, 2005, 44 I.L.M. 1294 (‘2005 Hague Convention’); Hague Conference ‘International Jurisdiction and Foreign Judgments in Civil and Commercial Matters’ Preliminary Document No 7 of April 1997 (1997) 8, available at [http://www.hcch.net/index\\_en.php?act=publications.details&pid=3490&dtid=35](http://www.hcch.net/index_en.php?act=publications.details&pid=3490&dtid=35) (accessed 14 February 2013) (hereinafter ‘Kessedjian Report’) 12, Hague Conference ‘Convention of 30 June 2005 on Choice of Court Agreements: Explanatory Report by Trevor Hartley & Masato Dogauchi’ 2005 (hereinafter ‘Hartley Dogauchi Report’) 30.

<sup>310</sup> Jenard P ‘Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (signed at Brussels, 27 September 1968)’ (1979) *Official Journal of the European Communities* No. C 59/1 (5 March 1979) (‘Jenard Report’) 9.

<sup>311</sup> Lowenfeld A ‘Thoughts about a Multinational Judgments Convention: A reaction to the Von Mehren Report (1994) 57(3) *Law and Contemporary Problems* 301-2.

<sup>312</sup> Lowenfeld (note 311) 301-2.

<sup>313</sup> SALRC Report (note 189) v.

<sup>314</sup> Huang J *Interregional Recognition and Enforcement of Civil and Commercial Judgments: Lessons for China from US and EU Laws* (unpublished SJD Thesis, Duke University School of Law, 2010) 261.

<sup>315</sup> See para 3.3.2 (Botswana), 3.4.2 (South Africa) and 3.5.2 (Namibia) above.

<sup>316</sup> Swaziland Act (s 2); Lesotho Act (s 2).



excluding fiscal matters, customs duties and fines, but not excluding civil suits for environmental damage, or suits between private parties based on a breach of competition law or acts of unfair competition.<sup>317</sup>

- ii. To which judgments the convention would apply, including the courts by which these judgments should have been rendered.

It is suggested that the proposed Convention should be limited to private international litigation, i.e. in cases between parties who are individuals or private companies, or who are undertaking private law activities. This would exclude all cases involving a State or a State entity, or any entity acting on behalf of the State in public service mission.<sup>318</sup> Unlike the other statutes, as listed in the respective articles 2 of the statutes, the Botswana Act only applies to judgments given after the coming into operation of the order directing that the Act extends to a specific State.<sup>319</sup> Whereas the other statutes apply to superior courts, the South African and Namibian statutes apply to judgments of both superior and inferior courts.<sup>320</sup>

- iii. Whether it will be limited to civil judgments or include criminal judgments.

The limitation of civil or commercial is primarily intended to exclude criminal law and public law.<sup>321</sup> However, proceedings should not be excluded from the scope of Convention, by the mere fact that a State, including a government, a governmental agency or any person acting for a State, is a party thereto.<sup>322</sup> The Botswana and Namibia statutes are the only ones that apply to judgments in criminal proceedings for the payment of a sum of money for compensation or damages to an injured party. The Swaziland, Lesotho and South African statutes do not apply criminal judgments.<sup>323</sup>

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<sup>317</sup> See Kessedjian Report (note 309) 18-24; Weintraub RJ 'How substantial is our need for a judgments recognition convention and what should we bargain away to get it?' (1998-1999) 24 *Brooklyn Journal of International Law* 216.

<sup>318</sup> Kessedjian Report (note 309) 12; Huang (note 314) 325.

<sup>319</sup> Botswana Act (note 160) s 3(2).

<sup>320</sup> South Africa Act (note 189) s 1; Namibia Act (note 247) s 1.

<sup>321</sup> Lussier L 'A Canadian perspective' (1998-1999) 24 *Brooklyn Journal of International Law* 62.

<sup>322</sup> For example, the Hague Choice of Court Convention; Hartley Dogauchi Report (note 309) 30.

<sup>323</sup> Swaziland (note 99) s 2, Lesotho (note 129) s 2, South Africa (note 189) s 2, Botswana (note 160) s 2(1) and Namibia (note 247) s 1.



- iv. Whether it will exclude money payable in respect of taxes, or other charges of a like nature.

It is recommended that these be excluded from the scope of the convention. Taxes, fines, and monetary penal judgments serve to raise revenue for public purposes, and they are considered in most countries to be matters of public law and therefore outside the scope of recognition and enforcement of judgments in private civil suits.<sup>324</sup> The non-enforcement of revenue and penal laws follows from the territorial application of such laws.<sup>325</sup>

- v. Whether it will include arbitration awards.

Three of the five statutes, namely Swaziland, Lesotho and Botswana apply to arbitral awards, provided that it has become enforceable in the rendering State in the same manner as a judgment given by the Court in that place.<sup>326</sup>

The ideal solution contained in a recognition and enforcement instrument would be to apply to all civil matters. As a practical matter, consensus may often be reached more easily by excluding controversial areas; therefore, a convention which seeks to alter the diverse legal relationships of States generally contains a number of exclusions from the scope of the instrument. If, however, the exclusions become too numerous, any convention will be deprived of a good deal of its usefulness.<sup>327</sup>

There are various reasons why specific matters are excluded. In some cases, the interests of the public, or that of third parties,<sup>328</sup> is involved, so that the parties may not have the right to dispose of the matter between them - in such cases, a particular court will often have exclusive jurisdiction that cannot be ousted by means of a choice of court agreement.<sup>329</sup>

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<sup>324</sup> Brand (note 302) 12

<sup>325</sup> See Chapter 1, para 5.1 above. See also, for example Brussels I Regulation (note 302) art 1, which also does not extend to revenue, customs or administrative matters.

<sup>326</sup> Swaziland (s2), Lesotho (s 2) and Botswana (s2).

<sup>327</sup> Borchers PJ 'A few little issues for the Hague judgments negotiations' 24 *Brooklyn Journal of International Law* (1998-1999)165.

<sup>328</sup> See Chapter 4 para 3.1 above.

<sup>329</sup> Article 21 of the Hague Choice of Court Convention makes it possible for a Contracting State to extend the list of excluded matters by means of a declaration specifying the matter that it wants to exclude, provided it defines it clearly and precisely. Where this is done, the Convention will not apply with regard to that matter

Exclusions may, in other cases, be a practical solution to conflicting national laws where agreement is impossible, or excluded because they raise particular problems and thus require a special regulatory framework of their own;<sup>330</sup> or other multilateral legal regimes already apply; so the Convention is not needed, and it would sometimes also be difficult to decide which instrument prevails if the Convention were to cover such an area.<sup>331</sup>

## 4.2 Requirements for enforcement

None of the statutes of SACU Member States provide for the automatic enforcement of relevant judgments, but rather facilitate enforcement by providing for the registration of judgments at the relevant local (enforcing) court.<sup>332</sup> The majority of the statutes provide for the registration of a judgment if the court is satisfied that all the requirements have been met,<sup>333</sup> but the Lesotho and Swaziland Statutes afford the courts discretion to register a judgment if it is ‘satisfied that it is just and convenient’.<sup>334</sup>



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in the State making the declaration. However, under art 32, any such declarations must be notified to the depositary, which will inform the States. If the declaration is made after the Convention comes into force for the State making it, it will not take effect for at least three months. It will therefore be possible for the parties to know in advance whether their legal relationship will be affected. Art 21(2) further provides that, where a State makes such a declaration, other States will not be required to apply the Convention with regard to the matter in question where the chosen court is in the State making the declaration (principle of reciprocity): see Hartley Dogauchi Report (note 309) 25.

<sup>330</sup> Bartlett LS ‘Full faith and credit comes to the Common Market: An analysis of the provisions of the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (1975) 24 *International and Comparative Law Quarterly* 49.

<sup>331</sup> Hartley Dogauchi Report (note 309) 31. An example is contracts for the national and international carriage of passengers (including passenger luggage) and goods. This includes carriage by sea, land and air, or any combination of the three, excluded from the 2005 Hague Convention (note 302) art 2(f). The reason for their exclusion is subject to a number of other conventions, for example the Hague Rules on Bills of Lading (adopted in 1928 and amended by the Brussels Protocol of 1968; sometimes referred to as ‘Hague-Visby Rules’). By excluding these matters, the possibility of a conflict of conventions is avoided. Further examples include nuclear liability (excluded by art 2(i) of the Hague Choice of court Convention), as it is the subject of various international conventions, which provide that the State where the nuclear accident takes place has exclusive jurisdiction over actions for damages for liability resulting from the accident: Paris Convention on Third Party Liability in the Field of Nuclear Energy 1960; Convention Supplementary to the Paris Convention 1963; the Convention on Supplementary Compensation for Nuclear Damage 1997; the Joint Protocol relating to the Application of the Vienna Convention and the Paris Convention 1988. A further example is the Montevideo Convention be followed: See Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards, May 8, 1979, OEA/Ser.A/2818 ILM 1224 (1979) (‘Montevideo Convention’) (see Chapter 4 para 5.1 above), which applies to arbitral awards in all matters not covered by the Inter-American Convention on International Commercial Arbitration, signed in Panama on 30 January 1975 UNTS 1438 No I-24384: art 2(a).

<sup>332</sup> See paras 3.1.4 (Swaziland); 3.2.4 (Lesotho); 3.3.4 (Botswana); 3.4.4 (South Africa) and 3.5.4 above.

<sup>333</sup> Botswana Act (note 160) s 5(1); South Africa Act (note 189) s 3; Namibia Act (note 247) s 3(1).

<sup>334</sup> Swaziland Act (note 99) s 3(1); Lesotho Proclamation (note 129) s 3(1): see paras 3.1.2 and 3.2.2 above.

The requirements that a court will have to be satisfied of include the element of finality: a foreign judgment will be enforced only if it finally and conclusively decides the dispute between the parties.<sup>335</sup> The principle of finality requires that, generally speaking, there should be no distinction between foreign and domestic judgment so far as their conclusiveness in terminating litigation is concerned. In principle, a party in whose favour a judgment has been rendered by a competent tribunal should not be compelled to re-litigate the merits of the cause of action in order to procure execution, whether in the courts of the state in which the judgment was originally given or in the courts of any other state; and that a defendant who has been successful in a prior litigation, domestic or foreign, should be able to rest upon the judgment in his favour as a valid defence to any subsequent action upon the same cause.<sup>336</sup> A judgment is final and conclusive if it is shown that

‘in the court by which it was pronounced<sup>337</sup> it conclusively, finally and forever established the existence of the debt of which it is sought to be made conclusive evidence in this country, so as to make it *res judicata* between the parties’.<sup>338</sup>

Such finality is not affected by the fact that there is an appeal pending, unless a stay of execution has been granted in the foreign country pending the hearing of the appeal. Where it is shown that the judgment is subject to such an appeal, or that such an appeal is pending, the requested court enjoys discretion and in the exercise thereof may, instead of giving judgment in favour of the plaintiff, stay the proceedings pending the final determination of the appeal in the foreign jurisdiction. As a rule, the recognising court will refuse to assess the merits of the appeal and its prospects of success in the foreign court.<sup>339</sup> The onus of proving that a foreign judgment is final and conclusive rests upon the party seeking to enforce it.<sup>340</sup> Where this onus has been discharged, it is up to the defendant to place before the court the facts relating to the impending appeal and such other relevant facts as may persuade the court to exercise its discretion in favour of granting a stay of proceedings.<sup>341</sup>

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<sup>335</sup> See paras 3.1.3 (Swaziland); 3.2.3 (Lesotho); 3.3.3 (Botswana); 3.4.3 (South Africa) and 3.5.3 (Namibia) above.

<sup>336</sup> Yntema (note 19) 1145-6.

<sup>295</sup> *Nouvion v Freedman* (note 51). The court also emphasised that under English law it is accepted that the requirement of finality means the judgment must be final in the particular court which pronounced it: At 9 per Lord Herschell.

<sup>338</sup> *Nouvion v Freedman* (note 51) 9 per Lord Herschell.

<sup>339</sup> *Jones v Krok* (note 201) 692 per Corbett J.

<sup>340</sup> The English rule is that the onus of proof that the judgment is final and conclusive lies on the parties asserting it, and Commonwealth parties practicing the common law appear to have adopted the same principles: see *Carl-Zeiss Stiftung v Rayner and Keelr Ltd and Other (No 2)* [1996] 2 All ER 536 (H) 560I & 587 D-E, relying on textbooks from Canada, Australia, the United States of America and Scotland.

<sup>341</sup> *Jones v Krok* (note 211) 692 per Corbett J.

The Member States' statutes also specify when a judgment is ripe for recognition and enforcement: the enforcing State normally mirrors the circumstances in the rendering State - if the judgment is subject to immediate enforcement where rendered, it should be enforced elsewhere. If enforcement is susceptible to a stay where it was rendered, whether automatically or on appeal, enforcement should be suspended elsewhere.<sup>342</sup>

A foreign judgment will be enforceable in SACU Member States once it has been registered at the relevant court. A proposed Convention for SACU Member States should, consequently, include the following provisions:

- i. That an applicable judgment from a Contracting State is enforceable in other Contracting States, once it has been registered there.<sup>343</sup>
- ii. The requirements for enforcement, including that it must be –
  - a. final and conclusive as between the parties thereto,<sup>344</sup> and
  - b. be enforceable by execution in the country of the original court.<sup>345</sup>
- iii. Whether the convention creates an exclusive avenue for enforcement of judgments which are eligible for registration under the Convention.

Whether the procedure is exclusive or not may be significant where the disputed grounds on international competence are in issue. For example, disputed grounds such as 'presence' or 'domicile' are not deemed grounds of jurisdiction under the South African Act and so could not be argued by a judgment creditor forced to proceed under the 1988 Act. Further, under the 1988 Act, if the foreign judgment is expressed to be payable in a foreign currency, that judgment shall be registered as if it were a judgment for such amount in the currency of the Republic, *calculated at the rate of*

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<sup>342</sup> Weintraub (note 317) 206; See, for example Article 25 of the Brussels I Regulation (note 302) which provides for recognition and enforcement of 'any judgment given by a court or tribunal of a Contracting State, but states that the enforcing court 'may stay the proceedings' if an appeal is pending.

<sup>343</sup> See, for example, the Brussels I Regulation which provides for that judgments will be enforceable upon a declaration of enforceability, except in the UK, where a judgment shall be enforced in England and Wales, in Scotland, or in Northern Ireland when, on the application of any interested party, it has been registered for enforcement in that part of the United Kingdom: see Brussels I Regulation (note 309) art 38.

<sup>344</sup> See paras 3.1.3 (Swaziland); 3.2.3 (Lesotho); 3.3.3 (Botswana); 3.4.3 (South Africa) and 3.5.3 (Namibia) above. It would be undesirable if the foreign court's judgment were enforced where after the foreign judgment was set aside or altered by the court which handed it down in the first place: See Schulze (note 103) 28.

