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RESEARCH ARTICLE

# From Symbolism to Substance: Comity and Judicial Reform in South Africa's Foreign Judgments Regime

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**Abstract**
Despite its strategic role in African and Global South commercial networks, South Africa's economy lags behind among its BRICS partners and most African peers. Statistics reveal that 44 per cent of foreign judgments are denied recognition in South Africa, primarily due to the rigorous requirements at the enforcement stage, resulting in expensive re-litigation or business discouragement. This article explores how the principle of comity, often used rhetorically by courts, could be transformed into a substantive tool to modernize South African common law. To address the misalignment between domestic rules and global trade, the paper proposes tailoring Canada's "real and substantial connection" test to suit South Africa's needs. Finally, to mitigate the risks of enforcing foreign default judgments with tenuous links to the forum, it proposes strengthening the natural justice defence by requiring sufficient notice and evidentiary grounding, as other common law systems have done.

**Keywords:** recognition and enforcement of foreign judgments; international jurisdiction; comity; real and substantial connection; South Africa

## Introduction

South Africa's hybrid legal system, which combines African customary law with Roman-Dutch civil law and English law, occupies a distinctive place in the global legal landscape.[1] However, despite its post-apartheid constitutional mandate to develop common law and promote openness to international law,[2] South Africa's private international law – particularly the rules governing the recognition and enforcement of foreign judgments (REFJ) – remain inconducive in creating an environment that promises to instil investor confidence.[3] This misalignment is reflected in its economic performance: with growth at just 0.7 per cent in 2023, the lowest among BRICS and many African peers, and persistent difficulties in enforcing contracts, South Africa continues to underperform relative to

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1 E Schoeman "South Africa" in J Basedow et al (eds) *Encyclopaedia of Private International Law* (2017, Edward Elgar Publishing) 2516.

2 Constitution of the Republic of South Africa, 1996, secs 39(2) and 233.

3 *Government of the Republic of Zimbabwe v Fick and Others* 2013 (5) SA 325 (CC) (*Fick*), para 50.

comparable economies.[4] The World Bank's "ease of doing business rankings" similarly ranks South Africa unfavourably, noting that the difficulties in enforcing contracts are among the most significant challenges of doing business in South Africa, causing the country to be outperformed by most of its other BRICS partners and some other sub-Saharan countries, such as Rwanda and Kenya.[5]

Weak investment outcomes are closely linked to the limited enforceability of foreign judgments. As of 2025, only 56 per cent of such judgments are enforced, with approximately 44 per cent refused – often those originating from key trading partners such as the UK, the USA and Germany.[6] This forces litigants either to re-litigate disputes to access assets within South Africa or to avoid transacting with South African entities altogether.

While South African law permits refusal of enforcement on familiar grounds – fraud, public policy and due process[7] – it imposes an additional, more restrictive requirement: the rendering court must be internationally competent under both its own law and South African private international law.[8] In practice, this confines international competence largely to the debtor's residence or voluntary submission. This dual threshold contrasts with more liberal approaches elsewhere, including Brazil and the USA, where foreign courts' jurisdiction is assessed more deferentially.[9]

South Africa's insistence on this double threshold, especially its narrow reading of what constitutes international competency, mainly limited to the debtor's residence or voluntary submission,[10] has made the recognition of judgments from otherwise legitimate forums uncertain. Of the 44 per cent of judgments that were denied enforcement as of 2025, 53 per cent are rejected specifically because the foreign court lacked international jurisdiction to adjudicate the matter, when the debtor was neither a resident nor had submitted to its jurisdiction.[11] Though the judiciary has frequently gestured toward comity as a rationale for a more open approach, the principle remains poorly defined and rarely determinative in practice.[12]

This paper examines whether comity can play a more meaningful role in determining the international competence of foreign courts under South African law. Part I outlines the existing REFJ framework and the limited role of comity in judicial reasoning, highlighting the consequences of a rigid focus on jurisdiction ad personam. Part II explores the conceptual relationship between comity and obligation. Part III considers whether, and how, the two may be reconciled to modernize the law. Part IV concludes.

## South Africa's recognition and enforcement of foreign judgments: tradition, tests and tensions

### *Between discretion and doctrine in the global enforcement of foreign judgments*

Unlike disputes settled by arbitration, where party agreements and binding obligations imposed by treaties typically obligate the enforcement of decisions, the settlement of disputes by litigation raises no such compulsion. Historically, the sovereignty of states barred REFJ, save in those cases

4 World Bank "GDP growth (annual %) – South Africa" (2024) *World Bank Data*, available at: <https://data.worldbank.org/indicator/NY.GDP.MKTP.KD.ZG?locations=ZA> (last accessed 4 June 2025).

5 World Bank "Ease of doing business rankings" (2020) *World Bank*, available at: <https://archive.doingbusiness.org/en/rankings> (last accessed 4 June 2025).

6 See Appendix A.

7 *Jones v Krok* 1995 1 SA 677 (A) (Appellate Division / SCA) (*Jones*).

8 *Reis Engineering Co Ltd v Isamcor (Pty) Ltd* 1983 1 SA 1033 (T) 1037B (Transvaal Provincial Division) (*Reis*).

9 J Dolinger *Private International Law in Brazil* (2012, Wolters Kluwer) at 324–25.

10 *Purser v Sales* 2001 3 SA 445 (*Purser*), para 12.

11 See Appendix A. Nine out of 17 judgments that were denied enforcement were because of the lack of the foreign court's international jurisdiction over the matter under South African law.

12 *Acutt Blaine & Co v Colonial Marine Insurance Co* (1882) 1 SC 402 at 406 (Cape Supreme Court) (*Acutt*); *Richman v Ben-Tovim* 2006 (2) SA 591 (C) (Cape High Court) (*Richman*), para 4; *Supercat Incorporated v Two Oceans Marine* CC 2001 (4) SA 27 C 29 (Cape High Court) per Conradie J (*Supercat*); *Fick*, above at note 3, paras 56–57.

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where the decision emanated from within the country's confines.[13] Absent comparable treaty regimes regulating judgment enforcement (as has been done for arbitral awards),[14] countries continue to remain under no obligation to give effect to the decisions pronounced outside their sovereign limits.[15] However, burgeoning international trade has necessitated the free movement of judgments across borders, both in the interests of the rendering foreign state involved and the creditor who must be assured of finding a satisfactory means of being given effect to in the country where the debtor's assets lie.[16] In the present day, the decision to enforce or not is thus purely domestic, based on policy considerations, statutes and case law, as opposed to binding treaty obligations. Like matters settled by arbitration, due process, public policy and fraud remain at the core of judgment enforcement globally.[17] Despite these commonalities, however, whether any country chooses to enforce a foreign judgment predominantly hinges on whether it constitutes an obligation in the requested state, is a matter of reciprocity or is simply an act of comity towards the rendering state.[18]

Rooted in the seminal case of *Hilton v Guyot (Hilton)*,[19] comity essentially entails a "spirit of cooperation", paving the way for courts to balance international duty and convenience while enforcing foreign judgments, especially when no treaty mandates it.[20] The open-ended nature of comity has caused it to differ substantially from other policy considerations that require judgment enforcement as a matter of obligation or based on reciprocity. In contrast, both obligation and reciprocity hinge on definitive factors upon which recognizing courts must determine the foreign judgment's effectiveness in their territory. In legal systems requiring judgments enforcement to be considered as a matter of obligation, the focus remains on the ascertainment of the international competency or jurisdiction of the foreign court under clearly defined standards – both in its capacity as a forum of first instance under its own law and, indirectly, under the recognizing court's principles.[21] Most common law systems, including those in South Africa, typically fall into this category. In a related vein, reciprocity, a prevailing factor to discern the effectiveness of foreign judgments in most civil law systems, rests on an exchange considered mutually beneficial by both countries – the rendering and recognizing state. Such a mutual exchange may manifest through the conclusion of treaties between the two states or judicial precedents demonstrating the rendering state's past willingness to enforce the recognizing state's decisions.[22] Increasingly, many legal systems have shown a preference for presuming the establishment of reciprocity when emanating from courts in countries that impose fundamentally similar criteria to those prevalent in the recognizing state.[23] That the two countries have not concluded a

13 E Spiro "The incidence of jurisdiction in the recognition and enforcement of foreign judgments" (1978) 3 *Acta Juridica* 59 at 59–60.

14 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1959) 330 UNTS 3 (New York Convention) which has been ratified by 172 countries. The Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters (adopted 2 July 2019, entry into force 1 September 2023) (Hague Judgments Convention) which has been ratified by 33 countries including the 27 EU Member States.

15 Spiro "The incidence of jurisdiction", above at note 13 at 60.

16 AB Edwards (updated by E Kahn) "Conflict of laws" in WA Joubert (ed) *The Law of South Africa* (vol 2, part 2, 2nd ed, 2003, LexisNexis South Africa) 384 at fn 10; C Forsyth *Private International Law* (5th ed, 2012, Juta) at 417.

17 See New York Convention, above at note 14, art V; Hague Judgments Convention, above at note 14, art 7.

18 For a discussion, see PN Okoli *Promoting Foreign Judgments: Lessons in Legal Convergence from South Africa and Nigeria* (2019, Kluwer Law International) 73.

19 159 US 113 at 163–64 (1895).

20 Okoli *Promoting Foreign Judgments*, above at note 18 at 84, referring to *Société Nationale Industrielle Áerospatiale v United States District Court for SD Iowa* 482 US 543 (1987).

