The recognition and enforcement of foreign judgments, maintenance orders and arbitral awards: a proposal for structural reform*

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Umongo | Abstract


The South African Law Reform Commission has issued two documents containing proposals for the consolidation of legislation pertaining to international cooperation in civil matters (Issue Paper 21 Project 121 2003 and Discussion Document 106 Project 121 2004). The Commission promotes the idea of a single uniform and comprehensive statute in the Issue Paper but pursues it less ardently in the Discussion Document. The author assesses the documents critically and suggests that certain areas require further attention before the Commission finalises its recommendations.

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1 Introduction

On 5 June 2000 the Minister of Justice and Constitutional Development approved an investigation into consolidated legislation pertaining to international cooperation in civil matters. The South African Law Commission (as it was then called) drew up and released Issue Paper 21 Project 121 Consolidated Legislation pertaining to International Co-operation in Civil Matters in 2003. This document proposed the adoption of a single uniform and comprehensive Act to facilitate and promote international cooperation in this area. The Commission suggested that this statute had to deal 'extensively with civil matters (which includes the recognition and enforcement of foreign judgments in South Africa), while protecting the interests of South African citizens'. Discussion Document 106, which was released in June 2004, contains conflicting messages concerning the aim of comprehensiveness. On the whole, Issue Paper 21 and Discussion Paper 106 differ rather drastically with regard to content, scope, strategy and methodology.

Project 121 is the only law reform initiative in South Africa in the area of recognition and enforcement of foreign judgments. The latest developments have implications for collecting transnational debts in the commercial world, as well as for safeguarding the economic interests of families and children by countering the economic hardships that physical distance and geographical boundaries impose when the maintenance debtor fails to discharge his or her financial obligations. Practitioners and academics should therefore take note of these developments.

Whereas the common law action is a residual basis for the enforcement of civil judgments, the common law route is not available to those seeking to enforce maintenance orders, being orders for periodical payments that are neither final nor conclusive but variable by the court that made them. The Enforcement of Foreign Civil Judgments Act 32 of 1988 (South Africa) does not exclude the use of the common law, but this Act applies only to enforcement proceedings in the magistrates' courts, where the financial limits on actions is R 100 000.00. Foreign judgments in excess of this amount must be taken to the High Court, where judge-made standards are developed and applied on a case-by-case basis. In practice, the common law is the only route available for recognition and enforcement of all other judgments, except for those rendered in the courts of Namibia. Namibia is the only country that has been designated for purposes of the Enforcement of Foreign Civil Judgments Act 32 of 1988 (South Africa), since it was deemed to give the judgment debtor sufficient notice of the proceedings in the foreign court.

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1 Issue Paper 17. Note that nationality is not a relevant connecting factor in South African conflict of laws.
2 Issue Paper 2, 17; Discussion Document 73 § 4.3; 100 § 5.2; 100 § 5.3; 103 § 5.13.
4 Forsyth op cit (n 3) at 435–437. Ministerial permission in terms of the Protection of Businesses Act 99 of 1978 is an additional requirement.
The Commission's first reappraisal of the position with regard to the recognition and enforcement of judgments was related to money orders, and was inspired by this reality and by various other factors. Among these is the fact that the common law system implies institution of an action before the local court, which involves trouble, expense and delay. \(^5\)

Issue Paper 21 mainly consists of a description of the current legislative framework and contains remarks concerning the disjointedness of this framework. It elicited a first round of comments from scholars and practitioners, which have been included in Discussion Document 106. Discussion Paper 106 is a more elaborate document that improves on the original document in many respects. For example, the Commission is aware of the need to keep abreast of commercial and political developments, and displays a greater historical awareness, which was altogether absent from the first. However, problems and gaps remain with regard to both the structural and the normative aspects of reform. Neither one of the documents distinguishes between and integrates issues pertaining to structural and normative law reform, nor do they explore the options and strategies for reform that are available to South Africa.

Views differ about whether structural legislative reform is really needed. Nonetheless, the project is going ahead as planned, and the Discussion Paper underscores the Commission's conviction that scope for reform exists.

