SOUTH AFRICAN LAW COMMISSION

ISSUE PAPER 21

PROJECT 121

CONSOLIDATED LEGISLATION PERTAINING TO INTERNATIONAL CO-OPERATION IN CIVIL MATTERS

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INTRODUCTION

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

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PREFACE

This issue paper has been prepared to elicit responses from interested parties and to serve as a basis for the Commission's deliberations, taking into account responses received. The issue paper is published so as to provide persons and bodies wishing to comment or make suggestions relating to the investigation with sufficient background information to enable them to place focussed submissions before the Commission. The issues raised need to be debated thoroughly. The comments of all interested parties are accordingly of vital importance to the Commission.

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

Respondents are requested to submit written comments, representations or requests to the Commission by **28 February 2003** at the address appearing on the previous page. The project leader responsible for the investigation is Adv. J J Gauntlett SC. The researcher allocated to the investigation, who may be contacted for further information, is Ms S Govender.

This document is also available on the internet at: www.law.wits.ac.za/salc/salc.html

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1. BACKGROUND

On 3 November 1999 the Directorate: International Affairs held a departmental workshop to discuss international co-operation between South Africa and foreign states in civil matters. The need to revisit this area arose mainly from South Africa's readmission to certain international organisations such as the United Nations and the Commonwealth. Growing international trade requires effective mechanisms and procedures for the recognition and enforcement of foreign judgments.

The Directorate of International Affairs also sensed growing concern amongst legal practitioners regarding the designation of countries to which legislation in this area applies. Thus far only a few countries have been designated under the relevant pieces of legislation. Since these apply only to the designated countries, the result is that they are inapplicable to all other countries.

The workshop was attended by key role-players such as judges, magistrates, state attorneys, sheriffs, registrars and clerks of the court. Various pieces of legislation were discussed,[1] after which it was concluded that there is no need to have the Reciprocal Enforcement of Maintenance Orders Act 1963 separate from the Enforcement of Foreign Civil Judgments Act 32 of 1988 since both Acts relate to civil judgments or orders. It was also concluded at the workshop that consolidated legislation capturing all relevant pieces of legislation should be developed.

On 5 June 2000 the Minister approved the inclusion of an investigation entitled "Consolidated Legislation Pertaining to International Co-operation in Civil Matters" in the Commission's programme.

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[1] Enforcement of Foreign Civil Judgments Act 32 of 1988; Reciprocal Enforcement of Maintenance Orders Act 80 of 1963; Recognition and Enforcement of Foreign Arbitrary Awards Act 40 of 1977; Reciprocal Service of Civil Process Act 12 of 1990; Foreign Courts Evidence Act 80 of 1962; Reciprocal Enforcement of Maintenance Orders (Countries in Africa) Act 6 of 1989.

2. SCOPE OF THE INVESTIGATION

There are a number of different statutes regulating international co-operation in civil matters. The investigation is aimed at reviewing this legislation with a view to developing a uniform Act which promotes the aims and achieves the purposes of the current individual Acts. It also aims to ascertain whether consolidation of legislation is the appropriate route to follow in attempting to facilitate international co-operation in civil matters.

International co-operation in the context of the Commission's investigation relates to the recognition and enforcement of foreign judgments; the service of judicial process abroad; and the taking of evidence for use in foreign civil proceedings. Recognition of a foreign judgment means that a domestic court acknowledges that the judgment has, within its own jurisdiction, the legal effect which the foreign court intended it to have. Enforcement means that the domestic court will compel the judgment debtor to comply with the judgment. It is possible for a court to recognise a foreign judgment but not enforce it. It is, however, not possible for a court to enforce a foreign judgment without recognising it.

On 14 February 2002 South Africa became the 59th member State of the Hague Conference on Private International Law. This has opened the door for ratification of the Hague Conventions on Private International Law, which in turn are intended to foster international co-operation in civil and commercial matters.

3. THE NEED FOR REVIEW OF LEGISLATION

Co-operation between South Africa and foreign states in civil matters is an area where there have been no recent significant developments. The present position is that, subject to certain statutory exceptions, a foreign judgment is not directly enforceable in South Africa.