21 See, generally, A Briggs "Recognition of foreign judgments: A matter of obligation" (2013) 129 *Law Quarterly Review* 87.

22 Examples include China. See "*Zuigao renmin fayuan guanyu shiyong 'Zhonghua renmin gongheguo minshi susong fa' de jieshi*" (Interpretation of the Supreme People's Court on Application of the 'Civil Procedural Law of the People's Republic of China') (2022) 11 *Fa Shi* (2022), sec 541.

23 Examples include Germany and Japan. See Zivilprozessordnung, 1877 (amended 2009) (The Federal Republic of Germany) (ZPO), art 328; Civil Code of Procedure (Japan) (CCP), art 118(iv).

treaty to secure the free movement of judgments consequently assumes no significance in countries such as these, which base their REFJ regimes on these latter modes of reciprocity, as does the absence of a judicial precedent in the rendering state. Despite its many flaws, whatever the mode employed, reciprocity, like obligation-based determinations, consists of well-defined criteria ensuring a certain degree of certainty on the grounds on which creditors can expect to enforce their decisions.

### *The doctrine of obligation, judicial development and the centrality of international competency in South Africa's uncodified framework*

Like most common law systems, the traditional principles of English law have played a crucial role in shaping the direction of South Africa's REFJ regime. Following the trends in most of its other common law counterparts, including the UK,[24] and other major jurisdictions such as Australia[25] and India,[26] South African legislators have similarly placed a significant onus of developing the REFJ regime on its courts.[27] Without codification, the South African courts have thus been endowed with enormous flexibility in determining a REFJ regime most suitable for addressing the increasing complexities of South Africa's participation in international trade.

The doctrine of obligation is said to possess "pride of place" under South African law,[28] and like most other common law systems, the enforcement of foreign judgments has typically grown out of a rejection of principles of comity or reciprocity as determining factors, into the rise of the notion of obligation.[29] Despite the overarching importance of the notion of obligation under South Africa's REFJ framework,[30] courts have increasingly referred to comity to give effect to foreign judgments, while still grounding their enforceability on the obligation the decision has created under the law of the foreign court as a result of the latter's international competency. In this context, the seminal decision of *Jones v Krok (Jones)*[31] by the Appellate Division of the Supreme Court of South Africa operates as a quasi-statutory authority and serves as the cornerstone of this framework. Handed down in 1995, the decision remains the leading authority on the Republic's REFJ framework, particularly regarding the jurisdictional requirements that a foreign forum must satisfy for its judgment to be enforceable in South Africa.[32] Specifically, for a foreign judgment to be enforceable in South Africa, *Jones* postulates five requirements to be satisfied:

1. the foreign court should have been internationally competent to decide the case;
2. the judgment should be final and conclusive;
3. it was not acquired by fraudulent means;
4. the execution of the judgment is not contrary to the public policy of South Africa (being the *lex fori*); and finally;
5. that its enforcement is not prevented by the provisions of the Protection of Businesses Act 1978 (PBA).[33]

24 A Briggs *The Conflict of Laws* (5th ed, 2024, Clarendon Law Series, Oxford University Press) 120.

25 R Mortensen, R Garnett and M Keyes *Private International Law in Australia* (5th ed, 2023, LexisNexis Butterworths) 115.

26 S Khanderia "Recognition and enforcement of foreign judgments: India" in S Jolly and S Khanderia (eds) *BRICS Private International Law: Convergence, Divergence and Reciprocal Lessons* (2024, Hart Publications) 470.

27 See *Acutt*, above at note 12; *Jones*, above at note 7; *Purser*, above at note 10.

28 C Roodt "Recognition and enforcement of foreign judgments: Still a Hobson's choice among competing theories?" (2005) *The Comparative and International Law Journal of Southern Africa* 15 at 17.

29 Spiro "The incidence of jurisdiction", above at note 13 at 72.

30 Ibid.

31 *Jones*, above at note 7.

32 Ibid.

33 For a detailed discussion on the application of the PBA, see E Schoeman et al *Private International Law in South Africa* (2014, Wolters Kluwer) at 111; Forsyth *Private International Law*, above at note 16 at 466–68; PSG Leon "Roma

Barring decisions from the Namibian courts, which are granted reciprocating status under the Enforcement of Foreign Civil Judgments Act 1988,[34] foreign judgments are generally incapable of automatic enforcement in South Africa.[35] To be enforced, creditors are obligated to initiate a fresh suit, with the judgment serving as the cause of action before the appropriate South African court that possesses jurisdiction.[36] Certain types of judgments, especially those arising in relation to exportation, importation or product, require the minister of economic affairs' prior approval before commencing enforcement proceedings.[37]

Regardless of their origin, foreign judgments must satisfy key requirements to be enforceable. First and foremost are the international competency of the foreign court and its power to render a final and conclusive judgment. Typically, only money-based judgments are enforceable in South Africa.[38] Foreign judgments must thus *unconditionally* acknowledge the debtor's indebtedness towards the creditor for a fixed sum of money.[39] A procedural equivalence to a money-based obligation is insufficient, and finality and conclusiveness must necessarily be in form and not effect.[40] Such judgments (sounding in money) are presumed to be final and conclusive in South Africa even when they might be pending appeal, as long as the rendering court no longer has the power to set it aside under its law.[41] This principle is equally applicable to judgments pronounced in default of the debtor's appearance before the rendering court, which, under common law,[42] are similarly treated as final and conclusive despite their ability to be reopened.[43] Unless the rendering court treats such a decision as inherently provisional,[44] finality in such decisions for the purpose of enforcement in South Africa "is reached once the possibility of recission is remote".[45] Despite such finality acquired through the rendering court's international competency, foreign judgments may nonetheless be denied effect when they have been acquired by fraud, usually extrinsic,[46] ie practised over the court as against the other party,[47] or when they contravene South African public policy.[48] Nonetheless, each of these requirements can only be triggered once the rendering court is shown to be internationally competent.[49]

### Demystifying international competency

Notwithstanding its central role in determining enforceability, South Africa's REFJ regime, unlike most other common law systems, lacks a comprehensive list of scenarios in which rendering courts

non-locusta est: The recognition and enforcement of foreign judgments in South Africa" (1983) *Comparative and International Law Journal of Southern Africa* 325 at 346–48.

34 Enforcement of Foreign Civil Judgments Act 1988, secs 2–3.

35 *Jones*, above at note 7 at 14; *Lindsey and Others v Conteh* (774/2022) [2024] ZASCA 13 at para 18 (Supreme Court of Appeal) (*Lindsey*).

36 Ibid.

37 Protection of Businesses Act 1978, sec 1(3).

38 *Lindsey*, above at note 35.

39 Ibid.

40 Ibid.

41 RF Oppong *Private International Law in Commonwealth Africa* (2013, Cambridge University Press) at 332.

42 Briggs *The Conflict of Laws*, above at note 24 at 123.

43 *Gabelsberger v Babl* 1994 (2) SA 677 (A) (Appellate Division / SCA). See also *Holz v Harksen* 1995 (3) SA 521 (C) (Cape Provincial Division).

44 Briggs *The Conflict of Laws*, above at note 24 at 168 and 169.

45 Also see Forsyth *Private International Law*, above at note 16 at 459 referring to E Kahn "The recognition and enforcement of foreign judgments" in HR Hahlo *The South African Law of Husband and Wife* (4th ed, 1975, Juta) at 642 and 662.

46 Forsyth *Private International Law*, above at note 16 at 463.

47 *Goodman v Goodman* 1903 20 SC 376 (Cape Supreme Court); *Jaffe v Salmon* 1904 TS 317 at 318 (Transvaal Supreme Court); *Jones*, above at note 7.

48 *Jones*, id; *Pinchas and Another v Pienaar* 2000 (3) All SA 632 (W) (Witwatersrand Local Division); *Eden v Pienaar* 2001 (1) SA 158 (W) (Witwatersrand Local Division).

49 *Jones*, id.

are presumed internationally competent. This has resulted in fragmented and underdeveloped standards, rendering the test for international competency unpredictable. Absent a structured test, litigants must invariably rely on academic writings and a dense body of judicial dicta to ascertain whether the South African courts would regard the rendering court as internationally competent under their law.

According to the South African Law Reform Commission, such competency turns on whether the rendering court was entitled, under South African law, to summon the defendant and subject them to its jurisdiction.[50] Accordingly, a rendering court must have jurisdiction under both its own domestic law and indirectly under South African private international law.[51] As early as 1882, South African courts made clear that actions *in personam* are enforceable only where the rendering court had jurisdiction over the debtor personally.[52] That strict interpretation postulated in *Acutt, Blaine & Co v Colonial Marine Assurance Co*[53] persists even today. Under South African private international law, international competency is generally limited to two grounds: the debtor's residence within, or their submission to, the rendering court's jurisdiction.[54] The Supreme Court of Appeal reaffirmed both in its 2000 decision, *Purser v Sales (Purser)*.[55] Although courts have occasionally acknowledged the need to adapt the common law to meet the demands of international trade, particularly to prevent debtors from habitually evading foreign jurisdiction,[56] these efforts have not displaced residence and submission as the dominant tests.

