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THE POSSIBLE IMPACT OF THE 2019 HAGUE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN CIVIL OR COMMERCIAL MATTERS ON THE GROUNDS OF INTERNATIONAL COMPETENCE IN GHANA

Solomon Okorley[1]

ABSTRACT

The 2019 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters is a product of the Judgments Project of the Hague Conference on Private International Law. The Hague Judgment Convention has the advantage of providing business partners with a simple, efficient, and predictable structure with regards to the recognition and enforcement regime; as well as reducing related cost. More specifically, the convention fosters predictability and certainty in international commercial relations by enabling international commercial partners to be precisely informed of the grounds on which the decision of the court of one contracting state will be recognised or enforced in the territory of another contracting state. The Convention offers a wide range of jurisdictional filters for the purposes of recognition and enforcement of judgments from Contracting States. This article discusses the modern and innovative grounds of international competence introduced by the Hague Convention and its potential impact on the grounds of international competence for Ghana if Ghana ratifies the convention. The article recommends the ratification of the 2019 Hague Judgment Convention as it would be of enormous benefit to Ghana whose grounds of international competence when it comes to recognition and enforcement of foreign judgments seems antiquated and confined only to residence, submission and more controversially, the presence of the judgment debtor in the jurisdiction of the foreign court.

Keywords: Recognition, Enforcement, Foreign Judgment, International Competence, Hague Judgments Convention

[1] B.A. (Hons) Social Sciences; LLB (Summa Cum Laude) (University of Cape Coast); LLM with Distinction (University of Johannesburg); Doctoral Candidate (University of Johannesburg); Academic Assistant, Research Centre for Private International Law in Emerging Countries, Faculty of Law, University of Johannesburg; Tutor, International Commercial Law, University of Johannesburg. The author is grateful to Professor Jan L. Neels and Dr Prince Obiri-Korang for their extensive reading of the earlier draft of this manuscript and their helpful comments as well.

INTRODUCTION

In recent times, there is an astronomical increase in international transaction and commerce.[2] This has brought about a corresponding increase in transnational litigation.[3] However, the effectiveness of a court's judgment is territorially constrained.[4] Judgments from a State do not have direct impact outside its jurisdiction due to territorial sovereignty.[5] Such a judgment must get the approval of the courts within the State of enforcement.[6] In addition to the territorial principle,[7] legal systems that recognise foreign judgments do so based on principles such as reciprocity, comity, the doctrine of obligation and the theory of vested rights.[8] There are even some countries that do not respect foreign judgments.[9] However, due to worldwide economic integration and globalisation, there is the need for international judicial cooperation.[10] The facilitation of international commerce,[11] enhancement of international relations and enlightened social values necessitate that a foreign judgment is recognised and enforced.[12]

To facilitate this process, there are national, bilateral,[13] and regional[14] regimes to govern it.[15] Internationally, earlier attempts[16] were made in the 20th century to have a worldwide enforcement convention, but they were without success.[17] The premier example of success at the global level

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[2] See generally W Friedman, *The Changing Structure of International Law* (Stevens and Sons, London 1978).

[3] C McLachlan, 'International Litigation and the Reworking of the Conflict of Laws' (2004) 120 LQR 580, 580–582.

[4] RF Oppong, *Private International Law in Commonwealth Africa* (Cambridge University Press, Cambridge 2013) 313.

[5] C Schulze, *On Jurisdiction and the Recognition and Enforcement of Foreign Money Judgments* (University of South Africa Press, Pretoria 2005) 16; JR Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press, Oxford 2019) 289.

[6] Ibid (n 3) 313.

[7] See the case of *Companie Naviera Vascongado v S.S.Cristina* 1938 AC 485 para 496-497 where Lord Macmillan describes the territorial principle as an important attribute of State sovereignty.

[8] Ibid (n 3) 316; C Roodt,'Recognition and enforcement of foreign judgments: still a Hobson's choice among competing theories?' (2005) 38 CILSA 15, 17.

[9] M Martinek, 'The principle of reciprocity in the recognition and enforcement of foreign judgments — history, presence and ... no future' (2017) 1 TSAR 36.

[10] B Fagbayibo, 'Towards the harmonization of laws in Africa: is OHADA the way to go?' (2009) 42 CILSA 309, 310.

[11] JL Neels, 'Preliminary remarks on the Draft Model Law on the Recognition and Enforcement of Judgments in the Commonwealth' (2017) 1 TSAR 1, 2.

[12] CF Forsyth, *Private International Law: The Modern Roman-Dutch Law including the Jurisdiction of the High Courts* (Juta and Co Pty Ltd, Cape Town 2012) 417.

[13] Example is the Australia-New Zealand Treaty on Trans-Tasman Court Proceedings and Regulatory Enforcement, 2008 between New Zealand and Australia; and Canada-United Kingdom Civil and Commercial Judgments Convention Act, R.S.C. 1985 between Canada and UK.

[14] Europe: Regulation (EU) No 1215/2012 of The European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters [the Brussels Recast] replaced the Brussels Convention and Lugano Convention on Jurisdiction and Recognition and Enforcement of Judgments in Civil and Commercial Matters; Organization of American States (OAS): the 1984 Inter-American Convention on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgments (Montevideo Convention); and Middle East: the 1952 Agreement as to the Execution of Judgments (Arab League Judgments Convention); 1983 Arab Convention on Judicial Co-operation (Riyadh Convention); and 1995 Protocol on the Enforcement of Judgments Letters Rogatory, and Judicial Notices issued by the Courts of the Member States of the Arab Gulf Co-operation Council ('GCC Protocol').

[15] Overview of the Judgments Project <https://www.hcch.net/en/projects/legislative-projects/judgments> accessed on 5 February, 2022.

[16] Examples are the Convention on the Jurisdiction of the Selected Forum in the Case of International Sales of Goods (1958) followed by 1965 Convention on the Choice of Court.

[17] R Michaels, 'Recognition and enforcement of foreign judgments' in *Max Plank Encyclopaedia of Public International Law* (Oxford University Press, Oxford 2009) 4.

is the New York Convention,[18] but it deals with the enforcement of foreign arbitral awards.[19] Despite the earlier failures in relation to an enforcement of foreign judgments convention, significant breakthrough was made with the entering into force of the 1971 Hague Convention on the Recognition and Enforcement of Foreign judgments in Civil and Commercial Matters.[20] However, only five States[21] signed and ratified it, and it never became operational.[22]

In recent times, there has been a revival of this vision of having a worldwide legal instrument for recognition and enforcement of foreign judgement. The Commonwealth Secretariat has embarked on a project for a Commonwealth Model Law on the Recognition and Enforcement of Judgments.[23] Also, the Hague Conference has been relentless in its effort to enact a convention for the recognition and enforcement of foreign judgments.[24] This perseverance has culminated into the 2019 Hague Convention on Recognition and Enforcement of Foreign Judgments (2019 Hague Convention), adopted recently on 2 July, 2019.[25] Since its adoption, six countries have become signatory states, namely: Costa Rica, Israel, Russian Federation, Ukraine, Uruguay and more recently USA.[26] There is also an European Council decision for the EU to accede to the Convention.[27] The Convention is, however, not yet in force.[28] The adoption of this Convention represent an effort to reach an optimum level of international judicial cooperation especially in commercial related transactions. This is very important for a country like Ghana which attracts a lot of foreign investment and is deemed to be the "gateway to Africa".