South Africa is part of the global business community. International co-operation in civil matters is very important in the light of our trade and other relations with foreign states. Globalisation and the rapid growth of international trade mean that cross-border disputes are inevitable. This in turn raises issues of jurisdiction of courts and the recognition and enforcement of foreign judgments by courts.

There are various pieces of legislation[2] providing for international co-operation in civil matters. This is achieved by way of designation of countries under the different pieces of legislation. To date only a few states have been designated for the purpose of co-operation in civil matters. Given the fact that South Africa is a member of many international organisations, there is a dire need to review the area of international co-operation.

The necessary laws exist in our statute book but do not seem to be achieving their purpose. The first possible reason is that there are currently too many statutes governing this area, thereby complicating rather than facilitating the process of enforcement of foreign judgments. The second reason is that the relevant Acts operate on the basis of designation of countries. The Acts therefore apply only to such designated countries.

In respect of judgments relating to money, Namibia is the only country designated under enabling regulations as a country with reciprocal enforcement procedures. The result is that statutory enforcement in South Africa has limited scope. From a practical point of view, common law enforcement seems to be the only method of enforcement currently available.

The same situation prevails in respect of the enforcement of other types of civil judgments such as maintenance orders. Only a few countries have been designated

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[2] Enforcement of Foreign Civil Judgments Act 32 of 1988; Reciprocal Enforcement of Maintenance Orders Act 80 of 1963; Recognition and Enforcement of Foreign Arbitrary Awards Act 40 of 1977; Reciprocal Service of Civil Process Act 12 of 1990; Foreign Courts Evidence Act 80 of 1962; Reciprocal Enforcement of Maintenance Orders (Countries in Africa) Act 6 of 1989.

in terms of the Reciprocal Enforcement of Maintenance Orders Act.[3] The Act therefore applies only to such designated countries. The Enforcement of Foreign Civil Judgments Act[4] cannot be used to enforce a foreign maintenance order because the definition of a judgment in that Act specifically excludes "the periodical payment of sums of money towards the maintenance of any person".[5] The common law does not offer a solution in maintenance matters. Orders for future maintenance are not recognised under the common law because such maintenance orders are not regarded as final.[6] This ultimately means that most foreign maintenance orders cannot be enforced in South Africa.

The reciprocal service of judicial process is hindered by the same obstacle of designation. Only a few countries have been designated under the relevant Act.[7]

4. THE COMMON LAW POSITION

In terms of the modern Roman-Dutch common law a foreign judgment will be recognised if :

(i) it emanated from a foreign court which had international jurisdiction according to South African law;

(ii) it is final;

(iii) it is not contrary to public policy (the judgment must not have been obtained fraudulently or without observance of the rules of natural justice nor must it be for the enforcement of a foreign revenue or penal law);

(iv) enforcement is not prohibited by the Protection of Businesses Act 99 of 1978.

A foreign judgment is not directly enforceable but constitutes a cause of action which will be enforced by South African courts.[8] In other words, a foreign judgment may be

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3 Act 80 of 1963.
4 Act 32 of 1988.
5 Section 1.
6 One of the common law requirements for recognition and enforcement of a foreign judgment is that the judgment must be a final judgment.
7 Reciprocal Service of Civil Process Act 12 of 1990.
8 ***Jones v Krok*** 1995 (1) SA 677 (A) at 685B.

enforced by an ordinary action. Provisional sentence may be granted on foreign money judgments.

The problems with the common law procedures[9] are that they are expensive, time-consuming and complex. In response to this the legislature enacted legislation to facilitate the enforcement of foreign judgments.

5. STATUTORY PROVISIONS

Various pieces of legislation regulate the enforcement of foreign judgments in South Africa. In most of these pieces of legislation there is provision for co-operation through the designation of foreign countries. There are other pieces of legislation providing for reciprocal service of documents and the taking of evidence for the purpose of civil proceedings. Each of these Acts is discussed briefly below.