As for residence, it remains unclear whether the ordinary or habitual residence is required by the South African courts for the courts to be internationally competent under their law.[57] Under South African law, residence may be inferred from indicators such as maintaining local telephone lines, gym memberships or spending six months or more in the country each year.[58] It is presumed that similar indicators would establish residence in the rendering state. While domicile has been mentioned in some judgments as a possible ground,[59] its independent relevance remains doubtful.[60] Case law suggests that "domicile" and "residence" are often used interchangeably, without distinct legal consequences.[61] In contrast to other common law systems, where domicile carries a specific legal meaning (denoting permanent intention to reside),[62] South Africa focuses squarely on residence.

Submission may be express or implied.[63] Implied submission is inferred from conduct indicating the debtor's intention to accept the foreign court's jurisdiction. This may include initiating proceedings as a plaintiff or defending the case on its merits.[64] Acts like filing a counterclaim constitute implied submission; by contrast, appearing solely to contest jurisdiction or to seek release

50 South African Law Reform Commission "Consolidated legislation pertaining to international co-operation in civil matters" (Discussion Paper 106, 2004), available at: http://www.justice.gov.za/salrc/dpapers/dp106.pdf (last accessed 9 May 2025).

51 *Reis*, above at note 8.

52 *Acutt,* above at note 12.

53 Ibid.

54 *Purser*, above at note 10 at 12.

55 ibid.

56 *Fick,* above at note 3 at 55. Also see *Richman,* above at note 12 at 8–9.

57 For a discussion on the difference between "ordinary" and "habitual" residence, see P Torremans and JJ Fawcett (eds) *Cheshire, North & Fawcett: Private International Law* (15th ed, 2017, Oxford University Press) at 172–82.

58 *Zwyssig v Zwyssig* 1997 (2) SA 467 (T) Transvaal Provincial Division (now Gauteng Division).

59 *Acutt*, above at note 12; *MacCartie v Bromwich* (1897) 4 OR 295 Orange River Colony Court (OR) (predecessor to the Orange Free State Division) (*MacCartie*); *Borough of Finsbury Permanent Investment Building Society v Vogel* (1910) 31 NLR 402 Natal Supreme Court (N) (*Borough of Finsbury*); *Purser*, above at note 10 at 12.

60 See *Foord v Foord* 1924 WLD 81 Witwatersrand Local Division (WLD); E Spiro *Conflict of Laws* (1973, Juta) at 213; Forsyth *Private International Law*, above at note 16 at 432; Leon, *Roma Non-Locusta Est* above at note 33 at 338–39.

61 *Acutt,* above at note 12; *MacCartie,* above at note 59; *Borough of Finsbury,* above at note 59; *Purser*, above at note 10.

62 For instance, see Khanderia "Recognition and enforcement of foreign judgments: India", above at note 26 at 473 referring to the stance of the Indian Supreme Court in *Yogesh Bharadwaj v State of UP* (1990) 3 SCC 355, paras 17–21.

63 *Mediterranean Shipping Co v Speedwell Shipping Co Ltd & Anr* 1986 (4) SA 329 (D) Durban & Coast Local Division (D).

64 Forsyth *Private International Law*, above at note 16 at 422–27; Schoeman et al *Private International Law*, above at note 33 at 112.

of attached property does not.[65] In such cases, residence remains necessary to establish international competency.

Express submission through written agreements, such as choice of court agreements (CoCAs), raises more complexity. Unlike many other common law systems,[66] South African private international law does not adopt a clear position on jurisdiction acquired through CoCAs in cross-border disputes. Judicial trends indicate that the validity of such agreements is limited to situations where some connection can clearly be established between the transaction and the chosen foreign court,[67] failing which the South African courts may continue to exercise concurrent jurisdiction over the claim.[68] Considering the limited recognition of CoCAs within South Africa's own private international law, submission to foreign courts through CoCAs alone cannot constitute a basis to establish the latter's international competency under the Republic's law, particularly where no residence exists to support it. While one leading case has suggested in *obiter* that a CoCA might suffice to establish jurisdiction under South African law,[69] the weight of authority affirms that a rendering court's compliance with its own jurisdictional rules is insufficient; it must also satisfy South African standards.[70]

With submission through written agreements becoming an increasingly popular basis for conferring jurisdiction, given the predictability and reduced transaction costs they offer, the disjunction created by South Africa's refusal to treat such agreements as sufficient to establish a foreign court's international competency under its indirect jurisdiction framework only widens the gap between South African law and the direct jurisdiction rules of rendering states. This misalignment becomes especially problematic where parties choose to resolve disputes before international commercial courts (ICC).[71] The rules of some ICCs, such as Singapore (SICC), empower these courts to assert coercive jurisdiction over third parties in "appropriate" circumstances even if they have not consented to its authority. Moreover, the third-party claim need not itself be international and commercial, provided the action as a whole meets that threshold.[72] Under South Africa's current framework, such jurisdiction would not qualify as a voluntary submission, increasing the likelihood that judgments from these forums would be denied enforcement, since international competence remains limited to residence or submission. These dilemmas are not unique to South Africa. Courts in other common law jurisdictions have similarly had to refuse enforcement of SICC judgments solely because the debtor was not resident in Singapore, despite the court's jurisdiction being proper under its own law.[73] In such scenarios, comity assumes critical importance, particularly in the absence of a multilateral framework, akin to the New York Convention for arbitral awards, that harmonizes recognition of court judgments across borders.

65 Forsyth, id at 425.

66 Examples include the UK, India and Australia. For the UK, see *SNI Aerospatiale v Lee Kui Jak* [1987] UKPC 12; *Donohue v Armco Inc* [2002] 1 All ER 749 (HL). Also see The Hague Convention on Choice of Court Agreements 2005 (HCCCA) (Implementation) Regulations 2015 (SI 2015/1644) incorporating the provisions of the HCCCA into domestic law. For India, see *Modi Entertainment Network and Another v WSG Cricket PTE Ltd* [2003] 4 SCC 341. For Australia, see *Akai Pty Ltd v The People's Insurance Co Ltd* (1996) 188 CLR 418.

67 GJ Bouwers "Recognition and enforcement of foreign judgments: South Africa" in S Jolly and S Khanderia (eds) *BRICS Private International Law: Convergence, Divergence and Reciprocal Lessons* (2024, Hart Publications) 114, referring to *Yorigami Maritime Construction Co Ltd v Nissho-Iwai Co Ltd* [1977] 4 SA 682 (C) at 692 (Cape Provincial Division); *Butler v Banimar Shipping Co* SA [1978] 4 SA 753 (SE) at 760–62 (South Eastern Cape Local Division (SE)); *Benidai Trading Co Ltd v Gouws & Gouws (Pty) Ltd* [1977] 3 SA 1020 (T) at 1028 (Transvaal Provincial Division) (*Benidai*).

68 Forsyth *Private International Law*, above at note 16 at 218.

69 *Argos Fishing Co Ltd v Friopesca* 1991 (3) SA 255 (NM) (Namibia High Court (NHC)).

70 See *Reis*, above at note 8: *Benidai*, above at note 67.

71 See, generally, Y Man and G Rühl "Success and impact of international commercial courts: A first assessment (2022–23)" (2022–23) 24 *Yearbook of Private International Law* 45.

72 See Singapore International Commercial Court Rules 2021, order 10, rule 5.

73 See the decision of the Delhi High Court in *Discovery Drilling Pte Ltd v Parmod Kumar & Anr* 2025 SCC OnLine Del 1075.

### International competence and the perplexed place of comity: a symbol without substance?

Typically, aside from the defendant's residence or voluntary submission, no other ground justifies the enforcement of foreign civil and commercial judgments in South Africa. While the demands of international trade have, at times, prompted South African courts to reconsider the basis on which rendering courts are assessed for international competency, such reconsideration has primarily occurred in the name of comity, and even then, only where the foreign court exercised jurisdiction *ad personam*.[74] Several leading cases reaffirm that jurisdiction *ad personam* remains the primary basis for determining a foreign court's international competency under South African law.[75]

Despite the sporadic recognition of the problems besetting the grounds of international competency,[76] based on 19th-century English common law,[77] South Africa's REFJ regime remains wedded to formalist principles, permitting debtors to escape foreign courts' jurisdictional nets with ease by merely challenging jurisdiction and ignoring orders to appear.[78] In the age of globalization and e-commerce, such predicaments are likely to have become more pronounced, where injurious conduct may cross borders, especially when intellectual property abuses are involved.

To address these complexities and safeguard the rights of innocent consumers, many nations have extended the jurisdiction of their domestic courts in response to the realities of cross-border commerce, permitting the initiation of disputes even when the infringed goods are delivered within their borders[79] or, in some cases, when products are advertised online.[80] However, none of these connecting elements are regarded by South African law as adequate for establishing international competence. Therefore, by avoiding residence or submission, South African actors can violate international standards and evade foreign court proceedings, undermining cross-border cooperation and accountability.

Despite increasing references to comity in case law,[81] the principle remains ill-defined and lacks a specific doctrinal function – being consistently dismissed when invoked to expand jurisdiction beyond traditional *ad personam* grounds.[82] There are only two cases where comity has played a practical role in determining the enforceability of a foreign judgment – *Richman v Ben-Tovim (Richman)* and *Zimbabwe v Fick (Fick)*. While *Richman* was concerned with the place of presence as a factor, *Fick,* on the other hand, questioned the enforceability of a foreign judgment against a foreign state, and not a private person, thus typically falling outside the traditional precepts of South Africa's private international law. In the former,[83] the Supreme Court of Appeal took a notably controversial

74 See *Richman,* above at note 12; *Supercat*, above at note 12; *Nkwe Platinum Ltd v Genorah Resources (Pty) Ltd and Others* [2023] ZAGPPHC (Gauteng Division, Pretoria (High Court)) (unreported, case no 30712/2023, 27 October 2023) (*Nkwe*) rejecting comity if it meant looking beyond jurisdiction *ad personam*.