LEGAL AND ECONOMIC CONTEXT

The economic development of Africa in recent decades has not gone unremarked upon with intra Africa trade, and trade between African countries and other major trading blocs, such as the European Union, Asia, and especially China and the United States of America.[29] Involvement in

[18] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral awards, 30 June 1958 <http://www.newyorkconvention.org/> accessed on 5 February, 2022.

[19] AVP Mumba, *The Recognition and Enforcement of Foreign Judgments in Malawi* (Master's dissertation, University of Johannesburg, 2014).

[20] Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, 1 February 1971 (1971) 1144 UNTS 249.

[21] Kuwait, The Netherlands, Albania, Portugal and Cyprus.

[22] Y Zeynalova, 'The Law on Recognition and Enforcement of Foreign Judgments: Is It Broken and How Do We Fix It?' (2013) 31 Berkeley Journal of International Law 150, 182.

[23] Commonwealth Secretariat 'Improving the recognition of foreign judgments: model law on the recognition and enforcement of foreign judgments' (2017) 43 Commonwealth Law Bulletin 545, 545-546; and Neels (n 10) 2.

[24] RA Brand, 'The circulation of judgments under the draft Hague Judgments convention' *University of Pittsburgh School of Law legal Studies Research Paper Series No 2019-02* (2019).

[25] It's done: the 2019 HCCH Judgments Convention has been adopted! <https://www.hcch.net> accessed on 5 February, 2022.

[26] <https://www.hcch.net/en/instruments/conventions/status-table/?cid=137> accessed on 5 February, 2022.

[27] <https://ec.europa.eu/info/sites/default/files/proposal_eu_accession_judgments_convention_and_annex_en.pdf > accessed 5-02-2022.

[28] Article 28(1) of the Convention provides the condition precedent for the convention to enter into force: *"This Convention shall enter into force on the first day of the month following the expiration of the period during which a notification may be made in accordance with Article 29(2) with respect to the second State that has deposited its instrument of ratification, acceptance, approval or accession referred to in Article 24."*

[29] AJ Moran QC, and AJ Kennedy, *Commercial Litigation in Anglophone Africa: the law relating to civil jurisdiction, enforcement of foreign judgments and interim remedies* (Juta and Co (Pty) Ltd, Cape Town 2018) vii.

international trade impacts positively on the economic growth rates of developing countries, which in turn has a multiplier effect, including rising incomes, poverty level reduction and closing the gap with more advanced countries.[30] According to the 2019 West African Economic Outlook,[31] in 2018, estimated real GDP growth for West Africa was 3.3 percent, up from 2.7 percent in 2017 and the main drivers for this growth were positive net exports, investments, government consumption and household consumption.[32] It was estimated that by 2020, the continent's GDP will reach US$2.6 trillion, and consumer spending is projected to reach US$1.4 trillion.[33] However, in 2020, economic activity in Africa, and in the world as a whole, was greatly affected by the global pandemic caused by COVID–19. As a result, Real GDP in Africa contracted by 2.1 percent in 2020.[34]

Be that as it may, with increased in intra- and extra-continental trade, as well as increase in consumption in Ghana, it is inevitable that commercial disputes will increase, and a number of these disputes will possess cross-border characteristics. In respect of the commercial transactions between foreign trade partners and their counterparts from Ghana, litigation or arbitration of disputes takes place in a forum in a developed country.[35] Eventually, judgments obtained in these developed countries may have to be enforced in Ghana. Currently, the legal regime for recognising and enforcing foreign judgments in Ghana is largely premised on the English common law, which defines the foreign court's international competence in a narrow way. This does not meet the expectation of the modern commercial world.[36]

It is in this regard that this paper seeks to analyse the possible impact of the 2019 Hague Convention on the grounds of international competence of foreign courts recognised in Ghana if Ghana becomes a Contracting State to the convention. To achieve this purpose, the paper begins with an introduction that showcase the efforts of the international community in enacting a global enactment to regulate recognition and enforcement of foreign judgment. It is followed by the legal and economic context of the article highlighting the rationale behind the paper. Further, key concepts that relate to recognition and enforcement of foreign judgment are defined and explained. Also, the Hague Judgments Project that gave birth to the convention is discussed. After delineating the grounds for international competence in the Hague Convention, the paper will move on to discuss the current legal framework for recognition and enforcement of foreign judgment in Ghana. The paper will then move on to illustrate the potential impact that the grounds for international competence, as spelt out in the Hague Convention, would have on the grounds for international competence of Ghana if Ghana becomes a contracting state to the convention. In the dying embers of the article, concluding remarks and suggestions are made.

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[30] See generally D Dollar, and A Kraay, *Trade, Growth, and Poverty* (The World Bank, Washington DC 2001).

[31] This was before the advent of the COVID-19 pandemic which whittled down most economic gains of countries all over the world.

[32] African Development Bank *West Africa economic outlook 2019* (African Development Bank Group, Cote Divoire 2019) 9.

[33] African Development Bank *Africa Economic Outlook 2012* (African Development Bank Group, Cote Divoire 2012).

[34] African Development Bank *African Economic Outlook 2021* (African Development Bank Group, Cote Divoire 2021) 2.

[35] CN Fondufe, and S Mansuri, 'Doing Deals in Africa – Reflections on What Is Different and What Is Not' (2013) 14 Business Law International 163, 176–82.

[36] A Arzandeh, 'Reformulating the common law rules on the recognition and enforcement of foreign judgments' (2019) 39 Legal Studies 56, 58.

