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THE SUPERIOR COURTS ACT 10 OF 2013
AND JURISDICTION IN INTERNATIONAL
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THE SUPERIOR COURTS ACT 10 OF 2013
AND JURISDICTION IN INTERNATIONAL
CIVIL AND COMMERCIAL MATTERS

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INTRODUCTION:

In a globalizing world cross-border trade and investment have become more crucial facilitators for job creation and economical growth on a daily basis.\(^1\) Since the introduction of the international element in a range of transactions, international regulatory mechanisms are no longer a luxury, but a necessity for the effectiveness of these cross-border transactions, especially with regards to the judicial procedure and administrative cooperation in international civil and commercial matters.

The words “better justice, better business”\(^2\) are resonated by the global business community, hoping that national governments will realize that a reliable legal environment is critical for international trade.

In order for such a reliable legal environment to exist globally, the parties prive to such a cross-border transactions should be in equal legal positions, for example when legal action is instituted by either party. This means that the starting point for all parties involved in a legal matter, in respect of cross-border trade, must be the same and that the same set of legal rules will apply to both parties in this matter.

The starting point for any legal matter to be instituted is to determine which court has the jurisdiction to adjudicate such a matter effectively. Jurisdiction is thus the starting point for legal institution of matters and should be equal for all parties involved. Although most legal systems can be traced back to three main legal families the domestic rules regarding legal procedure can be vastly different depending from state to state.\(^3\) This can mostly be accrediting to the sovereignty principle respected between states of the world.\(^4\)

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\(^1\) Asia-Pacific Economic Cooperation. The Meeting was held in Beijing, China on 17 – 18 August 2014. Minutes of the meeting are accessible at http://hcchasiapacificweek.org.


\(^3\) Smiths (Ed) Elgar Encyclopaedia of Comparative Law (2012) 79.

\(^4\) De Cruz Comparative Law in a Changing World (2007) 41.
This has led to point that parties to international commercial transactions will most of the time include a clause known as a “forum selection clause” in their agreements. This clause insures certainty in respect of which court will have jurisdiction when a legal dispute may arise between the parties. However, not all domestic legal systems recognise the so called “choice of court” agreements. Important economic trading blocks, such as the United States, European Union, Canada, Japan, China and Russia, realised that a multilateral legal instrument will in the form of a convention will be necessary. The Hague Convention of 30 June 2005 on Choice of Court Agreements\(^5\) was then drawn up and has been ratified by important trading states since.\(^6\) Ratification of the Convention by states will have the potential that it may become a legal basis worldwide for the recognition and enforcement of judgments resulting from a choice of courts agreement.\(^7\)

This study will in essence determine the past and current legal environment in South Africa in respect of the adjudication of international civil and commercial matters and suggest reform to the current Superior Courts Act 10 of 2013 to create an optimum climate for international trade by ratifying and implementing The Hague Convention of 30 June 2005 on Choice of Court Agreements\(^8\).

South Africa is undoubtedly a country with rich cultural influences. However, this has lead to a lot of change in the field of law impacting both domestic and foreign litigants.

The Constitution of the Republic of South Africa\(^9\) lead the charge for change and the law reformed at a pace hard to keep up with. Procedural law was first relatively unaffected with a few exceptional changes but, there were monumental developments in the South Africa society. This resulted that the

\(^7\) (n 6).
\(^8\) (n 5).
\(^9\) See the Preamble of Constitution of the Republic of South Africa 1996.
significant changes brought forth dislocation and problems in the smooth functioning of a prospering legal system.  

The objective of this study is to urge the South African Government to reform the current Jurisdictional rules which applies to international civil and commercial matters and to align it with the valued international standards of the business community. The Superior Courts Act of 1959\textsuperscript{11} was recently repealed by the Superior Courts Act of 2013\textsuperscript{12} with even more gaps and gremlins creeping in.

To establish and motivate that reform of the current in position South African law with regards to jurisdiction in international civil and commercial matters is crucial, it is necessary to examine the historical background thereof, current principles and factors of jurisdiction in respect of international jurisdiction, the constitutionality of some of these principles and a plausible internationally accepted solution for the raised issues.

The desired outcome is to urge the South African legislature and government to conform to do business through international mechanisms such as The Hague Convention of 30 June 2005 on Choice of Court Agreements\textsuperscript{13} to promote international trade not only in South Africa but also in the whole of the Southern region of Africa.


\textsuperscript{11} The Supreme Courts Act 59 of 1959.

\textsuperscript{12} The Superior Courts Act 10 of 2013. See specifically s 2 of the act that deals with the objects and interpretation thereof.

\textsuperscript{13} The Hague Convention on Choice of Court Agreements (n 5).
1. HISTORICAL BACKGROUND OF INTERNATIONAL JURISDICTION IN SOUTH AFRICAN LAW

1.1. Jurisdiction in the International Sense

Most authors agree that jurisdiction is understood to be the competence or authority that is vested in a court by law, to be able to adjudicate, determine or dispose of a matter brought before it.\textsuperscript{14} However, it is important to stress that the rules governing domestic jurisdiction may be completely different from the rules that govern international jurisdiction in a legal system.\textsuperscript{15} This basically means that if a court should make a judgment in respect of the domestic rules of the said legal system it may result in that the judgment may not be recognised as an enforceable judgment in respect of international jurisdictional rules of that same legal system.\textsuperscript{16} The rules a court apply to determine if it may preside over a matter with an international element will differ to rules that will be applied by the same court to determine if it may adjudicate over a domestic matter.

The consequences of divergence between domestic rules of jurisdiction and those rules of international jurisdiction should in a perfect world be limited. However, when a foreign element is introduced in South African law, the consequences of this divergence between the aforementioned sets of rules are far greater than it needs to be.\textsuperscript{17}

1.2. International Jurisdiction in respect of South African Law


\textsuperscript{15} Forsyth (n 10) 1.

\textsuperscript{16} Forsyth (n 10) 1.

\textsuperscript{17} Forsyth (n 10) 1.
In order to remedy the divergence of the consequences between domestic rules of jurisdiction and international rules of jurisdiction\(^\text{18}\) it is important to determine why it exists in the first place.

All courts in the Republic of South Africa may exercise jurisdiction as determined by the Constitution\(^\text{19}\). It is important to note that the Constitution\(^\text{20}\) itself has undergone substantial reform recently under the Constitution Seventeenth Amendment Act\(^\text{21}\) in order to unify the Superior Court structures in South Africa. This significantly altered the structure and functionality of the judicial system in South Africa and will be discussed in more detail hereunder.\(^\text{22}\)

Although the jurisdiction of the courts in South Africa is vested in the Constitution,\(^\text{23}\) the rules that it will apply in accordance to determine whether it has international jurisdiction is strongly vested in South African common law.\(^\text{24}\)

In South African law the Roman-Dutch principles of jurisdiction are applied to determine whether or not a jurisdictional ground exist over a person. Jurisdiction by a court will be exercised based on such a ground.\(^\text{25}\) It is therefore important to first analyse the principles that will determine if any ground for jurisdiction exists, whether it is domestic or international.

