THE UNIVERSITY OF ZAMBIA

SCHOOL OF LAW

RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN ZAMBIA: AN OVERVIEW OF THE LAW.

BY

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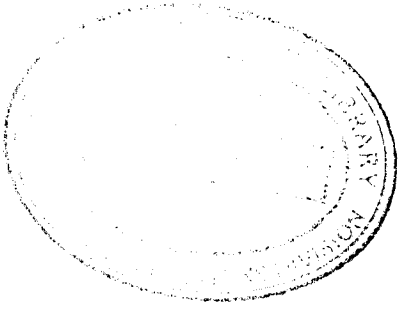
A Directed Research Essay submitted to the University of Zambia in partial fulfilment of the requirements for the degree Bachelor of Laws (LLB) of the University of Zambia.



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ABSTRACT

This research has set to give an overview of the law on recognition and enforcement of foreign judgments in Zambia in light of the decision in *Attorney General v Chiluba and others*[1]. In a bid to establish the above, this research seeks to address the issue of recognition and enforcement of foreign judgments both at common law and under statute. This research further sets out to determine how the Courts in Zambia have interpreted the law governing recognition and enforcement of foreign judgments. Finally, this research has set out to address the relationship between recognition and enforcement of foreign judgments and the promotion of international commerce.

The objectives of this research have been achieved by analysing the applicable laws, judicial decisions, textbooks, scholarly articles, magazine articles and internet sources. This research found that enforcement at common law is governed by the common law of England, while the Foreign Judgments (Enforcement Reciprocal) Act governs the statutory enforcement mechanism.

The research has also revealed that the court was on point when it refused to register the English judgment in the *Chiluba* case. However, it has revealed that the British Colonial Judgments Act is still applicable in contrast to what the court held. This research has further revealed that the current law is not effective as it is unduly complicated, out of tune with current demands, time consuming and expensive, and therefore, reform is inevitable. Finally, this research has proposed that the Foreign Judgment Act be extended to England and that courts be allowed to grant judgments in foreign currency.

[1] (2007) HP/FJ/004 (unreported)

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The successful completion of this Directed Research would not have been possible without the valuable contributions of certain individuals. It is for this reason that I am obliged to acknowledge the support they rendered to me throughout the period of my research.

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To all my friends (members of the Court) who I could not mention, thank you for the encouragement and for always providing a shoulder for me to lean on when things got tough. You all are truly amazing.

DEDICATION

This work is dedicated to the memories of my late father, Maynard Mwamulima and loving mother Elebia Phiri Mwamulima. For the love, compassion and inspiration you always showed me.

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CHAPTER ONE

THE CONCEPT OF RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS

1.0 Introduction

It is a fundamental principle of territorial sovereignty that a judgment obtained in a particular jurisdiction shall be recognised and enforced in that jurisdiction and cannot in the absence of international agreement, be recognised by the courts of a foreign jurisdiction.[1] Over centuries, Private International Law has developed rules and various pieces of legislation have been passed by various legal systems to deal with the problem of the 'absconding debtor'[2]and Zambia is no exception. The purpose of these pieces of legislation is to facilitate enforcement of a foreign judgment without the requirement to re-litigate the matter, pursuant to provisions of a statute.[3] Furthermore, Justice La Forest of Canada's Supreme Court notes that, ''the rules of private international law are grounded in the need in modern times to facilitate the flow of wealth, skills and people across state lines''.[4]

In Zambia, the legislation which regulates recognition and enforcement of foreign judgments was put into statutory form when the British Colonial Judgments Ordinance ("BCJ Ordinance") was enacted in 1922. The aforementioned Act was subsequently repealed by the Foreign Judgments (Reciprocal Enforcement) Act[5] ("Foreign Judgment Act") in 1959. In addition to statutory law, a foreign judgment may be recognised and enforced in accordance

[1] P. M. North, *Cheshire and North's Private International Law*, 10th ed. (London: Butterworths, 1979), 630.
[2] Reid Mortensen, ''Judgements Extension under CER, '' *New Zealand Law Review*, no. 237 (1999): 239.
[3] Jeremy Carver and Christopher Napier, *Enforcement of Foreign Judgements Worldwide,* ed. Charles Platto (London: Graham and Trotman,1989), 203.
[4] *Morguard Investments v De Savoye* [1990] 3 SCR 1077, 1096.
[5] Chapter 76 of the Laws of Zambia.

with the principles of common law which are applicable to Zambia, pursuant to Section 2 of the English Law (Extent of Application) Act.[6]

The law on recognition and enforceability of foreign judgments came to public prominence in Zambia in 2007, when the Zambian Government attempted to enforce by mere registration in Zambia, a judgment obtained from the High Court of Justice in the United Kingdom. The judgment related to a civil claim against the former Republican President of Zambia, Dr Fredrick Chiluba and others.[7]

1.1 Statement of the problem

The problem to be addressed by this research is the determination of the conditions to be satisfied by the plaintiff before a foreign judgment is registered in Zambia. When the High Court refused to register the London judgment in the *Chiluba case*, different opinions have been given on the conditions which a plaintiff must satisfy before a foreign judgment is registred. However, the majority of the opinions have focused on criticising the judgment for refusing to register the London judgment[8] and not explaining the conditions which must be satisfied before a foreign judgment is registered. In this regard, this research seeks to explain the conditions which the plaitiff must satisfy in order to secure his legal rights both under statute and common law.

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[6] Chapter 11 of the laws of Zambia

[7] *Attorney General v. Dr. Frederick Jacob Titus Chiluba , Xavier F. Chungu, Attan Shansonga , Stella Mumba Chibanda , Aaron Chungu , Faustin Mwenya Kabwe, Ireen Kabwe and Francis Kaunda.* [2007] HP/FJ/004.

[8] Law Association of Zambia and Transparency International Zambia are some of the organisations which criticised the judgement which refused to register the London Judgement.

1.2 Objectives of the research

The ultimate objective of this research is to give an overview of the law on recognition and enforcement of foreign judgments in Zambia.

In order to determine this, the following benchmarks have been addressed:

i. A historical background on Zambia's law on recognition and enforcement of foreign judgments (that is, the British Colonial Judgments Ordinance) and an ascertainment of the reasons for its repeal.

ii. Review of the salient provisions of Zambia's Foreign Judgments Act in a bid to discover whether or not there is need to reform the law to meet the current challenges.

iii. A discussion of the conditions which the plaintiff must satisfy for an action under common law to succeed.

iv. An assessment of the Court's interpretation of the law governing recognition and enforcement of foreign judgments in Zambia.

v. An assessment on how the existing law in Zambia, both common and statutory, are responsive to the growth of international trade especially in the light of the present efforts by the government to promote investment and international commerce.

1.3 Rationale and justification of research

This essay has been undertaken to clear some of the misunderstandings which the general public has in relation to this area of the law, by explaining the different concepts which govern enforcement of foreign judgments in Zambia. Further, this essay addresses the effectiveness of the Foreign Judgment Act in achieving its purpose in light of the current demands of international commerce and trade. Additionally, this research has come at a time when there are few scholars who have presented any literature in relation to recognition and enforcement of foreign judgments in Zambia.

1.3.1 Specific research questions.

i. What is the purpose of the Foreign Judgments Act and how effective is it in achieving its intended purpose?

ii. Is the judgment in the *Chiluba* case a mischief to the Zambian jurisprudence?

iii. Should part two of the Foreign Judgments Act be extended to more jurisdictions?

iv. Is there is need to reform the current law?

1.4 Research methodology

Owing to the fact that this paper is more technical in nature, the objectives of the paper as aforementioned, have been achieved by analysing the applicable laws and judicial decisions. This paper has further relied on information from authors who have analysed the law on recognition and enforcement of foreign judgments, namely, textbooks, scholarly articles, magazine articles as well as the internet, where text books and scholarly articles fall short.

1.5 The Concept of Recognition and Enforcement of Foreign Judgments.

Enforcement and recognition of foreign judgments is a phenomenon which has long existed as a topic in the sphere of Private International Law. It relates to the practice of a court to recognise and enforce a judgment of a foreign court.[9] Recognition of a foreign judgment occurs when a court determines that a matter has been adequately adjudicated by a foreign court and does not need further litigation in domestic courts. Enforcement of foreign judgments, on the other hand, is the application of the local court's powers to give effect to the foreign court's decision without the plaintiff having to re-litigate the merits of the dispute.[10] Thus, whilst a foreign judgment must be recognised before it can be enforced, not every recognised judgment will be enforced.[11]

The basic rule is that by virtue of the doctrine of territorial sovereignty, foreign judgments have no effect in any other country other than the country in which it was delivered, unless and until it is given effect through recognition and enforcement by a domestic court.[12] However, circumstances do arise when courts recognise and enforce a judgment delivered by competent courts of other jurisdictions. For instance, where the parties have got their disputes adjudicated in a forum in England and owing to the existence of some elements in a contract in Zambia, to apply to the High Court to recognise and enforce the decree so obtained from English Court. In determining whether recognition and enforcement should be ascribed to a foreign judgment, courts are governed by the rules of Private International Law of their respective jurisdictions which are present in almost all jurisdictions. Private International

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[9] Rautray Darmendra, "The Enforcement of Foreign Judgments or Orders in other Jurisdictions: the Pitfalls/Merits/Recognition of Foreign Judgment and interim Orders in India." http://www.kaplegal.com (accessed on 20th December, 2011)

[10] Kim Pham , ''Enforcement of Non-Monetary Foreign Judgments in Australia'', *Sydney Law Review* 30, no. 663 (2008): 663.