75 Examples include *Jones*, above at note 7; *Purser*, above at note 10; *Supercat*, above at note 12; *Nkwe*, id.

76 *Richman,* above at note 12 at 9; *Fick,* above at note 3 at 55.

77 *Acutt,* above at note 12.

78 *Purser*, above at note 10.

79 Examples include the EU, China and South Africa. For the EU, see Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] OJ L351/1, arts 4, 7 and 17. For China, see Interpretations of the Supreme People's Court on Applicability of Civil Procedure Law of People's Republic of China (30 January 2015) Zhu Shi [2015] No 5 (adopted by the Judicial Committee of the Supreme People's Court at its 1636th session on 18 December 2014), art 20. For South Africa, see Magistrates Court Act, Act No 32 of 1944, sec 28(1)(d) read along with *Tel Peda Investigation Bureau (Pty) Ltd v Van Zyl* 1965(4) SA 475(E) (Eastern Cape Local Division).

80 The Supreme Court Ruling N 34-KG20-6-K3 of 15 December 2020, Russia.

81 Prominent examples include *Acutt,* above at note 12; *Supercat*, above at note 12; *Fick,* above at note 3; *Nkwe*, above at note 74.

82 See *Supercat*, id; *Nkwe*, id.

83 *Richman,* above at note 12.

approach,[84] signalling the exceptional weight comity can carry in rare circumstances. The English court's judgment was recognised not on the grounds of the debtor's residence or voluntary submission, but solely because the foreign court had exercised jurisdiction based on the debtor's physical presence in its territory.[85] "Compelling reasons" prompted the court to regard the debtor's presence in England as a factor to establish the latter court's international competency in South Africa based on comity.[86] Though the dictum was anomalous on several accounts, it is significant that in a regime like South Africa's which, unlike other common law systems such as the UK[87] or Australia,[88] has never accepted presence as a direct jurisdictional ground under domestic law in the Republic,[89] it reflected a momentary desire to elevate comity from a symbolic principle to a practical tool for cross-border legal cooperation – albeit within the existing framework that obligates international competency to be acquired *ad personam* over the debtor.

*Fick*, handed down by the Constitutional Court, serves as another prominent example of comity in the REFJ.[90] A decision from the South African Development Committee (SADC) Tribunal was enforced under exceptional circumstances, despite its non-conformity to the traditional precepts of the Republic's regime that limits its application to judgments from domestic (and not regional) forums.[91] Comity was a motivating factor, and the need to develop common law in favour of a broader, more integrated approach that fosters international cooperation prompted the court to look beyond the current framework and enforce the decision against the Zimbabwean Government to support constitutional obligations to recognize international tribunal decisions.[92]

Notwithstanding its centrality in underscoring comity in South Africa's REFJ regime, *Fick* is but an indication of the judiciary's approach in public international law matters. Despite being considered normatively admirable, this form of comity has been explicitly rejected[93] if it entails an expansion of the confines of the 2000 dictum of *Purser*.[94] As a result, jurisdiction based on the occurrence of harm, contract performance or place of incorporation is not recognized under the current framework unless it is acquired through the defendant's person, specifically their residence or submission before the foreign forum. Judicial and scholarly resistance have thus consistently opposed introducing the "cause of action" as an independent basis for international competency, because it would undermine the centrality of personal jurisdiction.[95]

*Duarte v Lissack*[96] represented an anomalous attempt to operationalize comity, permitting the enforcement of a foreign judgment where the cause of action arose in the rendering court's territory. The defendant, a Durban resident, contracted to sell a car to a local in Lourenço Marques. Following an accident, the plaintiff sued in Lourenço Marques, claiming that both a breach of contract and consequential harm had occurred there. Although the court lacked jurisdiction under South African law due to the absence of personal ties, enforcement was nonetheless granted, seemingly because the court was competent under its own law. While comity was not explicitly invoked, it clearly underpinned the court's willingness to look beyond personal jurisdiction. The acceptance of such comity

84 The decision was severely criticized by scholars. See R Oppong "Mere presence and international competence in private international law" (2007) 3 *Journal of Private International Law* 321 at 327; C Schulze "International jurisdiction in claims sounding in money: Is *Richman v Ben-Tovim* the last word?" (2008) 20 *South African Mercantile Law Journal* 61.

85 *Richman*, above at note 12.

86 Id at 8–9.

87 Briggs *The Conflict of Laws*, above at note 24 at 131–36.

88 Mortensen *Private International Law in Australia*, above at note 25 at 118–23.

89 Bouwers "Recognition and enforcement of foreign judgments: South Africa", above at note 67 at 101–14.

90 *Fick*, above at note 3.

91 Ibid.

92 Id, paras 56–69.

93 *Nkwe*, above at note 74, paras 23–52.

94 *Fick*, above at note 3.

95 See *Supercat*, above at note 12; *Nkwe*, above at note 74.

96 1973 3 SA 615.

has, however, been short-lived, having been soon rejected for not being a "reliable" criterion, making foreign judgments pronounced through jurisdiction derived through subject matter impossible to enforce unless simultaneous residence or voluntary submission of the debtor is proven.[97] Indeed, the courts have clarified that if comity were ever to justify international competency acquired through subject matter jurisdiction, rendering courts would need to adhere to standards identical to those in South Africa.[98] Specifically, this would entail attaching the debtor's property in the rendering court's jurisdiction, thus reinforcing the primacy of *ad personam* grounds within South Africa's REFJ framework.[99]

Consequently, when it comes to judgment enforcement against persons, the role of comity has remained rhetorical, with no operative role in assessing a foreign court's jurisdiction. It does not function as a rule of decision,[100] a presumption[101] or a standard for evaluating the forum's connection to the dispute.[102]

## Unravelling comity in the context of REFJ

### *Comity at its core*

Depending on the foreign interest the court strives to accommodate,[103] comity assumes different forms –prescriptive, sovereign-party or adjudicative – depending on whether it aims to acknowledge the interests of foreign lawmakers, foreign governments in their capacity as litigants or the rendering court.[104] Historically invoked to promote cooperation in cross-border evidence and case management, exercise restraint in foreign relations, support international legal norms and foster consistency in human rights adjudication,[105] comity, in the context of REFJ especially, has steadily evolved from a tool facilitating commerce to a broader notion of justice denoting the willingness of one state to recognize the foreign authority of another because doing so generally aligns with the forum state's own conception of justice.[106]

### *Judicial discretion and the underlying concerns of comity: an investigation into the (true) extent of deference*

In the long term, comity is said to improve cooperation between countries,[107] and may be particularly beneficial, especially in those countries where judgment enforcement is otherwise dependent on the obligation created under the rendering country's law – the proof of which is generally confined to a few narrow grounds. Its use could narrow the gaps between the direct and indirect grounds of jurisdiction, typically found in most common law regimes, thus promoting access to justice.[108] However,

97 *Supercat*, above at note 12.

98 Ibid.

99 Ibid.

100 See *Hilton*, above at note 19.

101 See *Club Resorts v Van Breda* 2012 SCC 17 (*Club Resorts*); *Chevron Corp v Yaiguaje* 2015 SCC 42 (*Chevron Corp*).

102 Ibid.

103 M Gardner "A primer on international comity" (31 October 2022) *Transnational Litigation Blog*, available at: <https://tlblog.org/a-primer-on-international-comity/> (last accessed 4 June 2025).

104 Ibid.

105 Okoli *Promoting Foreign Judgments,* above at note 18 at 86.

106 T Schultz and J Mitchenson "The history of comity" (2019) 4(2) *Jus Gentium: Journal of International Legal History* 383 at 382.

107 A Ben-Ezer and AL Bendor "The constitution and conflict-of-laws treaties: Upgrading the international comity" (2003) 29 *North Carolina Journal of International Law and Commercial Regulation* 1 at 10.

108 See RA Brand "Understanding judgments recognition" 40 *North Carolina Journal of International Law and Commercial Regulation* (2015) 877 at 891–92.

this expansion comes with a cost. Absent any legal duty on the recognizing court, comity is susceptible to creating more problems than it resolves, with its unpredictable, abstract nature, resting instead on subjective criteria.

Given its emphasis on international cooperation as opposed to a fixed set of rules similar to those applied when testing rendering courts for international competency, judicial discretion has remained the foremost concern surrounding comity as the principal means to discern its effectiveness abroad.[109] Despite this scepticism, a close examination depicts with considerable clarity that comity was never intended to operate as a sole principle guiding courts in determining the enforceability of foreign judgments in their territory. *Hilton*,[110] where the Southern District Court (SDC) of New York had denied enforcement of a French judgment, illustrates this. Enforcement was refused, not on the merits, but because American judgments generally lacked reciprocity before French courts pursuant to the review of foreign judgments on law and facts under the latter's domestic law.[111] Since French courts did not extend the reciprocal treatment they inevitably received in American courts, where foreign judgments were prohibited from being tested on their merits to discern their enforceability, the SDC denied enforcement on the ground that "comity was reciprocal".[112] Unlike judgments emanating from "sister-states", which are generally entitled to full faith and credit at the time of enforcement in American courts,[113] foreign judgments came to be subject to judicial discretion and case-specific analysis when tested under the lens of comity.