\(^{18}\) Forsyth (n 10) 1.
\(^{19}\) The Constitution of the Republic of South Africa, 1996. Also see Cilliers, Loots and Nel (n 14) 45.
\(^{21}\) 2012.
\(^{22}\) See Chapter 2 hereunder with reference to the “The Superior Courts Act No 10 of 2013”.
\(^{23}\) (n 20) s 165 - 166.
2. THE BASIC PRINCIPLES OF JURISDICTION IN SOUTH AFRICAN LAW

2.1. The Common-Law Principles

As previously mentioned, the common law of South Africa is manifested in Roman-Dutch law. Traditionally Roman-Dutch law determines that powers vested in respect of the jurisdiction of a court are subject to the territory where it subsides. This traditional view of the interpretation of jurisdictional powers is expressed by Nienaber AJA in *Ewing McDonald & Co Ltd v M. & M. Products Company*. At paragraph 256 he states that: “[s]uch power is purely territorial”, and therefore the court’s jurisdiction will not extend beyond the territorial boundaries, or over persons or subjects matters that are not associated with it.

The determination of a jurisdictional issue will depend on the specific grounds of jurisdiction which have been established subject to the type of claim in the relevant matter. Ultimately the grounds of jurisdiction have been developed over the years through binding precedent and statutory enactment. The principles are therefore of great importance when determining grounds of jurisdiction for the specific claim. It is of even greater importance if there is no existent rule to determine if there is a jurisdictional ground present in respect of the said specific claim. These claims may either be in respect of property, a person or a claim sounding in money. The principles may therefore be used by the judiciary to derive conclusion in respect of jurisdictional issues.

The principles will be disused hereunder:

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26 Theophilopoulos, van Heerden, Borain (n 25) 45.
27 1991 (1) SA 252 (AD).
28 Schulze (n 24) 1 with reference to the aforementioned matter in (n 20). Also see *Bisonboard Ltd v K. Braun Woodworking Machinery (Pty) Ltd* 1991 (1) (AD).
29 Theophilopoulos, van Heerden, Borain (n 25) 53.
30 Schulze (n 24) 44.
2.1.1. *The Doctrine of Effectiveness*

This doctrine, although not directly applicable in every case, is in many cases the prominent principle authorities would rely on to determine if a court may confer jurisdiction over a matter or not.\(^{31}\) Effectiveness forms the underlying basis of thinking in respect of cognisance to confer jurisdiction in a matter.\(^{32}\) The principle basically entails that a court will only assume jurisdiction over a matter if such a court is able to give effect to the judgment it makes.\(^{33}\)

The principle of effectiveness is derived from Roman law. It has developed to such an extent in South African law that the basic rule applied by courts where a foreigner is involved, is that a court will not adjudicate a matter against such a foreigner unless either the person or property of the foreigner is attached.\(^{34}\) Many authorities in previous cases were of the opinion that attachment is the only way effectiveness can be insured in a judgment where a foreign element is involved in.\(^{35}\) This statement has been criticised by authors because as stated in *Thermo Radiant Oven Sales (Pty) Ltd v Nelspruit Bakeries (Pty) Ltd*\(^{36}\) by Potgieter AJ, effectiveness does not require a court to determine that it is fully enforceable, but rather that it means it has the potential to be enforced.

Forsyth\(^ {37}\) points out that the doctrine of effectiveness even in classical times was not the only principle recognised by courts to determine if a court is the proper forum for the adjudication of a matter. The author states further that effectiveness is not the ultimate determining factor of jurisdiction and that it should be stresses that the evolution of this ground into our law is: “*[a]rtificial rather than realistic*”.\(^ {38}\)

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31. Cilliers, Loots and Nel (n 14) 63.
32. Forsyth *Private International Law* (2012) at 170. Also see Cilliers, Loots and Nel (n 14) on page 63 where the authors refer to *Styler NO v Fitzgerald* 1911 (AD) and the statement given by Kotze J in *Forbes v Uys* 1933 (T).
33. Cilliers, Loots and Nel (n 14) 45.
35. Forsyth (n 34) 64. The authors refer to Hoexter JA in *National Bank Ltd v Thompson* 1985 (3) SA 778 (A).
36. 1969 (2) SA 295 (A).
37. Forsyth (n 34) 170.
38. Forsyth (n 34) 71.
Effectiveness is therefore a jurisprudential principle and should not be viewed in isolation as the basis on which the courts assume jurisdiction over a matter. It should rather be a contributing factor together with other principles such as convenience and submission, to ultimately determine jurisdiction if a court may assume jurisdiction over a matter brought before it.\textsuperscript{39}

\subsection*{2.1.2. The Doctrine Convenience}

The principle of convenience is vested in that a court may assume jurisdiction over a matter if it is most convenient to do so.\textsuperscript{40} The origins of convenience as a principle can mainly be contributed to specific type of cause of action and where such arose. In view of the aforementioned it will thus be most convenient for a court to assume jurisdiction to adjudicate the matter where all the evidence is present.\textsuperscript{41}

\subsection*{2.1.3. Actor Sequitur Forum Rei}

The general rule in respect of \textit{actor sequitur forum rei} is that when a plaintiff institutes a legal suit against a defendant, that the plaintiff will do so in a courts’ jurisdiction in which the defendant is domicile or resident.\textsuperscript{42} To complicate the jurisdictional rules of South Africa even further, the Supreme Court of Appeal warned in \textit{Mayne v Main}\textsuperscript{43} that there is a difference between domicile and residence and that a court would not necessarily assume jurisdiction of a person if that person is domiciled in the jurisdiction of the court, but not physically present. Thus, although domicile is well recognised as

\begin{itemize}
\item \textit{Utah International Inc v Honeth} 1987 (4) (T) 145 at paragraph 147. See Schulze (n 24) 12 who refers to \textit{Murphy v Dallas} 1974 (1) SA 793 (D) and \textit{Kasimov and Another v Kurland} 1987 (4) SA 76 (C).
\item Theophilopoulos, van Heerden, Borain (n 25) 45. The authors refer to Forsyth (n 34) 170 at 201 – 203 wherein Forsyth heed a warning with regards to the origin of the cause of action and the Magistrates’ Courts of South Africa. This is currently still the legislative position in section 28(1)(d) of the Magistrates’ Courts Act 32 of 1944. It states that it is a requirement that action arose wholly within the jurisdiction of the specific or regional division.
\item \textit{Dusheiko v Milburn} 1964 (4) SA (A) 655 F-H.
\item Theophilopoulos, van Heerden, Borain (n 25) 45.
\item 2001 (2) 1239 (SCA).
\end{itemize}
a jurisdictional connecting factor, a court may still decline jurisdiction in this regard. This creates a highly uncertain environment for both foreign and domestic litigators and is perhaps why authors will refer to jurisdictional rules in South Africa as “idiosyncratic”.