5.1 Recognition and Enforcement of Foreign Judgments

(i) The **Enforcement of Foreign Civil Judgments Act 32 of 1988** provides for the registration in a local Magistrates' Court of judgments from certain courts in designated countries. A registered foreign judgment has the same effect as a civil judgment of the registering court and can be enforced as such.[10]

The Act is silent on the issue of registration of foreign judgments by the High Court. Therefore, the registration and enforcement of foreign judgments by the High Court are done under the common law. Magistrates' Courts have jurisdiction in matters up to R100 000 only. This means that all foreign money judgments in excess of R100 000 must be dealt with by the High Court under the common law.

This Act, unlike its predecessor, is not based on reciprocity. The Act applies only to money judgments. The following are but a few of the questions posed in relation to this Act:

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9 Provisional sentence, default judgment and declaratory orders.

10 Section 4(1).

Should the provisions of this Act be extended to the High Court in order to facilitate the registration of foreign money judgments in excess of

R100 000?

Is the current situation where the High Courts deal with enforcement of foreign judgments under common law principles, satisfactory?

In the United Kingdom there are three Acts governing the recognition and enforcement of foreign civil judgments. The Administration of Justice Act 1920 makes provision for the reciprocal enforcement within the United Kingdom of judgments obtained in superior courts of any part of the Commonwealth. The Foreign Judgments (Reciprocal Enforcement) Act 1933 makes provision for the registration of judgments emanating from Commonwealth countries[11] as well as those from completely foreign countries. This Act reiterates the English common law position in respect of the recognition and enforcement of foreign civil judgments.

Both Acts are based on reciprocity and apply equally to foreign arbitral awards. They do not apply to matrimonial matters, administration of deceased estates, bankruptcy, winding up of companies, lunacy, or guardianship of infants. This is because such matters are not considered to be claims ***in personam***.[12]

The Civil Jurisdiction and Judgments Act 1982 provides for the reciprocal enforcement of judgments from States which are parties to the Brussels Convention.[13] This Act implements the Brussels Convention[14] and applies to money and non-money judgments.[15]

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11 Those Commonwealth countries which the Administration of Justice Act 1920 does not apply to.

12 Dicey and Morris **The Conflict of Laws** 13th edition London: Sweet & Maxwell 2000 (Volume 1) at 263.

13 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 1968.

14 The Civil Jurisdiction and Judgments Act 1991 implemented the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 16 September 1988. The 1982 Act was then amended so as to refer to the Lugano Convention.

In New Zealand the Reciprocal Enforcement of Judgments Act 1934 provides for the enforcement in New Zealand of judgments given in the United Kingdom or in other countries which afford reciprocal treatment to judgments given in New Zealand. The Act applies to both money judgments and non-money judgments. The Act does not apply to matrimonial matters, administration of deceased estates, insolvency, winding up of companies, lunacy, or guardianship of infants.[16]

In Australia the relevant Act is the Foreign Judgments Act 1991. Similar to the Acts discussed above, this Act is based on reciprocity. The Act does not apply to matrimonial matters, administration of deceased estates, bankruptcy, insolvency, winding up of companies, mental health, or guardianship of infants.[17] The Act applies to both money judgments and non-money judgments.

The New Zealand and Australian Acts are modelled on the United Kingdom legislation. The Acts also facilitate the enforcement of Australian and New Zealand judgments in other countries. This is achieved by providing for the Registrars of their courts to issue certified copies of judgments and certificates containing pertinent details of the judgments to judgment creditors.

It must be noted, however, that these Acts do not provide for the reciprocal service of legal documents.

The Hague Conference on the Recognition and Enforcement of Judgments in Civil and Commercial Matters[18] provides for mutual recognition and enforcement of judicial decisions rendered in their respective countries. This convention does not enjoy much support. Only three states, namely, Cyprus, Netherlands and Portugal have ratified the convention. As between the Netherlands and Portugal the provisions of the Hague Convention have been replaced by those of the Brussels

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15 A non-money judgment is defined in the Civil Jurisdiction and Judgments Act 1982, schedule 7, para 1, as “any relief or remedy not requiring payment of a sum of money”.