Over time, this open-ended judicial discretion has sometimes allowed courts to base decisions on enforceability on political or moral preferences, occasionally under the guise of safeguarding public policy and national interests.[114] The practice of some USA courts provides an explicit illustration of the tendency for comity to be primarily understood as a means to avoid diplomatic friction, urging its enforcement, except in exceptional circumstances. Foreign judgments are thus generally enforceable in the interests of comity unless they are acquired by fraud, or contrary to public policy[115] – provided they emanate from a legal system that is "systematically adequate" with impartial tribunals and procedures compatible with USA due process.[116] Simultaneously, however, such a focus on the systematic adequateness of the foreign legal system has led to the inevitable prioritization of the concerns of the recognizing state against the interests of the litigants belonging to that country, occasionally encroaching on executive powers.

Where the debtor is neither a resident nor a national, nor has voluntarily submitted to the foreign forum, evaluating the systematic adequacy of the rendering state presents many challenges, allowing its judgments to be enforced elsewhere even when the decision itself fails to ensure compliance with due process. However, when scrutinized carefully, it was never the intention in *Hilton* to ignore the debtor's legitimate concerns and advocate REFJ mechanically, while simply focusing on a list of exceptions such as fraud and public policy alongside an examination of the foreign legal system's systematic adequacy.[117] Technically, in cases where a foreign judgment is issued against a defendant who neither resides in, is a national of, nor has voluntarily submitted to the jurisdiction of the rendering

109 Brand, id at 897–98; Okoli *Promoting Foreign Judgments,* above at note 18 at 89–90.

110 *Hilton*, above at note 19.

111 Id at 202–03.

112 Ibid.

113 For a discussion see T Folkman "Two modes of comity" (2013) 34 *University of Pennsylvania Journal of International Law* 823.

114 Okoli *Promoting Foreign Judgments,* above at note 18 at 94–95.

115 See Folkman *Two Modes of Comity,* above at note 113 at 823, referring to *Cagan v Gadman* No 08-CV-3710 (SJF)(ARL), 2012 US Dist LEXIS 162053 (EDNY 31 October 2012); *United States v Barry Fischer Law Firm* LLC 12 No 10 Civ 7997, 2012 US Dist LEXIS 152921 (SDNY 24 October 2012).

116 Folkman, ibid.

117 See Brand "Understanding judgments recognition", above at note 108 at 901–02, referring to *Hilton*, above at note 19 at 144–45.

court, recognizing courts have always been compelled to apply additional filters when considering comity.[118] According to *Hilton*, this additional filter, while recognizing foreign judgments based on comity, was to invoke the principle on a reciprocal basis, allowing courts to refuse enforcement where the foreign legal system imposed substantially different conditions for recognition.[119] These filters were meant to curtail judicial discretion, refocusing the inquiry onto the position of the defendant rather than the systemic adequacy of the rendering state alone.

### *Comity reincarnated: the Canadian story*

The primary concerns with comity stem from its state-centric definition, which historically facilitated presumptions that deference was to be extended to all acts of a foreign state, legislative, executive and judicial, having regard to international duty and convenience. Though *Hilton* supports a more organized, case-sensitive way of handling requests for enforcement against defendants who were not residents or who had not voluntarily submitted to "further testing" based on reciprocity, uncertainty persists about the principle's practical application.[120] Creditors cannot reliably predict whether a foreign system's recognition framework will be deemed "fundamentally similar" to that of the forum state, increasing transaction costs and legal risk. This problem is particularly visible when judgments from several African jurisdictions require enforcement in comity-based systems. Although the black letter law in the rendering state's law may permit merits review,[121] courts often limit its use to verifying whether the foreign judgment is grounded in evidence and not simply the product of the defendant's failure to appear.[122]

Canada attempts to address these concerns by tethering comity to a "real and substantial connection" (R&SC) test.[123] Unlike most common law systems, comity operates as a "touchstone" of Canada's REFJ regime,[124] updated to reflect the ever-escalating complexities of globalization and to facilitate the free "flow of wealth, skills, and people".[125] However, Canada's "modern" version shifts the focus from substantial similarity with the rendering state's REFJ regime to the jurisdiction of the forum. For rendering courts to bear an R&SC with the dispute, its jurisdiction must either be based on the debtor's residence, the fact that they were carrying on business there, the location of the tort[126] or the fact that the contract was concluded in its territory and is closely related to the claim.[127] Other factors considered substantially connected to the dispute, such as the personal circumstances of the litigants, the standards of comity used elsewhere or the recognizing court's willingness to enforce judgments based on the same grounds, may thus merely serve as analytical tools in establishing comity with the rendering court under the R&SC test.[128]

Under this model, enforcement occurs even when the foreign forum lacks international jurisdiction under South African standards if the rendering court a) shared a substantial connection with

118 Ibid.

119 Ibid.

120 *Hilton*, above at note 19 at 144–45.

121 Examples include Tanzania (Civil Procedure Code 2019, sec 11), Uganda (Civil Procedure Act 1929, sec 10) and Kenya (Civil Procedure Act 1924, sec 9).

122 Oppong *Private International Law*, above at note 41 at 334.

123 See *Morguard Investments Ltd v De Savoye* [1990] 3 SCR 1077 (*Morguard*); *Club Resorts*, above at note 101. For a discussion see S Pitel et al *Private International Law in Common Law Canada: Cases, Texts and Materials* (2016, Emond Publishing) at 414, referring to J Blom "The enforcement of foreign judgments: *Morguard* goes forth into the world" (1997) 28 *Canadian Business Law Journal* 373 at 375.

124 Blom, id at 374.

125 *Morguard*, above at note 123 at 1098.

126 *Club Resorts*, above at note 101, overruling *Muscutt v Courcelles* (2002) 60 OR (3d) 20 CA (*Muscutt*).

127 Ibid, read along with *Lapointe Rosenstein Marchand Melançon LLP v Cassels Brock & Blackwell LLP* 2016 ONCA 769 (*Lapointe*).

128 *Club Resorts*, above at note 101, referring to the eight factors prescribed in *Muscutt*, above at note 126, paras 83–109.

the claim and b) duly served the debtor.[129] No R&SC is, however, required between the enforcing court (in Canada) and the debtor, or the dispute – provided the debtor was duly served and the rendering court possessed jurisdiction under its national law.[130] Assets falling within jurisdiction of the Canadian courts, for instance, due to the debtor's business activities there, are thus attachable – resulting in a wider enforcement rate, especially of those decisions where jurisdiction was neither based on the debtor's residence nor submission.[131]

Overall, compared to the American interpretation of comity, Canada's revived version brings the application of the principle closer to the natural forum doctrine, fostering a more party-centric approach; thus, enhancing predictability and discipline in comity-based recognition, while still enabling courts to accommodate international cooperation.

## Re-envisioning international competency through the lens of comity: what lessons for South Africa?

South Africa's REFJ framework – anchored to residence, submission and occasionally presence as the sole basis to ascertain the extraterritorial impact of foreign judgments – leaves little room for comity. Nonetheless, contrary to several other common law systems – notably the UK,[132] Ireland[133] and Australia,[134] where comity, and especially the R&SC test, has been met with severe scepticism – Canada's approach has garnered some praise from South African courts[135] and scholars[136] as a possible tool for evaluating foreign courts' international competence through a comity-oriented lens. Cautiously incorporating an R&SC test to define the contours of an otherwise vague doctrine could improve chances of enforcement of such decisions in South Africa, thereby improving trade and investment flows in the Republic pursuant to increased investor confidence – provided this development is approached with due care.

In several other common law systems, Canada's R&SC test has been sharply criticized for its inherent uncertainty and the risk of judicial overreach[137] – aspects that ought not to be taken lightly by South African lawmakers. Uncertainty remains the principal criticism of the application of Canada's R&SC test in the law of enforcement, whose primary objective is to advance predictability.[138] Litigants expect to know in advance the situations in which they must appear in proceedings before foreign forums – a decision which often hinges on the enforceability of the judgment overseas in the country where they hold assets. By contrast, the R&SC test, with its application after the fact, as opposed to before, necessarily hinders predictability by preventing parties from having the information needed

129 See *Chevron Corp*, above at note 101; *Lapointe*, above at note 127; *HMB Holdings Ltd v Antigua and Barbuda* 2021 SCC 44 (*HMB Holdings*). See also *Supercat*, above at note 12.

130 Ibid.

131 *Chevron Corp*, above at note 101, affirmed in *Lapointe*, above at note 127; *HMB Holdings*, above at note 129.

132 See the discussion of the UK Supreme Court in *Rubin v Eurofinance* [2012] UKSC 46. See also Briggs *The Conflict of Laws* above at note 24 at 135–36.

133 See the decision of the Irish Supreme Court in *Re Flightlease (Ireland) Ltd (In Voluntary Liquidation)* [2012] 2 ILRM 461 (23 February 2012) (*Re Flightlease*).

134 Mortensen *Private International Law in Australia*, above at note 25 at 123–24.

135 *Supercat*, above at note 12 at 31.

136 GMN Xaba "Presence as a basis for the recognition and enforcement of foreign judgments sounding in money: the 'real and substantial connection' test considered" (2015) 36 (1) *Obiter* 121 at 133.