2.1.4. Submission in General

In the event that a person submits to the jurisdiction of a court, such a court may have jurisdiction over the person purely on this basis of submission. Submission may be given by either positive or negative conduct of a party in front of a court, which may lead to a court conferring jurisdiction over the matter.

The consent may thus be expressly conferred or implied. This basically means that the person who submits to the jurisdiction of a court would not object to the judgment handed down by it. For example, in the case where the defendant has submitted to the jurisdiction of a South African court, it will be the court’s duty to determine whether or not the submission constitutes jurisdiction of the court over the matter. Regardless of the confusion this principle creates for both foreign and domestic litigators regarding the rules of jurisdiction on South African soil, it has been clearly established that a notice given by a defendant to a plaintiff of the defendant’s intention to defend the matter will not be accepted as submission. This is because a notice of intention to defend is a necessary procedural step a defendant has to take in order to object to the jurisdiction of the court. However, it should be stressed that once a defendant has either pleaded to the merits of the particulars of claim of the plaintiff, or requested the plaintiff to furnish security, or applied for postponement of the matter it will be regarded by the court as tacit submission to its jurisdiction.

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44 Theophilopoulos, van Heerden, Borain (n 25) 45.
45 Forsyth (n 10) 2.
46 Cilliers, Loots and Nel (n 14) 64.
47 Schulze (n 24) 13.
48 Schulze (n 24) 12.
49 Ibid.
Therefore all litigants should be warned that there is a significant differentiation between the approaches a South African court will follow to determine jurisdiction in respect of resident litigators of South Africa and foreign litigators. It should be further stressed that the approach a South African court will follow to determine jurisdiction will not only be in respect of the residency of the parties to the action, but also to the specific claim under the action.\(^{50}\)

2.2. The Differentiation between *Incola* and *Peregrinus*

The aforementioned Latin terms are ultimately derived from Roman and Dutch-Roman law and are used by South African courts in relation to jurisdiction.\(^{51}\) A South African court will exercise jurisdiction over a person, being natural or juristic, if such a person is either domiciled or resident in the area of the jurisdiction of the court.\(^{52}\) Thus it can be derived from the aforementioned that an *incola* is a person that is either domiciled or resident in the area of the jurisdiction of the court, while a *peregrinus* is a person who is domiciled or resident outside the area of jurisdiction of the court.\(^{53}\) South African courts will further distinguish between a local *peregrinus* and a foreign *peregrinus*. A local *peregrinus* is a person who is resident or domiciled outside the area of the jurisdiction of the court, but who is still domiciled or resident in the Republic of South Africa.\(^{54}\) These expression used by a court to describe the status of a party to a matter is not only important for jurisdictional issues, but also for certain procedural matters such as the furnishing of security of costs, attachment to either find or confirm jurisdiction and arrest.\(^{55}\)

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\(^{50}\) Theophilopoulos, van Heerden, Borain (n 25) 46.

\(^{51}\) Theophilopoulos, van Heerden, Borain (n 25) 47.

\(^{52}\) Schulze (n 24) 11.

\(^{53}\) Theophilopoulos, van Heerden, Borain (n 25) 47.

\(^{54}\) Ibid.

\(^{55}\) Schulze (n 24) 11.
The status of the parties to the matter is thus an important decisive factor when determining the court’s jurisdiction.\(^{56}\)

2.3. Jurisdictional Connecting Factors in respect of South African Law

As previously mentioned a South African court will traditionally exercise jurisdiction depending on the type of claim to the instituted under the law suit and the relief prayed to the court therein.\(^{57}\) The application of the jurisdictional rules further requires the identification of several connecting factors as well as their nature. The factors may include domicile, residence, the place where a contract was concluded and whether there has been submission to jurisdiction of a particular court.\(^{58}\)

It is also important to note that the grounds of jurisdiction identified by the court are usually related to a specific claim. There are three general groups these claims are divided into, viz claims sounding in money, claims in respect of property in the wide sense and matrimonial claims. However, for the purpose and length of this study there will only be focused on the first mentioned claims sounding in money.

2.3.1. Claims Sounding in Money

A claim sounding in money refers to any claim for the payment of money by the defendant to the plaintiff. This will be irrespective of the fact whether the claim is a liquidated amount or not. There are specific jurisdictional rules for claims sounding in money dependent on whether the parties’ are *incola* or *peregrinus*.\(^{59}\)

It is common that a claim sounding in money is usually contractual of nature, although there have been reported cases where the claim was successfully

\(^{56}\) Ibid.
\(^{57}\) Cilliers, Loots and Nel (n 40) 67.
\(^{58}\) Cilliers, Loots and Nel (n 40) 68.
\(^{59}\) Schulze (n 24) 11.
instituted in respect of a delict. Claims sounding in money may also be claimed in the alternative subject to damages suffered in the suit. When determining jurisdiction in respect of money claims it is of the highest of importance for the approached court to identify whether the plaintiff instituting the claim bears the status of *incola* or *peregrinus*.

The court will mainly focus on the defendant or respondent with regard to his or her status, because the plaintiff or applicant is *dominus litis*.

### 2.3.2. Domicile and Residence

Domicile is one of the factors a court will take into consideration in order to establish if it may exercise jurisdiction over a matter or not. The court will also consider if a person is an *incola* or *peregrinus* of the court. Domicile of persons are mainly divided into the domicile of natural person and into the domicile of juristic persons.

Domicile of natural persons will be determined in accordance with the Domicile Act. There are two general requirements set out in section 2(1) which states that a person will be considered to be domiciled in a place where such a person is lawfully present and intend to settle at that place for an indefinite period.

Whereas domiciled is well defined in terms of legislation, residence on the other hand is more than often used inaccurately. Residence can present itself as

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60 Theophilopoulos, van Heerden, Borain (n 25) 64. Also see *Bid Industrial Holdings (Pty) Ltd v Strang* 2008 (3) SA 355 (SCA) for a claim sounding in money instituted in respect of a delict.

61 *Ibid*.

62 Theophilopoulos, van Heerden, Borain (n 25) 65. The authors explain that there is a presumption, although rebuttable that a plaintiff or applicant will approach the proper forum to institute legal action in.


64 Schulze (n 25) 13.
somewhat of a loose term, but it has long been established through authority that it should be something more than mere physical presence.\(^{65}\)

In *Mayne v Main\(^ {66}\)* the Supreme Court of Appeal held that it should not be a question of domicile, but rather a question of residence subject to the modern day lifestyle people lead. It may be said that residence can constitute to something more than just a casual visit, but will always be less then domicile.\(^ {67}\)

The determination of domicile and residence of a juristic person has always been a complicated and problematic matter. This is mainly because a company may be registered in a specific place and may have a main place of business elsewhere.\(^ {68}\) For many years this situation was dealt with in accordance to *Bisonboard Ltd v K. Braun Woodworking Machinery (Pty) Ltd\(^ {69}\)* in which the court determined that a juristic person will be considered domiciled at the place of incorporation and resident where its general administration was centred.