DEFINITION OF KEY CONCEPTS

Foreign judgment refers to a judicial verdict given by a competent adjudicating body outside the geographical boundaries of a State.[37] Recognition and enforcement of foreign judgments are related terms, although different.[38]

Recognition implies the enforcing court accepts that the foreign judgment has the same legal effect anticipated by the original court.[39] According to Dickinson and Lein, recognition is the process by which the effectiveness and authority of a judgment are permitted to be relied upon in the legal order of a country other than the original country where the judgment was rendered.[40]

Enforcement of foreign judgment means that the domestic court will compel the judgment debtor to comply with the foreign judgment which the domestic court has recognised.[41] The enforcement process is often left to municipal law and it differs vastly among countries.[42] While recognition is always indispensable for enforcement,[43] however, judgments such as a declaratory order would be recognised but won't be enforced.[44]

PRINCIPLE OF INTERNATIONAL COMPETENCE

At common law, it is an essential prerequisite for the enforcement of foreign judgments that the foreign court should have been capable to adjudicate the case from the perspective of the private international law rules of the requested State.[45] This is often referred to as "international competence".[46]

[37] M Rossouw, *The Harmonisation of Rules on the Recognition and Enforcement of Foreign judgments in the Southern African Customs Union* (Pretoria University Law Press, Pretoria 2016) 10.
[38] C Platto, and W Horton, (eds) *Enforcements of Judgments Worldwide* (Graham and Trotman, London 1993) 155; and Collins (ed) *Dicey, Morris and Collins on the Conflict of Laws* (Sweet and Maxwell, London 2012) para 14-002-14-006.
[39] Ibid (n 4) 17.
[40] A Dickinson, and E Lein, *The Brussels I Regulation Recast* (Oxford University Press, Oxford 2015) 375.
[41] Ibid (n 4) 17.
[42] Ibid (n 16) 2. This is the same position per art 15 of the 2019 Hague Convention which provides that: "subject to article 6, this Convention does not prevent the recognition or enforcement of judgments under national law".
[43] C Schulze, 'Practical problems regarding the Enforcement of Foreign Money Judgments' (2005) 17 SA Merc LJ 125, 126.
[44] H Silberberg, *The Recognition and Enforcement of Foreign Judgments in South Africa* (Institute of Foreign and Comparative Law UNISA, Pretoria 1977) 6.
[45] Ibid (n 3) 322
[46] Ibid (n 36) para 14R-020; A Briggs, *Civil Jurisdiction and Judgments* (Informa Law from Routledge, UK 2015) 691; J Hill, and ASL Chong, *International Commercial Disputes: Commercial Conflict of Laws in English Courts* (Hart Publishing, Oxford 2010) para 12.2.1.

Currently, submission, residence, and more controversially, presence[47] in the foreign court's jurisdiction are the accepted bases of international competence in Commonwealth Africa.[48] Even though the common-law grounds continue to dominate the determination of the international competence of the foreign courts, statutory provisions[49] have been made in several jurisdictions to provide the grounds for determining the international competence of the foreign court.[50] Solely relying on residence, submission and, perhaps, mere presence of the defendant in the jurisdiction of the foreign court, as bases of international competence is seen as restrictive in nature,[51] thus the need for new grounds to be added. This is very crucial in the light of the current upsurge in international trade, transnational relationships and movement of persons.[52]

Some countries have debated the necessity of accepting other bases of international competence such as attachment of property, domicile, doing business in the foreign country, and nationality.[53] Canadian courts have adopted a "real and substantial connection"[54] as an additional basis of international competence.[55] In the Canadian case of *Chevron Corporation v Yaiguaje*,[56] the Supreme Court of Canada held that to recognise and enforce a foreign judgment in Ontario, the foreign court must have had a "real and substantial connection"[57] with the subject matter or parties to the dispute.[58] Ghanaian courts need to follow this example and expand its basis of international

[47] According to Forsyth, in the current world where international travel is widespread, presence is almost an arbitrary ground of jurisdiction and does not ensure any link between the judgment debtor and the court or the court and the dispute, thus not guaranteeing effectiveness. See Ibid (n 11) 430. Overall, writers have been critical of "mere presence" being considered as a ground of international competence. See GMN Xaba, 'Presence as a basis for the recognition and enforcement of foreign judgment sounding in money: The "real and substantial connection" test considered' (2015) 36 Obiter 121-135; A Briggs, 'Recognition of foreign judgments: A matter of Obligation' (2013) 129 LQR 87, 91; RF Oppong, 'Mere Presence and International Competence in Private International Law' (2007) 3 JPIL 321; C Schulze, 'International Jurisdiction in Claims Sounding in Money: Is *Richman v Ben-Tovim* the Last Word?' (2008) 20 SA Merc LJ 61.

[48] RF Oppong, 'Recognition and Enforcement of Foreign Judgments in Commonwealth African countries' (2014) XV Yearbook of Private International Law 365, 373; Briggs (n 44) 692; *Adams v Cape Industries* CA [1990] Ch 433; [1990] 2 WLR 657; *Richman v Ben-Tovim* [2006] SCA 148; 2007 (2) S.A.L.R [SA] 283.

[49] which generally overlaps with, rather than replacing the common law.

[50] Ibid (n 11) 420.

[51] Arzandeh (n 34) 58; A Briggs, 'Crossing the River by Feeling the Stones: Rethinking the Law on Foreign Judgments' (2004) 8 Singapore YearBook of International Law 1.

[52] Oppong (n 46) 374.

[53] M Tilbury, G Davis, and B Opeskin, *Conflict of Laws in Australia* (Oxford University Press, Oxford 2002) 209–210; J Fawcett, J Carruthers, and P North, *Cheshire, North and Fawcett's Private International Law* (Oxford University Press, Oxford 2008) 527–531.

[54] The test of "real and substantial connection" was enunciated in the case of *Morguard Investments Ltd v De Savoye* [1990] 3.

[55] *Club Resorts Ltd v Van Breda* 2012 S.C.C 17; *Beals v Saldanha* [2003] 3 S.C.R. 416; *Haaretz.com v Goldhar* 2018 SCC 28; *Morguard Investments Ltd v De Savoye* [1990] 3 S.C.R. 1077. See generally V Black, 'Simplifying court jurisdiction in Canada' (2012) 8 *JPIL* 411; J Blom, and E Edinger, 'The Chimera of the Real and Substantial Connection Test' (2005) 38 University of British Columbia Law Review 373.

[56] 2015 SCC 42.

[57] Fawcett, Carruthers and North have opined that "there is much to be said for adopting the real and substantial connection test": Fawcett, Carruthers & North (n 51) 531.

