

The Fragmentation of (Mutual) Trust in Commonwealth Africa – A Foreign Judgments Perspective*

Abstract

Mutual trust plays an important role in facilitating the recognition and enforcement of foreign judgments. The 2019 Convention on the Recognition and Enforcement of Foreign Judgments also reflects some degree of mutual trust, although not explicitly. Commonwealth African countries seem to be influenced by mutual trust but have not yet adopted any coherent approach in the conflict of laws. This incoherence has impeded the recognition and enforcement of foreign judgments especially in Africa. This article seeks to understand the principle of mutual trust in its EU context and then compare it with the subtle application of mutual trust in the recognition and enforcement of foreign judgments in Commonwealth Africa. The article illustrates this subtle and rather unarticulated application of mutual trust primarily through decided cases and relevant statutory provisions in the Commonwealth African jurisdictions considered. The article then considers how the subtle application of mutual trust has sometimes resulted in parallel efforts to promote the recognition and enforcement of foreign judgments and how a proliferation of legal regimes can undermine legal clarity, certainty and predictability. A progressive application of mutual trust will help to ensure African countries maximise the benefits of a global framework on foreign judgments.

Kew words: mutual trust, foreign judgments, Commonwealth Africa, Hague Judgments Convention, European Union, common law, legal cultures, regional integration

I Introduction

The principle of mutual trust is a fundamental aspect of EU law, especially in the Area of Freedom, Security and Justice.¹ In assuming a special role in EU private international law, mutual trust has facilitated the recognition and enforcement of foreign judgments. This influence of mutual trust has become even more significant in recent years especially considering the Brussels legal regime which specifically identifies mutual trust as a major underlying principle in international litigation.² The Brussels legal regime applies to the EU.³ However, there is a tendency to completely situate mutual trust in EU private international law and not realise how the effects of mutual trust have implications for other jurisdictions especially African countries. Although the principle of mutual trust has been developed to a

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¹Case Opinion 2/13 of 18 December 2014 (Opinion Pursuant to Article 218(11) TFEU), EU:C:2014:2454 para 191.

² Regulation (EU) No 1215/2012 recital 26; Council Regulation (EC) No 44/2001 recitals 16 and 17.

³ An example of the EU focus is that defendants from outside the EU are not protected from 'exorbitant jurisdiction'. See TC Hartley, *International Commercial Litigation: Text, Cases and Materials on Private International Law* (3rd edn, Cambridge University Press 2020) 22.

relatively sophisticated level in the EU, the substance of mutual trust is not restricted to the EU and may be found in certain foreign judgments regimes of some Commonwealth African jurisdictions.

There is a heightened need for mutual trust with respect to African countries that are members of the Commonwealth.⁴ This need has been highlighted by a couple of factors. Fostering mutual trust is critical to facilitate inter-African trade.⁵ The African Continental Free Trade Agreement, which unites all member states of the African Union and covers a market of more than 1.2 billion people, may precipitate an increase in foreign judgments.⁶ Furthermore, there are important and recent developments in the area of foreign judgments in what has been a busy decade for researchers. The Hague Judgments Project which had failed in 2001, was revived in 2012 and the final Convention (the Judgments Convention) was concluded in July 2019.⁷ Also, the Hague Choice of Court Convention which contains provisions concerning the recognition and enforcement of foreign judgments has been in force since 2015⁸ and many (mostly EU) countries have signed but some have not ratified.⁹ No African country has signed the Hague Choice of Court Convention.¹⁰ Although neither the Judgments Convention nor the Hague Choice of Courts Convention expressly refers to mutual trust perhaps because they are not EU legal regimes, both draw extensively on the need for countries to have a considerable degree of trust in the legal and institutional frameworks of other contracting parties. The express application of mutual trust as a principle in the EU context, but not in the non-EU or global context (e.g. the Judgments Convention and the Choice of Court Convention) is often explained away on the different political and economic structures that mark the EU out as a regional organisation.¹¹ However, this attitude should be reconsidered if countries outside the EU are influenced by mutual trust considerations in international litigation. The Judgments Convention presents an opportunity for Commonwealth African countries to articulate a progressive characterisation of mutual trust on a global level. Such countries can benefit from the Judgments Convention if they consider how mutual trust helps to facilitate the recognition and enforcement of foreign judgments.

⁴ The focus is on East Africa, West Africa and Southern Africa. The Commonwealth of Nations is a voluntary association of 53 independent States, most of which were formerly under the British Empire. Not all members of the Commonwealth are former colonies of Britain. For example, Mozambique had long been interested in the Commonwealth and became the first member without a British colonial history <<http://thecommonwealth.org/about-us>> <<http://thecommonwealth.org/our-member-countries/mozambique/history>> accessed 16 January 2019.

⁵ For the argument that African countries need to foster 'mutual trust and cooperation' to implement such policies, see T Albert, 'African Continental Free Trade Agreement: Opportunities and Challenges' (CUTS International 2019) 11.

⁶ This entered into force on 30 May 2019. See Albert (n 5) 17. The Agreement has its own dispute resolution system – art 27 of the on the Protocol on Rules and on Rules and Procedures on the Settlement of Disputes. However, the increase of commercial activities may have implications for private international law.

⁷ <<https://www.hcch.net/en/instruments/conventions/full-text/?cid=137>> accessed 16 January 2020

⁸ <<https://www.hcch.net/en/instruments/conventions/status-table/?cid=98>> accessed 16 January 2020.

⁹ E.g. the United States and China <<https://www.hcch.net/en/instruments/conventions/status-table/?cid=98>> accessed 28 May 2019.

¹⁰ <<https://www.hcch.net/en/instruments/conventions/status-table/?cid=98>> accessed 16 January 2019.

¹¹ E.g. the internal market and regional integration. See C Rizcallah, 'The Challenges to Trust-Based Governance in the European Union: Assessing the Use of Mutual Trust as a Driver of EU integration' (2019) 25(1) European Law Context 37.

For example, the Judgments Convention does not permit a review of the merits of the judgment when parties seek enforcement.¹² This is an implied application of mutual trust. Some degree of mutual trust is required if countries are to enforce foreign judgments without reviewing the merits of a case. One aim of this article is to demonstrate that the application of mutual trust (of whatever type) is a common denominator between the EU regime on foreign judgments and relevant regimes in several Commonwealth African countries. However, mutual trust has not been applied in a conceptual and principled manner in Africa.

Mutual trust is a subtle but underpinning factor in the recognition and enforcement of foreign judgments in several African jurisdictions under consideration. The lack of coherence in the meaning of mutual trust itself has meant that mutual trust is not expressly recognised as a significant influence on relevant African laws. The subtle and unarticulated application of mutual trust in private international law in Africa has not received any serious consideration. In this regard, the lack has been complicated by the proliferation of regional economic integration organisations (REIOs) which are also concerned with foreign judgments.¹³ The effect of this subtlety and lack of articulation is evident on at least two levels. The first is denial because the apparent reliance on mutual trust has not been recognised. Secondly, there is a misplacement of priorities because the application of mutual trust without any coherence or structure cannot promote legal certainty and predictability. These levels underpin a tripartite consequence for African countries. First, such countries do not benefit from the international discourse on mutual trust. Secondly, there is no consideration of how a more coherent and better articulated notion of mutual trust can help to bridge jurisdictional divides and legal cultures in Africa. Thirdly, there is no realisation that a clear articulation and application of mutual trust can help to recast the global literature and discourse.

This article seeks first to understand mutual trust and then consider whether its effects find any basis in the recognition and enforcement of foreign judgments in Africa. Mutual trust will be examined, initially, in the EU context since it is a well-developed principle in the EU. The article will illustrate the unarticulated application of mutual trust primarily through decided cases and relevant statutory provisions in the jurisdictions considered: Eastern, Western and Southern Africa.¹⁴ These legal regimes demonstrate how such an application undermines coherence in relevant jurisprudence concerning African Commonwealth jurisdictions. This is

¹² Art 4(2) of the 2019 Judgments Convention.

¹³ As will be highlighted later (n 30), there have been some promising decisions within certain REIOs in individual cases. Ultimately, however, there is no clear evidence of how such REIOs have promoted the recognition and enforcement of foreign judgments for private litigants in commercial matters on a continent-wide basis. Examples of REIOs include the Southern Africa Development Community (SADC), Economic Community of West African States (ECOWAS), and East African Community (EAC). The capacity of the AU to coordinate the REIOs can be explored. See Art 3(l) of the AU Charter; Art 3 (p) of the Protocol on Amendments to the Constitutive Act of the African Union (adopted by the first Extraordinary Session of the Assembly of the Union in Addis Ababa on 3rd February 2003, and by the second Ordinary Session of the Assembly of the Union in Maputo on 11th July 2003).

¹⁴ The comparative analysis is primarily through Kenya/Uganda (as their courts often refer to each other), Nigeria and South Africa. Except where 'English common law' is specifically mentioned, this article uses 'common law' in reference to general case law and legal principles applicable through colonial history. This factors in the Roman-Dutch influence on several jurisdictions in Southern Africa. See B Lenel, *The History of South African Law and Its Roman Dutch Roots* (Thal, 2002) 10.

especially so in an area where there is already much space for clarity in the law. The article will then consider how the subtle application of mutual trust has resulted in parallel efforts to promote the recognition and enforcement of foreign judgments and how a proliferation of legal regimes can undermine legal clarity, certainty and predictability. This will also demonstrate that a clear conceptualisation and expression of mutual trust can form a basis for reaping the benefits of any treaty on foreign judgments. The first task is to understand what mutual trust means in the context of the recognition and enforcement of foreign judgments.