16 Section 2(2) of the Act.

17 Section 3(1) of the Act.

18 Entered into on 1 February 1971.

Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 1968.

(ii) The **Reciprocal Enforcement of Maintenance Orders Act 80 of 1963** provides for the reciprocal enforcement of maintenance orders made in South Africa and proclaimed countries. A maintenance order cannot be enforced under the common law because it is variable and is therefore not seen to be 'final and conclusive'. The failure of the common law to make adequate provision for the enforcement of foreign maintenance orders led to the enactment of statutory mechanisms in this area. A maintenance order requires the periodical payment of sums of money. In this regard the aim of this Act bears some similarity to that of the Enforcement of Foreign Civil Judgments Act.

At a departmental workshop[19] held by the Directorate of International Affairs it was concluded that there is no need to have the Reciprocal Enforcement of Maintenance Orders Act separate from the Foreign Civil Judgments Act 1988 since both Acts relate to civil judgments or orders.

The approaches of other countries in relation to the enforcement of foreign maintenance orders might provide assistance. For example, in the United Kingdom the reciprocal enforcement of foreign maintenance orders are dealt with separately from the reciprocal enforcement of foreign civil judgments. A foreign judgment, including a maintenance order, will not be recognised or enforced under the common law in England unless it is final and conclusive. This requirement is carried through in the Foreign Judgments (Reciprocal Enforcement) Act 1933.[20] A maintenance order providing for the periodical payment of money is not seen to be 'final and conclusive' if it is variable by the court which pronounced it.[21] This is why the 1933 Act could not be used for the recognition or enforcement of foreign maintenance orders. Since the common law could not be used either, other statutory means had to be devised to solve the problem.

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19 Departmental Workshop on International Co-operation in Civil Matters, Pretoria, 3 November 1999. This workshop was attended by 25 participants, consisting of judges, magistrates, state attorneys and sheriffs.

20 Section 1(2)(*a*).

21 Dicey and Morris **The Conflict Of Laws** 13th edition London: Sweet & Maxwell 2000 (Volume 1) at 477.

The Maintenance Orders (Facilities for Enforcement) Act 1920 makes provision for the reciprocal enforcement in England and Northern Ireland of maintenance orders made in certain commonwealth countries overseas. The Maintenance Orders Act 1950[22] provides for the reciprocal enforcement of maintenance orders within the United Kingdom. The Maintenance Orders (Reciprocal Enforcement) Act 1972 provides for the reciprocal enforcement of maintenance orders between the United Kingdom and certain countries outside the United Kingdom. The Civil Jurisdiction and Judgments Act 1982 provides for the reciprocal enforcement of maintenance orders in states which are parties to the 1968 Brussels convention.

A similar situation prevails in Australia and New Zealand. The international trend seems to be towards keeping maintenance matters separate from other civil matters.

In view of the above, the following are but a few of the issues which need to be addressed in relation to the South African legislation in this regard:

- Is it advisable to have the Reciprocal Enforcement of Maintenance Orders Act separate from the Enforcement of Foreign Civil Judgments Act?

The second aspect revolves around the question whether South Africa should ratify any of the Hague Conventions dealing with the recognition and enforcement of maintenance obligations. There are two conventions in this area: one relates to maintenance obligations in respect of adults[23] and the other relates to maintenance obligations in respect of children[24]. These conventions have a fair amount of support amongst member states but almost no support amongst non-member states.[25]

- Should South Africa ratify the conventions mentioned above?
- Are there specific disadvantages to the ratification of the two conventions?

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22 Part II of the Act.

23 Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations (1973).

24 Convention Concerning the Recognition and Enforcement of Decisions Relating to Maintenance Obligations Towards Children (1958).

25 Only one non-member state, Liechtenstein, has acceded to the Convention on the Maintenance of Children.

(iii) **Reciprocal Enforcement of Maintenance Orders (Countries in Africa) Act 6 of 1989** provides a procedure whereby maintenance orders made in African countries may be registered locally. The countries to which the Act is applicable are designated by the Minister of Justice and not by the President. The process is administrative and does not involve the use of diplomatic channels.

