# THE POSSIBLE IMPACT OF THE HAGUE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN CIVIL OR COMMERCIAL MATTERS ON PRIVATE INTERNATIONAL LAW IN COMMON-LAW WEST AFRICA

by

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# PART I

# INTRODUCTION

## 1.1 Background

In recent times, there is an astronomical increase in international transaction and commerce.[1] This has brought about a corresponding increase in transnational litigation.[2] However, the effectiveness of a court's judgment is territorially constrained.[3] Judgments from a State do not have direct impact outside its jurisdiction due to territorial sovereignty.[4] Such a judgment must get the approval of the courts within the State of enforcement.[5] In addition to the territorial principle,[6] legal systems that recognize foreign judgments do so based on principles such as reciprocity, or comity, the doctrine of obligation and the theory of vested rights.[7] There are even some countries that do not respect foreign judgments.[8]

However, due to worldwide economic integration and globalization, there is the need for international judicial cooperation.[9] The facilitation of international commerce,[10] enhancement of

[1] See generally Friedman *The Changing Structure of International Law* (1978); and Domke and Glossner "The Present State of the Law Regarding International Commercial Arbitration*"* in Bos (ed) *The Present State Of International Law* **(**1973).

[2] McLachlan "International Litigation and the Reworking of the Conflict of Laws" 2004 *Law Quarterly Review* 580 580–582.

[3] Oppong *Private International Law in Commonwealth Africa* (2013) 313.

[4] Schulze *On Jurisdiction and the Recognition and Enforcement of Foreign Money Judgments* (2005) 16; and Brownlie *Principles of Public International Law* (1998) 289.

[5] Oppong (n 3) 313.

[6] See the case of *Companie Naviera Vascongado v S.S.Cristina* 1938 AC 485 at par 496-497 where Lord Macmillan describes the territorial principle as an important attribute of State sovereignty.

[7] Oppong (n 3) 316; and Roodt *"*Recognition and enforcement of foreign judgments: still a Hobson's choice among competing theories?" 2005 *CILSA* 15 17.

[8] Martinek "The principle of reciprocity in the recognition and enforcement of foreign judgments — history, presence and ... no future" 2017 *TSAR* 36.

[9] Fagbayibo "Towards the harmonization of laws in Africa: is OHADA the way to go?" 2009 *CILSA* 309 310.

[10] Neels "Preliminary remarks on the Draft Model Law on the Recognition and Enforcement of Judgments in the Commonwealth" 2017 *TSAR* 1 2 (special edition).

international relations and enlightened social values necessitate that a foreign judgment is recognized and enforced.[11]

To facilitate this process, there are national, bilateral,[12] and regional[13] regimes to govern it.[14] Internationally, earlier attempts [15] were made in the 20th century to have a worldwide enforcement convention, but they were without success.[16] The premier example of success at the global level is the New York Convention,[17] but it deals with the enforcement of foreign arbitral awards. [18] Despite the earlier failures in relation to an enforcement of foreign judgments convention, significant breakthrough was made with the entering into force of the 1971 Hague Convention on the Recognition and Enforcement of Foreign judgments in Civil and Commercial Matters.[19] Only five States[20] signed and ratified, and it never became operational.[21]

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[11] Forsyth *Private International Law: The Modern Roman-Dutch Law including the Jurisdiction of the High Courts* (2012) 417.

[12] Example is the Australia-New Zealand Treaty on Trans-Tasman Court Proceedings and Regulatory Enforcement, 2008 between New Zealand and Australia and; and Canada-United Kingdom Civil and Commercial Judgments Convention Act, R.S.C. 1985 between Canada and UK.

[13] Europe: Regulation (EU) No 1215/2012 of The European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters [the Brussels Recast] replaced the Brussels Convention and Lugano Convention on Jurisdiction and Recognition and Enforcement of Judgments in Civil and Commercial Matters; Organization of American States (OAS): the 1984 Inter-American Convention on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgments (Montevideo Convention); and Middle East: the 1952 Agreement as to the Execution of Judgments (Arab League Judgments Convention); 1983 Arab Convention on Judicial Co-operation (Riyadh Convention); and 1995 Protocol on the Enforcement of Judgments Letters Rogatory, and Judicial Notices issued by the Courts of the Member States of the Arab Gulf Co-operation Council ('GCC Protocol').

[14] Overview of the Judgments Project (https://www.hcch.net/en/projects/legislative-projects/judgments (5-6-2019)).

[15] Examples are the Convention on the Jurisdiction of the Selected Forum in the Case of International Sales of Goods (1958) followed by 1965 Convention on the Choice of Court.

[16] Michaels "Recognition and enforcement of foreign judgments" in *Max Plank Encyclopaedia of Public International Law* (2009) 4.

[17] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral awards, 30 June 1958 (http://www.newyorkconvention.org/ (10-6-2019)).

[18] Mumba "The Recognition and Enforcement of Foreign Judgments in Malawi" (2014 dissertation UJ).

[19] Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, 1 February 1971 (1971) 1144 UNTS 249.

In recent times, the necessity to improve measures within the Commonwealth has led the Commonwealth Secretariat to embark on a project for a Commonwealth Model Law on the Recognition and Enforcement of Judgments, which is still in its draft form.[22] The Hague Conference has been relentless in its effort to enact a convention for the recognition and enforcement of foreign judgments.[23] This perseverance has culminated into the 2019 Hague Convention on Recognition and Enforcement of Foreign Judgments (2019 Hague Convention), adopted recently on 2 July, 2019.[24]

### 1.2 Legal and economic context of the paper

The economic development of Africa in recent decades has not gone unremarked upon with intra Africa trade, and trade between African countries and other major trading blocs, such as the European Union, Asia, and especially China and the United States of America.[25] Involvement in international trade impacts positively on the economic growth rates of developing countries, which in turn has a multiplier effect, including rising incomes, poverty level reduction and closing the gap with more advanced countries.[26] According to the 2019 West African Economic Outlook, in 2018, estimated real GDP growth for West Africa was 3.3 percent, up from 2.7 percent in 2017 and the main drivers for this growth were positive net exports, investments, government consumption and household consumption.[27] It is estimated that by 2020, the continent's GDP will reach US$2.6 trillion, and consumer spending is projected to reach US$1.4



[20] Kuwait, The Netherlands, Albania, Portugal and Cyprus.

[21] Zeynalova "The Law on Recognition and Enforcement of Foreign Judgments: Is It Broken and How Do We Fix It?" 2013 *Berkeley Journal of International Law* 150 182.

[22] Commonwealth Secretariat "Improving the recognition of foreign judgments: model law on the recognition and enforcement of foreign judgments" 2017 *Commonwealth Law Bulletin* 545 545-546; and Neels (n 10) 2.

[23] Brand "The circulation of judgments under the draft Hague Judgments convention" 2019 (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3334647 (11-6-2019)).

[24] It's done: the 2019 HCCH Judgments Convention has been adopted! (https://www.hcch.net (4-7-2019)).

[25] Moran and Kennedy *Commercial Litigation in Anglophone Africa: the law relating to civil jurisdiction, enforcement of foreign judgments and interim remedies* (2018) vii.

[26] See generally Dollar and Kraay *Trade, Growth, and Poverty* (2001).

[27] African Development Bank *West Africa economic outlook 2019* (2019) 9.

trillion.[28] With increased in intra- and extra-continental trade, as well as increase in consumption in the west-African sub-region, it is inevitable that commercial disputes will increase and a number of these disputes will possess cross-border characteristics. In respect of the commercial transactions between foreigners and their counterparts from Africa, litigation or arbitration of disputes take place in a forum in a developed country.[29] Eventually, judgments obtained in these developed countries would have to be enforced in the countries under study. Currently, the legal regime for recognizing and enforcing foreign judgments in the countries under study is largely premised on the English common law,[30] which defines the foreign court's international competence in a narrow way and which does not meet the expectation of the modern commercial world.[31] It is in this regard that this paper seeks to analyse the possible impact of the 2019 Hague Convention on the grounds of international competence of foreign courts recognized in the countries under study.

### 1.3 Objective/aim

The objective of this dissertation is to ascertain the possible impact of the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters on Private International Law in common-law West Africa. Its aim is to determine the extent to which the grounds of international competence of foreign courts outlined in the Hague Convention will impact the foreign court's grounds of international competence in common-law West Africa if the countries under study become Contracting States.

### 1.4 Limitation/scope

Recognition and enforcement of foreign judgments is a broad area and covers many aspects. Thus, this paper will be limited to the impact of the 2019 Hague convention on the grounds for international competence of foreign courts recognized in common-law West Africa.

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[28] African Development Bank *Africa Economic Outlook 2012* (2012).

[29] Fondufe and Mansuri "Doing Deals in Africa – Reflections on What Is Different and What Is Not" 2013 *Business Law International* 163 176–82.

[30] which will be seen in the discussion in Part IV of the work.

[31] Arzandeh "Reformulating the commonlaw rules on the recognition and enforcement of foreign judgments" 2019 *Legal Studies* 56 58.

Further, the analysis will be limited to the four common-law West African states: Nigeria, Sierra Leone, Ghana and The Gambia (hereinafter referred to as "countries under study"), which are all former colonies of Great Britain.[32] They are all member States of ECOWAS.[33] A notable omission is Cameroon. Although Cameroon joined the Commonwealth of Nations in November 1995,[34] its legal system is of bi-jural nature,[35] as a result of its colonial heritage.[36] Eight of the 10 regions in Cameroon have a civil-law system[37] and the remaining two regions[38] have a common-law system.[39] This has resulted in several inconveniences.[40] Historically and politically, Cameroon has ties with West Africa,[41] nevertheless, geographically, Cameroon is considered to be located in Central Africa and it is not a member of ECOWAS.[42] For these reasons, it was excluded.[43]

ECOWAS was established on the 28th of May 1975, and it currently has a membership of fifteen States of the West African sub-region.[44] The initial objective of forming ECOWAS was to

[32] Daniels *English law in West Africa: The limits of its application* (2017) ii.

[33] Economic Community of West African States (https://www.ecowas.int/member-states/ (5-6-2019)

[34] Pondi "Cameroon and the Commonwealth of nations" 1997 *The Round Table* 563.

[35] That is common-law and civil-law.

[36] Ngwafor "Cameroon: The Law across the Bridge: Twenty Years (1972-1992) of Confusion" 1995 *Revue générale de droit* 69 70. Cameroon was colonized by Germany, Britain and France.

[37] The eight regions are: Sud, Adamaoua, Extrême-Nord, Ouest, Est, Littoral, Centre and Nord.

[38] South-West and North-west are the English speaking regions.

[39] Ngwe "Cameroon" in *Guide to dispute resolution in Africa: a multi-jurisdictional review* (2016) 50.

[40] Ngwafor (n 36) 70.

[41] See Mancuso "The New African Law: Beyond the Difference Between Common Law and Civil Law" 2008 *Annual Survey of International and Comparative Law* 39-60.

[42] Akum and Donnenfeld "Gathering storm clouds: Political and economic uncertainty in Central Africa" 2017 *Central African Report* 1 2-3; and Fontebo *Prison conditions in Cameroon: the narratives of female inmates* (2013 dissertation US).