II Mutual Trust and Mutual Recognition

The term 'mutual trust' is a combination of two words. If trust is mutual, it means it is done by each of two or more parties towards the other or others.¹⁵ This content of reciprocity is fundamental.¹⁶ There is a strong connection between mutual trust and the mutual recognition of judicial decisions in private international law.¹⁷

There is no consensus among scholars as to which comes first: mutual trust or mutual recognition. For example, there is an argument that although 'mutual trust did not play any kind of major operational role' in the original common market model of economic integration of the 1950s, it was 'undoubtedly there in the background'.¹⁸ The order or hierarchy of mutual trust and reciprocity or mutual recognition is not rigid and there is a need to understand this in relevant contexts. Understanding mutual trust depends on what parameters are used to assess its value. A functionalist explanation would focus on the practical impact of mutual trust, while a theoretical standpoint would start with conceptualisation. In trying to reconcile both perspectives, it may be pragmatic to rely on assumptions such as one which has become dominant in relevant literature. That is, mutual recognition presupposes mutual trust.¹⁹ However, such an assumption has not helped to promote clarity with respect to what mutual trust means in private international law generally. Mutual trust as a concept has eluded any definitive characterisation. This vagueness even as a principle is illustrated through the argument that mutual trust is not synonymous with blind trust,²⁰ while some scholars have avoided the issue of whether and how a meaning should be attached.²¹

There is merit in the assertion that in the context of the recognition and enforcement of foreign judgments in Europe, mutual trust is a supplement to mutual recognition and

¹⁵ <<https://en.oxforddictionaries.com/definition/mutual>> <<https://en.oxforddictionaries.com/definition/trust>> accessed 16 January 2020.

¹⁶ *In the matter of N (Children)* [2016] UKSC 15 para 4.

¹⁷ In the context of the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, see Case C-335/17 *Valcheva v Babanarakis* (ECLI:EU:C2018:242) para 52. See also Recital 21 of Council Regulation (EC) No 2201/2003.

¹⁸ J Snell, 'The Single Market: Does Mutual Trust Suffice?' in E Brouwer and D Gerard (eds), *Mapping Mutual Trust: Understanding and Framing the Role of Mutual Trust in EU Law* (EUI Working Papers 2016/13) 11.

¹⁹ E G-Pedro and X Groussot, 'The Duty of Mutual Trust in EU Law and the Duty to Secure Human Rights: Can the EU's Accession to the ECHR Ease the Tension?' (2017) 35(3) *Nordic Journal of Human Rights* 258, 264.

²⁰ K Lenaerts, 'La Vie Après L'Avis: Exploring the Principle of Mutual (Yet Not Blind) Trust' (2017) 54 *Common Market Law Review* 805, 840

²¹ M Zilinsky, 'Mutual Trust and Cross-Border Enforcement of Judgments in Civil Matters in the EU: Does the Step-by-Step Approach Work?' (2017) 64 *Netherlands International Law Review* 115.

therefore mutual trust is 'only later elevated to a principle'.²² This position can be supported with a comparison of the 1968 Brussels Convention and the current Brussels legal regime. The 1968 Convention did not contain any reference to 'mutual trust', even though a major aim was to simplify the formalities governing the reciprocal recognition and enforcement of foreign judgments.²³ The 2012 Regulation, however, clearly referred to 'mutual trust' in the administration of justice in the EU as justifying the recognition and enforcement of foreign judgments without the need for any special procedure.²⁴ This background is critical to understand that mutual trust has not necessarily followed any linear course in its development. There is some scope to consider to what extent such trust or any of its variations exists in any form with respect to the recognition and enforcement of foreign judgments in Africa. This is so despite the reality that mutual trust in Africa does not exist in any principled form. Since mutual trust has become well known in the EU context, it would help to understand to what extent such trust has been applied in the African jurisdictions under consideration.

III Mutual Trust versus Legal history

The order of mutual recognition preceding mutual trust may be applied to Africa, but only with considerable difficulty. There are at least two reasons for this: REIOS and legal history. The most significant mention of mutual trust has been at the (sub)regional levels.

The concept of trust in the context of African private international law has been largely ignored.²⁵ Some attention has been given to trust in regional or sub regional arrangements and regional integration. In this context, however, cases have hardly focused on private litigants. For example, in the East African Community of which Kenya and Uganda are key members, mutual trust has been discussed as an important element of the regional legislative framework on regional integration.²⁶ In assessing the importance of mutual trust in the East African Community, the East African Court of Justice observed that it was important to avoid 'a possible emergence of mistrust among the Partner States'.²⁷ Although the Court did not explain 'mutual trust', it clearly indicated that mutual trust required some degree of flexibility in such a manner that Partner States could adapt overarching Treaty provisions to their individual jurisprudential challenges and levels of development. In the context of decisions,

²² E Storskrubb, 'Mutual Trust and the Dark Horse of Civil Justice' (2018) 20 Cambridge Yearbook of European Legal Studies 179, 182.

²³ Pursuant to art 220 of the Treaty Establishing the EEC. See the preamble to the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.

²⁴ Recital 26 of the 2012 Regulation.

²⁵ Mutual trust has been essentially expressed in political contexts without any direct impact on private international law. There is considerable scope to build on such foundations. For a discussion of 'mutual trust and the respect of sovereign equality of states' in an EU-AU relationship, see L Miyandazi et al, 'AU-EU Relations: Challenges in Forging and Implementing a Joint Agenda' (2018) 25(4) South African Journal of International Affairs 461, 467.

²⁶ One of the fundamental principles of the Community is 'mutual trust, political will and sovereign equality'. See art 6(a) of the Treaty for the Establishment of the East African Community of 1999 (as amended).

²⁷ *In the Matter of a Request by the Council of Ministers of the East African Community for an Advisory Opinion* (Application No 1 of 2008).

the Court observed that ‘simultaneous implementation is impracticable in some circumstances’ and it would require some trust to factor in the different speeds of Partner States.²⁸ In the Southern African Development Community, it has been argued that mutual trust has remained largely elusive partly because the SADC Tribunal’s judgments appear to be shaped by political realities.²⁹ Currently, and arguably for the foreseeable future, it is difficult to dissociate the influence of African regional powers from the implementation of regional courts’ decisions. This reality is well illustrated by the Economic Community of West African States (ECOWAS) region where implementation, rather than good judgments, has undermined the credibility of regional litigation under the ECOWAS framework.³⁰

While the SADC has taken some practical and institutional measures to engender and improve mutual trust in the region,³¹ the ECOWAS has focused more on mutual benefits vis-à-vis cooperation within and outside Africa.³² Thus, apart from a few Treaty provisions and institutional efforts which are often more relevant for regional politics,³³ there is scant jurisprudence on mutual trust both in regional litigation that has implications for private litigants and private international law. There is ample scope for the new African Continental Free Trade Agreement to provide a viable context within which the express development of mutual trust may be considered.³⁴ The absence of such discussions has undermined the application of mutual trust in African private international law.

One reason for the relatively limited growth of literature and jurisprudence on mutual trust in Africa is the history of legal development. African legal regimes on the subject have been vastly shaped by legal traditions that were inherited through former colonial rule. During the formative years of the legal regimes during that era, foreign powers first enacted and applied laws that would create the fundamental structures necessary for any sophisticated specialist laws. For example, tribunals and customary laws were ‘overtly recognised’ only after the period of direct administration.³⁵ Indirect rule would later provide a structure more amenable

²⁸ p 29 and 35 of the judgment.

²⁹ J Mapuva and L Muyenga-Mapuva, ‘The SADC Regional Bloc: What Challenges and Prospects for Regional Integration’ (2014) 18 *Law, Democracy and Development* 22, 26.

³⁰ E.g. *In the Matter of Chude Mba v the Republic of Ghana* Suit No. HRCM/376/15, the Ghanaian High Court decided that the Protocols had not been domesticated and therefore the ECOWAS judgment could not be enforced in Ghana. See the ruling of Suurbaareh JA (Additional High Court Judge) 1 (Unreported). For the position that the common law can be used to enforce judgments from the SADC Tribunal, see *Government of the Republic of Zimbabwe v Fick* 2013 (5) SA 325 (CC).

³¹ E.g. the Core Group is a platform that facilitates cooperative arrangements between the SADC and international cooperating partners to support ‘mutual trust and respect’ in the region <<https://www.sadc.int/about-sadc/international-cooperation/icp-partnership-dialogue/>> accessed 16 January 2020.

³² <<http://www.ecowas.int/ecowas-eu-reaffirm-commitment-to-strengthen-cooperation/>> accessed 16 January 2020.

³³ Examples of such institutions are: the Interstate Politics and Diplomacy Committee, the SADC Electoral Advisory Council, and the Mediation Unit <<https://www.sadc.int/themes/politics-defence-security/politics-and-diplomacy/>> accessed 16 January 2020.

³⁴ Albert (n 5)

³⁵ Amankwah, writing in the context of Ghana (formerly ‘the Gold Coast’), analysed three stages of the British attitude to native tribunals (which had been administering native laws). The first stage was the ‘direct administration’ stage where Ghana was for more than a century. See HA Amankwah, ‘Ghanaian Law: Its Evolution and Interaction with English Law’ (1970) 4(1) *Cornell International Law Journal* 37, 45-47.

to reducing distrust especially as it required cooperation with the locals. Thus, there was a period where it was necessary to set the stage for reducing ideological and cultural gaps between the British and locals.³⁶ There were several versions of the repugnancy doctrine (the enforcement of native law was subject to compatibility with 'natural justice, equity and good conscience').³⁷ This doctrine was applied in the regions relevant to this article.³⁸ This focus was on internal rule with respect to natives, but this was also a precursor to developing specialist frameworks such as the ordinances on the recognition and enforcement of foreign judgments. For example, it would have been self-defeatist to provide for the defence of public policy to the recognition and enforcement of foreign judgments if such notions of public policy did not conform to English notions of natural justice such as fair hearing. Thus, legal regimes (in recognisable statutory forms) on the recognition and enforcement of foreign judgments emerged after structures had been put in place and there was some presumption of trust in such structures. The fact that Foreign Judgment Extension Ordinances were enacted despite the application of the English common law in relevant colonies suggests that the English common law had some space which statutory provisions could navigate. There is no evidence that the statutory frameworks were of any use to litigants beyond British dominion at the time because the ordinances that followed in such Commonwealth countries were usually restricted to the British colonies. In Nigeria for example, the aim of the statutory framework that would follow in 1922³⁹ was very similar in scope to that of 1908: 'The Foreign Judgments Extension Ordinance provides for the transfer of judgments in the Supreme Court of the other British West African dependencies to the Supreme Court of Southern Nigeria for execution'.⁴⁰

There was a chance to lay solid foundations for engendering trust that can provide support beyond legal traditions in favour of litigants, but this chance was missed. While the structural foundations set in place introduced some minimal level of trust (mostly one-directional from England to the colonies as England already had a robust institutional framework), a different type of trust was introduced through the statutory frameworks that were enacted. This could be described as transferred mutual trust that should be distinguished from presumed mutual trust. Under the principle of mutual trust in the EU, every Member State is required to presume that other Member States observe EU law.⁴¹ Getting to the stage of presuming that

³⁶ See generally, S Cretney, 'The Application of Equitable Doctrines by the Courts in East Africa (1968) 12(3) *Journal of African Law* 119.