137 See, generally, TJ Monestier "A real and substantial mess: The law of jurisdiction in Canada" (2007) 33 *Queen's Law Journal* 179; J Blom and E Edinger "The chimera of the real and substantial connection test" (2005) 38 *University of British Columbia Law Review* 373; D Kenny "Re *Flightlease*: The Real and substantial connection test for recognition and enforcement of foreign judgments fails to take flight in Ireland" (2014) 63 *International and Comparative Law Quarterly* 197; A Arzandeh "Reforming the common law rules on the recognition and enforcement of foreign judgments" (2019) 39 *Legal Studies* 56 at 64; A Briggs "Crossing the river by feeling the stones: Rethinking the Law on foreign judgments" (2004) 8 *Singapore Year Book of International Law* 1 at 13 and 14.

138 Ibid.

to act.[139] Notwithstanding the conservative approach underlining the factors employed to test the international competency of foreign courts and their restriction to the debtor's presence, residence and submission before the foreign forum, the enforcement of judgments based on these grounds enable defendants to predict the situations in which judgments against them are likely to be enforced in the country where they hold assets – a facet that the Canada's R&SC test in its current form fails to achieve. Its ever-evolving nature essentially prevents defendants from predicting with confidence and certainty whether the foreign court will bear or is likely to bear an R&SC in relation to the dispute.[140] From the perspective of the recognizing forum, the adoption of the R&SC test has similarly been criticized for promoting circularity, particularly upon its re-application at the enforcement stage.[141] To gauge whether the rendering court indeed bore an R&SC with the dispute, the test, if replicated under South African law, would invariably necessitate courts to employ the identical factors at the time of enforcement – invariably opening doors to the application of new, unforeseeable grounds, which occasionally might have less to do with the substance of the case. The Canadian experience illustrates these concerns, particularly in light of the R&SC test's highly volatile nature, despite its attempts to introduce order into the otherwise complex world of comity as a threshold for determining the enforcement of foreign judgments. Though starting from the application to presumptive connecting factors that were highly factual – like the place of the injury and the place of the performance of the contracts – the test was seen to have slowly evolved into a flexible inquiry, allowing the analysis of personal factors, including the financial means of the litigants if necessary.[142] Under this approach, courts are permitted to assess the overall fairness to the litigants and to account for factors beyond the facts of the case, such as the standards of jurisdiction, enforcement and comity existing in other legal systems. The consistent application of overly flexible factors at the enforcement level transcending beyond the place of injury or the conclusion or the performance of the contract, in turn risks the test's incorrect application given its intuitive nature pursuant to the lack of a definitive psychological angle from where the enquiry should be initiated as applied in other tests – such as the commonly employed "reasonable man" standard applicable under tort law.[143] Even when correctly applied, the test in its current form risks "patchwork justice" pursuant to the enforcement of some decisions but the denial of others – based on special factors like the financial means of the litigant – which should otherwise have less bearing on the outcome of the decision.[144]

*Beals v Saldanha (Beals)*[145] illustrates how an overly flexible adoption of the R&SC test, as done in Canada that endows courts with the freedom to expand the criteria when deemed necessary, could result in the harsh enforcement of many more default judgments previously considered ineffective under South African law due to the absence of the debtor's residence in or submission before the rendering court. In *Beals*,[146] the debtor chose not to appear before the Florida court, possibly assuming that the forum lacked jurisdiction or that the claim lacked seriousness. The Florida court awarded damages significantly disproportionate to the claimant's actual loss, resulting in a Kaffa-esque judgment debt of USD 750,000 that was eventually deemed enforceable on appeal by the Supreme Court of Canada based on the dispute's real and substantial connection to the rendering court. In essence, *Beals* highlights how comity, even structured through the R&SC test, could potentially expose defendants to harsh consequences for non-appearance, particularly when the judgment arises from courts with lower standards for procedural fairness or disproportionate fairness. From a South African

139 Kenny "Re *Flightlease*", above at note 137 at 210 referring to the observations of O'Donnell J in *Re Flighlease*, above at note 133.

140 Briggs "Crossing the river by feeling the stones", above at note 137 at 13–14.

141 Monestier "A real and substantial mess", above at note 137 at 197–205.

142 See in this respect, the eight factors prescribed in *Muscutt*, above at note 126, paras 83–109. Also see Monestier "A real and substantial mess", above at note 137 at 186–205.

143 Blom and Edinger "The chimera of the real and substantial connection test", above at note 137 at 377–416.

144 Monestier "A real and substantial mess", above at note 137 at 193–96.

145 [2003] 3 SCR 416 (*Beals*).

146 Ibid.

perspective, mirroring Canada's approach could threaten to expose citizens and local businesses to risks of injustice especially when judgments emanating from courts in countries like India particularly in disputes such as those concerning the online infringement of intellectual property that authorize national courts to establish long arm jurisdiction over foreign defendants simply based on the plaintiff's residence or place of business within the court's territory.[147] Under Indian law, the mere accessibility of the plaintiff's website within the court's territory suffices in establishing direct jurisdiction,[148] in turn resulting in the application of domestic laws that are generally more stringent towards defendant-infringers.[149] Mirroring Canada's R&SC test would thus compel the unjust enforcement of judgments from plaintiff-friendly venues, such as India, that would otherwise be ineffective under South Africa's current regime. For instance, safe harbour protections that shield intermediaries from liability for infringing content on their websites due to a lack of awareness have generally been stricter under India's domestic copyright protection regime compared to some other jurisdictions,[150] such as the USA[151] or UK.[152] The exposure of South African businesses and citizens to such harsh effects from forum shopping remains an obvious concern, particularly with the widening of the grounds beyond the present factors based on the debtor's residence and submission.

The PBA in South Africa attempts to restrict unfair or harsh foreign judgments by obligating ministerial consent prior to the enforcement of certain types of decisions. However, this requirement only applies to trade-related transactions that involve the production, importation, exportation, refinement, possession, use, sale or ownership "of anything" (viz tangible goods or materials).[153] In such matters, the minister's discretion could prevent harsh consequences akin to the "Kafka-esque" result faced by Saldanha in *Beals* pursuant to the application of the R&SC test at the enforcement stage. Simultaneously, however, several other types of judgments from civil proceedings, notably those concerning services, torts unrelated to goods and others not involving the movement of goods, like directors' liability or partnership dissolution, remain outside the scope of the PBA and thus do not require ministerial consent. The risk of unjust enforcement from an overly flexible application of an R&SC test, akin to Canada's, remains very high in such matters.

At the same time, the limited grounds on which foreign courts are considered internationally competent under South African law compel litigants to initiate proceedings before domestic courts to enhance chances of enforcement. Many other countries prescribe arduous standards for enforcement, similarly compelling, so to speak, the adjudication of disputes domestically. South Africa's BRICS partners, India[154] and China,[155] are prominent examples. While China requires reciprocity based on treaties or past judicial decisions, with rendering states,[156] India,[157] like South Africa, postulates merely a few grounds to discern the rendering court's international competency. Singapore

147 See Copyright Act 1957, sec 62(2); Trade Marks Act 1999, sec 134(2), read along with Civil Procedure Code 1908, sec 20.

148 *World Wrestling Entertainment, Inc v M/s Reshma Collection & Others* [2016] CS (OS) 1930/2013; *Lifestyle Equities CV and Others,* CS(COMM) 1015/2018 (decided on 14 September 2022).

149 See S Khanderia "The law of obligations: India" in S Jolly and S Khanderia (eds) *BRICS Private International Law: Convergence, Divergence and Reciprocal Lessons* (2024, Hart Publications) 331 at 334, indicating the application of domestic law to all cross-border disputes on non-contractual obligations under the double actionability principle.

150 See *Super Cassettes v MySpace Ltd* IA No 15781/2008 & IA No 3085/2009 in CS (OS) No. 2682/2008, later overruled in *MySpace Inc. v. Super Cassettes Industries Ltd* FAO(OS) 540/2011, CM APPL.20174/2011, 13919 & 17996/2015.

151 Digital Millennium Copyright Act (DMCA), sec 512.

152 See E-Commerce Regulations 2002, regs 17–19.

153 PBA, secs 1(1) and 1(3).

154 See, generally, S Khanderia "Thorn in the lion's paw: *Révision au fond* as India's self-inflicted injury in the recognition and enforcement of foreign judgments" (2026) 20/2 *Asian Journal of Comparative Law* 217.

155 See, generally, W Zhang and Y Zhong "Recognition and enforcement of foreign judgments: China" in S Jolly and S Khanderia (eds) *Private International Law in BRICS: Convergence, Divergence and Reciprocal Lessons* (2024, Hart Publications) 491.

156 Ibid.

157 Khanderia "Recognition and enforcement of foreign judgments: India", above at note 26 at 470.

is similarly a compelling example of a city-state with similarly narrow grounds.[158] However, the creation of specialized courts to adjudicate commercial disputes at the domestic level in China,[159] India,[160] or Singapore[161] contributes to the internationalization of national courts. Presently, South Africa lacks such features. There are no specialized courts to handle high-value commercial matters, and the extension of domestic rules by analogy to foreign-related matters[162] generally renders jurisdictional rules ill-equipped for complex civil and commercial matters with foreign elements. Similarly, though English law necessitates international competency to be confined to jurisdiction acquired *ad personam*,[163] the UK's accession to multilateral treaties like the 2005 Hague Choice of Court Convention (HCCCA)[164] and the 2019 Hague Judgments Convention[165] facilitates recognition of foreign judgments from many contracting states even when jurisdiction was based on contract performance or harm, rather than presence or submission. Singapore, another common law country bound by its heritage, has similarly acceded to its HCCCA in its efforts to modernize and strengthen its existing REFJ regime. Pending legislative amendments and accession to multilateral treaties, elevating comity to a crucial consideration to discern foreign courts' international competency would prove to be an essential step towards internationalizing the South African judiciary.