[43] Also, authors that have done work on commonwealth countries did not include Cameroon in their analysis. See McClean *Recognition of Family Judgments in the Commonwealth* (1983); Patchett *Recognition of Commercial Judgments and Awards in the Commonwealth* (1984); Read *Recognition and Enforcement of Foreign Judgments in the Common Law Units of the British Commonwealth* (1938) and Black *Foreign Currency Claims in the Conflict of Laws* (2010).

[44] Namely: Benin, Burkina Faso, Cape Verde, Cote D'ivoire, Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone and Togo. See (https://www.ecowas.int/member-states/(30-9-2019)).

achieve economic integration and development so as to form a unified economic zone in West Africa.[45] Later on, the scope was widened to include political and security issues.[46] In 1993, ECOWAS revised its Treaty to introduce among other measures, the principle of supra-nationality concerning the application of its decisions.[47] Although the revised ECOWAS treaty makes provisions for its members to conclude treaties regarding recognition and enforcement of foreign judgments,[48] however, at the moment, no treaty of such kind has been concluded by the countries.[49]

## 1.5 Organisation of work

### 1.5.1 Part II

This part will briefly differentiate the key terms of the study, which are "recognition" and "enforcement" of "foreign judgments". Also, since grounds of international competence of foreign courts are very essential to this study, the "principle of international competence" will be discussed.

### 1.5.2 Part III

This part will commence with a discussion of the Judgment Project of the Hague Conference on Private International Law. This part will continue with a summary of the 2019 Hague Convention and outlining the grounds for international competence of foreign courts as provided by the Hague Convention. It will end with criticisms leveled against it.



[45] n 44.

[46] Komla *Economic Community of West African States Regional Integration Process: A study of the new regionalism phenomenon in Africa* (2007 dissertation LU).

[47] Komla (n 46).

[48] ECOWAS Revised Treaty establishing the Economic Community of West African States, 24 July 1993, 35 ILM 660; art 57(1).

[49] Oppong (n 3) 313.

### 1.5.3 Part IV

This part will be allocated to the four common-law West African countries: Ghana, Nigeria, Sierra Leone and The Gambia. The legal framework for recognition and enforcement of foreign judgments in all these four countries will be discussed with focus on the grounds for international competence of foreign courts as found in their legal framework. This part will end with observations made from the legal framework of the four countries and a discussion of the problems with the current grounds.

### 1.5.4 Part V

This part constitutes the gravamen of the work as it entails the possible impact of the 2019 Hague Convention on the grounds for international jurisdiction in the countries under study if they become Contracting States. This will be done by a discussion of the potential changes that the provisions in the Hague Convention will bring to the grounds of international competence of foreign courts in common-law West Africa.

### 1.5.5 Part VI

This part concludes the work with recommendation and general closing remarks.

## PART II

## THEORETICAL BASIS FOR RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS

### 2.1 Definition of key concepts

"Foreign judgment" refers to a judicial verdict given by a competent adjudicating body outside the geographical boundaries of a State.[50] Recognition and enforcement of foreign judgments are related terms, although different.[51]

"Recognition" implies the enforcing court seized accepts that the foreign judgment has the same legal effect anticipated by the original court.[52] According to Dickinson and Lein, recognition is the process by which the effectiveness and authority of a judgment are permitted to be relied upon in the legal order of a country other than the original country where the judgment was rendered.[53] However, enforcement of foreign judgment means that the domestic court will compel the judgment debtor to comply with the foreign judgment which the domestic court has recognized.[54] The enforcement process is often left municipal law and it differs vastly among countries.[55] While recognition is always indispensable for enforcement,[56] however, judgments such as a declaratory order would be recognized but won't be enforced.[57]



[50] Rossouw *The Harmonisation of Rules on the Recognition and Enforcement of Foreign judgments in the Southern African Customs Union* (2016) 10.

[51] Plato and Horton *Enforcements of Judgments Worldwide* (1993) 155; and Collins (ed) *Dicey, Morris and Collins on the Conflict of Laws* (2012) par 14-002-14-006.

[52] Schulze (n.4) 17.

[53] Dickinson and Lein *The Brussels I Regulation Recast* (2015) 375.

[54] Schulze (n 4) 17.

[55] Michaels (n 16) 2. This is the same position per art 15 of the 2019 Hague Convention which provides that: "Subject to article 6, this Convention does not prevent the recognition or enforcement of judgments under national law".

[56] Schulze "Practical problems regarding the Enforcement of Foreign Money Judgments" 2005 *SA Merc LJ* 125 126.

[57] Silberberg *The Recognition and Enforcement of Foreign Judgments in South Africa* (1977) 6. See also Spiro *Conflict of Laws* (1973) 208; and Wolff *Private International Law* (1950) 251.

## 2.2 Principle of international competence

At common law, it is an essential prerequisite for the enforcement of foreign judgments that the foreign court should have been capable to adjudicate the case from the perspective of the private international law rules of the requested State.[58] This is often referred to as "international competence".[59]

At the moment, submission, residence, and more controversially, presence[60] in the foreign court's jurisdiction are the accepted bases of international competence in Commonwealth Africa.[61] Even though the common-law grounds continue to dominate the determination of the international competence of the foreign courts, statutory provisions[62] have been made in several jurisdictions to provide the grounds for determining the international competence of the foreign court.[63]

Solely relying on residence, submission and, perhaps, mere presence as bases of international competence is seen as restrictive in nature,[64] thus the need for new grounds to be added. This is

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[58] Oppong (n 3) 322

[59] Dicey, Morris and Collins (n 51) par 14R-020; Briggs *Civil Jurisdiction and Judgments* (2015) 691; and Hill and Chong *International Commercial Disputes: Commercial Conflict of Laws in English Courts* (2010) par 12.2.1.

[60] According to Forsyth, in the current world where international travel is widespread, presence is almost an arbitrary ground of jurisdiction and does not ensure any link between the judgment debtor and the court or the court and the dispute, thus not guaranteeing effectiveness. See Forsyth (n 11) 430. Overall, writers have been critical of "mere presence" being considered as a ground of international competence. See Xaba "Presence as a basis for the recognition and enforcement of foreign judgment sounding in money: The "real and substantial connection" test considered" 2015 *Obiter* 121-135; Briggs "Recognition of foreign judgments: A matter of Obligation" 2013 *The Law Quarterly Review* 87 91; Oppong "Mere Presence and International Competence in Private International Law" 2007 *Journal of Private International Law* 321; Schulze "International Jurisdiction in Claims Sounding in Money: Is *Richman v Ben-Tovim* the Last Word?" 2008 *SA Merc LJ* 61 and Eiselen "International Jurisdiction in Claims Sounding in Money" 2006 *SA Merc LJ* 45.

[61] Oppong "Recognition and Enforcement of Foreign Judgments in Commonwealth African countries" 2014 *Yearbook of Private International Law* 365 373; Briggs (n 59) 692; *Adams v Cape Industries* CA [1990] Ch 433; [1990] 2 WLR 657 and *Richman v Ben-Tovim* [2006] SCA 148; 2007 (2) S.A.L.R [SA] 283.

[62] which generally overlaps with rather than replacing the common law.

[63] Forsyth (n 11) 420.

[64] Arzandeh (n 31) 58; and Briggs "Crossing the River by Feeling the Stones: Rethinking the Law on Foreign Judgments" 2004 *Singapore Year Book of International Law* 1.

crucial in the light of the current upsurge in international trade, transnational relationships and movement of persons.[65] Some countries have debated the necessity of accepting other bases of international competence such as attachment of property, domicile, doing business in the foreign country, and nationality.[66] Canadian courts have adopted a "real and substantial connection"[67] as an additional basis of international competence.[68] In the Canadian case of *Chevron Corporation v Yaiguaje*,[69] the Supreme Court held that to recognize and enforce a foreign judgment in Ontario, the sole requirement is for the foreign court to have had a "real and substantial connection" with the subject matter or parties to the dispute.[70] Fawcett, Carruthers and North have opined that "there is much to be said for adopting the real and substantial connection test".[71] In South Africa, an attempt to invoke the 'real and substantial connection' test in the case of *Supercat Incorporated v Two Oceans Marine*[72] was an exercise in futility.[73]

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[65] Oppong (n 60) 374.

[66] Tilbury, Davis and Opeskin *Conflict of Laws in Australia (2002)* 209–210; South African Law Reform Commission "Consolidated Legislation Relating to International Cooperation in Civil Matters" (Project 121 Discussion Paper 106), 37–45; and Fawcett, Carruthers and North *Cheshire, North and Fawcett's Private International Law* (2008) 527–531.

[67] The test of "real and substantial connection" was enunciated in the case of *Morguard Investments Ltd v De Savoye* [1990] 3 S.C.R. 1077.

[68] *Club Resorts Ltd v Van Breda* 2012 S.C.C 17; *Beals v Saldanha* [2003] 3 S.C.R. 416; *Haaretz.com v Goldhar* 2018 SCC 28; and *Morguard Investments Ltd v De Savoye* [1990] 3 S.C.R. 1077. See generally Black "Simplifying court jurisdiction in Canada" 2012 *Journal of Private International Law* 411; and Blom and Edinger "The Chimera of the Real and Substantial Connection Test" 2005 *University of British Columbia Law Review* 373.

[69] 2015 SCC 42.

[70] 2015 SCC 42; par 85. See also the case of *Barer v Knight Brothers LLC* 2019 SCC 13.

[71] Fawcett, Carruthers and North (n 66) 531.

[72] 2001 (4) S.A. 27.

[73] Forsyth has argued that in South Africa, such a test "devoid of precise meaning, simply provides a veil for judicial discretion", and "is not therefore supported as a ground for international competence". See Forsyth (n 11) 408.
In *Supercat Incorporated v Two Oceans Marine* case, the plaintiff sought enforcement of a Florida judgment against the defendant South African company. The Florida court assumed jurisdiction on the basis that the tort involved fraud, and had been committed within its jurisdiction. At the time of the action the defendant was neither resident nor domiciled in Florida. However, appearance had been entered and the jurisdiction of the court denied.
It was held that the Florida court was not internationally competent under South African law. Counsel for the plaintiff referred to Canadian cases relating to the "real and substantial connection test". Counsel argued that the

There is the need for courts in the Commonwealth to expand the basis of international competence.[74] An expansion of the recognized grounds of international competence has the benefit of bringing within the scope many foreign judgments which at the moment do not meet the existing threshold of international competence.[75]



traditional approach to the recognition of foreign judgments has been rendered obsolete by the exigencies of international trade, and called for a new approach. The judge found the Canadian cases "informative" but felt "not inclined or, sitting as a single judge, entitled to ignore the considerable weight of judicial authority in this country".

[74] It was stated in *Richman v Ben-Tovim* 2007 (2) S.A.L.R [SA] 283 at par 9: "there are compelling reasons why . . . in this modern age, traditional grounds of international competence should be extended, within reason, to cater for itinerant international businessmen. In addition it is now well established that the exigencies of international trade and commerce require that final foreign judgments be recognized as far as is reasonably possible in our courts and effect be given thereto."

[75] Oppong (n 61) 374.

