Recognition of foreign *in personam* money judgments in Australia

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1. Introduction

This article discusses that branch of Australian private international law which deals with the recognition of foreign judgments.[1] As such, the article has two objectives: to critically examine the law governing the recognition of foreign judgments by Australian courts and then to suggest improvements to that law.

The reform proposed calls for the introduction of a new statutory scheme for the recognition of foreign judgments. The new regime would embody many of the rules currently in operation, and would also mark a departure from prevailing policies. The most significant reform suggestions are concerned with the conceptual bases which should underpin recognition of foreign judgments in Australia, and the requirement of international jurisdiction. With respect to the former, this article recommends the common law obligatory approach, and not the current statutory approach based upon reciprocity. As to international jurisdiction, this article argues that the current requirement is ripe for reform and suggests a new flexible approach capable of catering for the concerns of litigants operating in the modern global environment.

Given the breadth of the topic, and to allow sufficient focus, the scope of this article is confined to money judgments in actions *in personam*[2] which do not involve matrimonial matters,

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1 Unless otherwise specified, for present purposes the term 'foreign judgment' is defined as a decision of a judicial body or tribunal of a non-Australian country regularly established and exercising the jurisdiction conferred upon it by the law of the country of its creation, which determines the respective rights and claims of the parties to a suit therein litigated. Specifically, this definition excludes arbitral awards. See Castel, J.G., 'Recognition and Enforcement of Foreign Judgments in *Personam* and in *Rem* in the Common Law Provinces of Canada' (1971) 17 *McGill Law Journal* 1 at 12.

2 For present purposes, the term 'money judgments for actions in *personam*' refers to actions brought against a person to compel that person to pay an

administration of estates, bankruptcy or insolvency, winding up of corporations, mental health and the guardianship of infants.[3] The current scope also excludes judgments relating to governmental interests such as revenue and penal judgments, as well as judgments involving diplomatic immunity. In addition, the article does not cover the actual enforcement, which would normally follow the recognition, of foreign judgments. Other restrictions on the current scope will appear where the issue becomes relevant and references to material dealing with excluded issues are made where it is felt that the reader may wish to explore them further.

2. Policy Considerations Involving the Recognition of Foreign Judgments

The Case Against Recognition

(i) Sovereignty & Territoriality

Notions of sovereignty may induce a country to protect itself against the intrusion of foreign elements:

> the laws of one country can have no intrinsic force, *proprio vigore*, except within the territorial limits and jurisdiction of that country. They can bind only its own subjects, and others who are within its territorial limits; and the latter only while they remain therein.[4]

In the context of foreign judgments this principle indicates that a country having exclusive sovereignty within its boundaries should not permit a public act of another country to directly affect the affairs of its subjects within its territorial boundaries.[5] Direct recognition of foreign judgments, in other words, amounts to an invasion of the territorial sovereignty of the country on which judgment is foisted.[6]

In addition, recognition of foreign judgments flies in the face of the principle of independent territorial jurisdiction of courts. Under this principle, the judge is a public officer whose authority derives

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amount of money. See Collins, L. (ed.), 1993, *Dicey and Morris on the Conflict of Laws*, 12th edn, Sweet & Maxwell, England, 270 ('Dicey & Morris').

3 This limitation is adopted from s. 3(1) of the *Foreign Judgments Act 1991* (Cwlth).

4 Story, 1883, *Commentaries on the Conflict of Laws*, 8th edn, pp. 7, as reproduced by Cook, W.W., 'The Jurisdiction of Sovereign States and the Conflict of Laws' (1931) 31 *Columbia Law Review* 368.

5 Cheshire, G.C. 1938, *Private International Law*, 2nd edn, Oxford University Press, England, 579-581.

6 Wharton, F. 1991, *A Treatise on the Conflict of Laws*, Fred B. Rothman, USA, 523.

by delegation from the sovereign, and therefore, a judge's decision cannot extend beyond the territory of the state to which the judge owes his or her competence.[7] It follows that a decision of a court of a foreign nation should not be extended beyond its territorial limits:

> Can a sentence or judgment pronounced by a foreign court jurisdiction be pleaded in this kingdom to a demand for the same thing in any court of justice here? I always thought it could not, because every sentence, having its authority from the sovereign in whose dominions it is given, cannot bind the jurisdiction of foreign courts, who own not the same authority, and have a different sovereign, and are only bound by judicial sentence given under the same sovereign power by which they themselves act...[8]

(ii) Distrust & Discomfort

Foreign interference can also induce 'uneasiness if not suspicion'[9] regarding the competence of foreign courts to adjudicate disputes. Suspicion may be based, in certain cases, on corruption, bribery of judges, poor legal education of judges, and the influence which the foreign state or some powerful body within it brings to bear upon the judiciary. In other words, 'it is not advisable to trust every court in the world to administer justice irreproachably'.[10]

In most cases, however, recognition would not induce suspicion, but rather discomfort relating to jurisdictional bases, procedural rules, and the way cases are handled on the merits. Hence, discomfort may relate to rules of evidence and admissibility, the role of the judge, the ways witnesses are examined, and the general methods by which trials are conducted.[11]

(iii) Protectionism

The combined effect of territorial sovereignty and different notions of justice and its administration may induce protectionism, that is a

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7 Yntema, H.E., 'The Enforcement of Foreign Judgments in Anglo-American Law' (1935) 33 *Michigan Law Review* 1129, as reproduced in Culp, M.S. (ed.), 1956, *Selected Readings on Conflict of Laws*, West Publishing, USA, 387.

8 *Gage v. Bulkeley* [1744] 27 ER 824.

9 Ehrenzweig, A.A. 1962, *A Treatise on Conflict of Laws*, West Publishing, USA, 160.

10 Wolff, M. 1954, *Private International Law*, Oxford University Press, England, 253. See also Juenger, F.K., 'The Recognition of Money Judgments in Civil and Commercial Matters' (1988) 36 *American Journal of Comparative Law* 1 at 4.

11 von Mehren, T. & Trautmanm, D.T., 'Recognition of Foreign Adjudications: A Survey and a Suggested Approach' (1968) 81 *Harvard Law Review* 1601 at 1610-68.

tendency to safeguard subjects of the country where the foreign judgment is to be enforced from measures taken against them in the foreign country.[12] The attitude of protectionism is demonstrated, in its extreme perhaps, by an old French doctrine, under which a distinction was to be drawn between foreign judgments against French nationals and those against non-French nationals—only the latter class of foreign judgments were to be recognised and enforced.[13]

(iv) Reprisal

Even where a country is willing to recognise foreign judgments, it may reject recognition of judgments of a particular country on the basis of reprisal, or retaliation—'It appears to me to be equitable and logical not to execute judgments for the benefit of foreigners when our judgments are not executed in their country.'[14]

By reprisal a country applies pressure which should result in the recognition of its own judgments, and hence the protection of its own nationals abroad.[15] It 'is a weapon in the hand of the government to obtain respect abroad for [our] decisions'.[16] Reprisal, however, can go both ways. When France did not regard American judgments as conclusive, the majority of the US Supreme Court in *Hilton v. Guyot*[17] reacted by refusing to recognise a French decision on the basis of 'want of reciprocity, on the part of France, as to the effect to be given to the judgments of this and other foreign countries'.[18]

The Case for Recognition

The case for recognition is shorter, bolder, and probably more persuasive; after all, most countries do allow for recognition of foreign judgments in one way or another. The rationale is succinctly articulated as follows:

> The ultimate justification for according some degree of recognition is that if in our highly complex and interrelated

12 Castel, fn. 1 at 14.
13 Gutterdige, H.C., 'Reciprocity in Regard to Foreign Judgments' (1932) XIII *British Yearbook of International Law* 49 at 55.
14 Professor Niboyet discussing French policy on foreign judgments in a French Government Commission hearings taking place in 1945-1946, as cited by Nadelmann, K.H., 'Reprisals Against American Judgments?' (1952) 65 *Harvard Law Review* 1184 at 1186.
15 Lenhoff, A., 'Reciprocity: The Legal Aspect of a Perennial Idea' (1954) 49 *Northwestern University Law Review* 752 at 763, 772.
16 Professor Niboyet, in Nadelmann, fn.14 at 1185.
17 159 US 113 (1895).
18 Id at 210.

> world each community exhausted every possibility of insisting on its parochial interests, injustice would result and the normal patterns of life would be disrupted.[19]

Or as James LJ put it more than a century ago:

> [i]t would be impossible to carry on the business of the world if courts refused to act upon what had been done by other courts of competent jurisdiction.[20]

Free movement of judgments among countries, in other words, is essential to modern private affairs.[21] Recognition operates to protect the successful litigant from harassing or evasive tactics.[22] Put another way, if foreign judgments were not recognised, 'one of the essential objects of Private International Law, the protection of rights acquired under a foreign system of law, [would] not be fully attained.'[23] Lastly, recognition serves the interest of the State itself. It avoids duplication of litigation, improves administrative convenience, and enhances efficiency.[24]

3. In Search of a Theoretical Basis for the Recognition of Foreign Judgments

The above examination exposes a fundamental tension. On the one hand recognition offends against the territorial sovereignty, gives rise to suspicion and uneasiness, and induces protectionism and reprisal. On the other hand recognition echoes universality, facilitates trade, promotes justice and simplifies its administration. In order to reconcile these conflicting factors, some middle-ground policy has to be found.

A recognition policy must accommodate the interaction among different notions of justice and its administration, and anticipate the impact of foreign judgments on the social and commercial intercourse within and outside a country. However, as one may suggest at this point, policies of recognition could be difficult to forge. It is one thing to frame a procedural scheme for the recognition of foreign judgments, and another to provide it with a

19 von Mehren & Trautman, fn. 11 at 1603; Casad, R.C., 'Civil Judgment Recognition and the Integration of Multi-State Associations: A Comparative Study' (1980-81) 4 *Hastings International and Comparative Law Review* 1 at 7.

20 *Re Davidson's Settlement Trusts* (1873) LR 15 Eq 383 at 386.

21 Castel, fn. 1 at 12.

22 von Mehren & Trautman, fn. 11 at 1603-4; Casad, fn. 19 at 7; Sykes, E. & Pryles, M., 1991, *Australian Private International Law*, 3rd edn, Law Book Company, Sydney, 107.

23 Cheshire, fn. 5 at 580.

24 von Mehren & Trautman, fn. 11 at 1603-4; Casad, fn. 19 at 7.

sound conceptual basis. How can the rationales against and for recognition be addressed within one coherent legal framework on which recognition could not only develop into rules, but also be rationalised? How can one reconcile sovereignty with universality; little confidence in other legal systems with justice; and protectionism with free movement of judgments?

This discussion analyses three principal recognition theories: comity; obligation; and *res judicata*. The focus is on the ability of these theories to reconcile the arguments against and for recognition and to defuse the tension that they give rise to.

Comity

(i) Doctrine of Convenience

Huber, Story and others maintained that the recognition and enforcement of a judgment without the territory of the court rendering it must be placed upon some basis other than that of the authority inherent in the judicial office.[25] This other basis was suggested to be comity. Huber, who endeavoured to reconcile sovereignty and the exigencies of multistate transactions, said that:

> the solution of the problem must derive not exclusively from the civil law, but from convenience and the tacit consent of nations. Although the laws of one nation can have no force directly with another, yet nothing could be more inconvenient to commerce and to international usage than that transactions valid by the law of one place should be rendered of no effect elsewhere on account of a difference in the law.[26]

Huber viewed the recognition of foreign legal acts and the application of the contents of foreign laws as a matter of mutual convenience. This reasoning is also applicable in the context of foreign judgments. As Gray J of the US Supreme Court explained in *Hilton v. Guyot*:

> [comity] is the recognition which one nation allows within its territory to the legislative, executive or *judicial acts* of another nation, having due regard both to international duty and convenience and to the rights of its own citizens or other persons who are under the protection of its laws.[27]

25 See Yntema, fn. 7 at 387; Castel, fn. 1 at 15.

26 *Praelectiones Iuris Romani et Hodierni Pars 2*, lib. 1, tit. 3 (1689), as cited by Juenger, F.K. 1993, *Choice of Law and Multistate Justice*, Martinus Nijhoff Publishers, The Netherlands, 20-21.

27 Fn. 17 at 163 (emphasis added).

(ii) Comity and Reciprocity

If comity allows for recognition of foreign judgments, does it not run contrary to notions of sovereignty and territoriality? Not necessarily, if one is willing to assume that comity is part of the law of nations.[28] Under such an assumption, comity can be consistent with sovereignty and territoriality '[s]ince the state where the judgment was given had power over the litigants, the judgment of its courts should be respected'.[29]

The assumption which incorporates comity into the law of nations can also imply that comity requires reciprocity in order to enhance equality. As Savigny maintained, 'the principle of reciprocity nearly everywhere will result in a strict equality of treatment of nationals and aliens with respect to the capacity to enjoy rights'.[30]

Conversely, when there is no reciprocity, there is no requirement to recognise. If one accepts that:

> each sovereign State within the community of nations accepting some subtraction from its full sovereignty for similar concessions on the side of the others.[31]

Then the result would be that:

> comity does not require us to recognise as conclusive a judgment of any country which did not give like effect to our own judgments.[32]

(iii) Comity Examined

The weak point in the above line of reasoning is the assumption that comity is part of the law of nations. Comity, however, is not obligatory in nature:

> the courts of one jurisdiction will give effect to the laws and judicial decisions of another jurisdiction not as a matter of obligation but out of mutual deference and respect.[33]

If comity is not obligatory, how can it be part of international law? Indeed, it appears that it is not.[34] Comity may be more accurately

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28 See eg. *Hughes v. Cornelius* (1680) 2 Show 232; *Bank of Augusta v. Earle* (1839) 13 Pet 519.

29 *Morguard Investments Ltd v. De Savoye* (1990) 76 DLR (4th) 256 at 268, per La Forest J (*'Morguard Investments'*).

30 Savingy, V. 1849, *System Des Heutigen Romischen Rechts*, 99, as cited by Lenhoff, fn. 15 at 759.

31 *Campania Naviera Vasocongado v. Steamship 'Cristina'* [1938] AC 485 at 502-03, per Lord Wright.

32 *Hilton v. Guyot,* fn. 17 at 212.

33 *Zingre v. The Queen* (1981) 127 DLR (3rd) 223 at 230, per Dickson J.

34 Castel, fn. 1 at 17-18.

stated as a rule of *domestic* public policy on the international level.[35] Comity, in other words, is a matter of *choice* for the forum.

> The enforcement in our courts of some positive law or regulation of another state depends upon our express or tacit consent. This consent is given only by virtue of adoption of the doctrine of comity as part of our municipal law.[36]

It follows that the doctrine of comity presents an internal inconsistency because:

> while it denies the intrinsic force of foreign judgments from the point of view of international law, it nevertheless endeavours to provide an international basis for their recognition and enforcement.[37]

Comity, therefore, can be seen as no more than a means to achieve certain results, rather than a coherent doctrine underpinning the area of private international law. If stripped of its fancy dress, comity demystified is a doctrine of pragmatism. Its ultimate purposes are convenience and utility, and it is driven by local interests which happen to be common among nations. That is, 'common interest impels Sovereigns to mutual intercourse and an interchange of good office with each other'.[38] Perhaps, then, comity is merely a label. It attempts to dress itself up, but one could argue that at the end of the day, '[i]t is not the comity of nations, it is the needs of mercantile and other intercourses the world over that must govern.'[39]

Furthermore, there appears to be a conflict between the way comity operates and basic notions of justice. As discussed above, comity sees reprisal as the flip side of reciprocity. Should the price of reprisal / reciprocity be paid by the individual parties? Is it proper to treat people differently because their days in court happened to be in different countries? The short and cynical answer is that under the doctrine of comity 'courts are required to do, not as justice and reason require, but as they are done by.'[40]

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35 Ibid.
36 The Court in *Marshall v. Sherman* 148 NY 9 at 25 (1895), as cited by Lenhoff, fn. 15 at 755.
37 Yntema, fn. 7 at 388
38 *Zingre v. The Queen,* fn. 33 at 230, per Dickson J.
39 *Maguire v. Maguire* (1921) 50 Ont LR 100 at 111, per Meredith CJ.
40 *MacDonald v. Grand Trunk Railway Co.* (1902) 71 NH 448 at 456, per Parsons J.