<sup>345</sup> See paras 3.3.3 (Botswana); 3.4.3 (South Africa) and 3.5.3 (Namibia) above.

*exchange prevailing at the date of judgment*' (emphasis added).<sup>346</sup> Under the common law judgment may be given in foreign currency and conversion into rand for the purpose of enforcement takes place on the date of payment.<sup>347</sup>

### 4.3 Procedural requirements

The purpose of the procedural requirements that must be met to qualify for recognition and enforcement is to convince the requested court that the judgment at issue is indeed what it purports to be, and that there are no other proceedings that can or ought to affect the enforcement proceedings.<sup>348</sup> Procedural requirements would include matters such as that the enforcing party has to provide a true, correct and authenticated copy of the judgment at issue to satisfy the court. This rule, with which it is easy to comply, makes it straightforward for people to have judgments recognised and enforced in foreign countries. Once this requirement has been fulfilled and established that a judgment should be recognised and enforced, the opposing party will have to prove that there is a legitimate reason for the court addressed to refuse the recognition or enforcement of the judgment. Other examples include translation of the judgment into the local language in the enforcing jurisdiction; and the requirement that a judgment be final and conclusive for it to be recognised.<sup>349</sup> It is one of the fundamentals of private international law that foreign laws and proceedings that differs from one's own rules are to a large extent respected.<sup>350</sup> The longer the list of elements to be established, the less the Convention would be of interest in terms of one of its objectives, namely much greater ease in circulating judgments within the States that are parties to the Convention.<sup>351</sup>

For the same reasons that the Lugano ad hoc working party decided not do away with intermediary proceedings and provide for the automatic enforcement of judgments: they found it premature, in the light of the prerogatives of national sovereignty that still

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<sup>346</sup> See para 3.4.4 above.

<sup>347</sup> *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 (4) SA 747 (A) 777D): see Forsyth (note 8) 461.

<sup>348</sup> Kramer XE 'Harmonisation of civil procedure and the interaction with private international law' in Kramer XE & Van Rhee CE (eds) *Civil Litigation in a Globalising World* (2012) 11.

<sup>349</sup> Oestreicher Y 'The Rise and Fall of the "Mixed" and "Double" Convention Models Regarding Recognition and Enforcement of Foreign Judgments' (2007) 6 *Washington University Global Studies Law Review* 360-1.

<sup>350</sup> Kramer (note 348) 11.

<sup>351</sup> Hague Conference 'Synthesis of the work of the Special Commission of March 1998 on international jurisdiction and the effects of foreign judgments in civil and commercial matters' *Preliminary Document No 9, July 1998* (1998) 17.

characterise the (non-EU) European States the same finding may apply to the SACU Member States, which have achieved a far lesser degree of economic and legal integration than that of the EU, and it is therefore recommended that the proposed convention include intermediary proceedings before a judgment is enforced.<sup>352</sup>

Based on an analysis of the above statutory provisions,<sup>353</sup> it is recommended that a prospective convention should include the following:

- i. That any judgment to which the Convention applies will be enforceable only once it is registered, after an application to that effect has been made to the relevant court in the Contracting State.
- ii. Details of the relevant courts (whether superior or inferior) to which an application for registration should be made.
- iii. By whom an application for registration must be made.
- iv. The time within which the application is to be made.
- v. The procedure for making an application for registration, including the matters to be dealt with, and documents to be furnished (which should include a certified copy of the judgment) on an application for the registration of a judgment<sup>354</sup> as well as the mode of compliance with the requirements;<sup>355</sup> or alternatively that this shall be governed by the law of the Member State in which enforcement is sought.<sup>356</sup>
- vi. Notice of the registration to be provided to the judgment debtor informing him of such registration;<sup>357</sup> and the method for serving the notice.
- vii. The method for determining the rate of exchange, or alternatively leaving this to be determined by the law of the requested court.

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<sup>352</sup> Pocar F 'Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, signed in Lugano on 30 October 2007' Explanatory Report *OCJ C319/1* 23.12.2009 ('Pocar Report') 36; para 4.2 above.

<sup>353</sup> See paras 3.1.4 (Swaziland); 3.2.4 (Lesotho); 3.3.4 (Botswana); 3.4.4 (South Africa) and 3.5.4 (Namibia) above.

<sup>354</sup> See, e.g., Swaziland Rules of Court which provide that the application must be supported by an affidavit of the facts exhibiting the judgment or a verified or certified copy of the judgment, and stating that to the best of the information and belief of the deponent the judgment creditor is entitled to enforce such judgment and that such judgment does not fall with any of the cases in terms of the Act under which a judgment cannot be registered (Rule 2), as well as the full name, title, trade or business, and the usual or last known place of abode or business of the judgment creditor and judgment debtor respectively (Rule 3); Lesotho contains the same requirements to be provided (see Rule 2).

<sup>355</sup> See Botswana Act (note 160) s 6(1)(b).

<sup>356</sup> See Brussels I Regulation (note 309) art 40.

<sup>357</sup> South Africa Act (note 189) s 3(2); Namibia Act (note 247) s 3(2); Botswana Act (note 160) s 6(1)(c); Lesotho Rules (note 132) 9; Swaziland Rule (note 102) Rule 10.



- viii. A requirement that the requested court may stay execution of a judgment in certain circumstances, if an application to this effect is made to the registering court.
- ix. The effect of registration which should generally have the same effect as a civil judgment of the court at which the judgment has been registered; provided that in certain circumstances a registered judgment may not be executed before the expiration of a prescribed period of time.<sup>358</sup>

#### 4.4 Setting aside of registered judgments

Most existing regimes for the recognition and enforcement of foreign judgments base the decision to extend recognition on the presence or absence of certain specific conditions.<sup>359</sup> In traditional international practice, States make recognition of a foreign judgment conditional on a number of considerations, which include: the positive evaluation of the rendering court's jurisdiction, the fairness of its procedures, possibly a review of the corrections of the rendering court's decision in substance and as a matter of conflicts of law; *révision au fond*, which implies that requested courts re-examine the merits of a foreign judgment, possibly also on the existence of reciprocity. These are all measured by the standards of the *lex fori*, and ultimately depend on the absence of objections on local public policy grounds.<sup>360</sup> There are a number of requirements for the enforcement of foreign judgments that are universally recognised,<sup>361</sup> in the absence of which a judgment will not be recognised. Some of them are: if the court rendering the original judgment lacked jurisdiction to do so;<sup>362</sup> the judgment debtor received insufficient notice of the proceedings to enable him to prepare a defence;<sup>363</sup>

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<sup>358</sup> In terms of Botswana's Statute, execution may not be issued so long as it is possible for any party to apply to have the registration of the judgment set aside: see para 3.2.4 above. In South Africa and Namibia, until the expiration of 21 days after service of the notice on the judgment debtor: see paras 3.4.4 and 3.4.5 above; in Lesotho and Swaziland, the expiration of the time limited by the order giving leave to register after service on the judgment debtor of notice of registration: see paras 3.1.4 and 3.2.4 above.

<sup>359</sup> Casad (note 305) 12-16. Particular impediments to recognition and enforcement may either be found as requirement for enforcement or defences, i.e. grounds on which a registered judgment will be set aside: Juenger (note 168) 12. See, for example, the application to have a judgment registered by the judgment creditor which is included as part of the procedural requirements, as discussed above, but a number of statutes includes the absence of this element as one of the grounds on which a registered judgment must be set aside: See Botswana s 7(1); South Africa s 5(1); Namibia s 5(1). The Swaziland Act and Lesotho Acts are the only Statutes which does not include this as one of the grounds on which a registered judgment will be set aside. Other examples include the requirement/defence of a judgment that has been wholly satisfied (see for example South Africa s 5(1)).

<sup>360</sup> Hay P 'The development of the public policy barrier to judgment recognition within the European Community' (2007) 6 *The European Legal Forum* 290.

<sup>361</sup> Oestreicher (note 349) 374.

<sup>362</sup> See para 4.5 below.

<sup>363</sup> See para 4.4.1 below.

fraud in obtaining the judgment,<sup>364</sup> and if enforcing the foreign judgment would be against the public policy of the requested state.<sup>365</sup> The statutory grounds of all SACU Member States<sup>366</sup> for setting aside a registered judgment or the instances in which a judgment will not be registered correspond with these, and are now discussed.

#### 4.4.1 *Insufficient Notice*

In order to be recognised or enforced, the judgment should not have been rendered contrary to natural justice.<sup>367</sup> Natural justice means justice that is the result of procedural justice. It requires that the hearing take place before an impartial tribunal, that the defendant have due notice of proceedings against him and that he has been given an opportunity to present his case.<sup>368</sup> A foreign judgment will generally not be accorded recognition unless it satisfies the ‘international’ standards as to notice.<sup>369</sup> The exercise of the right to be heard presupposes notice sufficient to inform the defendant of the fact that an action is pending. It is therefore a universally accepted principle that a judgment rendered against a party who was not properly notified of the proceeding, for example in the case of service by mere publication, will not be recognised.<sup>370</sup> A judgment given in default of appearance is generally not recognised if the application or equivalent document instituting the proceedings before the original court was not ‘duly’ served on the defendant.<sup>371</sup>

The ultimate purpose of notice is to enable a party to effectively contest a lawsuit. Mere service of process does not necessarily safeguard the right of defence; the rendering state’s domestic law may fall short of providing a full and fair hearing, which would deprive the defendant of a realistic opportunity to litigate. A defendant must, at the very least, be adequately informed of the nature of the proceedings in sufficient time to enable him to

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<sup>364</sup> See para 4.4.2 below.

<sup>365</sup> See para 4.4.3 below.

<sup>366</sup> Swaziland Act (note 99) s 3(2); Lesotho Proclamation (note 129) s 3(2); Botswana Act (note 160) s 7(1)(a); South Africa Act (note 189) s 5(1); Namibia Act (note 247) s 5(1).

<sup>367</sup> The term ‘natural justice’ has reference to the procedure rather than to the merits of a particular case: *Lissack v Duarte* 1974(4) SA 560 (NPD) 564 per Leon J.

<sup>368</sup> *Jones v Krok* (note 210) 551 per Kirk-Cohen J.

<sup>369</sup> Casad (note 305) 14.

<sup>370</sup> Juenger (note 168) 17.

<sup>371</sup> Provisions of this kind lay down two conditions, the first of which, that service should be duly effected, entails a decision based on the legislation of the State of the rendering court and on the conventions binding on that State in regard to service, whilst the second, concerning the time necessary to enable the defendant to arrange for his defence, implies appraisals of a factual nature, as it has to be determined whether the period calculated from the date on which service was duly effected allowed the defendant sufficient time to arrange for his defence: Pocar Report (note 335) 37.

protect his rights.<sup>372</sup> In *Lissack v Duarte*<sup>373</sup> a defendant was given notice but the foreign court did not inform him of the correct procedure to adopt when the defendant wrote a letter to the court denying liability but gave judgment against him instead. The court held that the defendant had been unfairly deprived of the opportunity of presenting his side of the case and enforcement was consequently denied.<sup>374</sup> If, however, the defendant's inability to participate in the foreign proceedings is a consequence of his own misconduct, the judgment may be recognised, and the exception will not apply.<sup>375</sup>

With regards to whether it is sufficient to review only the period of notice or whether there should also be a requirement that notice be properly carried out, some suggests that if the defendant has appeared before the court of origin and was given sufficient time to organise his defence, it would not matter if he had not been properly notified; while other suggests that reviewing the fact that proper notification occurred and that sufficient time was allowed for preparing a defence need only take place when the judgment of origin was delivered by default.<sup>376</sup> The Botswana, Lesotho and Namibia statutes provide that 'the judgment debtor did not receive notice of the proceedings in sufficient time to enable him to defend the proceedings and did not appear' whereas Swaziland and Lesotho requires that the judgment debtor, being the defendant in the proceedings, was 'not duly serviced with the process of the original court' and did not appear.<sup>377</sup>

It is suggested that the proposed Convention follow the approach of the Hague Choice of Court Convention.<sup>378</sup> It provides that a judgment will not be recognised if the notice of proceedings was not brought to the defendant's attention in sufficient time and in such a way to enable him to arrange for his defence, unless the defendant entered an appearance and presented his case without contesting notification in the court of origin. Similarly, whereas the 1988 Lugano Convention, for example, provided that where judgment was given in default of appearance, it will not be recognised if the defendant was not duly served with the document which instituted the proceedings 'in sufficient time to enable him to arrange for his

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<sup>372</sup> Jeunger (note 168) 21.

<sup>373</sup> See note 367.

<sup>374</sup> *Lissack v Duarte* (note 367) 566-7 per Leon J.

<sup>375</sup> Jeunger (note 168) 21.

<sup>376</sup> Hague Conference (note 351) 20.

<sup>377</sup> See paras 3.1.5 (Swaziland); 3.2.5 (Lesotho); 3.3.5 (Botswana); 3.4.5 (South Africa) and 3.5.5 (Namibia) above.

<sup>378</sup> 2005 Hague Convention (note 309) art 9(c).

defence’,<sup>379</sup> the 2007 Lugano Convention adds the following proviso: ‘unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so’.<sup>380</sup> Therefore, even if service was not effected in sufficient time and in such a way as to enable the defendant to arrange for his defence, the judgment is to be recognised if the defendant did not challenge it in the State of origin. The protection of a defaulting defendant in the event of defects in the notification should not extend to cases where the defendant remains inactive, and the rule seeks to overcome the problem by requiring him, if he can, to raise any objection in the State of origin, and to exhaust all remedies there, rather than keeping them in reserve for the following stage when the judgment has to be recognised in another State bound by the Convention.<sup>381</sup> As a result, art 34(2) of the 2007 Lugano Convention no longer expressly requires service in due form, but treats the question in connection with the opportunity given to the defendant to arrange for his defence, in the same way as the time that may be needed, and uses the same wording that is used in the Brussels I Regulation.<sup>382</sup> The aim is to protect a defaulting defendant’s right to a due notice and a reasonable opportunity to be heard.<sup>383</sup>



#### 4.4.2 *Fraud*

A recognised ground for refusal to recognise or enforce foreign judgments relates to fraud by the judgment creditor in obtaining the judgment.<sup>384</sup> The term ‘fraud’ covers misrepresentations addressed to the court or the opposing litigant.<sup>385</sup> It is generally recognised that a judgment obtained by fraud may be denied recognition and enforcement in the second addressed forum.<sup>386</sup>

A minimum of four types of possible fraud can be distinguished, namely:

- a) fraud as to the jurisdiction of the court of origin;
- b) fraud in relation to the applicable law;
- c) fraud concerning prior notification to the defendant in the original proceedings; and

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<sup>379</sup> 2005 Hague Convention (note 309) art 27(2).

<sup>380</sup> 2005 Hague Convention (note 309) art 34(2).

<sup>381</sup> Pocar Report (note 352) 38.

<sup>382</sup> 2005 Hague Convention (note 309) art 34(2).

<sup>383</sup> Pocar Report (note 352) 38.