The former Companies Act of 1973 specifically dealt with the jurisdictional issue as involving juristic persons in respect of domicile and residence. The act stated in section 12(1) that any matter that may arise which may lead to litigation in respect of a company may be adjudicated by any division of the High Court within the area of the jurisdiction whereof the registered office of the company is or the main place of business of such company. This meant that a company had more than one residence.\(^ {70}\) However, the Companies Act of 1973 has been repealed by The Companies Act of 2008 and rippled substantial changes over the jurisdiction of juristic persons. This was the issue before the court in *Sibakulu Construction (Pty) Ltd v Wedgewood Village Golf Estate (Pty) Ltd\(^ {71}\)* by the learned Judge Binns-Ward.

\(^{65}\) Cilliers, Loots and Nel (n 14) 69.
\(^{66}\) 2001 (2) SA 1239 (SCA).
\(^{67}\) Cilliers, Loots and Nel (n 14) 71.
\(^{68}\) Schulze (n 24) 8.
\(^{69}\) 1991 (1) SA 482 (AD).
\(^{70}\) Schulze (n 24) 9.
\(^{71}\) 2011 (C) SA 439.
The court held that the new Companies Act of 2008 did not have a provision in respect of jurisdiction as the previous section 12(1) of the Companies Act of 1973. It was further stated by Judge Binns-Ward that section 23(3) of The Companies Act of 2008 determines that every company whether internal or external shall have one registered office within the Republic of South Africa. In other words, a company will only have one residence within the Republic of South Africa. This will be where its office is registered in terms of Section 23(3) of the Companies Act of 2008.72

2.3.3. Submission as a Ground for Jurisdiction

As previously mentioned, South African law differentiates between jurisdictional rules relating to issues with an international element and those relating to domestic instances.

This divergence between sets of jurisdictional rules entails particular problems subject to submission. This means that although submission by a defendant to the courts’ jurisdiction undoubtedly grants such a court with international competence to adjudicate a matter, the same cannot be said in the domestic sphere.73 The problem of this divergence is that even if a court is competent to assume jurisdiction subject to its own rules, such a court will lack jurisdiction in a matter where there is an international element involved, resulting that the judgment will be unenforceable locally.74

In the situation where a defendant has submitted to the jurisdiction of a court to assume jurisdiction over a matter in a domestic sense, was mostly governed until the decision by the Appellate Division in Veneta Mineraria Spa v Carolina Collieries (Pty) Ltd75 where the honourable Judge Viljoen states that: “By prorogation a defendant subjects his person to the jurisdiction of the court

72 Kindly refer to the aforementioned case in (n 61) with specific reference to paragraphs 10 -13, 16 – 17 and 26.
73 Forsyth (n 10) 2 - 3.
74 Ibid.
75 (In Liquidation) 1987 (4) SA 883 (A).
but that is not enough. One or more of the traditional ground of jurisdiction must also be present”.76

In the aforementioned case there was no traditional ground present as both parties were *peregrinus* to the area of the court’s jurisdiction. However, this will mean that submission will be nothing more than a mere substitute for attachment to ensure the judgment will be effective when enforced. 77

The relation between submission and attachment is highlighted when a foreign element is introduced. If interpreted correctly as stated by the learned Judge above, it is clear that if the defendant is an *incola* of the court and submitted to a court’s jurisdiction, attachment is unnecessary. This is because a traditional ground of jurisdiction is present *viz* domicile or residence.78

However, if the defendant is a *peregrinus* to the court and submitted to its jurisdiction, attachment to confirm jurisdiction will be necessary. The situation becomes even graver if both parties are *peregrinus* to the court. Although attachment will be necessary to find jurisdiction, as a *ratio jurisdictionis* is still required in order for the court to exercise jurisdiction over the matter. Forsyth illustrates the following situation:

“There is no substitute for attachment to found jurisdiction, with the result that the cause of action did not arise locally, two peregrinus cannot agree that their disputes should be settled I the local courts. The point may be stressed – submission is not a ratio jurisdictionis; it is a substitute for attachment to confirm jurisdiction.”79

Forsyth further stresses that the interpretation handed down in *Veneta Mineraria Spa v Carolina Collieries (Pty) Ltd* 80 has an unsatisfactory impact

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76 This quote is adapted as specifically referenced by Forsyth in (n 65).
77 Forsyth (n 10) 3.
78 Ibid.
79 Forsyth (n 10) 3.
80 (In Liquidation) 1987 (4) SA 883 (A).
not only on South African businesses, but also on global businesses trading in the southern region of Africa.  

Many authors regard this as an irksome problem for litigators. This is mainly because the plaintiff cannot rely on the submission by the defendant to the court’s jurisdiction as a recognised ground to assume competence which results in high uncertainty to what the outcome of the case might be.

In *American Flag PLC v Great African T-Shirt Corporation CC*\(^{83}\), a case similar to that in *Veneta Mineraria Spa v Carolina Collieries (Pty) Ltd*\(^{84}\), presented itself to the court. The court finally had the opportunity to review all the restrictions on submission as a ground for jurisdiction that was previously laid down in *Veneta Mineraria Spa*.

In *American Flag* the courts first distinguished between a case where both parties were *peregrinus* and the cause of action did not arise within the area of the courts’ jurisdiction and a case where one party was an *incola* and a *ratio jurisdictiionis* is present.\(^{85}\)

At paragraph 377 of the *American Flag* case the learned Judge Wunsh held as follows: “American Flag has consented to the jurisdiction of this court so that attachment is neither necessary nor permissible”.\(^{86}\) The decision clearly illustrates that submission has already been recognised as a ground for jurisdiction a decade prior to *Veneta Mineraria Spa*. This was an important first step for South African law, because submission to a courts’ jurisdiction can be sensitive to the commercial realities. The effectively means in a situation where the plaintiff is an incola of the court and the defendant a peregrinus of the Republic of South Africa and if the cause of action arose

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\(^{81}\) Forsyth (n 10) 4.

\(^{82}\) Forsyth (n 10) 5. Also see Kahn “Conflict of Laws” in *Annual Survey of South African Law* 1965 536.

\(^{83}\) 2000 (1) SA 356 (W).

\(^{84}\) Forsyth (n 10) 3.

\(^{85}\) Schulze (n 24) 14.

\(^{86}\) Forsyth (n 10) 5 also refers to the extract of the judgment and stating that it was impressive given the range thereof.
outside the jurisdiction of the court, that submission to the court’s jurisdiction prior to the an order for attachment, will result in that it will be sufficient for the court to assume jurisdiction over the matter. This decision should be welcomed and rather followed than the starker interpretation of submission as jurisdictional ground in *Veneta Mineraria Spa*.

This decision has been endorsed by the Supreme Court of Appeal in *Hay Management Consultants (Pty) Ltd v P3 Management Consultants (Pty) Ltd* and must be welcomed for the adoption of a more modern approach subject to the realities of the commercial community.