The Doctrine of Obligation

(i) The Doctrine of Obligation Described

The drawbacks of comity induced English courts to embrace another doctrine in its stead. It was first stated by Parke B in *Russel v. Smyth,*[41] and reiterated in *Williams v. Jones*[42] as follows:

> The principle in this case is, that where a competent court has adjudicated a certain sum to be due, a legal obligation arises to pay that sum, and an action of debt to enforce the judgment may be maintained. It is in this way that the judgment of foreign and colonial courts may be supported and enforced.[43]

Central to the understanding of the doctrine of obligation is that it approaches a judgment of a court as a private transaction. That is, the doctrine sees a foreign judgment as a settlement of the rights of private parties of a particularly solemn nature by which such parties should be bound.[44] This may be contrasted with the doctrine of comity, that regards the formal pronunciation of a court of a foreign sovereign as a formal public act requiring recognition under the principles of international law. The doctrine of obligation, then, avoids many of the difficulties that comity faces by treating foreign judgments as a problem, 'not of international, but of private law'.[45] It also follows that the question of reciprocity is eliminated. If a person is under a private obligation to another, it is immaterial how the court that created that obligation treats foreign judgments.[46]

(ii) The Doctrine of Obligation Examined

The decision rendered by a foreign court creates a new and independent obligation imposed on the debtor, and a new and independent right vested in the creditor.[47] The source of the obligation and the corresponding right is contractual or quasi-contractual in nature, based upon an implied or fictitious contract

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41 (1842) 9 M & W 810.
42 (1845) 13 M & W 628.
43 *Williams v. Jones*, id at 633, per Parke B. Later approved in *Godard v. Gray* (1870) LR 6 QB 139; *Schibsbyv. Westenholz* (1870) LR 6 QB 155, and applied in Australia in *Berry v. Shead* (1885) 7 NSWR 39; *Roberts* v *Gray* [1913] VLR 181.
44 Yntema, fn. 7 at 385-7.
45 Id at 388.
46 Cheshire, fn. 5 at 582.
47 North, P.M. & Fawcett, J.J. 1992, *Cheshire and North's Private International Law*, 12th edn, Butterworths, England, 346 ('Cheshire & North'); Read, H.E. 1938, *Recognition and Enforcement of Foreign Judgments*, Harvard University Press, England, 63; *Nouvion v. Freeman* (1887) 37 Ch D 244 at 256.

by which the parties are bound by their consent to pay the amount ordered.[48] This reasoning, however, invites criticism:

> What is meant by the term 'legal obligation' in the connexion in which it is used? Undoubtedly, we talk of the obligation to which a contract gives rise; but a 'legal obligation' imports a sanction, and is inseparably connected with it. After action brought and judgment given, the so-called obligation of the contract merges into the legal obligation with which it has been clothed by the Courts. It has disappeared into one of a higher order, and is thenceforward of no practical utility. Its place has been taken by a real obligation to which a sanction is attached; and this sanction, or liability to evil, is by the State alone. It is obvious that it is enforceable only by the State in which it has been called into being.[49]

However, Read argued that this criticism is unsound.[50] According to Read, it is untrue to say that the obligation imposed is an absolute one, enforceable by the state alone. Rather, it is enforced through the machinery of the state and by its sanction, but only on behalf of the plaintiff and at the instance of the plaintiff. After the action has been litigated there is left not only a defendant against whom the State force is demandable, but also the plaintiff by whom State force is demandable. Hence, there is still a person owing an obligation to another person who has a correlative right to its performance. From the plaintiff's point of view, he or she has not lost the right against the defendant. The plaintiff acquired a new right, a substantive right to have the judgment satisfied.

Res Judicata

(i) Res Judicata Described

It was argued that *res judicata* is the 'hidden[51] principle upon which a forum recognises and enforces foreign judgments, and that 'there is no other satisfactory explanation for the fact that [foreign] judgments are usually enforced'.[52] The *res judicata* principle requires that there be an end to litigation; that those who have contested an issue shall be bound by the result of that contest; that

48 See discussion in Read, id at 112-16; Castel, fn. 1 at 21; Cheshire & North, id at 346; Wolff, fn. 10 at 254.

49 Piggott, F. 1884, *Foreign Judgments*, 2nd edn, William Clowes & Son, England, 13, as cited by Read, fn. 47 at 61.

50 Read, fn. 47

51 Castel, fn. 1 at 24.

52 Reese, W.L.M., 'The Status in This Country of Judgments Rendered Abroad' (1950) 50 *Columbia Law Review* 783 at 785.

the matter once tried shall be considered forever as settled between the parties.[53] In other words, 'one trial on an issue is enough'.[54]

The *res judicata* principle expresses an underlying policy combining considerations of justice, legal order, simplicity and economy in the administration of justice. It seeks to protect party expectations based on previous litigation, safeguard against the harassment of defendants, avoid never-ending litigation of the same disputes, and promote efficient use of adjudicatory facilities.[55] For these reasons, it may be argued that the *res judicata* principle best reflects the case for recognition of foreign judgments and the rationales behind it.

> If the doctrine of *res judicata* were applied to all foreign judgments, if would foster uniformity of decision...it would facilitate a closer bond between this country and other nations; it would greatly benefit foreign business relations; it would reduce litigation in our courts; and it would be relegating to the past [the policy of reciprocity] which has long since lost its desirability as a factor in friendly foreign relations.[56]

(ii) Res Judicata Examined

The *res judicata* principle, however, fails to address the issues of territoriality and sovereignty. This is partly because the *res judicata* principle emphasises the character of foreign judgments as private transactions rather than as formal acts of government.[57] Additionally, *res judicata* is a principle of practicality; it does not attempt to harmonise recognition with sovereignty and territoriality. It offers persuasive reasons as to why foreign judgments should be recognised, and this is the basis of its legitimacy.

None of the principles presented above appear to offer a comprehensive theoretical basis for recognition of foreign judgments.[58] It has to be accepted that the recognition of foreign judgments derogates from some of the fundamental principles upon

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53 *Baldwin v. Iowa State Traveling Men's Assoc.* 283 US 522 at 525 (1931).

54 Ibid.

55 Campbell, E., 'Res Judicata and Decisions of Foreign Tribunals' (1994) 16 *Sydney Law Review* 311; Scoles, E.F. & Hay, P. 1992, *Conflict of Laws*, 2nd edn, West Publishing, USA, 950; Yntema, fn. 7 at 387-8.

56 Blake, D.P., 'Effect of Foreign Judgments' (1926-27) 12 *Cornell Law Quarterly* 62 at 66.

57 Yntema, fn. 7 at 388.

58 See e.g. Born-Reid, M., 'Recognition and Enforcement of Foreign Judgments' (1954) 3 *International and Comparative Law Quarterly* 49 at 55; Yntema, H.F., 'Review (of Read, H.E., *Recognition and Enforcement of Foreign Judgments* 1938)' (1940) 49 *Yale Law Review* 1134 at 1139-40.

which the area of private international law is based. That should not be too painful if one agrees that there has been 'too much preoccupation with the claims of sovereign power'.[59] If this is accepted, then the practicality behind the *res judicata* principle appears compelling.

> Instead of looking for theoretical explanations, it might be better to approach the whole problem from a practical point of view. Justice to litigants and economic necessary, in other words, public policy, force the courts to take into consideration the fact that it is impossible to fairly determine the rights of parties if foreign judgments were to be ignored.[60]

4. Recognition at Common Law

The common law began to develop recognition principles during the seventeenth century, largely in response to the growth of the British colonies and the resulting increase in the commercial activities of Great Britain.[61] Initially, recognition was based upon comity and reciprocity.[62] However, the desire to promote trade and the fact that a judgment was seen as a law governing private rights analogous to a foreign contract, led English courts to search for another basis for recognition.[63] The courts began to accept claims in *assumpsit* on a simple contract of which the foreign judgment was evidence.[64] Later, during the nineteenth century, foreign judgments were treated as creating a fresh cause of action in the nature of a simple contract which could be sued upon as a debt.[65] This position has not changed. The doctrine of obligation remains the basis upon which common law courts recognise and enforce foreign judgments. To recall, the essence of the doctrine of obligation is that:

> the judgment of a court of competent jurisdiction over the defendant imposes a duty or obligation on the defendant to pay the sum for which judgment is given, which the courts in

59 Yntema, id at 1140.
60 Castel, fn. 1 at 25.
61 Holdsworth, W. 1978, *A History of English Law*, vol. XI, Methuen & Co. and Sweet & Maxwell, London, 270.
62 See *Wier's Case* (1607) 1 Roll Abr 530; *Cottington's Case* (1678) 2 Swans 326; *Jurado v. Gregory* (1670) 1 Vent 32; 86 ER 23; *Roach v. Garvan* (1748) 1 Ves Sen 157; 27 ER 954; see discussion in Dicey & Morris, fn. 2 at 455; Castel, fn. 1 at 16.
63 Parchett, K.W. 1984, *Recognition of Commercial Judgments and Awards in the Commonwealth*, Butterworths, England, 3.
64 Ibid; Holdsworth, fn. 61 at 272-3.
65 Parchett, ibid; Holdsworth, ibid.

this country are bound to enforce; and consequently that anything which negates that duty, or forms a legal excuse for not performing it, is a defence to the action.[66]

Requirements

In order to support an action, a foreign judgment has to meet a number of basic requirements. These involve international jurisdiction, finality, definite sum of money and the identity of the parties. The following discussion examines their relationships with the underlying recognition doctrines and policies which the common law has adopted as the basis for recognition.

(i) The Requirement of International Jurisdiction

The first and foremost requirement for recognition is that the foreign court had adjudicatory jurisdiction in the international sense.[67] International jurisdiction is a matter determined solely by the recognising court. It turns upon the criteria by which the recognising court determines the competence of the foreign court to summon the defendant before it and to decide such matters as it has decided.[68]

The rationale behind the international jurisdiction requirement is two-fold. Firstly, it connotes protectionism—the recognising court may desire to shelter litigants from overly expensive exercise of jurisdiction facilitated by foreign long-arm jurisdictional rules.[69] Or, as Blackburn J put it, 'the foreign country has no jurisdiction to pronounce judgment against a person behind his back.'[70] Secondly, long-arm jurisdictional rules are regarded by courts to be inharmonious with notions of sovereignty and territorial jurisdiction. In *Buchanan v. Rucker*,[71] for example, the plaintiff relied on a judgment rendered by a Tobago court. The defendant

66 *Schibsby v. Westenholz*, fn. 43 at 159, per Blackburn J.

67 See a discussion in Nygh, P. 1995, *Conflict of Laws in Australia*, 6th edn, Butterworths, Sydney, 137; Cheshire & North, fn. 47 at 348; Dicey & Morris, fn. 2 at 473-4.

68 *Pemberton v. Hughes* [1889] 1 Ch 781; see a discussion in Nygh, ibid; Cheshire & North, ibid; Dicey & Morris, ibid; Sykes & Pryles, fn. 22 at 113. Note that the jurisdiction rules of the foreign court can be relevant if the foreign court assumed jurisdiction notwithstanding that under its rules it had no jurisdiction. In such cases, recognition may be refused even if it had jurisdiction in the international sense. See a discussion below.

69 Loree, P.J., 'The Recognition and Enforcement of United States Judgments in the Canadian Common-Law Provinces: The Problem of In Personam Jurisdiction' (1989) 15 *Brooklyn Journal of International Law* 317 at 345.

70 In *Castrique v. Imrie* (1870) LR 4 HL 414, as quoted in Piggott, F.T. 1884, *Foreign Judgments*, 2nd edn, William Clowes & Sons, England, 129-130.

71 (1808) 9 East 192; 103 ER 546.

never set foot on the island, nor did he appear by attorney. Under the law of Tobago the court had jurisdiction and it was sufficient to serve the defendant by nailing a copy of the declaration to the court house door. In refusing recognition, Lord Ellenborough asked:

> Can the Island of Tobago pass a law to bind the rights of the whole world? Would the world submit to such an assumed jurisdiction?[72]

The inter-play of protectionism and sovereignty on the one hand, and the doctrine of obligation on the other, puts the recognising court in a position where it has to be satisfied that the defendant is sufficiently linked to the foreign court for the purpose of attaching obligatory characteristics to the foreign judgment:

> [t]he essence of the capacity to exercise jurisdiction lies in the relationship between the territory of the foreign court and the defendant. In other words, jurisdiction depends on the existence...of a bond between the person of the defendant and the foreign court *sufficient to justify the creation of a right which will be recognized by the law of the forum.*[73]

The personal nature of the obligation created by a foreign judgment entails that international jurisdiction for actions *in personam* should focus upon the person of the defendant. The focus upon the defendant is manifested by the jurisdictional bases of presence and submission, and doubts exist with respect to personal connecting factors.[74]

- Presence

The physical[75] and voluntary[76] presence of the defendant in the foreign country when served with the originating process will suffice, even if the presence is temporary.[77] As was explained by the English Court of Appeal in *Adams v. Cape Industries Plc*:

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72 Id at 194.

73 Castel, fn. 1 at 28 (emphasis added).

74 Apart from what is discussed below, nothing else founds jurisdiction, not the location of property (*Rousillon v. Rousillon* (1880) 14 Ch D 351; *Sirdar Gurdyal Singh v. Rajah of Faridkote* [1894] AC 670; *Emanuel v. Symon* [1908] 1 KB 302; Dicey & Morris, fn. 2 at 485; Nygh, fn. 67 at 144; Cheshire & North, fn. 47 at 360), and not reciprocity (*Re Trepca Mines Ltd* [1960] 3 All ER 304; *Crick v. Hennessy* [1973] WAR 74; Dicey & Morris, fn. 2 at 486-8; Nygh, fn. 67 at 143). For a discussion refer to Cheshire & North, fn. 47 at 359-60.

75 As distinguished from presence through an agent or a partner; see *Seegner v. Marks* (1895) 21 VLR 491.

76 Presence must be voluntary. It cannot be induced by compulsion, fraud or duress; see *Adams v. Cape Industries Plc* [1990] Ch 433 at 517-8, per Slade LJ.

77 *Harman v. Meallin* (1891) 8 WN (NSW) 38; Nygh, fn. 67 at 138.

> [s]o long as he remains physically present in that country, he has the benefit of its laws, and must take the rough with the smooth, by accepting his amenability to the process of its courts...the presence of an individual in a foreign country, whether permanent or temporary and whether or not accompanied by residence, is sufficient to give the courts of that country territorial jurisdiction over him under our rules of private international law.[78]

However, if the duration of the residence is 'wholly immaterial',[79] then there may well be situations where the defendant would 'be bound by the decision of a court in whose jurisdiction [the defendant] may by chance have been temporarily present'.[80] In *Adams v. Cape Industries Plc*,[81] the Court of Appeal noted some of this criticism, but then it went on to say that:

> [t]he question whether residence or presence existed at the time of suit is determined by our courts *not by reference to concepts of justice or by the exercise of judicial discretion*; it is a question of fact which has to be decided with the help of the guidance given by the authorities.[82]

It is submitted that this reason does not satisfy the concerns relating to the presence rule. The underlying objectives of the international jurisdiction requirement are to determine a reasonable connection between the defendant and the foreign jurisdiction, and to protect the defendant from judgments rendered by a jurisdiction with which the defendant has little or no connection. The presence rule is rigid and capable of forcing defendants to contest a lawsuit in a distant forum having little or no connection with the underlying dispute.[83] If protectionism is a key consideration behind the international jurisdiction requirement, then in some cases the presence rule fails to satisfy the purpose of the jurisdiction requirement, and may result in exactly the situations sought to be avoided. To say that justice or discretion play no role in the process seems arbitrary and contrary to basic principles. The defendant, for example, can be

78 *Adams v. Cape Industries Plc*, fn. 76 at 519, per Slade LJ. As indicated in Dicey & Morris, fn. 2 at 477, it is unclear whether the date is that of service or issue of the proceedings, but it appears that the former date is the relevant one (see Cheshire & North, fn. 47 at 349). In any event, it is not the date where the cause of action arises; see *Emanuel v. Symon*, fn. 74. If, however, the defendant leaves the foreign country after the cause of action but before proceedings are commenced, international jurisdiction may not be established (see Nygh, fn. 67 at 138; *Sirdar Gurdyal Sing v. Rajah of Faridkote*, fn. 74).

79 *Carrick v. Hancoke* (1895) 12 TLR 59 at 60, per Lord Russell.