[11] Lawrence Collins et al. eds., *Dicey & Morris: The Conflict of Laws.* 13th ed. (London: Sweet and Maxwell, 2000), 1: 468.

[12] Pham, "Enforcement of Non-Monetary Foreign Judgments in Australia,'' *663.*

Law rules impose certain conditions which must be satisfied in order for a foreign judgment to be recognised and enforced.[13]

1.5.1 The Basis of Recognition and Enforcement of Foreign Judgments.

The rules of Private International Law in England, have long allowed recognition and enforcement of foreign judgments on certain grounds. Older cases allowed foreign judgments to be recognised and enforced using the doctrine of comity. "English Judges believed that the laws of nations required the courts of one country to assist those of any other, and they feared that if foreign judgments were not enforced in England, English judgments would not be enforced abroad".[14] Whereas a precise definition of comity may be elusive, comity entails the obligation which a domestic court has towards a foreign judgment to take a foreign judgment as it stands in order to obtain reciprocal treatment from courts of other countries.[15]

The Supreme Court of America in, *Hilton v. Guyot* [16], stated that:

> Comity is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and goodwill upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens.

The doctrine of comity can be traced to the seventeenth-century when it was put forth as a way to explain how rights acquired under the laws of one nation could have effect within the territory of another. A seventeenth century Dutch jurist, Ulrich Huber, outlined three maxims to address the problem of foreign rights in a world of exclusive territorial sovereignty:

1. The laws of each state have force within the limits of that government and bind all subject to it, but not beyond.

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[13]Rautray Darmendra, "The Enforcement of Foreign Judgments or Orders in other Jurisdictions: the Pitfalls/Merits/Recognition of Foreign Judgment and interim Orders in India."
[14] Dicey and Morris, *The Conflict of Laws,* 469.
[15] North, *Cheshire and North's Private International Law,* 630.
[16] 159 U.S. 113 [1895].

2. All persons within the limits of a government, whether they live there permanently or temporarily, are deemed to be subjects thereof.
3. Sovereigns will so act by way of comity that rights acquired within the limits of a government retain their force everywhere so far as they do not cause prejudice to the power or rights of such government or of its subjects.[17]

In relation to his third maxim Huber wrote that "nothing could be more inconvenient to commerce and to international usage than that transaction valid by the law of one place should be rendered of no effect elsewhere on account of a difference in the law," and comity served to avoid that inconvenience. Furthermore, to Huber, the third maxim permitted discretion on the part of the sovereign, which could deny the effect of foreign law to the extent necessary to protect itself and its subjects.[18]

Huber's ideas were incorporated into the English jurisprudence by Lord Mansfield in 1750 in *Robinson v. Bland.*[19] In *Holman v. Johnson*[20], Mansfield cited Huber and followed his proposition of law from his *Praelectiones* 2.1.3.5, which reads:

> What we have said about wills also applies to *inter vivos* acts. Provided contracts are made in accordance with the law of the place in which they are entered into, they will be upheld everywhere, in court and out of court, even where, made in that way, they would not be valid. [21]

The use of comity as a basis of recognising and enforcing foreign judgment, however, led to practical and theoretical difficulties. Under the doctrine of comity, enforcement of a foreign judgment is withheld if it emanates from a country that refuses to grant a similar measure. Thus, the requirement of reciprocity becomes relevant under comity. This requirement is

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[17] Hessel E. Yntema, " The Comity Doctrine'', *Michigan Law Review* 9, no. 65 (1966): 30, quoted in William S. Dodge, "International Comity in American Courts". http://www.asil.org/files/dodge.pdf (accessed on 20th December 2011).
[18] Ibid.
[19] [1760] 96 Eng. Rep. 141.
[20] [1775] 98 Eng. Rep. 1120.
[21] [1775] 1 Cowp 341, 343.

problematic as it punishes private litigants for the omissions of States. Furthermore, it is impossible to determine with precision the defences available to a defendant, if courts are compelled by comity to enforce the judgment, except the want of jurisdiction in the foreign courts. Therefore, to enforce a foreign judgment on the ground of goodwill, courtesy and mutual respect of another nation is inconsistent with the notion of natural justice.[22]

In light of the above defects and the fact that comity is a principle, not of duty but of prudence and politeness, the doctrine of comity has been superseded by a more defensible doctrine of obligation. Under this doctrine, what is enforced by English courts is not the foreign judgment per se but the obligation it produces.[23] Once a court of competent jurisdiction adjudicates, for instance, that a certain sum is due from one person to another, the liability to pay that sum becomes a legal obligation that may be enforced by an action of debt.[24]It does not matter where that promise was made or where the obligation arose; a man indebted to another in one place is indebted to him in all places.[25]

In the case of *Schibsby v Westenholz*[26], the doctrine of obligation was stated in the following terms:

> ...the true principle on which the judgments of foreign tribunals are enforced in England is...that the judgment of a court of competent jurisdiction over the defendant imposes a duty or obligation on the defendant to pay the sum for which judgment is given, which the courts in this country are bound to enforce; and consequently that anything which negatives that duty, or forms a legal excuse for not performing it, is a defence to the action.

In other words, a judgment of the court vests a new right in the creditor and a new obligation on the debtor. The obligation so created is a simple contract which is subject to the

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[22] North, *Cheshire and North's Private International Law , 630.*
[23] Dicey and Morris, *The Conflict of Laws* , 469.
[24] North, *Cheshire and North's Private International Law,* 630.
[25] *Whitehead v Brown* [1793] 83 ER 315.
[26] *[1870] L.R. 6 Q.B. 155.*

appropriate limitation period.[27] Consequently, the burden lies on the defendant to prove to the court why he or she should be excused from performing this obligation.

An obligation, once recognised by English law, must be enforced irrespective of the substantive rules of law obtaining in the country of its creation. Thus, unlike the doctrine of comity, the question of reciprocity is eliminated by the doctrine of obligation as there is no need to consider what treatment is meted between the two countries. Furthermore, under the doctrine of obligation, any fact which disapproves the existence of an obligation may be pleaded as a defence.[28] The doctrine of obligation, however, has been criticised for not advancing any reasonable ground as to which foreign judgments to recognise and which not to.

1.6 Application of English Rules of Private International Law in Zambia.

The application of English law into the Zambian legal system is permitted by the English Law (Extent of Application) Act[29] and the British Acts (Extension) Act[30]. Section 2 of the English Law (Extent of Application) Act provides *inter alia* that the common law shall be applicable to Zambia provided the same is not inconsistency with the constitution and statute.

Through the English Law (Extent of Application) Act, the body of law known as Private International Law, including the rules on recognition and enforcement of judgments at common law became part of the laws of Zambia. This position was affirmed by the Supreme Court of Zambia in *Mileta Pakou & others v. Rudnap Zambia Limited*[31] when it held that "the law which applies in Zambia in default of any statute is the common law of England''.

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[27] Lord Hailsham, ed., *Halsbury's Laws of England*, 4th ed. (London: Butterworths, 1974), 8: 475.
[28] North, *Cheshire and North's Private International Law, 631.*
[29] Chapter 11 of the Laws of Zambia.
[30] Chapter 10 of the Laws of Zambia.
[31] [1998] ZR 233.

1.7 Outline of Chapters

Chapter One

This chapter gives an introduction to the research and also deals with the basic aspects of the research. It includes the statement of the problem, objectives of the research questions, significance of the study and the methodology of this essay. This chapter further discuss the basis of recognising and enforcing of foreign judgments.

Chapter Two

This chapter explains the common law mechanism of recognising and enforcing foreign judgments in Zambia. What the plaintiff must satisfy for a foreign judgment to be enforced and the defences available to the defendant.

Chapter Three

This chapter discusses the historical background of recognition and enforcement of foreign judgments in Zambia under statute. This chapter further explains the salient provisions of the Foreign Judgments Act. Finally, this chapter discusses how the judiciary has interpreted cases under this area of the law.

Chapter Four

This chapter discusses the nexus between recognising foreign judgments and promotion of trade and further addresses the question of whether Zambia has an effective enforcement regime.

Chapter Five

This chapter gives the general conclusion of the research, recommendations and possible areas of reform in recognition and enforcement of foreign judgments in Zambia.

1.8 Conclusion

This chapter apart from laying the foundation upon which the essay is based, has briefly set out the basis of recognition and enforcement of foreign judgments and how the rules of conflict of laws of England are applicable to Zambia. In addition, the scene has been set for the subsequent chapters that specifically focus on recognition and enforcement of foreign judgments in Zambia.

CHAPTER TWO

RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN ZAMBIA.

2.0 Introduction.

Zambia, like many other jurisdictions, has no general law which allows for the automatic recognition and enforcement of foreign judgments in Zambia. Consequently, foreign judgments in Zambia are enforced either under the Foreign Judgments Act[1], which accords the plaintiff a relatively straightforward process for enforcement by means of registration of a foreign judgment or through the Common Law process which limits the recognition of the foreign judgment to mere evidence of a claim or defence which has to be re-litigated.[2] This chapter will outline the common law position of recognising and enforcing foreign judgments.