<sup>384</sup> *Joffe v Salmon* 1904 TS 317, 319 per Innes CJ.

<sup>385</sup> Juenger (note 168) 23.

<sup>386</sup> Juenger (note 168) 23.

d) fraud committed in the submission of evidence to the court of origin.<sup>387</sup>

Fraud,<sup>388</sup> according to Hartley and Dogauchi<sup>389</sup> is ‘deliberate dishonesty or deliberate wrongdoing’. A distinction is also made between extrinsic and intrinsic fraud. Extrinsic fraud refers to the judgment-rendering court’s jurisdiction, or a matter of procedure that deprived the losing party of adequate opportunity to present his or her case to the court. A foreign judgment is liable to be challenged if it was obtained by practicing upon the foreign court fraud of such a kind as would entitle a South African court to set aside its own final judgment.<sup>390</sup> Intrinsic fraud, by contrast involves matters upon by the original court had passed judgment, such as the reliability of testimony and the authenticity of documents, and would include circumstances where a witness in the foreign proceedings gave false testimony or introduced a forged document in the foreign proceeding.<sup>391</sup> Generally, a foreign judgment can be impeached only for extrinsic fraud, which deprives the aggrieved party of an adequate opportunity to present its case to the court. If a foreign plaintiff withheld material evidence that was favourable to the defendant from the foreign court, this would be considered extrinsic fraud sufficient to deny recognition.<sup>392</sup> A judgment cannot, in most cases, be impeached for intrinsic fraud.<sup>393</sup> Where, however, the fraud is intrinsic, in other words it has been raised before and rejected by an internationally competent court, then to avoid retrying the merits of the case the court should refuse to go into the matter and should recognise the

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<sup>387</sup> Hague Conference (note 334) 23.

<sup>388</sup> Fraud is a defence against recognition and enforcement in US law (see Brand (note 302) 22-3) and the Hague Choice of Court Convention (art 9(d) provides that recognition or enforcement may be refused ‘if the decision was obtained by fraud in the procedural sense’; but the Montevideo Convention (note 331) does not contain a fraud exception; nor does the Brussels Convention/Regulation or Lugano Convention.

<sup>389</sup> Hartley Dogauchi Report (note 309) 55. Examples would be where the plaintiff deliberately serves the writ, or causes it to be served, on the wrong information as to the time and place of the hearing; or where either party seeks to corrupt a judge or witness, deliberately conceals key evidence, or submits counterfeit or falsified documents.

<sup>390</sup> Schulze (note 103) 30. Examples are forgery or perjury in the course of the proceedings; fraudulent suppression of material documents; obtaining a foreign judgment without the defendant’s knowledge and contrary to a prior agreement between the parties; and fraudulently inducing the defendant not to appear

<sup>391</sup> Although this distinction between intrinsic and extrinsic fraud has been criticised as being fuzzy, particularly when the intrinsic fraud tainted a fair trial of the case. However, this distinction has been endorsed by international law, such as the 1999 Hague Draft Convention, and the 2005 Hague Choice of Court Convention. These two conventions state that the requested court may deny recognition and enforcement if the judgment was obtained by fraud in connection with a matter of procedure. This can be interpreted as extrinsic fraud. The benefit of this distinction is to prevent the requested court from reviewing the merits of the judgment, which is explicitly forbidden by art 8(2) of the Hague Choice of Court Convention: see Huang (note 314) 325.

<sup>392</sup> Brand (note 302) 23.

<sup>393</sup> Brand (note 302) 23.

judgment; the defendant may then avail himself of the remedy of an appeal from the decision of the foreign court within that foreign system.<sup>394</sup>

All the SACU statutes include fraud as one of the bases on which a judgment has to be set aside.<sup>395</sup> It is, therefore, recommended that this should be included as one of the basis on which recognition and enforcement under the proposed Convention would be denied.<sup>396</sup>

#### 4.4.3 *Public Policy*

The rendering court's jurisdiction may be beyond doubt and the judgment debtor may have had the opportunity to be heard, but the foreign judgment may still be 'unjust'.<sup>397</sup> The public policy exception aims to provide countries with a mechanism that will enable them to refrain from recognising and enforcing foreign judgments, even though all other requirements were met.<sup>398</sup>

There seems to be a consensus on the need for a public policy exception in the international sphere,<sup>399</sup> and this provision is also traditionally found in all national laws and international conventions dealing with judgments and recognition enforcement, whether single or double.<sup>400</sup> The rationale is that protection of the fair procedure must be more far-reaching

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<sup>394</sup> Forsyth (note 8) 433.

<sup>395</sup> See paras 3.1.5 (Swaziland); 3.2.5 (Lesotho); 3.3.5 (Botswana); 3.4.5 (South Africa) and 3.5.5 (Namibia) above.

<sup>396</sup> See para 3, proposed art 5(1)(c) below.

<sup>397</sup> Juenger (note 168) 21.

<sup>398</sup> Oestreicher (note 349) 370.

<sup>399</sup> In negotiations surrounding the New Lugano Convention, the European Commission proposed that the public policy of the requested State as a ground for refusal of recognition be deleted, amongst others because it had been applied only very rarely in the judgments of national courts with regard to the Brussels and Lugano Conventions: Pocar Report (note 352) 37; Lugano Convention (note 309) art 34(1). The Lugano ad hoc Working Party however objected that the State addressed had to be able to protect its fundamental interests by invoking a principle such as public policy, even if the principle was rarely applied. In order to emphasise the exceptional nature of recourse to this ground for refusal, the provision now specifies that recognition may be refused only when it would be 'manifestly' contrary to public policy, which is similar to the wording used in the Brussels Regulation: Pocar Report (note 352) 37; Lugano Convention (note 309) art 34(1).

<sup>400</sup> Kessedjian Report (note 309) 21; Oestreicher (note 349) 368. The Brussels I Regulation states that 'a judgment shall not be recognised if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought' (art 34(1)). The exception a limited role: it mainly functions as a 'safety net' that enables a state not to recognise and enforce a foreign judgment (or to apply foreign law) that goes against fundamental principles upheld by its legal system: see Kramer (note 348) 7. Public policy as used in the Brussels Regulation is subject to interpretation by the ECJ, under art 234 of the Treaty of Rome, which has ruled that recourse to the concept of public policy can be envisaged only where recognition would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought, inasmuch as it infringes a fundamental principle. The infringement would have to constitute a manifest



than proper service, because there should be fair trial ‘after its commencement, not just notice at its beginning’.<sup>401</sup>

The requested State’s public policy may be offended either by procedural irregularities, such as the lack of a fair hearing, or by substantive deficiencies, such as the violation of fundamental principles of equal protection. In its broadest sense, this reservation encompasses practically all impediments to recognition, including for instance the lack of due notice and fraud.<sup>402</sup> The public policy exception is to a certain extent a protection mechanism that enables countries to protect the very basic ideas and principles that guide them.<sup>403</sup> A foreign decision can be recognised despite the fact that the law on which it is based clashes with important forum policies, so long as the result that the rendering court reached is not repugnant<sup>404</sup> to the requested forum’s fundamental notions of justice.<sup>405</sup>

The determination of what exactly constitutes public policy is not done in the international sphere, but rather in the national sphere, i.e. national courts. In deciding whether a foreign decision is against a public policy, the rules of the requested State are decisive.<sup>406</sup> Different countries may have different interpretations of this term, and what is considered to be public policy in one country is not necessarily public policy in another.<sup>407</sup>

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breach of a rule of law regarded as essential in the legal order of that State: ECJ Case C-7/98 *Krombach* [2000] ECR I-1935, paras 23 and 37. EU courts are unanimous that a violation of public policy only occurs when *basic, essential* norms and values of the forum’s legal system would be violated by the recognition of the foreign judgment: see Hay (note 360) 291.

Article 5 of the 1971 Hague Convention provides that recognition or enforcement of a decision may be refused if recognition or enforcement of the decision is ‘manifestly incompatible’ with the public policy of the State addressed or if the decision resulted from proceedings incompatible with the requirements of due process of law: see Hague Convention (note 309) art 5.

See e.g. also Lugano Convention (note 309) art 34(1); Montevideo Convention (note 302) art 2(h) and New York Convention, art V(2)(b) (holding that “[r]ecognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: ... the recognition or enforcement of the award would be contrary to the public policy of that country”).

<sup>401</sup> Hay (note 360) 292-3.

<sup>402</sup> Juenger (note 168) 22.

<sup>403</sup> Oestreicher (note 349) 370.

<sup>404</sup> Not every provision of a foreign law which runs counter to a mandatory provision of some tenet of internal public policy should be excluded. There must be something fundamentally offensive about the application of the foreign law before public policy would exclude it. Foreign judgments will not be recognised if obtained contrary to the rules of natural justice: see Forsyth (note 230) 110. In *Ncgqobela v Sihele* (1893) 10 SC 346, 352 De Villiers CJ spoke of a result ‘entirely opposed’ to the public policy and institutions of South Africa; and in *Lourens v NO v Van Hohne* 1993 (2) SA 104 (W) 121B-C Schutz J confirmed that the foreign law must ‘fly in the face of some deep-rooted conception of good morals’ before it will be denied recognition.

<sup>405</sup> Juenger (note 168) 22.

<sup>406</sup> Kramer (note 348) 7.

<sup>407</sup> Oestreicher (note 349) 370.

Where a foreign judgment is regarded as being contrary to a State's notions of public policy, it will not be recognised or enforced.<sup>408</sup> It would not seem advisable to hamper the requested State's discretion by requiring greater specificity, especially among States with basically shared values. However, a definition of public policy should be very narrowly drawn<sup>409</sup> - public policy should not become a major loophole in the Convention's mechanism for enforcement.<sup>410</sup> It has been suggested that the use of public policy exception should be strictly restrained,<sup>411</sup> and that only when the *effects* of recognition and enforcement, rather than the law on which the judgment is based, will manifestly infringe the fundamental interest of a State, should a requested court be able to deny recognition and enforcement.<sup>412</sup> Where the foreign judgment is contrary to a distinct public policy principle of the local court, it will also not be recognised or enforced. Mere inconsistency with a domestic rule does not mean that a judgment will be refused enforcement. Rather, it must violate a fundamental policy of the law.<sup>413</sup>

Enforcement of foreign judgments should be denied on the basis of public policy only where enforcement would violate the forum state's most basic notions of morality and justice.<sup>414</sup>

A convention on the recognition and enforcement of foreign judgments for the SACU should, therefore, list the circumstances when a judgment will not be registerable for the purpose of enforcement under the Convention. The negotiators of a recognition and enforcement instrument would need to determine what grounds for refusal should be allowed.<sup>415</sup>

One of the reasons why countries may be hesitant to accede to a recognition and enforcement convention is a fear of having to surrender elements of their sovereignty and independence.<sup>416</sup>

One of the goals of a recognition and enforcement convention should be to make it attractive enough for all prospective (SACU) Member States to the Convention to be willing to be

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<sup>408</sup> Schulze (note 103) 29; Forsyth (note 8) 431.

<sup>409</sup> Juenger (note 169) 23; Lowenfeld (note 168) 291.

<sup>410</sup> See para 3, proposed art 5(1)(d) below.

<sup>411</sup> Hague Conference on Private International Law 'Preliminary Draft Convention on jurisdiction and foreign judgments in civil and commercial matters, adopted by the Special Commission and Report by P. Nygh & F. Pocar' *Preliminary Document No 11 of August 2000* (2000) 27 (hereafter 'Nygh & Pocar Report') 309.

<sup>412</sup> Nygh & Pocar Report (note 411) 309.

<sup>413</sup> Schulze (note 103) 30.

<sup>414</sup> Nygh & Pocar Report (note 411) 309.

<sup>415</sup> Traynor M 'An introductory framework for analysing the proposed Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters: US and European Perspectives' (2000) 6 *Annual Survey of International & Comparative Law* 8.

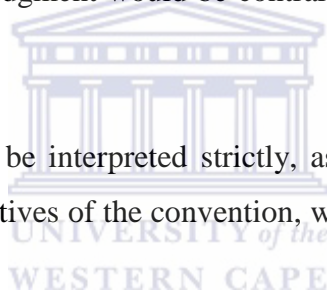
<sup>416</sup> Oestreicher (note 349) 361.

bound by it. A recognition and enforcement convention should contain very broad exceptions to the general rule of enforceability. A convention by doing so would more easily convince hesitant countries that they can comfortably join the convention, because, if a need arises, they can find refuge by utilising one of the broad exceptions provided therein to refuse the recognition or enforcement of the specific judgment.<sup>417</sup>

It is suggested that, based on a comparison of the relevant provisions in the statutes of the SACU Member States and the foregoing discussion, the proposed convention should include the following circumstances when judgment would not be registered for the purpose of enforcement:

- i. if the courts of the state of origin lacked jurisdiction;<sup>418</sup>
- ii. if the judgment debtor did not receive sufficient notice of the proceedings;<sup>419</sup>
- iii. if the judgment was obtained by fraud;<sup>420</sup> and
- iv. if the enforcement of the judgment would be contrary to law or public policy<sup>421</sup> in the recognising state.<sup>422</sup>

The grounds for refusal have to be interpreted strictly, as these grounds can constitute an obstacle to the fundamental objectives of the convention, which is to facilitate, to the greatest



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<sup>417</sup> Oestreicher (note 349) 361.

<sup>418</sup> International jurisdiction is discussed in paragraph 4.5 below.

<sup>419</sup> While Botswana requires the judgment debtor must have received ‘sufficient notice’ of the proceedings in the foreign court (see para 3.3.3 above) the South African Act provides that the notice prescribed by the law of the designated country is sufficient: (see para 3.4.5 above). Plainly the sufficiency of the prescribed notice will need to be investigated before a country is designated: Forsyth (note 8) 411; see generally para 4.4.1 above.

<sup>420</sup> See para 4.4.2 above.

<sup>421</sup> See para 4.4.3 above.