The court went even further in the *Hay Management* case in that they recognised tacit submission in the absence of the cause of action arising in the area of jurisdiction of the court. The honourable Judge Farlam confirmed the decision of *Hay Management* in *Jamieson v Sabingo* and went on to say that if submission was the ground that a court assumed jurisdiction on over a matter that it would generally allow the judgment to be enforced abroad. It is clear that South African law should depart from the restriction previously laid down in *Veneta Mineraria Spa*.

There is no dispute that the *Hay Management* case has broken ground for submission as a jurisdictional link however; it saddens most authors of private international law that it does not go far enough. The current recognition which submission enjoys is limited to situations where the plaintiff is an *incola* and not where both parties are *peregrinus* with any ratio jurisdictionis to the court. The South African courts will not recognise submission as the only link between itself and the related matter where a foreign element is involved.

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87 2005 (2) SA 522 (A).
88 Schulze (n 24) 16.
89 Forsyth (n 10) 5.
90 2002 (4) SA 49 (A).
91 Forsyth (n 82) 5 as emphasised in (n 13).
92 Forsyth (n 82) 6.
There is no doubt that this situation should be remedied immediately in order to facilitate international trade by creating a bridge between these divergences of different sets of international rules of jurisdiction.

2.3.4. Attachment – Past, Present and Future

Attachment is an essential aspect of the rules governing jurisdiction in South Africa. As previously stated it is the jurisprudential principle of effectiveness and is centred in the rules determining jurisdiction of court over a matter. It has been a long established practice that where a claim sounding in money against a *peregrinus* defendant arises out of a contractual obligation, attachment of the property of the defendant is necessary even if the contract was made and to be performed within the jurisdiction of the approached court. Therefore a South African court will not confer jurisdiction in an action sounding in money between *peregrines*, unless there is both a *ratio jurisdictionis* and attachment (previously also arrest, which has been declared an unconstitutional practice). The possibility arises that attachment may also be declared unconstitutional if this issue is brought under constitutional scrutiny. The position was not fully considered in *Bid Industrial Holdings*, but the court did remark that it does not infringe any constitutional right of a person directly.

It is therefore important to consider what the requirements for attachment are and who has the right to apply for it. Firstly, attachment can be applied for to either found or confirm jurisdiction. The plaintiff instituting the action against the defendant will usually be the applicant in the attachment matter and has to provide the court with the following in the founding affidavit of the aforementioned notice of motion:

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93 Oppong *Private International Law in Commonwealth Africa* (2013) 73.
94 Theophilopoulos, van Heerden, Borain (n 25) 65.
95 Cilliers, Loots and Nel (n 14) 105. Also see *Thermo Radiant Oven Sales (Pty) Ltd v Nelspruit Bakeries (Pty) Ltd* 1969 (2) SA 295 (A) at 300 – 311.
96 *Bid Industrial Holdings (Pty) Ltd v Strang* 2008 (3) SA 355 (SCA).
97 Forsyth (n 34) 198.
i. That the applicant is the plaintiff in the action who seeks the property of the defendant to be attached to found or confirm jurisdiction in the action;

ii. The applicant must indicate where the cause of action arose;\textsuperscript{98}

iii. That the defendant in the action is a \textit{peregrinus} of the Republic of South Africa;\textsuperscript{99}

iv. The applicant should make out a prima facia case for the attachment of the property of the defendant;\textsuperscript{100}

v. The property requested to be attached is in the Republic of South Africa;\textsuperscript{101}

vi. The defendant is the owner of the property;\textsuperscript{102}

vii. The nature of the property\textsuperscript{103} and the value thereof.\textsuperscript{104}

It should be mentioned that the status of the party in respect of where the cause of action arose should be stated in the founding affidavit. The time when submission was given is crucial. As previously stated submission cannot be given to the jurisdiction of a court after the application for attachment was made. Submission will most of the time be given in South African law to substitute an attachment order.

The five situations depicted in \textit{Ewing McDonald & Co Ltd v M. & M. Products Co}\textsuperscript{105} sets out the rules relating to the necessity of attachment for a court to confer jurisdiction when \textit{incola} and \textit{peregrinus} are involved. The learned Judge Nienaber specifically refers to sections 19(1)(c)(i)-(ii) and 28(1) of the

\textsuperscript{98} \textit{Ibid}. Also see section 28(1) of the Supreme Courts Act 59 of 1959 which prohibits the attachment of property of any person resident within the Republic of South Africa.

\textsuperscript{99} \textit{Cape Explosive Works Ltd v Fat Industries Ltd} 1921 (C) 244.

\textsuperscript{100} \textit{Ex Parte Acrow Engineers (Pty) Ltd} 1953 (2) SA 319 (T) 321.

\textsuperscript{101} Section 19(1)(c) of the Supreme Courts Act 59 of 1959 provided that the property does not have to be in the area of jurisdiction of the court, but it must be in the Republic of South Africa. Also see \textit{Ewing McDonald & Co Ltd v M. & M. Products Co} 1991 (1) SA 252 (A) and \textit{Siemens Ltd v Offshore Marine Engineering Ltd} 1993 (3) SA 913 (A).

\textsuperscript{102} \textit{Bominlot Ltd v Klein Hung Shipping Co Ltd} 2004 (2) SA 556 (C) 55.

\textsuperscript{103} \textit{Thermo Radiant Oven Sales (Pty) Ltd v Nelspruit Bakeries (Pty) Ltd} 1969 (2) SA 295 (A) 310.

\textsuperscript{104} \textit{Ibid}.

\textsuperscript{105} 1991 (1) SA 252 (A).
previous Superior Courts Act. These provisions set out the grounds on which one must rely on in an application for attachment. However, it must be stressed here already that this piece of legislation has been repealed in its entirety by the Superior Courts Act 10 of 2013. Although it is no longer in force, it is still gave rise to numerous sources of important authority governing the rules of jurisdiction where a foreign element is involved.

Section 19(1)(c) of the Supreme Courts Act of 1959 provided that:

“Subject to the provisions of section 28 and the powers granted under section 4 of the Admiralty Jurisdictional Regulation Act, 1983 (Act 105 of 1983), any High Court may

(i) issue an order for attachment of property or arrest of a person to confirm jurisdiction or order an arrest suspendus da fuga 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 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.”

Section 19 of the Supreme Courts Act of 1959 is now replaced with Section 21 of the Superior Courts Act 10 of 2013. It seems if the legislature intended section 19(1)(c) ought to be replaced by section 21(3) which provides:

“Subject to the provisions of section 28 and the powers granted under section 4 of the Admiralty Jurisdictional Regulation Act, 1983 (Act 105 of 1983), any Division may issue an order for attachment of property to confirm jurisdiction.”