80 Cheshire & North, fn. 47 at 350.

81 Fn. 76.

82 Id at 519, per Slade LJ (emphasis added).

83 Loree, fn. 69 at 347.

served while standing outside Copenhagen's International Airport for five minutes to get some fresh air while in transit on her way to Norway—that would satisfy the jurisdiction requirement if the case is to be tried before a Danish court. Indeed, the judgment would be enforceable in Denmark. But it should not automatically follow that merely because these five minutes technically mean that the defendant contracted 'in to a network of obligations, created by local law and by local courts',[84] the judgment should be recognised in the forum.[85]

As to corporations, their position under the presence rule is somewhat different. Because a 'corporation is a legal person but it has no corporeal existence,'[86] the presence criteria are based upon an artificial presence, central to which is whether the corporation carries on business in the foreign country. In *Adams v. Cape Industries Plc,* the Court of Appeal went into a lengthy discussion of what that might mean, and outlined three principal sets of circumstances under which corporate presence may be established:[87]

> the corporation has its own fixed place of business in the foreign country from which the corporation carries on its own business for more than a minimal time;[88] or
>
> a representative carries on the corporation's business for more than a minimal time from a fixed place of business;[89] or
>
> the corporation has its own fixed place of business in the foreign country from which the corporation's business is transacted.

It is submitted that whether by intent or neglect, courts are more cautious and protective with respect to corporations than individuals. Clearly, the artificial nature of corporations plays a role, but this, by itself, does not explain why individuals should be more exposed to the possibility of being amenable to the jurisdiction of a foreign court. As Dicey & Morris noted:

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84 *Adams v. Cape Industries Plc*, fn. 76 at 553, per Slade LJ.
85 Which would presumably be Australian.
86 *Adams v. Cape Industries Plc,* fn. 76 at 519, per Slade LJ.
87 For a detailed discussion see *Adams,* id at 530-1.
88 It is notable that the principle of corporate personality is to be maintained. Thus, notwithstanding the commercial realities, a corporation is not present in a foreign country through a wholly owned subsidiary, unless the subsidiary is a mere sham or facade. See discussion by the Court of Appeal, id at 532-44.
89 A mere commercial agency is not enough, and among other things, the representative's power to bind the corporation is of paramount importance; see *Vogel v. Kohnstamm Ltd* [1973] QB 133.

> the test for 'presence' of corporations involves some fixed place of business in the foreign country, and is not comparable to what may be the fleeting presence of an individual, even in the extreme case where the place of business is established for a very short period.[90]

- Submission

The jurisdiction requirement is met if a person submits to the jurisdiction of the foreign court. Underlying the submission base is the principle that a party, who voluntary submits to the jurisdiction of a foreign court, should be bound by the judgment of the court of his or her choice.[91]

Submission can be constituted by agreeing in advance to accept the foreign jurisdiction, or by appearance. With regard to the former, a contractual clause expressly providing that all disputes shall be referred to the exclusive jurisdiction of a specific tribunal is obviously sufficient.[92] Similarly, a submission will occur where the defendant gives a person residing in the foreign country authority to accept service on the defendant's behalf, or arranges service to be effected by leaving document at a given place in that foreign country.[93] On the other hand, where there is no clear indication of advance submission, jurisdiction may not be constituted. Thus, an implied jurisdiction clause,[94] conduct,[95] or a choice of law clause[96] would not by themselves constitute submission.

As to appearance, a plaintiff who commences proceedings in a foreign court submits to the jurisdiction of that court and should be bound by its ruling, including any decision relating to any set-off, counter-claim or cross-action brought against that plaintiff.[97]

A defendant served outside the jurisdiction of the foreign court can ignore the foreign proceedings, but if the defendant has assets in the foreign country, he or she might have to choose whether to defend the action on the merits, object to the court's jurisdiction, or risk a default judgment being rendered against him or her. If that

90 Dicey & Morris, fn. 2 at 476 (footnotes omitted).
91 Read, fn. 47 at 160.
92 Dicey & Morris, fn. 2 at 482; Nygh, fn. 67 at 142. Note that a contractual submission to a specific tribunal does not on itself constitutes a general submission to the jurisdiction of all courts of a country (Dicey & Morris, fn. 2 at 482).
93 Nygh, id at 142.
94 *Vogel v. Kohnstamm*, fn. 89.
95 Ibid.
96 *Keenco v. South Australia & Territory Air Service Ltd* (1974) 8 SASR 216; Nygh, fn. 67 at 142; Dicey & Morris, fn. 2 at 483-4.
97 *Schibsby v. Westenholz*, fn. 43; Dicey & Morris, id at 478; Sykes & Pryles, fn. 22 at 114.

defendant defends the action on the merits without contesting jurisdiction, or files an appearance to protest the jurisdiction but proceeds to argue the merits, there will be a submission.[98]

When, however, the defendant attempts to convince the foreign court to exercise its discretion and decline jurisdiction, the result may not be so straightforward. In *Henry v. Geoprosco International Ltd*,[99] the English Court of Appeal distinguished between arguments going to the rules of jurisdiction, which do not constitute submission, and, arguments going to the exercise of discretion, which amount to submission.[100] It was also said in *dicta* that if the protest takes the form of a conditional appearance and an application to set aside an order for service out of jurisdiction, and that application then fails, the entry of that conditional appearance (which then becomes unconditional) is a voluntary submission to the jurisdiction of the foreign court.[101]

In such circumstances, however, the 'absurd result' would be that 'a defendant who appeared before a foreign court to protest that it had no jurisdiction over him would be deemed to have submitted to that court's jurisdiction'.[102] It is submitted that this is the point where the element of 'choice' becomes questionable, the basic logic behind the submission rule loses its force, and submission may no longer be a justifiable jurisdictional base. A recognition rule that would better safeguard the defendant's interest would permit him or her to challenge the foreign court's jurisdiction without submitting to its jurisdiction in the process.[103]

This criticism led Parliament to modify the common law position by legislation. Section 11 of the *Foreign Judgments Act 1991* (Cwlth) now provides that a foreign court is not taken to have had jurisdiction to give judgment merely because the judgment debtor entered an appearance, or participated in proceedings only to such extent as was necessary, for the purpose of:

- contesting the jurisdiction of the foreign court;
- inviting the foreign court to exercise its discretion not to exercise jurisdiction; or

98 *Re Williams* (1904) 2 N & S 183; Nygh, fn. 67 at 139; Dicey & Morris, id at 479; Sykes & Pryles, id at 115.
99 [1976] QB 726.
100 For a further discussion refer to Edinger, E., '*Morguard v. De Savoye*: Subsequent Developments' (1993) 22 *Canadian Business Law Journal* 29, 39; Sykes & Pryles, fn. 22 at 115; Cheshire & North, fn. 47 at 353.
101 *Henry v. Geoprosco International Ltd,* fn. 99 at 748, per Roskill LJ.
102 Cheshire & North, fn. 47 at 353.
103 Loree, fn. 69 at 346.

- protecting, or obtaining the release of property seized or threatened with seizure in the proceedings, or property subject to an order restraining its disposition or disposal.

- Personal Connecting Factors

Can residence, domicile and nationality constitute jurisdiction where the defendant was served outside the jurisdiction of the foreign court and never submitted to it? As a matter of principle, these connecting factors may not suffice since:

> a court in one country has no power at all over a subject of another country; and it is important, because the converse is equally true, that with cessation of residence, or absence from territory, comes a cessation of this necessity for obedience to the writ of summons, even in the case of subjects of the country.[104]

However, the authorities are few and inconclusive. It appears that if the nationality is active, jurisdiction might be established.[105] Conversely, birth by itself is not enough.[106] Beyond that the issue is unclear, but it is arguable that a migrant who is still a national of a foreign country without active participation in its affairs would not be amenable by virtue of that connection only to the jurisdiction of its courts.[107] As to domicile, notwithstanding indications to the contrary, it seems that this factor alone will not be enough.[108] With regard to residence, it was suggested that jurisdiction can be established if the defendant is an ordinary resident of the foreign country even if served outside that country, provided that the residence exists at the time the foreign jurisdiction is invoked.[109]

(ii) The Requirement of Finality

Foreign judgments must be final and conclusive before they can be recognised and enforced.[110] This is because the obligation sought to be enforced can arise only where, under the law of the foreign

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104 Piggott, fn. 70 at 13.

105 E.g. by being registered as a voter; see *Federal Finance & Mortgage Ltd v. Winternitz* (unrept., SC(NSW), Sulley J, 9/11/89), as cited by Nygh, fn. 67 at 143 and by Bates, D., 'Recognition and Enforcement of Foreign Judgments in Personam in Queensland' (1993) 23 *Queensland Law Society Journal* 167 at 169.

106 *Gavin Gibson & Co. Ltd v. Gibson* [1913] 3 KB 379; Nygh, id at 144.

107 Nygh, ibid.

108 See discussion in Dicey & Morris, fn. 2 at 486; Nygh, ibid; Cheshire & North, fn. 47 at 360; Loree, fn. 69 at 330.

109 Nygh, id at 138. This also appears to be the Canadian position; see Loree, id at 330.

110 *Nouvion v. Freeman* (1887) 37 Ch D 244 at 256; Sykes & Pryles, fn. 22 at 117.

country, the judgment is *res judicata* between the parties. That is, all controversies between the parties are determined.[111] The requirement does not mean that only a foreign judgment which has left nothing for future determination, and is not subject to subsequent review, will be recognised. If that were so, any procedure of review could prevent recognition by the forum on grounds of lack of finality.[112]

Finality in this context means that the judgment should be final in the court that pronounced it.[113] This may be best understood in the context of two specific situations.

- Judgments Open to Appellate Review

In principle, the finality requirement will be satisfied even if the foreign judgment is subject to an appeal or an appeal is pending.[114] If the foreign court cannot revise its decision, the judgment is final in that court and is *res judicata* between the parties, notwithstanding that it is capable of being rescinded or varied by another court invested with competent appellate jurisdiction.[115] In practice, however, enforcement in the forum might be stayed pending the outcome of the appeal,[116] because the pendency of an appeal may cause unjust results if the forum permits the action on the judgment to continue while the foreign appeal is being considered.[117]

- Default Judgments

'The fact that a judgment...is made in a summary proceedings, does not prevent it from being *res judicata...*',[118] but then again, the foreign procedure is crucial. If the foreign procedure provides that the defendant can, within a specified time period, enter an opposition, then as long as the defendant is entitled to do so, the default judgment is provisional.[119] Similarly, a judgment conditional on an act to be done or an event to take place will not be

111 *Nouvion v. Freeman,* ibid; Born-Reid, fn. 58 at 55-8.
112 Castel, fn. 1 at 56.
113 *Beatty v. Beatty* [1924] 1 KB 807; Cheshire & North, fn. 47 at 367.
114 *Colt Industries Inc. v. Sarlie (No.2)* [1966] 1 WLR 1287; *Nouvion* v *Freeman,* fn. 110.
115 Castel, fn. 1 at 61. Note that if the foreign procedure provides for stay of execution while the appeal is pending, the finality requirement may not be met; see Cheshire & North, fn. 47 at 367.
116 Sykes & Pryles, fn. 22 at 118; Nygh, fn. 67 at 146; Cheshire & North, id at 367.
117 Castel, fn. 1 at 62.
118 *Nouvion v. Freeman,* fn. 110 at 255, per Lindley LJ.
119 *Jeannot v. Fuerst* (1909) 100 LT 816; Castel, fn. 1 at 59; Nygh, fn. 67 at 146.

enforced while the condition remains unperformed.[120] On the other hand, a foreign judgment which can be set aside only upon cause shown by the defendant will be treated as final and conclusive until set aside.[121]

(iii) The Requirement of Definite Sum of Money

At common law, the foreign judgment must be for a definite and actually ascertained sum of money.[122] Judgments directing the payment of a sum of money which cannot be readily ascertainable, or providing for another remedy, such as injunction or specific performance, cannot support an action.[123]

Conceptually, this requirement is a direct consequence of the assumption that a foreign judgment gives rise to a debt, an obligation to pay the sum ordered. In addition, in certain contexts, eg. land, it may be inappropriate to allow a foreign power to interfere with domestic policies 'wrought up in its history, familiar to its population, incorporated with its institutions, suitable to its soil'.[124] Also, a foreign judgment ordering the defendant to do, or not to do, an act may pose difficulties in that it would require the recognising court to determine whether the foreign order is confined to the territorial jurisdiction of the foreign court:

> In each case it will be necessary to decide what is the nature and extent of the defendant's obligation under the order of the foreign court. To do that it may be necessary to go behind the foreign judgment and examine the cause of action; not to see if the foreign court judged rightly, but to see precisely what was adjudged.[125]

It is notable that in equity the position is different, but by and large unsettled.[126] In *White v. Verkouille*,[127] McPherson J of the Queensland Supreme Court, after examining the authorities, said that equity may lend its aid to the enforcement of a foreign judgment without requiring as a pre-requisite that it be made a

120 *Patrick v. Shedden* (1853) 2 E & B 14; 118 ER 674; Castel, id at 59.
121 *Barclays Bank Ltd v. Piacun* [1984] 2 Qd R 476; *Linprint Pty Ltd v. Hexham Textiles Pty Ltd* (1991) 23 NSWLR 508; Nygh, fn. 67 at 146.
122 *Sadler v. Robins* (1808) 1 Camp 253; 170 ER 948; *Henderson v. Henderson* (1844) 6 KB 288; Cheshire & North, fn. 47 at 367; Castel, fn. 1 at 64.
123 Dicey & Morris, fn. 2 at 462; Sykes & Pryles, fn. 22 at 118.
124 Wharton, I.F. 1905, *Conflict of Laws*, 3rd edn, 636, as quoted by Scalia, J., *Association de Reclamantes v. United Mexican States* (1984) 735 F 2d 1517 at 1521. For a discussion in the Anglo-Australian context see White, R.W., 'Enforcement of Foreign Judgments in Equity' (1979-1982) 9 *Sydney Law Review* 630 at 641-6.
125 White, id at 640.
126 Ibid.
127 [1989] 2 Qd R 191.

judgment of the recognising court.[128] It remains to be seen how this equitable principle can make inroads into the common law limitation that only foreign judgments for a fixed sum of money can be enforced.

(iv) The Requirement of Party Identity

In an action on a foreign judgment *in personam* brought before the forum, the parties, or their privies, must be identical to the parties to the foreign suit.[129] The obligation and the corresponding right created by the foreign judgment are attached to these persons who are seen to have entered the implied contract giving rise to the obligation and the right. Accordingly, when different persons are appointed administrators of the same estate in different law areas, they remain two distinct persons and there is no privity between them; a foreign judgment rendered against one cannot be enforced against the other.[130]

The Conclusive Effect of Foreign Judgments

Early English authorities took the view that the very technical qualities of a court of record were not attributable to foreign court. Foreign courts were not regarded as being of equal dignity as English courts.[131] A foreign judgment, therefore, constituted a good cause of action and amounted to *prima facie* evidence of a debt, but it was not conclusive and its merits could be re-examined by the forum.

> One argument is clear that the difference between our Courts and their Courts is so great, that it would be a strong thing to hold that our Courts should give a conclusive force to foreign judgments when, for aught we know, not one of the circumstances that we call necessary may have taken place in procuring the judgment.[132]

Subsequently, however, the courts changed their approach.

> We are accustomed, and indeed bound, to give effect to final judgments of the courts of other countries and of our

128 For example, the courts of equity can either recognise directly the title of a foreign receiver to assets located in the forum, or by their own order set up an auxiliary receivership in the forum, provided that there is a sufficient connection between the defendant and the jurisdiction in which the foreign receiver has been appointed.

129 Read, fn. 47 at 272; Castel, fn. 1 at 111; Nygh, fn. 67 at 147.

130 *Bonn v. National Trust Co. Ltd* [1930] 4 DLR 820 and see discussion in Read, fn. 47 at 272; White, fn. 124 at 636.

131 Piggott, fn. 70 at 29.

132 *Houlditch v. Donegall* (1834) 2 Cl & F 470 at 477; 6 ER 1232 at 1234, per Lord Broughan.

> colonies, where they possess a competent jurisdiction which has been duly exercised; and the correctness of such judgments is not allowed to be brought into contest in our courts.[133]

With the exception of a mistake as to its own jurisdiction,[134] a mistake made by the foreign court, whether as to facts or law, whether obvious or not, and whether regarding the forum law or not, does not excuse the defendant from performing the obligation imposed by virtue of the foreign judgment.[135] The recognising court 'cannot sit as a Court of Appeal against a judgment pronounced by a court which was competent to exercise jurisdiction over the parties'.[136]

Why should a person be liable pursuant to defective application of the law? Would not that be 'an extension of injustice to enforce a judgment which ought never to have been given'?[137] If recognition is warranted because it promotes the objective of protecting private rights acquired under a foreign system of law, then why should rights wrongly acquired be recognised?