<sup>422</sup> Other grounds for non-enforcement include contained in one or more of the statutes include: if the judgment debtor satisfied the court either that an appeal is pending, or that he is entitled and intends to appeal against the judgment: Swaziland Act (note 99) s 3(2)(e); if the judgment is not a judgment to which the respective Acts apply as it does not fall within the definition of ‘judgment’ or was excluded from the scope of application of the Act, or was registered in contravention of the Act: Botswana Act (note 160) s 7(1)(a); South Africa Act (note 189) s 5(1)(a); Namibia Act (note 247) s 5(1)(a); if the judgment has been set aside by a court of competent jurisdiction: South Africa Act (note 189) s 5(1)(h); and Namibia Act (note 247) s 5(1)(h); if the judgment has been become prescribed under the laws of the designated country in which it was given: South Africa Act (note 189) s 5(1)(i); Namibia Act (note 247) s 5(1)(h). This also includes an instance when the judgment has become prescribed under the law of the requested State. The Statute of Botswana afford the courts discretion to set aside a registered judgment if the registering court is satisfied that the matter in dispute in the proceedings in the original court had prior to the date of the judgment in the original court been the subject of a final and conclusive judgment by a court having jurisdiction in the matter (s 7(1)(b); but the South African Act includes this as a ground on which a registered judgment must be set aside: A registered judgment must also be set aside if the cause of action upon which the judgment was given had at the date of that judgment been the subject of a final and conclusive judgment of a court having jurisdiction (s 10(2)(e)).

possible extent, the free movement of judgments by providing for a simple and rapid enforcement procedure.<sup>423</sup>

#### 4.5 International competence

When requested to enforce a foreign judgment, the enforcing court will generally ask whether the court rendering the judgment was entitled to assert jurisdiction under the rules of a relevant international convention or under the internal rules of the requested court if no convention is applicable.<sup>424</sup> That the rendering court must have had jurisdiction is one of the conditions regarded as essential in all judgment recognition systems, and can be found as one of the grounds for non-enforcement of foreign judgments in most single regional instruments on the topic.<sup>425</sup> All the SACU Member States' statutes provides that a court will set aside a registered judgment if it appears that the court of the rendering State lacked the international competence, or jurisdiction to decide the case, as determined by the law of the enforcing State.<sup>426</sup>

Unless some higher law, such as the constitution of a federal system, a treaty, or a convention establishes rules binding on both the rendering and the requested States, each legal system is free to determine which jurisdictional bases are acceptable for recognition purposes.<sup>427</sup> Exorbitant assertions of jurisdiction have resulted in few legal systems considering it sufficient that the rendering court could claim jurisdiction pursuant to its own law; most countries measure the foreign court's jurisdiction by reference to the bases found in their own laws.<sup>428</sup> Recognising the problems of measuring jurisdiction for recognition purposes by recourse to domestic or rendering State rules,<sup>429</sup> the English courts have taken the position

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<sup>423</sup> Kramer XE 'Enforcement under the Brussels Convention: Procedural Public Policy and the Influence of Article 6 ECHR' (2002) 7 available at [http://publishing.eur.nl/ir/repub/asset/10824/2003\\_Int-Lis\\_Annotation\\_Maronier-Kramer.pdf](http://publishing.eur.nl/ir/repub/asset/10824/2003_Int-Lis_Annotation_Maronier-Kramer.pdf) (accessed 9 September 2012).

<sup>424</sup> Oestreicher Y *Recognition and enforcement of foreign intellectual property judgments: analysis and guidelines for a new international convention* (Unpublished SJD Dissertation, Duke University School of Law, 2004) 126.

<sup>425</sup> See, for example, Montevideo Convention (note 331), Article 2(d); 1971 Hague Convention (note 309) art 4(1). The Brussels, Lugano and 2005 Hague Conventions are all double conventions, and for the recognition and enforces provisions to apply, the court had to have jurisdiction under the Convention. For example, Article 8(1) provides that a judgment given by a court of a Contracting State designated in an exclusive choice of court agreement shall be recognised and enforced in other Contracting States'.

<sup>426</sup> See para 4.4 above.

<sup>427</sup> Juenger (note 168)15.

<sup>428</sup> Casad (note 2305) 13; Forsyth (note 8) 431.

<sup>429</sup> The complexity and sensitivity of the jurisdiction issue may be illustrated by the unsuccessful attempt of The Hague Conference to conclude an international convention on the topic. Instead of a comprehensive

that the efficacy of a foreign judgment ought not to depend on the internal law of either country: instead, they seek to ascertain whether the foreign court had ‘jurisdiction in the international sense’.<sup>430</sup>

Weintraub<sup>431</sup> suggests that it is almost certain that the bases that will be approved for general jurisdiction are the domicile, or habitual residence of an individual, and the principal place of incorporation of a company,<sup>432</sup> as well as knowing and voluntary consent either before or after suit is brought (‘submission’).<sup>433</sup>

An analysis of the statutory provisions for enforcement indicates that the grounds for international competence of the Botswana, South African and Namibian Acts<sup>434</sup> are similar, and analogous to those contained in the 1933 UK Foreign Judgment (Reciprocal Enforcement) Act.<sup>435</sup> It is suggested that these grounds form the basis of the grounds on which a court would be deemed to have had jurisdiction for purposes of enforcement.<sup>436</sup>

Should negotiating parties be unable to agree on all the proposed grounds of jurisdiction, and only be able to reach consensus on a limited number of specific grounds of jurisdiction,<sup>437</sup> these specific grounds of jurisdiction could be used as building blocks for a comprehensive new instrument. An alternative solution may be for the bases of jurisdiction to be separated into optional chapters. This would complement a uniform regime on recognition and enforcement and would apply only as between States that have accepted each jurisdictional basis. This option may provide an option that would give Contracting States the ability to ‘pick and choose’ from the acceptable list of jurisdictional grounds if they are unable to agree

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judgments recognition and enforcement convention, negotiating parties at The Hague Conference were only able to conclude a narrow convention focusing on jurisdiction and recognition and enforcement in express choice of law agreements, in such a way that the Convention has been described as ‘the elephant that gave birth to a mouse’: Talpis J & Krnjevic N ‘The Hague Convention on Choice of Court Agreements of June 30, 2005: The elephant that gave birth to a mouse’ (2006) 13(1) *Southwestern Journal of Law and Trade in the Americas* 1.

<sup>430</sup> This is similar to the wording used in other common law countries: see Juenger (note 168)16.

<sup>431</sup> Weintraub (note 317) 198.

<sup>432</sup> Weintraub (note 317) 198.

<sup>433</sup> It is widely recognised that submission by the defendant to the jurisdiction of the foreign court grants to that court international competence: see Forsyth (note 230) 395.

<sup>434</sup> Botswana Act (note 160) s 7(3); South Africa Act (note 189) s 7(5); Namibia Act (note 247) s 7(5).

<sup>435</sup> See para 2.2.3 above. Swaziland and Lesotho’s Acts do not include any references as to when a rendering court would be deemed to have jurisdiction for the purposes of registering a foreign judgment.

<sup>436</sup> See para 5 below.

<sup>437</sup> Hague Conference ‘Ongoing work on international litigation and possible continuation of the Judgments Project’ *Preliminary Document No 5 of March 2012* (2012) 16.

on the bases of jurisdiction for the purposes of the Convention. Such an agreement may encourage a wider acceptance of a future instrument.<sup>438</sup> However, it is submitted that in light of the similarities for the grounds of jurisdiction for enforcement in the statutes of the SACU Member States, that this option should not be necessary.

## 4.6 Other matters the Convention may include

### 4.6.1 Interpretation of the Convention

Uniformity of interpretation has been suggested to be an ideal of judicial process which aims to achieve uniformity of result in private international law cases.<sup>439</sup> The adoption of a uniform interpretation across all relevant legal systems requires the further step of the unification of the interpretation process.<sup>440</sup>

Formal unification of the rules on recognition and enforcement by means of an international convention alone does not mean that there will be uniformity of decision - the courts of the legal systems, although applying identical rules, may apply them differently and disharmony of decisions will result.<sup>441</sup> For example, in the absence of a supranational institution capable of ensuring uniform interpretation, there is always a risk that it will be interpreted differently in each State.<sup>442</sup>

There are a number of ways in which uniform interpretation may be achieved.<sup>443</sup> One method is to create an international court or tribunal, similar to the International Court of Justice, designed to finally determine the 'true' interpretation of the law. This may require national

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<sup>438</sup> Hague Conference (note 416) 16.

<sup>439</sup> Forsyth (note 230) 108.

<sup>440</sup> Forsyth (note 230) 108.

<sup>441</sup> Forsyth (note 231) 104.

<sup>442</sup> Interpretation of the language of the harmonising instruments is one of the major problems EU Member States have to face; and it was also foreseen that the Hague Convention would have to face similar if not bigger problems, since there are considerably more members in the Hague Conference. Added to this problem would be the cultural, legal and social diversity among the Member States that could complicate the interpretation process by creating the risk of conflicting judgments: see Woestehoff K *The drafting process for a Hague Convention on jurisdiction and judgments with special consideration of intellectual property and e-commerce* (Unpublished LLM Thesis, University of Georgia School of Law) available online at [http://digitalcommons.law.uga.edu/stu\\_llm/54](http://digitalcommons.law.uga.edu/stu_llm/54) (accessed 5 September 2012) 37-8; Bonell MJ 'International Uniform Law in Practice – Or where the real trouble begins' (1990) 38 *American Journal of Comparative Law* 867.

<sup>443</sup> Felemegas J 'The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation' (2001) available at: <http://cisgw3.law.pace.edu/cisg/biblio/felemegas.html> (accessed 26 November 2012).



courts to postpone their decisions until the international body has decided the 'true' interpretation and then decide the case in accordance with that judgement. This is for example the approach that has been adopted in the EU, namely the final settlement by the ECJ of a disputed interpretation of the Brussels Convention/Regulation for all Member States: The 1968 Brussels Convention achieved this as it was accompanied by an Additional Protocol and a Joint Declaration on Interpretation. Member States recognised the importance of uniformly applying the Convention and expressed concern that each Member State might apply or interpret provisions differently, which would undermine the usefulness of the Convention, which was intended to remove inconsistencies among Member States. They concluded that there was a need to ensure a uniform interpretation of the Convention and decided to give the ECJ jurisdiction to interpret the Convention: The ECJ decisions that deal with problems of interpretation of the Brussels Convention/Regulation contribute to the clarification of the Brussels Regime and make it more dependable, workable and fully developed.<sup>444</sup> This method may be ill-suited to commercial law where businessmen prefer quick, efficient and less costly means of settling disputes.<sup>445</sup>

Alternatively, the Convention may include a section of defined terms: the drafters of the Convention on Contracts for the International Sale of Goods (CISG)<sup>446</sup> favoured a decentralised enforcement mechanism whereby the interpretation and application of the uniform law is entrusted to national courts and international arbitrators without transnational review.<sup>447</sup>

Elaborate arrangements for uniform interpretation are made within the Lugano Convention, amongst others, the Contracting Parties did not wish to entrust the interpretation of the Convention to the ECJ.<sup>448</sup> The similarities between the Brussels I Regulation and the Lugano Convention, on the other hand, suggested there was clearly a strong case for ensuring that diverging interpretations of these very similar texts did not create confusion and destroy

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<sup>444</sup> Woestehoff (note 442) 12; Forsyth (note 230) 108; Russel KA 'Exorbitant jurisdiction and enforcement of judgments: the Brussels system as an impetus for the United States action' (1993) 19 *Syracuse Journal of International Law and Commerce* 65; Bonell (note 442) 868.

<sup>445</sup> Osborne PJ 'Unification or harmonisation: A critical analysis of the United Nations Convention on Contracts for the International Sale Of Goods 1980' (2006) available at <http://www.cisg.law.pace.edu/cisg/biblio/osborne.html#int> (accessed 26 November 2012).

<sup>446</sup> Convention on the International Sale of Goods signed at Vienna, 1 April 1980 1489 U.N.T.S. 3.

<sup>447</sup> Gerhart PM 'The Sales Convention in Courts: Uniformity, adaptability and adoptability' in Sarcevic P & Volken P (eds) *The International Sale of Goods Revisited* (2001) 77.

<sup>448</sup> Forsyth (note 230) 105.

uniformity between the EU and EFTA. It was also felt that a judge grappling with the difficult point of interpretation of the Lugano Convention should not be denied the guidance available from decisions of other Contracting States on that point or the decisions of the ECJ deciding similar points under the Brussels Convention.<sup>449</sup> Accordingly, the Convention is accompanied by Protocol 2 on the Uniform Interpretation of the Convention.<sup>450</sup> The Protocol provides that the courts of each Contracting State must, when applying and interpreting the provisions of the Convention, pay due account to the principles laid down by any relevant decisions delivered by courts of the other Contracting States concerning provisions of the Convention, as well as by the ECJ.<sup>451</sup> The Protocol also provides for a system for the exchange of information on ‘judgments delivered pursuant to this Convention as well as relevant judgments under the Brussels Convention’.<sup>452</sup> The system of exchange of information is based essentially on transmission by each Contracting State to a central body, which it was decided should be the Registrar of the Court of Justice, of judgments delivered under the Lugano Convention and the Brussels Convention; classification of those judgments by the central body; and communication of the relevant documents by the central body to the competent national authorities of the Contracting States and to the European Commission.<sup>453</sup> The Protocol also set up a Standing Committee consisting of representatives of the Contracting States to review the operation of the Convention and to make recommendations.<sup>454</sup>

Uniformity of interpretation may be promoted by the use of the increasingly common practice of inserting provisions in international conventions or uniform laws requiring the national judge to take account of their international character and of the need to promote their uniform application when interpreting them, and in the case of lacunae, to refer in the first place to the ‘general principles’ to be derived from the text of the uniform law itself, and to resort only in the last instance to their own or any other State’s domestic law.<sup>455</sup>

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<sup>449</sup> Forsyth (note 230) 105.

<sup>450</sup> Lugano Convention (note 302) Article 65. Protocol available at <http://curia.europa.eu/common/reccdoc/convention/en/c-textes/lug02-idx.htm> (accessed 26 November 2012).

<sup>451</sup> Lugano Protocol (note 450) art 1(1).

<sup>452</sup> Lugano Protocol (note 450) art 2.

<sup>453</sup> Jenard Report (note 310) 54.

<sup>454</sup> Lugano Protocol (note 450) art 3.

<sup>455</sup> Bonell (note 442) 867. See, for example Article 23 of the 2005 Hague Convention which provides that ‘In the interpretation of this Convention, regard shall be had to its international character and to the need to promote uniformity in its application’.

In *LTU Lufttransportunternehmen GmbH & Co. KG v Eurocontrol* Case 29/76) [1976] the ECJ was requested whether, for purposes of interpreting the term ‘civil and commercial matters’, reference should be made to the law of the State where the judgment was rendered or to the law of the State where enforcement is sought. The ECJ held that an autonomous definition should be given to this phrase:

‘The concept in question must...be regarded as independent and must be interpreted by reference, first to the objectives and scheme of the convention and, secondly, to the general principles which stem from the corpus of the national legal systems’.<sup>456</sup>

It is clear that the ultimate aim towards which uniform laws are directed, namely the setting up of uniform legal regimes in respect of the subject matter covered by them, would be seriously compromised if the uniform laws were applied differently within the different legal systems, once accepted by the contracting States.<sup>457</sup> While as a general rule there should be a tendency to apply the prevailing interpretation arising at a regional level, there may however well be valid reason to depart from foreign precedents and to look for more accurate and progressive solutions in the national laws of Member States.<sup>458</sup>

A further example of a regional economic organisation which has awarded the interpretation function to a regional court is OHADA, which consist of a Council of Ministers and a Common Court of Justice and Arbitration (CCJA). The Council of Ministers is assisted by a Permanent Secretary Office, to which is attached a Regional High Judiciary School (ERUSMA).<sup>459</sup> The OHADA Treaty awards the interpretive function of Uniform Acts to the Common Court of Justice and Arbitration (CCJA). Legal harmonisation is effected through the issuing of Uniform Acts, the adoption which requires unanimous approval of the representatives of the Contracting States.<sup>460</sup> Uniform Acts are directly applicable and overriding in the Contracting States, notwithstanding any conflict they may give rise to in respect of previous or subsequent enactment of municipal laws.<sup>461</sup> The effect of this article is to abrogate and prohibit any future national legislative or regulatory provisions which has the

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<sup>456</sup> *LTU Lufttransportunternehmen GmbH & Co. KG v Eurocontrol*, (Case 29/76) [1976] 1541, 1550.