[58] Ibid (n 54) para 85. See also the case of *Barer v Knight Brothers LLC* 2019 SCC 13. However, in South Africa, an attempt to invoke the 'real and substantial connection' test in the case of *Supercat Incorporated v Two Oceans Marine* 2001 (4) S.A. 27 was an exercise in futility. Forsyth has argued that in South Africa, such a test "devoid of precise meaning, simply provides a veil for judicial discretion", and "is not therefore supported as a ground for international competence". See ibid (n 11) 408. In *Supercat Incorporated v Two Oceans Marine* case, the plaintiff sought enforcement of a Florida judgment against the defendant South African company. The Florida court assumed jurisdiction on the basis that the tort involved fraud, and had been committed within its jurisdiction. At the time of the action the defendant was neither resident nor domiciled in Florida.

competence.[59] An expansion of the recognised grounds of international competence has the benefit of bringing within the scope many foreign judgments which at the moment do not meet the existing threshold of international competence.[60]

THE HAGUE JUDGMENTS PROJECT

The Hague Conference on Private International Law (the Hague Conference) is an inter-governmental organization[61] established *inter alia* to progressively unify private international law rules.[62] The "Judgments Project" is one of the most significant projects of the Hague Conference.[63] It deals with the task of the Hague Conference in harmonizing the rules on the international jurisdiction of the courts as well as enforcement and recognition of foreign judgments in transnational commercial and civil cases.[64] The Hague Conference concluded its first multilateral international judgments convention in 1971, but this Convention was not widely accepted,[65] thus it did not enter into force. A reason proffered for the debacle of the 1971 Hague Convention was its inability to tackle the issue of jurisdiction.[66] The Convention sought only to regulate recognition and enforcement, without first regulating when the courts giving the judgment would have jurisdiction.[67] Also, the Convention required that each of the Contracting States[68] had to negotiate a supplementary agreement with the other contracting State.[69] This "method of

However, appearance had been entered and the jurisdiction of the court denied. It was held that the Florida court was not internationally competent under South African law. Counsel for the plaintiff referred to Canadian cases relating to the "real and substantial connection test". Counsel argued that the traditional approach to the recognition of foreign judgments has been rendered obsolete by the exigencies of international trade and called for a new approach. The judge found the Canadian cases "informative" but felt "not inclined or, sitting as a single judge, entitled to ignore the considerable weight of judicial authority in this country".

[59] It was stated in *Richman v Ben-Tovim* 2007 (2) S.A.L.R [SA] 283 at para 9: "there are compelling reasons why . . . in this modern age, traditional grounds of international competence should be extended, within reason, to cater for itinerant international businessmen. In addition, it is now well established that the exigencies of international trade and commerce require that final foreign judgments be recognised as far as is reasonably possible in our courts and effect be given thereto."

[60] Oppong (n 46) 374.

[61] It is made up of 90 members comprising one regional economic organisation and 89 countries. See Hague Conference Parties <https://www.hcch.net/index_en.php?act=states.listing> accessed on 5 February, 2022.

[62] Statute of the Hague Conference on Private International Law, Oct. 31, 1951 (1951) 220 U.N.T.S. 121; Hague Conference on Private International Law "Overview of the Judgments Project" <https://www.hcch.net/en/projects/legislative-projects/judgments> accessed on 5 February, 2022; S Khanderia, 'The Hague judgments project: assessing its plausible benefits for the development of the Indian private international law' (2019) 44 Commonwealth Law Bulletin 1, 1-2; and H van Lith, *International Jurisdiction and Commercial Litigation: uniform rules for contract disputes* (T.M.C ASSER Press, The Netherlands 2009) 14.

[63] Rossouw (n 35) 47.

[64] AF Garcimatin, and G Saumier, *Judgments Convention: Revised Draft Explanatory Report Preliminary Document No. 1* (Hague Conference, The Hague 2018) para 2; J Regan, 'Recognition and Enforcement of Foreign Judgments – A Second Attempt in the Hague' (2015) 14 Richmond Journal of Global Law and Business 63, 64; Khanderia (n 62) 3.

[65] Rossouw (n 35) 48.

[66] Y Oestreicher, 'We're on a road to nowhere – Reasons for the continuing failure to regulate recognition and enforcement of foreign judgments' (2008) 42 The International Lawyer 59, 70; C Kessedjian, '*The Permanent Bureau, Hague Conference on Private International Law: Preliminary Document No 7 – International Jurisdiction and Foreign Judgments in Civil and Commercial Matters'* (1997) 8 <https://www.assets.hcch.net/docs/76852ce3-a967-42e4-94f5-24be4289d1e5.pdf> accessed on 5 February, 2022.

[67] Rossouw (n 35) 141.

[68] Kuwait, The Netherlands, Albania, Portugal and Cyprus.

[69] Article 21 of the 1971 Hague Convention which provides that: "Decisions rendered in a Contracting State shall not be recognised or enforced in another Contracting State in accordance with the provisions of the preceding articles unless the two States, being Parties to this Convention, have concluded a Supplementary Agreement to this effect."

bilateralisation"[70] is regarded as a major obstacle that prevented States from ratifying and signing the 1971 Hague Convention.[71]

In 1992, there was a renewed interest in negotiating an international judgments Convention, which was largely due to the initiative of United States of America (USA).[72] At the beginning of 1993, negotiations started at the Hague Conference in a quest to enact a treaty on jurisdiction and the recognition and enforcement of judgments.[73] Negotiations that were conducted from 1996 to 2001 led to the 1999 Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters,[74] and the 2001 Interim Text.[75] However, as a result of dissensus on both instruments,[76] the Hague Conference decided in 2003 to narrow it to matters of jurisdiction dealing with choice of court agreements and the recognition and enforcement of judgments given by the chosen court.[77] This resulted in the conclusion of the Hague Convention on Choice of Court Agreements in 2005.[78]

After the adoption of the Hague Convention on Choice of Court Agreements, a Working Group was established *inter alia* to prepare proposals for enforcement and recognition of foreign judgment.[79] The Working Group completed its work in 2016, and a Special Commission was created to draft the Convention.[80] The Special Commission held its final Meeting from 24th to 28th May 2018 and came up with the 2018 draft Convention.[81] The Special Commission deemed that the draft Convention had reached the stage where a Diplomatic Session can be held.[82] Thus, the 22nd Diplomatic Session was held at the Peace Palace from 18th June to 2nd July, 2019 to adopt the Convention.