The answer to these concerns operates on three levels. First, historically the change of attitude of English courts was partially due to the possibility that if colonial judgments were to be re-examined on the merits, a conflict could arise between the colonial court and the Privy Council if the parties to the original action appealed.[138]

Second, conclusiveness can be seen as a direct consequence of the doctrine of obligation.

> If we are prepared to enforce an obligation as having been imposed by a competent Court, we must admit that the obligation was properly imposed.[139]

The reason is that:

> A valid foreign judgment creates a new right in the judgment plaintiff and imposes a new duty on the judgment defendant, *these rights being independent of and distinct from the cause of action alleged in the suit wherein the judgment was rendered.* A suit on this judgment being one on a new right, it

133 *Ellis v. M'Henry* (1871) LR 6 CP 228 at 238, per Bovill J, as cited by Cheshire, fn. 5 at 618.

134 Which renders the judgment null; see a discussion below on the defence of mistake as to jurisdiction.

135 *Castrique v. Imrie*, fn. 70; *Godard v. Gray* (1870) LR 6 QB 139; Cheshire & North, fn. 47 at 368-9; Nygh, fn. 67 at 147-8.

136 Cheshire & North, id at 368.

137 Cheshire, fn. 5 at 616.

138 Holdsworth, fn. 61 at 272-3.

139 Cheshire, fn. 5 at 616.

> is immaterial whether or not a valid cause of action existed prior to the judgment.[140]

Third, conclusiveness reflects *res judicata*:

> The pleas demurred to, might have been pleaded, and if there be any foundation for them, they ought to have been pleaded in the original cause of action.[141]

Hence, the conclusiveness rule should not be departed from even if the foreign court misapplied the relevant law or even applied the wrong law:

> if the defendant in that suit did not bring to the Court the knowledge of what the foreign law was, he has omitted a matter, which like any other fact not proved which might have proved in his defence, he cannot complain of; and such judgment rightly given upon the facts which were before the court is a valid and binding judgment, although there might have been a wholly different judgment pronounced if the full and correct state of the foreign law had been duly proved.[142]

The conclusiveness rule, then, fits into the doctrine of obligation, and can be justified on policy grounds regarding finality of litigation and efficiency in the administration of justice.[143] If foreign judgments were to be re-examined on the merits, then in practice parties would be forced back to their original cause of action. It would avail them of little that they had already won abroad.[144]

Further Implications of Conclusiveness: Operation by way of Estoppel

Upon satisfaction, foreign judgments can be pleaded by way of cause of action estoppel barring any subsequent action based on the same cause of action between the same parties or their privies in the

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140 Castel, fn. 1 at 68 (emphasis added).

141 *Bank of Australasia v. Nias* (1851) 20 LJQB 284 at 292, per Lord Campbell. See also *Israel Discount Bank of New York v. Hadjipateras* [1984] 1 WLR 137 at 144, where a party who failed to raise undue influence as a defence in a New York court could not raise it in England, Stephenson LJ saying 'a defendant must take all available defences in a foreign country' .

142 *Barned's Banking Co. Ltd v. Reynolds* (1875) 36 UCQB 256 at 273-4, per Wilson J.

143 von Mehren & Trautman, fn. 11 at 1666; Castel, fn. 1 at 69-72.

144 Cheshire, fn. 5 at 616. The *res judicata* framework, however, leaves open the question of what happens if the defendant could raise a defence available to it because certain facts came to light only after the foreign court rendered its decision. Clearly, the defendant is not at fault if the new evidence were not available at all at the time the foreign trial took place. Cheshire & North argue that under such circumstances the defendant should be allowed to raise the issue in the forum; see fn. 47 at 372.

forum.[145] That is, if the defendant lost abroad and paid the amount ordered, the plaintiff cannot commence an action based on the same cause of action against the defendant in Australia. Conversely, if the plaintiff lost abroad, he or she cannot re-try the same cause of action against the defendant in Australia.[146]

Furthermore, the policies justifying conclusiveness extend beyond cause of action estoppel. It is now settled that a foreign judgment can operate as an issue estoppel, that is it may bar the plaintiff or the defendant from contesting an issue which has already been determined by the foreign court, even if the cause of action in the forum is not the same as the cause of action in the foreign proceedings.[147]

In order to rely on either estoppel, three prerequisites must be satisfied: (a) the foreign decision must be final on the merits; (b) the parties or their privies in the foreign proceedings and in the forum proceedings must be the same; and (c) the issue in the forum proceedings in which the estoppel is raised must be the same issue as decided by the foreign judgment.[148]

The scope is rather broad; a 'decision on the merits' means:

> a decision which establishes certain facts as proved or not in dispute, states what are the relevant principles of law applicable to such facts, and expresses a conclusion with regard to the effect of applying those principles to the factual situation concerned.[149]

The broad operation of issue estoppel is illustrated in *The Sennar*.[150] The plaintiff brought an action for damages for the equivalent of a tort, alleging that a false date had been put on the contract giving rise to the dispute. The contract contained an exclusive jurisdiction clause referring all matters arising under the contract to the courts of Sudan. The Dutch court decided not to exercise jurisdiction on the basis of that exclusive jurisdiction clause. This decision was considered by the English court to be a

145 *Barber v. Lamb* (1860) 141 ER 1100; *Taylor v. Hollard* [1902] 1 KB 676; *Carl Zeiss Stiftung v. Rayner and Keeler (No.2)* [1967] 1 AC 853; Nygh, fn. 67 at 149-150; Cheshire & North, fn. 47 at 373-4.

146 *Ricardo v. Garcias* (1845) 12 Cl & Fin 368; 8 ER 1450.

147 *Carl Zeiss Stiftung v. Rayner and Keeler (No. 2)*, fn. 145; *The Sennar* [1985] 2 All ER 104; Cheshire & North, fn. 47 at 374-5.

148 See *Carl Zeiss Stiftung v. Rayner and Keeler (No. 2)*, id at 909-910; *The Sennar*, id at 493-4. The forum will be more cautious when an issue estoppel is pleaded because it may be difficult at times to ascertain the exact issues determined by the foreign court and because it may be impractical for the unsuccessful party to argue his or her case in full (see *Carl Zeiss Stiftung v. Rayner and Keeler (No. 2)*, id at 919, per Lord Reid).

149 *The Sennar*, id at 111, per Lord Brendon.

150 Ibid.

decision on the merits. The expansive definition of 'decision on the merits' coupled with the operation of issue estoppel meant that the Dutch decision on jurisdiction also determined that: (a) the only claim was in contract; and (b) by virtue of the jurisdiction clause, the contractual claim could only be brought in Sudan.[151] Since these were determinations on the merits, they could not be re-opened by the English court. Hence, notwithstanding that in the Dutch court the action could only be founded on contract, and in an English court it could be founded on contract and tort, the issue was the same. The jurisdiction clause applied to a claim in contract as well to a claim in tort, meaning that the plaintiff was estopped from asserting that its claim was outside the scope of that clause.

Actionability

At common law a foreign judgment cannot be directly enforced. It has no direct operation in the forum and execution cannot be levied upon it.[152] For that to occur, there must be an authoritative act of the country where the judgment is to be relied upon. At common law the authoritative act can be invoked in two ways: by suing on the judgment itself or by suing on the original cause of action.

By suing on the judgment itself, the plaintiff relies on the judgment as a single source of debt, the sum of which is certain.[153] If the defendant fails to mount a defence, the court will give judgment to the plaintiff.[154] This is a direct application of the doctrine of obligation. The obligation derives from an implied promise to pay the debt as adjudged, and therefore, in the absence of a defence disputing that obligation, the court should give effect to it.

An action based on the original cause of action may be more advantageous to the plaintiff because the forum might grant the plaintiff a higher amount of damages than that granted by the foreign court.[155] The plaintiff's ability to sue on the original cause of action derives from the rule that foreign judgments do not merge with the original cause of action.[156] This should be contrasted with domestic judgments, which do merge with the original cause of

151 *The Sennar*, id at 106-7, per Lord Diplock.
152 *Perry v. Zissis* [1977] 1 Lloyd's Rep 607; Sykes & Pryles, fn. 22 at 108.
153 Nygh, fn. 67 at 148.
154 Sykes & Pryles, fn. 22 at 108; Dicey & Morris, fn. 2 at 465.
155 *Barber v. Lamb* (1860) 8 CBNS 95; The quantification of damages has always been regarded as a matter of procedure, that is, it is to be carried out by the forum; for a discussion refer to the authorities set out in Nygh, fn. 67 at 263-4.
156 *Hall v. Odber* (1809) 11 East 118; 103 ER 949; Read, fn. 47 at 117; Sykes & Pryles, fn. 22 at 109.

action, that is a plaintiff who obtains a domestic judgment is barred from suing again on the original cause of action.[157]

The inapplicability of the merger rule to foreign judgments seems inconsistent with the common law basic principles of recognition:

> [h]ow can the courts say with one breath that a foreign judgment is recognized because it establishes the existence of a foreign judicially created substantive right and with the next breath that the right of action which the judgment has converted into a new right still exists?[158]

Furthermore, it almost goes without saying that the non-merger rule is not exactly compatible with the *res judicata* principle:

> if the plaintiff sues alternatively on both, then not only is formal evidence in support of the judgment adduced, but also the evidence already used at the foreign trial in support of the original cause of action...[159]

The inconsistency of the non-merger rule clearly runs contrary to policy objectives and sits uneasily within the frameworks of obligation and *res judicata*. The rule is a historical hangover from the days when foreign courts were seen as lacking the qualities of courts of record. This view not only entailed that a foreign judgment was merely *prima facie* evidence of the original cause of action impeachable on the merits, but also that there should be no merger of the original cause of action in the English judgment.[160] Later, when the courts abandoned the rule that a foreign judgment could be impeached on the merits, the non-merger rule should have been removed as well.[161] But it has survived.[162] Nowadays, the weight of authority is 'too strong to be disputed anywhere but in the Court of Appeal, and in view of the catena of authority, hardly there with success'.[163]

Defences

Upon the satisfaction of the basic requirements, the assistance of the recognising court may be invoked to clothe with enforceability

157 *King v. Hoare* (1844) 13 M & W 494 at 504; 153 ER 206 at 210; Cheshire, fn. 5 at 583.
158 Read, fn. 47 at 120.
159 Piggott, fn. 70 at 31.
160 Piggott, id at 27-30; Holdsworth, fn. 61 at 272.
161 Read, fn. 47 at 118.
162 In *Carl Zeiss Stiftung v. Rayner & Keeler Ltd (No.2)*, fn. 145 at 966, Lord Wilberforce referred to it as 'an illogical survival'.
163 Dicey, *Conflict of Laws*, 4th edn, 459, as cited by Read, fn. 47 at 117-8. The non-merger rule also survived in Australia. See *Delfino v. Trevis (No. 2)* [1963] NSWR 194; Nygh, fn. 67 at 148.

the legal obligation which has been created by a judgment of a court of another nation. However, the recognising court reserves the power to explore grounds for defence, that is, 'anything which negates that duty, or forms a legal excuse for not performing it.'[164]

Grounds for defence may be best understood as safeguards driven by considerations of sovereignty and protectionism. Nonetheless, one may bear in mind that sovereignty and protectionism can be in conflict with the *res judicata* principle, and that the resulting tension forces the courts to walk a very fine line. The discussion sets out the defences of fraud, natural justice, public policy, mistake as to jurisdiction and previous determination as indicative of this tension and the ways courts have attempted to defuse it.[165]

(i) Fraud

Earlier in this thesis it was explained how the *res judicata* principle justifies the rule that foreign judgments are conclusive upon the merits. However, this justification has limits, which in the context of fraud are defined by a general policy against allowing anyone to rely upon his or her own fraudulent act for legal advantage, whether such act is aimed at the other party or at the pronouncing court.[166] For example, the defence has been successful in cases involving suppression of a document, a forged will, a false affidavit, inducement of the judgment debtor not to appear in the original proceedings, perjured oral testimony, and parties acting in collusion.[167]

The defence of fraud is by no means limited to foreign judgments; it has been available for centuries as a ground upon which a domestic judgment could be impeached.[168] In the domestic

164 *Schibsby v. Westenholz* (1870) LR 6 QB 155 at 159, per Blackburn J.

165 It is assumed for present purposes that the foreign judgment sought to be recognised and enforced does not operate to give effect to foreign governmental interests, and therefore, the discussion does not include a section on the enforcement of judgments the effect of which indicates otherwise (for a discussion on the refusal to enforce foreign governmental interests in Australia refer to Nygh, fn. 67, ch. 18). In addition, statutory provisions operating to enhance the common law's scope of rejection must be left for future research into the area (eg. *Foreign Proceedings (Excess of Jurisdiction) Act 1984* (Cwlth); see discussion in Nygh, fn. 67 at 160-1).

166 Read, fn. 47 at 273.

167 See cases cited in Cheshire, fn. 5 at 622; Sykes & Pryles, fn. 22 at 119. The defence also includes constructive fraud as defined by equity, such as inferring that a fiduciary has made a private profit if the making of such a profit cannot be actually proved; see Nygh, fn. 67 at 154.

168 *Duchess of Kingston's Case* (1776) 2 SLC 644; 168 ER 175; Cheshire & North, fn. 47 at 377; for an examination of domestic Australian judgments

context, as well as in the foreign context, it is not enough that the judgment proceeded upon mistaken grounds, but rather, it is necessary to show that the court has been deliberately misled. [169]

Until very recently, the similarity between domestic and foreign judgments started to break down in cases where the defendant raised the allegation of fraud in the original proceedings and it was dismissed, or where the defendant could raise the allegation in the original proceedings but failed to do so. In domestic cases, the court would not go into the merits of the original proceedings. To re-open the case, it is necessary that the party alleging the fraud shows that there has been a new discovery of facts which would provide a reason for setting aside the judgment. As was explained by Kirby P in *Wenthworth v. Rogers (No. 5):*

> [t]here is a public interest in finality of litigation. Parties ought not, by proceeding to impugn a judgment, to be permitted to relitigate matters which were the subject of the earlier proceedings which give rise to the judgment. Especially should they not be so permitted, if they move on nothing more than the evidence upon which they have previously failed. If they have evidence of fraud which may taint a judgment of the courts, they should not collude in such a consequence by refraining from raising their objection at the trial, thereby keeping the complaint in reserve. It is their responsibility to ensure that the taint of fraud is avoided and the integrity of the court's process preserved.[170]

With respect to foreign judgments, however, courts were willing to give the unsuccessful party a second go. That was stated unequivocally in *Abouloff v. Oppenheimer*:[171]

> I will assume even that the defendants gave the very same evidence which they propose to adduce in this action; nevertheless the defendants will not be debarred at the trial of this action from making the same charge of fraud and from adducing the same evidence in support of it.[172]

This has been followed in England in other cases,[173] notwithstanding its apparent inconsistency with the rule that foreign

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refer to Kirby P in *Wenthworth v. Rogers (No. 5)* (1986) 6 NSWLR 534 at 538-539.

169 *Duchess of Kingston's Case,* ibid.

170 *Wenthworth v. Rogers (No. 5)*, fn. 168 at 538.

171 (1882) 10 QBD 295.