## PART III
## THE HAGUE JUDGMENTS PROJECT

### 3.1 Overview

The Hague Conference on Private International Law (the Hague Conference) is an inter-governmental organization[76] established inter alia to progressively unify private international law rules.[77] The "Judgments Project" is one of the most significant projects of the Hague Conference.[78] It deals with the task of the Hague Conference in harmonizing the rules on the international jurisdiction of the courts as well as enforcement and recognition of foreign judgments in transnational cases of commercial and civil issues.[79] The Hague Conference concluded its first multilateral international judgments convention in 1971, but this Convention was not widely accepted,[80] thus it did not enter into force. A reason proffered for the debacle of the 1971 Hague Convention was its inability to tackle the issue of jurisdiction.[81] The Kessedjian Report juxtaposes the relative triumph of the Lugano[82] and Brussels Conventions[83] against the

[76] It is made up of 83 members comprising one regional economic organisation and 82 countries. See Hague Conference Parties (https://www.hcch.net/index_en.php?act=states.listing (5-6-2019)).

[77] Statute of the Hague Conference on Private International Law, Oct. 31, 1951 (1951) 220 U.N.T.S. 121; Hague Conference on Private International Law "Overview of the Judgments Project" (https://www.hcch.net/en/projects/legislative-projects/judgments (5-6-2019)) 1; Khanderia "The Hague judgments project: assessing its plausible benefits for the development of the Indian private international law" 2019 *Commonwealth Law Bulletin* 1 1-2; and Lith *International Jurisdiction and Commercial Litigation: uniform rules for contract disputes* (2009) 14.

[78] Rossouw (n 50) 47.

[79] Garcimatin and Saumier *Judgments Convention: Revised Draft Explanatory Report Preliminary Document No. 1* (2018) par 2; Regan "Recognition and Enforcement of Foreign Judgments – A Second Attempt in the Hague" 2015 *Richmond Journal of Global Law and Business* 63 64; and Khanderia (n 77) 3.

[80] Rossouw (n 50) 48.

[81] Oestreicher "We're on a road to nowhere – Reasons for the continuing failure to regulate recognition and enforcement of foreign judgments" 2008*The International Lawyer* 61 145; and Kessedjian "*The Permanent Bureau, Hague Conference on Private International Law: Preliminary Document No 7 – International Jurisdiction and Foreign Judgments in Civil and Commercial Matters"* (1997) 8 (https://www.assets.hcch.net/docs/76852ce3-a967-42e4-94f5-24be4289d1e5.pdf (7-6-2019)).

[82] Lugano Convention (n 13).

failure of the 1971 Hague Convention, and posits that the first two treaties[84] are double conventions in the sense that they basically govern both the direct jurisdiction of courts in the matters with which they adjudicate, as well as the recognition and enforcement arising from the resulting judgment; and that recognition and enforcement are just the natural extension of such jurisdiction.[85] However, the 1971 Convention sought only to regulate recognition and enforcement, without first regulating when the courts giving the judgment would have jurisdiction.[86] Also, the 1971 Convention required that each of the Contracting States[87] had to negotiate a supplementary agreement with the other contracting State.[88] This "method of bilateralisation"[89] is regarded as a major obstacle that prevented States from ratifying and signing the 1971 Hague Convention.[90]

### 3.2 Judgments project revisited

In 1992, there was a renewed interest in negotiating an international judgments Convention, which was largely due to the initiative of United States of America (USA).[91] At the beginning of 1993, negotiations were started at the Hague Conference in a quest to enact a treaty on jurisdiction and the recognition and enforcement of judgments.[92] Negotiations that were conducted from 1996 to 2001 led to the 1999 Preliminary Draft Convention on Jurisdiction and



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[83] Brussels I recast (n 13).

[84] That is the Lugano and Brussels Convention.

[85] Kessedjian (n 80) 8.

[86] Rossouw (n 50) 141.

[87] Kuwait, The Netherlands, Albania, Portugal and Cyprus.

[88] 1971 Hague Convention (n 19) art 21 which provides that: "Decisions rendered in a Contracting State shall not be recognized or enforced in another Contracting State in accordance with the provisions of the preceding articles unless the two States, being Parties to this Convention, have concluded a Supplementary Agreement to this effect."

[89] Rossouw (n 50) 140.

[90] Kessedjian (n 81) 8.

[91] Schulze "The 2005 Hague Choice of Court Agreements" 2007 *SA Merc LJ*140; and Clermont "An introduction to the Hague Convention" in Barcelo and Clermont (eds) *A Global Law of Jurisdiction and Judgments: Lessons from the Hague* (2002) 3 5.

[92] Schulze (n 91) 140; and Woestehoff *The drafting process for a Hague Convention on jurisdiction and judgments with special consideration of intellectual property and ecommerce* (2005 thesis US).

Foreign Judgments in Civil and Commercial Matters,[93] and the 2001 Interim Text.[94] However, as a result of dissensus on both instruments,[95] the Hague Conference decided in 2003 to narrow it to matters of jurisdiction dealing with choice of court agreements and the recognition and enforcement of judgments given by the chosen court.[96] This resulted in the conclusion of the Hague Convention on Choice of Court Agreements in 2005.[97]

In 2011, the Council on General Affairs and Policy of the Hague Conference agreed for an Experts Group to be formed to appraise the probable advantages of recommencing the Judgments Project.[98] A Working Group was established *inter alia* to prepare proposals for enforcement and recognition of foreign judgment.[99] The Working Group completed its work in 2016, and a Special Commission was created to draft the Convention.[100] The Special Commission held its final Meeting from 24th to 28th May 2018 and came up with the 2018 draft Convention.[101] The Special Commission deemed that the draft Convention had reached the stage where a Diplomatic Session can be held.[102] Thus, the 22nd Diplomatic Session was held at the Peace Palace from 18th June to 2nd July, 2019 to adopt the Convention.

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[93] see Nygh and Pocar "Report on the preliminary draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial matters" *Preliminary Document No 11 of August 2000* (https://www.hcch.net/index_en.php?act=publications.details&pid=3497&dtid=35(10-6-2019)); and Rossouw (n 50) 50.

[94] 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"(https://www.hcch.net/upload/wop/jdgm2001draft_e.pdf (10-6-2019)).

[95] Khanderia (n 77) 4; and Bennett "The Hague Convention on Recognition and Enforcement of Foreign Judgments – A Failure of Characterisation" in *Intercontinental Cooperation through Private International Law: Essays in Memory of Peter E. Nygh* (2004) 19 20.

[96] Lith (n 76) 16; Rossouw (n 50) 51; Brand "Introductory Note to the 2005 Hague Convention on Choice of Court Agreements" 2005 *International Legal Materials* 1291; and Schulze (n 90) 150.

[97] Hague Conference on Private International Law Convention on Choice of Court Agreements, 30 June 2005, 44 ILM 1294; and Khanderia (n 77) 4.

[98] The Judgments Project (http://www.hcch.net/en/projects/legislative-projects/judgments/overview-judgments (13-4-2019)).

[99] The Judgments Project (n 98).

[100] The Judgments Project (n 98).

[101] The Judgments Project (n 98).

[102] The Judgments Project (n 98).

### 3.3 Overview: 2019 Hague Convention

The Convention is applicable to the recognition and enforcement of foreign judgments of a commercial or civil nature among Contracting Parties.[103] The Convention excludes matters of revenue, customs, or other administrative nature. It also excludes arbitration, status and legal capacity, wills and succession.[104] Further, it offers certain fundamental precepts concerning the working of the Convention: Among Contracting States, foreign judgments from other Contracting States shall not be reviewed on its merits;[105] it provides the basis for recognition and enforcement and the basis for refusal of foreign judgment;[106] and the Convention allows the recognition or enforcement of judgments pursuant to municipal law, subject to article 6.[107] To end with, the Convention sets out general and final clauses, per articles 18 to 26 and also 27 to 34.

The Convention introduces the terms "court of origin" and a "requested court".[108] The "court of origin" is the court in a Contracting State (State of origin) that renders the original judgment. The "requested court" is the court in the other Contracting State (requested State) that is being asked to enforce the judgment given by the "court of origin". For instance, Australia and South Africa become Contracting Parties to the Convention. A judgment is rendered in Australia and plaintiff seeks to enforce the judgment in South Africa. In this scenario, the court in Australia that rendered the judgment is the "court of origin" and Australia is the State of origin. The South African court seised with the matter for enforcement is the "requested court" and South Africa is the "requested State".



[103] art 1.

[104] art 2.

[105] art 4.

[106] art 5-7.

[107] art 15.

[108] art 4.

### 3.4 Grounds for international competence under the 2019 Hague Convention

An essential provision of the 2019 Hague Convention is article 5,[109] as it delineates the jurisdictional filters for the purposes of recognition and enforcement of judgments from Contracting States.[110] The grounds or jurisdictional filters provided for in Article 5 are exhaustive for the purpose of recognition and enforcement of foreign judgment under the Convention.[111]

Per article 5, the court of origin will be regarded to be internationally competent "if one of the following requirements is met –

a. the person against whom recognition or enforcement is sought was habitually resident in the State of origin at the time that person became a party to the proceedings in the court of origin;
b. the natural person against whom recognition or enforcement is sought had their principal place of business in the State of origin at the time that person became a party to the proceedings in the court of origin and the claim on which the judgment is based arose out of the activities of that business;
c. the person against whom recognition or enforcement is sought is the person that brought the claim, other than a counterclaim, on which the judgment is based;
d. the defendant maintained a branch, agency, or other establishment without separate legal personality in the State of origin at the time that person became a party to the proceedings in the court of origin, and the claim on which the judgment is based arose out of the activities of that branch, agency, or establishment;
e. the defendant expressly consented to the jurisdiction of the court of origin in the course of the proceedings in which the judgment was given;
f. the defendant argued on the merits before the court of origin without contesting jurisdiction within the timeframe provided in the law of the State of origin, unless it is evident that an objection to jurisdiction or to the exercise of jurisdiction would not have succeeded under that law;

[109] Garcimatin and Saumier (n 79) par 143.

[110] Garcimatin and Saumier (n 79) par 143; and Khanderia (n 77) 9.

[111] Garcimatin and Saumier (n 79) par 143.

g. the judgment ruled on a contractual obligation and it was given by a court of the State in which performance of that obligation took place, or should have taken place, in accordance with

   (i) the agreement of the parties, or

   (ii) the law applicable to the contract, in the absence of an agreed place of performance,

   unless the activities of the defendant in relation to the transaction clearly did not constitute a purposeful and substantial connection to that State;

h. the judgment ruled on a lease of immovable property (tenancy) and it was given by a court of the State in which the property is situated;

i. the judgment ruled against the defendant on a contractual obligation secured by a right *in rem* in immovable property located in the State of origin, if the contractual claim was brought together with a claim against the same defendant relating to that right *in rem*;

j. the judgment ruled on a non-contractual obligation arising from death, physical injury, damage to or loss of tangible property, and the act or omission directly causing such harm occurred in the State of origin, irrespective of where that harm occurred;

k. the judgment concerns the validity, construction, effects, administration or variation of a trust created voluntarily and evidenced in writing, and –

   (i) at the time the proceedings were instituted, the State of origin was designated in the trust instrument as a State in the courts of which disputes about such matters are to be determined; or

   (ii) at the time the proceedings were instituted, the State of origin was expressly or impliedly designated in the trust instrument as the State in which the principal place of administration of the trust is situated.