Only the formerly independent states of Transkei, Bophuthatswana, Venda and Ciskei were designated under the Act. Since these states are now once again part of South Africa the Act is, from a practical point of view, of no use.

It is possible that the Minister could designate more African countries, thereby facilitating co-operation amongst countries in Africa. The advantage of the Act is that it provides a simplified administrative process for the registration of maintenance orders made in African countries. It also provides for the registration and enforcement of provisional maintenance orders as well as the registration of emoluments attachment orders.

- Is it advisable to retain this Act and if so for what purpose?

(iv) The **Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977** provides for the recognition and enforcement of foreign arbitration awards. Section 2 of the Act provides that an arbitration award may be made an order of court in any court and may be enforced in the same manner as any judgment or order to the same effect.

In 1976 South Africa became a party to the Convention on the Recognition and Enforcement of Foreign Arbitrary Awards. Act 40 of 1977 was enacted to give effect to this accession. The Commission, in the course of its investigation into arbitration, found that this Act is seriously defective.[26]

[26] South African Law Commission **Report on an International Arbitration Act for South Africa** Project 94 July 1998 at 1.

The six main criticisms levelled at the Act related to the definition of a "foreign arbitral award"; the failure to include an equivalent to article II of the New York Convention regarding the enforcement of arbitration agreements; problems with the wording of section 4 regarding the grounds for refusal of enforcement of foreign arbitral awards; the enforcement of awards in a foreign currency; the failure to make express provision for the recognition of foreign arbitral awards as opposed to their enforcement; and the wording of the Act which creates the impression that the grounds for refusal of enforcement of awards are not exhaustive and the court has a general discretion to refuse enforcement.[27]

The Commission proposed a draft Bill on International Arbitration, which is expected to be enacted soon. The Bill implements the UNCITRAL[28] Model Law on International Commercial Arbitration of 1985. The Commission recommended in its report that, because of the serious defects in the 1977 Act, it should be repealed and replaced by legislation forming part of a single statute which also enacts the UNICITRAL Model Law.[29]

The Commission has been requested, as part of its current investigation, to consider incorporating the provisions of Act 40 of 1977 into the consolidated statute. The question is how this is to be achieved in view of the latest developments mentioned above.

5.2 Service Of Documents

(i) The **Reciprocal Service of Civil Process Act 12 of 1990** provides for the reciprocal service of process in civil matters in South Africa and in designated countries. Under section 2(1) of the Act the former Republics of Transkei, Venda, and Ciskei were designated. These are no longer separate states and the designations are therefore no longer applicable.

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27 South African Law Commission **Report on an International Arbitration Act for South Africa** Project 94 July 1998 at 110 .

28 United Nations Commission on International Trade Law.

29 South African Law Commission **Report on an International Arbitration Act for South Africa** Project 94 July 1998 at 111.

This Act provides for the service in South Africa of process received from designated countries.[30] It also provides for service in designated countries of process issued in South Africa.[31] The procedure set out in the Act is cheaper and more expedient. The effectiveness of the Act is, however, hindered by the issue of designation of countries.

Although the Supreme Court Rules[32] provide that no process or document whereby proceedings are instituted may be served outside the country without the leave of the court, the Reciprocal Service of Civil Process Act provides that in designated countries any process, other than a process relating to the enforcement of a civil judgment, may be issued by a registrar of any division of the High Court or by any clerk of the Magistrate's Court without leave of the court.

Documents and processes relating to the enforcement of civil judgments are regulated by the Enforcement of Foreign Civil Judgments Act 1988 and the Foreign Courts Evidence Act 1962 and are therefore specifically excluded in section 4 of this Act.[33]

Should the provisions of the Reciprocal Service of Civil Process Act 12 of 1990 be incorporated in a consolidated Act providing for international co-operation in civil matters?

The Hague Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil or Commercial Matters applies to the service abroad of all judicial and extra-judicial documents in civil and commercial matters. [34] The convention does not apply in cases where the address of the person to be served with the document is not known. As at 23 August 2002 the Convention had been adopted by 39 member states. In addition to this, ten non-member states have also acceded. The main advantage of adopting this Convention is that it has wide support amongst member states.