172 Id at 306, per Brett LJ.

173 *Vadala v. Lawes* (1890) 25 QBD 310; *Syal v. Heyward* [1948] 2 KB 443; *Jet Holdings Inc v. Patel* [1990] 1 QB 335; *Owens Bank Ltd v. Bracco* [1992] AC 443.

judgments cannot be re-examined on the merits.[174] In explaining this, it was said that the question of whether the foreign court was misled was not an issue decided by that foreign court:

> [t]he technical objection that the issue is the same is technically answered by the technical reply that the issue is not the same, because in this Court you have to consider whether the foreign Court has been imposed upon...[175]

This reasoning has attracted strong criticism,[176] the boldest of which was perhaps stated by Patterson J of the Ontario Court of Appeal:

> I confess my inability to follow this distinction without understanding the word 'issue' in what seems to me too narrow or technical a sense...The *issue*, in substance and reality, though perhaps not in technical form...is the truth or falsehood of what the plaintiff swears to.[177]

In addition, non-English common law courts felt that the impact of the fraud exception on the *res judicata* doctrine is too severe to accept:

> A doctrine so useful and so well established, resorting not alone upon a consideration of the private convenience of litigants, but upon the broader foundation of public policy, should, one would think, require more for its abrogation than the mere dicta of one or even more Judges, here or elsewhere, however eminent.[178]

In Australia, Rogers CJ CommD, in *Keele v. Findley*,[179] also refused to follow the English decisions.[180] His Honour raised the possibility that the reason behind the distinction between domestic and foreign judgments may be 'no more than a reflection of the attitudes of the English judiciary at the apogee of the British Empire'.[181] He then summed up:

> [w]ith very great respect, it seems to me, odd to say the least, that on the one hand, local courts should grant a stay of proceedings in their courts, and send the litigants to a foreign court, and at the same time, arrogate to themselves the right to re-try an issue determined by the foreign judge, simply on

174 '[Y]ou cannot go into the alleged fraud without going into the merits'; see *Vadala v. Lawes*, id at 316, per Lindley LJ.
175 *Vadala* v *Lawes*, id at 317, per Lindley LJ.
176 See e.g. Read, fn. 47 at 273-281; Cheshire & North, fn. 47 at 380; Dicey & Morris, fn. 2 at 507; Sykes & Pryles, fn. 22 at 120.
177 *Woodruff v. McLennoan* (1887) 14 Ont AR 242 at 252.
178 *Jacobs v. Beaver* (1908) 17 OLR 496 at 505, per Garrow JA.
179 (1990) 21 NSWLR 444.
180 And an Australian *dictum* in *Norman v. Norman* (No. 2) (1968) 12 FLR 39.
181 *Keele v. Findley*, fn. 179 at 457.

the basis that the local court may be more skilful in detecting perjury than was the foreign judge. It is accepted, on all hands, that, whatever errors of fact, or law, the foreign court may commit, its judgment is conclusive. *I can detect no difference in principle between a grossly erroneous finding of fact and an incorrect conclusion that a person is telling the truth.* Yet under the law of England, the resultant foreign judgment cannot be challenged in the first case, but grounds a permissible argument of fraud in the latter. The principle of enforcement of foreign judgments calls for self denial in those circumstances.[182]

(ii) Natural Justice

'A decree of a foreign court of competent jurisdiction must be presumed not to be against natural justice',[183] but if this presumption is rebutted, the foreign judgment otherwise valid will not be enforced.[184] This accords with the *res judicata* principle, the application of which pre-supposes that a party has exhausted or could have exhausted the avenues available to him or her. In the absence of such an opportunity, the presumption is removed, and so is the justification for preventing relitigation.

When, however, one considers specific factual settings, one may face some difficulties related to meaning of natural justice in this context. Until recently, it was thought that the defence was associated with the requirements of due notice and proper opportunity to be heard.[185] But in *Adams v. Cape Industries Plc*, the Court of Appeal revived the view[186] that ultimately the issue is whether there has been a breach of the forum's views of 'substantial justice'.[187] Yet, the court did not shed much light on the concept. It said that a mere procedural irregularity may not be sufficiently strong to offend the forum's concepts of substantial justice,[188] and that '[t]he notion of substantial justice must be governed in a particular case by the nature of the proceedings under consideration'.[189]

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182 Id at 458 (emphasis added).
183 *Cowen v. Braidwood* 1 M & G 288, per Maule J, as cited by Piggott, fn. 70 at 168.
184 See e.g. Piggott, id at 168-70 and authorities cited therein; Read, fn. 47 at 281; Cheshire & North, fn. 47 at 384.
185 See e.g. Nygh, fn. 67 at 157, *Jacobson v. Frachon* (1927) 138 LT 386 as discussed in Dicey & Morris, fn. 2 at 515
186 Expressed in *Pemberton v. Hughes* [1889] 1 Ch 781.
187 *Adams v. Cape Industries Plc* [1990] Ch 433 at 564, per Slade LJ.
188 Id at 567.
189 Id at 566. In that case, the foreign judgment was for damages in default of appearance, and notice was given to the defendant about it. The foreign court

It follows, it is submitted, that if the foreign court was biased or acted in a fraudulent manner, for example because the creditors of the defendant constituted themselves as a court and proceeded to render a binding judgment against the defendant,[190] then there would be a violation of natural justice.[191] Indeed, it is difficult to conceive a more serious breach of *any* forum's view of substantive justice than a case where the rendering tribunal itself acted improperly.

With regard to due notice, where jurisdiction is exercised over an absent defendant, it is important to determine whether the jurisdiction requirement is satisfied. If the defendant was present in the foreign country or voluntarily appeared in the proceedings, then most forms of notice complying with foreign procedure would be satisfactory.[192] In marginal cases, the forum will examine the method by which notice was given, but in a cautious fashion. Thus, the forum will not measure the foreign methods against the forum's own procedural standards,[193] and probably, after *Adams v. Cape Industries Plc*, the concept of substantial justice will dictate the outcome.

Where the defendant has contracted in advance to be subject to the jurisdiction of a foreign court, he or she is deemed to have agreed with the methods of service in the foreign country, and therefore, there would be no violation of natural justice, even though the defendant may not have had actual notice of the proceedings.[194]

In *Jamieson v. Robb*[195] a judgment was obtained in Scotland by the liquidators of a Scottish company against a shareholder, who resided in Victoria, as a contributory, without notice of the Scottish proceedings. On becoming a shareholder, the defendant signed the memorandum of association of the company, which provided that

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in default of appearance by the defendant entered judgment without a hearing or a judicial assessment of the evidence, although required to do so under the relevant law. The defence of natural justice was successful, not due to the lack of judicial assessment, but rather, because the defendant was not notified that damages would be assessed in that way, and therefore had a *reasonable expectation* that there would be a judicial assessment.

190 *Price v. Dewhurst* (1837) 8 Sim 279; 59 ER 111.

191 Although this may be classified as a type of fraud, it seems that it better reflects violation of natural justice, especially in light of the decision in *Adams v. Cape Industries Plc.*, fn. 187; see also discussion in Fine, J.D., 'Defences Against Recognition or Enforcement of Interstate or Foreign Judgments' (1987) 61 *ALJ* 350 at 360-61.

192 Dicey & Morris, fn. 2 at 485, 516.

193 *Jeannot v. Fuerst* (1909) 25 TLR 424; Nygh, fn. 67 at 158.

194 *Vallée v. Dumergue* (1849) 4 Exch 290 at 303, as cited by Dicey & Morris, fn. 2 at 516.

195 (1881) 7 VLR 170.

such proceedings would be *ex parte* and without notice. In affirming recovery against the defendant, Higginbotham J of the Supreme Court of Victoria said:

> it is said that the judgment was obtained in such a way as to be in violation of...natural justice, since a man should have notice of judicial proceedings before he is bound by the judgment—a strong and fair argument, but the defendant had himself in the first place contracted himself into that of which he now complains as injustice.[196]

With respect to the opportunity to be heard, it would be contrary to natural justice if a litigant, although appearing in the proceedings, is unfairly prejudiced in the presentation of his or her case to the court, for example, the litigant is prevented from pleading.[197] The forum, however, would carefully examine the foreign procedural rules before holding that there has been a breach of natural justice. The issue of whether there has been an opportunity to be heard appears to be a matter of relativity. In *Scarpetta v. Lowenfeld*,[198] it was held that there was no breach of natural justice where neither party to a litigation could be called as a witness on the party's own behalf, since neither party was given an unfair advantage over the other.

The question, it is submitted, is how far this reasoning can be stretched. In *Scarpetta v. Lowenfeld* the judge remarked that the same rule had existed in England until 1846, so an English judge could hardly hold it violated natural justice. But after *Adams v. Cape Industries Plc*, it seems arguable that there might be instances where the foreign law is so unfair, to both parties, that an Anglo-Australian court would treat it as a violation of natural justice principles.

Another question is whether the defendant should seek a remedy in the foreign court in respect of the lack of natural justice. In *Adams v. Cape Industries Plc* the Court of Appeal distinguished two classes of cases.[199] Using the analogy of the defence of fraud, the court said that in cases involving the traditional grounds of due process and opportunity to be heard, the defendant should not be obliged to use any remedy that might be available in the foreign court, and he or she could raise the objection in the forum. In cases involving other forms of substantial injustice the defendant may or

196 Id at 176.
197 Cheshire & North, fn. 47 at 385.
198 (1911) 27 TLR 509.
199 See fn. 187 at 569-570.

may not be obliged to use any available remedy. In determining this issue, the court should consider:

> factors which include the nature of the procedural defect itself, the point in the proceedings at which it occurred and the knowledge and means of knowledge of the defendants of the defect and the reasonableness in the circumstances of requiring or expecting that they made use of the remedy in all the particular circumstances.[200]

Given the decision and reasoning of Rogers CJ CommD in *Keele v. Findley*, it is submitted that it is not certain that Australian courts would follow the part of the decision in which the analogy of fraud was used. The other part of the judgment, however, seems consistent with *Keele v. Findley*, at least if one is willing to accept the proposition that where the defect in the foreign proceedings could not have been identified or argued by the defendant, the *res judicata* principle loses its force and thus the defendant should be able to raise his or her objection before the forum.

Finally, if the defendant actually raised the issue of natural justice before the foreign court, and that court determined the issue, then, according to Cheshire & North, the forum could look into the foreign decision to re-determine the issue.[201] In Australia, *Keele v. Findley* would suggest otherwise in most cases involving the defence of natural justice, but much would depend upon the particular form of substantial injustice. If, for example, the foreign court was biased against the defendant, the policy considerations of *res judicata* would lose their force, clearing the way for the concept of substantial justice to allow re-litigation.

(iii) Public Policy

As a rule, a foreign judgment, the recognition or enforcement of which is contrary to the forum's public policy, will be impeachable.[202] The defence of public policy is similar to that of natural justice in that they are both driven by sovereignty and protectionism. However, whereas natural justice focuses upon procedural defects in the foreign proceedings, public policy is concerned with the *outcome* of the foreign decision. As such, the public policy defence is less precise since *any* issue (not merely a procedural one) is capable of invoking it.

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200 Id at 570.

201 Cheshire & North, fn. 47 at 387.

202 *In Re Macartney* [1921] 1 Ch 522; *Dalmia Dairy Industries Ltd v. National Bank of Pakistan* [1978] 2 Lloyd's Rep 223; Cheshire & North, id at 380-1; Dicey & Morris, fn. 2 at 509; Nygh, fn. 67 at 157, Sykes & Pryles, fn. 22 at 122-23.

The occasions where public policy was successful in actions *in personam* are few,[203] but general principles may be derived from cases dealing with exclusion of foreign law.[204] Although there is no precise formula to determine when a foreign judgment would be contrary to public policy, it appears that two main categories of cases can be identified.[205]

Firstly, recognition may be refused if the nature or content of the foreign judgment, or the law which it is based upon, disregards the forum's conception of morality, or is so unacceptably repugnant that it could not be applied in the forum.[206] A good illustration is found in *Oppenheimer v. Cattermole*,[207] where the court was faced with a law depriving German Jews living abroad of German nationality and their property without compensation. In refusing to give it effect in England, Lord Cross said:

> To my mind a law of this sort constitutes so grave an infringement of human rights that the courts of this country ought to refuse to recognise it as a law at all.[208]

The second category does not so much focus upon the nature or content of a foreign law or judgment, but rather, upon the public or national interest. Examples of cases of this kind involve a contract of loan for the purpose of financing a revolt in a friendly country,[209] or a contract to circumvent an Indian law prohibiting the export of certain commodities from India to South Africa.[210]

As one may suggest, the defence of public policy gives the recognising court rather broad discretionary powers.

> The real difficulty with public policy as a limitation is that it is incapable of measurement. All law is an expression of policy, and whether a particular foreign rule falls under the

203 Dicey & Morris, id at 511-2.

204 Cheshire & North, fn. 47 at 38; Fine, fn. 191 at 361. The present discussion provides a rather short analysis of the issue in order to illustrate the importance of public policy in the context of foreign judgments. For further discussion on public policy in private international law refer to Cheshire & North, fn. 47 at 128-37; Sykes & Pryles, fn. 22 at 279-301.

205 As suggested by Carter, P.B., 'Rejection of Foreign Law: Some Private International Law Inhibitions' (1985) *British Yearbook of International Law* 111 at 123-24.

206 E.g. a contract for the sale of slaves (*Santos v. Illidge* (1860) 8 CB (NS) 861); a contract drafted to deceive third parties (*Mitsubishi Corporation v. Aristidis I Alafouzos* [1988] 1 Lloyd's Rep 191); a contract which had been executed as a result of undue influence (*Israel Discount Bank of New York v. Hadjipateras*, fn. 141; see criticism in Dicey & Morris, fn. 2 at 512-13).

207 [1976] AC 249.

208 Id at 278.

209 *De Wutz v. Hendricks* (1824) 2 Bing 314; 130 ER 326.

210 *Regazzoni v. Sethia* [1958] AC 301.

> ban is a matter of opinion which can easily become a matter of whim.[211]

However, although it is inevitable that the power to reject recognition may sometimes be over-used, it must be realised that the need to protect persons or the national interest must be coupled with broad discretionary power. Overall, the trade-off between instances of unwarranted rejection and protectionism may be justified, as long as the courts do not abuse this power.[212] When the protection of national interests is concerned, universality should not override sovereignty. Furthermore, the public interest in finality of litigation should not outweigh the public interest in maintaining fundamental views on society, justice and morality.

(iv) Mistake as to Jurisdiction

It was stated above that foreign jurisdictional standards are immaterial for the purpose of determining international jurisdiction. However, where a foreign court makes a mistake as to its own jurisdiction, recognition may be refused,[213] that is, it is not the foreign jurisdictional rules that matter, but rather the mistake made with respect to them.[s]

Is this principle sound? On the one hand, this line of reasoning seems at first glance to fly in the face of the *res judicata* principle. Should not the defendant argue that there was no jurisdiction? Should not the failure to do so successfully be the defendant's problem, on the same basis that unsuccessful arguments as to mistake of law or fact are the defendant's problem?

However, there appears to be a sound distinction warranting the availability of the defence. A complete lack of jurisdiction over the cause of action, as distinguished from a procedural error in the exercise of jurisdiction, renders the judgment null in the foreign country where it was rendered.[214] So, although a foreign judgment normally creates an obligation independent of the underlying cause of action, where a foreign judgment is a nullity, there is nothing to enforce because, as a matter of principle, there is no foreign judgment. What the plaintiff seeks to enforce is a right which she

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211 Stumberg 1937, *Conflict of Laws*, 179, as cited by Carter, fn. 205 at 125.

212 It seems that common law courts do not, at least by comparison to continental courts; see Carter, id at 125-6.

213 *Adams v. Adams* [1970] 3 All ER 572; *Papadopoulos v. Papadopoulos* [1929] All ER 310; Cheshire & North, fn. 47 at 369; Nygh, fn. 67 at 151-2.

214 Cheshire & North, ibid, Nygh, ibid.

has never in effect obtained, 'a right which had never arisen under the system indicated by English law as the proper law.'[215]

It is submitted, therefore, that there is no conflict with the *res judicata* principle. Because the foreign determination is a nullity, there is no risk of re-litigation of issues previously determined. In principle, the dispute brought before the forum has never been officially adjudicated upon.

(v) Previous Determination

This defence is a clear and bold application of *res judicata* principles. A foreign judgment will not be recognised and enforced if it is inconsistent with a previous decision of a competent Australian court on the same issue between the same parties or their privies.[216] An earlier decision rendered in the forum operates as a cause of action estoppel preventing the same matter from being raised again in the forum.[217] If there are competing foreign judgments, the earlier in time should receive effect to the exclusion of the later.[218] It should follow that if a judgment is given in the forum after a judgment on the issue was rendered abroad, the foreign judgment should prevail.[219]

Recognition at Common Law Summarised

The common law recognition rules have been derived from the theory that foreign judgments are a source of debt giving rise to an obligation. In addition, the common law courts have given significant weight to *res judicata* considerations aimed at enhancing convenience and efficient allocation of resources. The combined operation of obligation and *res judicata* has resulted in a liberal recognition scheme under which a foreign judgment is recognised regardless of the country it emanated from.

To be recognised, a foreign judgment has to meet the requirements of international jurisdiction, finality, definite sum of money and party identity. Whereas the latter three accord with policy objectives, the requirement of international jurisdiction contains flaws capable of operating contrary to the purposes and principles which that requirement is meant to serve. Although legislation dealt with parts of the problem by modifying the rules

215 Graveson, R.H. 1955, *The Conflict of Laws*, 3rd edn, Sweet & Maxwell, England, 467.
216 *Vervaeke v. Smith* [1983] 1 AC 145. For actions *in personam* refer to *ED & F Man (Sugar) Ltd v. Haryanto (No. 2)* [1991] 1 Lloyd's Rep 429.
217 *Vervaeke v. Smith*, ibid; *ED & F Man (Sugar) Ltd v. Haryanto (No. 2)*, ibid.
218 *Showlag v. Mansour* [1994] 2 WLR 615.
219 Nygh, fn. 67 at 160.

concerning submission, the presence base remained intact and thus raises serious issues which are yet to be addressed.