   This sub-paragraph only applies to judgments regarding internal aspects of a trust between persons who are or were within the trust relationship;

l. the judgment ruled on a counterclaim –

   (i) to the extent that it was in favour of the counterclaimant, provided that the counterclaim arose out of the same transaction or occurrence as the claim; or

   (ii) to the extent that it was against the counterclaimant, unless the law of the State of origin required the counterclaim to be filed in order to avoid preclusion;

m. the judgment was given by a court designated in an agreement concluded or documented in writing or by any other means of communication which renders information accessible so as to be usable for subsequent reference, other than an exclusive choice of court agreement".[112]

Per article 6, a judgment which concerns rights *in rem* in immovable property which is situated in the State of origin[113] shall be entitled to be recognized and enforced under the Convention.[114] The jurisdictional filters of residence and submission found in the 2019 Hague Convention are fully accepted under the legal regime of the countries under study.[115] However, the remaining grounds, which "generally reflect an international consensus",[116] are nevertheless novel for these legal systems.

### 3.5 Critique of the 2019 Hague Convention

Brand asserts that the merits of the exhaustive nature of article 5(1) also bring corresponding disadvantages.[117] He explains that the jurisdictional filters delineated in article 5 are premised on present occurrences. However, due to the dynamic nature of international trade, as well as rapid advancement in technology, very soon many grounds of international competence may be adopted which are not present in the convention at the moment and some of the grounds may also become obsolete.[118] He also adds that with time, predictability which is seen as a hallmark of the Convention will wane through the interpretational role afforded to national courts and its associated "homeward trend," which is apparent in other conventions which stipulate "uniform

[112] "exclusive choice of agreement" means "an agreement concluded by two or more parties that designates, for the purposes of deciding disputes which have arisen or may arise in connection with a particular legal relationship, the courts of one State or one or more specific courts of one State to the exclusion of the jurisdiction of any other courts."

[113] art 6; and Garcimatin and Saumier (n 79) par 256.

[114] Khanderia (n 77) 10.

[115] As will be seen in the discussion in the next section.

[116] Neels (n 10) 6.

[117] Brand (n 23) 19.

[118] Brand (n 23) 19.

rules."[119] Nevertheless, Goddard has argued, in response, that the method of the 2019 Hague Convention with respect to article 5 is the most efficient as it enhances predictability, accessibility and transparency in the application of the Convention.[120]



[119] Brand (n 23) 20. see also Flechtner "Another CISG Case in the U.S. Courts: Pitfalls for the Practitioner and the Potential for Regionalized Interpretations" 1995 *Journal of Law and Commerce* 127.

[120] Goddard "The Judgments Convention – the current state of play" 2019 11-12 (https://blogs.law.nyu.edu/transnational/2019/02/judgments-convention-state-by-Goddard.pdf/ (12-6-2019)).

# PART IV
# LEGAL FRAMEWORK FOR RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS OF THE COUNTRIES UNDER STUDY

## 4.1 Ghana

### 4.1.1 Legal regime for recognition and enforcement

There are two regimes that regulate the enforcement and recognition of foreign judgment in Ghana: the common-law and statutory regimes.[121]

### 4.1.2 Common-law regime

Under this regime, the foreign judgment creates an obligation so the judgment creditor has to institute a fresh suit on the decision.[122] In view of this, the judgment creditor must serve the writ of summons on the defendant.[123] Alternatively, the judgment creditor may institute an action for summary judgment premised on the ground that the judgment debtor has no defence to the suit.[124] Under this regime, for the foreign judgment to be enforced or recognised, it ought to be a fixed amount of money, final and conclusive[125] and the foreign court must be internationally competent.[126] The common law regime appears less used or not known about in the profession of Ghana.[127]



[121] Oppong *Private International Law in Ghana* (2017) 99; and Moran and Kennedy (n 25) 77.

[122] Oppong "Recognition and enforcement of foreign judgments in Ghana: A second look at a colonial inheritance" 2005 *Commonwealth Law Bulletin* 19 22.

[123] *Perry v Zissis* [1977] 1 Lloyd's Rep. 607.

[124] High Court (Civil Procedure) Rules, CI 47 of 2004, Order 14.

[125] Oppong (n 121) 102.

[126] Oppong (n 122) 22.

[127] Moran and Kennedy (n 25) 78. For example in the case of *Republic v Mallet ex parte Braun* [1975] 1 GLR 68 which had to do with an unsuccessful application to enforce a judgment given in West Germany pursuant to 1993 Act. The court held that the statute do not extend to Germany. However, surprisingly the court did not even consider the common-law approach.

### 4.1.3 The statutory regime for enforcement

Under the statutory regime, enforcement is by means of registration;[128] and it is based on reciprocity.[129] The Foreign Judgments and Maintenance Order (Reciprocal Enforcement) Instrument 1993 (L.I. 1575),[130] Courts Act,[131] and High Court (Civil Procedure) Rules,[132] are the laws which regulate this regime.[133] The specific country and court needs to be designated under the Foreign Judgments and Maintenance Order (Reciprocal Enforcement) Instrument 1993.[134]
Under the statutory regime, for the foreign judgment to be recognised and enforced or recognised, it ought to involve a definite amount of money which is not a penalty or a tax, must be conclusive and final; and the foreign court should be internationally competent.[135] A foreign judgment which is registered considered as a decision rendered by the High Court.[136]

### 4.1.4 Grounds for international competence

With respect to international competence, the common-law regime acknowledges submission,[137] residence and presence[138] to be the grounds of international competence.[139]
The statutory regime further lays down the basis for which the foreign court would be deemed to possess international competence. Per section 83(2)(a) of the Courts Act,[140] the foreign court will

[128] Oppong (n 121) 110.

[129] Oppong (n 3) 362.

[130] Oppong (n 3) 362.

[131] 1993 (Act 459).

[132] 2004 (C.I. 47).

[133] Oppong (n 3) 362. Section 85 of Act 459 provides that "No proceedings for the recovery of a sum payable under a foreign judgment, being a judgment to which this Sub-Part applies other than proceedings by way of registration of the judgment, shall be entertained by any court in Ghana." See the case of *Yankson v Mensah* [1976] 1 G.L.R. 355

[134] In the instrument, the following countries are designated: Italy, United Kingdom, Spain, Lebanon, Brazil, France, Israel, Japan, Senegal, and United Arab Republic.

[135] Act 459 s 81(2).

[136] Act 459 s 82(5).

[137] See the cases of *John Holt Co. Ltd v Nutsugah* (1929–1931) Div. Ct. 75; and *Crisp v Renner* (1931–7) Div. Ct. 107.

[138] Moran and Kennedy (n 25) 79.

[139] Oppong (n 121) 102.

[140] Courts Act, 1993.

be deemed to be internationally competent "in the case of a judgment given in an action *in personam* –

i. 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; or

ii. if the judgment debtor was the plaintiff in, or counterclaimed in, the proceedings in the original court; or

iii. 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 the courts of the country of that court; or

iv. if the judgment debtor, being a defendant in the original court, was at the time when proceedings were instituted resident in, or being a body corporate had its principal place of business in, the country of that court; or

v. if the judgment debtor, being a defendant in the original court, had an office or a place of business in the country or that court and the proceedings in that court were in respect of a transaction effected through or at that office or place."



Section 83(2)(b) of the Courts Act concerns property and provides that the original court will possess international competence in an action concerning immovable or movable property if the property in question was located in the foreign country at the time when proceedings commenced.

## 4.2 Nigeria

### 4.2.1 Legal regime for recognition and enforcement

Similar to Ghana, Nigeria has two regimes for the recognition and enforcement of foreign judgments: common-law regime and the statutory regime.[141]

### 4.2.2 Common law regime

Under this regime, the process of effectuating foreign judgment is by enforcement action.[142] The common law characterizes the rights obtained under foreign judgments as an actionable debt.[143] This debt creates an obligation that is binding on the judgment debtor.[144] Therefore, to collect the judgment sum, a creditor needs to commence a suit against the judgment debtor.[145] Alternatively, the judgment creditor may apply for summary judgment[146] if he believes that the judgment debtor has no serious defense to the action.[147] Foreign judgments can be enforced under this regime if the foreign court possessed international competence; if the judgment is conclusive and final; and it involves a fixed amount of money.[148]

It appears there are no decided cases in Nigeria of an action adjudicated under the common law approach.[149] Thus, foreign judgments, which fall under the common-law regime have been enforced under the statutory regime.[150]



[141] Moran and Kennedy (n 25) 328.

[142] Yekini "Foreign judgments in Nigerian courts in the last decade: a dawn of liberalization" 2017 *Nederlands Internationaal Privaatrecht* 205 207.

[143] Oppong (n 61) 369; and Dicey, Morris and Collins (n 51) par 14R-20.

[144] *ToepherInc of New York v Edokpolor* (1965) All NLR 301; *Mudasiru and Ors v Onyearu and Ors* (2013) LPELR.

[145] Bamodu in "The Enforcement of Foreign Money Judgments in Nigeria: A Case of Unnecessary Judicial Pragmatism?" 2012 *Oxford University Commonwealth Journal* 1 3 remarked that "strictly speaking the option of suing on the original cause of action is not a case of enforcing a foreign judgment"; and Briggs *The Conflict of Laws* (2012) 164.

[146] Order 11, High Court of Lagos State (Civil Procedure) Rules 2012.

[147] Yekini (n 142) 207.

[148] Yekini (n 142) 208.

[149] Olawoyin "Enforcement of Foreign Judgments in Nigeria: Statutory Dualism and Disharmony of Laws" 2014 *Journal of Private International Law* 129 132; and Moran and Kennedy (n 25) 328. Olaniyan speculates if the

### 4.2.3 Statutory regime

Under this regime, recognition and enforcement of foreign judgments is by means of registration.[151] There are two statutes that regulate recognition and enforcement of foreign judgments in Nigeria.[152] The foremost statute is the Foreign Judgments Ordinance of 1922 (1922 Act),[153] which covers judgments from the United Kingdom[154] as well as Commonwealth States such as Trinidad and Tobago, Gambia, Sierra Leone, Ghana and Jamaica.[155]

The second statute is the Foreign Judgments (Reciprocal Enforcement) Act of 1961.[156] The rationale behind the enactment of the 1961 Act was to extend the 1961 Act to judgments from non-Commonwealth countries based on reciprocity.[157] However, at the moment the statute is not applicable to judgments from any country.[158] Although the 1922 Act is not essentially different

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Nigerian judiciary and bar have relegated the common law regime of enforcement of foreign judgment to history. See Olaniyan "The Commonwealth model and the conundrum in the enforcement of Foreign judgments Regime in Nigeria" 2014 *Commonwealth Law Bulletin* 76 88.

[150] See the cases of *Teleglobe America Inc v 21st Century Technologies Limited* (2008) 17 NWLR (Pt 1115) 108; and *Hypporite v Egharevba* (1998) 11 NWLR (Pt 575) 598: These are cases involving US judgments. However, the Nigerian courts applied the statutes.

[151] Yekini (n 142) 207.

[152] Olawoyin (n 149) 134.

[153] It was derived from the Administration of Justice Act 1920 in England.

[154] England, Ireland and Scotland.

[155] Other countries are Newfoundland (now part of Canada), State of Victoria and New South Wales (both of which now form part of Australia), St. Vincent, Barbados, Leeward Islands, Grenada, British Guiana, St. Lucia, Bermuda, and Gilbratar. See Moran and Kennedy (n 25) 331.