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30 Section 3.
31 Section 4.
32 Rule 5 of the Supreme Court Rules.
33 Hansard **Parliamentary Debates**, 16 February 1990, col 1059-1060.
34 Entered into on November 15, 1965.

Should South Africa consider ratifying the Hague Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil or Commercial Matters?

5.3 Evidence

(i) The **Foreign Courts Evidence Act 80 of 1962** provides for the obtaining of the evidence of witnesses in South Africa for use in civil proceedings in foreign countries. An order for the examination of a witness has to be granted by a Judge of the High Court in South Africa. Section 2 of the Act provides that such an order will not be granted if it appears to the judge that the evidence required is the furnishing of information in contravention of section 1 of the Protection of Businesses Act, 1978.[35]

The Foreign Courts Evidence Act does not, however, make provision for the obtaining of evidence in foreign countries for use in civil proceedings in South Africa.

South Africa is a party to the Hague Convention on the Taking Abroad of Evidence in Civil or Commercial Matters.[36] This convention aims to improve mutual judicial co-operation in civil or commercial matters and to facilitate the transmission and execution of Letters of Request. Currently there are 39 states which have become parties to this Convention.

5.4 Other Relevant Legislation

The effect of consolidation or reform of current legislation on the following Acts needs to be considered:

(i) The **Magistrate's Court Act 32 of 1944** provides a registration procedure for the enforcement of foreign judgments[37]. Provision is made for a certified copy of a foreign judgment to be registered by the clerk of a magistrate's court. Upon registration of the foreign judgment by the magistrate's court, such judgment has the same effect as a civil judgment of the registering court.

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35 Discussed on page 15 of this paper.

36 Concluded on 18 March 1970.

(ii) The **Supreme Court Act 59 of 1959** does not make provision for the enforcement of foreign judgments. Even the Enforcement of Foreign Civil Judgments Act 1988 is silent on the issue of registration of foreign judgments by the High Court. The High Court can, however, deal with the enforcement of foreign judgments under the common law. This may be the route to follow in cases where the amount of the judgment exceeds R100 000 as well as where the foreign country involved is not designated in terms of the Enforcement of Foreign Civil Judgments Act.

Even though the High Court can deal with the enforcement of foreign judgments under the common law, a statutory provision might prove less cumbersome, less expensive and less time-consuming.

Should statutory provision be made for the registration of foreign judgments by the High Court?

Section 33(1) provides for the taking of evidence in South Africa upon request by a foreign country. The letter of request is transmitted to the registrar by the Director General: Justice. The registrar then submits it to a judge in chambers in order to give effect to the request. The purpose of a letter of request envisaged in this section is to extend the hearing before a foreign court to a hearing before a commissioner in South Africa. The evidence taken before the commissioner becomes part of the evidence before the foreign court.[38] In effect South Africa merely lends its aid to the taking of evidence in the Republic for use in the foreign court.[39]

Section 33(2) of the Act makes provision for the service of foreign civil process in South Africa. This is done upon request from a foreign country. The request is sent to the registrar of the court by the Director General. The registrar then arranges for service by the sheriff in accordance with the rules of court.

(iii) The **Protection of Businesses Act 99 of 1978** stipulates that permission must be obtained from the Minister before foreign judgments, orders, directions, arbitration awards and letters of request connected with the mining, production,

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37 Rule 43A of the Magistrates' Courts Rules.

38 Saunders and Another v Minister of Justice and Others 1997 (3) SA 1090 (C) at1096.

39 Erasmus **Superior Court Practice** Juta: Cape Town 1994 at A1-90, A1-91.

importation, exportation, refinement, possession, use, sale or ownership of any matter or material can be enforced in South Africa. This is aimed at preventing the recovery of excessive damages awarded in foreign courts to externally-based companies doing business with South African citizens.