<sup>457</sup> Bonell (note 442) 879.

<sup>458</sup> Bonell (note 442) 879.

<sup>459</sup> Treaty on the Harmonisation of Business Law in Africa (JO OHADA N° 4), 1 November 1997 available at [http://www4.worldbank.org/afr/ssatp/Resources/HTML/legal\\_review/Annexes/Annexes%20III/Annex%20III-06.pdf](http://www4.worldbank.org/afr/ssatp/Resources/HTML/legal_review/Annexes/Annexes%20III/Annex%20III-06.pdf) accessed on 17 April 2013 [‘OHADA Treaty’] art 3.

<sup>460</sup> OHADA Treaty (note 459) art 8.

<sup>461</sup> OHADA Treaty (note 459) art 10.

same purpose as the Uniform Acts, and which conflict with these.<sup>462</sup> This is a complete judicial system that is supranational within the OHADA territory and operates parallel to the national systems. The CCJA offers a forum for international arbitration, and also serves as the court of laws for judgments rendered and arbitrations instituted within member states.<sup>463</sup> The CCJA represents a transfer of national sovereignty to a supranational authority, because it preserves the uniformity of the OHADA laws through its final say on matters concerning the application thereof.<sup>464</sup> OHADA represents an example of the willingness of African governments to relinquish sovereignty to promote economic development, as Member States have given up some degree of national sovereignty in order to establish a single regime of uniform business laws.<sup>465</sup>

It is recommended that the mandate of the SACU Tribunal be extended to include interpretation of the proposed Recognition and Enforcement Convention.<sup>466</sup> The 2002 SACU Agreement provides for an ad hoc Tribunal, composed of three members, except as otherwise determined by the Council, to settle any dispute regarding the interpretation or application of the Agreement, or any dispute arising thereunder at the request of the Council.<sup>467</sup>

#### 4.6.2 *Conflicting Judgments*

The proposed Convention should ideally indicate which of two conflicting foreign judgments are entitled to recognition and enforcement.<sup>468</sup> The laws of the SACU Member States do not include a provision regulating conflicting judgments in their recognition and enforcement statutes.<sup>469</sup> Mortensen,<sup>470</sup> however, suggest that for any scheme that categorises litigation between courts exclusively of their own discretion, a simple statutory direction for the

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<sup>462</sup> Martor B *Business law in Africa OHADA and the harmonisation process* (2002) 21. Uniform Acts enter into force 90 days after their adoption, and may be relied upon against any party 30 days after publication in the OHADA official journal (art 9).

<sup>463</sup> Dickerson CM 'OHADA calls the tune' (2005) 44 *Columbia Journal of Transitional Law* 56.

<sup>464</sup> Dickerson (note 463) 56.

<sup>465</sup> Dickerson (note 463) 56.

<sup>466</sup> See para 3 art 7 below.

<sup>467</sup> 2002 Southern African Customs Union (SACU) Agreement between the Governments of the Republic of Botswana, the Kingdom of Lesotho, the Republic of Namibia, the Republic of South Africa and the Kingdom of Swaziland signed on 21 October 2002 in Gaborone, Botswana art 13; See Chapter 1 para. 2.2.

<sup>468</sup> Weintraub (note 317) 217.

<sup>469</sup> See Chapter 2, above.

<sup>470</sup> Mortensen R 'The Hague and the Ditch: The Trans-Tasman Judicial Area and the Choice of Court Convention' (2009) 5(2) *Journal of Private International Law* 228.

treatment of incompatible judgments would seem a worthwhile precaution.<sup>471</sup> Countries differ as to whether the judgment that prevails is the first or the last in time.<sup>472</sup> The common law rule is that the court (with a recognised jurisdiction) that rendered the judgment first is the court that makes the issue in dispute *res judicata*, and subsequent judgments should give way to its judgment.<sup>473</sup> This may discourage post-judgment attempts by disappointed litigants to obtain better result in another forum.<sup>474</sup> Another possibility is to select the judgment resulting from the suit first filed in order to ‘discourage multiple lawsuits between the same parties’.<sup>475</sup>

Most legal systems allow the court addressed to refuse to give effect to a foreign judgment if it is irreconcilable with a previous judgment. The Brussels Regulation<sup>476</sup> selects the earlier judgment - a judgment will not be recognised if it is irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought; or if it is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed.<sup>477</sup>

The Hague Choice of Court Convention<sup>478</sup> gives separate treatment to the case where the conflicting judgment is from the same State as that in which proceedings are brought to enforce the judgment of the chosen court, and where the conflicting judgment is from another State. In the former case, the existence of a conflicting judgment as such constitutes a ground on which recognition of the judgment of the chosen court may be refused. In the latter case, the conflicting judgment must have been given before the judgment of the chosen court; it must also involve the same cause of action and fulfil the conditions required for its recognition in the requested State. In neither case, however, is the court obliged to recognise the conflicting judgment or to refuse recognition to the judgment of the chosen court.<sup>479</sup>

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<sup>471</sup> Mortensen (note 470) 228.

<sup>472</sup> Juenger (note 168) 25.

<sup>473</sup> Mortensen (note 470) 228.

<sup>474</sup> Weintraub (note 317) 217.

<sup>475</sup> Juenger (note 168) 25.

<sup>476</sup> Brussels I Regulation (note 309) art 34(4) and (5).

<sup>477</sup> Brussels I Regulation (note 309) art 34(4) and (5).

<sup>478</sup> 2005 Hague Convention (note 309) art 9.

<sup>479</sup> Hartley Dogauchi Report (note 309) 22.

The Trans-Tasman Regime has been criticised as it is silent on the point.<sup>480</sup> The Working Group took the view that there was no need to legislate for incompatible judgments.<sup>481</sup>

Although none of the SACU Member States include a provision pertaining to conflicting judgments in their recognition and enforcement statutes, based on the above discussion, it is recommended that the proposed Convention should include a provision dealing with conflicting judgments.<sup>482</sup>

Having set out the main principles, following is a proposed text for a convention on the recognition and enforcement of foreign judgments for SACU Member States. The recommended provisions are based on comparisons of the statutory provisions currently in force in all SACU Member States. In certain instances where the present situation is unsatisfactory, recommendations are made for improvement.

## **5 PROPOSED TEXT FOR A CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS**

### **CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN CIVIL JUDGMENTS**

**THE GOVERNMENTS OF THE REPUBLIC OF BOTSWANA, THE KINGDOM OF LESOTHO, THE REPUBLIC OF NAMIBIA, THE REPUBLIC OF SOUTH AFRICA AND THE KINGDOM OF SWAZILAND**

**RECOGNISING** the obligations of Member States to facilitate the cross-border movement of goods between the territories of the Member States;<sup>483</sup>

**RECALLING** their commitment to promote the integration of Member States into the global economy through enhanced trade and investment;<sup>484</sup>

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<sup>480</sup> This is because the Australian scheme, which has been extended to New Zealand to form the Trans-Tasman Scheme, is silent on the point: Mortensen (note 470) 228.

<sup>481</sup> Australia (Attorney-General's Department) and New Zealand (Ministry of Justice) *Trans-Tasman Court Proceedings and Regulatory Enforcement – A Report by the Trans-Tasman Working Group* Commonwealth of Australia, Canberra 2006 (referred to as 'Trans –Tasman Working Group Report') 18.

<sup>482</sup> See para 3, proposed art 5(2)(b) below.

<sup>483</sup> 2002 SACU Agreement (note 469) art 2(a).

<sup>484</sup> 2002 SACU Agreement (note 469) art 2(f).



**RECOGNISING** that certain differences between national rules governing jurisdiction and recognition and enforcement hamper the facilitation of trade

**FURTHER RECOGNISING** the need to unify the rules of conflict of jurisdiction and to simplify the formalities governing the recognition and enforcement of judgments from Member States<sup>485</sup>

Hereby agree as follows:

### *1. Scope*

- (1) This Convention shall apply to judgments rendered in civil proceedings from any court<sup>486</sup> of a Contracting State, for the payment of an amount of money not being for the payment of any tax, duty or charge of a like nature or of any fine or other penalty,<sup>487</sup> provided -
  - (a) it is final and conclusive as between the parties thereto,<sup>488</sup> and
  - (b) it is enforceable by execution in the Contracting State where the judgment was given.<sup>489</sup>
- (2) A judgment shall be deemed to be final and conclusive notwithstanding that an appeal may be pending against it, or that it may still be subject to appeal in the courts of the State of origin.<sup>490</sup>
- (3) Contracting States may declare, when ratifying the Convention that it shall also apply to judgments ordering compensation for damages resulting from an offence.<sup>491</sup>

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<sup>485</sup> See Brussels I Regulation (note 309) Recital 1.

<sup>486</sup> The Botswana (s 3(2)), Swaziland (s 3) and Lesotho (s 3(1)) the statutes only apply to judgments which were rendered by superior courts. The South African (s 1) and Namibian (s 1) statutes applies to judgments from superior or inferior courts. In order to facilitate the enforcement of judgments in the SACU, it is recommended that the Convention apply to judgments rendered by inferior or superior courts, provided the other requirements under the Convention are met.

<sup>487</sup> See para 4.1 above.

<sup>488</sup> See para 4.2 above.

<sup>489</sup> See para 4.2 above.

<sup>490</sup> See Botswana Act (note 160) s 3(3); South Africa Act (189) s 7(1) and Namibia Act (note 247) s 7(1).

<sup>491</sup> The South African, Swaziland and Lesotho statutes only include civil proceedings, while the Namibia (s 1) and Botswana s 2(1); statutes include payments in respect of compensation or damages to any aggrieved party in any criminal proceedings'. South Africa's Criminal Procedure Act 51 of 1977 for example provides that where a person is convicted by a superior court, a regional court or a magistrate's court of an offence which has caused damage to or loss of property (including money) belonging to some other person, the court in question may award the injured person compensation for such damage or loss: art 300(1). Payment of money for damages and compensation falls within the area of civil law, and it is therefore possible to include these in a Convention dealing with 'civil and commercial matters'. Bartlett further suggests that it is not uncommon for a criminal court to decide civil issues along with criminal ones, especially in the case of automobile accidents: see Bartlett (note 330) 48.

- (4) The Convention shall not apply to -  
(a) orders for the periodic payment of maintenance<sup>492</sup> and  
(b) awards rendered by an arbitral tribunal.<sup>493</sup>

## 2. *Recognition and Enforcement*

- (1) A judgment given in a State bound by this Convention and enforceable in that State shall be recognised and enforced in another State bound by this Convention, once it has been registered there.<sup>494</sup>
- (2) Any judgment to which the Convention applies will be registered, after an application to that effect has been made by the judgment creditor,<sup>495</sup> including a

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It is suggested that if parties are unable to reach agreement on whether they are willing to include or exclude payments for compensation or damages, the approach of the Montevideo Convention be followed: see Montevideo Convention (note 317) art 1.

<sup>492</sup> The South African (s 1) and Namibian (s 1) Acts exclude periodical payment of sums of money towards maintenance. The view of the SALRC is supported in this regard, namely that instead of including maintenance awards in an instrument on recognition and enforcement, States should accede to the Hague Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations: see SALRC Report (note 189) 7.

The Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations entered into force on 1 August 1973. It currently has 24 Contracting States none of which are SACU Member States: [http://www.hcch.net/index\\_en.php?act=conventions.status&cid=85](http://www.hcch.net/index_en.php?act=conventions.status&cid=85) (accessed 21 February 2013). The Convention applies to decisions of judicial administrative authorities in Contracting State in respect of maintenance obligations arising from a family relationship, parentage, marriage or affinity, including a maintenance obligation towards an infant who is not legitimate (art 1). The Convention provides that a decision rendered in Contracting States shall be recognised or enforced in other Contracting States, provided it was rendered by an authority that has jurisdiction under the Convention, and it is no longer subject to ordinary forms of review in the State of Origin (art 4). Recognition or enforcement may only be refused on the grounds of public policy, fraud in connection with a matter of procedure, pending litigation in the requested State; and incompatibility with an earlier decision between the same parties on the same cause of action (art 5).

<sup>493</sup> The Swaziland, Lesotho and Botswana Acts include arbitration proceedings: See para 4.1. It is suggested that for the purposes of international uniformity, the recognition and enforcement of arbitral awards should continue to be governed by the established international regime, the New York Convention, and therefore not included in the scope of the proposed instrument. States which are not party to the New York Convention – in this instance Swaziland and Namibia – should be encouraged to accede to that Convention: UNCITRAL ‘New York Convention – Status’ available at [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html) (accessed 4 October 2012).

<sup>494</sup> See para 4.2 above. See further, for example, the Brussels I Regulation which provides for that judgments will be enforceable upon a declaration of enforceability, except in the UK, where a judgment shall be enforced in England and Wales, in Scotland, or in Northern Ireland when, on the application of any interested party, it has been registered for enforcement in that part of the United Kingdom: Brussels I Regulation (note 309) art 38.

<sup>495</sup> The Statutes differ on the time period within which an application to have a judgment registered should be made: The Botswana judgment provides that the application should be made within six years after the date of judgment (s 5(1); see para 3.2.4 above). In terms of Swaziland and Lesotho’s Statutes, however, the application must be made within twelve months after the date of the judgment, or such longer period as the Court may allow (Swaziland s 3(1); Lesotho s 3(1)). The South African and Namibian Acts do not expressly provide for a time in which a judgment creditor may apply to have a judgment registered, but a judgment will be set aside if ‘that the judgment has become prescribed either under the laws of [the enforcing State] or

person in whom rights under the judgment has become vested<sup>496</sup> to the relevant court in the Contracting State in which enforcement is sought.<sup>497</sup>

- (3) The relevant court in of the Contracting State in which enforcement is sought shall be determined by the rules of jurisdiction of that State.
- (4) The procedure for making an application for registration, including the matters to be provided on an application for the registration of a judgment and mode of providing those matters;<sup>498</sup> shall be governed by the law of the Member State in which enforcement is sought.<sup>499</sup>
- (5) Notice of the registration shall be provided to the judgment debtor,<sup>500</sup> provided that the method by which the notice shall be served on the debtor shall be governed by the law of the Contracting State in which enforcement is sought.<sup>501</sup>

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the designated country concerned': see South Africa s 3(1); Namibia s 3(1). It is recommended that a judgment should be enforced under the Convention as long as it is enforceable in the rendering state: see art 1 of the proposed Convention, above.