Another important feature of the common law rules is that a foreign judgment is considered to be conclusive and may operate as a cause of action, and issue, estoppel. This feature is a direct consequence of the combined operation of obligation and *res judicata*, and is central to the objectives of certainty, commerce, and fairness to the plaintiff.

Actionability at common law can be based on the judgment itself and on the original cause of action. Whilst the former is consistent with the doctrines of obligation and *res judicata*, the latter is not. The survival of the action on the original cause of action represents a severe conceptual flaw in the common law scheme and may also offend efficiency and fairness to the defendant.

The common law's liberal approach to recognition is confined by a set of defences based on sovereignty and protectionism, safeguarding the defendant and the forum against fraud, lack of natural justice, inconsistency with public policy, jurisdictional mistake of the foreign court and duplication of judgments on the same issue between the same parties. Broadly speaking, the defences attain their objectives and serve their purposes. The recent development regarding the defence of natural justice is important in that it enhances protectionism by reference to considerations of justice. Another important development is the removal of the special treatment of fraud. In this regard, there seems to be a strong authority in Australia now, which is expressly based on *res judicata* considerations and which better balances the interests of the parties.

5. Recognition Under the *Foreign Judgments Act 1991* (Cwlth)

The *Foreign Judgments Act 1991* (Cwlth) (*'FJA'*) provides a framework for the enforcement of foreign civil judgments in Australia by a registration process. Based upon comity and reciprocity,[220] as distinguished from obligation, it operates in parallel to the common law and applies to specific judgments.

The present discussion focuses on this legislation by examining its scope, registration procedure, effect, and methods of setting aside registration. Although the *FJA* and the common law differ in their basic approach to the issue of recognition of foreign

220 See Second Reading Speech by the Honourable Micheal Duffy MP, Attorney-General, on the *Foreign Judgments Bill 1991*, House of Representatives, The Parliament of the Commonwealth of Australia, *Hansard*, 1991, 4218.

judgments, broadly speaking, both regimes produce similar results. For this reason, the discussion is shorter, endeavouring to highlight those features which distinguish the *FJA* from the common law.

Some Background and Dates

Having commenced operation on 27 June 1991,[221] the *FJA* gradually replaces similar recognition legislation at the state level.[222] The enactment of federal legislation did not mark any significant departure from most state legislative schemes, and was motivated by considerations of convenience, greater efficiency in negotiating and implementing arrangements with other countries, and better use of resources.[223] State legislation continues to apply to foreign judgments registered under such legislation prior to 27 June 1991.[224] With respect to countries covered by state legislation but not by the *FJA*, state legislation continued to apply until 27 June 1993.[225]

Scope

Although the focus of the present discussion is on private money judgments in actions *in personam*,[226] it is notable that the *FJA* under certain conditions can allow for the recognition of judgments

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221 Except for s. 21, which amends the *Foreign Proceedings (Excess of Jurisdiction) Act 1984* (Cwlth), which commenced operation on 27 October 1991.

222 The *FJA* and the state-level legislation are modelled on the *Foreign Judgments (Reciprocal Enforcement) Act 1933* (UK). See *Foreign Judgments (Reciprocal Enforcement) Act 1963* (WA); *Foreign Judgments (Reciprocal Enforcement) Ordinance 1954* (ACT); *Foreign Judgments (Reciprocal Enforcement) Act 1955* (NT); *Foreign Judgments (Reciprocal Enforcement) Act 1973* (NSW); *Foreign Judgments Act 1971* (SA); *Foreign Judgments Act 1962* (Vic.); *Foreign Judgments(Reciprocal Enforcement) Act 1963* (Tas.); *Reciprocal Enforcement of Judgments Act 1959* (Qld); *Foreign Judgments (Reciprocal Enforcement) Ordinance 1977* (CI); *Foreign Judgments (Reciprocal Enforcement) Ordinance 1978* (NI). For a discussion see Sykes & Pryles, fn. 22 at 125-35.

223 Second Reading Speech, fn. 220 at 4218-4219. Note that Murphy J, in *Hunt v. BP Exploration Co. (Libya) Ltd* (1980) 54 ALJR 205, said that enforcement of foreign judgments is a federal matter falling under the external affairs power (s. 51(xxix) of the Australian Constitution). His Honour also commented that 'I do not share the view that provision for enforcement of foreign judgments is plainly within the competence of the States' (at 209).

224 *FJA*, s. 19(a).

225 *FJA*, ss. 18 (1), 19(b).

226 Section 3(1) of the *FJA* specifically excludes from the definition of 'action *in personam*' matrimonial matters, the administration of the estate of deceased persons, bankruptcy and insolvency, mental health and the guardianship of infants. For the purpose of the *FJA*, money judgments can include punitive damages; *SA General Textiles v. Sun and Sand Ltd* [1978] 1 QB 279 at 299.

in rem,[227] non-money judgments,[228] and judgments representing governmental interests.[229] Where certain parts of a foreign judgment falls within the scope of the *FJA*, but other parts do not, the court may only register those parts of the judgment which comply with the *FJA*.[230]

For the purposes of the *FJA*, 'judgment' refers to a final or interlocutory judgment made by a court in civil proceedings, a judgment or an order made by a court in criminal proceedings for the payment of a monetary sum in respect to compensation or damages to an injured party, and certain arbitral awards.[231] The term 'country' means any region which is a foreign country, part of a foreign country, or for whose international relations a foreign country is responsible.[232]

Part 2 of the *FJA* deals with reciprocal recognition of foreign judgments by registration. It has a political flavour in that it is based upon substantial reciprocity, meaning that a judgment rendered by a foreign court can be enforced in Australia provided that there is a reciprocal arrangement between Australia and the country from which the judgment emanated.[233] Part 2 applies to judgments of superior courts of specified reciprocating countries.[234] It may, however, be extended to cover specified inferior courts of such countries.[235] Where no specification of inferior courts is made, a

227 *FJA*, s. 7(3)(b). For further discussion see Jones O.F.L., 'The New Commonwealth Foreign Judgments Legislation', Attorney-General's Department, *Eighteenth International Trade Law Conference*, Canberra, 18-19 October 1991.

228 *FJA*, s. 5(6)&(7). For further discussion see Jones, ibid.

229 *FJA*, s. 3(1). For further discussion see Jones, ibid.

230 *FJA*, s. 6(13).

231 *FJA*, s. 3(1).

232 Ibid.

233 In practice, arrangements with foreign countries are concluded following exchange of information with the relevant foreign agency about the respective laws on the recognition of judgments in civil matters; McGinnes J, Attorney-General's Department, *Letter; Foreign Judgments Act 1991*, 3 August 1995.

234 *FJA*, s. 5(1). The Schedule of the *Foreign Judgments Regulations (Amendment) 1993* (Cwlth) covers the superior courts of: Bahamas, British Columbia, British Virgin Islands, Cayman Islands, Dominica, Falkland Islands, Fiji, France, Germany, Gilbraltar, Grenada, Hong Kong, Israel, Italy, Japan, Manitoba, Montserrat, Papua New Guinea, St Helena, St Kitts and Nevis, St Vincent and the Grenadines, Seychelles, Singapore, Solomon Islands, Tuvalu and the United Kingdom.

235 *FJA*, s. 5(3). The Schedule of the *Foreign Judgments Regulations (Amendment) 1993* (Cwlth) specifies inferior courts of France, Germany, Israel, Italy, and Japan. Also, regs 3-5 of the *Foreign Judgments Regulations 1992* (Cwlth) extend the operation of the *FJA* to the High Court and District Court of New Zealand.

judgment of a superior court by way of an appeal from a judgment of an inferior court would fall outside the scope of Part 2.[236]

Registration

The common law conception that a foreign judgment must take the form of an action on debt has some definite and obvious merits in that it enables the recognising court, without hindrance of political considerations, to develop relatively liberal rules as to the recognition of foreign judgments.[237] However, the common law has some drawbacks associated with unnecessary delay and expense.[238] Such drawbacks can undermine the objectives of protecting private rights, freer trade, and freer movement of people. A system of registration, on the other hand, promotes simplicity, thereby making the enforcement of foreign judgments less troublesome.

> The Act dispenses altogether with the old procedure whereby the judgment creditor sues on the foreign judgment so as to obtain a new judgment in the Supreme Court which is then enforced against the local assets of the judgment debtor. Instead the foreign judgment is registered and once registered, subject to certain qualifications, execution may be effected against local assets.[239]

A judgment creditor who obtained a foreign money judgment to which the *FJA* applies has six years from the date of the judgment to file an application for registration in a State or Territory Supreme Court.[240] The money judgment is registrable if, at the date of application, the judgment:

is final and conclusive,[241] and
it has not been wholly satisfied,[242] and
it could be enforced in the country of the original court.[243]

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236 *FJA*, s. 5(9).
237 Yntema, fn. 7 at 400.
238 Id at 401.
239 *Hunt v. BP Exploration Co.*, fn. 223 at 208, per Stephen, Mason and Wilson JJ.
240 *FJA*, s. 6. Section 6(5) provides for an extension of that time period by court order. Applications regarding money judgments given under the *Commerce Act 1986* (NZ) may also be made to the Federal Court (sub-s. (2)).
241 *FJA*, s. 5(4)(a). It seems that the meaning of 'final and conclusive' is similar to that given by common law. Thus, a default judgment or a judgment that an appeal may be pending against it could be regarded as final and conclusive; see *Barclays Bank Ltd v. Piacun* [1984] 2 Qd R 476; Sykes & Pryles, fn. 22 at 127. Note that enforcement may be stayed under certain conditions: see a discussion below.
242 *FJA*, s. 6(6)(a). If it has been partially satisfied, the judgment may be registered for the unsatisfied portion (s. 6(12)).
243 *FJA*, s. 6(6)(b). A procedural defect which may form the ground for setting the judgment aside in the foreign country does not affect enforcement as long as

The *FJA* provides that if a judgment satisfies these conditions, the recognising court has no discretion to refuse registration.[244] Nevertheless, it was held that registration may be refused if prior to registration it appears that the judgment would be set aside upon application by the judgment debtor.[245] Although that may be regarded as a counter-productive measure, it could also be seen as a way to reduce future cost and delay in applications to set aside registration. Overall, then, if used sensibly, this discretion may promote efficiency and simplicity.

Once registered, the judgment, for *execution* purposes, has the same force and effect, and proceedings may be taken upon it, as if it was originally rendered by the court in which it was registered.[246] The judgment debtor must be served with notice of registration,[247] and if the debtor resides outside Australia, this could be a rather difficult task requiring special provisions to be made.[248] It is notable that the application for registration itself does not involve an action *in personam* requiring service of the court's process in or outside jurisdiction.[249]

The order of registration must indicate the time within which the judgment debtor may apply to have the registration set aside.[250] To protect the interests of debtors and avoid future unnecessary costs, execution cannot issue so long as it is competent for any party to set aside registration or until any such application is determined.[251] Also, the registering court may stay enforcement for a specified day or period, if it is satisfied that the judgment debtor has appealed, or is entitled and intends to appeal, against the judgment.[252]

Conclusiveness

The *FJA* reflects the common law position on conclusiveness. Section 12 provides that a registrable foreign money judgment is conclusive between the parties to it in all proceedings founded on the same cause of action and may be relied on by way of defence or counter-claim in any such proceedings, unless registration has been

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the judgment has not been set aside: *SA General Textiles v. Sun and Sand Ltd,* fn. 226.

244 Section 6(3).

245 *Crick v. Hennessy* [1973] WAR 74; *Re Word Publishing Co. Pty Ltd* [1992] 2 QR 336; Nygh, fn. 67 at 165.

246 *FJA*, s. 6(7).

247 See e.g. WA *Rules of the Supreme Court*, Order 44A, rule 8(1). See Nygh, fn. 67 at 163 for a detailed list of other jurisdictions.

248 See Nygh, id at 163-4

249 *Hunt v. BP Exploration Co. (Libya) Ltd*, fn. 223.

250 *FJA*, s. 6(4). The time period may be extended by court order (s. 6(5)).

251 *FJA*, s. 6(10).

252 *FJA*, s. 8.

set aside, or would have been set aside if the judgment were to be registered. It is notable that nothing in section 12 prevents an Australian court from recognising a judgment as conclusive of any matter of law or fact decided in the judgment if that judgment would be recognised as conclusive at common law.[253]

Setting Aside Registration

Section 7(2) lists twelve alternative grounds upon which registration *must* be set aside if satisfactorily established. Most of these grounds are straightforward. Given the scope of this article, they are not further elaborated upon. The latter five (*h* - *l* below), however, are further discussed as they highlight important policy considerations relevant to the objectives of this article.

(a) The judgment is not, or has ceased to be, a judgment to which Part 2 applies.
(b) The judgment was registered for an amount greater than was payable under it at the date of registration.
(c) The judgment was registered in contravention of the *FJA*.
(d) The judgment was reversed on appeal or otherwise set aside in the court of the country of the original court.
(e) The rights under the judgment are not vested in the person by whom the application for registration was made.
(f) The judgment has been discharged.
(g) The judgment has been wholly satisfied.
(h) The foreign court had no jurisdiction in the circumstances of the case.

The jurisdictional rules for actions in personam under the *FJA* are similar to these of the common law, but not to the extent of codification as there are some noticeable differences.[254] Section 7(3)(a)(i-v) provides that a foreign court to which the *FJA* applies would have jurisdiction under the *FJA*, if the judgment debtor:

- voluntarily submitted to the jurisdiction of that foreign court; or
- was plaintiff in, or counter-claimed in, the proceedings in that foreign court; or
- was a defendant in the foreign proceedings and had agreed, in respect of the subject matter of the proceedings, before the

253 *FJA*, s. 12(3). The reference to 'judgment' is confined to judgments on the merits, and does not cover the dispositive portion of judgments where damages are awarded or the suit is dismissed. See *Black-Clawson International Ltd v. Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591; Cheshire & North, fn. 47 at 403-405.

254 This ground does not cover instances where the foreign court had no jurisdiction at all under its own rules. The grounds under which this could be raised may be (a), (c), (d) or (e) set out above.

proceedings commenced, to submit to the jurisdiction of the foreign court;[255] or

- was a defendant in the foreign proceedings and, at the time when the proceedings were instituted, *resided* in, or (being a body corporate) had its principal place of business in, the foreign country;[256] or
- was a defendant in the foreign proceedings and the proceedings in the foreign court were in respect of a transaction effected through or at an office or place of business that the judgment debtor had in the foreign country.[257]

In addition, section 7(5) clarifies the limits of voluntary submission in the same way, discussed above, which section 11 modifies the common law.

(i) The judgment was obtained by fraud

It appears that this ground is equivalent to the common law defence of fraud.[258] This means, as Rogers CJ CommD indicated,[259] that the decision in *Keele v. Findley* changed the statutory interpretation of defence of fraud.

(j) The judgment debtor did not receive notice of the foreign proceedings in sufficient time to enable the judgment debtor to defend the proceedings and did not appear.[260]

This ground echoes the traditional common law requirement as to due notice.[261] It is important to note that there is no general

255 Note that this is not confined to contractual arrangements but to any written or oral statement indicating a willingness to submit; see *SA General Textiles v. Sun and Sand Ltd,* fn. 226; Sykes & Pryles, fn. 22 at 130-31; Cheshire & North, fn. 47 at 400-401.

256 This rule is more restrictive with respect to corporations than the equivalent common law is, since at common law a branch office would be enough; Nygh, fn. 67 at 168. It may be assumed that 'resided' is equivalent to 'was present', i.e. a temporary visit would suffice; Nygh, fn. 67 at 168. However, Cheshire & North (id at 399) and Dicey & Morris (fn. 2 at 527) argue that the reference to 'resident' excludes the relevance of mere presence. The issue is still to be determined at the judicial level.

257 This rule forms new grounds which are not embraced by common law rules.

258 Cheshire & North, fn. 47 at 402.

259 (1990) 21 NSWLR 444 at 457; See Brereton, P., 'Refusing to enforce foreign judgments on the grounds of fraud' (1993) 10 *Australian Bar Review* 224 for a discussion about the view expressed by Rogers CJ CommD.