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5 The same applies to regulating the service in South Africa of process received elsewhere, or regulating the service elsewhere of process issued in South Africa. In the absence of statutory regulation, the leave of the court is required before process or documents whereby proceedings are instituted may be served outside South Africa.

6 Issue Paper 5; also Forsyth op cit (n 3) at 408.

7 Discussion Document 2 § 1.4.
2 Structural or normative legislative reform?

The Commission states in Issue Paper 21 that its investigation is being undertaken with a view to developing a uniform Act, and to ascertain whether consolidation is 'the appropriate route to follow in attempting to facilitate international cooperation in civil matters'. Thus the objective of Project 121 was originally formulated in terms of the need to draw together scattered pieces of legislation into a uniform act. In the opinion of the Commission, consolidation renders legislation more user-friendly and accessible and provides ease of reference for users. The Commission does not explain what it means by 'consolidated legislation'; yet the first document focuses on this structural aim and leans towards structural goals and anticipated results. But while the Commission does not state specifically that it has in mind reform that goes beyond the mere structural aspects, the factors listed in the first document, and the needs they imply, create the expectation of normative reform. These factors refer to the following needs:

- to develop an effective alternative to judge-made rules that will make it possible for more judgments to move cross-border
- to review the problematic statutory basis in the form of designation
- to stimulate development in the area
- to reconsider criteria to help determine which foreign countries the consolidated legislation should apply to.

Issue Paper 21 is written in a descriptive style. It rests on the premise that the necessity for statutory improvements and devices to facilitate litigation for recognition and enforcement has been demonstrated. It also reflects a desire to bring common law and statute into conformity with reason, to improve its justifiability and accountability, and to simplify statutory law to render it more coherent and accessible. The practice of designation is specifically identified as giving rise to problems in the area. Nonetheless, there is no analysis of any of the pressures towards the unification of normative frameworks.

By contrast, the normative thrust of Discussion Document 106 (the second document) is evident. It is clearly stated that the Commission was asked to suggest improvements. The Commission makes no bones about its desire to review the norms governing the area and to overcome the gaps and fragmentation existing in the field. In some places the Commission comes across as almost indifferent.

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8 Issue Paper 2; 17.
9 Ibid.
10 See Issue Paper 2 'Scope of the investigation'.
11 Issue Paper 1.
12 Issue Paper 3.
13 Issue Paper 2.
14 Issue Paper 18.
15 Discussion Document 73 § 4.3.
16 Discussion Paper 1 § 1.3; 2 § 1.6.
towards the ideal of a single statute that includes all forms of judicial determination — arbitral awards are specifically excluded, for example, and its recommendation that statutes governing maintenance orders and other civil judgments should be combined, has been changed.\textsuperscript{17} In other places however, the desire to consolidate legislation is still evident and the merit of this proposal supported.\textsuperscript{18} Ambivalence and internal inconsistencies remain because the idea of a partial consolidation has not been rejected out of hand. However, a chauvinist preoccupation with provisions that apply nationally is not helpful in an area of law where the collinearity between South African statutory law and statutory provisions applying in the region and beyond has great ultimate importance.

Since neither of the two documents makes any distinction between issues pertinent to structural reform and normative legislative reform, such issues are not raised in a systematic way. Issue Paper 21 even regards the structural aims as synonymous with its scope. A single comprehensive statute will no doubt facilitate subsequent legislative amendment, but Discussion Document 106 reflects a realisation that normative concerns are equally important, for example establishing mechanisms that would enable foreign judgment creditors to execute judgments directly in South Africa, overcoming fragmentation among different laws\textsuperscript{19} and improving the law through simpler, inexpensive and speedy methods.\textsuperscript{20} One wonders why the Commission did not make it plain from the outset that 'rationalisation' of the legislation is being considered. The original document points out that uniform legislation pertaining to international cooperation in criminal matters exists, whereas regulation in the area of civil matters is piecemeal.\textsuperscript{21} In and of itself, however, this difference is insufficient to justify an overhaul of the legislative framework. One cannot help wondering why it was deemed necessary to prepare an issue paper if the intention was merely to consolidate the old legislation without changing it, or to collect in an easily accessible legislative form all existing provisions relevant to recognition and enforcement, service of judicial process and evidence.