It is uncertain what the legislature attempted to provide in section 21(3) in respect of the requirements of attachment. To date there has been no case law to interpret this change. It seems as if the legislature intended for the interpretation of attachment to be wider as what it previously was under section 19(1)(c)(i)-(ii). The reason for stating this is because no mention to a ratio
jurisdictionis or the status of the plaintiff is made by the legislature at any time. Does this mean that any person may apply to any division of the High Court of South Africa to issue an order for attachment against an opposing party to a matter? The provision under section 21(3) is highly uncertain and might create even more confusion in the field of private international law and the commercial environment.

Although the requirements of attachments are murky under the new Superior Courts Act one thing is clear; arrest over a person to assume jurisdiction is revoked in its entirety.

Perhaps this is a blessing in disguise too, because for once and for all it attempts to harmonise the divergence between rules of domestic jurisdiction and those applicable to jurisdiction where a foreign element is involved as it eliminates the rule that attachment is required where submission has been given by a person to the area of jurisdiction of a court.

2.3.5. Forum non Convenience

The doctrine of forum non convenience will mostly find application in common-law states and not so much in the continental states. This doctrine is usually relied on by the defendant in a matter to limit the freedom of the plaintiff who is dominus litis in an action. However; a court may also rely on this doctrine in order decline to exercise its jurisdiction and stay the proceedings before it in favour of a court that would be more competent to adjudicate the matter.

Forum non convenience may be problematic in instances where both parties to a matter are peregrinus. If there is no ratio jurisdictionis available to the approached court to take in to account, other than the submission by the parties, it is highly likely that a South African court will decline jurisdiction on

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107 Forsyth (n 34) 184.
108 Ibid.
109 Sonia (Pty) Ltd v Wheeler 1958 (1) SA 555 (A). Also see Forsyth (n 34) 185.
the basis of the doctrine although it has competent jurisdiction over the matter.110

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110 Forsyth (n 34) 186. Also see Maritime & Industrial Services Ltd v Marcierta Compania Naviera SA 1969 (3) 28 (D).
3. CONSENT, CONFUSION AND CONSTITUTIONALITY

Even before the adoption of the Constitution\(^{111}\) it was considered by academics that the consent to the jurisdiction of a court will in itself suffice as a ground of jurisdiction for a court.\(^ {112}\) At first sight, it was not thought that the Constitution\(^ {113}\) or changes thereof would have a great impact on the procedural field of the law. However, with the judgment handed down by the Supreme Court of Appeal in *Bid Industrial Holdings (Pty) Ltd*\(^ {114}\) it was clear that there were substantial changes on the horizon for procedural law with specific regard to the rules of jurisdiction. In the *Bid Industrial Holdings* case the court held that arrest to found or confirm jurisdiction must be abolished as it does not pass the constitutional test provided in section 36 of the Bill of Rights.\(^ {115}\) The limitation of the peregrinus‘ constitutional rights was unjustifiable, as it unfairly infringed upon the rights provided in chapter two of the Constitution\(^ {116}\). It was therefore decided that arrest to either find or confirm jurisdiction is declared unconstitutional.\(^ {117}\) The court then developed the common law in terms of section 39(2) of the Bill of Rights for less restrictive means by founding or confirming jurisdiction in the absence of arrest.

The first of the less restrictive means is attachment. In paragraph 38 the court held that: “attachment ordinarily involves no infringement of constitutional rights (absent, for example seizure of the means by which the defendant’s livelihood is earned)”\(^ {118}\).

Although the courts held that attachment in itself is not unconstitutional, it should be queried if it is an exorbitant ground if submission was given to the court to exercise jurisdiction over a matter. The problem arises when the

\(^{111}\) The Constitution of the Republic of South Africa 1996.

\(^{112}\) Peter “Consent Confusion but No Effect” 1993 *South African Law Journal* 15. Also see *Briscoe v Marais* 1992 (2) SA 413 (W) as referenced by the author.

\(^{113}\) (n 111).

\(^{114}\) *Bid Industrial Holdings (Pty) Ltd v Strang* 2008 (3) SA 355 (SCA).

\(^{115}\) Chapter 2 of the Constitution of the Republic of South Africa 1996.

\(^{116}\) (n 111).

\(^{117}\) Oppong “Roman-Dutch Law Meets the Common Law on Jurisdiction in International Matters” 2008 *Journal of Private International Law* 331.

\(^{118}\) (n 114) [38].
plaintiff to the matter is a *peregrinus*. It has never been denied that South African courts treat incola plaintiffs more leniently than *peregrinus* plaintiffs.\(^{119}\) This is clear from section 28 of both the previous\(^{120}\) and the current unchanged section in the Superior Courts Act\(^ {121}\), in which it provides that no attachment of the property of an incola is permissible. This practice should neither be continued nor conjured, because it may potentially violate the non-discrimination and equality principles enshrined in the Constitution.\(^ {122}\)

The principles within the ambit of private international law’s general focuses are to ensure justice and to protect the expectations of parties who are involved in transactions that include a foreign element.\(^{123}\) When one party is privileged in a dispute settlement these objects of private international law are defeated.

The most concerning situation that arises in the international commercial community is the non-recognition of choice-of-forum agreements between *peregrinus* under South African law. Because South African courts will not assume jurisdiction purely on the basis of submission the choice by the parties for the South African courts to assume jurisdiction will not be recognised. It is not only in conflict with the principle known as party autonomy, but is also inconsistent with the position in most common law countries.\(^{124}\)

This position is not only unfortunate for businesses in South Africa, but also for those on the rest of the continent. Oppong states that:

“It must be admitted that in most cases, these jurisdiction agreements adopt non-African courts as their preferred forum. The perception of judicial corruption in Africa and a lack of faith in the ability of African judges to address the complex legal issues of international litigation may account for this.”

\(^{119}\) Oppong (n 117) 231.

\(^{120}\) Supreme Courts Act 59 of 1959.

\(^{121}\) Superior Courts act 10 of 2013.

\(^{122}\) (n 111).

\(^{123}\) (n 119).

\(^{124}\) Oppong (n 117) 322.
This rule thus prevents South African courts from developing the country into a litigation centre for international commercial litigation in Africa. The ability or rather non-ability of *peregrinus* parties to be able to choose a South African court to assume jurisdiction over a dispute that might arise from the agreement between them, will be a testament to the standing of South Africa’s judicial and legal system in the international community.\textsuperscript{125}

From what is submitted above, South Africa should abandon the rule of attachment where consent is given by the parties to the jurisdiction of a South African court. This will reform the law to be on an international recognised standard. For this reason, it has been proposed by many authors such as Forsyth\textsuperscript{126} and Schulze\textsuperscript{127} that South Africa should adopt the Hague Convention on Choice of Court Agreements.\textsuperscript{128}

This movement in South African law to adopt the aforementioned convention is of high importance and will not only promote international business in Africa, but also rationalise the current legal framework of jurisdictional rules in South African law. However, it should be mentioned that private international law does not feature prominently on the schedule of legislature, which is not only a sombre song for business community in South Africa, but also to the whole business community in Africa.\textsuperscript{129} As previously mentioned, foreign trade is of crucial significance for the development in countries of Africa in the struggle to ultimately overcome poverty.