OVERVIEW: 2019 HAGUE CONVENTION

The Convention is applicable to the recognition and enforcement of foreign judgments of a commercial or civil nature among Contracting Parties.[83] The Convention excludes matters of

[70] Rossouw (n 35) 140.
[71] Kessedjian (n 65).
[72] C Schulze, 'The 2005 Hague Choice of Court Agreements' (2007) 19 *SA Merc LJ* 140; KM Clermont, 'An introduction to the Hague Convention' in JJ Barcelo III and KM Clermont, (eds) *A Global Law of Jurisdiction and Judgments: Lessons from the Hague* (Kluwer Law International, The Netherlands 2002) 3, 5.
[73] Schulze (n 71) 140.
[74] see P Nygh, and F Pocar, 'Report on the preliminary draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial matters' *Preliminary Document No 11 of August 2000* <https://www.hcch.net/index_en.php?act=publications.details&pid=3497&dtid=35> accessed on 5 February, 2022; and Rossouw (n 35) 50.
[75] Hague Conference "Interim text – Summary of the outcome of the discussion in Commission II of the first part of the diplomatic conference 6-20 June 2001" <https://www.hcch.net/upload/wop/jdgm2001draft_e.pdf> accessed on 5 February, 2022.
[76] Khanderia (n 62) 4.
[77] van Lith (n 62) 16; Rossouw (n 35) 51; RA Brand, 'Introductory Note to the 2005 Hague Convention on Choice of Court Agreements' (2005) 44 International Legal Materials 1291; Schulze (n 71) 150.
[78] Hague Conference on Private International Law Convention on Choice of Court Agreements, 30 June 2005, 44 ILM 1294; Khanderia (n 62) 4.
[79] The Judgments Project (n 62).
[80] Ibid
[81] Ibid
[82] Ibid
[83] 2019 Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil or Commercial matters, art 1.

revenue, customs, or other administrative nature. It also excludes arbitration, status and legal capacity, wills and succession.[84] Further, it offers some fundamental precepts concerning the working of the Convention: among Contracting States, foreign judgments from other Contracting States shall not be reviewed on its merits;[85] it provides the basis for recognition and enforcement and the basis for refusal of foreign judgment;[86] and the Convention allows the recognition or enforcement of judgments pursuant to municipal law, subject to article 6.[87] To end with, the Convention sets out general and final clauses, per articles 18 to 26 and also 27 to 34.

The Convention introduces the terms "court of origin" and a "requested court".[88] The "court of origin" is the court in a Contracting State (State of origin) that renders the original judgment. The "requested court" is the court in the other Contracting State (requested State) that is being asked to enforce the judgment given by the "court of origin". Of great importance to this work is the grounds for international incompetence delineated by the Convention.

Grounds for international competence under the 2019 Hague Convention

An essential provision of the 2019 Hague Convention is article 5,[89] as it enumerates the jurisdictional filters for the purposes of recognition and enforcement of judgments from Contracting States.[90] The grounds or jurisdictional filters provided for in Article 5 are exhaustive for the purpose of recognition and enforcement of foreign judgment under the Convention.[91]

Per article 5, the court of origin will be regarded to be internationally competent "if one of the following requirements is met –

a. the person against whom recognition or enforcement is sought was habitually resident in the State of origin at the time that person became a party to the proceedings in the court of origin;
b. the natural person against whom recognition or enforcement is sought had their principal place of business in the State of origin at the time that person became a party to the proceedings in the court of origin and the claim on which the judgment is based arose out of the activities of that business;
c. the person against whom recognition or enforcement is sought is the person that brought the claim, other than a counterclaim, on which the judgment is based;
d. the defendant maintained a branch, agency, or other establishment without separate legal personality in the State of origin at the time that person became a party to the proceedings in the court of origin, and the claim on which the judgment is based arose out of the activities of that branch, agency, or establishment;
e. the defendant expressly consented to the jurisdiction of the court of origin in the course of the proceedings in which the judgment was given;

[84] Ibid art 2.
[85] Ibid art 4.
[86] Ibid art 5-7.
[87] Ibid art 15.
[88] Ibid art 4.
[89] Garcimatin and Saumier (n 64) para 143.
[90] Ibid para 143; Khanderia (n 62) 9.
[91] Garcimatin and Saumier (n 64) para 143.

f. the defendant argued on the merits before the court of origin without contesting jurisdiction within the timeframe provided in the law of the State of origin, unless it is evident that an objection to jurisdiction or to the exercise of jurisdiction would not have succeeded under that law;
g. the judgment ruled on a contractual obligation and it was given by a court of the State in which performance of that obligation took place, or should have taken place, in accordance with
   (i) the agreement of the parties, or
   (ii) the law applicable to the contract, in the absence of an agreed place of performance, unless the activities of the defendant in relation to the transaction clearly did not constitute a purposeful and substantial connection to that State;
h. the judgment ruled on a lease of immovable property (tenancy) and it was given by a court of the State in which the property is situated;
i. the judgment ruled against the defendant on a contractual obligation secured by a right *in rem* in immovable property located in the State of origin, if the contractual claim was brought together with a claim against the same defendant relating to that right *in rem*;
j. the judgment ruled on a non-contractual obligation arising from death, physical injury, damage to or loss of tangible property, and the act or omission directly causing such harm occurred in the State of origin, irrespective of where that harm occurred;
k. the judgment concerns the validity, construction, effects, administration or variation of a trust created voluntarily and evidenced in writing, and –
   (i) at the time the proceedings were instituted, the State of origin was designated in the trust instrument as a State in the courts of which disputes about such matters are to be determined; or
   (ii) at the time the proceedings were instituted, the State of origin was expressly or impliedly designated in the trust instrument as the State in which the principal place of administration of the trust is situated.

   This sub-paragraph only applies to judgments regarding internal aspects of a trust between persons who are or were within the trust relationship;
l. the judgment ruled on a counterclaim –
   (i) to the extent that it was in favour of the counterclaimant, provided that the counterclaim arose out of the same transaction or occurrence as the claim; or
   (ii) to the extent that it was against the counterclaimant, unless the law of the State of origin required the counterclaim to be filed in order to avoid preclusion;
m. the judgment was given by a court designated in an agreement concluded or documented in writing or by any other means of communication which renders information accessible so as to be usable for subsequent reference, other than an exclusive choice of court agreement".[92]

[92] "exclusive choice of agreement" means "an agreement concluded by two or more parties that designates, for the purposes of deciding disputes which have arisen or may arise in connection with a particular legal relationship, the courts of one State or one or more specific courts of one State to the exclusion of the jurisdiction of any other courts."

Per article 6, a judgment which concerns rights *in rem* in immovable property which is situated in the State of origin[93] shall be entitled to be recognised and enforced under the Convention.[94]
The jurisdictional filters of residence and submission found in the 2019 Hague Convention are fully accepted under the legal regime of Ghana. However, the remaining grounds, which "generally reflect an international consensus",[95] are nevertheless novel to Ghana. Notwithstanding the lofty benefits of the convention, it is not without flaws.