260 The term 'proceedings' in such context refers to the action for principal relief only, as distinguished from interlocutory proceedings. See *Brockley Cabinet Co. Ltd v. Pears* (1972) 20 FLR 333; Nygh, fn. 67 at 166.

natural justice ground. Does it mean that the common law grounds concerning lack of opportunity to be heard before an impartial tribunal and other instances of substantial injustice have no corresponding provisions under the *FJA*? It may be argued that it is unlikely that the Legislature would enable registration to be set aside on grounds of insufficient notice, but not on other grounds of lack of natural justice.

(k) The enforcement of the judgment would be contrary to public policy

Dicey & Morris maintain that such a provision is the same as the common law defence of public policy.[262] If this is correct, the concept of natural justice is severely circumvented under the *FJA*, unless courts would be willing to supplement the narrow defence of natural justice with a broader defence of public policy.

(l) Previous determination

Section 7(2)(b) gives effect to *res judicata* considerations. The section provides that registration may be set aside if the recognising court is satisfied that the matter in dispute in the foreign proceedings had before the date of the judgment in the original court been the subject of a final and conclusive judgment by a court having jurisdiction on the matter.

The Relationship Between the *FJA* and the Common Law

Can a judgment which comes under the regime established by Part 2 of the *FJA* be recognised at common law? Section 10(1) provides that:

> No proceedings for the recovery of an amount payable under a judgment to which [Part 2] applies, other than proceedings by way of registration of the judgment, are to be entertained by a court having jurisdiction in Australia.

It was argued that such a provision should not prevent the judgment creditor from suing at common law on the original cause of action by taking advantage on the non-merger rule.[263] However, if one considers that the *FJA* aims at simplifying recognition of foreign judgments, one may conclude that a common law action on the

261 In that it requires 'actual notice': *Barclays Bank Ltd v. Piacun*, fn. 241 at 478, per Connolly J.
262 Fn. 2 at 528. See also Cheshire & North, fn. 47 at 402, 680.
263 Read, fn. 47 at 300; Cheshire & North, id at 403, but see Nygh, fn. 67 at 170.

original cause of action would not necessarily promote that objective. And if that is not a sufficient argument, then one may refer to the *Explanatory Memorandum* of the *FJA*, which says that section 10(1):

> provides that the *only* means of enforcement in Australia of a judgment to which Part 2 applies...is by proceedings under the Act for registration of the judgment.[264]

Hence, to the extent that explanatory memorandums can to be taken into account for interpretation purposes,[265] it seems that no action on the original cause of action may be permitted with respect to judgments falling within the scope of Part 2.

Recognition Under the *FJA* Summarised

The *FJA* contains most of the rules found at common law, but is based on reciprocity rather than obligation. This difference renders the *FJA* more limited in scope, as it is discriminatory and confined to judgments of specified courts of specific countries.

A major advantage of the *FJA* is the system of registration it operates upon. This not only enhances the efficient allocation of resources in the Australian judicial system, but also assists the parties in saving resources and avoiding unnecessary delay.

The *FJA* contains provisions aiming at the protection of defendants and the interests of the forum. Most of these provisions are analogous to the defences and recognition requirements found at common law, with the notable exceptions of international jurisdiction and natural justice. As to the former, the *FJA* is an improvement in comparison to the common law, but its precise scope is yet to be determined at the judicial level. With respect to the latter, the *FJA* is clearly unsatisfactory. It offers a limited protection against lack of natural justice and does not extend to cover instances of lack of opportunity to be heard before an impartial tribunal, let alone substantial injustice.

The *FJA* seems to have removed the option of suing on the original cause of action with respect to judgments to which it applies. This represents an important re-balancing of plaintiff-defendant interests, as well as providing significant support to *res judicata* objectives.

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264 Explanatory Memorandum, *Foreign Judgments Bill 1991*, House of Representatives, The Parliament of the Commonwealth of Australia, 9 (Circulated by authority of the Attorney-General, the Honourable Michael Duffy MP) (emphasis added).

265 Section 2(e) *Interpretation Act 1901* (Cwlth) explicitly allows for such documents to be used for interpretation purposes.

6. Suggestions for Reform—The New Regime

The discussion thus far has examined the common law and the *FJA* in light of the policy considerations associated with the recognition of foreign judgments in Australia. It critically examined the relationship between rules and policy objectives, and highlighted areas presenting inconsistency and disparity. This part of the article proceeds to suggest improvements to the current law. The suggested improvements are to be incorporated into a single statutory regime ('the New Regime') which would exclusively cover the field of the recognition of *in personam* foreign money judgments.

Determination of areas requiring reform

The following discussion is divided into three parts. The first mentions areas which do not require reform. The second sets out areas in need for reform but which do not require detailed examination. The third discusses those areas requiring reform, and which warrant detailed examination.

(i) Areas Which Need Not Be Further Discussed

Given the scope of this article, it would be futile to further discuss areas which: (a) the common law and the *FJA* treat in a similar manner; and (b) their treatment is consistent with policy objectives. Accordingly, the following rules should survive reform:

1. The basic requirements for recognition, apart from that of jurisdiction.
2. Conclusiveness.
3. Defences, apart from natural justice.

(ii) Areas of Reform for Mention Only

Where one regime addresses an area better than the other regime and the reasons for preferring that solution are already discussed above, only a brief discussion setting out the preferred rule is required. In light of the above discussion the following changes are recommended:

- Actionability

The common law provides for two possible actions: on the foreign judgment itself and on the original cause of action, whereas the *FJA* allows only for the former. Considerations of fairness and *res judicata* firmly point at the abolition of the common law non-

merger rule and the resulting claim based on the original cause of action.

- Registration

The *FJA* provides for a registration process, whilst under the common law a new judgment by the forum has to be obtained. Simplicity and convenience suggest that a system of registration should prevail over the common law approach requiring a fresh judgment.

- Natural justice

The common law provides for a broader scope of the defence of natural justice than that provided under the *FJA* concerning only due notice. To ensure adequate protection to judgment debtors, the New Regime should embrace the common law approach to natural justice based on the concept of substantial justice.

(iii) Areas of Reform Requiring Further Analysis Identified

There are two areas of reform which require further discussion: (a) conceptual basis; and (b) international jurisdiction. The following part of this discussion examines their flaws and proposes improvements.

The Conceptual Basis of the New Regime

(i) Reciprocity Re-Examined

In his Second Reading Speech on the *Foreign Judgments Bill*, the then Attorney-General, Michael Duffy, said:

> Considerations of justice, convenience, greater certainty in international transactions and comity between nations show the desirability of the scheme reflected in this Bill.[266]

Comity and reciprocity represent a marked departure from the basic common law principles of recognition. The operative question, it is submitted, is whether this departure is consistent with the objectives that the Attorney-General had in mind.

Reciprocity has a twofold purpose: (a) to induce other countries to recognise Australian judgments, and thus (b) to protect Australian interests abroad. This was clearly stated by the current Attorney- General, Michael Lavarch. In the Parliamentary Debate on the *FJA*, he argued that the *FJA* would 'help Australians, companies and individuals in their dealing with foreign countries in

266 Second Reading Speech, fn. 223 at 4219.

making sure that they also can enforce judgments in [foreign] countries.'[267]

Reciprocity, nevertheless, has been the subject of much criticism.[268] Firstly, there is no guarantee that the two-fold objective of reciprocity can be achieved. In *Nicol v. Tanner*,[269] the Minnesota Supreme Court discussed *Hilton v. Guyot*,[270] and said that:

> there is serious doubt that *Hilton* achieved either of its two probable goals: (1) protecting Americans abroad; and (2) encouraging foreign nations to enforce United States judgments. If protecting American interests is a goal of *Hilton*, it is clear that reciprocity does not achieve that goal because it does not look to the fairness or persuasiveness of the foreign judgment.[271]

In addition, the political nature of reciprocity diverts the attention of courts from justice and the essential issue of recognition.[272] Reciprocity operates to discriminate against judgments obtained in these foreign countries which do not favour recognition of foreign judgments.[273] Concerns, therefore, may arise with respect to the relationship between reciprocity and the objective of protecting private rights. In *Nicol v. Tanner*, the court made the point by stating that:

> [t]he judgment of a foreign nation, when rendered in a foreign proceeding in which the foreign court had jurisdiction and the issues were fully and fairly adjudicated, should be entitled to no less effect on policy grounds than a judgment of another state.[274]

267 Debate: *Foreign Judgments Bill 1991*, House of Representatives, The Parliament of the Commonwealth of Australia, *Hansard*, 1991, 4986 at 4990 (emphasis added).

268 See e.g. Kennedy, G.D., 'Recognition of Judgments in Personam: The Meaning of Reciprocity' (1957) 35 *Canadian Bar Review* 123; Bishop, R.D. & Burnette, S., 'United States Practice Concerning Recognition of Foreign Judgments' (1982) 16 *International Lawyer* 425; Reese, fn. 52; Casad, fn. 19.

269 310 Minn 68 at 77 (1976).

270 159 US 113 (1895), in which the US Supreme Court adopted reciprocity as a prerequisite for recognition.

271 *Nicol v. Tanner*, fn. 269 at 76-77 (the Court).

272 Cheshire & North, fn. 47 at 4; Reese, fn. 52 at 793.

273 Kennedy, fn. 268 at 131.

274 *Nicol v. Tanner*, fn. 269 at 76-77 (the Court).

Moreover, reciprocity flies in the face of *res judicata* objectives.[275] If a country refuses to recognise a foreign judgment on retaliation basis, re-litigation may be the only way for judgment creditors to vindicate their rights. Thus, judicial resources are wasted, costs and delay increase, and the scope for harassment tactics is enhanced. *Res judicata* considerations are therefore 'thwarted by the reciprocity requirement'.[276]

In the specific Australian context, reciprocity would appear even more undesirable. If one examines the list of reciprocating countries, one would notice the absence of major trading partners.[277] Hence, 'although the intent of the Commonwealth Parliament is admirable; its effect—at present—is severely debilitated by the lack of players'.[278]

This, however, may not be surprising. Australia is a relatively small player in the international arena. It is unreasonable to expect bigger powers to change their laws merely because it would protect their relatively few commercial interests in Australia.[279] Furthermore, the lack of an arrangement with Australia does not leave the interests of such countries unprotected. Their corporations

275 Bishop & Burnette, fn. 268 at 435.

276 *Nicol v. Tanner,* fn. 269 at 76-77 (the Court).

277 Countries which can be classified as major trading partners and with which Australia has no reciprocal arrangements are: The US, China, Indonesia, Singapore, the Netherlands, Hong Kong, Republic of Korea and Taiwan. For present purposes, the importance of a trading partner is determined by reference to the value of merchandise exports and imports between 1990-1993. The figures relied on are set out in Australian Bureau of Statistics, *Year Book Australia 1995 No. 77*, Canberra, 1995, 766-768. For a discussion on the particular difficulties associated with reaching an arrangement with the US, refer to Jones, O.F.L., 'Enforcement of Judgments: Work of the Hague Conference on Private International Law', Attorney-General's Department, *Twentieth International Trade Law Conference*, Canberra, 1-13 November 1993, 6-8.

278 Bates, fn. 105 at 171

279 This position can change if Australia enters into a multinational convention for reciprocal recognition and enforcement of foreign judgments, which involve certain difficulties: see Jones, fn. 277 at 2-7. Although the chances are currently slim, it is notable that in the context of multinational conventions, the issue of reciprocity may become much more important. For example, almost half of the signatories to the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (New York, 1958) have made the reciprocity reservation (see Craig, W.L., Park, W.W. and Paulsson, J. 1990, *International Chamber of Commerce Arbitration*, 2nd edn, Oceana Publications Inc., USA, app. 1-19). Thus, the very nature of multinational conventions and the strong cooperative element they are based on may put the reciprocity consideration under a different light, thereby maximising the benefits which could be attributable to reciprocity.

and individuals could always resort to the common law, which by virtue of the doctrine of obligation, does not require reciprocity.[280]

It is true that recognition under the *FJA* makes enforcement cheaper and faster, but this is hardly a sufficient incentive for a foreign country to change its recognition rules. After all, the delay occurs in the Australian court system, not in foreign courts. As to cost, it is not a direct problem of the foreign government, but of the private litigants. So, Australian judgment debtors defending their interests in Australia are likely to pay more in legal fees because foreigners from non-reciprocating countries are forced to use the common law. In other words, if the *FJA* were to be open to persons from any country, Australians would suffer less inconvenience.

(ii) The Doctrine of Obligation Re-Examined

The common law doctrine of obligation does not appear to create major difficulties if one is willing to accept the implied contract which the doctrine relies upon. Otherwise, it may be preferable to replace the implied contract theory with a statutory obligation. This solution may still present some conceptual difficulties, but nonetheless, would make the framework sounder than it is now. It has to be remembered that sovereignty and territoriality render all recognition doctrines weak on the point where foreign interference is allowed, and more importantly, that legislation has been commonly used to attribute liabilities, to create rights, and to form legal fictions.[281]

Beyond that, the doctrine of obligation seems highly consistent with policy objectives. The obligatory element of the doctrine reinforces the policy objective of protection of private rights, and in addition, the doctrine is apolitical since it does not discriminate between countries, as reciprocity does.

But perhaps the most important attribute of the doctrine is that it discourages re-litigation. In that, the doctrine of obligation is

280 One may suggest the abolition of recognition at common law in order to increase pressure on other countries to recognise Australian judgments. This radical change, however, would place Australia in a position of a non-recognising country, which not only would adversely affect Australia's commercial interests and relations, but could also trigger retaliation from countries that currently recognise Australian judgments.

281 E.g. the concept of corporate personality. It should be mentioned that another issue arising under the doctrine is its limited scope, i.e. it can apply only to money judgments since the foreign judgment is treated as a source of debt. Although other remedies fall outside the scope of this research, it is notable that a new statutory obligation to do or not to do something by virtue of a foreign judgment may enable the recognition of non-money judgments. A further discussion of such reform, however, must be the subject of another research.

highly compatible with *res judicata* doctrine. The difference between the doctrines is not in result but in reasoning. The doctrine of obligation discourages re-litigation primarily upon grounds of fairness and justice founded on an implied contract, as it would be unjust to the plaintiff to allow the defendant who had impliedly agreed to obey a judgment of a particular court to escape liability. On the other hand, the doctrine of *res judicata* discourages re-litigation primarily upon grounds of efficiency and allocation of resources. This combination explains why at common law most of the rules can be rationalised by reference to obligation as well as *res judicata*. The two frameworks complete each other in reasoning and agree on results, a quality ensuring internal consistency at the policy level, without the conceptual and practical difficulties posed by reciprocity.

(iii) Conceptual Basis: Recommendation

It is submitted that the dual basis of obligation and *res judicata* can provide a comprehensive framework catering for the objectives of fairness, private rights, finality of litigation and international commerce. It is recommended to base the New Regime on obligation and *res judicata*, and not upon comity and reciprocity.

International Jurisdiction

(i) The Need for Reform

The jurisdictional rules of the common law and the *FJA* present a mechanical approach under which classes of cases are categorised under an inflexible set of rules. The rules derive from two broad bases. The first is presence, physical or commercial; the second is submission, in advance or subsequent to service. The submission base, as modified by the *FJA*, seems fair and reasonable. It either binds the defendant to a contractual promise to submit to a particular jurisdiction, or to a submission made by appearance within the safeguards set out by the *FJA*,[282] which would be incorporated into the New Regime.

The presence base as defined by the common law, however, is in need for reform. At times the rigidness of the rules can lead to arbitrary results, as the discussion on mere presence demonstrated. In other instances the rules may result in unfairness since individuals and corporations are treated differently. The *FJA* appears to cure some of these defects, but there is a great deal of

282 In s. 11, discussed above in the context of the requirement of international jurisdiction at common law.

uncertainty with respect to the way the *FJA* deals with mere presence.[283]

Furthermore, under both regimes the jurisdictional rules do not cover situations where the defendant was served outside the jurisdiction and did not submit to the jurisdiction of the foreign court. This may be based on protectionism but may undermine other crucial policy objectives. Assume, for example,[284] that an electrician was fatally injured in Iceland while removing a spent light globe manufactured in Australia by a company that neither carried on business nor held any property in Iceland. The company sold all its products to distributors and none to consumers and had no sales-persons or agents in Iceland. The electrician's spouse and children brought an action against the company in Iceland. The company ignored the action and the plaintiffs obtained a default judgment. Under the existing jurisdictional rules, the electrician's spouse and children may obtain a symbolic victory in an Icelandic court, but would be unable to enforce that judgment in Australia for want of international jurisdiction. Their only redress may be possible through an expensive and inconvenient suit brought in Australia. Such a result, it is submitted, would fly in the face of the objectives regarding the protection of private rights, *res judicata*, and most importantly, justice.