2.1 The Common Law Mechanism of Recognising and Enforcing Foreign Judgments.

At common law, a foreign judgment creates a simple debt, therefore, to enforce it the judgment creditor has to bring a fresh action on the judgment[3], subject to the Rules of the High Court[4] either before a judge in chambers if it is a matter that can be disposed of in chambers; or by general writ and fresh statement of claim by pleading that the judgment debt is due and owing if it is a matter that cannot be disposed of in chambers.[5] A plaintiff may also apply for summary judgment under Order XIII of the High Court Rules on the grounds that the defendant has no defence to a claim. "A summary judgment may be granted only if there is (1) no serious convict as to matter of fact and (2) no real difficulty as to any matter of law".[6]

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[1] Recognition and Enforcement of Foreign Judgment under statute will be discussed in more detail under chapter 3 of this research.
[2] The law which will be discussed is the common law of England.
[3] Richard Frimpong Oppong, ''Recognition and Enforcement of Foreign Judgements in Ghana: A Second Look at a Colonial Inheritance,'' *Commonwealth Law Bulletin* 31, no. 4 (2005): 22.
[4] Chapter 27 of the Laws of Zambia.
[5] John Collier, *Conflict of Laws,* 2nd ed. (London: Cambridge University Press , 1994), 127.
[6] *Commonwealth Development Corporation v. Central African Power Corporation* [1968] ZR 70 (H.C.)

However, "the plaintiff's right to have summary judgment entered under Order XIII is not absolute merely because the defendant's affidavits as to his defence are not completely satisfactory; the jurisdiction is to be exercised with great care so as not to preclude a party from raising any defence he may really have."[7]

Before a foreign judgment can be enforced it must first be recognised by a domestic court that it was rendered by a court of competent jurisdiction according to the rules of Private International Law and that the defendant cannot avail himself to the defences available when a foreign judgment is recognised.[8]

2.1.1 Court of Competent Jurisdiction

It is a trite principle of private international law that a foreign court which renders a foreign judgment capable of recognition in Zambia had jurisdiction over both the parties and the subject-matter.[9] The words of Buckley LJ in *Emanuel v. Symon*[10] provide a customary starting point for an exposition of this topic.

> In actions in personam there are five cases in which the courts of this country will enforce a foreign judgment: (1) where the defendant is a subject of the foreign country in which the judgment has been obtained; (2) where he was resident in the foreign country when the action began; (3) where the defendant in the character of plaintiff has selected the forum in which he is afterwards sued (4) where he has voluntarily appeared and (5) where he has contracted to submit himself to the forum in which the judgment is obtained.

An examination of the words of Buckley LJ show that the issue of jurisdiction is almost always related to the requirement of personal jurisdiction over the parties, and more specifically, over the defendant. Consequently, a foreign court will be considered to be a court of competent jurisdiction, if at the date of the commencement of the proceeding the

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[7] *Partizanski Put (Zambia) Ltd v. Willy Kit Ltd* [1977] ZR 357 (S.C.)
[8] Mark Stiggelboult , " The Recognition in England and Wales of United States Judgements in Class Actions", *Harvard International Law Journal* 52, no. 2 (2011): 462.
[9] Lawrence Collins et al. eds., *Dicey & Morris: The Conflict of Laws* . 13th ed. (London: Sweet and Maxwell, 2000) , 1: 488.
[10] [1908] 1 K.B 308.

defendant was resident or present in the country of the foreign court or if he submitted to the foreign court's jurisdiction.

Therefore, the court must be satisfied that the defendant was served with process while he was present in the country of the foreign court and it is sufficient that the defendant is temporarily present but not resident when the proceedings are commenced. In the case of *Adams v. Cape Industries*[11], it was observed thus:

> So long as he remains physically present in that country, he has the benefit of its laws and must take the rough with the smooth, by accepting his amenability to the process of its courts. In the absence of authority compelling a country conclusion, we would conclude that the voluntary presence of an individual in a foreign country, whether permanent or temporary and whether or not accompanied by residence, is sufficient to give the courts of that country territorial jurisdiction over him under our rules of private international law.

Where the defendant is a corporation, the foreign court will have jurisdiction if the company was carrying on business (either themselves or through an agent or representative doing the company's business) from a definite and reasonably permanent place of business in the foreign country.[12] The test is set out in the case of *Cape Industries*, in which the Court of Appeal held that an overseas trading corporation was likely to be treated by the English court as present within the jurisdiction of the courts of another country only where either:

> such a corporation had established and maintained at its own expense in that other country a fixed place of business of its own and for more than a minimal period of time has carried on its own business at or from such premises by its servants or agents (a branch office *case*);....

In addition to territorial context, a foreign court will have jurisdiction, if the defendant submitted or agreed to submit to the jurisdiction of a foreign court.[13] The rationale for this

[11] [1990] Ch 433 C.A, 736.
[12] Lord Hailsham, ed., *Halsbury's Laws of England*, 4th ed. (London: Butterworths, 1974),8 :476.
[13] P. M. North, *Cheshire and North's Private International Law*, 10th ed. (London: Butterworths, 1979),663.

requirement may be found in the words of Lord Seaborne, in the case of *Sirdar Gurdyal Singh v. The Rajah of Faridkote*[14], when he observed thus:

> In a personal action . . . a decree pronounced *in absentem* by a foreign court, to the jurisdiction of which the defendant has not in any way submitted himself, is by international law an absolute nullity. He is under no obligation of any kind to obey it; and it must be regarded as a mere nullity by the courts of every nation except (when authorized by special local legislation) in the country of the forum by which it was pronounced.

Submission arises in two ways. Firstly, through voluntary appearance of the defendant before a foreign court to defend the claim on its merits, or to counterclaim, even though he also contested the court's jurisdiction.[15] In the case of *Molony v. Gibbons*[16], the defendant appeared by a foreign attorney but was put on defence. It was held that the judgment so obtained was enforceable in England. However, submission will not be voluntary where the defendant appears before a foreign court only to contest the jurisdiction of a foreign court. Consequently, a person who has voluntarily and unsuccessfully submitted before a foreign jurisdiction cannot deny the jurisdiction of the foreign court, if sued upon the judgment in Zambia.

Submission is not only in relation to defendants but also plaintiffs and this arises, "where a defendant in his character as plaintiff selected the forum where the judgment was given against him, whether this took the form of dismissal of a claim or of judgment against him in respect of a counter claim[17], cross-action or costs."[18]

Secondly, submission arises if there is an agreement which provides that all disputes between the parties shall be referred to the exclusive jurisdiction of the foreign court in question. This

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[14] [1894] A.C. 670 (P.C)
[15] Collier, *Conflict of Laws*, 117.
[16] [1810] 2 Camp 502.
[17] In *Murthy v. Sivasjothi* [1999] 1 WLR 467, it was observed that, "the counterclaim must arise out of the same facts or transaction as his claim or out of facts which are reasonably connected - a test of broad common sense applies".
[18] Halsbury's Laws of England, 477.

may also take the form of an agreement to accept service of process at a designated address.[19] However, such agreement must be express rather than implied. Ashworth, J. in *Vogel v. R. and A. Kohnstamm, Ltd*[20], held that: "an implied agreement to assent to the jurisdiction of a foreign tribunal is not something which courts of this country have entertained as a legal possibility...."

2.1.2 Unavailability of Defences

A foreign judgment will not be recognised or enforced if a defence is available to the defendant. Accordingly, to escape liability under the foreign judgment, the defendant may argue that a foreign judgment should not be recognised and enforced as it is contrary to the principles of natural and substantial justice, public policy and that the foreign judgment was obtained by fraud. However, the defendant cannot plead factual or legal errors made in foreign court as a defence. This is because the obligation created by a foreign judgment arises from the foreign judgment itself, and not from the underlying cause of action.[21]

2.1.2.1 Foreign Court Proceedings in Breach of Natural or Substantial Justice

Principles of natural justice are two-fold: namely, that no man shall be a judge in his own cause, (*nemo judex in causa sua*), and that no man shall be condemned unheard, that is, parties shall be given adequate notice and opportunity to be heard (*audi alteram partem*).[22] Therefore, the defendant may invoke this defence if he was not given due notice of the proceedings or was denied a proper opportunity to be heard by the foreign court which rendered the judgment.

Zambian courts are likely to dismiss a foreign judgment which violates the principles of natural justice, as they have done so in actions or decisions made in total disregard of the

[19] Ibid.,477
[20] [1973] Q.B. 133.
[21] *Goddard v. Gray* [1870] L.R. 6 Q.B. 139.
[22] *Shilling Bob Zinka v. the Attorney-General* [1991] ZR 73 (S.C)

principles of natural justice. In *Contract Haulage v. Kamayoyo*[23], Gardner D.C.J. stated, albeit obiter, "that a failure to give an employee an opportunity to answer charges against him or, indeed, any other unfairness may be said to be contrary to natural justice to the extent that a dismissal under such circumstances would be null and void."[24]

Similarly, in *Chilufya v. Kitwe City Council*[25] the court stated that where a public authority has discretionary powers, the court is entitled to investigate its exercise of these powers in order to determine whether it has taken into account matters which it ought not to have taken into account, and vice versa, and that its decision was reasonable. The exercise must conform to general law and principles of natural justice.