Critique of the 2019 Hague Convention

Ronald A. Brand asserts that the merits of the exhaustive nature of article 5(1) also bring corresponding disadvantages.[96] He explains that the jurisdictional filters delineated in article 5 are premised on present occurrences. However, due to the dynamic nature of international trade, as well as rapid advancement in technology, very soon many grounds of international competence may be adopted which are not present in the convention at the moment and some of the grounds may also become obsolete.[97] He also adds that with time, predictability which is seen as a hallmark of the Convention will wane through the interpretational role afforded to national courts and its associated "homeward trend," which is apparent in other conventions which stipulate "uniform rules".[98] Nevertheless, David Goddard has argued, in response, that the method of the 2019 Hague Convention with respect to article 5 is the most efficient as it enhances predictability, accessibility and transparency in the application of the Convention.[99]

LEGAL FRAMEWORK FOR RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS OF GHANA

Legal regime for recognition and enforcement in Ghana

There are two regimes that regulate the enforcement and recognition of foreign judgment in Ghana: the common-law and statutory regimes.[100]

Common-law regime

Under this regime, the foreign judgment creates an obligation so the judgment creditor has to institute a fresh suit on the decision.[101] In view of this, the judgment creditor must serve the writ of summons on the defendant.[102] Alternatively, the judgment creditor may institute an action for summary judgment premised on the ground that the judgment debtor has no defence to the suit.[103]

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[93] 2019 Hague Judgment Convention, art 6; Garcimatin and Saumier (n 64) para 256.
[94] Khanderia (n 62) 10.
[95] Ibid (n 10) 6.
[96] Brand (n 23) 19.
[97] Ibid.
[98] Ibid 20. see also HM Flechtner, 'Another CISG Case in the U.S. Courts: Pitfalls for the Practitioner and the Potential for Regionalized Interpretations' (1995) 14 Journal of Law and Commerce 127.
[99] D Goddard, 'The Judgments Convention – the current state of play' (2019) 29 D*uke Journal of Comparative* & I*nternational* L*aw* 473, 483-484.
[100] RF Oppong, *Private International Law in Ghana* (Kluwer Law International, The Netherlands 2017) 99; Moran & Kennedy (n 27) 77.
[101] RF Oppong, 'Recognition and enforcement of foreign judgments in Ghana: A second look at a colonial inheritance' (2005) 31 Commonwealth Law Bulletin 19, 22.
[102] *Perry v Zissis* [1977] 1 Lloyd's Rep. 607.
[103] High Court (Civil Procedure) Rules, CI 47 of 2004, Order 14.

Under this regime, for the foreign judgment to be enforced or recognised, it ought to be a fixed amount of money, final and conclusive[104] and the foreign court must be internationally competent.[105] It has been observed that the common law regime appears less used or not known about in the profession of Ghana.[106]

The statutory regime for enforcement

Under the statutory regime, enforcement is by means of registration;[107] and it is based on reciprocity.[108] The Foreign Judgments and Maintenance Order (Reciprocal Enforcement) Instrument 1993 (L.I. 1575),[109] Courts Act,[110] and High Court (Civil Procedure) Rules,[111] are the laws which regulate this regime.[112] The specific country and court needs to be designated under the Foreign Judgments and Maintenance Order (Reciprocal Enforcement) Instrument 1993.[113]
Under the statutory regime, for the foreign judgment to be recognised and enforced or recognised, it ought to involve a definite amount of money which is not a penalty or a tax; must be conclusive and final; and the foreign court should be internationally competent.[114] A foreign judgment which is registered is considered as a decision rendered by the High Court.[115]

GROUNDS FOR INTERNATIONAL COMPETENCE

With respect to international competence, the common-law regime acknowledges submission,[116] residence and presence[117] to be the grounds of international competence.[118]
The statutory regime further lays down the basis for which the foreign court would be deemed to possess international competence. Per section 83(2)(a) of the Courts Act,[119] the foreign court will be deemed to be internationally competent "in the case of a judgment given in an action *in personam* –

i. if the judgment debtor, being a defendant in the original court, submitted to the jurisdiction of that court by voluntarily appearing in the proceedings otherwise than for the purpose of protecting, or obtaining the release of, property seized, or

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[104] Oppong (n 99) 102.
[105] Oppong (n 100) 22.
[106] Moran and Kennedy (n 27) 78. For example, in the case of *Republic v Mallet ex parte Braun* [1975] 1 GLR 68 which had to do with an unsuccessful application to enforce a judgment given in West Germany pursuant to 1993 Act. The court held that the statute does not extend to Germany. However, surprisingly the court did not even consider the common-law approach.
[107] Oppong (n 99) 110.
[108] Oppong (n 3) 362.
[109] Ibid.
[110] 1993 (Act 459).
[111] 2004 (C.I. 47).
[112] Oppong (n 3) 362. Section 85 of Act 459 provides that "No proceedings for the recovery of a sum payable under a foreign judgment, being a judgment to which this Sub-Part applies other than proceedings by way of registration of the judgment, shall be entertained by any court in Ghana." See the case of *Yankson v Mensah* [1976] 1 G.L.R. 355
[113] In the instrument, the following countries are designated: Italy, United Kingdom, Spain, Lebanon, Brazil, France, Israel, Japan, Senegal, and United Arab Republic.
[114] Act 459 s 81(2).
[115] Act 459 s 82(5).
[116] See the cases of *John Holt Co. Ltd v Nutsugah* (1929–1931) Div. Ct. 75; *Crisp v Renner* (1931–7) Div. Ct. 107.
[117] Moran and Kennedy (n 27) 79.
[118] Oppong (n 99) 102.
[119] Courts Act, 1993.

threatened with seizure, in the proceedings or of contesting the jurisdiction of that court; or

ii. if the judgment debtor was the plaintiff in, or counterclaimed in, the proceedings in the original court; or

iii. if the judgment debtor, being a defendant in the original court, had before the commencement of the proceedings agreed, in respect of the subject matter of the proceedings, to submit to the jurisdiction of that court or the courts of the country of that court; or

iv. if the judgment debtor, being a defendant in the original court, was at the time when proceedings were instituted resident in, or being a body corporate had its principal place of business in, the country of that court; or

v. if the judgment debtor, being a defendant in the original court, had an office or a place of business in the country or that court and the proceedings in that court were in respect of a transaction effected through or at that office or place."

Section 83(2)(b) of the Courts Act concerns property and provides that the original court will possess international competence in an action concerning immovable or movable property if the property in question was located in the foreign country at the time when proceedings commenced.