[156] The intention, which was in line with reforms in England at that time, was to have dual regimes to be applicable to commonwealth and non-commonwealth countries respectively. See Olaniyan (n 149) 78-80; and Patchett (n 43) 91.

[157] section 9(1) of the 1961 Act stipulates that: "This Part of this Act shall apply to any part of the Commonwealth other than Nigeria and to judgments obtained in courts thereof as it applies to foreign countries and to judgments obtained in the courts of foreign countries and the Reciprocal Enforcement of Judgments Ordinance shall cease to have effect except in relation to those parts of her Majesty's Dominions other than Nigeria to which it extended at the date of commencement of this Act."

[158] Ibrahim "The legal regime and judicial practice on enforcement of foreign judgments in Nigeria: a case for reform"(https://www.academia.edu/17605628/the_legal_regime_and_judicial_practice_on_enforcement_of_foreign

from the 1961 Act, there are differences between them.[159] The concurrent application of the two Acts has caused confusion as a result of conflicting interpretations from the courts.[160] Initially, there was an erroneous thought that the 1922 Act was repealed with the enactment of the 1961 Act.[161] However, this error was corrected by the Supreme Court of Nigeria in *Macaulay v Raiffeisen Zentral Bank Osterreich AkiengesellSchaft (RBZ) of Austria,*[162] where it was held that the 1922 Act has not been repealed by the enactment of the 1961 Act.[163]

### 4.2.4 Grounds for international competence

The accepted grounds of international competence of foreign courts in Nigeria under the common-law regime are presence, residence and submission.[164]

The statutory regime also provides grounds of jurisdiction for the foreign court in the international sense. The 1922 Ordinance provides per section 3(2)(a) and (b) that a foreign judgment shall not be registered if the foreign court did not have jurisdiction, or if the judgment creditor did not make a voluntary appearance, or submit, or consent to submit to the court's jurisdiction, was not carrying on business or ordinarily resident within the original court's jurisdiction.[165]

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_judgements_in_Nigeria_a_case_for_reform) (6-6-2019)).The 1961 Act has been held to be inchoate. See *Macaulay v RZB of Australia* (2003) 18 NWLR pt 852.

[159] For the differences between the two Acts, see Yekini (n 142) 208; and Olawoyin (n 149) 134-140.

[160] Olaniyan (n 149) 82-86; Olukolu "The Enforcement of Foreign Judgments in Nigeria: Scope and Conflict of Laws Questions" 2015 *African Journal of International and Comparative Law* 129; and Olawoyin (n 149) 129-156.

[161] *Murmansk State Steamship Line v Kano Oil Millers Ltd* (1974) All NLR 893.

[162] (2003) 18 NWLR (Pt 852) 282.

[163] See also *Marine and General Assurance Company Plc v Overseas Union Insurance Limited and Ors*. (2006) 4 NWLR (Pt 971) 622.

[164] Oppong (n 3) 326.

[165] See *Conoil PLC v Vitol SA* [2012] 2 NWLR 50. However, in an earlier case before the Supreme Court in *Grosvenor Casinos Ltd v Halaoui [2009] 10 NWLR 309*, the Supreme Court speaking through Oguntade JSC stated at (338D-F): "I have no doubt that it's inimical to the interest of trade and commerce if judgments in foreign countries cannot be readily enforced in Nigeria. It is particularly alarming that when in a case like this, a person ordinarily resident in Nigeria obtains a credit in England and in satisfaction issues a cheque which is later dishonoured, the judgment obtained against him cannot be enforced in Nigeria. Under section 3(2)(b) above, the judgment of a court in England cannot be enforced in Nigeria on the ground that a defendant has not submitted to

Further, section 6(2)(a) of the 1961 Act determines that "the foreign court is deemed to have had jurisdiction in the case of judgment in an action *in personam:*

i. 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; or
ii. if the judgment debtor was plaintiff in, or counterclaimed in, the proceedings in the original court; or
iii. 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; or
iv. 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
v. 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."



Section 6(2)(b) relates to property and stipulates that the foreign court has international competence in cases concerning movable or immovable property if that property was located in the foreign country when proceedings begun.

Olawoyin[166] remarks that the current legal framework for recognition and enforcement of foreign judgments in Nigeria is ill suited for encouraging economic integration because the present statutory regime that was developed in the industrial colonization period is clearly unsuitable to the current epoch of economic liberalization, open borders, and regional integration.[167]

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the jurisdiction of the English court. There is an urgent need to reform our law on the matter. It is an open invitation to fraud and improper conduct."

[166] Olawoyin (n 149) 133.

[167] Olawoyin (n 149) 133.

## 4.3 Sierra Leone

### 4.3.1 Legal regime for recognition and enforcement

Recognition and enforcement of foreign judgments in Sierra Leone is regulated by both the common-law regime and a statutory regime.[168]

### 4.3.2 Enforcement under the common law regime

In Sierra Leone, there is no reported authority on the circumstances, if any, which will necessitate the recognition and enforcement of foreign judgments under the common-law regime.[169] However, according to Moran and Kennedy,[170] nothing prevents a judgment creditor from instituting an action to enforce or recognize a foreign judgment at common law in Sierra Leone. In support of this view, they point out that the Sierra Leonean Foreign Judgments (Reciprocal Enforcement) Act 1935[171] is closely modeled on the 1933 Foreign Judgments (Reciprocal Enforcement) of United Kingdom and it does not hinder a judgment creditor from enforcing a foreign judgment pursuant to the common law if that judgment does not fall within the remit of the 1933 Act.[172] For a foreign judgment to be recognized and enforced in Sierra Leone under the common law, it ought to be conclusive and final and must be for a fixed amount of money.[173] Also, the foreign court ought to possess international competence.[174]



### 4.3.3 Statutory regime of enforcement

The statutory regime for the enforcement of foreign judgment in Sierra Leone is regulated by the Foreign Judgments (Reciprocal Enforcement) Act, 1935[175] and High Court rules of Sierra

[168] Moran and Kennedy (n 25) 512.

[169] Moran and Kennedy (n 25) 513.

[170] Moran and Kennedy (n 25) 513.

[171] Act 11 of 1935.

[172] Moran and Kennedy (n 25) 513.

[173] Dicey, Morris and Collins (n 51) par 14R-020.

[174] Moran and Kennedy (n 25) 514.

[175] Act 11 of 1935. The Act refers to itself as an Ordinance indicating its historicity of drafting. Nevertheless, modern sources such as High Court Rules (Order 45, rule 1) refer to it as "Foreign Judgments (Reciprocal Enforcement) Act."

Leone.[176] Section 3(1) of the 1935 Act[177] empowers the Governor in Council[178] to extend the Act to the superior courts of other countries on the grounds of substantial reciprocity. In pursuance of this provision, the Act has been extended to judgments from Ghana and Gambia,[179] Nigeria[180] and the United Kingdom.[181] Enforcement under the Act is by registration.[182]

### 4.3.4 Grounds for international competence

In Sierra Leone, the common-law regime acknowledges submission, residence and presence to be the grounds of international competence.[183]

The 1935 Act provides the grounds for which the foreign court will be regarded to possess international competence. Per section 6(2)(a) of the 1935 Act, "in the case of a judgment given in an action *in personam* –

i. 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; or

ii. if the judgment debtor was plaintiff in, or counterclaimed in, the proceedings in the original court; or

iii. 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 the courts of the country of that court; or



[176] Wright "Sierra Leone" in *Dispute Resolution in Africa* (2016) 260.

[177] Foreign Judgments (Reciprocal Enforcement) Act, 1935.

[178] The term Governor in Council ceased to be used when Sierra Leone attained independence on 27 April, 1961. The term now refers to the Head of State. Moran and Kennedy (n 25) 516.

[179] Foreign Judgments (Reciprocal Enforcement) (Gambia and Ghana) Order in Council (PN 56 of 1945).

[180] Foreign Judgments (Reciprocal Enforcement) (Federation of Nigeria) Order in Council (PN 39 of 1957).

[181] Moran and Kennedy (n 25) 516.

[182] Moran and Kennedy (n 25) 516.

[183] Moran and Kennedy (n 25) 514; and Oppong (n 61) 369.

iv. if the judgment debtor, being a defendant in the original court, was at the time when proceedings were instituted resident in, or being a body corporate had its principal place of business in, the country of that court; or

v. if the judgment debtor, being a defendant in the original court, had an office or a place of business in the country or that court and the proceedings in that court were in respect of a transaction effected through or at that office or place."

Section 6(2)(b) provides that "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," then the foreign court will be considered to possess international competence.

## 4.4 The Gambia

### 4.4.1 Legal regime for recognition and enforcement

The Gambia has a tripartite legal system: customary law, English common law, and Islamic law.[184] As characteristic of the other commonwealth nations, The Gambia has two regimes for recognition and enforcement of foreign judgment: the common-law regime and a statutory regime.[185]

### 4.4.2 Common-law regime

Under this regime, the foreign judgment is enforced by issuing a writ.[186] This is a common-law relief based on the judgment itself bestowing a right of action which entitles the judgment-creditor to sue.[187] The foreign decision represents a debt,[188] and the judgment creditor must

[184] Bensouda "The Gambia" in *Dispute Resolution in Africa* (2016) 128.

[185] Moran and Kennedy (n 25); and Bensouda (n 184) 130.

[186] Bensouda (n 184) 130.

[187] Mcclean and Abou-Ngim *The Conflict of laws* (2012) 170.

[188] Oppong (n 3) 317.

institute an action on the foreign decision.[189] For the foreign judgment to be enforced or recognized, it ought to be conclusive and final,[190] and should be for a definite sum of money, not being a penalty or tax, and the foreign court should possess international competence.[191]

### 4.4.3 Statutory regime

Under the statutory regime, recognition and enforcement of foreign judgments in Gambia is regulated by the Reciprocal Enforcement of Foreign Judgments Act of 1922[192] and the Foreign Judgments Reciprocal Enforcement Act of 1936.[193] The 1922 Act covers foreign judgments of the High Court of England or Northern Ireland, or the Court of Session in Scotland.[194] Further, the 1922 Act can be extended to judgments secured in a superior court in other parts of the commonwealth.[195] The 1922 Act has been extended to judgments from New South Wales;[196] Sierra Leone;[197] the Northern and Capital Territory of Australia;[198] and the State of Tasmania.[199]

[189] Oppong (n 3) 317.

[190] See the case of *Bourgi Co Ltd v Withams H/V* (2002–8) 2 GR 38 where The Gambian Court of Appeal per Agim PCA stated "The common law rule as to the conclusiveness of foreign judgment applies in The Gambia by virtue of s 7(1) of the 1997 Constitution which makes the common law part of the Laws of The Gambia. The common law rule is preserved and given effect by s.9 of the Foreign Judgments Reciprocal Enforcement Act."

[191] Oppong (n 3) 326, 329, 336.

[192] Reciprocal Enforcement of Judgment Rules 1924 (r2 of 1924, LN 54 of 1963) and the rules of court enacted in pursuant to it.

[193] They are derivative of English statutory provisions, that is, the 1920 Administration of Justice Act and the 1933 Foreign Judgments (Reciprocal Enforcement) Act. See Bensouda (n 184) 130.

[194] 1992 Act, s 3(1).