<sup>496</sup> All the statutes either provide that the application to have a judgment registered must be made by the judgment creditor under a judgment to which the Act applies (Swaziland s 3(1); Lesotho s 3(1); Botswana s 5(1)), or that the registration of a judgment will be set aside if the rights vested under the judgments are not vested in the person who applied for its registration: Botswana (s 7(1)); South Africa (s 5(1)); Namibia (s 5(1)). In terms of the current statutory provisions, an application to be set aside must be made by the judgment creditor, including a person in whom rights under the judgment have become vested.

<sup>497</sup> The current statutory provisions provide for registration with the High Courts of Lesotho, Swaziland and Botswana, but the magistrate's courts of South Africa and Namibia: See para 4.3 above. As a result of the limited jurisdiction of the Magistrate's Courts in South Africa and Namibia, it is recommended that the proposed Convention not be limited to magistrate's courts, but apply to High Courts, as is the case with the Botswana, Lesotho and Swaziland. In terms of the Namibian and South African statutes, the court of a designated country, include the Supreme or High court or magistrate's court (including a regional court) of that country (South Africa s1; Namibia s 1).

<sup>498</sup> See, e.g., Swaziland Rules of Court which provide that the application must be supported by an affidavit of the facts exhibiting the judgment or a verified or certified copy of the judgment, and stating that to the best of the information and belief of the deponent the judgment creditor is entitled to enforce such judgment and that such judgment does not fall with any of the cases in terms of the Act under which a judgment cannot be registered (Rule 2), as well as the full name, title, trade or business, and the usual or last known place of abode or business of the judgment creditor and judgment debtor respectively (Rule 3); Lesotho contains the same requirements to be provided (see Rule 2).

<sup>499</sup> See, for example, Brussels I Regulation (note 309) art 40.

<sup>500</sup> South Africa s 3(2); Namibia s 3(2); Botswana s 6(1)(c); Lesotho Rule 9; Swaziland Rule 10.

<sup>501</sup> See eg. Swaziland Rules of Court which provide that notice in writing of the judgment must be served on the judgment debtor within a reasonable time of such a registration, provided that such notice shall (in the absence of an order by Court as to the mode of service thereof) be served on the judgment debtor by personal service, but the Court may at any stage of the proceedings authorise or direct some other mode of service, and if it does so the service shall be effected in accordance with such authority: Rule 10. The Lesotho Rules of Court also provides for notice in writing of the registration of the judgment within reasonable time; but provide that notice must be served in the same manner as a summons is required to be served, but the court may at any time otherwise direct: Rule 9. The South African (s 3(3) and Namibian (s 3(3)) Acts provide that the notice must be served on the judgment debtor by the judgment creditor in the manner prescribed for the service of proceedings, except that the Namibian Act provide that the notice must be served by the Messenger of the Court. It is recommended this should be left to be determined by law of the State in which enforcement is sought, as once a judgment is registered, as a judgment will be for the purposes of execution, be of the same force and effect as if the judgment had been a judgment originally given in the registering court and entered on the date of *registration* (not the date of *application*). This is in line with the current provisions in Member States' statutes.

### 3. *Effect of registration*

- (1) A registered judgment will have the same effect as of the date of registration, as a civil judgment of the enforcing court,
  - (a) proceedings may be taken on a it;
  - (b) the sum for which a judgment is registered shall carry interest, as determined by the law of the requested State;<sup>502</sup> and
  - (c) the registering court shall have the same control over the execution of a registered judgment as it has over any civil judgment of its own.<sup>503</sup>
  
- (2) If any amount payable under a judgment registered under the Convention is given in a currency other than the currency of the State in which enforcement is sought, the judgment shall be registered as if it were a judgment for such amount in the currency of the requested State, calculated at the rate of exchange prevailing at the date of the judgment.<sup>504</sup>

### 4. *Stay of execution of a registered judgment*

Notwithstanding the provisions of Article 3, the execution of a judgment may be stayed on an application by the judgment debtor to the registering court, if the

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<sup>502</sup> The South African (s 3(4)) and Namibian (s 3(4)) Acts provide that the interest shall be calculated at the rate prescribed under s 1 of the Prescribed Rate of Interest Act, 1975, or the rate fixed by the court of the designated country, *whichever is the lower* (emphasis added). Section 1 of the Prescribed Rate of Interest Act provides that if a debt bears interest and the rate at which the interest is to be calculated is calculated at the rate prescribed by the Minister of Justice by notice in the Gazette (s 1(1)-(2)) which is currently 15,5% per annum: See General Notice R1814 in *Government Gazette* 15143 of 1 October 1993. The matter is governed in Botswana by the Prescribed Rate of Interest Act (Cap 11:05), which commenced on 25 August 1978 and in Lesotho by the Prescribed Rate of Interest Act No.55 of 1975.

<sup>503</sup> Botswana (note 160) s 5(2)(d); see also South Africa Act (note 189) s 4(1); Namibia Act (note 247) s 4(1); Swaziland Act (note 99) s 3(3); and Lesotho Proclamation (note 129) s 3(3), the latter two Acts which also provide that reasonable costs of an incidental to the registration of the judgment (including the costs of obtaining a certified copy thereof from the original court and of the application for registration) shall be recoverable in a like manner as if they were sums payable under the judgment.

<sup>504</sup> The fact that most statutes requires a judgment to be 'for the payment of an amount of money', provision is made for the method of calculating the exchange rate, if the amount is expressed in a currency other than that of the enforcing state. Swaziland and Lesotho's Acts are silent on the matter. Botswana and South Africa's Acts provide that the rate of exchange prevailing at the *date of the judgment* of the original court will be used to calculate the sum payable (Botswana s 5(5); South Africa s 3(4)), but the Namibian Act provides that the amount shall be calculated at the rate of exchange on the *date of the registration* (s 3(5)). It is recommended that the rate of exchange prevailing at the date of the judgment is used, so as to prevent the judgment creditor who is seeking enforcement, and who is the will have to apply for registration and therefore determine the time at which to apply, not to use the fluctuations in the exchange rates to the detriment of the judgment debtor and to prevent him from applying for registration at a time where he will benefit most from the prevailing exchange rates.

judgment debtor satisfies the court either that an appeal is pending, or that he is entitled to and intends to appeal against the judgment.<sup>505</sup>

### ***5. Refusal of recognition or enforcement***

(1) A judgment will<sup>506</sup> not be recognised or enforced under this Convention if<sup>507</sup> –

- (a) the courts of the Contracting State that rendered the judgment had no jurisdiction to hear the case, as determined by this Convention;<sup>508</sup>
- (b) the notice of proceedings was not brought to the attention of the defendant in the original proceedings in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant entered an appearance and presented his case without contesting notification in the court of origin, provided that the law of the State of origin permitted notification to be contested;<sup>509</sup>
- (c) the judgment was obtained by fraud, or deliberate dishonesty or deliberate wrongdoing;<sup>510</sup> and
- (d) the enforcement of the judgment would be manifestly contrary to law or public policy in the State where enforcement is sought.<sup>511</sup>

(2) A judgment will also not be recognised or enforced –<sup>512</sup>

- a) if it is irreconcilable with a judgment given in a dispute between the same parties in the Contracting State in which enforcement is sought;
- b) if it is irreconcilable with an earlier judgment given in another Contracting State or in a third State involving the same cause of action and between the

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<sup>505</sup> This is in line with existing provisions in Member States' states. Although art 1 of the proposed Convention requires that a judgment should be final and conclusive as between the parties thereto, the statutes of Lesotho (s 3(2)), and Swaziland (s 3(2)) provide that a judgment will not be registered if the court is satisfied either that an appeal is pending, or that he is entitled to and intends to appeal against the judgment; the South African (s 6) and Namibian Acts (s 6) also provide that execution may be stayed if the court is satisfied that an appeal is pending, or that the applicant is entitled and intends to appeal against the judgment: see para 3.4.4, and 3.5.4 above. This provision is therefore included to satisfy this requirement and afford parties an opportunity to stay proceedings if they are entitled to and intends to appeal against the judgment.

<sup>506</sup> It is recommended that in order to promote the greatest degree of legal certainty, States should not be afforded discretion but should be required to refuse recognition and enforcement based on the provisions of the Convention as negotiated and agreed to by Member States.

<sup>507</sup> The Convention should state explicitly that recognition and enforcement may only be refused for the grounds listed in the Convention. It is suggested that an overriding principle should be that if the procedures in the rendering court were fair, which should be presumed among states willing to enter into a judgments convention, the judgment should be recognised and enforced: Lowenfeld (note 168) 291.

<sup>508</sup> See para 4.5 above.

<sup>509</sup> See para 4.4.1 above.

<sup>510</sup> See para 4.4.2 above.

<sup>511</sup> See para 4.4.3 above.

<sup>512</sup> This recommendation is based on art 34 of the Brussels I Regulation (note 309).



same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the State where enforcement is sought.<sup>513</sup>

## ***6. Jurisdiction for purposes of enforcement***<sup>514</sup>

(1) The court of the Contracting State which rendered the judgment shall be considered to have had jurisdiction for the purposes of recognition and enforcement under this Convention, if -:<sup>515</sup>

(a) the judgment debtor-

- i. was the plaintiff or plaintiff in reconvention in the proceedings or submitted to the jurisdiction of the court by which the judgment was given by voluntarily appearing in the proceedings for any purpose other than protecting or obtaining the release of property seized or threatened with seizure in the proceedings or contesting the jurisdiction of that court;
- ii. was a defendant in the proceedings and had, before the commencement of the proceedings, agreed, in respect of the subject matter of the proceedings, to submit to the jurisdiction of a court of the Contracting State having jurisdiction in respect of the subject matter of the proceedings, in accordance with its domestic laws; or
- iii. was a defendant and, at the institution of the proceedings, resident in, or being a juristic person, had its principal place of business in, such Contracting State, or at any time had an office or place of business in such Contracting State through or at which the transaction to which the proceedings relate, was effected;

(b) in any action relating to immovable property, or in an action in rem of which the subject matter was movable property,<sup>516</sup> the property is situated in the Contracting State in which the proceedings were instituted;

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<sup>513</sup> The provision that the court addressed may refuse to give effect to a foreign judgment if it is irreconcilable with a previous judgment is usually subject to several conditions: First, a definition of what is meant by 'irreconcilable decisions': these will be two decisions providing contradictory rights and obligations for the parties to the case. Secondly, if the decision with which the foreign judgment concerned cannot be reconciled also comes from abroad, both judgments must have successfully passed the tests for the verification of foreign judgments, either under the ordinary law of the State addressed, if the judgment comes from a non-Contracting State, or under the Convention itself if the judgment comes from a court in a State Party: Kessedjian Report (note 302) 50-1; see also para 4.6.2 above.

<sup>514</sup> Based on the similarities in the grounds of jurisdiction in SACU Member States' national laws, it is recommended that a strict double convention be used, containing a white and a black list, and that no other grounds for assuming jurisdiction should be permitted: See Chapter 2, para 5.1 above.

<sup>515</sup> Botswana Act (note 160) s 7(2); South Africa Act (note 189) s 7(4); Namibia Act (note 247) s 7(4). These provisions are analogous to those contained in the Foreign Judgments Act (note 42).



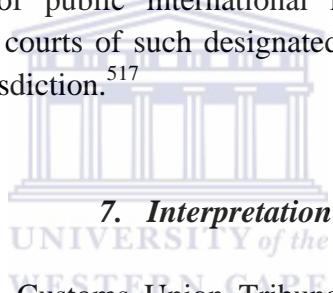
(c) in any proceedings other than proceedings referred to in paragraph (a) or (b), the jurisdiction of the court by which the judgment was given is recognised by the law of the Enforcing State.

(2) The court of the Contracting State in which the judgment was given shall, for the purposes of section 5, be deemed *not* to have had jurisdiction-

(a) in proceedings relating to immovable property situated outside such Contracting State;

(b) except in the cases referred to in subsections (1)(a)(i) and (ii), in proceedings instituted in contravention of an agreement under which the dispute in question was to be settled otherwise than by proceedings in the courts of such Contracting State; or

(c) in proceedings in which the person against whom the judgment was given was under the rules of public international law entitled to immunity from jurisdiction of the courts of such designated country, and the person did not submit to such jurisdiction.<sup>517</sup>



(1) The Southern African Customs Union Tribunal shall have jurisdiction to give rulings on the interpretation of this Convention.<sup>518</sup>

(2) The High Court of a Contracting State may request the Southern African Customs Union Tribunal to give a ruling on a question of interpretation of the Convention if judgments given by the courts of that State conflict with the interpretation given either by Southern African Customs Union Tribunal or in a judgment of one of the courts of another Contracting State.

(3) The interpretation given by the Southern African Customs Union Tribunal in response to such a request shall not affect the judgments which gave rise to the request for interpretation.

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<sup>516</sup> See Botswana Act (note 160) s 7(3).

<sup>517</sup> Botswana (note 160) s 7(3); South Africa Act (note 189) s 7(5); Namibia Act (note 247) s 7(5) contain similar provisions in this regards, which is similar to the jurisdiction provisions contained in the Foreign Judgments Act (note 42).

<sup>518</sup> See para 4.6.1 above.

- (4) The head of the judiciary or other competent authority of the Contracting State<sup>519</sup> shall be entitled to request a ruling from the Southern African Customs Union Tribunal on interpretation in accordance with paragraph 3.
- (5) The Registrar of the Southern African Customs Union Tribunal shall give notice of the request for interpretation to Contracting States, to the Southern African Customs Union Commission; the parties so notified shall then be entitled within two months of the notification to submit statements of case or written observations to the Tribunal.
- (6) No fees shall be levied or any costs or expenses awarded in respect of the proceedings provided for in this Article.
- (7) The Rules of Procedure of the Southern African Customs Union Tribunal shall, if necessary, be adjusted and supplemented in accordance with Article 13<sup>520</sup> of the Southern African Customs Union Agreement.<sup>521</sup>



## 8. *Final Clauses*

This Convention shall not affect other Conventions relating to the recognition and enforcement of judgments to which the Contracting States are already parties.

## 9. *Signature*

This Convention shall be open for signature by all Member States of the Southern African Customs Union.

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<sup>519</sup> It is proposed that this be specified by Member States and listed in an Annexure to the Convention.

<sup>520</sup> Article 13 of the SACU Agreement provides that:

- ‘1. Any dispute regarding the interpretation or application of this Agreement, or any dispute arising thereunder at the request of the Council, shall be settled by an ad hoc Tribunal.
2. The Tribunal shall be composed of three members, except as otherwise determined by the Council.
3. The Tribunal shall decide by majority vote and its decision shall be final and binding.
4. The Tribunal shall, at the request of the Council, consider any issue and furnish the Council with its recommendations.
5. In any matter referred to the Tribunal, the parties to the dispute shall choose the members of the Tribunal from amongst a pool of names, approved by the Council, and kept by the Secretariat.
6. Member States party to any dispute or difference shall attempt to settle such dispute or difference amicable before referring the matter to the Tribunal.
7. The Tribunal shall be assisted by the Secretariat in its work.
8. The Tribunal shall determine its own rules of procedure’: see para 4.6.1 above.