Being among the most globally connected economies in the African continent, with significant trade and investment, rigid, outdated factors confined to two grounds could, if retained, make it harder for South Africa to operate seamlessly in global networks if many foreign judgments remain unenforceable because of not fitting neatly within the existing grounds. For this reason, considering the evolving realities of international commerce, expanding the grounds to ascertain international competency to include situations where the dispute bore an R&SC with the recognizing court remains of crucial importance for South Africa. In the day and age of globalization, the initiation of a plethora of disputes is based on the occurrence of the injury or the performance of the contractual obligations within the rendering court's territory. By refusing to recognize judgments where foreign courts have assumed jurisdiction based on the occurrence of the cause of action within their territory, South Africa's current enforcement regime fails to meet the legitimate expectations of plaintiffs and, most importantly, introduces asymmetry between the direct and indirect jurisdiction grounds. Contrary to the other flexible factors considered under Canada's R&SC test – notably those evaluating fairness to both litigants – both the place of injury and the performance of the contractual obligations bear a close nexus to the dispute, in turn being truly representative of an R&SC with the rendering foreign court. Any decision to recognize foreign judgments based on comity when they emanate from the occurrence of the harm or the performance of the contractual obligations within the foreign forum's territory would thus alleviate the current challenges arising when plaintiffs initiate disputes before foreign courts based on a real nexus with the dispute, only to discover the unenforceable nature of such a judgment later. Likewise, debtors based in South Africa would thus be able to predict when non-submission could additionally result in a default judgment capable of enforcement in the Republic. After all, South African private international law similarly considers the

158 Kenny Chng "Singapore" in Anselmo Reyes (ed) *Recognition and Enforcement of Judgments in Civil and Commercial Matters* (2019, Hart Publications) 141.

159 W Zhang and G Tu "Recent efforts in China's Ambition to Become a Centre for International Commercial Litigation" (2023) 87/3 *Rabel's Journal of Comparative and International Private Law* 497 at 501–06.

160 S Khanderia "India" in M Yip and G Rühl (eds) *New International Commercial Courts* (2024, Intersentia).

161 A Chong and Y Man "Singapore as a centre for international commercial litigation: Party autonomy to the fore" (2019) *Journal of Private International Law* 97 at 101.

162 See generally Bouwers "Recognition and enforcement of foreign judgments: South Africa", above at note 67 at 101–14.

163 Briggs *The Conflict of Laws*, above at note 24 at 125–39.

164 The Hague Convention on the Choice of Court Agreements (HCCCA) (adopted 20 June 2005, entry into force 1 October 2015). For a list of signatories, visit: <https://www.hcch.net/en/instruments/conventions/status-table/?cid=98> (last accessed 16 July 2026).

165 Hague Judgments Convention, above at note 14. For a list of signatories, visit: <https://www.hcch.net/en/instruments/conventions/status-table/?cid=137> (last accessed 16 July 2026).

place of performance as a significant factor in determining the governing law in disputes concerning contractual obligations with foreign elements.[166]

Reformulating the R&SC test in this manner to suit South African commercial realities, while also addressing concerns of uncertainty and circularity, would, in the long run, promote the internationalization of the Republic's judiciary. Litigants seeking to arbitrate or litigate their dispute overseas solely to increase the chances of enforcement would have fewer incentives to do so. As an essential member of the African Continental Free Trade Agreement (AfCFTA), the need for a modern, flexible enforcement regime is indispensable for South Africa – especially considering that many African jurisdictions do not share the same legal doctrines of residence and submission to determine direct jurisdiction.[167] South African conflict of law rules of jurisdiction itself prescribes additional grounds – beyond residence and submission. Widening the grounds could improve mutual trust across the AfCFTA.

Simultaneously, however, the risks of exploitation through the initiation of suits before courts with procedurally unfair standards of justice pursuant to such expansion to include "cause of action" based on its R&SC with the foreign forum would remain a pressing concern. Necessarily, to combat the chances of unfair default judgments being enforced, and to ensure the protection of local assets, South African lawmakers would have to ensure that the current defences are robust enough to prevent such situations.[168] As a necessary step, this would require the natural justice exception to be bolstered to address the potential unfairness when default judgments are requested for enforcement in the Republic.[169] Presently, natural justice, though treated as a procedural safeguard under South African law, is subsumed under the public policy exception.[170] However, elevating the status of natural justice as a distinct defence and by extending its parameters to evaluate whether the debtor was given sufficient time to present their case and whether the judgment was supported by the evidence that was presented and recorded before the rendering court, South African courts could effectively manoeuvre the perils of foreign judgments from rendering courts acquiring jurisdiction over the subject-matter mainly when the defendant did not expressly consent to it. This would not entail a review of the judgment's merits but rather a verification that the foreign court engaged with the dispute based on the reasoning recorded in the decision. Foreign judgments without supporting evidence are not enforced in many other common law jurisdictions, such as the UK,[171] India[172] and other African countries, including Kenya, Tanzania and Uganda, because they are deemed to be against the principles of natural justice.[173] Following suit, South Africa should acknowledge that rulings made without sufficient notice or substantial reasoning would not be compliant with the principles of natural justice.

Concomitantly, as a core fairness requirement, South African courts should retain the liberty to refuse enforcement to those judgments where the defendant could not reasonably anticipate litigation in that forum, notwithstanding the cause of action occurring there. Although such safeguards introduce a degree of uncertainty in a domain that values predictability, they can concomitantly protect South African citizens and businesses, as well as their assets, from the consequences of forum shopping, where proceedings have been strategically initiated to benefit the plaintiff. While there

166 JL Neels "Preliminary remarks on the draft model law on the recognition and enforcement of judgments in the Commonwealth" (2017) 5 *Tydskrif vir die Suid-Afrikaanse Reg (TSAR)* 1 at 8.

167 Examples include Nigeria, Ghana and Zambia which either additionally rely on presence or cause of action to establish jurisdiction.

168 See in this respect, a similar suggestion made by LeBel J in *Beals,* above at note 145. For a discussion, see Briggs "Crossing the river by feeling the stones", above at note 137 at 14–21.

169 See in this respect, Briggs, id at 117, on natural justice as a key defence in judgments against uncontesting defendants.

170 Oppong *Private International Law*, above at note 41 at 341–42.

171 Briggs *The Conflict of Laws*, above at note 24 at 123–24.

172 *International Woollen Mills v Standard Wool (UK) Ltd* (2001) 5 SCC 265, paras 17–33.

173 Oppong *Private International Law*, above at note 41 at 334.

cannot be a rigid carrot-and-stick formula to assess such behaviour, certain categories of disputes, such as those arising from online intellectual property infringements, remain particularly vulnerable to forum shopping – in turn necessitating closer scrutiny at the time of enforcement. South African courts should consequently deny enforcement to such disputes when the judgment clearly evinces a lack of substantial connection between the forum and the claim, for instance, when jurisdiction is chiefly based on the accessibility of the website continuing to infringe material, but neither litigant resides in that place.

Needless to say, such reforms would be best achieved through statutory developments. However, legislative amendments in this domain remain unlikely, considering that, in South Africa, the grounds of international jurisdiction are judge-made. Therefore, to ensure uniformity and prevent the test's inconsistent application, the Supreme Court of Appeal and the Constitutional Court should issue guidelines clarifying the scope of these grounds, combined with the interpretations of the defences in light of these changes. A reform of this kind would respond to global business realities, strike a balance between the rights of creditors and debtors, and move the Republic closer to international best practices. Most importantly, it would demonstrate South Africa's commitment to promoting legal certainty and cross-border legal cooperation as a major African economy and BRICS member.

## Concluding remarks

Despite the burgeoning global developments in the field, South African principles on REFJ have remained largely unchanged by reform. The grounds on which the Republic acknowledges the international competence of foreign courts remain unduly restrictive, potentially excluding a substantial number of otherwise legitimate judgments. The South African courts, therefore, need to develop a more comprehensive strategy to realize their constitutional mandate, namely, to develop the common law and "to facilitate international relations".[174] In this context, the Canadian courts' approach of substituting the traditional doctrine of obligation with comity, as demonstrated by the R&SC test, may serve as an appropriate strategy to achieve the stated developmental goals in South Africa, provided it is tailored to suit South Africa's particular needs and limited to situations where the defendant could reasonably anticipate the initiation of legal proceedings. For South Africa, adopting such a test would strike a better balance between openness to foreign judgments and protection of local litigants. To safeguard debtor interests, South African courts should, like several other common law jurisdictions, including India and their African counterparts, broaden the application of natural justice. This would involve assessing whether the debtor was duly notified of the proceedings and whether the judgment was based on evidence and reasons recorded by the court. Such a framework ensures that only judgments meeting minimal due process standards are enforced, without compromising protections against jurisdictional overreach.

Eventually, however, South Africa should consider ratifying international instruments such as the HCCCA[175] and the Hague Judgments Convention. Doing so would widen the grounds on which the international competence of foreign courts is tested beyond the defendant's allegiance[176] and would promote predictability in the enforcement of choice of court agreements.[177] Notably, the grounds on which courts in contracting states may base their jurisdiction for judgments to be enforceable in South Africa closely mirror this "adapted" R&SC test - foreign courts are internationally competent

174 See Constitution of the Republic of South Africa 1996, secs 39(2) and 233.

175 For a discussion, see S Khanderia "The Hague Conference on private international law's proposed draft text on the recognition and enforcement of foreign judgments: Should South Africa endorse it?" (2019) 63/3 *Journal of African Law* 413.