³⁷ WC Ekow Daniels, 'The Influence of Equity in West African Law' (1962) 11 *International and Comparative Law Quarterly* 31. See also TO Elias, 'Customary Law: The Limits of its Validity in Colonial Law' (1954) 13(3-4) *African Studies* 97.

³⁸ *ibid*

³⁹ Reciprocal Enforcement of Judgments (the 1922 Ordinance).

⁴⁰ See the Annual Colonial Reports: Southern Nigeria Report for 1908. No 630. In this context, see Southern Nigeria: Foreign Judgment Extension Ordinance No VI of 1908, Sierra Leone: Foreign Judgment Extension Ordinance No 4 of 1908. For the West Africa region generally, see Ghana Foreign Judgments Extension Ordinance No 4 of 1907, Gambia Foreign Judgments Extension Ordinance No 5 of 1908, Northern Nigeria: Foreign Judgment Extension Ordinance No 21 of 1908. Cf s 9 of the Sierra Leonean Foreign Judgments (Reciprocal Enforcement) Ordinance of 6 June 1935.

⁴¹ Opinion 2/13 para 191. The 'system of legal remedies' in individual Member States and the preliminary reference procedure also mitigate the damage caused by a misapplication of national or EU Law. In the context

mutual trust was predicated on some degree of negotiation through the formal entry requirements of EU membership. The process in the African colonies was different. This trust was transferred on behalf of the colonies as the countries were not yet self-governing and thus unable to take independent decisions or negotiate. For example, the Nigerian Reciprocal Enforcement of Judgments Act provides for an 'Ordinance to facilitate the reciprocal enforcement of judgments obtained in Nigeria and in the United Kingdom and other parts of Her Majesty's Dominions and Territories under Her Majesty's protection'.⁴² The Ordinance was then extended to certain Commonwealth colonies including present day Ghana, the Gambia and Sierra Leone.⁴³ Such colonies benefited from 'mutual trust' which continues to exist until today. A glaring example can be seen in the number of UK judgments that have formed the basis of Supreme Court adjudication in Nigerian jurisprudence. Such transfer of trust essentially laid the foundations for fragmentation of the trust even within the same legal tradition. In the case of Nigeria, for example, many countries of the Commonwealth have not been designated as countries to which the statutory framework applies. The transfer of this trust thus mandated cooperation among the States involved.⁴⁴ Given the political reality of the colonial era, it was relatively easy to transfer trust on behalf of the colonies. Upon attaining independence, the African countries in question often continued with the legal frameworks already in place.

A common denominator between mutual trust (whether presumed or transferred) is reciprocal obligations.⁴⁵ Thus, in this regard, neither 'presumed' or 'transferred' trust should imply blind 'trust'. If blind trust existed in this context, the legal regimes would probably have flawless application, but this is not the reality. In the case of the EU where mutual trust has been elevated to a principle,⁴⁶ there have been persistent efforts to refine processes that can facilitate the circulation of foreign judgments despite the application of mutual trust. In Commonwealth Africa, mutual trust has often had a subtle influence through the reciprocal legal regimes or the application of the common law.⁴⁷ Reciprocity cannot be divorced from trust,⁴⁸ and some cases from the eastern and west African jurisdictions can be used to illustrate this point.

of the recognition and enforcement of foreign judgments under Brussels I, see Case C-681/13: Diageo Brands para 63. See also art 267 of the TFEU on preliminary reference.

⁴² Ordinance of 19th January 1922.

⁴³ Non-African Commonwealth countries generally include present-day Australia and most of the Caribbean. See the Proclamations made (mostly within the decade of the Ordinance coming into force) pursuant to s 5 of the Ordinance.

⁴⁴ Although Prechal's article was written in an EU context, it demonstrates the multi-dimensional relationship between mutual trust and cooperation which is relevant to Commonwealth Africa. For the overlapping matrices of 'loyal cooperation', 'mutual cooperation', 'mutual trust' and 'mutual respect', see S Prechal, 'Mutual Trust before the Court of Justice of the European Union (2017) 2(1) European Papers 75, 91-92.

⁴⁵ Mutual trust implies positive and negative obligations. See Prechal *ibid* 91.

⁴⁶ Storskrubb (n 22).

⁴⁷ The next section of this articles contains references to some statutory regimes e.g. Kenya and Nigeria that are clearly based on reciprocity.

⁴⁸ P Englebert, 'Pre-Colonial Institutions, Post-Colonial States, and Economic Development in Tropical Africa (2000) 53(1) Political Research Quarterly 7, 9.

IV East Africa and West Africa

a) Kenya/Uganda

In the eastern and western African jurisdictions chosen for comparative analysis, reciprocity has remained an important element in the recognition and enforcement of foreign judgments. While there have been legal developments that de-emphasise reciprocity in some jurisdictions,⁴⁹ such developments have left many jurisdictions in Africa largely untouched. Both the requirement of reciprocity and the applicability of the common law have not been leveraged to benefit from the subtle application of mutual trust in Africa. The effect of this is that African countries sometimes struggle to recognise judgments from other African countries. In the East African region, an illustration of this reality is seen in the Kenyan case of *Shah v Haria*.⁵⁰ The judgment creditor sought to enforce a money judgment obtained from Ethiopia, a next-door neighbour. Since Ethiopia was not on the list of countries designated under the Kenyan Foreign Judgment (Reciprocal Enforcement) Act, the appellant instituted an action against the respondent at the Kenyan High Court.⁵¹ In addition to this issue of non-designation,⁵² another important aspect of the respondent's defence relevant to this article was the contention that Ethiopia was not a member of the Commonwealth and that both legal systems were different.⁵³ This was despite the fact that the Act had already designated countries such as the Republic of Rwanda and Seychelles – countries that strictly cannot be categorised as English common law countries and are mixed (with civil law) legal systems at best.⁵⁴

The trial court dismissed the appellant's application for summary judgment. In dismissing the judgment creditor's further appeal, the Court of Appeal considered that triable issues had been raised and therefore the matter had to proceed to full trial.⁵⁵ In the context of legal unpredictability, it is significant that the judgment creditor was already aware that there was a need to institute an action but had a different understanding as to how the English common law would apply.⁵⁶ Despite impeding the recognition and enforcement of foreign judgments in *Shah v Haria*, one positive point that can be developed is the restatement that the Kenyan High court had 'original and unlimited civil jurisdiction' to consider foreign judgments from countries not designated under the Act.⁵⁷

⁴⁹ In arguing that reciprocity was a 'paperless tiger', Elbati mostly referred to Asian jurisdictions such as China and Japan, as well as civil law jurisdictions in Africa such as Tunisia and Ethiopia. See B Élbati, 'Reciprocity and the Recognition and Enforcement of Foreign Judgments: A Lot of Bark but Not Much Bite' (2017) 13(1) *Journal of Private International Law* 184, 218.

⁵⁰ *Shah v Haria* [2016] eKLR. Civil Appeal 147 of 2009.

⁵¹ Nairobi HC Civil Case No 488 of 2007. See also *Shah v Haria* (n 50) para 4.

⁵² See also *Intalframe Ltd v Mediterranean Shipping Company* (1988) KLR on reciprocal arrangements.

⁵³ *Shah v Haria* (n 50) para 5.

⁵⁴ Other countries designated were Tanzania, Uganda, Zambia, the UK, Australia and Malawi. See *Shah v Haria* (n 53) para 1.

⁵⁵ *Shah v Haria* (n 50) para 33.

⁵⁶ *Shah v Haria* (n 50) para 4.

⁵⁷ *Shah v Haria* (n 50) para 33

In the Kenyan Foreign Judgments (Reciprocal Enforcement) Act, there is a clear preferential treatment for countries that are designated under the Act. The Act further specifically provides that there is a different arrangement for non-Commonwealth countries. For example, the Minister of Justice needs to specify in an agreement which courts are superior courts and which Kenyan courts may recognise foreign judgments.⁵⁸ The Minister of Justice is empowered to designate a 'reciprocating country' pursuant to an appropriate agreement between Kenya and that country.⁵⁹

The question of selective trust has other implications for developing relevant jurisprudence. In another Kenyan case of *Shah v Bid*,⁶⁰ the applicant contested the registration of the English judgment partly claiming its registration would contravene Kenyan public policy.⁶¹ This was partly because the quantum of costs which the English court awarded was 'outrageously excessive'.⁶² Although the Kenyan High court observed that Kenyan law was 'in tandem' with English law on payable costs,⁶³ it decided that costs awarded were 'manifestly in excess' of what would have been awarded in Kenya.⁶⁴ In such a case, under the Foreign Judgments Reciprocal Enforcement Act the Kenyan court may set aside the registration of a foreign judgment to the extent of the excess.⁶⁵ This was despite the fact that the applicant did not contest the costs in England and, needless to say, the court was likely influenced by the currency conversion rate rather than focusing on the difference in cost of living and currency value in each country. The Kenyan Court of Appeal adopted a more liberal attitude in *Dhanjal Investments Limited v Cosmos Holidays Plc*.⁶⁶ The judgment creditor obtained an English judgment (based on indemnity including interest and future losses) with costs. Although the court rightly observed that the winding up procedure was not the right means of enforcing a foreign judgment, it decided that the judgment debtor had a 'legal obligation as a matter of common law, recognized by the High Court, to satisfy the money decree of the foreign judgment'.⁶⁷ This was the basis for enforcing and not re-examining a foreign judgment. The Court of Appeal was again referring to the English common law, a different legal framework on foreign judgments under Kenyan law, in determining the issue.⁶⁸ It is one thing to argue that litigants should have different options in seeking to enforce foreign judgments, but another altogether to combine different legal regimes in the recognition and enforcement even when their scope has been delimited. There are at least two implications. First, it reveals

⁵⁸ S 13(2) of the Kenyan Foreign Judgments (Reciprocal Enforcement) Act Cap 43 (of 1985, revised 2018).