\textsuperscript{125} (n 117) 321 – 322.
\textsuperscript{126} Forsyth (n 10) 1.
\textsuperscript{128} The Hague Convention of 30 June 2005 on Choice of Court Agreements Available at http://www.hcch.net.
\textsuperscript{129} (n 117) 324.
4. THE HAGUE CHOICE OF COURT AGREEMENTS

Many authors have written on this topic and the endorsement it will provide for an environment for international trade to flourish in.\(^{130}\)

4.1. Background of the Hague Convention on Choice of Court Agreements

It was first noticed with the difficulties of enforcing foreign judgments abroad, that The Hague Conference on Private International Law initiated a project which is commonly referred to as the “Judgments Project”. The main objective of this project was to draft a convention that would deal with the challenges that are faced when enforcing foreign judgments.\(^{131}\)

However, the working group of the conference realised that the judgments project was perhaps too ambitious for its time. Although many viewed the Judgments Project as a failure, it was mainly responsible for the creation of the convention now known today as the convention that governs choice of court agreements. The working group applied a more narrow approach and limited the convention to only apply in civil and commercial matters.\(^{132}\) This basically means that the convention will ultimately only to business-to-business cases.\(^{133}\)

4.2. Scope and Objectives

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\(^{131}\) Schulze (n 127) 140.

\(^{132}\) Ibid.

\(^{133}\) A Schulze (n 127) 243.
The convention states its purpose in the preamble as follows:

“Desire to promote international trade and investment through enhanced judicial co-operation, believing that such co-operation can be enhanced by uniform rules on jurisdiction and on recognition and enforcement of foreign judgments in civil and commercial matters, believing that such enhanced co-operation requires in particular an international regime that provides certainty and ensures the effectiveness of exclusive choice of court agreements between parties to commercial transactions and that governs the recognition and enforcement of judgments resulting from proceedings based on such agreements”.

The scope as stated in article 1 of the Convention entails that it applies to exclusive choice of court agreements in civil and commercial matters in international cases. This means that it will govern the jurisdictional issues as well as the recognition and enforcement of a matter subject to the Convention. In article 2(1) it expressly excludes consumer and employment agreements from the scope of the convention. Further exclusions can be found in article 2(2) which consequently leads to the result that the Convention only applies to business-to-business cases. This emphasises that the Convention will only facilitate party autonomy via the choice of forum by the parties in matters that are not expressly excluded from the scope of the Convention.

The Convention further determines in article 4 that it only applies to international cases. A case will be recognised as international in terms of the convention if the parties to the choice of court agreement are in different contracting states. Article 4 also defines who is considered a resident of a contracting state.

It is important to note, that in order to obtain the widest scope possible for the Convention, that the definition of an international case is different in the

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135 Ibid.
136 Schulze (n 127) 248.
137 Schulze (n 127) 249.
138 Schulze (n 127) 250.
chapter on Jurisdiction to the chapter on recognition and enforcement. This is mainly contributed to the fact that the Convention does not want to interfere too much with the internal law of the relevant contracting states.\(^\text{139}\)

4.3. The Jurisdiction of the Court Chosen

The most central provision of the convention is found in article 5 which states:

“The court or courts of a Contracting State designated in an exclusive\(^\text{140}\) choice of court agreement shall have jurisdiction to decide a dispute to which the agreement applies, unless the agreement is null and void under the law of that State.”

The Convention contains three central rules which are addressed to different courts. First, the chosen court by the parties must hear the case if the choice of court agreement is valid according to the standards upheld by the Convention. Secondly, any court which is seized and located in a different state as the state of the court which the parties chose, must dismiss the case unless the choice of court agreement falls in the ambit of one of the exception of the Convention as listed in article 6. Lastly, any judgment given by a court of a contracting state that was chosen via a valid exclusive choice of court agreement must be recognised and enforced in other contracting states unless one of the exceptions established by the convention applies.\(^\text{141}\)

4.4. South Africa and the Hague Convention on Choice of Court Agreements

South Africa is a member country to the Hague Conference on Private International Law which was established in 1893.\(^\text{142}\) During 2005 South Africa

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\(^{139}\) Schulze (n 127) 254.
\(^{140}\) See article 3 of the Convention in respect of exclusivity (n 128) 278.
\(^{141}\) Schulze (n 127) 254.
was one of the states who participated in the negotiations of the Hague Convention on Choice of Court Agreements.\textsuperscript{143} To date, the convention has not yet entered into force but was ratified by Mexico, the European Union and the United States of America. The impact of the ratification by two major international trading unions is that the rest of the world will be soon on their heels to also ratify the Convention.

If South Africa ought to ratify the convention the provision and rules governing jurisdiction in respect of matters with an international element will change the domestic law of South Africa. This means that submission by \textit{peregrinus} parties to the jurisdiction of a South African court will be recognised as such. Ratification will have the effect that the jurisdictional rules regarding attachment, submission and the status of the plaintiff will have to be abandoned.\textsuperscript{144} This will affect both domestic and international rules in respect of jurisdiction.\textsuperscript{145} Consequently the incorporation of the Convention into South African law will allow peregrines to sue other peregrines in a South African court, if the defendant or respondent have validly submitted to the South African courts.\textsuperscript{146}

Jurisdictional clauses are common in international commercial cases and it is a prudent decision for the parties to make. The importance thereof should never be underestimated for it seeks to prescribe parties’ conduct by requiring them to settle disputes in a certain form.\textsuperscript{147}

The Convention seems to have a bright future ahead as it has been described as the litigation counterpart to the New York Arbitration Convention. It will allow to measure predictability of litigation outcomes which will have the desired effect to lower the risks associated with cross-border commerce. It establishes a

\textsuperscript{143} Forsyth \textit{Private International Law} (2012) 233.
\textsuperscript{144} Forsyth (n 143) 234.
\textsuperscript{145} \textit{Ibid}.
\textsuperscript{146} Forsyth (n 10) 12.
\textsuperscript{147} Schulze (n 127) 146.
high level of party autonomy that will meet the expectations of parties in international commercial transactions. Ultimately the value the Convention adds international trade lies within the creation of an environment which respects choice of court agreements.

Therefore the South African legislature is urged to incorporate Hague Convention on Choice of Court Agreements into the internal law of South Africa. It is suggested that the legislature follows the successful route of implementation Hague Convention on Choice of Court Agreements into South African law as it was done when the Convention on Child Abduction as well as the Apostille Convention was incorporated.

With reflection of the above there is no doubt that The Hague Convention on Choice of Court Agreements will have the same success for the global business community as what the Convention on Child Abduction has for the protection of children.