3 Differences in scope

Issue Paper 21 supports a 'national recognition statute' and deals with the recognition and enforcement of foreign unsatisfied money judgments, maintenance orders and arbitral awards.\textsuperscript{22} However, one looks in vain under the heading 'scope' for a delimitation of some kind. That the Commission has a

\textsuperscript{17} Discussion Document viii § 6.2; 103 § 5.13.
\textsuperscript{18} Discussion Document 73 § 4.5; 100 § 5.2.
\textsuperscript{19} Discussion Document 2 § 1.6.
\textsuperscript{20} Discussion Document 73 § 4.3.
\textsuperscript{21} Issue Paper 17.
\textsuperscript{22} The proposed uniform statute is also supposed to regulate mutual assistance in obtaining evidence and the reciprocal service of legal documents in civil process.
threelfold intention becomes clear once the whole document has been read through:

(a) to consolidate 6 different pieces of legislation dealing with international co-operation in civil matters (with the exception of one, all were drafted and promulgated long before 27 April 1994): 23

- The Foreign Courts Evidence Act 80 of 1962;
- The Reciprocal Enforcement of Maintenance Orders Act 80 of 1963;
- The Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977;
- The Enforcement of Foreign Civil Judgments Act 32 of 1988 (South Africa);
- The Reciprocal Enforcement of Maintenance Orders (Countries in Africa) Act 6 of 1989;

(b) to seek views on whether South Africa should accede to different international agreements. 24 In the area of maintenance orders, two are mentioned, namely:

- the 1958 Convention Concerning the Recognition and Enforcement of Decisions Relating to Maintenance Obligations Towards Children; 25
- the 1973 Convention on the Recognition and Enforcement of Decisions relating to Maintenance Obligations. 26

(c) to seek views on whether the Protection of Businesses Act 99 of 1978, which subjects the enforcement of foreign judgments, orders, directions, arbitral awards or letters of request to the discretion of the Minister of Economic Affairs (now Trade and Industry), poses unjustifiable obstacles to international co-operation. 27

The Discussion Document declares categorically that the type of consolidated legislation contemplated in the Issue Paper does not exist anywhere in the world,
and that no international convention attempts to deal in a single instrument with all the matters pertaining to judicial cooperation. The concept of ‘judgment’ has been broadened so as to allow for the enforcement of non-monetary judgments, and not only enforcement of those sounding in fixed sums of money as the English model prescribes. At the same time, the scope of Project 121 was narrowed down to exclude the enforcement of foreign arbitral awards. Even though this narrowing down impacts on structure and on normative content, no explanation is given beyond that the Commission has already prepared a report on the reform of arbitration law. This previous report proposes the statutory incorporation of the UNCITRAL Model Law on International Commercial Arbitration of 1985, which has had great success in francophone Africa. The first document invited comments regarding the incorporation of the outdated provisions of the Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977. The Commission seems to have contemplated confining itself to the possible incorporation, in a consolidated statute, of provisions modelled on English statutes unsuited to international commercial arbitration. The previous report no longer forms part of Project 121 because the Arbitration Bill has entered the Parliamentary Committee stage. Since South Africa has hovered ‘on the brink of adopting a modern arbitration statute’ for too long and given the fast pace with which new developments take place with regard to a number of conventions on arbitration, it is to be hoped that the Parliamentary Committee concerned will give fresh consideration to the requirements of business partners including the establishment of a regional arbitration center for cross-border commercial disputes in the Southern African Development Community.