In the *Cape Industries* case, the Court of Appeal held that the concept of natural justice extended to any situation which would amount to a breach of the English court's views of 'substantial justice', such as an absence of a judicial determination of damages. In this case, the judge directed that the average award for each plaintiff should be $75,000 and counsel placed the plaintiffs in four bands according to the seriousness of their injuries. Thus, in cases involving a claim for unliquidated damages for a tortious wrong, the notion of substantial justice requires the amount of compensation to be assessed objectively by an independent judge, rather than subjectively by or on behalf of the claimant.

2.1.2.2 Recognition of Foreign Court Judgment Contrary to Public Policy

As a general rule, a foreign judgment will not be enforced if to do so would be contrary to public policy. Public policy entails enforcing a contract or agreement which is illegal in Zambia. In the case of *Mohamed S. Itowala v. Variety Bureau de Change*[26], the court held

[23] [1982] ZR 13 (S.C)
[24] This case even though it did not involve private international law issues, it illustrates the point that courts in Zambia do not enforce decisions or orders which are contrary to the principles of natural justice.
[25] [1967] ZR 115 (H.C)
[26] [2001] ZR

that "A party cannot sue upon a contract if both knew that the purpose, the manner of performance and participation in the performance of the contract necessarily involved the commission of an act which to their knowledge is legally objectionable". Furthermore, in *Valsamos Koufou v. Anthon Greenberg*[27], the High Court of Zambia held that "an agreement to commit a crime or perpetrate a tort is illegal and will not be enforced by the courts." In light of the foregoing, a foreign judgment for a debt payable in return for committing a crime will not be enforceable in Zambia on the grounds of public policy.

Furthermore, English courts have refused to recognised or enforce a foreign judgment which is inconsistent with the decisions of English Court.[28] Zambian courts are likely to take a similar position due to the doctrine of *stare decisis*. In this regard, decisions by Zambian courts take precedence over foreign decisions. In the case of *Commonwealth Development Corporation v Central African Power Corporation*[29], the court observed that "where the law of England coincides with the law of Zambia, the decisions of the Court of Appeal in England must have great persuasive authority."

2.1.2.3 Foreign Court Judgment Obtained by Fraud

Fraud on the part of the foreign court or of the plaintiff will render the foreign judgment unenforceable. Such fraud may take various forms. It may be that the foreign court itself has acted in a fraudulent manner, or it may be that the successful party had produced forged evidence or had kept vital evidence from the foreign court, or it may be that he or she bribed the foreign court. This defence is available even though the evidence of fraud was raised and rejected by the court. [30]

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[27] [1982] ZR 30 (H.C.)
[28] *E D & F Man (Sugar) v. Haryanto* [1991] 1 Lloyd's Rep 429.
[29] [1968] ZR 70 (H.C.)
[30] "It is immaterial that the unsuccessful party in the foreign proceedings refrained from raising the plea of fraud in those proceedings although the facts were known to him at all material times." Dicey and Morris, *Conflicts of Laws*, 468.

2.1.3 Further Conditions for Enforcement

A foreign judgment must be recognised before it can be enforced, but not every recognised judgment will be enforced.[31] Thus, notwithstanding that a foreign judgment has been recognised, it will not be enforced unless it is for a fixed sum of money, other than a sum payable in respect of taxes or penalties, and that it is final and conclusive rendered on merits.

2.1.3.1 For a Fixed Sum and not Taxation or Penalties

The foreign judgment must be for a definite and actually ascertained sum of money for it to be enforced. In *Beatty v. Beatty*[32], the court held that this requirement is satisfied where the debt can be ascertained by a simple arithmetical process. Therefore, a plaintiff cannot enforce a foreign judgment for specific performance, injunctions or any judgment which orders the defendant to do more than pay a certain amount of money. However, with regards to an order for the payment of costs, they are enforceable upon being taxed.

Furthermore, a foreign judgment must be for a sum other than a sum payable in respect of taxes or a fine or penalty.[33] Lord Denning MR, in *SA Consortium General Textiles v. Sun and Sand Agencies Ltd*[34], stated that the word penalty means, "a sum payable to the State by way of punishment and not a sum payable to a private individual, even though it is payable by way of exemplary damages".

2.1.3.2 Final and Conclusive on the Merits

In addition, to a judgment being of a fixed sum of money, it must be a final and conclusive judgment, rendered on the merits.

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[31] Ibid.,468.
[32] [1924] 1 K.B. 807 (C.A)
[33] Jeremy Carver and Christopher Napier, *Enforcement of Foreign Judgements Worldwide,* ed. Charles Platto (London: Graham and Trotman,1989), 227.
[34] [1978] Q.B. 279.

The test of finality was explained in the case of *Nouvion v. Freeman*[35]:

> In order to show that a final and conclusive judgment has been pronounced, it must be shown that in the court by which it was pronounced it conclusively, finally and forever established the existence of the debt of which it is sought to be made conclusive evidence in this country, so as to make it res judicata between the parties.

A foreign judgment is not final if it liable to alteration or variation by the court which pronounced it. However, it is final and conclusive if it is liable to be set aside by the court which rendered it.[36] Furthermore, a foreign judgment may still be recognised as final and conclusive even though it is capable of being appealed in foreign court, as the question is only whether the court giving the judgment has conclusively dealt with all the issues between the parties.[37]

Brandon LJ in *the Sennar (No 2)*), elaborated on the meaning of a judgment on merits, when he stated:

> A decision on the merits is a decision which establishes certain facts proved or not in dispute, states what are the relevant principles of law applicable to such facts, and expresses a conclusion with regard to the effect of applying those principles to the factual situation concerned.[38]

2.2 Conclusion

This chapter has provided direction to the law in Zambia in relation to recognition and enforcement of foreign judgments in Zambia by showing what must be proved by a plaintiff for a foreign judgment to be recognised and enforced in Zambia. Further, this chapter has outlined the various defences which may be available to the defendant.

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[35] [1889] 15 App Cas 1, 19.
[36] Dicey and Morris, *The Conflict of Laws,* 477.
[37] Carver and Napier, *Enforcement of Foreign Judgements Worldwide,* 227.
[38] [1985] 2 All ER 104 (H.L)

CHAPTER 3

RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS UNDER STATUTE

3.0 Introduction

The common law position that a foreign judgment, though creating an obligation that is actionable in Zambia, cannot be enforced here except by the institution of fresh legal proceedings is subject to important exceptions introduced by statute, the most important being the Foreign Judgment Act.[1] Under statute a foreign judgment is enforceable by a more direct process of registration rather than by way of action. This chapter discusses the historical background of statutory mechanism of enforcing foreign judgments in Zambia; the current mechanism of enforcing foreign judgments and the cases which the judiciary had an opportunity to adjudicate upon.

3.1 Historical Background.

The history of the statutory mechanism for the recognition and implementation of foreign judgments in Zambia dates back to 1922 when the British Colonial Judgments Ordinance ("BCJ Ordinance of 1922") was enacted. The BCJ Ordinance of 1922 was enacted in response to the Administration of Justice Act of 1920 ("AJA Act of 1920") of England which made provision for a person who has obtained a judgment in a territory forming part of the Commonwealth to apply to the High Court in England within twelve months for its registration.[2] Under the AJA Act of 1920, a judgment could not be registered unless its provisions have been extended by Order in Council to the country in which the judgment has

[1] P.M. North and J.J Fawcett, *Cheshire and North's Private International Law*. 12th ed. (London: Butterworths, 1992), 392.
[2] P. M. North, *Cheshire and North's Private International Law*, 10th ed. (London: Butterworths, 1979), 667.

been obtained.[3] The Order in Council could only be extended to a country in the Commonwealth if Her Majesty was satisfied that reciprocal provision had been made in the country concerned for enforcement therein of United Kingdom judgments.[4]

To facilitate the registration of judgments of Superior Courts in the United Kingdom and to provide for the requisite reciprocal provisions required by the AJA Act of 1920, the BCJ Ordinance of 1922 was enacted. In this regard, section 3 of the BCJ Ordinance of 1922 provided for the registration of judgments obtained in the High Court in England or Ireland or in the Court of Session in Scotland.[5] For Judgments from territories which were part of the United Kingdom dominions, there had to be reciprocity between Northern Rhodesia and the relevant dominion and relevant orders had to be made.[6]

However, the BCJ Ordinance was limited in scope as it applied only to Commonwealth countries and furthermore, registration under this Act was not as a matter of right but at the discretion of the court. In England the Foreign Judgment (Reciprocal Enforcement) Act of 1933 ("1933 Act") was enacted to cure this mischief by making registration as a matter of right and extending the scope of the Act to other foreign countries other than Commonwealth countries.[7] Following in the footsteps of our former colonial master, Zambia (Northern Rhodesia then), enacted the Foreign Judgments (Reciprocal Enforcement) Ordinance of 1937 to accommodate judgments from countries which were not part of His Majesty's dominions.