[195] Per s 6(1) of the 1922 Act, the Minister will do this if "satisfied that reciprocal provisions have been made by the legislature of any part of the Commonwealth outside the UK for the enforcement within that part of the Commonwealth of judgments obtained in the High Court of Gambia." The expression 'part of the Commonwealth' seen in s 6(1) is explained in s 6(2) to refer to "any territory which is under Her Majesty's protection or in respect of which a mandate is exercised by the Government of any part of the Commonwealth."

[196] By way of Ministerial Order made on 26 January 1926.

[197] In view of Ministerial Order made on 30 January 1924.

[198] Reciprocal Enforcement of Judgments (Australian Capital Territory and Northern Territory) Order 1975, came into operation on 5 September 1973 (LN 12 of 1975).

The judgment-creditor can file an application at the High Court of Gambia for the decision to be registered[200] and enforced by the court as if it were its own decision.[201]

The second statutory regime in force in The Gambia is the Foreign Judgments (Reciprocal Enforcement) Act, 1936.[202] Foreign judgments from designated countries can also be enforced pursuant to the statute.[203] At the moment, the 1936 Act has been extended only to the Federal Republic of Nigeria.[204]

### 4.4.4 Grounds for international competence

Under the common law, it is an essential prerequisite that the original court ought to be competent to adjudicate the matter in terms of Gambia's private international law.[205] Thus, the foreign court should have international competence. Presently, submission, presence and residence are the established grounds of international competence.[206]

The statutory regime also provides for international competence of the foreign court. Section 3(2) of the 1922 Act stipulates that the foreign court should be internationally competent in rendering the judgment. The 1936 Act goes further to espouse the bases on which the foreign court will be said to be internationally competent. Per section 5(2)(a) of the 1936 Act, "in the case of a judgment given *in personam* –

i. 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



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[199] Reciprocal Enforcement of Judgments (State of Tasmania) Order 1975, came into operation 1 January 1972 (LN 6 of 1975).

[200] s 3 of the 1922 Act; and Oppong (n 3) 360.

[201] Reciprocal Enforcement of Judgments Act 1922, s. 3(3)(a); and Bensouda (n 183) 130.

[202] Cap 8:06.

[203] Bensouda (n 184) 130.

[204] Foreign Judgments Reciprocal Enforcement (Nigeria) Order (Order 11 of 1956). By virtue of this Order, the following courts are considered superior courts of Nigeria: "the Supreme Court of Nigeria; the High Court of Western Nigeria; the High Court of Northern Nigeria; the High Court of Eastern Nigeria; and the High Court of Lagos." See Oppong (n 3) 360.

[205] Oppong (n 3) 322.

[206] Oppong (n 3) 326.

threatened with seizure, in the proceedings or of contesting the jurisdiction of that court; or

ii. if the judgment debtor was plaintiff in, or counterclaimed in, the proceedings in the original court; or

iii. 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 the courts of the country of that court; or

iv. if the judgment debtor, being a defendant in the original court, was at the time when proceedings were instituted resident in, or being a body corporate had its principal place of business in, the country of that court; or

v. if the judgment debtor, being a defendant in the original court, had an office or a place of business in the country or that court and the proceedings in that court were in respect of a transaction effected through or at that office or place."

Further, section 5(2)(b) provides that "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," the foreign court will be considered to possess international competence.



### 4.5 Observation and critique of the common-law grounds of international competence

A critical look at both the common-law and the statutory regimes of the countries under study shows how the English legal system has largely influenced their legal system, including the grounds of international competence of the foreign court.[207] The grounds of international competence of the foreign courts in common-law West Africa are the same, namely: residence, submission and presence of the judgment debtor in the foreign court's jurisdiction. Despite their clarity and straightforwardness, these grounds have been criticized by judges as well as scholars

[207] The grounds for international competence were notably espoused in the English cases of *Godard v Grey* (1870) LR 6 QB 139 and *Schibsby v Westenholz* (1870) LR 6 QB 155.

in the field of recognition and enforcement of foreign judgment.[208] Tan observes that the meaning of the concept of international competence itself is restricted[209] and that it is based on the presumption of a "very narrow, territorial notion of jurisdiction".[210]

From a conceptual perspective, there is the problem of disparity in the definition of international competence. When it comes to the assertion of jurisdiction of the domestic court in an international commercial litigation, the grounds that it will consider to assert jurisdiction is wider than in enforcement and recognition matters.[211] The reason behind this disparity can be traced from the era when the current principles were first enunciated.[212] Briggs is critical of the absence of consistency and has argued "the case for reuniting the two areas is a strong one".[213]

Further, the narrow definition of the grounds of international competence at common law has exposed it to the allegation of lack of trust in the foreign court's civil litigation procedure.[214] It has thus been described as being "chauvinistic".[215] Also, the application of the current grounds of international competence tends to "overly protect" the interest of the judgment debtor.[216] This is

[208] Arzandeh (n 31) 61.

[209] Tan "Recognition and Enforcement of Foreign Judgments" in Teo et al (eds) *Current Legal Issues in International Commercial Litigation* (1997) 290.

[210] Kenny "Re Flightlease: The Real and Substantial Connection Test for Recognition and Enforcement of Foreign Judgments Fails to Take Flight in Ireland" 2014 *International and Comparative Law Quarterly* 197 200.

[211] Arzandeh (n 31) 61.

[212] Arzandeh (n 31) 61. See Hill and NíShúilleabháin *Clarkson and Hill's Conflict of Laws* (2016) at par 3.36: "the foundations of the common law rules relating to foreign judgments were laid in the second half of the nineteenth century when the primary bases of the English jurisdiction were presence and submission. At this time there was only a limited form of 'long-arm' jurisdiction, introduced by the Common Law Procedure Act 1854, and the doctrine of *forum non conveniens* was not even a glimmer in the eye of the House of Lords. It is hardly surprising that, when deciding whether or not to enforce a foreign judgment, the courts in the nineteenth century looked to see whether the defendant had been present in the country of origin or had submitted to the jurisdiction of its courts."

[213] Briggs "Which Foreign Judgments Should We Recognise Today?" 1987 *International and Comparative Law Quarterly* 240.

[214] Arzandeh (n 31) 62.

[215] Kenny (n 210) 197.

[216] Arzandeh (n 31) 62.

due to the narrow definition of the grounds under common law,[217]and it makes it relatively easy for the judgment debtor to be free from the judgment of the foreign court.[218]

Thus despite the straightforward nature of the common law grounds of international competence which is commendable, it is narrow and as a result, new grounds need to be added.[219]



[217] That is, residence, presence and submission.

[218] Arzandeh (n 31) 63.

[219] New grounds of international competence can be seen in the 2019 Hague Convention and it is discussed in Part V below.

## PART V

## THE POTENTIAL IMPACT OF THE HAGUE CONVENTION ON GROUNDS OF INTERNATIONAL COMPETENCE IN COMMON-LAW WEST AFRICA

### 5.1 Introduction

The potential impact that the 2019 Hague Convention will have on recognition and enforcement of foreign judgment in common-law West Africa if the countries under study become Contracting States is discussed under this section using the particular articles of the Hague Convention as point of departure.

### 5.2.1 Article 5(1)(a): habitual residence of the judgment debtor

Article 5(1)(a) of the 2019 Hague Convention stipulates that, if the judgment debtor's habitual residence was in the State of origin, the foreign court will be deemed to be in possession of international competence. The 2019 Hague Convention employs "habitual residence" as a connecting factor against other alternatives recognised in municipal law and uniform law treaties,[220] which includes nationality or domicile and this is in sync with modern Hague instruments which also adopts habitual residence.[221] The benefit of habitual residence utilized as a connecting factor is that it is more accurate than the other connecting factors such as nationality or domicile.[222] This is because it shows a close link between individuals and their socio-economic setting, and is unlikely to lead to inconsistent judgments by courts.[223] The use of "habitual residence" in the Hague Convention brings clarity and certainty as against "residence," as found under the common law regime and statutory regime of the countries under study. According to Forsyth,[224] "residence" is a difficult term which has different meanings in varied

[220] Brussels 1 Recast; and Rome 1 Regulation.

[221] Garcimatin and Saumier (n 79) par 150. See the 1996 Hague Convention on Jurisdiction, Applicable law, Recognition, Enforcement and Co-operation in respect of Parental responsibility and measures for the protection of children; and the 1980 Hague Convention on the Civil Aspects of International Child Abduction.

[222] Domicile is regarded as a "normative concept" whereas habitual residence is a "factual concept." See Mankowski "Article 5" in Magnus and Mankowski (eds) *European commentaries on Private International Law: Brussels 1 Regulation* (2007) 1 177-178; and Garcimatin and Saumier (n 79) par 150.

[223] Garcimatin and Saumier (n 79) par 150.

[224] Forsyth (n 11) 422.

contexts. Thus, the use of the term "habitual residence" appropriately qualifies the vagueness of the term "residence" and brings clarity in its application as a jurisdictional filter. Although habitual residence for natural persons has not been defined[225] and this may lead to different interpretations by municipal courts, uniform interpretation should be encouraged in view of Article 20 of the Convention.[226]

### 5.2.2 Article 5(1)(a) and article 3(2): habitual residence of juristic persons

Under both the common-law and the statutory regime of the countries under study, when it comes to residence of a body corporate, the foreign court will only be considered to be internationally competent if the company's principal place of business is in the foreign State.[227] However, per the combined effect of articles 3(2) and 5 of the 2019 Hague Convention, new connecting factors such as place of incorporation, the place of the company's statutory seat and place of central administration of the company are added grounds considered as the habitual residence of the company and thus enabling the courts in the country of these places to be internationally competent.

Under the common-law system, the law of the place of incorporation is usually considered as essential for determining matters concerning the corporation's internal affairs.[228] In some States, it is impossible to depend on statutory seat as the connecting factor.[229] In such instance, the Convention uses the country under whose law the legal person was formed as an alternative. This criterion will usually indicate the place where the corporation is registered, where it has a

[225] According to Mankowski "Article 5" in Magnus and Mankowski (eds) *European Commentaries on Private International Law: Brussels 1 Regulation* (2007) 1 177-178: "habitual residence is defined as the factual centre of the individual's personal and social life."

[226] Art 20 provides: "In the interpretation of this Convention, regard shall be had to its international character and to the need to promote uniformity in its application."

[227] Ghana: s 83(2)(a)(iv) of Courts Act, 1993; Nigeria: s 6(2)(a)(iv) of Foreign Judgments (Reciprocal Enforcement) Act, 1961; Sierra Leone: s 6(2)(a)(iv) of Foreign Judgments (Reciprocal Enforcement) Act, 1935; and The Gambia: s 5(2)(a)(iv) of Foreign Judgments (Reciprocal Enforcement) Act, 1936.

[228] Hartley and Dogauchi "Explanatory Report on the Convention of 30 June 2005 on Choice of Court Agreements" (2013) par 120 (https://www.hcch.net/en/publications-and-studies/details4/?pid=3959&dtid=/ (6-6-2019)); and Garcimatin and Saumier (n 78) par 92.