In addition, the furnishing of information relating to any business, in compliance with such orders, directions, interrogatories, arbitration awards or letters of request constitutes a criminal offence.[40]

The Act also prohibits the recognition and/or enforcement of foreign judgments in respect of multiple or punitive damages.[41]

The Act has been severely criticised by Forsyth[42] who states that the case for legislative reform in this area is overwhelming and that in the absence of legislative reform the refusal of permission by the Minister may give rise to constitutional issues concerning the denial of fundamental rights.[43] Another problem posed by the Act is that having to obtain permission from the Minister leads to unnecessary delay.

Similar legislation has been enacted in other countries to protect local business entities from what is considered to be excessive jurisdiction exercised by foreign courts. In the United Kingdom the Protection of Trading Interests Act 1980 serves a protective function.[44] In Australia the Foreign Proceedings (Excess of Jurisdiction) Act 1984 does the same.

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40 Section 1(1)(*b*) read with Section 2 of the Act.

41 Section 1A of the Act.

42 C F Forsyth **Private International Law** 3rd edition Cape Town: Juta 1996 at 404.

43 C F Forsyth **Private International Law** 3rd edition Cape Town: Juta 1996 at 405 "…every person – including a plaintiff seeking to enforce a foreign judgment – has the right to…'procedurally fair administrative action where any of his or her rights [are] affected or threatened'. Moreover, such action affecting rights must be 'justifiable in relation to the reasons given for it' by the decision maker. Save in the most extreme case – for instance, where the enforcement of the foreign judgment would inflict substantial damage on the economy as a whole – and cases where the court would in any event refuse to enforce on public policy grounds, it is difficult to conceive of any constitutionally proper ground on which the Minister could refuse permission."

44 Forsyth states at page 404 that the Protection of Trading Interests Act 1980 shows how the objectives of such legislation can be achieved without sacrificing all principles of law in this area to the Minister's discretion.

- What would be the impact of this Act on any new legislation providing for international co-operation in civil matters?
- Can the limitations imposed by this Act on the enforcement of specific foreign judgments be justified?
- Does this Act pose an unjustifiable obstacle to international co-operation in civil matters?

6. EFFECTIVE LEGISLATION

It is evident from the discussion above that South Africa currently has many Acts dealing with foreign judgments. The ideal situation would be to have a uniform Act which facilitates international co-operation in civil matters. This would be in line with the approach to international co-operation in criminal matters.[45] The consolidated Act should deal extensively with the recognition and enforcement of foreign judgments, whilst protecting the interests of South African citizens. The legislation ultimately proposed must be effective in achieving its objectives.

An important issue for consideration is whether consolidation is the route to follow. The advantages of one comprehensive and all-encompassing Act, as opposed to various Acts dealing with exclusive areas, must be explored. One advantage of a single Act is that it provides for ease of reference. The legislation pertaining to international co-operation in civil matters would be easily accessible to both domestic and foreign users. This is especially important in the context of foreign users.

Another very important issue, regardless of whether there is a consolidation or not, is whether international co-operation should be based on reciprocity. At this point it might be useful to point out that in the past the requirement of reciprocity proved detrimental to South Africa's efforts to facilitate the recognition and enforcement of foreign civil judgments.

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45 International Co-operation In Criminal Matters Act 75 of 1996.

The Reciprocal Enforcement of Civil Judgments Act 9 of 1966, which was intended to facilitate the recognition and enforcement of foreign civil judgments, was founded on reciprocity. South Africa was, however, unable to conclude mutually acceptable agreements with foreign governments. This fact was largely, if not solely, responsible for the failure to bring the1966 Act into operation. The Act never came into operation and was subsequently repealed by the Enforcement of Foreign Civil Judgments Act 32 of 1988

In relation to the above, the following issues must be addressed :

Is consolidation of legislation advisable to facilitate international co-operation in civil matters?
Should the consolidated Act be based on reciprocity?
If not, what criteria should be used to determine which foreign countries the consolidated Act should apply to?
Alternatively, should South Africa recognise and enforce civil judgments emanating from all foreign countries?

It is suggested that the issues raised in this paper should serve as a catalyst for the raising of other issues relevant to the investigation. Respondents are accordingly invited to indicate whether there are other issues to be explored. All issues raised will have to be debated thoroughly before any particular approach is adopted.