In light of the foregoing, two systems of registration; one for the commonwealth and the other for countries outside the commonwealth, were in existence both in England and Zambia and this was opined to be undesirable in England. Therefore, a deliberate policy of gradual

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[3] Lawrence Collins et al. eds., *Dicey & Morris: The Conflict of Laws.* 13th ed. (London: Sweet and Maxwell, 2000), 1: 471.
[4] section 14, AJA Act of 1920.
[5] Chiluba case, 15.
[6] Ibid., 11.
[7] North and Fawcett, *Cheshire and North's Private International Law*. 397.

supersession of the AJA Act of 1920 was adopted in England. Once an Order in Council had been issued under the 1933 Act, to any country forming part of the commonwealth the AJA Act of 1920 shall cease to apply to any such country except those to which it extended at the date of the Order in Council.[8] However, in order for the 1933 Act to be applied to any particular Commonwealth country, a further specific Order in Council is required, both in the case of a jurisdiction to which the AJA Act of 1920 had never been applicable and of one to which it had.[9]

Adopting the same policy adopted by England, the Foreign Judgments (Reciprocal Enforcement) Order of 1958 was issued in Zambia and the BCJ Ordinance was repealed in 1959. This meant that both judgments from the commonwealth and judgments from countries outside the commonwealth could be registered under one piece of legislation, the Foreign Judgments Act.[10]

From the above discussion, the intention behind the Foreign Judgments Act was that Zambia also deemed it desirable to have one system of registration of foreign Judgments inclusive of foreign judgments outside the commonwealth. This was to be achieved by the gradual supersession of the BCJ Ordinance by issuing of further specific Statutory Orders to both countries to which the BCJ Ordinance of 1922 had never been applicable and of one to which it had.

Section 9(1) of the Foreign Judgment Act affirms the intention of gradually replacing the BCJ Ordinance of 1922. Section 9(1) renders the Foreign Judgment Act applicable by Statutory Order to countries forming part of Her Britannic Majesty's dominions. It provides that the

[8] Dicey and Morris, *The Conflict of Laws,* 397.
[9] North and Fawcett, *Cheshire and North's Private International Law*, 397.
[10] Chiluba case, 12.

BCJ Ordinance of 1922 shall cease to apply to any such country except those to which it extended at the commencement of the Order.[11]

An analysis of section 9 of the Foreign Judgments Act shows that, it was not only intended to repeal the provisions of the BCJ Ordinance of 1922 Act but also to replace them with provisions under the Foreign Judgments' Act. This position was affirmed by the case of *Jamieson v Northern Electricity Supply Corporation (Private) Ltd* [12], where it was stated that: "If an order is made under the 1933 Act applicable to a country to which there is already an order in force under the AJA of 1920, then the latter ceases to apply".[13] Currently, Zambia has extended the Foreign Judgments Act to two countries: Gilbert and Ellice Islands Colony and British Solomon Islands Protectorate.

Dicey and Morris[14] have, further observed that "the AJA Act of 1920 is still in force, but its application to territories to which it had not already been applied was excluded by an Order in Council made under the 1933 Act".[15] Whether the BCJ Act of 1922 is still applicable in Zambia is a matter of controversy in light of the sentiments expressed by Judge Hamaundu in the *Chiluba Case*, which indicated that the British and Colonial Judgments Act was no longer applicable to Zambia:

> after the repeal of the British and Colonial Judgments Act, judgments obtained in Superior Courts of the United Kingdom would only become registrable under the Foreign Judgments (Reciprocal Enforcement) Act if and when the Governor (subsequently, the President) issued an order extending Part II of the Act to the United Kingdom. I have looked through our laws for such an order. I have been unable to find any.

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[11]Section 9(1) of the Foreign Judgments Act.
[12] [1970] SLT 113 (Zambia).
[13] The court adjudicated on s 7(2) of the Foreign Judgment Act of 1933 which is similar to Section 9(2) of our Foreign Judgments Act of 1959.
[14] Dicey and Morris, *The Conflict of Laws,* 472.
[15] The list of states and territories to which the AJA Act of 1920 applies was consolidated by S.1. 1985 No. 1994 and Zambia is among those states as Part II of the AJA Act of 1920 was extended to Zambia, then Northern Rhodesia, by the Northern Rhodesia and Uganda Protectorate Order 1922. No. 719. The order is in force by virtue of s. 2(1) of the Zambian Independence Act 1964.

To ascertain whether the BCJ Act of 1922 is still applicable, it is important to examine the repealing and the provisions that replaced section 9. A close examination reveals that the repeal related only to future extensions of application of the BCJ Ordinance of 1922 (that is, extensions beyond 1958). In other words, the repeal did not affect the application of reciprocity to the specific dominions of Her Britannic Majesty already identified under the BCJ Ordinance of 1922. Therefore, where a Specific Extension Order is issued by the President in respect of a new dominion, that will not affect the continued application of the reciprocal enforcement to the dominions to which it already applied in 1958.

The assessments above are supported by section 13 of the Interpretation and General Provisions Act[16], which enshrines the principle that provisions repealed under a new statute continue to apply until the substitute provisions become operative. This therefore, means that the BCJ Ordinance of 1922 remains applicable to Zambia and can only be considered repealed when a Specific Extension Order is passed by the President for all the dominions of Her Britannic Majesty to which the BCJ Ordinance of 1922 applied as at 1958.

However, it should be noted that the 1922 Act is only applicable to countries which are under 'Her Britannic Majesty's dominions' and to which the Foreign Judgment Act has not been extended. Her Britannic Majesty's dominions' is defined under the Foreign Judgments Act to include British protectorates.[17] In *Re Mwenya*[18], it was held that territorial dominions of the crown could be equated to all territory belonging to the Crown but could also include a protectorate which is under subjection or control of the Crown in fact. Further, according to the Halsbury's Laws of England[19], the term 'Her Britannic Majesty's dominion includes any territory in which Her Majesty is sovereign and includes the United Kingdom (that is

[16] Chapter 2 of the Laws of Zambia.
[17] section 9(3) of the Foreign Judgment Act.
[18] [1959] 3 All ER 525 (CA)
[19] Lord Hailsham, ed., *Halsbury's Laws of England*, 4th ed. (London: Butterworths, 1974),6: 321.

England, Scotland, Wales and Northern Ireland) as territories under the sovereignty of the crown.

3.2 Foreign Judgment (Reciprocal Enforcement) Act of 1959

3.2.1 Reciprocity

The Foreign Judgment Act is based on reciprocity, which means that a foreign judgment cannot be registered by the High Court of Zambia unless the provisions of the Act have been extended by Statutory Order to the country in which the judgment has been obtained. For a Statutory Order to be issued, the President must be satisfied that when the benefits of the Act are extended to judgments from a particular country similar benefits will be accorded judgments from the High Court of Zambia.[20]

3.2.2 Pre-requisites for Registration.

The Foreign judgment[21] to which the Foreign Judgment Act applies must be registered by the plaintiff within a period of six years of their pronouncement[22] and this is available as a matter of right and not mere discretion of the Court.[23] A right of execution exists after registration provided the foreign judgment has not been wholly satisfied or it could not be enforced by execution in the country of the judgment.[24]

To qualify for registration, the foreign judgment must be final and conclusive as between the parties thereto.[25] The foreign judgment must settle the rights and liabilities of the parties so as to render the matter *res judicata* in the country in which it was given. In this regard, interim

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[20]Section 3(1) of the Foreign Judgments Act.
[21] Under section 2 of the Foreign Judgment Act, judgment means a judgment or order given or made by a court in any civil proceedings, or a judgment or order given or made by a court in any criminal proceedings for the payment of a sum of money in respect of compensation or damages to an injured party.
[22] Section 4(1) of the Foreign Judgments Act.
[23] Collier, *Conflicts of Laws,* 131. This is a departure from the BCJ Ordinance of 1922 Act which gave the court discretion of whether to register a foreign judgment or not.
[24] Section 4(1), (1) (2) of the Foreign Judgments Act.
[25]Section 3(2)(a) of the Foreign Judgments Act.

or interlocutory and default judgments that do not finally and conclusively determine the rights and liabilities of the parties cannot be registered. However, a judgment shall be deemed to be final and conclusive despite the fact that an appeal is pending against it or that it may still be subject to an appeal in the foreign country in which it was pronounced.[26]

Furthermore, a foreign judgment must be one for a sum of money, not being a sum payable in respect of taxes or other charges of similar nature or in respect of a fine or penalty.[27] Consequently, non-monetary judgments such as declarations and injunctions cannot be registered under the Foreign Judgments Act. The case of *Zanetta Nyendwa v. Kenneth Paul Spooner*[28]provides guidance on this point. In this case, the Supreme Court held that the English Court's order was not capable of registration under the Foreign Judgments Act on the ground that the order was not for the payment of money and that the order was neither final nor conclusive.

3.2.3 Effect of Registration of the Foreign Judgment

For the purposes of execution, a registered judgment has the same force and effect as the original judgment and proceedings may be taken on it. The judgment sum carries interest, and the registering court has the same control over execution, as if the registered judgment had been one originally given by the registering court and entered on the date of registration.[29]

3.2.4 Setting Aside of Registered Judgments

Section 6(1) of the Foreign Judgments Act empowers the defendant to apply for the foreign judgment to be set aside and the court may do so, if certain conditions are satisfied.

[26] Section 3(3) of the Foreign Judgments Act.
[27] Section 3(2)(b) of the Foreign Judgments Act.
[28] SCZ. Judgment No. 20 of 2010. (Unreported)
[29] Section 4(2), (a) (b),(c),(d) of the Foreign Judgments Act.