<sup>521</sup> See protocol of 3 June 1971 on the interpretation by the Court of Justice of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters: arts 4 and 5.

This Convention shall remain open for accession by any other State.<sup>522</sup> The instrument of accession shall be deposited with the General Secretariat of the Southern African Customs Union.

This Convention shall enter into force on the sixtieth day after the deposit of the second instrument of ratification with the General Secretariat of the Southern African Customs Union.

This Convention shall enter into force for each State which ratifies it subsequently on the sixtieth day after the deposit of its instrument or ratification.

## 6 CONCLUSION

Some States may have concerns and reservations to joining a judgments recognition convention and thereby sacrificing some of their sovereignty.<sup>523</sup> That attitude may be influenced by political reasons, but it has to be kept in mind that the requirements to be met for a judgment to be recognised and enforced<sup>524</sup> still ensure that accession to a judgments Convention will not result in the automatic recognition and enforcement of all judgments from all Contracting States.<sup>525</sup> It will, however, imply that debtors in terms of judgments given in one of the SACU Member States will have an expedited registration and enforcement procedure available to them, provided that certain requirements are met.<sup>526</sup>

Challenges that are likely to be experienced with the introduction of a uniform law into the national laws of SACU Member States include challenges relating to interpretation,<sup>527</sup> the need to provide translations of the text of the uniform law into the languages of the SACU Member States and the risk that these translations might not accurately reflect the original

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<sup>522</sup> Whether the instrument should be open for ratification by any other State, or only AU, or even only SADC Member States will depend on the objectives of the instrument and priorities of Member States. If the facilitation and promotion of international trade is the main objective, then it is suggested that the instrument be open for accession to any State. However if the instrument is seen as a building block towards regional integration within the African continent, and specifically a building block in the development of the SADC (see Chapter 1, para 2.2), then accession should be open to SADC Member States.

<sup>523</sup> See Chapter 1 para. 6.1 for a discussion of the sovereignty doctrine.

<sup>524</sup> See par 4.2 above; arts 2 and 5 of the proposed text of the Convention.

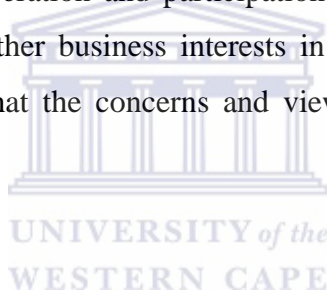
<sup>525</sup> The application of the Convention is limited by its scope (see art 1 of the proposed Convention), as well as the requirement for registration (art 2), and the grounds on which recognition and enforcement will be refused (art 5).

<sup>526</sup> See para 4.4 above.

<sup>527</sup> See para 4.6.1 above for suggestions how the challenges relating to interpretation may be addressed.

translation of the text.<sup>528</sup> Further challenges may include reservations<sup>529</sup> by SACU Member States when ratifying internationally negotiated agreements, which would limit their unifying effect from the outset.<sup>530</sup> Furthermore, the different techniques employed to translate uniform law into domestic law and the possible distortions as a result of their incorporation into national legal systems;<sup>531</sup> and finally the various bureaucratic obstacles which often stand in the way of a rapid ratification of internationally agreed rules.<sup>532</sup> However, as a result of the shared legal tradition of the Contracting States to the proposed Convention, the similarities of their national statutes governing the recognition and enforcement of foreign judgments, as well as the similarities between the text of the proposed Convention and the national statutes,<sup>533</sup> it is expected that these challenges should not be significant.

Non-governmental organisations, academic institutions and scholars have important roles to play in the negotiating process. To ensure the practical workability of any proposal for regional harmonisation, the cooperation and participation of international traders, business groups, trade associations and other business interests in the negotiating processes should also be obtained, and ensured that the concerns and views of these groups are aired and



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<sup>528</sup> As a result of the common colonial heritage of SACU Member States and the fact that all SACU Member States recognise English as an official government or business language suggest that this challenge may be less significant than other regions with diverse languages: See Nations Online 'Official and Spoken Languages of African Countries' available at [http://www.nationsonline.org/oneworld/african\\_languages.htm](http://www.nationsonline.org/oneworld/african_languages.htm) (accessed 28 May 2013).

<sup>529</sup> Article 2(1)(d) of the Vienna Convention on the Law of Treaties (1969) 115 U.N.T.S. 331, 8 ILM 679 defines a reservation as 'a unilateral statement, however phrased or named, made by a state when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or modify the legal effect of certain provisions of the treaty in their application to that estate.'

<sup>530</sup> A state may become a party to a multilateral treaty while maintaining a reservation which excludes or modifies the legal effect of certain provisions of the treaty in their application to that State, provided that the reservation is compatible with the object and purpose of the treaty: Dugard J *International Law: A South African Perspective* 3 ed (2005) 410.

<sup>531</sup> In this regard, a distinction should be made between the monist and the dualist approaches to the place of international law in municipal law: the monist school argues that municipal courts are obliged to apply rules of international law directly without the need for any act of adoption by the courts or transformation by the legislature. For them, international law is incorporated into municipal law without any act of adoption by the courts or transformation by the legislature. Dualists, on the other hand, see international law and municipal law as completely different systems of law, with the result that international law may be applied by domestic courts only of 'adopted' by such courts or transformed into local law by legislation: See Dugard (note 530) 59; Roodt C 'National Law and Treaties' (1987-8) *South African Yearbook of International Law* 72. The Constitution of South Africa, a dualistic state, for example provides that 'the negotiating and signing of all international agreements is the responsibility of the national executive' (s 231(1)); and 'an international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces' (s 231(2)): Constitution of the Republic of South Africa, 1996.

<sup>532</sup> Bonell (note 442) 867.

<sup>533</sup> See para 4 and 5 above.

reflected in any proposals. Southern African trade organisations<sup>534</sup> should participate in and effectively contribute to the development of commercial practices and customs in the region, as illustrated by the major role trade organisations had to play in Europe.<sup>535</sup>

A comparison of the relevant recognition and enforcement statutes of SACU Member States, namely Swaziland,<sup>536</sup> Lesotho,<sup>537</sup> Botswana,<sup>538</sup> South Africa<sup>539</sup> and Namibia<sup>540</sup> reveal a close similarity between them,<sup>541</sup> and in many instances resemble to the 1920 UK Administration of Justice Act<sup>542</sup> and the 1933 UK Foreign Judgments (Reciprocal Enforcement) Act.<sup>543</sup>

The similarities in the statutes do not, however, guarantee a free-flow of judgments in the region – this is impeded by the requirement present in all statutes for a foreign state to be designated by the Executive under the domestic statute, which in turn often hinges on reciprocity.<sup>544</sup> It is peculiar that a number of these statutes contain great similarities, and share a common legal heritage, but yet they do not designate each other under the respective statutes.<sup>545</sup>

The current situation in which judgments from SACU Member States do not enjoy the benefit of the expedited enforcement of registration under the respective statutes, can be addressed by either designating all SACU Member States and each Statutory regime, or concluding a multilateral convention to which all SACU Member States would become Contracting Parties, which is recommended.<sup>546</sup> Based on a comparison of the provisions contained in the respective statutes regarding the application or scope of the statute,<sup>547</sup> the requirements for

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<sup>534</sup> Such as Business Unity SA (BUSA); Business Leadership South Africa; South African Chamber of Commerce; (South Africa); the Namibia Chamber of Commerce; Namibian Agricultural Trade Forum (Namibia); Lesotho Chamber of Commerce and Industry (Lesotho); Federation of Swaziland Employers and Chambers of Commerce; Swaziland Sugar Association (Swaziland); Botswana Chamber of Commerce, Industry and Manpower (Botswana).

<sup>535</sup> Bamodu G 'Transnational law, unification and harmonisation of international commercial law in Africa' (1994) 38 *Journal of African Law* 137.

<sup>536</sup> See para 3.1 above.

<sup>537</sup> See para 3.2 above.

<sup>538</sup> See para 3.3 above.

<sup>539</sup> See para 3.4 above.

<sup>540</sup> See para 3.5 above.

<sup>541</sup> See para 4 above.

<sup>542</sup> See para 2.1 above.

<sup>543</sup> See para 2.2 above.

<sup>544</sup> See para 4.1 above.

<sup>545</sup> See para 4.1 above.

<sup>546</sup> See para 4.1 above.

<sup>547</sup> See para 4.1 above.

enforcement,<sup>548</sup> the procedural requirements<sup>549</sup> and the grounds on which registration will be refused,<sup>550</sup> a proposal was made for a Draft SACU Convention on the Recognition and Enforcement of Foreign Civil Judgments.<sup>551</sup>



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<sup>548</sup> See para 4.2 above.

<sup>549</sup> See para 4.3 above.

<sup>550</sup> See para 4.4 above.

<sup>551</sup> See para 5 above.



**CHAPTER 5**  
**RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS:**  
**CONCLUSIONS**

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**1 INTRODUCTION AND PROBLEM STATEMENT – THE NEED FOR A HARMONISED RECOGNITION AND ENFORCEMENT REGIME**

While the European Union has the sophisticated Brussels Regime for the recognition and enforcement of foreign judgments;<sup>1</sup> the European Free Trade Areas has the Lugano Convention;<sup>2</sup> the United States of America has the full faith and credit clause;<sup>3</sup> Australia and New Zealand has the Trans-Tasman Judicial System;<sup>4</sup> and Latin America has the Montevideo and La Paz Conventions<sup>5</sup> to regulate the recognition and enforcement of foreign judgments, Southern Africa, or more specifically the SACU,<sup>6</sup> has none.<sup>7</sup>

The absence of a regional enforcement treaty means that the recognition and enforcement of foreign judgments in the SACU is left to the diverse national laws of Member States.<sup>8</sup> The need for a harmonised recognition and enforcement regime in the SACU stems from the fact that different approaches to the recognition and enforcement and the risk of non-enforcement lead to legal uncertainty and increase transaction cost for prospective traders, which

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<sup>1</sup> See Chapter 2, para 3.1.  
<sup>2</sup> See Chapter 2, para 3.1.  
<sup>3</sup> See Chapter 2, para 3.2.  
<sup>4</sup> See Chapter 2, para 3.3.  
<sup>5</sup> See Chapter 2, para 3.4.  
<sup>6</sup> See Chapter 1, para 2.2.  
<sup>7</sup> See Chapter 1, para 3.2.  
<sup>8</sup> See Chapter 1, para 3.2.

ultimately acts as a non-tariff barrier to trade. Trade is critical to Southern Africa, and all developing regions, and the ideal is that barriers to trade, of which uncertainty concerning recognition and enforcement of judgments is one, should be removed.<sup>9</sup> Certainty, predictability, security of transactions, effective remedies and cost are important considerations in investment decision-making; and clear rules for allocating international jurisdiction and providing definite and expedited means of enforcing foreign judgments will facilitate inter-regional trade.<sup>10</sup>

In addition to trade facilitation, a harmonised recognition and enforcement regime will consolidate economic and political integration in the SACU.<sup>11</sup> An effective scheme for the mutual recognition and enforcement of civil judgments has been regarded as a feature of any economic integration initiative ‘likely to achieve significant integration’.<sup>12</sup>

## 2 INTERNATIONAL AND REGIONAL HARMONISATION EFFORTS

Chapter 2 considered the past and present international and regional harmonisation efforts, with a view to identifying a suitable approach for the SACU. This Chapter firstly considered the current international harmonisation efforts, specifically those of the Hague Conference on Private International Law, and found that despite the on-going efforts since 1992 to conclude a global recognition and enforcement convention, the Hague Conference has not succeeded in this regard.<sup>13</sup> International organisations such as UNIDROIT and UNCITRAL have contributed to the harmonisation of private international law in the area of international trade, including in particular New York Convention on the Recognition and Enforcement of Foreign Awards.<sup>14</sup> Despite the on-going work of international organisations towards harmonisation the current position persists where there is no global convention for the recognition and enforcement of foreign judgments, analogous to the New York Convention in the field of arbitration awards.<sup>15</sup>

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<sup>9</sup> See Chapter 1, para 4.1.

<sup>10</sup> See Chapter 1, para 4.1.

<sup>11</sup> See Chapter 1, para 4.2.

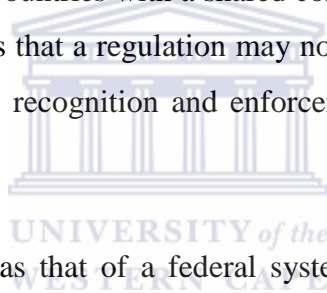
<sup>12</sup> Casad RC ‘Civil Judgment Recognition and the Integration of Multi-state Associations: A Comparative Study’ (1980-1981) 4 *Hasting International & Comparative Law Review* 1.

<sup>13</sup> See Chapter 2 para 2.1.

<sup>14</sup> See Chapter 2 para 2.2.1.

<sup>15</sup> See Chapter 1, para 3.1.

The Chapter further considered the approaches followed by various regional economic communities or groupings. The first regional economic community discussed is the Brussels regime of the EU, which, in the form of a Regulation, became directly applicable in all Member States as soon as it was enacted. It provides clear and detailed rules to its Member States on jurisdiction in transactions falling within its scope, and the quasi-automatic enforcement of the ensuing judgments under the Brussels I Regulation. The success of the instrument is generally attributed to amongst others, the supranational elements of the EU law, the direct applicability of EU laws in EU Member States and the ECJ which ensures a uniform interpretation of the Regulation and Convention.<sup>16</sup> SACU Member States are far less integrated than those of the EU Member States. Further, SACU does not contain similar elements of a supranational institution to that of the EU, and also does not have an existing supranational court analogous to the ECJ to ensure uniform interpretation. While the Brussels model has operated with great success in Europe, its civil law origins meant that it may not be considered as the best model for countries with a shared common-law heritage or mixed legal heritage.<sup>17</sup> These factors, suggests that a regulation may not be the most suitable approach to follow to harmonise the laws on recognition and enforcement of foreign judgments in the SACU.<sup>18</sup>



The second model considered was that of a federal system, specifically the full faith and credit approach of the USA which creates an overarching recognition and enforcement scheme binding on every sister-State through the presence of a constitutional requirement that each State recognise and enforce judgments of sister-States.<sup>19</sup> This approach presupposes the existence of a single politico-legal community for purposes of recognition and enforcement of foreign judgments. SACU Member States, at present, do not constitute a single political community, but rather a group of sovereign States. The full faith and credit approach may not be the optimal approach to follow to harmonise the recognition and enforcement of foreign judgments in the sub-region; but the approach will likely become more appropriate as political integration in Africa progresses, at the height of political integration and at a time where it resembles a federal system.<sup>20</sup>

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<sup>16</sup> See Chapter 2 para 3.1.