⁵⁹ S 14 of the Kenyan Foreign Judgments (Reciprocal Enforcement) Act Cap 43 (of 1985, revised 2018).

⁶⁰ *Shah v Bid* [2017] eKLR (Misc. Civil Application No 72 of 2014).

⁶¹ Para 11. In this context, the applicant also relied on art 5(1) of the Convention on the Recognition and Enforcement of Judgments in Civil and Commercial Matters, even though no African country is one of the 5 contracting parties to that convention. This is available on <<https://www.hcch.net/en/instruments/conventions/status-table/?cid=78>> accessed 28 May 2019.

⁶² *Shah v Bid* (n 60) para 11(c).

⁶³ *Shah v Bid* (n 60) para 15.

⁶⁴ *Shah v Bid* (n 60) para 18.

⁶⁵ S 10(4) of the Foreign Judgments (Reciprocal Enforcement) Act Cap 43 (rev 2018).

⁶⁶ *Dhanjal Investments Limited v Cosmos Holidays* [2018] eKLR (Civil Appeal No 317 of 2013).

⁶⁷ Para 23 of *Cosmos Holidays Plc* (n 66).

⁶⁸ The court added that foreign judgments were conclusive until proved otherwise under s 9 of the Civil Procedure Act.

a compulsive recourse to the English common law. Second, this recourse is inspired by transferred trust to the common(wealth) law.

Colonial history and the Commonwealth have contributed to the transfer of 'mutual trust' and, as such, UK laws and institutions are trusted almost by default. Nevertheless, it can be difficult to predict how the trust will function in individual cases. The Ugandan case of *Sales v the Attorney General* was referred to as addressing a similar situation where a judgment creditor is 'stranded' in the absence of any statutory framework on which the relevant country has been designated.⁶⁹ The Foreign Judgment (Reciprocal Enforcement) Act was inapplicable in this case.⁷⁰ In *Sales*, the judgment creditor sought to enforce a US judgment and instituted an action for a declaration that the US judgment was enforceable in Uganda. However, this case is not exemplary for some reasons. First, it seemed to combine an analysis of different theoretical bases and conflate them. This is, however, beyond the scope of this work.⁷¹ Secondly, and more relevant to the focus of this article, the Ugandan court undertook a rather detailed analysis of why judgments obtained from the United States should be trusted. The court provided two US Cases that illustrated situations where foreign judgments will not be enforced in the US. The first was a Liberian judgment which was not enforced since the Liberian judicial system was grossly insufficient during war time.⁷² The second was a Nicaraguan judgment which was not enforced essentially because the Nicaraguan system of jurisprudence was unlikely to secure an impartial administration of justice.⁷³ The Ugandan court then concluded that the Liberian and Nicaraguan experiences could not be compared with the current case and that the US judicial system was 'beyond reproach'.⁷⁴ Thus, even if there was no reciprocal arrangement there were enough reasons to trust the US system. Implied in the court's deductive analysis is the argument that the US would be expected to enforce Ugandan judgments in a similar case since the Ugandan system experience was not like wartime Liberia or Nicaragua. In other words, there was implied mutual trust between the United States and Uganda. Thus, the judgment creditor successfully brought a substantive action to enforce the US judgment. The decision in *Sales* was also relied upon by the Kenyan court. In adopting the reasoning in *Sales*, the Kenyan court observed that there was no reciprocal arrangement between Kenya and the US and thus the Foreign Judgment (Reciprocal Enforcement) Act of 1984 was inapplicable. The court decided that it was necessary to bring a substantive action.⁷⁵ The question of trust from the earliest years of the legal regimes on foreign judgments in West African jurisdictions have been only briefly

⁶⁹ *Sales v the Attorney General* Civil Suit No 91 of 2011 at p 11.

⁷⁰ S 3 of the Cap 9 Laws of Uganda.

⁷¹ For example, the South African Supreme Court of Appeal and the Nigerian Supreme Court took different positions on comity as a theoretical justification for the recognition and enforcement of foreign judgments. See *Krok* 1995 (1) SA 677, 692 and *Grosvenor Casinos Ltd v Halaoui* [2009] 10 NWLR (Pt 1149) 309, 339 (SC). Cf DE Childress III, 'Comity as Conflict: Resituating International Comity as Conflict of Laws' (2010) 44 University of California Davis Law Review 15.

⁷² The judgment had been rendered in 1995. The case is *Bridgeway Corp. v Citibank*, 201 f.3d 134 (2nd Civ. 2000).

⁷³ *Osorio v Dole Food Co.* 665 F. Supp. 2d 1307 at 1351-52 (S.D. Fla, 2009).

⁷⁴ *Sales v the Attorney General* (n 69) p 12.

⁷⁵ *EMM v GWM* [2016] eKLR 3 (Misc Civil Application No 30 of 2015). In this case, the High Court decided that 'the applicant should have moved the court by way of a substantive action or suit', just as the judgment creditor did in *Sales*.

considered.⁷⁶ Nigerian law presents a good context to further consider the implications of trust vis-à-vis legal cultures.

b) Nigeria

Most cases that have got to the appellate levels in Nigeria originated in the UK.⁷⁷ *Obasi v Mikson Establishment Industries Ltd* is an important case because it is a Supreme Court judgment that illustrates how judicial attitude and pragmatism can help to bridge the gap of legal tradition.⁷⁸ The fact that Niger is a civil law country did not prevent the recognition and enforcement of the judgment obtained from that country. The court in Nigeria overcame the challenge by looking beyond the technicalities raised by the judgment creditor. One of the corollaries of a legal tradition can be the language barrier itself. Different languages should not impede harmonisation of laws generally, especially with respect to international commerce as these concern 'all progressive countries...irrespective of national culture, language or legal system'.⁷⁹ However, even for jurisdictions that have vast experience in private international law it can be challenging to use translated legal materials.⁸⁰ *Obasi v Mikson Establishment Industries Ltd* illustrates this difficulty.

A company called 'Mikson Industries Ltd' had obtained a judgment against the judgment creditor in Niger. The judgment creditor then registered the judgment in the name of the company called 'Mikson Establishment Industries Ltd' in the Kano State High Court. The High Court had made this amendment *suo motu* in registering the foreign judgment and attributed the need for this change to an improper translation from French to English language. The judgment debtor appealed against this exercise of judicial discretion and contended that the registration of the judgment should be set aside. In this manner, the appellant relied on a ground on which such registration could be set aside: 'that the rights under the judgment are not vested in the person by whom the application for registration was made'.⁸¹ This argument was rejected at the High Court, Court of Appeal and Supreme Court. The Supreme Court decided that the appeal was 'founded on mere technicality and has no merit'.⁸² By focusing on the foreign judgment (which itself was not disputed) and enforcing the foreign judgment from Niger, the Supreme Court's judgment was a watershed in the history of legal divides at the highest judicial level in Nigeria. In *Obasi*, the judgment creditor registered the foreign judgment despite the language differences between both countries and this was a good

⁷⁶ See the earlier reference to Ghana (notes 40 and 43).

⁷⁷ This is evident in the index to the Nigeria Weekly Law Reports.

⁷⁸ *Obasi v Mikson Establishment Industries Ltd* [2016] 16 NWLR (Pt 1539) 335.

⁷⁹ G Bamodu, 'Transnational Law, Unification and Harmonization of International Commercial Law in Africa' (1994) 38 *Journal of African Law* 125, 132. See also *Traité de Protection des Investissements avec les Etats-Unis* (12 January 1990).

⁸⁰ On how the use of translated legal materials can be 'frustrating and treacherous', see W Köing, 'Translation of Legal Texts: Three English Versions of the Swiss Federal Statute on Private International Law' (1990) 11 *Michigan Journal of International Law* 1294, 1295.

⁸¹ S 6 (1) (d) (vi) of the 1961 Act.

⁸² *Obasi* (n 78) 369.

decision. The real issue was the judgment creditor's exploitation of a perceived lack of trust and the issue of language difference was only coincidental. The grounds of appeal clearly suggested, as observed by the Supreme Court, that the judgment debtor was 'fishing'.⁸³ The point here is that there should not be enough room for a judgment debtor to thrive on undue technicalities because this may frustrate the recognition and enforcement of foreign judgments even when the indebtedness of the judgment debtor is not contested. It is usual to have 'language or systemic barriers' in the context of foreign judgments.⁸⁴ Indeed, disparities in language can be particularly significant where the transnational litigation process involves civil law systems and jurisdictions that are largely influenced by the common law.⁸⁵ However, it is necessary to reduce that space for contest especially as 'languages shape worldviews, and legal languages are bound to specific legal traditions'.⁸⁶ Potentially, therefore, *Obasi* can encourage a focus on the interests of litigants and the recognition and enforcement of judgments, rather than impediments caused by transferred trust in favour of certain jurisdictions.