Firstly, the judgment must be a judgment to which Part II of the Foreign Judgment Act applies. This requirement is premised on the requirement of reciprocity and as such Part II will apply to a foreign judgment obtained from a country where Part II has been extended by a Statutory Order. Further, such judgment should satisfy the requirement of section 4(1) (2) of the Foreign Judgment Act.[30] In the case of *Mileta Pakou & others v. Rudnap Zambia Limited*[31], the Supreme Court held that Yugoslavia was not one of the scheduled countries under the Foreign Judgments Act and therefore the question of enforcing the judgment of its courts directly by registration did not arise.

Secondly, the court must be satisfied that the foreign court had jurisdiction in the circumstances of the case.[32] A foreign court will have jurisdiction, where the defendant voluntary submitted to its jurisdiction. However, the court will not have jurisdiction where the defendant submitted to the jurisdiction of the court 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.[33]

Furthermore, the foreign court will have jurisdiction where the defendants was a plaintiff in, or made a counter claim in, the proceedings in the original court or agreed to submit to the jurisdiction of the country of that court. In relation to a corporation, the courts will have jurisdiction, if it was resident in, or had its principal place of business in, the country of that court; or had an office or place of business in the country of that court.[34] Additionally, the

[30] See 3.2.2, Pre-requisites for Registration.
[31] [1998] ZR 233.
[32] The rules on jurisdiction are similar to those under common law. See chapter Two for more details.
[33] Section 6(2)(a)(1) of the Foreign Judgments Act. This provision has changed the common law position which considered intervention to save property as voluntary hence submission.
[34] Section 6(2)(a)(2),(3),(4) of the Foreign Judgments Act.

court will have jurisdiction where the proceedings in that court were in respect of a transaction effected through or at that office or place.[35]

In an action in which the subject matter was immovable property, or in an action *in rem* of which the subject matter was movable property, the foreign court is deemed to have jurisdiction if, at the time of the proceedings, the property in question was situated in the country of that court. In the case of a judgment given in an action other than those aforesaid, the original court is deemed to have jurisdiction if its jurisdiction is recognized by the registering court.

The question of jurisdiction under the Foreign judgments Act is subject to qualification and the foreign court will not have jurisdiction where the subject matter of the proceedings was immovable property outside the country of the original court; or if any dispute should be settled other than by proceedings in the foreign courts. If the judgment debtor being a defendant in the original proceedings was a person, who under the rules of public international law was entitled to immunity from the jurisdiction of the courts of the country of the original court and did not submit to the jurisdiction of that court.[36]

Thirdly, the court must be satisfied that the judgment debtors, being the defendant in the proceedings in the original court did not receive notice of those proceedings in sufficient time to enable him prepare for his defence. Fourthly, that the judgment was obtained by fraud or that enforcement of the judgment would be contrary to the public policy in the Republic and that the rights under the judgment are not vested in the person who applied for registration.[37]

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[35] Section 6(2) (a)(5) of the Foreign Judgments Act. This is a new provision introduced by statute and did not exist at common law.
[36] North, *Cheshire and North's Private International Law*, 672.
[37] Sections 6(1)(a)(3),(4),(5),(6) of the Foreign Judgments Act. See 2.1.2, (2), (3) under Chapter Two for a detailed discussion on Fraud and Public Policy.

The judgment may also be set aside if the registering court is satisfied that the matter in dispute in the proceedings in the original court had previously to the date of the judgment in the original court been the subject of a final and conclusive judgment by a court having jurisdiction in the matter.

3.3 The Judiciary and the Statute Law Approach: Some Decided Cases

In Zambia, no concise discussion in Private International Law can be made without making reference to the case of *Mileta Pakou & others v. Rudnap Zambia Limited.*[38] This case not only affirmed the principle of reciprocity enshrined by the Foreign Judgment Act, by refusing to register a judgment obtained in Yugoslavia as it was not one of the scheduled countries under the Foreign Judgments Act but also provided guidance on which law is to be applied in default of any statute. In this regard, the common law of England.

3.3.1 Zanetta Nyendwa v. Kenneth Paul Spooner[39]

In this case, the Supreme Court has occasion to deal with a case where the husband in a divorce, Spooner, obtained an ex-parte order in the High Court of Justice which compelled his former wife, Zanetta Nyendwa, to return the children to the United Kingdom following her failure to do so after a two-week holiday. Spooner had registered the order in Zambia under the Foreign Judgments Act. In refusing to set aside the registration of the English Order, the High Court stated that:

> Although the applicant is opposing the registration of the exparte order granted in England on the ground that the Foreign Judgment Act does not apply in this case, they have not furnished this court with an alternative Act which may apply in this, as the matter stands this is the only Act which has been cited.[40]

[38] [1998] ZR 233.
[39] SCZ. Judgment No. 20 of 2010 (unreported).
[40] Spooner case, 4.

On appeal, the Supreme Court set aside the English Order and refused to register it on the ground that, the English Order was not for payment of money. Neither was it final or conclusive between the parties and it was an ex-parte order obtained in the absence of the appellant.

Assessment of the Decision.

This case has provided an important insight on the interpretation of the Foreign Judgment Act by illustrating that matrimonial matters are expressly excluded from registration and enforcement under the Foreign Judgments Act. In this premise, only judgments or orders for payment of money can be enforceable under the Act. The Supreme Court was correct in light of section 2(2)[41] of the Foreign Judgment Act.

However, the Supreme Court did not explicitly address the issue of reciprocity between Zambia and England under the Foreign Judgment Act. The Court refused to register the English Order on other grounds other than reciprocity. The Court also observed that "Spooner made a grave error by applying in the United Kingdom as there is no reciprocal arrangement for registration and enforcement of this type of judgment or order between Zambia and the United Kingdom".[42]

An analysis into the observation of the Court leads one to conclude, that other types of English judgments or orders are enforceable in Zambia. Using this reasoning Transparency International Zambia argued that the reasons given by the court clearly state that the judgment is based on the type of judgment involved and consequently there is reciprocity

[41] Section 2(2) of the Foreign Judgment Act specifically states: "For the purposes of this Act, the expression "action in personam" shall not be deemed to include any matrimonial cause or any proceedings in connection with any of the following matters, that is to say, matrimonial matters, administration of the estates of deceased persons, bankruptcy, winding up of companies, lunacy or guardianship of infants."
[42] Spooner case, 21.

between the United Kingdom and Zambia provided the plaintiff satisfies other conditions of the Foreign Judgment Act.[43]

Notwithstanding that the Court did not address the issue of reciprocity between Zambia and England expressly; they did so by implication when they discussed enforcement and recognition of judgment from the commonwealth (of which England is a part). According to Cheshire and North, a judgment obtained from another Commonwealth country may be registered for the purpose of enforcement if the registering court thinks it just and convenient. They further state that registration is not a right but in the discretion of the registering court and a judgment cannot be registered unless it is for a sum of money and the original court had jurisdiction, the judgment debtor submitted to the jurisdiction and appeared in the original proceedings.[44]

The Supreme Court in this case agreed with Cheshire and North and stated that the above applies to Zambia which is also a member of the Commonwealth.[45] However, caution is necessary when interpreting the words of the Supreme Court. The Supreme Court confirmed that English judgments can be registered in Zambia but it does not follow that they are registrable under the Foreign Judgments Act as concluded by Transparency International Zambia. This is because registration under the Foreign Judgment Act is as of right and there is no discretion given to the High Court.[46] The only Act which gives discretion to a Court to register a foreign judgment if it thinks just and convenient is the BFJ Act of 1922.

In light of the foregoing, there is no reciprocal arrangement between Zambia and England under the Foreign Judgment Act and consequently no English Judgment or Order can be

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[43] Dawood Salim, *Transparency International Zambia on Chiluba's case: Conditions for Registration,* The Post Newspaper Zambia, August 9, 2010.
[44] North and Fawcett, *Cheshire and North's Private International Law*, 395.
[45] Spooner case, 18.
[46] Section 4 of Foreign Judgments Act, expressly provides that: on any such application the court **shall,** subject to proof of the prescribed matters and to the other provisions of this Act, order the judgment to be registered.

registered under it, until such a time a Statutory order is passed by the President. However, English Judgments may be registered if the High Court thinks it is just and convenient under the British Foreign Judgment Act as observed by the Supreme Court in the *Spooner case*.

3.3.2 Attorney General v Chiluba and other's

This case relates to a civil claim against the former and now late Republican President of Zambia, Dr Fredrick Chiluba. The Zambian Government attempted to enforce by mere registration in Zambia, a judgment obtained from the High Court of Justice in the United Kingdom.

The High Court determined that it was not possible to enforce the judgment of the English court under the Foreign Judgments Act because the High Court was not able to identify any order of extension by the President of Zambia to extending registration under the Foreign Judgments Act to judgments from the United Kingdom and that the BCJ Ordinance of 1922 that allowed English judgments to be enforced in Zambia was repealed in 1959 by the Foreign Judgments Act.