<sup>17</sup> Trans-Tasman Working Group 'Trans-Tasman Court Proceedings and Regulatory Enforcement: A public discussion Paper by the Trans-Tasman Working Group' Attorney-General's Department (Australia) and Ministry of Justice (New Zealand) August 2005 (2005) 12.

<sup>18</sup> See Chapter 2 para 4.1.

<sup>19</sup> See Chapter 2 par 3.2.

<sup>20</sup> See Chapter 2 para 3.2.

Thirdly, the approach in the Trans-Tasman Judicial System is that the recognition and enforcement regime for inter-state judgments of the Australian federal state is extended to a foreign State, New Zealand, with whom it shares a common legal heritage and similar legal system.<sup>21</sup> This system therefore goes further than the USA model by treating a foreign judgment of the State party to the agreement as a sister-State judgment, while continuing to treat the judgments of other States not party to the agreement in a different manner. Although SACU Member States share a common legal heritage, which is required by this approach, it would not be possible to replicate this system to the SACU, as none of the SACU Member States is a federation whose federal rules on recognition and enforcement can be extended to other SACU Member States.<sup>22</sup> As the Australian federal scheme probably manifests the purest presentation of a common law model for a double convention that is presently available,<sup>23</sup> it may nevertheless offer some lessons to the SACU if a multilateral treaty in the form of a double convention is adopted in the SACU.<sup>24</sup>

The final regional approach considered is that of the Latin-American States parties to the OAS, which are far less integrated than the USA or the EU. These States nevertheless have a well-developed regime for the recognition and enforcement of foreign judgments based on the Montevideo and La Paz Conventions, which facilitate the recognition and enforcement of judgments amongst Contracting States.<sup>25</sup>

This Chapter concludes that a multilateral recognition and enforcement agreement is the most suitable method to harmonise or unify the rules of SACU Member States;<sup>26</sup> and finally that the presence of a number of factors in the region points toward the feasibility of the proposed harmonisation efforts. These factors include the use of comparative law and reliance by courts on courts of other Member states; the availability of legal literature indigenous to the region; the fact that law reporting and access to legal materials is fairly up to date in the

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<sup>21</sup> See Chapter 2 para 3.3.

<sup>22</sup> See Chapter 2 para 4.3.

<sup>23</sup> It is a 'double convention' because there are common principles of jurisdiction that help to address litigation between courts across the federation.

<sup>24</sup> For example the requirements that a judgment have to meet to be registrable under the judicial system (of the Australia Trans-Tasman Act 35 of 2010 s 66), and when a judgment would not be registrable under the Act (s 66(2)); application requirements (s 66(5); setting aside registration (s 72); effect of registration and notice of registration (s 73 and s 74).

<sup>25</sup> See Chapter 2 para 4.3.

<sup>26</sup> See Chapter 2 para 5.1 and 5.2.

major States of the region; a number of tertiary initiatives towards the study and harmonisation and laws of the region, and finally the availability of research tools in the region.<sup>27</sup>

### **3 OVERVIEW OF SOME OF THE MAJOR MULTILATERAL RECOGNITION AND ENFORCEMENT INSTRUMENTS**

What will be of critical importance for the negotiators of a possible recognition and enforcement convention is choosing the most suitable form of the instrument for the Member States of the SACU, taking into account the specific historical, political, cultural and socio-economic differences between the States. Chapter 3 provides an overview of the traditional convention types, namely a single convention regulating only recognition and enforcement and indirect rules of jurisdiction,<sup>28</sup> and a double convention regulating both direct jurisdiction and the recognition and enforcement of judgments ensuing from those courts.<sup>29</sup>

Comparatively speaking, a single convention may be easier for States to agree upon than concluding an arrangement on direct jurisdiction. This is because it leaves direct jurisdiction to national laws, and it can use denying recognition and enforcement to discourage parties from litigating on exorbitant direct jurisdiction grounds.<sup>30</sup> There is a likelihood of tensions in reaching agreement upon the exclusive list of jurisdictional bases that a true double convention requires, which is linked to the differences between the social, sociological, political, and economic cultures of the legal orders in question, which may render reaching agreement on a list of jurisdictional bases on which courts would be allowed to assume jurisdiction challenging.<sup>31</sup> A single convention with indirect jurisdictional bases may pave the way for the regions to develop a mixed or double convention regulating both direct and indirect jurisdiction in the long run.

Whatever the type of convention adopted, it will present a dramatic improvement of the current recognition and enforcement regime in the SACU, as States' legal obligations will be

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<sup>27</sup> See Chapter 2 para 5.3.

<sup>28</sup> See Chapter 3 para 1.1.

<sup>29</sup> See Chapter 3 para 1.2

<sup>30</sup> Hague Conference 'International Jurisdiction and Foreign Judgments in Civil and Commercial Matters' *Preliminary Document No 7 of April 1997* (1997) ('Kessedjian Report') 138.

<sup>31</sup> See Chapter 3 para 1.3.

based on international law and not the arbitrary designation of States by the administrative under that State's national law.<sup>32</sup>

Many challenges that will be experienced in the harmonisation of recognition and enforcement rules are likely to have already been experienced, and possibly addressed, by previous attempts to harmonise such rules on an international or regional level. The rich jurisprudence in these areas may be able to provide insights for the SACU in its efforts to establish a multilateral recognition and enforcement regime. Two international conventions, namely the 1971 Hague Convention on Recognition and Enforcement in Civil and Commercial Matters,<sup>33</sup> and the 2005 Hague Convention on Choice of Court Agreements,<sup>34</sup> as well as two regional examples, namely the EU Brussels I Regulation/Convention<sup>35</sup> and the 1979 OAS Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards (Montevideo Convention)<sup>36</sup> are considered.

In terms of types of Conventions, the 2005 Hague Convention<sup>37</sup> and the Brussels I Regulation<sup>38</sup> are double conventions as they address the issue of the assumption of jurisdiction by the rendering court; while the 1971 Hague Convention<sup>39</sup> and Montevideo Convention (read with the La Paz Convention)<sup>40</sup> are examples of single conventions, which nevertheless provide rules of indirect jurisdiction for the purpose of recognition and enforcement under the Convention. It is therefore expected that the provisions of especially the latter two conventions will be of significance to the SACU when negotiating a recognition and enforcement convention for the SACU.<sup>41</sup>

A comparison of the above provisions suggested that a recognition and enforcement convention would contain the following provisions:<sup>42</sup>

- Scope and exclusions from scope of the Convention

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<sup>32</sup> See Chapter 4 para. 4.1 for a discussion of the requirement of reciprocity and designation under the national laws of SACU Member States; and Chapter 4 para 5 for proposals for a recognition and enforcement convention for the SACU.

<sup>33</sup> See Chapter 3 para 2.

<sup>34</sup> See Chapter 3 para 3.

<sup>35</sup> See Chapter 3 para 4.

<sup>36</sup> See Chapter 3 para 5.

<sup>37</sup> See Chapter 3 para 3.

<sup>38</sup> See Chapter 3 para 4.

<sup>39</sup> See Chapter 3 para 2.

<sup>40</sup> See Chapter 3 para 4.

<sup>41</sup> See Chapter 3 para 7.

<sup>42</sup> See Chapter 3 para 7.



- Procedural requirements for recognition and enforcement under the Convention
- Instances when recognition and enforcement would be refused under the Convention
- The recognised bases of jurisdiction of the rendering court for the purpose of recognition and enforcement under the Convention.

The next Chapter, Chapter 4 firstly considered the statutory provisions currently in force in SACU Member States, before making specific proposals for a recognition and enforcement regime for the SACU.

#### **4 STATUTORY INSTRUMENTS CURRENTLY IN FORCE IN SOUTHERN AFRICA**

A comparison of the relevant recognition and enforcement statutes of SACU Member States reveal a close similarity between them,<sup>43</sup> and in many instances they resemble to the 1920 UK Administration of Justice Act<sup>44</sup> and the 1933 UK Foreign Judgments Act.<sup>45</sup>

A major weakness of the current statutory regimes is that recognition and enforcement often rely on designation, whereby a judgment debtor will be able to enforce his judgment under the statutory regime only if the foreign country is specifically designated by the Act. This requirement is further complicated by the fact that despite their shared common legal tradition and their membership in the Customs Union, all SACU Member States are not designated under each other's regimes.<sup>46</sup>

The application or scope of the current statutes was firstly compared.<sup>47</sup> Although the ideal would be to extent the scope of the Convention to all civil matters, it is proposed that certain matters should nevertheless be excluded from the convention. It may be easier to reach agreement by excluding controversial areas; therefore, a convention which seeks to alter the diverse legal relationships of States generally contains a number of exclusions from the scope

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<sup>43</sup> See Chapter 4 para 4.

<sup>44</sup> See Chapter 4 para 2.1.

<sup>45</sup> See Chapter 4 para 2.2.

<sup>46</sup> See Chapter 4 para 5.

<sup>47</sup> See Chapter 4 para 4.1.

of the instrument. If, however, the exclusions become too numerous, any convention will be deprived of a good deal of its usefulness.<sup>48</sup>

Based on a comparison of the provisions regarding the application or scope of the statute,<sup>49</sup> the requirements for enforcement,<sup>50</sup> the procedural requirements<sup>51</sup> and the grounds on which registration will be refused,<sup>52</sup> a proposal is made for a Draft Convention on the Recognition and Enforcement of Foreign Civil Judgments for the Southern African Customs Union.<sup>53</sup>

The Draft Convention deals with the scope of the proposed convention;<sup>54</sup> recognition and enforcement;<sup>55</sup> the effect of registration;<sup>56</sup> stay of execution of a registered judgment;<sup>57</sup> refusal of recognition or enforcement;<sup>58</sup> jurisdiction for purposes of enforcement under the Convention;<sup>59</sup> interpretation;<sup>60</sup> and final clauses and signature.<sup>61</sup>

In order to facilitate the enforcement of judgments in the SACU the Draft Convention applies to judgments rendered in civil proceedings by both inferior and superior courts provided the other requirements are met.<sup>62</sup> Further, while it is recommended that parties reach consensus on whether it should extend to judgments ordering compensation for damages resulting from an offence at the time of concluding the Convention, the Draft Convention leaves open the opportunity for States to declare at the time of ratification whether the Convention will also extend to judgments ordering compensation.<sup>63</sup> The Draft Convention does not apply to orders for the periodic payment of maintenance and arbitral awards.<sup>64</sup> Instead, Member States are

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<sup>48</sup> Borchers PJ 'A few little issues for the Hague judgments negotiations' 24 *Brooklyn Journal of International Law* (1998-1999)165.

<sup>49</sup> See Chapter 4 para 4.1.

<sup>50</sup> See Chapter 4 para 4.2.

<sup>51</sup> See Chapter 4 para 4.3.

<sup>52</sup> See Chapter 4 para 4.4.

<sup>53</sup> See Chapter 4 para 5.

<sup>54</sup> See article 1.

<sup>55</sup> See article 2.

<sup>56</sup> See article 3.

<sup>57</sup> See article 4.

<sup>58</sup> See article 5.

<sup>59</sup> See article 6.

<sup>60</sup> See article 7.

<sup>61</sup> See articles 8 and 9.

<sup>62</sup> See article 1(1).

<sup>63</sup> See article 1(3).

<sup>64</sup> See article 1(4).

encouraged to join the existing instruments in this regard in order to promote international uniformity.<sup>65</sup>

In line with the existing instruments in force in the SACU Member States, a judgment given in a Contracting State will be recognised and enforced in other Contracting States once it has been registered there.<sup>66</sup> The procedure for applying for registration is governed by the law of the Member State in which enforcement is sought.<sup>67</sup> A judgment will not be registered or enforced if it satisfies one of the grounds listed in the Convention, which includes lack of jurisdiction of the rendering court; improper notice; fraud; public policy and irreconcilability with certain earlier judgments.<sup>68</sup> The Draft Convention further specifies the instances when a rendering court would be considered to have had jurisdiction for the purposes of recognition and enforcement under the Convention.<sup>69</sup>

The SACU Tribunal is mandated to give rulings on the interpretation of the Draft Convention.<sup>70</sup> The Draft Convention is open for signature by all SACU Member States, and remains open for accession by any other State, or alternatively, to all SADC Member States.<sup>71</sup>

Adoption of the Draft Convention will significantly improve the present situation where Member States are not necessarily designated under other Member States' statutory regimes, thereby denying them the opportunity to access the simplified and expedited procedure for recognition and enforcement. The provisions of the Draft Convention generally do not represent a major departure from the existing provisions in force in SACU Member States but include a number of recommendations for improvements.

With this in mind, if Member States take seriously their commitments to facilitate the cross-border movement of goods between the territories of Member States and to promote the

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<sup>65</sup> Hague Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations (1973) and the UNCITRAL Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958): see Chapter 5 notes 492 and 493.

<sup>66</sup> See article 2(1).

<sup>67</sup> See article 2(4).

<sup>68</sup> See article 5.

<sup>69</sup> See article 6.

<sup>70</sup> See article 7.

<sup>71</sup> See Chapter 5 note 499.

integration of Member States into the global economy through trade and investment,<sup>72</sup> it is envisaged that this Draft Convention will have a real likelihood of success.

## 5 FINAL COMMENTS

The thesis, as a first step in the process, considered the applicable statutes in force in selected States that apply the common law and Roman-Dutch law, and concluded that the differences between them are, in many instances, minor, and that harmonisation should, therefore, be feasible. A bigger concern is the fact that many statutes only designate a very small number of States under their regimes, which is further complicated by a reciprocity requirement inherent in most schemes.

States may be hesitant at first, or lack the political will, to adopt uniform laws to replace their own national laws, even though the position may in some instances be similar to that of their own laws. The progress of regional integration and legal integration may result in States becoming more comfortable with the idea of harmonising their laws and in the light of the benefits of regional integration, which includes the removal of trade barriers and as a result an increase in trade, be more willing to unify their laws.

‘The pursuit of harmony is the principle task of those who make it their concern to think about private international law... An immense intellectual effort has been invested in this discipline for many centuries. If any result commensurate with this effort is ever to be achieved, a clear vision of the ideal of harmony must be combined with an equally clear insight into the social facts which will ever prevent it from being attained. ... Many will never be able to see more than a tilt at windmills... sometimes they may even be right. But one hopes that there will always at least be some who can see that these hazards are giants of injustice and who will, as best they can, try to overcome them.’<sup>73</sup>

*Word Count: 111 372.*

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<sup>72</sup> 2002 Southern African Customs Union (SACU) Agreement between the Governments of the Republic of Botswana, the Kingdom of Lesotho, the Republic of Namibia, the Republic of South Africa and the Kingdom of Swaziland signed on 21 October 2002 in Gaborone, Botswana art 2(a) and (d).

<sup>73</sup> Kahn-Freund O *General Principles of Private International Law* (1976) 323.

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