The *Obasi* judgment, however, has a fundamental deficiency that weakens its position as a tool for bridging the gap between civil and common law in the recognition and enforcement of foreign judgments. The High Court registered the foreign judgment under the Foreign Judgments (Reciprocal Enforcement) Act of 1961.⁸⁷ The challenge is that the Act in question requires an appropriate ministerial order (which has not been made) for the 1961 Act to be activated. The Nigerian Supreme Court did not refer to previous judgments that had clarified the extant statutory framework as the Ordinance. To further compound this vagueness, neither the 1961 Act (which *Obasi* applied) nor the Ordinance (which essentially remains the only functional statutory framework on foreign judgments) should have been applied. Since an appropriate ministerial order had not been made under the 1961 Act and Niger is not on the list of designated countries under the Ordinance, the English common law should have been applied. In this context, therefore, *Obasi* undermined legal certainty in Nigeria regarding what legal regime should apply to foreign judgments that are not governed by the Ordinance – which are essentially common law countries. This uncertainty is potentially worsened by the doctrine of binding precedent. Lower courts could do one of two things. First, lower courts could consider themselves bound by *Obasi* especially as it concerns a judgment from a non-Commonwealth and civil law jurisdiction. This provides some illumination with respect to a pragmatic attitude to enforcing foreign judgments from outside the Commonwealth. Secondly, lower courts could determine that *Obasi* conflicts with other Supreme Court

⁸³ See p 366 where the Court observed that 'the appellant "fished" for as many issues as possible'.

⁸⁴ TA Monestier, 'Whose Law of Personal Jurisdiction? The Choice of Law Problem in the Recognition of Foreign Judgments' (2016) 96 Boston Law Review 1729, 1755

⁸⁵ MJ Wilson, 'Improving the Process: Transnational Litigation and the Application of Private Foreign Law in U.S. Courts' (2013) 45 International Law and Politics 1111, 1121.

⁸⁶ FP Ramos, 'International and Transnational Law in Translation: From Multilingual Lawmaking to Translation' (2014) 20(3) The Translator 313, 317

⁸⁷ Cap 152, LFN 1990.

judgments (in terms of whether the 1961 Act could apply at all) and select which appellate judgment to apply.⁸⁸

The spiral of uncertainty also underscores the implications of compartmentalising or presuming mutual trust. The basis on which the statutory legal regime was created has waned and this is an era different to that where Commonwealth countries were given a special or preferential treatment. The Nigerian Court of Appeal adopted a liberal interpretation of ‘may’ in deciding that a judgment creditor was not obliged to register the Ghanaian judgment under the Nigerian Ordinance.⁸⁹ The judgment creditor had the option of bringing an option on the foreign judgment.⁹⁰ Otherwise, a Ghanaian judgment would have been denied enforcement in Nigeria even though Ghana and Nigeria apply very similar legal regimes, Ghana is designated under the Nigerian Ordinance,⁹¹ and both countries share the English common law tradition. This implied trust that underpinned the current applicable legal regime has become inadequate and the lack of any reference to the English common law in *Obasi* suggests the need for soul searching. This question of a subtle application or transfer of mutual trust through legal regimes that were either instituted during colonial era or an adjunct of foreign laws takes a significant turn in South Africa.

V Southern Africa

In Africa, the presumption and fragmentation of mutual trust are highlighted by the relevance of laws which have been developed without any African content. The use of such laws has meant that some mutual trust was presumed in the existing international relations framework at the time with no contemplation of an era where neighbouring states would have relations that build on individual sovereignty rather than colonial influence.

A relevant case that illustrates this point is the Malawian case of *Muller v Pretorius*.⁹² In this case, the applicants sought the ‘recognition and/or enforcement of the orders of the South African Court’.⁹³ The issue before the court was whether South African judgments could be enforced by a process of direct registration.⁹⁴ One of the reasons for the rejection of the registration of the judgment and orders was the absence of reciprocity.⁹⁵ The court decided that there was no reciprocity between South Africa and Malawi to allow direct registration. The court did, however, observe: ‘It is disheartening that the United Kingdom has reciprocal arrangements with almost each and every country in the SADC region and yet the SADC countries do not have similar arrangements between themselves’.⁹⁶ While it is true that the applicant could have brought an action on the judgment, the point is that it was more difficult

⁸⁸ The Nigerian Supreme court had earlier decided that the 1922 Ordinance was applicable. E.g. *Macaulay v R.Z.B. of Austria* [2007] 18 NWLR 2007 (Pt 1062) 282, 296.

⁸⁹ *Willbros West Africa Inc v McDonnell Contract Minning Ltd* [2015] All FWLR 310, 340.

⁹⁰ *ibid* 347.

⁹¹ *ibid* 336.

⁹² *Muller v Pretorius* Commercial Cause No 17 of 2010.

⁹³ *ibid* para 1.

⁹⁴ *ibid* para 7.

⁹⁵ *ibid* para 16.

⁹⁶ *ibid* para 19.

to enforce a foreign judgment from a neighbouring South Africa than from the UK. This does not mean that the enforcement of foreign judgments should be predicated on geographical or spatial considerations. However, this illustration is relevant because private international law in Africa cannot be divorced from organisations that play a role in African regional economic integration.⁹⁷

Another case is *Barclays Bank of Swaziland v Koch*.⁹⁸ The plaintiff sought to recognise a Swazi judgment through provisional sentence summons in the Botswanan High Court. As the compliance with requirements for granting provisional sentence summons (an expeditious procedure to enforce foreign judgments) was strict, the plaintiff was held to not be eligible. But the judgment could not be registered under section 3 of the Judgments (International Enforcement) Act as the list of applicable countries did not include Swaziland. Thus, the foreign judgment was not enforced in Botswana. It seems ironical that the court observed how ‘the comity of nations and international commerce require that foreign judgments be recognised in each other’s country as far as possible.’⁹⁹ In addition to various other procedural shortcomings, the failure of the judgment creditor to annex the actual judgment is a valid point. Such a case should not have been heard because there was no foreign judgment before the court. The defendant did not seem to contest the judgment itself. However, the least that the judgment creditor could do was to provide the basis of the claim and comply with essential requirements. A routine court administrative process should have prevented the case from being heard as proceedings were initiated prematurely. If Swaziland had been listed pursuant to section 3 of the Act, there may have been a greater administrative interest in ensuring basic documents were filed.¹⁰⁰ In any case, the countries listed enjoy implied trust through a historical advantage which seems to have been overtaken by the realities of modern international commercial litigation.

South Africa offers an example of how a country can attain relative success in the recognition and enforcement of foreign judgments by essentially relying on one legal regime. Although there is a statutory framework for foreign judgments, the common law remains the only practical means of enforcing foreign judgments since the statutory framework has been extended to only one country – Namibia.¹⁰¹ This context is helpful to assess the Commonwealth efforts to deepen mutual trust among members of the Commonwealth. Most reported cases on the recognition and enforcement of foreign judgments emanate from outside Africa,¹⁰² especially if the SADC tribunal cases¹⁰³ are excluded. One important lesson that can be drawn from South Africa is the focus of its legal analysis in cases concerning the

⁹⁷ Monsenepwo’s article is instructive in this context. See J Monsenepwo, ‘Contribution of the Hague Principles on Choice of Law in International Commercial Contracts to the Codification of Party Autonomy Under OHADA Law’ (2019) 15(1) *Journal of Private International Law* 162.

⁹⁸ *Barclays Bank of Swaziland v Koch* [1997] BLR 1294 (HC).

⁹⁹ *Ibid.*

¹⁰⁰ For a similar argument that there should be a focus on trying to enforce the foreign judgment once a foreign judgment creditor has complied with requirements under South African or Nigerian law, see PN Okoli, *Promoting Foreign Judgments: Lessons in Legal Convergence from South Africa and Nigeria* (Wolters Kluwer 2019) 187.

¹⁰¹ R Kelbrick, *Civil Procedure in South Africa* (3rd edn, Wolters Kluwer Law 2015) para 323.

¹⁰² Most of these cases have been enforced anyway. The leading case of *Ben-Tovim* arguably entrenched a liberal attitude. See *Richman v Ben-Tovim* 2007 (2) SA 283 (SCA).

¹⁰³ E.g. *Government of the Republic of Zimbabwe v Fick* (n 30). This judgment was enforced.

recognition and enforcement of foreign judgments. There is relatively much less emphasis on issues that are anchored to undue technicalities including the multiplicity of legal regimes. The essentially and practically single legal regime on foreign judgments is arguably a reason for this. Although this legal regime is anchored to the Roman-Dutch law and significantly influenced by English law, the South African courts have often adopted a comparative approach that includes other legal cultures and jurisdictions.¹⁰⁴ The willingness to engage without any clear implied or transferred trust is reflected in the variety of countries from which foreign judgments have sought to be enforced. These points can be illustrated through the enforcement of foreign judgments expressed in foreign currency.

In *Barclays Bank of Swaziland Ltd v Mnyeketi*,¹⁰⁵ the plaintiff sought to enforce a foreign judgment obtained against the defendant in Swaziland. The plaintiff wanted the South African High Court to make payment to the plaintiff in Swazi currency or the South African equivalent as at the date of judgment. After an extensive comparative analysis, the High Court decided to make an order for the payment of the debt in Swazi currency but also gave the defendant an option to make the payment in Swazi currency. This aligned with the trajectory of South African jurisprudence towards the end of the previous decade.¹⁰⁶ It is, however, striking that the court demonstrated its willingness to extricate itself from undue restriction to legal cultures and focus on facilitating the recognition and enforcement of foreign judgments. This is despite the fact that statutory law was inapplicable as the Reciprocal Enforcement of Civil Judgments Act had not entered into force.¹⁰⁷ Although the English House of Lords decision had decided that English courts need not be restricted to judgments expressed in sterling,¹⁰⁸ the South African High court engaged in an impressive analysis of Roman Dutch law to demonstrate that the pre-*Miliangos* position was 'chauvinistic' and 'entirely foreign' to the South African common law.¹⁰⁹ The court then gave an order to enforce the foreign judgment as prayed by the plaintiff, especially as the judgment sum had been 'definitively quantified'.¹¹⁰ On a separate issue (ascertaining the rate of exchange at the time of payment) however, the South African court observed that Roman-Dutch sources did not provide any clear solution considering modern realities. The court then considered and found the English approach persuasive on this separate issue.¹¹¹ African courts need to consider such courageous

¹⁰⁴ E.g. *Society of Lloyds v Price; Society of Lloyds v Lee* 2006 (5) SA 393. For the argument that such a comparative approach could go even further, see RF Oppong, 'Mere Presence and International Competence in Private International Law' (2007) 3(2) *Journal of Private International Law* 321, 326.