OBSERVATION AND CRITIQUE OF THE COMMON-LAW GROUNDS OF INTERNATIONAL COMPETENCE

A critical look at both the common-law and the statutory regime of Ghana shows how the English legal system has largely influenced its legal system, including the grounds of international competence of the foreign court.[120] The grounds of international competence of the foreign courts in Ghana are residence, submission and presence of the judgment debtor in the foreign court's jurisdiction. Despite their clarity and straightforwardness, these grounds have been criticized by judges as well as scholars in the field of recognition and enforcement of foreign judgment.[121] Tan observes that the meaning of the concept of international competence itself is restricted[122] and that it is based on the presumption of a "very narrow, territorial notion of jurisdiction".[123]

Also, from a conceptual perspective, there is the problem of disparity in the definition of international competence. When it comes to the assertion of jurisdiction of the domestic court in an international commercial litigation, the grounds that it will consider to assert jurisdiction is wider than in enforcement and recognition matters.[124] The reason behind this disparity can be traced

[120] The grounds for international competence were notably espoused in the English cases of *Godard v Grey* (1870) LR 6 QB 139 and *Schibsby v Westenholz* (1870) LR 6 QB 155.
[121] Arzandeh (n 34) 61.
[122] YL Tan, 'Recognition and Enforcement of Foreign Judgments' in KS Teo et al (eds) *Current Legal Issues in International Commercial Litigation* (National University of Singapore Press, Singapore 1997) 290.
[123] D Kenny, 'Re Flightlease: The Real and Substantial Connection Test for Recognition and Enforcement of Foreign Judgments Fails to Take Flight in Ireland' (2014) 63 International and Comparative Law Quarterly 197, 200.
[124] Arzandeh (n 34) 61.

from the era when the current principles were first enunciated.[125] Briggs is critical of the absence of consistency and has argued that "the case for reuniting the two areas is a strong one".[126]

Further, the narrow definition of the grounds of international competence at common law has exposed it to the allegation of lack of trust in the foreign court's civil litigation procedure.[127] It has thus been described as being "chauvinistic".[128] Also, the application of the current grounds of international competence tends to "overly protect" the interest of the judgment debtor.[129] This is due to the narrow definition of the grounds under common law,[130] and it makes it relatively easy for the judgment debtor to be free from the judgment of the foreign court.[131] Thus, despite the straightforward nature of the common law grounds of international competence which is commendable, it is narrow and as a result, new grounds need to be added.

THE POTENTIAL IMPACT OF THE HAGUE CONVENTION ON GROUNDS OF INTERNATIONAL COMPETENCE IN GHANA

The potential impact that the 2019 Hague Convention will have on recognition and enforcement of foreign judgment in Ghana if Ghana becomes a Contracting States is discussed under this section using specific provisions of the Hague Convention.

Article 5(1)(a): habitual residence of the judgment debtor

Article 5(1)(a) of the 2019 Hague Convention stipulates that, if the judgment debtor's habitual residence was in the State of origin, the foreign court will be deemed to be in possession of international competence. The 2019 Hague Convention employs "habitual residence" as a connecting factor against other alternatives recognised in municipal law and uniform law treaties,[132] which includes nationality or domicile and this is in sync with modern Hague instruments which also adopts habitual residence.[133] The benefit of habitual residence utilized as a connecting factor is that it is more accurate than the other connecting factors such as nationality

[125] Ibid. See J Hill, and M NíShúilleabháin, *Clarkson and Hill's Conflict of Laws* (Oxford University Press, Oxford 2016) at para 3.36: "the foundations of the common law rules relating to foreign judgments were laid in the second half of the nineteenth century when the primary bases of the English jurisdiction were presence and submission. At this time there was only a limited form of 'long-arm' jurisdiction, introduced by the Common Law Procedure Act 1854, and the doctrine of *forum non conveniens* was not even a glimmer in the eye of the House of Lords. It is hardly surprising that, when deciding whether or not to enforce a foreign judgment, the courts in the nineteenth century looked to see whether the defendant had been present in the country of origin or had submitted to the jurisdiction of its courts."

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

[127] Arzandeh (n 34) 62.

[128] Kenny (n 122) 197.

[129] Arzandeh (n 34) 62.

[130] That is, residence, presence and submission.

[131] Arzandeh (n 34) 63.

[132] Brussels 1 Recast; and Rome 1 Regulation.

[133] Garcimatin and Saumier (n 64) para 150. See the 1996 Hague Convention on Jurisdiction, Applicable law, Recognition, Enforcement and Co-operation in respect of Parental responsibility and measures for the protection of children; and the 1980 Hague Convention on the Civil Aspects of International Child Abduction.

or domicile.[134] This is because it shows a close link between individuals and their socio-economic setting, and is unlikely to lead to inconsistent judgments by courts.[135] The use of "habitual residence" in the Hague Convention brings clarity and certainty as against "residence," as found under the common law and statutory regimes of Ghana. According to Forsyth,[136] "residence" is a difficult term which has different meanings in varied contexts. Thus, the use of the term "habitual residence" appropriately qualifies the vagueness of the term "residence" and brings clarity in its application as a jurisdictional filter. Although habitual residence for natural persons has not been defined[137] and this may lead to different interpretations by municipal courts, uniform interpretation should be encouraged in view of Article 20 of the Convention.[138]

Article 5(1)(a) and article 3(2): habitual residence of juristic persons

Under both the common-law and the statutory regime of Ghana, when it comes to residence of a body corporate, the foreign court will only be considered to be internationally competent if the company's principal place of business is in the foreign State. However, per the combined effect of articles 3(2) and 5 of the 2019 Hague Judgment Convention, new connecting factors such as place of incorporation, the place of the company's statutory seat and place of central administration of the company are added grounds considered as the habitual residence of the company and thus enabling the courts in the country of these places to be internationally competent.

Under the common-law system, the law of the place of incorporation is usually considered as essential for determining matters concerning the corporation's internal affairs.[139] In some States, it is impossible to depend on statutory seat as the connecting factor.[140] In such instance, the Convention uses the country under whose law the legal person was formed as an alternative. This criterion will usually indicate the place where the corporation is registered, where it has a registered office.[141] The place of the corporation's central management is vital in that it is the administrative centre of the company, the venue where very vital decisions are made.[142] The

[134] Domicile is regarded as a "normative concept" whereas habitual residence is a "factual concept." See P Mankowski, 'Article 5' in U Magnus, and P Mankowski, (eds) *European commentaries on Private International Law: Brussels 1 Regulation* (2007) 1, 177-178; Garcimatin and Saumier (n 64) para 150.

[135] Garcimatin and Saumier (n 64) para 150.

[136] Ibid (n 11) 422.

[137] According to Mankowski "Article 5" in U Magnus and P Mankowski, (eds) *European Commentaries on Private International Law: Brussels 1 Regulation* (Sellier European Law Publishers, Munich 2007) 1, 177-178: "habitual residence is defined as the factual centre of the individual's personal and social life."

[138] Article 20 provides: "In the interpretation of this Convention, regard shall be had to its international character and to the need to promote uniformity in its application."

[139] T Hartley, and M Dogauchi, *Explanatory Report on the Convention of 30 June 2005 on Choice of Court Agreements* (2013) para 120 <https://www.hcch.net/en/publications-and-studies/details4/?pid=3959&dtid=/> accessed on 5 February, 2022; Garcimatin and Saumier (n 64) para 92.

[140] Nygh and Pocar (n 74) 41.

[141] Ibid.