[229] Nygh and Pocar (n 93) 41.

registered office.[230] The place of the corporation's central management is vital in that it is the administrative centre of the company, the venue where very vital decisions are made.[231] The corporation's statutory seat is regarded as the domicile of the corporation[232] as indicated by its bylaws or constituent documents.[233]

All these three additional connecting factors are essential under common law,[234] and the 2019 Hague Convention stipulates that a juristic person is considered as resident in all these three places too. The advantage of these additional connecting factors establishing habitual residence is that it expands the grounds and enables judgment from these other places which at the moment are not recognized under the legal framework of the countries under study to be recognized and subsequently increasing the chances of them being enforced.

### 5.2.3 Article 5(1)(b): principal place of business of a natural person

Natural persons embarking on business endeavours are similar to juristic persons in terms of jurisdictional connections.[235] Allowing cases to be adjudicated in the country of the principal place of business is in sync with the legitimate expectations of parties.[236]

Per the statutory regime of the countries under study, if the judgment debtor's office or place of business is in the State of origin and the action arose out of a transaction effected through or at that office or place, then the foreign court will be deemed to be internationally competent.[237] However, conspicuously missing from this provision is the relationship between the timing of the claim and establishing the principal place of business. The location of a person's principal place



[230] Nygh and Pocar (n 93) 41.

[231] Hartley and Dogauchi (n 228) par 120; and Nygh and Pocar (n 93) 41. However, in the current world of commerce, modern techniques are used in decision-making for corporations which undertake business in many countries. There is the likelihood of decision making via videoconferencing or modern forms of electronic communication. This means decisions may be made in several places making it difficult to locate where the decision was made. As a result of this, there is some level of vagueness using this criterion. Thus this criterion is inadequate in itself and can be on the list as one of the alternative jurisdictional filter. See generally Nygh and Focar (n 93).

[232] Hartley and Dogauchi (n 228) par 120.

[233] Garcimatin and Saumier (n 79) par 92.

[234] Hartley and Dogauchi (n 228) par 120.

[235] Garcimatin and Saumier (n 79) par 156.

[236] Garcimatin and Saumier (n 79) par 156.

[237] As highlighted above under the statutory regimes of the countries.

of business may change over time. This can be either happen during the course of proceedings before the verdict is given or even after the verdict has been given but before recognition or enforcement is sought or even after the cause of action have risen before the institution of the proceedings in court. To cater for this situation and avert controversies, the Hague convention requires a contemporaneity of the time of the claim and the founding of the principal place of business. In other words, the principal place of business is to be assessed at the time when the judgment debtor became a party to the proceedings in the foreign court.[238] It is not a prerequisite that the judgment debtor should have his principal place of business in the foreign country at the time that the requested State is determining the connection. It will be thus recommended that the countries under study amend the existing provision in their statutes to incorporate the phrase "at the time that person became a party to the proceedings in the court of origin".

Further, the statutory provision of the countries provides that the proceedings in the State of origin should relate to a transaction effected through or at that office or place. The assumption is that the transaction will be effected at a physical location. However, in the current world where transactions can be effected online by private businessmen, if a dispute is to arise out of a transaction that was effected online, it will be difficult establishing the place of transaction to aid in determining whether the foreign court was internationally competent. However, the provision in article 5(1)(b) of the 2019 Hague Convention, delineates the principal place of business of the natural person as the connecting factor at the time the proceedings were instituted. This brings clarity and certainty because even if the transaction was done online, the principal place of business will be easily to identify.



### 5.2.4 Article 5(1)(d): agency, branch or other establishment

Article 5(1)(d) provides grounds of jurisdiction for secondary establishments.[239] This concerns situations where the claim emanated from the endeavours of a branch of a person whose habitual residence is in another country. Under that circumstance, the 2019 Hague Convention accepts the

[238] Garcimatin and Saumier (n 79) par 159.

[239] Garcimatin and Saumier (n 79) par 163.

jurisdiction of the courts in the country where the branch is situated.[240] This "branch jurisdiction" or a branch establishing jurisdiction is found in other legislation.[241]

The rationale behind this provision is that an individual who creates an establishment in another country implicitly or explicitly approves of the jurisdiction of the courts of that country on claims regarding the activities of that entity because that individual regulates the entity.[242] This is in line with the legitimate expectations of parties and since this jurisdiction is restricted to matters that emanated from the activities of the branch, it is vindicated by the close link that exists between the court that adjudicated the matter and the dispute.[243] There is no such provision under the legal framework of the countries under study.

### 5.2.5 Article 5(1)(e): express consent to the jurisdiction of the foreign court by the judgment debtor during proceedings

Article 5(1) provides for three types of consent: unilateral express consent during proceedings,[244] implied consent or submission,[245] and consent in an agreement by the parties.[246] Any of these types satisfies the jurisdictional prerequisite under Article 5(1).[247] Under article 5(1)(e), the jurisdictional filter prerequisite is met if the defendant explicitly agrees to the jurisdiction of the foreign court during the course of proceedings. It is a question of fact whether there is an express consent and this is determined by the enforcing court.[248] The express consent could be oral or in writing and it can also be addressed to the other party or to the court during the course of the proceedings.[249] This mode of consenting is not renowned or familiar in all legal systems,[250]



[240] Garcimatin and Saumier (n 79) par 163.

[241] Garcimatin and Saumier (n 79) par 163; Brussels I recast (n 13) art 7(5); Nygh and Pocar (n 93) par 127; and Civil Code of Québec, art 3168(2).

[242] Dickinson and Lein (n 53) 176; and Garcimatin and Saumier (n 79) par 164.

[243] Garcimatin and Saumier (n 79) par 164.

[244] art 5(1)(e).

[245] art 5(1)(f).

[246] art 5(1)(m).

[247] Garcimatin and Saumier (n 79) par 168.

[248] Garcimatin and Saumier (n 79) par 170.

[249] Garcimatin and Saumier (n 79) par 170.

[250] Garcimatin and Saumier (n 79) par 171.

however, it is not a hindrance to the assessing of such consent by the requested State. The requested State is not deciding whether the foreign court had jurisdiction according to its own rules of direct jurisdiction. Rather, the requested State is ascertaining whether any of the jurisdictional filters (grounds of indirect jurisdiction) have been met.[251] This is thus a novel ground for determining the international competence of the foreign courts.

### 5.2.6 Article 5(1)(f): a challenge to the jurisdiction of the foreign court would not have been successful under that law

There are some States that procedurally have time frames within which the defendant can challenge the jurisdiction of a court.[252] The Hague Convention makes provision that if there is no challenge by the defendant to the jurisdiction in accordance with the time frame stipulated by the court of origin, it will be considered that the defendant have submitted to the foreign court. Such a provision is lacking in the statutes of the countries under consideration.[253]

Also, there is submission if the defendant implicitly consents to the jurisdiction of the foreign court even though ordinarily the foreign court would not have had jurisdiction,[254] or there were even grounds for a challenge to that jurisdiction.[255] A key presumption of this principle is that procedurally the foreign court permits the defendant to contest jurisdiction and thus a failure to challenge the jurisdictions will be construed as implied consent.[256]

Article 5(1)(f) considers whether such a contest to jurisdiction would have been successful in the foreign court since it would otherwise be unfair to require the defendant a contest if it was going to be an exercise in futility.[257] Thus, if the defendant can prove that any effort to challenge the jurisdiction of the foreign court was bound to fail, then the failure of the defendant to raise such an objection before the foreign court will not be construed as consent or submission. In that

[251] Garcimatin and Saumier (n 79) par 171.

[252] Garcimatin and Saumier (n 79) par 179.

[253] In Ghana, issues about jurisdiction can be raised at any stage of the case. See *Amoasi v Twintoh* [1987-88] 1 GLR 554.

[254] Forsyth (n 11) 422-423.

[255] Garcimatin and Saumier (n 79) par 180.

[256] Garcimatin and Saumier (n 79) par 180.

[257] Garcimatin and Saumier (n 79) par 181.

case, the jurisdictional criterion will not have been satisfied.[258] For instance, the foreign court assumes jurisdiction on the ground that the defendant has property in the jurisdiction[259] although there is no link between the property and the claim. Prior case law authorities in the court of origin shows that objections to jurisdiction on this ground are always unsuccessful and, based on this, the defendant did not challenge the jurisdiction of the court of origin. In such scenario, the judgment that will be given by the foreign court will not be recognized and enforced even though the defendant did not challenge the jurisdiction of the court and argued on the merits of the case.[260]

Article 5(1)(f) also makes provision for a situation where a challenge to the foreign court's exercise of jurisdiction would have been unsuccessful. This is a possibility in countries that adhere to the doctrine of *forum non conveniens*.[261] In such a situation, if the defendant does not invoke the doctrine and can show that even if the doctrine had been invoked, it would have been unsuccessful under the laws of the foreign country, such a judgment by the foreign court is unenforceable.[262] These provisions are very essential but are presently missing in the legal regimes of the countries under study.

### 5.2.7 Article 5(1)(g): the place of performance of a contractual obligation

At the moment, place of performance is not recognized as basis of international competence under the private international law of the countries under study. However, from a developmental perspective, this jurisdictional filter deserves special attention.[263] Neels has argued that the place



[258] Nevertheless, to avoid such strategic conduct by the defendant, the Convention requires a relatively high standard of proof. It ought to be "evident" that a challenge to the jurisdiction would have been unsuccessful under the law of the foreign country. see Garcimatin and Saumier (n 79) par 182.

[259] In South Africa for instance, if the defendant is a foreign peregrines and the cause of action did not occur in the area of jurisdiction of the court, the property of the foreign peregrine can be attached to found jurisdiction and the court will thus exercise jurisdiction. This is referred to as attachment ad fundandam jurisdictionem. In that case, it is not additionally required for the peregrine defendant to submit to found jurisdiction of the court. See Van Niekerk and Schulze *The South African Law of International Trade: Selected Topics* (2016) 325; and Forsyth (n 11) 223.

[260] Garcimatin and Saumier (n 79) par 183.

[261] Garcimatin and Saumier (n 79) par 184.

[262] The courts of the countries under study adhere to the doctrine of *forum non conveniens*. See generally Moran and Kennedy (n 25).

[263] Neels (n 10) 6.

of characteristic performance could be considered as a ground for international competence and he espoused reasons to fortify his stand.[264]

First of all, the place of performance is accepted as a ground of domestic jurisdiction in many countries.[265] The Brussels I (recast) provides for inter alia the place of delivery, which is the characteristic performance as a ground for jurisdiction.[266] Since all the countries under study trade with the European community, the recognition and enforcement of foreign judgment emanating from the courts of trade partners are very essential as it will boost investor confidence, and as a multiplier effect, it will lead to the creation of jobs and poverty alleviation.[267]

Secondly, the place of the characteristic performance is a connecting factor which provides a real and substantial connection with a court.[268]

Thirdly, the place of performance, particularly the characteristic performance plays an essential role in the private international law of the countries under study as it aids to indicate the default legal system and constitutes the most important connecting factor in determining the objective proper law[269] in the absence of express or tacit choice by the parties.

Further, the Draft Model Law on the Recognition and Enforcement of Judgments in the Commonwealth[270] also makes provision for the recognition of the place of performance as a



[264] Neels (n 10) 6-8.

[265] Neels (n 10) 7.

[266] Art. 7 of Brussels I (recast) provides: "A person domiciled in a Member State may be sued in another Member State: (1)(a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;
(b) for the purposes of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:
– in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered, or
– in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided;
(c) if point (b) does not apply, then point (a) applies."

[267] Neels (n 10) 7.