Assessment of Court decision

Judge Hamaundu made a correct pronouncement that English Judgments cannot be registered under the Foreign Judgment Act as no Statutory Order has been issued by the President to extend English judgment to Zambia.[47] However, he made a flawed conclusion when he stated that the BCJ Ordinance of 1922 that allowed English judgments to be enforced in Zambia was repealed in 1959 by the Foreign Judgments Act. As explained above[48], the BCJ Ordinance of 1922 is still applicable to Zambia and it is the only statute that provides the basis for the statutory enforcement of English judgments in Zambia. This being the case, the

[47] Since 1959, Part Two of the Act has only been extended to two countries and England is not one of them.
[48] See 3.1, Historical Background above.

Court should therefore have determined that the procedure used was not provided for under the law through which the registration was sought as opposed to stating as it did that the British and Colonial Judgments Act was no longer applicable to Zambia.[49]

3.4 Conclusion

This chapter has provided direction by showing what conditions must be satisfied for a foreign judgment to be registered under the Foreign Judgment Act. Further, it is the conclusion of this chapter that English judgments are still registrable in Zambia under the British and Colonial Judgment Ordinance and not under the Foreign Judgment Act.

[49] By stating that, Judge Hamaundu went against the principle of *stare decisis* by not following what the Supreme Court stated in the Spooner case.

CHAPTER 4

THE RELATIONSHIP BETWEEN ENFORCEMENT OF FOREIGN JUDGMENTS AND PROMOTION OF TRADE, COMMERCE AND FOREIGN INVESTMENT.

4.0 Introduction

The need to make Private International Law responsive to the current needs of international commerce has been recognized in international forums, judicial decisions and academic writings.[1] Huber premised the doctrine of comity on the ground that, it will be more convenient to commerce and to international usage for a transaction valid by the law of one place to have effect elsewhere.[2] Justice La Forest of Canada's Supreme Court also rationalised ''the rules of Private International Law on the ground that they are required in modern times to facilitate the flow of wealth, skills and people across state lines''.[3] In light of the foregoing, this chapter will address the connection between enforcement of foreign judgment and promotion of international trade and the possible areas of reform to ensure that the Zambia enforcement regime is receptive to international trade and foreign investment.

4.1 Promoting International Trade

The liberalization of the Zambian economy in the early 1990s saw the emergence of increased commerce and trade between Zambia and the outside world.[4] Due to the disparity in the strength of the Zambian economy and that of the developed countries, there was an increased inflow of foreign direct investment into Zambia from developed countries and the rest of the world. This compounded with a vicious and haste privatization programme in Zambia that was fuelled by a Structure Adjustment Programme under the auspices of the

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[1] Richard Frimpong Oppong, "Private International Law in Africa: The Past, Present and Future". http://eprints.lancs.ac.uk/20995/1/OPPONG (accessed on 10th March, 2012).

[2] Hessel E. Yntema, " The Comity Doctrine'', *Michigan Law Review* 9, no. 65 (1966): 30, quoted in William S. Dodge, "International Comity in American Courts". http://www.asil.org/files/dodge.pdf (accessed on 20th December 2011).

[3] *Morguard Investments v De Savoye* [1990] 3 SCR 1077, 1096.

[4] This is due to Zambia changing from a socialist economy to a capitalist economy.

Bretton Woods institutions made it inevitable for commercial disputes to arise requiring enforcement of foreign judgments.

An international trader incurs costs due to unfamiliarity with foreign laws which domestic traders are never subjected to. The high cost of dispute resolution threatens to swamp the value of the underlying transaction.[5] Non-recognition or enforcement of foreign judgments by a state may all evince protectionism as it will operate not only as a non-tariff barrier to international trade and a disincentive to investment but also a clog on the free flow of "wealth, skills and people" across national boundaries. [6]

Therefore, to realize the potential of attracting foreign investment, it is necessary to reduce the costs of dispute resolution by creating an effective enforcement regime. Private international law ensures that these risks are decreased, and therefore costs by increasing certainty and consistency of legal rights. Under an effective enforcement regime, the obligations of the parties remain the same in every country.[7] Furthermore, the legal rights of an international trade are secured through registration of the foreign judgment under statute, which is a straight forward method. By doing so additional costs in bringing separate actions in a foreign country to re-secure legal rights and remedies are averted.

In light of the foregoing, Private International Law has a role to play in developing countries like Zambia's to promote trade and investment. However, it is worth noting that during this period of renaissance of the Zambian economy which underwent a transformation from a socialist styled economy to a capitalist model, there was no simultaneous reciprocal harmonization of the laws between Zambia and the main players of the world economy with

[5] For instance, it is irrational to spend $5,000 or $10,000 for a lawsuit over a $300 transaction.
[6] Paolo Mengozzi, *Private International Law and the WTO Law*, 292 RECUEIL DES COURS 249 (2001) quoted in Richard Frimpong Oppong, "Private International Law in Africa: The Past, Present and Future".
[7] Kim Pham , ''Enforcement of Non-Monetary Foreign Judgments in Australia'', *Sydney Law Review* 30, no. 663 (2008): 670.

regard to the enforceability of foreign judgments. Thus, for Zambia to attract foreign investment and international trade, Zambia must have rules that provide certain and expedited means of enforcing foreign judgments, which is an essential part of a private international law regime meant to facilitate international business.

Oppong[8] commenting on the Ghanaian Legal Framework observed that there is need to have an effective foreign judgment enforcement regime[9] in any country to promote international commerce and trading as not having one would prove to be an obstacle to economic development since it will hamper trade relations with a country.

4.2 Foreign Judgment Act and Promotion of International Trade and Commerce.

The Foreign Judgments Act in its currents state interferes with the promotion of international commerce. While its intention was to provide an easy mechanism of enforcing foreign judgments, it is out of tune with the current demands and out of date, which necessitates for its reform.

4.2.1 Reciprocity

The Foreign Judgment Act is based on the doctrine of reciprocity and as such foreign judgments are enforceable in Zambia depending on how Zambian judgments are treated by the country where the judgment was obtained. However, despite this power being vested in the Government by the Act, the Zambian government have not utilised this provision to provide an effective enforcement regime by extending the Act to other countries who are willing to give similar treatment to Zambian judgments.

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[8] Richard Frimpong Oppong, ''Recognition and Enforcement of Foreign Judgements in Ghana: A Second Look at a Colonial Inheritance,'' *Commonwealth Law Bulletin* 31, no. 4 (2005): 21.

[9] "A regime will be effective if it is not unduly complicated, out of tune with current demands, time consuming and expensive." Ibid., 21.

For financiers and investors that have entered into agreements that refer to laws of other countries (such as English law) and grant the Courts of those countries jurisdiction for resolution of disputes raises obvious concerns. Having to re-litigate in Zambia, a dispute that has already been determined in the English Court creates uncertainty and introduces the very real risk of increasing cost of doing business in Zambia.

The United Kingdom for instance, is not only a major global financial and commercial centre but is one of the leading jurisdictions as the choice of law for resolution of investment and commercial disputes by foreign investors.[10] Numerous active commercial agreements have been concluded on this basis. Until and unless the Foreign Judgment Act is extended to countries which are the leading jurisdictions as choice of law for resolution of disputes, the increased risk of doing business in Zambia is likely to be reflected in the cost of financing major projects in the country and may adversely affect investment in projects that show marginal returns.

Counties like England, according to Oppong[11], "are not international commercial litigation center by adopting a protectionist approach, but rather contracting parties with no association to England are attracted to litigate there because of its accommodating jurisdiction rules, respect for choice of law and forum agreements, and effective foreign judgments enforcement regime. In addition, these rules are combined with a judicial system that is neutral, modern, and independent".

[10] Lord Denning's in the *Atlantic Star* [1973] Q.B. 364, 382, famously stated that England is a good place to forum shop.
[11] Richard Frimpong Oppong, "Private International Law in Africa: The Past, Present and Future".

4.2.2 President's powers

According to the World Bank a country will have a good investment climate, if it able to protect property rights of an investor. Providing more secure property rights encourages investment and can ease access to finance. Protecting property rights also entails facilitating contract enforcement. In many developing countries, firms lack confidence in the courts to uphold their property rights.[12]

Under section 12 of the Foreign Judgment Act, the President has power to make foreign judgments unenforceable in the Republic if no reciprocity has been accorded to Zambian judgments. By virtue of this provision both the statutory and the common law mechanism are affected. In light of this provision, a plaintiff, whose judgment is refused recognition and enforcement on this ground, has had his property rights violated as a judgment is property in every sense of the word.