4 Gaps in respect of regional and international developments

The most important criticism in respect of both documents released by the

28 Discussion Document 100 § 5.3.
29 Discussion Document vii § 5.3.1; Discussion Document 36 § 3.23; 98 § 4.75(i).
30 Discussion Document 4 § 1.12.
33 In general Butler op cit (n 32) at 171.
Commission is that the options South Africa is faced with are not set out in their proper relation to one another. Issue Paper 21 does not contextualise the issue of recognition and enforcement with reference to possible approaches or international and regional developments and trends. It omits even oblique reference to the most recent international initiative, the Draft Hague Convention on Jurisdiction and Recognition and Enforcement of Civil and Commercial Judgments. Three-odd international agreements are identified as potentially suitable for accession, but the structure of the reform is not explored even superficially. Since its admitted focus is supposed to be on aspects of structure, it is strange that there is no reference to bilateral agreements and regional models with regard to civil judgments (eg the Southern African Development Community, the EU model and the Organisation for Harmonisation of Business Law in Africa. OHADA is the French acronym that stands for Organisation pour l’Harmonisation en Afrique du Droits des Affaires. The English acronym is OHBLA, but the French acronym is widely used and is preferred for present purposes). OHADA was established in 1993 with the objective of creating a standard for business law in a number of French-speaking African countries. It sponsored the Treaty for Harmonisation of African Business Laws. Its Council of Ministers and a Common Court of Justice and Arbitration were set up in terms of Article 3 of the OHADA treaty.

Given this basic oversight with regard to regional models, it is little wonder that one is left with the impression that the Commission initially favoured a ‘national’ recognition statute, in other words one independent of any bilateral or multilateral agreement in the region or beyond.

Discussion Document 106 is an improvement on this score, at least in a formalistic sense. For the first time the problems of the subject field are contextualised. For example, the document questions the fact that the statutory route is limited to money judgments and their enforcement in the lower courts and looks at possible solutions such as the possibility of a regional régime.

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37 Discussion Document 93 § 4.57–58.

38 Discussion Document 87 § 4.39; the document even mentions regional groupings in South America at 85 § 4.36.
Aspects of the EU régime are discussed, reference is made to SADC and the potential importance of this grouping for law reform in this area is realised. The Draft Hague Convention on Jurisdiction and Recognition and Enforcement of Civil and Commercial Judgments is referred to several times. Reference is also made to bilateralism and there is a section that deals with comparative materials. Given these references to current regional and international developments, the disappointment about the remaining gaps and oversights is that much greater.

First of all, Discussion Document 106 does not contain or solicit proposals concerning the structural options in existence. Even if notice has been taken of recent international agreements, the Commission still confines its thinking to a national recognition statute. Unlike the first document which still mentions the UNCITRAL Model Law on International Commercial Arbitration of 1985, this document does not explore the possibility of preparing model legislation.

Secondly, Discussion Document 106 does not contemplate the establishment of an organisation that could prepare legislation with application beyond South Africa, in the way that OHADA was able to achieve. The founders of OHADA were convinced that a sound system of business law and the implementation of a harmonised legal framework in the area of business laws (ie harmonisation of their legal instruments inherited from France) would facilitate economic integration and political cooperation, spur greater foreign investment, boost economic activities and contribute to regaining investor confidence. The main means of achieving the objectives laid down in the OHADA treaty consists of the elaboration of legislative texts termed ‘uniform Acts’ directly applicable and mandatory in the Member States ‘notwithstanding any previous or subsequent provision of domestic law’. It is noteworthy that the scope of the OHADA treaty is not limited to the member states of the Franc Zone. Indeed, Article 53 provides that it will be opened to the membership of any member state of the Organisation of African Unity that is not a signatory, in prospect of better economic integration in Africa. It will also be opened to the membership of any non-member state of the Organisation of African Unity invited to join OHADA with the common agreement of all the member states. Furthermore, the OHADA treaty takes other

40 Discussion Document 81 § 4.25; Discussion Document 101 § 5.5.
41 Discussion Document 11 § 1.29; 94 § 4.60–61; 95 § 4.64; 96 §§ 4.66–4.67.
42 For example Discussion Document 8 § 1.23.
applicable international conventions into account, thereby avoiding a conflict of
conventions in the OHADA member states.