[268] Neels (n 10) 8.

[269] Neels (n 10) 8.

[270] Model Law on the Recognition and Enforcement of Foreign Judgements (2015) (https://www.thecommonwealth.org/default/files/ (11-6-2019)).

ground of international competence in article 5(1)(g).[271] Thus, in principle if the Commonwealth, despite the adoption of the Hague Convention, proceeds and adopts this Model law on Recognition and Enforcement of Foreign Judgments which is applicable to commonwealth countries, the place of performance will consequently become a ground for international competence in the countries under study since they are members of the Commonwealth.[272] However, Neels argues that there may be complexities in construing place of performance as a ground of international competence.[273] This is because it is unclear whether the place of performance refers only to the place of the "characteristic performance"[274] or it also includes the place of payment.[275]

Also, there is also the problem of determining the place of performance in the absence of an agreed place of performance by the parties. The Hague Convention provides that in the absence of an agreed place of performance by the parties, the law applicable to the contract will help to determine the place of performance.[276] Nevertheless, this provision is not going to work for countries like South Africa, traditional common law countries like Canada or Australia or States that use the Restatement Second.[277] This is because in such legal systems, in the absence of choice of law by the parties, the place of performance, especially the place of the characteristic performance, plays an important role in indicating the default applicable legal system or at least constitutes the most important connecting factor in determining the objective proper law of the



[271] Art 5(1): "A court in the State of origin is deemed to have had jurisdiction if: -… (g) the proceedings related to a contractual obligation that was or should have been performed in the State of origin."

[272] Member countries per (https://thecommonwealth.org/member countries/ (11-6-2019)).

[273] Neels (n 10) 8.

[274] For instance, the place of delivery of the goods under a contract of sale.

[275] For instance in India, place of payment of money has been interpreted as a place of performance. See *B.C Paul and Sons v Union of India* AIR 1978 Cal.423; *ABC Laminart v A.P. Agencies* (1989) 2 SCC 163; and Agrawal and Singh *Private International Law in India* (2009) 231.

[276] art 5(1)(g)(ii).

[277] Twenty-three (23) States in the United States of America(USA) follow the Restatement Second in contract conflicts namely: Alaska, Arizona, Colorado, Connecticut, Delaware, Idaho, Illinois, Iowa, Kentucky, Maine, Michigan, Mississippi, Missouri, Montana, Nebraska, New Hampshire, Ohio, South Dakota, Texas, Utah, Vermont, Washington and West Virginia. See Symeonides "Choice of law in the American courts in 2012: twenty-sixth annual survey" 2013 *The American Journal of Comparative Law* 1 278-285.

contract.[278] Thus, the place of performance is needed to determine the proper law. However, the place of performance is not known, thus making it not feasible for such legal systems.[279] Nevertheless, some of these potential difficulties are assuaged by the decisions of the European court[280] in the context of supranational jurisdiction under the Brussels I (recast), and this may guide the courts in the countries under study.[281] It is thus recommended that the countries under study recognize the place of contractual obligation, especially the characteristic performance,[282] as a ground of international competence.

### 5.2.8 Article 5(1)(i): contractual obligations secured by rights *in rem*.

Under the legal regime of the countries under study, the court of origin will possess international competence in an action concerning immovable property if the property in question was located in the State of origin with regards to *in rem* claims.[283] However, no provision is made for a related contractual claim brought in that State, and as result, it may be impossible to recognize

[278] Neels (n 10) 8. See also Forsyth (n 11) 329-336; Fredericks *Contractual Capacity in Private International Law* (2016) 13-16; Fredericks and Neels "The proper law of a documentary letter of credit" (part 1) 2003 *SA Merc LJ* 63 69; Neels and Fredericks "The music performance contract in European and Southern African Private International Law" (part 2) 2008 *THRHR* 529 535; and Schoeman, Roodt and Wethmar-Lemmer *Private International Law in South Africa* (2014) 53 and 55-56.

[279] However, the situation will be different in Rome I countries. This is because per article 4 of Rome I, in the absence of choice of applicable law by the parties, per art.4 the default applicable law in a contract for the sale of goods is the law of the country where the seller has his habitual residence. Having identified the applicable law, that helps to determine the place of performance. Thus, it is not a problem for Rome I countries.

[280] In the case of Color Drake, the ECJ decided in the context of complex contracts(where delivery must place in different places or countries) that the "principal place of performance" provides the only jurisdictional connecting factor on the basis of "efficient organization of the proceedings." See Neels (n 10) 8; and Grušiæ "Jurisdiction in complex contracts under the Brussels I Regulation" 2011 *Journal of Private International Law* 321 321-338; and ECJ *Color Drack GmbH v Lexx International Vertriebs GmbH* C386/05 (3 May 2007) [2007] ECR I3699.

[281] Neels (n 10) 8.

[282] Per the Giuliano and Lagarde Report, the characteristic performance is the one that gives a contract its name and for which the payment is due. See Giuliano and Lagarde "The Report on the Convention on the Law Applicable to Contractual Obligations" [19801QJ C-282/20.

[283] See discussion under the grounds of international competence under statutory regimes of the countries under study above.

and enforce a judgment on the associated contractual claim instituted in that State.[284] This void is catered for by article 5(1)(i) which stipulates that the foreign court will be internationally competent if the judgment was given based on a contractual obligation obtained by a right *in rem* in immovable property situated in the foreign country, and the contractual claim was instituted jointly with the claim against the same defendant concerning that right *in rem*.[285]

### 5.2.9 Article 5(1)(j): non-contractual obligations

Article 5(1)(j) is one of the novel provisions in the 2019 Hague Convention. It concerns judgments in respect of a non-contractual obligation arising from physical injury, death, damage to or loss of tangible property, and the act or omission directly causing such harm occurred in the State of origin. The place where the harm eventually occurred is irrelevant. This provision marks a departure from the position of regional and municipal legal systems that recognize jurisdiction exercised by the court in the country where the harm occurred.[286] The importance of the limitation to a "single jurisdictional connection" and the placement of a ceiling on the types of harm covered by this provision is that it will help to minimise interpretive complexities that have shown up in other systems.[287] It also purges the quandary of whether long-lasting suffering and pain in the State of origin resultant of a physical injury that was sustained in another State is adequate to constitute jurisdiction in the State of origin.[288] The private international rules of the countries under study are however bereft of such provision.



[284] Garcimatin and Saumier (n 79) par 199.

[285] For instance, A, habitually resident in country Y, buys an immovable property in country Z, procured by a mortgage given by a bank in country B. The mortgage agreement stipulates that payment is to be done in country B. A is unable to pay and the bank institute action in country Z to get a judicial sale of the property and a judgment against A for any default arising from the judicial sale. However, the property sold for less than the outstanding amount. A judgment from the court in country Z which makes A liable for the remaining amount after the debt is enforceable in country Y in pursuant to art 5(1)(i). see Garcimatin and Saumier (n 79) par 200.

[286] See the interpretation of Brussels I Recast, art. 7(2) by the ECJ in cases such as *Shevill v Presse Alliance SA* (Case C-68/93) [1995] ECR I-415 par 20; *Kronhofer v Marianne Maier* (Case C-168/02) [2004] ECR I-6009 par 16; and *Bier BV v Mines de Potasse d'Alsace SA* (Case 21/76) [1976] ECR 1735 1746 par 15, 19-25. see also Nygh and Pocar (n 93) par 135-149; and Garcimatin and Saumier (n 79) par 203.

[287] Garcimatin and Saumier (n 79) par 204.

[288] Garcimatin and Saumier (n 79) par 205; and *Club Resorts v Van Breda* (n 68) par 89.

### 5.2.10 Article 5(1)(k): validity, construction, effects, administration or variation of a trust

This jurisdictional filter is one of the novel grounds under the convention. Judgment concerning trust is not covered by the current legal regime because of the fixed sum rule under the common-law.[289] This rule presumes the enforcement of only *in personam* judgments that deal with the payment of money.[290] However, an *in personam* judgment can either be in the form of payment of money or an order for an act to be done.[291] Thus, this jurisdictional filter which is an improvement on the present regime under the common law is a welcome addition to the existing grounds.[292]



[289] Oppong (n 122) 24.

[290] Oppong (n 122) 24.

[291] Oppong (n 122) 24.

[292] See the case of *Pro Swing Inc v Elta Golf Inc* (2004) 71 OR (3d) 566 where the court said "the time was ripe for a re-examination of the rules governing the non-recognition of foreign non-monetary judgments."

# PART VI

# RECOMMENDATION AND CONCLUDING REMARKS

## 6.1 Recommendation

The material conditions in the life of a country at any stage influence the level of development of private international law.[293] These factors include growth in international trade and investment, and advancement in technology.[294] It is therefore recommended that the countries under study sign and ratify the Hague convention so that they become beneficiaries of the global developments in private international law, especially those on grounds of international competence of foreign court.

Alternatively, it is suggested that in the event the countries do not want to be parties to the Hague Convention, they can amend their existing legal framework on recognition and enforcement of foreign judgments and incorporate these novel grounds of international competence of foreign courts as provided for in article 5 of the 2019 Hague Convention.

## 6.2 Concluding remarks

The significance of cross-border commerce to the economic development of common-law West Africa cannot be overemphasized.[295] As set out at the commencement of this work, the common-law grounds of international competence, which have further been codified in the statutes of the countries under study, is very narrow, restricting it to merely residence, presence and submission. However, the Hague Convention provides a broader scope for conferring international competence on the foreign courts and the subsequent possibility of recognizing and enforcing judgments rendered by it.

At its just ended summit in Abuja, ECOWAS adopted a single currency, The Eco, to be used in the West African sub-region.[296] The Eco is envisaged to enhance economic development in the West African sub-region and boost cross-border trade. An increase in trade will inevitably lead

[293] See generally Kalensky *Trends of Private International Law* (1971).

[294] Oppong "Private International Law in Africa: The Past, Present, and Future" 2007 *The American Journal of Comparative Law* 677 678.

[295] See generally Verter "International Trade: The position of Africa in Global Merchandise Trade" in Ibrahim (ed) *Emerging issues in economics and development* (2017) 65-88.

[296] Economic Community of West African States (https://www.ecowas.int/ (10-7-2019)).

to an increase in commercial litigation.[297] Judgments result from such litigation and will need to be recognized and enforced in other countries including other ECOWAS States. It is thus advantageous that the countries under study sign and ratify the 2019 Hague Convention to enjoy the numerous benefits that this Convention offers. The Hague Convention has the advantage of providing business partners with a simple, efficient, and predictable structure with regards to the recognition and enforcement regime;[298] it will also reduce related cost.[299]

The Hague Convention is the latest legal framework on recognition and enforcement of foreign judgments. It encapsulates the modern accepted basis for recognizing and enforcing foreign judgments across borders. This will help to accelerate economic engagement and development among the countries under study and their trade partners, majority of which are member States of the Hague Conference, if they all become Contracting Parties to the Convention.



[297] See generally Hartley *International commercial litigation: Text, Cases and Materials on Private International Law* (2015).

[298] The Judgments Project (n 98); Khandeira (n 77) 9; and Mehren "Enforcing judgments abroad: Reflections on the design of Recognition Conventions" 1998 *Brooklyn Journal of International Law* 17 23.

[299] The Judgments Project (n 98).

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