It appears, then, that the current presence rules fail to echo the underlying rationale behind the international jurisdiction requirement. As stated earlier, the requirement should depend upon the existence of a nexus between the defendant and the foreign court, a nexus which would be sufficient to justify the recognition of the foreign judgment by the forum. If it is accepted that five minutes of presence in a foreign country should not constitute such nexus, and that the distribution of products in a foreign country should constitute such nexus, then there is no escape from the conclusion that at least in marginal cases the presence rule under-achieves its goals.[285]

This position seems to flow from the fact that the current rules were formulated a good few decades ago and suited the surrounding environment at that time. With the passage of time, these rules have become incompatible with the objectives which they were supposed

283 See fn. 256.

284 The facts here are based on *Moran v. Pyle National (Canada) Ltd* (1973) 43 DLR (3d) 239.

285 See *Morguard Investments*, fn. 29; von Mehren & Trautman, fn. 11 at 1618-21.

to accomplish. In *Morguard Investments*, La Forest J, speaking for the Canadian Supreme Court, stated that:

> the world has changed since the above rules were developed in 19th century England. Modern means of travel and communication have made many of these 19th century concerns appear parochial. The business community operates in a world economy and we correctly speak of a world community even in the face of decentralised political and legal power. Accommodating the flow of wealth, skills and people across state lines has now become imperative. Under these circumstances, our approach to the recognition and enforcement of foreign judgments would appear ripe for reappraisal.[286]

(ii) Basis of Reform: 'Real and Substantial Connection'

To remedy this situation, two basic approaches may be employed. First, a new set of rules may be formulated to reflect modern realities. Alternatively, a single rule reflecting underlying purposes, by which individual cases could be resolved, may be framed. The first approach has the advantages of certainty and predicability. On the other hand, the second approach offers flexibility and a better reflection of policy objectives over time. As long as the flexible approach does not result in a high degree of uncertainty, it would enable a court to better determine the issue of jurisdiction rather than to 'seek a solution in a mechanical equivalence principle'.[287]

In *Morguard Investments* the court chose the second approach. La Forest J referred to first principles, saying that 'what must underlie a modern system of private international law are principles of order and fairness, principles that ensure security of transactions with justice.'[288] He proposed to focus on the question of whether the foreign court properly and appropriately assumed jurisdiction. The court noted that the traditional rules may be just, but added that jurisdiction will be properly assumed if there is 'a real and substantial connection with the action'.[289]

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286 *Morguard Investments*, id at 270.

287 von Mehren & Trautman, fn. 11 at 1620.

288 *Morguard Investments*, fn. 29 at 269, per La Forest J.

289 Id at 278. It should be noted at this stage of the discussion that the court's words on international jurisdiction in the international context are technically *obiter*, but are well considered *dicta* of a unanimous court. Besides, the principles laid down in *Morguard Investments* were followed and applied to the recognition of non-Canadian judgments in *Minkler and Kirshbaum v. Sheppard* (1991) 60 BCLR (2d) 360; *Clarke v. Lo Bianco* (1991) 84 DLR (4th) 244; *Federal Deposit Insurance Co. v. Vanstone* (1992) 88 DLR (4th) 448; *McMickle v. Van Straaten* (1992) 93 DLR (4th) 74; *Moses v. Shore Boat Builders Ltd* [1992] 5 WWR 282. For a further discussion on *Morguard*

In an article published before *Morguard Investments*, Briggs[290] also indicated that the international jurisdiction requirement was ripe for reform and that a flexible rule may be preferable. He suggested that the doctrine of *forum non conveniens*, which determines when the forum should assume or decline jurisdiction, should be extended to provide a new basis for the taking of jurisdiction for recognition purposes.

> Perhaps "did the defendant have a real and substantial connection with the forum of the judgment?" would have done the trick...we should recognise judgments of a forum to whose jurisdiction the defendant submitted, or which was in any event the natural forum for the action to be prosecuted in.[291]

(iii) Possible Approaches to 'Real and Substantial Connection'

Blom[292] suggested two models for looking at 'real and substantial connection'. The first is associated with the *forum non conveniens* doctrine, and the second is based upon a subjective examination of the defendant's link to the foreign court.

The *forum non conveniens* model is based on the notion that the foreign court 'must meet a minimum standard of suitability'.[293] Under the model, the recognising court would look at factors such as the respective interests of the plaintiff and the defendant, convenience, expense, the law governing the transaction, availability of relief in the foreign court, and legitimate personal and juridical advantage.[294]

It is notable that Briggs relied on the doctrine of *forum non conveniens* as defined in *Spiliada Maritime Corporation v. Cansulex Ltd.*[295] In that case, the House of Lords adopted the notion that for every dispute there is a natural forum with which the

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Investments, refer to Black, V., 'The Other Side of *Morguard*: New Limits on Judicial Jurisdiction' (1993) 22 *Canadian Business Law Journal* 4; Blom, J., 'Conflict of Laws— Enforcement of Extraprovincial Default Judgments— Real and Substantial Connection' (1991) 70 *Canadian Bar Review* 733; Edinger, fn. 100; Finkle, P. & Labreque, C., 'Low-Cost Legal Remedies and Market Efficiency: Looking Beyond *Morguard*' (1993) 22 *Canadian Business Law Journal* 58.

290 Briggs, A., 'Which Foreign Judgments Should We Recognise Today?' (1987) 36 *International and Comparative Law Quarterly* 240.

291 Id at 243,249 (footnote omitted).

292 Fn. 289.

293 Id at 741.

294 Id at 741-2. For a detailed examination of relevant factors associated with the doctrine of *forum non conveniens* refer to Harris, W., 'Life After *Voth*—The Application of Forum Non Conveniens by Australian Courts in Transnational Proceedings' (1992) 22 *Queensland Law Society Journal* 21.

295 [1987] AC 460 (*'Spiliada'*).

action has the 'most real and substantial connection'.[296] In *Voth v. Manildra Flour Mills Pty Ltd*,[297] however, the High Court of Australia rejected the notion of 'natural forum' saying that the complexity of international transactions and relationships between parties can give rise to situations where there may be 'more than one forum with an arguable claim to be the natural forum'.[298] Therefore, it is important to bear in mind that under the Australian jurisprudence of private international law, the *forum non conveniens* model would have a broader application than that set out by Briggs.

The second model suggested by Blom is based on the notion that jurisdiction is legitimate if the action is brought in any forum within which the defendant either regularly lives or carries on business. Thus, in determining whether there is a real and substantial connection between the defendant and the foreign forum, the recognising court would look at factors relating to the defendant's activities and residence, and not at factors relating to the interests of the plaintiff, efficiency or convenience.[299]

This second model, it is submitted, was the one employed by the House of Lords in *Indyka v. Indyka*,[300] which involved the recognition of a foreign divorce decree. The court in *Indyka* looked for a 'real and substantial connection' between the applicant and the foreign forum,[301] rather than the connection between the action and the foreign forum. It is notable that the defendant-focus used under *Indyka*, which emphasises the seriousness of a bona fide connection, means that apart from residence, nationality and probably domicile would also be relevant.[302] In a commercial context, it is submitted, the flexibility of the *Indyka* model would allow the assessment of connections such as the place of business where goods or services are provided, agency, and commercial representation.

296 Id at 478, per Lord Goff (emphasis added).
297 (1990) 171 CLR 538 ('*Voth*'); see also *Oceanic Sun Line Special Shipping Co. Inc. v. Fay* (1988) 165 CLR 197.
298 *Voth*, id at 558, per Mason CJ, Deane, Dawson and Gaudron JJ.
299 Blom, fn. 289 at 742.
300 [1969] 1 AC 33 ('*Indyka*').
301 In that case the court established a real and substantial connection because the former wife had her matrimonial home in the foreign forum and had continued to reside there after her husband had left her.
302 See a discussion in Nygh, fn. 67 at 402 and authorities cited therein. The reference to domicile is based upon the similarity between domicile and ordinary residence (see Nygh, fn. 67 at 144).

(iv) The Preferred Approach to 'Real and Substantial Connection'

Although the court *in Morguard Investments* contemplated that more than one forum may be proper and appropriate for recognition purposes, the reasoning in *Morguard Investments* provides support for the two models of the test of 'real and substantial connection'.[303] Briggs, however, clearly prefers the forum non conveniens model, with the implications arising under *Spiliada*.

In Australia, a *Voth*-based *forum non conveniens* model is rather tempting. Its incorporation into the Australian law governing recognition would create an almost unified system of private international law by equating the rules governing international jurisdiction with the rules governing *forum non conveniens*.

However, it is submitted that policy objectives point to the opposite direction, that of *Indyka*. First, as mentioned earlier, a single test which operates to increase uncertainty beyond a certain level is not desirable. The *Indyka* model is narrower as it is confined to the defendant. It would therefore, result in less uncertainty than the *forum non conveniens* model, under which a whole range of factors can be taken into account. If one bears in mind that recognition of foreign judgments should reflect simplicity, then one may conclude that a less involved application of the jurisdiction test would be more compatible with the general spirit of the reform suggested, under which a system of registration would be in operation.

Second, the *Indyka* model's focus on the defendant accords with the doctrine of obligation. By contrast, the *forum non conveniens* model concentrates on the connection between the action and the foreign forum, and is therefore less compatible with the doctrine.

Third, the doctrine of *forum non conveniens* is designed to determine whether to decline or assume jurisdiction and to avoid harassment of defendants. As a result, certain factors relevant under the doctrine, such as the plaintiff's choice of forum and legitimate personal and juridical advantage, may be extraneous to recognition purposes.

Fourth, the *Indyka* model would take into consideration most of the existing jurisdictional elements provided by the common law and the *FJA*. The difference would be in flexibility, not in focus. Consequently, the experience acquired by courts and advisers would not be wasted, but rather would assist them in deciding cases and advising clients.

303 Blom, fn. 289 at 742; Edinger, fn. 100 at 32.

Last, the *Indyka* model seems more compatible with international standards than the *forum non conveniens* model because such standards are defendant-oriented. Trautman and von Mehren suggested that the *Indyka* model is 'implicit in...international efforts to frame rules for recognition practices'.[304] They compared the model to the *Draft Hague Convention*,[305] which lists various jurisdictional bases such as the defendant's habitual residence and the principal place of business.[306] It is submitted that the *Indyka* model is also substantially compatible with the *Brussels Convention*[307] and the *Lugano Convention*.[308] Under these Conventions, the domicile of the defendant is the key concept for the determination of jurisdiction.[309] The concept of domicile, in turn, is based upon a 'continuing connection with a local community'.[310] The *Lugano Convention* is capable of extension to any country which accepts its terms; if and when Australia joins in,[311] the process would be less troublesome.

(v) International Jurisdiction: Recommendation

It is recommended to preserve the current submission jurisdictional rules, but to replace the rules involving physical or commercial presence with a single rule based upon the existence of a real and

304 Fn. 11 at 1620.

305 *On the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters 1966.*

306 For a discussion on the *Hague Conference's* focus on jurisdiction refer to the sources indicated in von Mehren & Trautman, fn. 11 at 63. For an updated discussion refer to von Mehren, T., 'Recognition and enforcement of Foreign Judgments: A New Approach for the Hague Conference?' (1994) 57(3) *Law and Contemporary Problems* 271; Lowenfeld, A., 'Thought About a Multinational Judgments Convention: A Reaction to the von Mehren Report' (1994) 57(3) *Law and Contemporary Problems* 289.

307 *The EEC Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968.*

308 *Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1988.*

309 *Brussels Convention*, art. 2; *Lugano Convention*, art. 2.

310 Russell, K.A., 'Exorbitant Jurisdiction and Enforcement of Judgments: The Brussels System as an Impetus for United States Actions' (1993) 19 *Syracuse Journal of International Law & Commerce* 57 at 73. See also Cheshire & North, fn. 48 at 284-85, 342. For a further discussion on jurisdiction under the Brussels and the Lugano Conventions refer to Young, J., 'Extending the Free Movement of Judgments in Western Europe' [1992] *Lloyd's Maritime and Commercial Law Quarterly* 109; Struycken, A.V.M., 'The Rules of Jurisdiction in the EEC Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters' (1978) 25 *Netherlands International Law Review* 354; Tebbens, H.D., 'Jurisdiction and Enforcement in International Contract Law', in Sarcevic, P. (ed.) 1992, *International Contracts and Conflicts of Laws*, Graham & Trotman / Martinus Nijhoff, England, 124.

311 On that, see Jones, fn. 277.

substantial connection between the defendant and the foreign forum.

7. Conclusion

This article approached the recognition of *in personam* foreign money judgments in Australia by pursuing two objectives. First, it set out the current recognition regimes, common law and legislation, and examined their relationship with policy objectives. Second, it outlined and argued reform proposals.

The discussion of the current law concluded that the two regimes rely on different recognition doctrines, the common law on the doctrines of obligation and *res judicata* and the *FJA* on comity and reciprocity. The regimes also differ in their approach to the jurisdictional base of presence, actionability, recognition procedure and the defence of natural justice. Beyond that, both regimes appear to provide for similar recognition rules.

The examination identified flaws in the current law, in terms of consistency with policy objectives. The protection of private rights, for example, seems to be undermined by the narrow defence of natural justice found under the *FJA*, and by the jurisdictional base of presence used by both regimes. Also, both regimes operate to offend *res judicata* considerations associated with efficient resource allocation and convenience in the administration of justice. This is demonstrated by the availability at common law of the action on the original cause of action, and by the requirement of reciprocity found under the *FJA*.

To achieve policy objectives, the article proposed the creation of a new statutory regime to govern the recognition of *in personam* money judgments in Australia. This regime would contain those rules currently used at common law and under the *FJA* which are consistent with policy objectives. These include recognition requirements apart from that of international jurisdiction, conclusiveness, and defences except from that of natural justice. Where the common law and the *FJA* differ, and one provides for a solution which adequately addresses policy considerations, that solution would be adopted. The solutions preferred were those of the *FJA* regarding registration and actionability, and those of the common law regarding the defence of natural justice and the conceptual basis of obligation coupled with strong emphasis upon *res judicata*. With respect to the jurisdictional base of presence, which none of the regimes adequately address, a new solution would be provided. Under this proposal, a real and substantial

connection between the defendant and the foreign forum would have to be established.

Whilst international commerce, technology, communication, and mobility of persons and goods have undergone significant changes during the second half of this century, recognition rules almost remain intact. Anglo-Australian courts have not been dynamic enough to update the common law recognition rules, and the legislature did not demonstrate much innovation when enacting the *FJA*. As a result, Australia has two recognition regimes, the rules of which were formulated to reflect the realities of the first half of this century. The reform suggested would close the gap which has been created by the growing disparity between underlying policy objectives and recognition rules. It would promote the protection of private rights, international trade, efficiency and convenience, and be capable of accommodating further changes to the modern environment in which private litigants operate.

8. Appendix 1

This appendix contains drafting suggestions of the core provisions which may be included in any relevant legislation based on the analysis set out in this article. The *FJA* may be the basis of such legislation, after modifications reflecting the ideas and the objectives set out in the reform section above.

Actionability

To remove doubts, section 10(1) of the *FJA* may be modified as follows:

> No proceedings for the recovery of an amount payable under a judgment to which this Part applies, *and no proceedings on the original cause of action of a judgment to which this Part applies*, other than proceedings by way of registration of the judgment, are to be entertained by a court having jurisdiction in Australia.

Registration

The registration mechanism provided for by the *FJA* (s. 6) seems adequate and hence the provisions dealing with this mechanism may remain intact.

Natural Justice

A new section 7(2)(a)(v1) should be added:

> *that the judgment debtor suffered substantial injustice during the proceedings in the original court.*

Reciprocity

Section 5(1)(2)(3) of the *FJA* should be repealed. In its stead, a new provision should be inserted:

> *This Part is based upon the principle that the judgment of a court of competent jurisdiction, as provided by section 7(3) of this Act, over the judgment debtor imposes an obligation on the judgement debtor to pay the sum for the judgment is given, and this obligation shall be registered and be treated as provided by section 6 of this Act, unless one or more of the grounds set out in section 7(2) of this Act is satisfied.*

It should be noted that a broader amendment must be made in order to embrace non-money judgments (s.5(6)&(7)). Also, s.5(8) needs technical changes by removing references to specified courts.

International Jurisdiction

Section 7(3)(a)(iv) of the *FJA* may be amended as follows:

> if the judgment debtor was a defendant in the original court, and at the time when the cause of action arose, the defendant had a real and substantial connection with the country of the foreign court.