4.2.3 Judgment must be given in local currency.

Further, the Foreign Judgment Act has a currency conversion provision in section 4(3), which may adversely affect trade and investment. Under this provision, a party who seeks to register a foreign judgment is compelled to convert the judgment into the currency of the enforcing forum. The provision provides:

> Where the sum payable under a judgment, which is to be registered, is expressed in a currency other than the currency of the Republic, the judgment shall be registered as if it were a judgment for a sum in the currency of Republic as, on the basis of the rate of bank prevailing at the date of the judgment of the original court....[13]

This provision may be of great financial significance to both parties, especially in an era of fluctuating exchange rates which may work to the prejudice of one party. While Zambia retains this provision in its statute, some African countries, following English precedents,

[12]The World Development Report, *A Better Investment Climate for Everyone*. (New York: Oxford University Press,2005), 9.
[13] *Section 4(3) of the Foreign Judgments Act.*

have departed from the common law rule that the courts cannot give judgments in foreign currency.[14]

4.2.4 Non-monetary judgments

The Supreme Court in the Spooner's case, gave force to section 3(1) (b) of the Foreign Judgment Act, which requires that a judgment which is not for a specific sum of money cannot be enforced under the Foreign Judgments Act.[15] However, in modern international commercial litigation other types of relief[16] are necessary as a plaintiff may desire to maintain the status quo during the litigation, thus, ensuring that there will be assets to satisfy any subsequent judgment by using a statutory mechanism which is quick.[17]

To be in tune with the modern challenges of international commerce, jurisdiction's such as Australia have changed their definition of judgment to final or includes, 'an interlocutory order given or made by a court in civil proceedings' and provision is made for the possibility of registering such judgments. Likewise, under the Brussels Convention (1968), a 'judgment' means any judicial determination, however labelled, including decrees, orders, decisions or writs of execution, as well as determinations of costs.[18]

4.3 Conclusion

This chapter has discussed how an effective enforcement regime is cardinal to promotion of international trade and commerce. This chapter further discussed how the current Zambian enforcement of foreign judgment regime is not responsive to the current demands of modern international commerce.

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[14] Richard Frimpong Oppong, "Private International Law in Africa: The Past, Present and Future".
[15] The issue of whether non-monetary judgments should be enforced has attracted attention in recent years both from the courts and jurists. However, this paper is not an appropriate forum to further the discussion on this area of private international law.
[16] Freezing injunctions, anti-suit injunctions, Anton Piller orders and orders for disclosure of evidence.
[17] Oppong, "Private International Law in Africa: The Past, Present and Future".
[18] Ibid.

CHAPTER 5

CONCLUSION AND RECOMMENDATIONS

5.1 General Conclusion

In upholding the fundamental principle of territorial sovereignty a judgment obtained in a foreign jurisdiction cannot be recognised by the Zambia courts. Consequently, foreign judgments in Zambia are enforced either under the Foreign Judgments Act[1], or through the common law.

A foreign judgment may be recognised and enforced in accordance with the principles of English common law which are applicable to Zambia, pursuant to Section 2 of the English Law (Extent of Application) Act.[2] This position was affirmed by the Supreme Court of Zambia in *Mileta Pakou & others v. Rudnap Zambia Limited*[3] when it held that, "the law which applies in Zambia in default of any statute is the common law of England''.

The common law process limits the recognition of the foreign judgment to mere evidence of a claim or defence which has to be re-litigated. Therefore, the plaintiff would have to commence an action in a Zambian court and proceed using the foreign judgment as evidence. Under common law, foreign judgments which are for a fixed sum of money, final and conclusive are enforceable provided that the foreign court had jurisdiction over the subject of the case and the person of the defendant and that the defendant cannot avail himself to the defences available when a foreign judgment is recognised.[4]

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[1] Chapter 76 of the Laws of Zambia.
[2] Chapter 11 of the laws of Zambia.
[3] [1998] ZR 233.
[4] That is, a foreign judgment is contrary to the principles of natural justice, public policy and the foreign judgment was obtained by fraud.

The common law position of enforcing a foreign judgment by the institution of fresh legal proceedings is subject to important exceptions introduced by statute, the most important in Zambia being the Foreign Judgment Act. The purpose of the statute is to facilitate enforcement of a foreign judgment without the requirement to re-litigate the matter, pursuant to provisions of a statute.

Enforcement through statute was first introduced in Zambia in 1922 when the British Colonial Judgment Ordinance was enacted. However, its scope was limited to Commonwealth countries and registration under this Act was not as a matter of right but at the discretion of the court. Thus, to cure the aforementioned mischief's The Foreign Judgment Ordinance of 1937 was enacted. However, it was later opined that it is undesirable to have two systems of registration; one for the commonwealth and the other for countries outside the commonwealth.

To achieve this purpose, the Foreign Judgment Order was issued on 1958, which provided that the BCJ Ordinance ceased to apply when an order is made under the Foreign Judgment Act to a country to which there is already an order in force under the BCJ Ordinance. Furthermore, no order could be made extending registration of foreign judgments under the BCJ Ordinance to another country.

Judge Hamaundu in the *Chiluba Case*, indicated that the British and Colonial Judgments Act was no longer applicable to Zambia. However, this paper has respectively disagreed with him on the ground that, the BCJ Ordinance of 1922 remains applicable to Zambia and can only be considered repealed when a Specific Extension Order is passed by the President for all the dominions of Her Britannic Majesty to which the BFJ Act of 1922 applied as at 1958.

Further, the Supreme Court in the Spooner case agreed with the learned author's Cheshire and North, when they stated that, a judgment obtained from another Commonwealth country

may be registered for the purpose of enforcement if the registering court thinks it just and convenient. The only Act in Zambia which gives discretion to a Court to register a foreign judgment if it thinks just and convenient is the BFJ Ordinance of 1922. Therefore, it is the conclusion of this paper that judgments from another commonwealth country may be registered if the High Court thinks it is just and convenient under the British Foreign Judgment Act as observed by the Supreme Court in the Spooner case.

Be that as it may, the statute which currently governs enforcement of foreign judgments is the Foreign Judgments Act. The position under the Act is that a foreign judgment can be enforced in Zambia as long as the foreign country in which the judgment was rendered has a reciprocal arrangement with Zambia for the enforcement of the foreign judgment. The effect of the registration of a foreign judgment in Zambia is that such a foreign judgment has the force of law. In short, the foreign judgment once registered in Zambia is as good as a Zambian judgment.

To qualify for registration, the foreign judgment must be final and conclusive as between the parties thereto. Furthermore, a foreign judgment must be one for a sum of money, not being a sum payable in respect of taxes or other charges of similar nature or in respect of a fine or penalty.

Section 6(1) of the Foreign Judgments Act empowers the defendant to apply for the foreign judgment to be set aside and the court may do so, if certain conditions are satisfied. Firstly, the judgment must be a judgment to which Part II of the Foreign Judgment Act applies. Secondly, the court must be satisfied that the foreign court had jurisdiction in the circumstances of the case. Thirdly, the court must be satisfied that the judgment debtors, being the defendant in the proceedings in the original court did not receive notice of those proceedings in sufficient time to enable him prepare for his defence. Fourthly, that the

judgment was obtained by fraud or that enforcement of the judgment would be contrary to the public policy in the Republic and that the rights under the judgment are not vested in the person who applied for registration.

This paper has further discussed the link between enforcement of foreign judgment and promotion of investment and it is the conclusion of this paper that the Zambian does not have an effective foreign judgment enforcement regime to promote international commerce and trading. This is because there has been no comprehensive attempt to review, amend or modify the law on recognition and enforcement of foreign judgment in Zambia to bring it up to date with the challenges and demands of modern commercial dealings.[5]

5.2 RECOMMENDATIONS

5.2.1 Reciprocity

The policy of government to promote or create a good investment climate in Zambia cannot succeed without creating an effective enforcement regime by extending the Foreign Judgment Act to countries which are the leading jurisdictions as choice of law for resolution of disputes. By doing so, the cost of re-litigating a dispute that has already been determined by Foreign Courts will be averted. This should be achieved through negotiation with relevant countries so that Zambian judgments may receive the same treatment. In addition, when an Act is extended to another country and that country does not accord Zambian judgments similar treatment, the President still has the power to render judgments country unenforceable.

[5] Since 1959 part two of the Foreign Judgements (Reciprocal Enforcement) Act has only been extended to two countries: Gilbert and Ellice Islands Colony and British Solomon Islands Protectorate.

5.2.2 Express repeal of the BFJ ordinance.

The Foreign Judgment Act should express state that BFJ Ordinance is repealed or in the alternative the President should declare that countries whose judgments were applicable under the BFJ Ordinance are no longer applicable in Zambia. Further, the intention of the Foreign Judgments Act is to restrict and replace the BFJ Act of 1922 and in this regard orders are required to be made under the Foreign Judgment Act to countries to which there is already an order in force under the BFJ Ordinance for the later Act to cease to apply. However, this has not been forthcoming as since 1959 part two of the Foreign Judgments Act has only been extended to two countries: Gilbert and Ellice Islands Colony and British Solomon Islands Protectorate. Therefore, it is imperative for those orders to be issued by the President for the intention of the Foreign Judgment Act to be realised.

5.2.3 Section 12 should be restricted to enforcement under Statute

Section 12 of the Foreign Judgment Act, is another obstacle to promotion of trade as it seems to deprive a person of his rights under the Judgment, when the President makes foreign judgments unenforceable in the Republic if no reciprocity has been accorded to Zambian judgments. While it is important for the President to retain this power, it should be restricted to enforcement under statute and not enforcement under common law. This is because at common law, a foreign judgment is recognised and enforced regardless of whether similar treatment is given to its judgments. The requirement for reciprocity is only required under statute.

5.2.4 Courts should give Judgments either in local or foreign currency.

While our friends are abreast with the demand of modern times, Zambia is still hanging on to colonial provisions which are out of tune with the modern demands of international commerce. English precedents from which our legal regime was derived at the time of enactment have departed from the common law rule that the courts cannot give judgments in foreign currency. Thus, a party who seeks to register a foreign judgment should not be compelled to convert the judgment into the Zambian currency but rather the court should have the discretion of choosing which currency to use depending on the circumstance of the case.

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