Thirdly, Discussion Document 106 does not treat national and regional
possibilities together with the conventional route, and consequently gives a partial
(in more than one sense of the word) perspective. Even the treatment given to the
Draft Hague Convention on Jurisdiction and Recognition and Enforcement of
Civil and Commercial Judgments leaves a gnawing feeling that the picture
provided is incomplete (and the Commission does not indicate which draft was
used as the source document). Originally envisaged as a global application of the
Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and
Commercial Matters in the European Union, the purpose of the draft has now
been modified into a more humble endeavour that focuses on one jurisdicational
ground, namely choice of court clauses in business-to-business transactions.
Hopefully the references supplied are to the most recent draft. Even if the
content of the Draft Hague Convention is not particularly helpful in the South
African circumstances prevailing at present, it may teach lessons from a structural
point of view. It is to be regretted that the Commission does not formulate a
position with regard to the possibility of linking statutory and treaty-based
jurisdictional tools to recognition and enforcement issues in a double approach.
The Draft Convention has to be analysed from this perspective, because the risk of
separating the rules on jurisdiction and judgments is not worth it. The two
branches are inherently collinear, and must be considered together if any structural
recommendation is to be convincing. The insight that conventions avoid the
process of case-by-case designation is present, but the Commission’s thinking
remains tied to reform of the national legislative framework. Given the context of
this proposed law reform initiative, such an approach is rather chauvinist and
old-fashioned. An insistence on reviewing the jurisdictional competence of the courts
of the rendering state at the recognition and enforcement stage is based on a
perceived ‘disadvantage’ of losing the chance to scrutinise the standards and
practices employed by other states. Since state parties to the convention adopt and
incorporate conventional standards, this danger is more apparent than real.

Recommendations appear at the end of every chapter, but as indicated

45 Brussels Convention (n 39).
46 Dogauchi and Hartley ‘Preliminary Draft Convention on Exclusive Choice of Court
Agreements’ [A Draft Report prepared for the Special Commission of April 2004 on
Jurisdiction and Recognition and Enforcement of Foreign Judgments in Civil and
[visited 21 April 2004].
47 Discussion Document 11 § 1.29; 85–86 § 4.36.
48 Discussion Document 83 § 4.30; 84 § 4.32. The statement at 83 § 4.30 about the nationality
of a contracting state is particularly confusing. In general Reed ‘A new model of
jurisdictional propriety for Anglo-American foreign judgement recognition and enforce-
ment: something old, something borrowed, something new?’ (2003) 25 Loyola Los Angeles
International and Comparative Law Review 243, 252.
49 Discussion Document 88 § 4.44.
previously, internal consistency is lacking at times. The recommendations would
certainly have carried more weight had the options that are possible at the
national, regional and international levels been fully considered. Failing to
identify all the options, it was not feasible, of course, to consider them in their
proper relation to one another either. In any research project, methodology and
content are linked. If the methodology is wanting, basic options may never be
generated and considered. If the options that are available are not borne in mind,
the resulting methodology and strategy will not achieve what is necessary. The
Issue Paper leaves the reader in the dark as to the methodology that was used.
Throughout, certain questions are highlighted in blocks, presumably to guide
those who wish to comment, yet disclosing the stages in which the reform is
meant to unfold. The methodology that was used in the Discussion Document is
also not disclosed. Basing the plan for the proposed law reform on reason
informed by experience could have been helpful and would have ensured that
important conventions are not overlooked. For example, no explanation is given
in either the first or the second document as to why the 1958 Convention
Concerning the Recognition and Enforcement of Decisions Relating to
Maintenance Obligations Towards Children and the 1973 Convention on the
Recognition and Enforcement of Decisions relating to Maintenance Obligations
are considered worthy of South Africa’s accession, whereas the 1957
Convention on the Recovery of Maintenance is omitted. Moreover, while the
conventions adopted in The Hague may be of primary importance to South Africa
as a new member of the Hague Conference, they are not the only models available
for future law reform initiatives. The Inter-American Convention offers a broad-
based convention on this topic, for example. To state the obvious, it is important
to start with all the models that are available regionally and internationally before
eliminating some and identifying the most suitable combination.