¹⁰⁵ *Barclays Bank of Swaziland Ltd v Mnyeketi* 1992 (3) SA 425.

¹⁰⁶ See for example, the decision in *Elgin Brown and Hamer (Pty) Ltd v Dampskibsselskabet Torm Ltd* 1988 (4) SA 671 (NPD). This liberal trajectory was essentially maintained in the next decade. See *Standard Chartered Bank of Canada v Nedperm Bank Ltd* (1994) 4SA 747 (AD). See also *Zelenyuk v Avnik* (2009) ZAGPPHC 86 para 4.

¹⁰⁷ Act 9 of 1966. That Act did not enter into force.

¹⁰⁸ See the landmark case of *Miliangos v George Frank (Textiles) Ltd* [1975] 3 All ER 801. Under the extant law in Nigeria, there is no restriction on courts to register foreign judgments in foreign currencies. See *Witt & Busch Ltd v Dale Power Systems Plc* [2007] (Pt 1062) 1, 20.

¹⁰⁹ *Mnyeketi* (n 105) 435. For an insight into how African countries struggled with the uncertainty connected with the 'feeling-the-loss' rule vis-à-vis post-*Miliangos* developments, see V Black, *Foreign Currency Claims in the Conflict of Laws* (Hart Publishing 2010) 92.

¹¹⁰ *Mnyeketi* (n 105) 436.

¹¹¹ The court adopted a practical approach to the issue, and considered that the English approach would need to be adapted to the South African procedural context anyway. See *Mnyeketi* (n 105) 437 of the judgment.

approaches that transcend ancient boundaries of legal culture that have merely served to transfer (mutual) trust although without any clear basis or structure. In this context, African countries need to carefully consider what ends they wish to attain through fora that have the potential to encourage legal harmonisation. One such relevant forum is the Commonwealth itself.

VI The Commonwealth

Ironically, Africa's colonial history has meant that English common law remains a somewhat unifying factor for its former colonies not only in Africa, but also in the Commonwealth generally.¹¹² The foreign judgments cases already discussed illustrate the deference to English common law as a pragmatic and robust safety net to sort challenges in the recognition and enforcement of foreign judgments. The Judgments Convention, the global framework on the recognition and enforcement of foreign judgments, could have significant impact on African countries and they can be inspired by the reforms and insights that the Hague Conference provides. The use of treaties is important, but this use should be firmly anchored in an underlying driving force other than the possible benefits that may accrue to such parties that sign up to such conventions. There is evidence for this line of reasoning from the Commonwealth. In 2005, Law Ministers advised the Commonwealth Secretariat to 'review the intra-Commonwealth arrangements for the recognition and enforcement of foreign judgments'.¹¹³ Since then, the Commonwealth has sought to develop its own foreign judgments framework despite the efforts of the Hague Judgments Project which has now culminated in the Judgments Convention.¹¹⁴

One of the reasons for the parallel Commonwealth efforts at developing a framework to facilitate the recognition and enforcement of foreign judgments is to ensure judgments from all countries can be enforced. Thus, no other means apart from 'registration' should be adopted and the common law action on the foreign judgment should be abolished.¹¹⁵ However, registration in this manner also potentially implies the abolition of existing statutes that were part of colonial legislation handed down in many British ex colonies.

While there may have been a rapprochement between the civil and common law traditions in Europe in the context of private international law, the Commonwealth Bill reflects a persistent lack of trust for judgments emanating from outside the common law legal tradition. The instinctive default logic may seem persuasive, but it is not clear if there is any evidence for the approach. Nigerian recognition from Niger is a case in point – a clear traversing of the legal cultures. A more practical argument is that of efforts to attain an effective global framework where most of the Commonwealth member countries did not participate in

¹¹² <<http://thecommonwealth.org/about-us>> accessed 28 May 2019.

¹¹³ Commonwealth Secretariat, 'Commonwealth Practice in the Recognition of Foreign Judgments' (2009) 35(2) 345 para 1.

¹¹⁴ D McClean, 'Improving the Recognition of Foreign Judgments: Model Law on the Recognition and Enforcement of Foreign Judgments' (2017) 43(3-4) Commonwealth Law Bulletin 545. This paper was prepared on behalf of the Commonwealth Secretariat.

¹¹⁵ The Model Recognition and Enforcement of Judgments Bill s 8. *ibid* 567.

relevant Hague negotiations. In preparing the Model law, it was observed that ‘forty Commonwealth member countries are not members to The Hague Convention, and thus have not participated in the negotiations to the draft text of the convention’.¹¹⁶

If the Commonwealth efforts to attain a legal framework on foreign judgments becomes fruitful, some Commonwealth countries will have several legal regimes for the recognition and enforcement of foreign judgments. Potentially, Nigeria will have up to five (assuming it ratifies the Judgments Convention). A multiplicity of laws on the same subject and sometimes the same countries not only fails to demonstrate trust, but is also complicated for litigants. More than one way of accessing justice can be beneficial to litigants but, as the principle of mutual trust in the EU demonstrates, trust is critical in ensuring that a group of countries attain common goals in a cohesive manner. In this context, Commonwealth African jurisdictions can build on the subtle application of mutual trust already existing in Africa and consider to what extent the principled application of mutual trust in the EU may be adapted for Africa.

Accepting or discounting the relevance of mutual trust in African private international law requires an assessment of how various legal regimes affect the entire matrix of dispute resolution. This is where the multiplicity of legal regimes does not promote the harmonisation of laws. This issue has largely been glossed over because the UK (from where the fountain of the English common law finds its source) has various legal regimes. That is arguably more understandable or acceptable because the different regimes are largely for different sets of litigants. Even so, there is a clear effort on the part of the UK to reduce the space for overlaps with respect to the same countries. For example, ‘for almost all practical purposes the 1933 Act is superseded by the Brussels I Regulation’ with respect to certain countries such as France, Germany and Italy.¹¹⁷ Countries such as Norway fall within the scope of the Lugano regime.¹¹⁸ Also, actions cannot be brought under common law where the 1933 Act applies.¹¹⁹ The general English position is in favour of exclusive application of statutory schemes where they do apply.¹²⁰

In the Commonwealth, there is an emerging realisation of how a multiplicity of legal regimes can undermine mutual trust. One of the major inspirations for pursuing an overarching legal framework for the recognition and enforcement of foreign judgments in the Commonwealth is multiplicity of legal regimes. The jurisdictions under analysis are members of the Commonwealth, and the influence of the Commonwealth on the development of relevant laws and policies is likely to continue. This is not from a perspective of supranational law, but considering that African members mostly share a similar colonial history and legal systems and are at similar levels of development.

¹¹⁶ McClean (n 114) 550.

¹¹⁷ Dicey, Morris and Collins, *The Conflict of Laws* (15th edn, Sweet and Maxwell 2012) para 14-184.

¹¹⁸ The Lugano Convention through Pt 1 of the 1982 Act. See also Dicey, Morris and Collins *ibid* para 14-184.

¹¹⁹ S 6 of the 1933 Act (for a similar position in the context of the 1982 Act, see s 18(8) of the 1982 Act). This does not however prevent assistance under the common law to a foreign court that has requested in the context of insolvency proceedings. See para 14-051.

¹²⁰ In the context of the Brussels I Regulation, see Dicey, Morris and Collins (n 117) para 14-051. See also Case C-42/76 *De Wolf v Cox* [1976] E.C.R. 1759.

The Commonwealth's decision to pursue a legal regime parallel to the efforts of the Hague Judgments Project is a good illustration of how the presence of a common legal culture does not necessarily imply legal homogeneity. Commonwealth African countries (as with the non-African countries) generally also have 'double-track' regimes: registration under statute and bringing an action to enforce foreign judgments which is a typical feature of the English common law.¹²¹ Yet, the presence of multiple legal regimes can pose a challenge to the recognition and enforcement of foreign judgments. If the multiplicity of legal regimes did not deliver substantially different outcomes, there would be no need to problematise this reality. The option to apply the English common law even where the statutory framework applies, is a double-edged sword. On the one hand, the applicability of the English common law – bringing an action on the judgment – increases chances to ensure foreign judgments are enforced.¹²² On the other hand, this option results in some unpredictability which does not promote mutual trust within Africa. For example, litigants seeking to enforce a foreign judgment would generally have more than one route to enforce that judgment in some Commonwealth African countries.¹²³ However, foreign judgments from neighbouring countries such as Niger can only be enforced through the safety net of the common law legal regime.

Although the Commonwealth efforts have a clear potential to promote mutual trust in the African countries (and non-African countries) involved in the Commonwealth, that progress further undermines mutual trust in Africa as a whole. This is because the elimination or reduction of mistrust in Commonwealth Africa is based on principles of the English common law – a legal culture generally inapplicable to many countries in Africa – including those in close geographical proximity to such African countries that are member states of the Commonwealth. Ironically, one of the reasons for retaining the designation of reciprocating states is that it 'enables the enacting state to be selective, identifying states which are geographically close, have close trading links or share a similar legal tradition.'¹²⁴

Neither geographical proximity nor close trading links have clearly benefited African countries in the context of developing mutual trust in private international law as influenced by the common law. The memberships of some major REIOs provide evidence for this claim. An example is ECOWAS which has been driven by political and economic goals that have included the promotion of international commerce. Several ECOWAS countries, however, are not members of the Commonwealth. Such countries include Niger and Benin which are neighbours of Nigeria. These countries do not benefit from the Nigerian statutory framework on foreign judgments which remains, despite its shortcomings, the most successful Nigerian legal regime on the recognition and enforcement of foreign judgments in Nigeria.¹²⁵ The 'trust' that was formed during the pre-independence era has remained in place for such commonwealth countries designated on the list. This phenomenon is replicated in the Southern African region where countries such as Swaziland, Botswana and Namibia are SADC

¹²¹ McClean (n 114) 548.