176 The Hague Judgments Convention, above at note 14, art 5.

177 HCCCA, above at note 164, arts 8 and 9.

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when their jurisdiction has been acquired by being the place where the harm occurred or where the contract was performed or should have been performed under the contract.[178]

As seen in the UK and Singapore, ratification of these conventions has modernized their REFJ regimes, enabling the enforcement of judgments from contracting states in a broader range of situations, without requiring the rendering court to simultaneously satisfy the enforcing state's private international law standards on jurisdiction. For instance, the UK's ratification of the Hague Judgments Convention allows for the enforcement of foreign judgments even where jurisdiction was grounded in the location of contractual performance, harm, or immovable property, regardless of whether the debtor submitted to the court. Only if basic due process, such as timely notice or opportunity to be heard, is denied, will such judgments be refused enforcement. Ratification of the 2005 HCCCA similarly facilitates the smooth movement of judgments in civil and commercial matters in the UK from rendering courts in contracting parties when jurisdiction has been acquired pursuant to a choice of court agreement in their favour, a factor currently implausible under South Africa's rigid requirements. Likewise, Singapore's accession to the HCCCA reflects its conscious move toward strengthening and modernizing its REFJ regime despite its own common law heritage. A comparable step by South Africa would not only align it with international best practices but also enhance legal certainty and cross-border commercial trust in its judiciary.

**Competing interests.** None

178 The Hague Judgments Convention, above at note 14, arts 5(g) and (j). Also see art 5(e).

## Appendix A

International jurisdiction and the REFJ in civil and commercial matters in South Africa

| No | Case | Status: enforced (✓) not enforced (✗) | Origin of foreign judgment | Reasons, if any, for rejection |
|---|---|---|---|---|
| 1 | *Liquidators (Small and Medium Enterprises Bank Limited) v Met Bank Limited (formally Metropolitan Bank of Zimbabwe)* (A2023/043983) [2025] ZAGPJHC 216 | ✓ | Namibia | |
| 2 | *Lindsey and Others v Conteh* (774/2022) 2024 (3) SA 68 (SCA) | ✗ | USA | Not a money judgment. |
| 3 | *Nkwe Platinum Limited v Genorah Resources (Pty) Ltd and Others* (30712/2023) [2023] ZAGPPHC 1868 | ✗ | Bermuda (British Overseas Territories) | Public policy. |
| 4 | *HM Watch Distributors v Weisz-Vurwerken* (15737/2021) [2023] ZAGPPHC 2054 | ✗ | Netherlands | Non receipt of summons. |
| 5 | *Lindsey and Others v Mohamed* (0022649/2017) [2022] ZAGPJHC 310 | ✗ | USA | Not a money judgment and the alleged money-conversion depended on foreign procedural law that South African courts cannot adopt. |
| 6 | *RDS v SBS and Others* (19109/2020) [2021] ZAWCHC 218 | ✗ | Senegal | Incomplete evidentiary record. |
| 7 | Cooperative Muratori & *Cementisti-CMC Di Tavena Societi Cooperative A Responsabilita Limitada (External Company Incorporated in Italy) and Others v Companies and Intellectual Properties Commission and Others* (15454/2019) 2020 (2) SA 109 (GP) | ✗ | Italy | Enforcement would result in conflict with the Companies Act of South Africa and fall outside the High Court's jurisdiction. |
| 8 | *Elan Boulevard (Pty) Ltd v Fnyn Investments (Pty) Ltd and Others* (228/2018) 2019 (3) SA 441 (SCA) | ✓ | Australia | |
| 9 | *Trademore (Pty) Ltd v Minister of Trade and Industry and Another* (49321/2017) [2019] ZAGPPHC 591 | ✓ | Zambia | |
| 10 | *International Fruit Genetics, LLC v Okran 28 (Pty) Ltd and Another* (9963/2018) [2019] ZAWCHC 37 | ✓ | USA | |
| 11 | *International Fruit Genetics LLC v Redelinghuys NO and Others* (24870/16) 2019 (4) SA 174 (WCC) | Partial | USA | There was a pending appeal. The South African court enforced the immediate, reversible injunctive relief, while staying the irreversible and potentially ruinous remedies. |

(*Continued*)

(*Continued*)

| No | Case | Status: enforced (✓) not enforced (✘) | Origin of foreign judgment | Reasons, if any, for rejection |
|---|---|---|---|---|
| 12 | *Wile and Another v MEC for the Department of Home Affairs, Gauteng and Others* (21150/2014) 2017 (1) SA 125 (WCC) | ✓ | Germany | |
| 13 | *Danielson v Human 2017* (1) SA 141 | ✓ | USA | |
| 14 | *Elan Boulevard (Pty) Limited v Mahomed* (12451/2014) [2016] ZAKZDHC 49 | ✓ | Australia | |
| 15 | *Government of the Republic of Zimbabwe v Fick and Others* 2013 (5) SA 325 (CC) | ✓ | Southern African Development Community (SADC) Tribunal | |
| 16 | *Doerner v Gubalke* (2404/2011) [2012] ZAWCHC 64 | ✘ | Germany | Foreign court lacked international jurisdiction and the defendant was not afforded an opportunity to present their case to the German court. |
| 17 | *Society of Lloyds v Price; Society of Lloyd's v Lee* (327/05) 2006 (5) SA 393 (SCA) | ✓ | UK | |
| 18 | *Society of Lloyds v Romahn; Society of Lloyd's v Ilse* 5108/03 2006 (4) SA 23 (C) | ✓ | UK | |
| 19 | *Richman v Ben-Tovim* (11050/04) 2006 (2) SA 591 (C) | ✓ | UK | |
| 20 | *Jordaan v Dijkhof* (9967/2003) [2004] ZAWCHC | ✓ | Monaco | |
| 21 | *Blanchard, Krasner, French v Evans* 2004 (4) SA 427 (WLD) | ✓ | USA | |
| 22 | *Maschinen Frommer GMBH & Co KG v Trisave Engineering & Machinery Supplies (PTY) Limited* (415/02) 2003 (6) SA 69 (C) | ✘ | Germany | Foreign court lacked international jurisdiction. |
| 23 | *Purser v Sales* (613/98) 2001 (3) SA 445 (SCA) | ✓ | UK | |
| 24 | *Eden v Pienaar* 2001 (1) SA 158 (WLD) | ✓ | Israel | |
| 25 | *Erskine v Chinatex Oriental Trading Co* 2001 (1) SA 820 (CPD) | ✘ | UK | Foreign court lacked international jurisdiction. |
| 26 | *Supercat Incorporated v Two Oceans Marine* CC 2001 (4) SA 27 | ✘ | USA | Foreign court lacked international jurisdiction. |
| 27 | *C Hoare & Co v Runewitsch* 1997 (1) SA 338 (WLD) | ✓ | UK | |
| 28 | *Zwyssig v Zwyssig* 1997 (2) SA 467 | ✓ | USA | |
| 29 | *Jones v Krok* (721/92) 1995 (1) SA 677 (AD) | ✓ | USA | |

(*Continued*)

(*Continued*)

| No | Case | Status: enforced (✓) not enforced (✘) | Origin of foreign judgment | Reasons, if any, for rejection |
|---|---|---|---|---|
| 30 | *Holz v Harksen* 1995 (3) SA 521 (CPD) | ✘ | Germany | Foreign court lacked international jurisdiction. Moreover, order was not final and conclusive. |
| 31 | *Gabelsberger v Babl* 1994 (2) SA 677 (TPD) | ✓ | Germany | |
| 32 | *Tradex Ocean Transportation SA v MV Silvergate (or Astyanax)* 1994 (4) SA 119 (DCLD) | ✓ | Greece | |
| 33 | *Barclays Bank of Swaziland Ltd v Mnyeketi* 1992 (3) SA 425 (WLD) | ✓ | Swaziland | |
| 34 | *Reiss Engineering Co Ltd v Insamcor* (Pty) Ltd [1983] (1) 1033 (WLD) | ✘ | UK | Foreign court lacked international jurisdiction. |
| 35 | *Standard Bank Ltd v Butlin* 1981 (4) SA (D&CLD) | ✘ | Zimbabwe | Foreign court lacked international jurisdiction. |
| 36 | *Lissack v Duarte* 1974 (4) 561 (NPD) | ✘ | Portugal | Public policy: rendering court had failed to inform the appellant of the correct procedure to adopt in refuting the respondent's claim. |
| 37 | *De Naamloze Vennootschap Alintex v Von Gerlach* 1958 (1) SA 13 (TPD) | ✘ | The Netherlands | Foreign court lacked international jurisdiction. |
| 38 | *Dale v Dale* 1948 (4) SA 741 (TPD) | ✘ | UK | Order was not final and conclusive. |
| 39 | *Rubie v Haines* 1948 (4) SA 998 (WLD) | ✓ | UK | |

| Status | Number of judgments | Percentage of total judgments |
|---|---|---|
| Refused enforcement | 17* | 43.59 |
| Enforced | 22 | 56.41 |
| Total | 39 | 100 |

*Among the 17 judgments refused enforcement, nine cases (52.94 per cent) were specifically rejected wholly or partially due to the foreign court's lack of international jurisdiction and competence under South African law.

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