The basic structural question of grouping together legislation on foreign civil
judgments and maintenance orders receives attention in the Discussion Document
(arbitral awards having been left aside, as explained above). On the grouping
together of maintenance legislation and legislation dealing with civil judgments,
 pointers are to be found in international and regional instruments. For example,
the Draft Hague Convention does not apply to proceedings that have as their

50 Eg Discussion Document 101 § 5.4.
52 Discussion Document 76 § 4.12 states that South Africa’s accession must be encouraged as it provides ‘reciprocal access to the courts of all other states party to the Conventions’.
object maintenance obligations but, if maintenance arises as an incidental question, proceedings are not excluded from the scope of the convention. The Discussion Document takes note of the position, but includes no conclusive recommendation as yet. In my view, the recognition and enforcement of maintenance orders is an area that warrants the attention of the commission, and it would be unfortunate if it gets left aside just because it does not fit into a grand plan for consolidation. The 1968 Brussels Convention (Brussels I), the 1988 Lugano Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters and the Brussels Regulation (Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters) include maintenance orders and treat them on a par with other civil judgments. Article 5(2) Brussels I states for example:

'A person domiciled in a contracting state may, in another contracting state, be sued in matters relating to maintenance, in the courts for the place where the maintenance creditor is domiciled or habitually resident ... or if the matter is ancillary to proceedings concerning the status of a person, in the court which, according to its own law, has jurisdiction to entertain those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties.'

Moreover, cognisance has not been taken of the jurisdictional rules on matrimonial proceedings (divorce, annulment or legal separation) as contained in 'Brussels II'.

Whereas it is noted in the Discussion Document that the enforcement of foreign maintenance orders is regulated separately from other civil judgments in Britain, Canada and Australia, a broader base of foreign law and experience would have been helpful.

5 Conclusion

The statutory framework in the area of the recognition and enforcement of foreign judgments, maintenance orders and arbitral awards needs to be structurally rearranged for effective use and to be aligned with the ideal of law. The Commission must be commended for having addressed, in Discussion Document

56 Article 3.
57 Article 4. Discussion Document 103 § 5.10 does not capture this.
58 Discussion Document 103 § 5.10.
59 Discussion Document 103 § 5.11.
60 Also Regulation (EC) no 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses.
61 Discussion Document 102 § 5.9

The purpose of Project 121 clearly links to both structural and normative legislative rationalisation. However, it is unfortunate that the Commission is still ambivalent about structural issues and the partial or wholesale integration of the relevant legislation. There should be no doubt that Project 121 is about updating, modernising and revising laws that belong together in close relationship and if possible, merging them into one all-embracing law. Moreover, the scope of the project should not be narrowed down without good reason.

It goes without saying that no discussion document can be expected to provide all the alternatives in terms of possible solutions, but the scope of the investigation and the methodology chosen require very careful consideration. It is vital for South Africa not only to ratify existing international agreements (and deal with the structural and normative implications of accession), but also to participate meaningfully in the negotiation of new international agreements in this area (eg the Draft Hague Convention on Jurisdiction and Recognition and Enforcement of Civil and Commercial Judgments).

The Commission's final recommendations need to include a position on the best option, structurally and normatively speaking. In order to achieve this, the Commission needs to explore possible options at the national, regional and international levels and sensible combinations of existing options. Any remaining flaws in conceptual thinking, internal inconsistencies and methodological difficulties must be ironed out.

Since no comprehensive international agreement exists as yet, some discussion is necessary with regard to a new regional initiative based in South Africa or within the Southern African Development Community framework. If the legal traditions represented in SADC are regarded as too diverse, the example of OHADA must at least be looked into.

The Commission should be encouraged fully to explore and utilise the strategic position of South Africa in the region and beyond, so that true protection of the interests of litigants can replace lip service.