148 Schulze (n 127) 150.
149 Ibid.
5. INTERNATIONAL SUPPORT FOR THE HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS

The Conventions drafted by the Hague Conference undoubtedly play an important role in cross-border dispute resolution. The International Chamber of Commerce signalled its strong support for the convention on the choice of court agreements. The first statement made by the ICC was during October of 2007 where it stated that:

“Today the International Chamber of Commerce (ICC) began sending letters to Ministers of Justice around the world urging countries to join the Hague Convention on Choice of Court Agreements. The Convention is designed to reduce the time and expense courts and business face when dealing with international jurisdictional issues and enforcement of foreign court decisions. The Convention requires courts to respect agreements regarding choice of courts made in business-to-business contracts.”

During 2012 the ICC once again called on governments to facilitate cross-border litigation by becoming member to the Convention on Choice of Court Agreements.

The ICC reaffirmed its support for the Hague Choice of Court Convention and urges governments to bring it into force without further delay. Despite strong interest from various states, as well as the signature of both the EU and the US, the ratification of the convention has not progressed as swiftly as hoped, to the detriment of business. The Convention insures the effectiveness of choice of court agreements in international commercial transactions and secures the enforcement of foreign judgments rendered pursuant to those agreements. It therefore provides international commercial transactions with increased

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certainty and reduces the workload of courts and the expenses to business of long court battles over essentially procedural points, thereby contributing to a favourable climate for trade and investment.\textsuperscript{154}

Although the Convention still awaits a second ratification for it to enter into force, the European Union is in the final stages of preparation to become a party thereof.\textsuperscript{155}

It is already manifested in European law under Brussels I\textsuperscript{156} that party autonomy is of the highest importance in the jurisdictional sphere in relation to international business and commerce. The agreements between parties on the jurisdiction of a forum that must adjudicate a dispute will increase predictability of the outcome and reduce costs provided the luxury of a domestic court.\textsuperscript{157}

The Convention and Brussels both I have the common aims to promote international trade and investment. It was advocated that the provisions of the Brussels I Regulation should be aligned with those set out in the Convention.\textsuperscript{158}

Several important changes within the rules related to choice of court agreements have been introduced by the Recast of the Regulation. This had the effect that there were substantial changes not only to the specific article which

\begin{itemize}
  \item \textsuperscript{154} ICC calls on governments to facilitate cross-border litigation”, ICC Commission on Commercial Law and Practice, Paris, (29 November 2012) available at http://www.iccwbo.org/news/articles/2012/ICC.
  \item \textsuperscript{155} http://www.conflictoflaws.net/2014/the-eu-prepares-to-become-a-party/(11February 2014 ). The European Union announced during a press conference it has approved the Convention. The article published by the Hague Conference is available at http://www.hcch.net and reads as follows: “The Council Decision of 4 December 2014, on the approval, on behalf of the European Union, of the Hague Convention of 30 June 2005 on Choice of Court Agreements, has been published today (see OJ L 353). The President of the Council is authorised to designate the person(s) empowered to deposit the instrument of approval provided for in Article 27(4) of the Convention, which shall take place within one month of 5 June 2015. The date of entry into force for the Union of the Convention will be published in the Official Journal of the European Union by the General Secretariat of the Council.”.
  \item \textsuperscript{156} Regulation 44/2001 EC on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L12/1.
  \item \textsuperscript{158} Ratkovic and Rotar (n 157) 250.
\end{itemize}
dealt with choice of court agreements\textsuperscript{159}, but also a discussion of the substantial amendment of the obligations of courts subject to the rules of \textit{lis pendens}.\textsuperscript{160}

The most substantial changes that were introduced by the Recast are in respect of the previous article 23. Under the Recast the requirement that at least one of the parties should be domiciled in the European Union in order to consent to the jurisdiction of one of its courts, is abandoned. This will mean that a non-resident of the European Union will be able to consent to the jurisdiction of one of its courts without any further requirements.\textsuperscript{161} The changes introduced under the Recast are in line with the provisions of the Convention which is to give the fullest effect to choice of court agreements.\textsuperscript{162}

In a Second Economic Committee Plenary Meeting held by APEC\textsuperscript{163} it was recorded that APEC member countries are actively considering becoming members to the Convention for the benefit of cross-border trade and investment.

Although there is an endless range of questions that may arise in respect of cross-border situations it can without hesitation be submitted that there is immense support for the Hague Convention on Choice of Court Agreements subject to international and commercial matters.

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\textsuperscript{159} Article 23(2) was the specific article which dealt with choice of court agreements under Regulation 44/2001 EC on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001].
\textsuperscript{160} Ratkovic and Rotar (n 157) 267.
\textsuperscript{161} Ratkovic and Rotar (n 157) 267.
\textsuperscript{162} Ratkovic and Rotar (n 157) 267.
\textsuperscript{163} Asia-Pacific Economic Cooperation. The Meeting was held in Beijing, China on 17 – 18 August 2014. Minutes of the meeting is accessible at http://hcchasiapacificweek.org.
\end{flushright}
6. CONCLUDING REMARKS

To summarise the position of the jurisdictional grounds and rules of a court where a foreign element is involved, is as unclear as the current legislation provided in the Superior Courts Act 10 of 2013. Although the previous Section 19 of the Superior Courts Act of 1959 was strict and narrow, it was clear that a court will not assume jurisdiction over a matter where both parties are *peregrinus* if there is not attachment and a *ratio jurisdictionis*. There is no current case law available to determine if the courts in South Africa will still interpret submission or other factors as it did in *Hay Management Consultants (Pty) Ltd v P3 Management Consultants (Pty) Ltd.*\(^{164}\) It is therefore crucial for South Africa to become a member of the Hague Convention on Choice of Court Agreements which will be a great benefit to trade and economic development. As previously suggested, the Convention may be incorporated into South African domestic law as it was done with the Convention on Child Abduction or the Apostille Convention.\(^{165}\)

Currently the rate of international transactions is globally increasing at a pace hard to keep up with. Although this growth is desperately needed, it may lead to risks for those stakeholders involved in the transactions. This highlights the potential cost of protecting foreign investment.\(^{166}\) South Africa is in desperate need to reform its domestic law in form of the Superior Courts Act\(^{167}\) by incorporating the Hague Convention on Choice of Court Agreements into it as soon as possible. Incorporation of the Hague Convention on Choice of Court Agreements into the Superior Courts Act\(^{168}\) will breach the gap of divergence between the rules of jurisdiction in international matters. Reform is not only necessary for South Africa but for the whole region of southern Africa.\(^{169}\)

It seems to be a small step to ratify and incorporate the Convention on Choice of Court Agreements in the domestic law of South Africa, but soon enough it

\(^{164}\) 2005 (2) SA 522 (A).
\(^{165}\) (n 142).
\(^{166}\) http://www.hcch.net/Dutch-Russian-Seminar-on-Legal-Co-operation. (6 March 2013).
\(^{167}\) 10 of 2013.
\(^{168}\) 10 of 2013.
\(^{169}\) Forsyth (n 10) 12.
will become a milestone for rules relating to jurisdiction not only in South Africa, but across the continent.
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