¹²² In *Willbros West Africa Inc v McDonnell* (n 89).

¹²³ E.g. Nigeria *ibid.* South African statutory law does not restrict judgment creditors.

¹²⁴ McClean (n 114) 551.

¹²⁵ (n 114)

members; yet Namibia has remained the only country to which the South African state on foreign judgments has been extended.¹²⁶ This position presents less of a geographical irony or contrast because most neighbours of South Africa have a similar legal history. However, Mozambique (a neighbour) suffers a double disadvantage because it is not designated as one of such countries to which South African statute applies and Mozambique also has a different legal tradition. Mozambique's mixed legal system contains a clear civil law component as evidence of its Portuguese colonial history.¹²⁷ A significant feature of this legal system is a lack of binding precedent – a fundamental part of the common law system. The influence of legal pluralism and homogeneity is further illustrated by the fact that Mozambique has had a more defined way of facilitating judicial cooperation with Portugal than with its African neighbours. An example is the Agreement on Legal and Judicial Cooperation between the Portuguese Republic and the People's Republic of Mozambique.¹²⁸ The trust that has carried over from the colonial era is arguably not sustainable because it is adopted or transferred but not deliberately created. This is partly why some conventions seem to lack widespread appeal – they are often merely adopted as a matter of practical need which may serve urgent interests, but trust is hardly created where the parties' trust is not transferred through a process of which they are a part. Subject to any necessary reservations if applicable, Commonwealth African countries can consider the Judgments Convention as a platform on which they can rise above multiplicity and pluralism. To attain this end, however, such countries first need to consider how they wish to characterise mutual trust.

A clear characterisation of mutual trust in private international law in Africa will offer purposeful guidance on how such African countries can accept any treaty on the recognition and enforcement of foreign judgments. There is no doubt that the Brussels regime on foreign judgments is vastly successful.¹²⁹ There is also some scope to argue that this application of mutual trust in the EU is an indirect but significant factor in EU countries accepting certain global treaties. This is not because the principle of mutual trust per se makes EU Member States accept such global treaties, but because the principle promotes a collective consideration of the impact of global treaties on EU private international law. An example is where, if jurisdiction is exercised under the Brussels Regulation or national law, the fact that the court of an EU Member State determines that an arbitration agreement is inoperative does not preclude that court's judgment on the substance of the case from being recognised or enforced under the Regulation.¹³⁰ Clearly, however, the Regulation not only preserves the competence of Member State courts to decide on the recognition and enforcement of arbitral awards in accordance with the New York Convention on arbitration,¹³¹ but also ensures the

¹²⁶ (n 114)

¹²⁷ B Santos, 'The Heterogenous State and Legal Pluralism in Mozambique' (2006) 40 *Law and Society Review* 39-40.

¹²⁸ Signed in Lisbon in 1990. Other such agreements between Portugal and former colonies include: Agreement on Legal Cooperation between the Portuguese Republic and the Republic of Guinea-Bissau, concluded in Bissau (1988). Angola and Guinea Bissau were former Portuguese colonies with a great influence of civil law.

¹²⁹ P Hovaguimian, 'The Enforcement of Foreign Judgments under Brussels I Bis: False Alarms and Real Concerns' (2015) 11(2) *Journal of Private International Law* 212, 239.

¹³⁰ Recital 12 of the Brussels Recast.

¹³¹ Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.

New York Convention takes precedence over the Regulation.¹³² A delicate balance is thus struck between promoting mutual trust in the EU and accepting a global treaty that applies to the EU Member States in general without undermining the application of the Regulation with respect to appropriate scope. A pragmatic consideration of such ways of striking any necessary balance will place African countries in a good position to appreciate the practical importance of the Judgments Convention. This consideration will also enable African countries to decide which treaties on foreign judgments or private international law generally should be accepted and ensure that any relevant treaty is effective in Africa.¹³³ Clearly, an effective global treaty will promote the circulation of foreign judgments on a larger scale.

The Judgments Convention does not expressly mention mutual trust. However, the Judgments Convention provides that there cannot be any review of the merits of the foreign judgment in the requested State.¹³⁴ This reflects some degree of mutual trust because it is necessary for the movement of foreign judgments to traverse legal cultures, REIOs and (Commonwealth) African countries to ensure this cardinal provision of the Judgments Convention is effective. Avoiding or minimising the chances of reviewing the merits of a foreign judgment in general, especially in civil or commercial matters, is critical to promoting the recognition and enforcement of foreign judgments. This does not mean that a denial of enforcement necessarily implies a failure of mutual trust. In fact, a judgment may not be enforced precisely because of mutual trust. For example, a general trust in shared values of natural justice can justify a denial of enforcement.¹³⁵ However, adjudicating such a delicate balance should be predicated on a clear and purposeful characterisation of mutual trust in private international law in Africa. Commonwealth African countries can consider different layers of mutual trust in promoting the recognition and enforcement of foreign judgments. Practical decisions in this context should depend on the beneficiaries of such layers of mutual trust. For example, a SADC treaty may suit litigants in regional but not intercontinental contexts.

VIII Beyond Multiplicity and Pluralism

Some scholars have found a link between legal traditions and economic outcome. They argued that ‘for the most part, common law systems tend to provide greater protection for investors’.¹³⁶ The inapplicability of statutory law should not impede the recognition and enforcement of foreign judgments. In the same vein, however, there is no justification for litigants to be deprived of a common law regime especially if litigants find one legal framework easier than the other. This cannot promote the recognition and enforcement of

¹³² Recital 12 of the Brussels Recast.

¹³³ Okoli (n 100) 264.

¹³⁴ However, the Judgments Convention also provides that such a consideration is possible ‘as is necessary for the application of this Convention’. See art 4(2) of the Judgments Convention.

¹³⁵ For the argument that ‘a possibility to refuse recognition or enforcement can work in synergy with mutual trust’, see M Hazelhorst, *Free Movement of Civil Judgments in the European Union and the Right to a Fair Trial* (Springer 2017) 419.

¹³⁶ M Breen and D Doyle, ‘The Determinants of Privatization: A Comparative Analysis of Developing Countries’ (2013) 15(1) *Journal of Comparative Policy Analysis: Research and Practice* 1, 10.

foreign judgments. This is also true if statutory laws otherwise applicable would not help in the case. The Judgments Convention provides another useful reference in this context of multiplicity of relevant laws. In addition to the focus of the Judgments Convention on avoiding a review of the merits of foreign judgments, it also preserves the recognition or enforcement of foreign judgments under national law.¹³⁷ The decision to respect national laws in this way is, at least in principle, indicative of some trust for national laws especially if such laws promote the circulation of foreign judgments. Despite its imperfections, the common law has been a largely successful safety net for Commonwealth African countries. However, a default reliance on the common law may not ensure sustainable progress in the long term. This default-reliance approach presumes trust – what may originally have been anchored to some degree of mutual trust by accident or design (e.g. several reciprocal enforcement judgments) which several African courts now apply generally. Such trust is inappropriate because it emerged in a context different to the current realities of globalisation and ground-breaking trade agreements such as the African Continental Free Trade Agreement.¹³⁸ The substance of legal frameworks should be converging considering the increased mobility of litigants through international commerce. The movement of foreign judgments should be facilitated to align with these current realities based on certain and predictable laws. The more international elements of a case transcend jurisdictions and legal cultures, the more likely there would be mutual suspicion.¹³⁹ In the EU, this tendency has been greatly tempered by significant harmonisation of private international law. For example, the divide between civil law and common law has been reduced.

Application for the enforcement of obligations under a wrong law should not be enough to deny justice or judgment to litigants in so far as the court has powers to do justice in the subject matter generally. A situation where a litigant is unable to enforce a foreign judgment or is subjected to undue delay is not progressive. It is necessary to consider what can help to promote the recognition and enforcement of foreign judgments if mutual trust has been neither coherently articulated nor applied in any consistent manner. However, the tendency to rely on a theoretical framework developed in a non-African context may not be sustainable. For example, it has been argued that there should be ‘a reasonable degree of willingness’ to tackle impediments to resolving private international law issues ‘on an appropriate level of judicial comity’ where mutual trust fails.¹⁴⁰ Such an option may be persuasive especially in a non-African context, but it is based on some implied assumptions which African jurisdictions must first accept. One such major assumption is that traditional theories that underlie foreign

¹³⁷ Art 15 of the Judgments Convention. Preserving national rules does not necessarily blacklist their systems but leaves relevant countries to decide countries with which such rules should be used.

¹³⁸ Albert (n 5).

¹³⁹ A Briggs, ‘Decisions of British Courts 2009: Private International Law’ (2009) 80(1) *British Yearbook of International Law* 575, 641.

¹⁴⁰ U Neergaard and AE Sørerensen, ‘Activist Infighting among Courts and Breakdown of Mutual Trust? The Danish Supreme Court, the CJEU, and the Ajos Case’ (2017) 36(1) *Yearbook of European Law* 275, 310. Public policy can also serve as a safety net where mutual trust fails because public policy protects State sovereignty. Some degree of trust is required respect State sovereignty and security. In this context, see art 7(1)(c) of the 2019 Judgments Convention.

judgments are clear. However, there is vast literature that shows this is not the case.¹⁴¹ Another assumption, from an African perspective, is that such theories are applied in a consistent manner. Again, case law does not provide evidence in that regard.¹⁴²

The inherent jurisdiction of the court should be developed further and explored with a view to doing substantive justice in matters of private international law.¹⁴³ This does not detract from considering rules of private international law but is rather complementary. This is because the power can be used to develop the law.¹⁴⁴ Inherent jurisdiction can be used as a 'reserve' on which courts can draw to ensure fairness is attained.¹⁴⁵ This can also be used to avoid awkward situations where a court may characterise a foreign judgment application as one of reciprocity and decide that neither statute nor the common law provides for any reciprocal arrangement.¹⁴⁶ One possible criticism of relying on the inherent power of the court is that it may undermine legal predictability. But this risk is narrowed if the use of inherent powers as a safety net to ensure that the circulation of judgments is not impeded because of undue technicalities. The use of this power can be strengthened by considering a comparative analysis of other countries that face challenges which other countries face or have overcome. This comparative analysis need not be constrained by presumed or transferred trust in favour of any group of countries.¹⁴⁷ South Africa has often adopted a relatively robust comparative approach in foreign judgments matters.¹⁴⁸ There is a universal need to promote the enforcement of foreign judgments and facilitate international commerce.

Developing the court's capacity vis-à-vis a focus on the promotion of enforcement highlights how a contextual approach should influence dispute resolution. For example, the jurisdiction of the Judicial Committee of the Privy Council has since ceased in the African jurisdictions under Africa.¹⁴⁹ However this jurisdiction continues in several Commonwealth countries outside Africa.¹⁵⁰ Some benefits of the 'imposed trust' facilitated by the Privy Council during

¹⁴¹ See Childress (n 71); For an extensive discussion of the theoretical bases for the recognition of foreign judgments and their application in South Africa and Nigeria, see Okoli (n 100) 71-115; Kenya: *Shah v Haria* (n 50) para 26. South Africa: *Richman v Ben-Tovim* (n 101) para 5; Nigeria: *Grosvenor Casinos Ltd v Halaoui* (n 71) 339.
¹⁴² *ibid*

¹⁴³ In Nigeria and Kenya, the High Courts are competent to enforce foreign judgments. Generally, such courts have inherent jurisdiction. For South Africa, the monetary value of the foreign judgment depends on whether it will be the High Court or the Magistrates courts. See for the revised financial limits, see Government Gazette No. 37477 of 27 March 2014.

¹⁴⁴ In South Africa, the High Courts and appellate courts have the inherent power 'develop the common law, taking into account the interests of justice'. See the Constitution of the Republic of South Africa, 1996 s 173.

¹⁴⁵ *APA Insurance Company v Nthuka* [2018] eKLR para 22.

¹⁴⁶ In *Mamba v Mamba* [2011] SZHC 43, the Swazi High Court decided that neither the Reciprocal Enforcement of Judgment Act No 4 of 1922 nor the Roman Dutch law was thus applicable to the US. Cf. *Improchem (Pty) Limited v USA Distillers* [2020] SZHC 23.

¹⁴⁷ See, generally, *Gyimah v The Attorney General* [2010] 1BLR 646, 655-656 where the Botswanan High Court considered an application to enforce a Ghanaian judgment. This case is instructive although it was decided in a matrimonial context.

¹⁴⁸ *Society of Lloyds v Price; Society of Lloyds v Lee* (n 104).

¹⁴⁹ And indeed, the whole of Africa. This contrasts with the 1930s when it was the final appellate court for more than a quarter of the world. <<https://www.icpc.uk/docs/jurisdiction-of-the-icpc.pdf>> accessed 16 January 2020.

¹⁵⁰ E.g. Trinidad and Tobago, and Jamaica. <<https://www.icpc.uk/docs/jurisdiction-of-the-icpc.pdf>> accessed 16 January 2020.

the colonial era can be gained by focusing on foreign judgments, and avoiding undue distinction between legal cultures. The non-applicability of the Privy Council in Africa underscores the need to process and contextualise any presumed or transferred trust in foreign laws or institutions. The Privy Council also ensured uniformity of decisions. If a national supreme court reached its limits, then there was hope that the Privy Council would rectify any flaws and ensure uniform interpretation of relevant laws.

Without any supranational court (e.g. a reference court of the CJEU scope), Africa has no experience of promoting the recognition and enforcement of foreign judgments on a continent-wide basis.¹⁵¹ No African country is a party to the 1971 foreign judgments convention or the Hague Choice of Courts Convention.¹⁵² Even for conventions where there has been significant African participation, the issue of trust has arisen in the context of Africa. A good example is the restriction on adoptions under Scots law. In 2018, the Scottish government suspended adoptions from some countries (including Africa) where legal certainty and 'legal guarantees' were lacking.¹⁵³ For the avoidance of any doubt, the argument here is not that Commonwealth Africa should have a supranational court. However, this absence underscores the need to determine the layers of mutual trust that should apply with respect to different judgments from various parts of the world. African jurisdictions need to reflect on the rather retrogressive tendency to draw lines according to legal cultures even in family matters (e.g. child adoption despite the success of the Adoption Convention).¹⁵⁴ Overarching issues of trust transcend compartments of private international law as this area of law cannot be dissociated from socio-political developments of the real world. For example, a successful convention on foreign judgments would be based on some degree of underlying mutual trust.¹⁵⁵ A significant presumption is that the judicial standards/processes of the foreign court are above board in terms of transparency of the system. Even before Brexit, the EU started reflecting on 'the status of mutual trust and monitoring its preconditions'.¹⁵⁶ The importance of mutual trust will increase either through its application or absence.

¹⁵¹ Cf Case C-139/10 *Prism Investments BV v van der Meer* (ECLI:EU:C2011:653).

¹⁵² <<https://www.hcch.net/en/instruments/conventions/status-table/?cid=78>> accessed 16 January 2020.

¹⁵³ Ethiopia was one such country (other countries were Haiti, Nepal, Guatemala and Cambodia). This list was published pursuant to s 62 of the Adoption and Children (Scotland) Act 2007. Although Ethiopia has not signed the convention, no other African country was included even though they did not sign. This suggests that trust is not necessarily dependent on a convention. <<https://www.gov.scot/publications/restricted-list-countries-with-restrictions-on-adoption/>> accessed 16 January 2020.

¹⁵⁴ Only francophone West African States participated in a recent workshop on the implementation of this convention, although Ghana is also a contracting party. <<https://www.hcch.net/en/publications-and-studies/details4/?pid=6600>> accessed 16 January 2020.

¹⁵⁵ RA Brand, 'The Circulation of Judgments Under the Draft Hague Judgments Convention' (University of Pittsburgh Law School, 2019) Working Paper No. 2019-02 p 1, 33-34.

¹⁵⁶ M Weller, 'Mutual Trust: In Search of the Future of European Union Private International Law' (2015) 11(1) *Journal of Private International Law* 64, 66-67.

IX Conclusion

Intractable challenges (such as conflict of laws issues) sometimes require taking a step back from undue legal technicalities to consider such challenges in a new way.¹⁵⁷ The question of mutual trust in African private international law is an underlying issue that requires attention. This is not only because the principle of mutual trust has shaped European private international law, but also because it should reshape a post-Brexit Europe. In a post-Brexit era, the UK and (what will remain as) the EU need to pay greater attention to the nature, application and contextualisation of mutual trust. The principled application of mutual trust is absent in Africa, but the subtle and unarticulated application of mutual trust are relevant to Africa as well because there is a need to be strategically positioned to benefit from relevant jurisprudential developments.¹⁵⁸ The Commonwealth initiatives such as the Model Law have the potential to inspire reflections on how Commonwealth African countries should clearly characterise mutual trust. Such characterisation can be a basis on which Commonwealth African countries may consider the extent to which the principle of mutual trust may be adapted for use in promoting the recognition and enforcement of foreign judgments and private international law in Africa generally.

Except where a clear case is made for access to justice, the fact that many African courts continue to navigate through a myriad of legal regimes does not serve predictability or certainty.¹⁵⁹ The South African experience especially demonstrates that the common law need not impede the recognition and enforcement of foreign judgments. This point is compatible with the efforts of the Commonwealth to provide an overarching framework on foreign judgments.¹⁶⁰ However, considerations of mutual trust and its clear conceptualisation or characterisation are necessary to develop a coherent jurisprudence in Commonwealth Africa. Ensuring such jurisprudence is suitable for modern international commercial litigation requires a clear articulation of how mutual trust can promote a global perspective. This will increase the prospect of the Judgments Convention gaining traction in Africa vis-à-vis the 2005 Choice of Court Convention. Conventions have a way of eliciting uniformity, but not necessarily trust. Eventually some trust is inevitable for the proper functioning of a convention.¹⁶¹ The need for trust and the Judgments Convention form the confluence where preparation can meet opportunity.¹⁶²

Developing trust requires the cooperation of all actors (including countries, litigants and experts) in the transnational litigation process.¹⁶³ By considering how mutual trust should be

¹⁵⁷ Brand (154) 13.

¹⁵⁸ Some recent Nigerian Supreme Court cases reiterate that Nigerian courts may be persuaded by foreign decisions where there is no established precedent. However, courts can go further by pushing the boundaries of legal tradition. See *Sifax Nigeria Limited v Migfo Nigeria Limited* [2018] 9NWLR (Pt 1623) 138; *In Re: Abdullahi* [2018] 14 NWLR (Pt 1639) 272.

¹⁵⁹ The African cases analysed in this article are instructive.

¹⁶⁰ Notes 114-116.

¹⁶¹ Brand (155) 33-34.

¹⁶² The quote 'luck is what happens when preparation meets opportunity' is commonly attributed to Seneca, the Roman Stoic philosopher who died in 65 AD.

¹⁶³ MJ Wilson, 'Improving the Process: Transnational Litigation and the Application of Private Foreign Law in U.S. Courts' (2013) 45 *International Law and Politics* 1111, 1144-1145 and 1150.

contextualised, there is potential for a broader understanding and application of mutual trust in a manner that promotes the recognition and enforcement of judgments at the global level.