[142] Hartley and Dogauchi (n 139) para 120; Nygh and Pocar (n 74) 41. However, in the current world of commerce, modern techniques are used in decision-making for corporations which undertake business in many countries. There is the likelihood of decision making via videoconferencing or modern forms of electronic communication. This means decisions may be made in several places making it difficult to locate where the decision was made. As a result of this, there is some level of vagueness using this criterion. Thus, this criterion is inadequate in itself and can be on the list as one of the alternative jurisdictional filters. See generally Nygh and Focar (n 74).

corporation's statutory seat is regarded as the domicile of the corporation[143] as indicated by its bylaws or constituent documents.[144]

All these three additional connecting factors are essential under common law,[145] and the 2019 Hague Convention stipulates that a juristic person is considered as resident in all these three places too. The advantage of these additional connecting factors establishing habitual residence is that it expands the grounds and enables judgment from these other places which at the moment are not recognised under the legal framework of Ghana to be recognised and subsequently increasing the chances of them being enforced.

Article 5(1)(b): principal place of business of a natural person

Natural persons embarking on business endeavours are similar to juristic persons in terms of jurisdictional connections.[146] Allowing cases to be adjudicated in the country of the principal place of business is in sync with the legitimate expectations of parties.[147]

Per the statutory regime of Ghana, if the judgment debtor's office or place of business is in the State of origin and the action arose out of a transaction effected through or at that office or place, then the foreign court will be deemed to be internationally competent.[148] However, conspicuously missing from this provision is the relationship between the timing of the claim and establishing the principal place of business. The location of a person's principal place of business may change over time. This can be either happen during the course of proceedings before the verdict is given or even after the verdict has been given but before recognition or enforcement is sought or even after the cause of action have risen before the institution of the proceedings in court. To cater for this situation and avert controversies, the Hague convention requires a contemporaneity of the time of the claim and the founding of the principal place of business. In other words, the principal place of business is to be assessed at the time when the judgment debtor became a party to the proceedings in the foreign court.[149] It is not a prerequisite that the judgment debtor should have his principal place of business in the foreign country at the time that the requested State is determining the connection. It will be thus recommended that Ghana amends the existing provision in its statutes to incorporate the phrase "at the time that person became a party to the proceedings in the court of origin".

Further, the statutory provision of Ghana provides that the proceedings in the State of origin should relate to a transaction effected through or at that office or place. The presumption is that the transaction will be effected at a physical location. However, in the current world where transactions can be effected online by private businessmen, if a dispute is to arise out of a transaction that was effected online, it will be difficult establishing the place of transaction to aid in determining whether the foreign court was internationally competent. However, the provision in article 5(1)(b) of the 2019 Hague Judgment Convention, delineates the principal place of business of the natural person as the connecting factor at the time the proceedings were instituted. This

[143] Hartley and Dogauchi (n 139) para 120.
[144] Garcimatin and Saumier (n 64) para 92.
[145] Hartley and Dogauchi (n 139) par 120.
[146] Garcimatin and Saumier (n 64) para 156.
[147] Ibid.
[148] As highlighted above under the statutory regime of Ghana.
[149] Garcimatin and Saumier (n 64) para 159.

brings clarity and certainty because even if the transaction was done online, the principal place of business will be easily to identify.

Article 5(1)(d): agency, branch or other establishment

Article 5(1)(d) provides grounds of jurisdiction for secondary establishments.[150] This concerns situations where the claim emanated from the endeavours of a branch of a person whose habitual residence is in another country. Under that circumstance, the 2019 Hague Judgment Convention accepts the jurisdiction of the courts in the country where the branch is situated.[151] This "branch jurisdiction" or a branch establishing jurisdiction is found in other legislation.[152]

The ideation behind this provision is that an individual who creates an establishment in another country implicitly or explicitly approves of the jurisdiction of the courts of that country on claims regarding the activities of that entity because that individual regulates the entity.[153] This is in line with the legitimate expectations of parties and since this jurisdiction is restricted to matters that emanated from the activities of the branch, it is vindicated by the close link that exists between the court that adjudicated the matter and the dispute.[154] There is no such provision under the legal framework of Ghana.

Article 5(1)(e): express consent to the jurisdiction of the foreign court by the judgment debtor during proceedings

Article 5(1) provides for three types of consent: unilateral express consent during proceedings;[155] implied consent or submission;[156] and consent in an agreement by the parties.[157] Any of these types satisfies the jurisdictional prerequisite under Article 5(1).[158] Under article 5(1)(e), the jurisdictional filter prerequisite is met if the defendant explicitly agrees to the jurisdiction of the foreign court during the course of proceedings. It is a question of fact whether there is an express consent and this is determined by the enforcing court.[159] The express consent could be oral or in writing and it can also be addressed to the other party or to the court during the course of the proceedings.[160] This mode of consenting is not renowned or familiar in all legal systems,[161] however, it is not a hindrance to the assessing of such consent by the requested State. The requested State is not deciding whether the foreign court had jurisdiction according to its own rules of direct jurisdiction. Rather, the requested State is ascertaining whether any of the jurisdictional filters (grounds of indirect jurisdiction) have been met.[162] This is thus a novel ground for determining the international competence of the foreign courts.

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150 Ibid para 163.
151 Ibid para 163.
152 Ibid; Brussels I recast, art. 7(5); Nygh and Pocar (n 74) para 127; Civil Code of Québec, Art.3168(2).
153 Dickinson and Lein (n 38) 176; Garcimatin and Saumier (n 64) para 164.
154 Garcimatin and Saumier (n 64) para 164.
155 2019 Hague Judgment Convention, art 5(1)(e).
156 Ibid, art 5(1)(f).
157 Ibid, art 5(1)(m).
158 Garcimatin and Saumier (n 64) para 168.
159 Ibid para 170.
160 Ibid.
161 Ibid para 171.
162 Garcimatin and Saumier (n 64) para 171.

Article 5(1)(f): a challenge to the jurisdiction of the foreign court would not have been successful under that law

There are some States that procedurally have time frames within which the defendant can challenge the jurisdiction of a court.[163] The Hague Judgment Convention makes provision that if there is no challenge by the defendant to the jurisdiction in accordance with the time frame stipulated by the court of origin, it will be considered that the defendant have submitted to the foreign court. Such a provision is lacking in the statutes of Ghana.[164]

Further, there is submission if the defendant implicitly consents to the jurisdiction of the foreign court even though ordinarily the foreign court would not have had jurisdiction,[165] or there were even grounds for a challenge to that jurisdiction.[166] A key presumption of this principle is that procedurally the foreign court permits the defendant to contest jurisdiction and thus a failure to challenge the jurisdictions will be construed as implied consent.[167]

Article 5(1)(f) considers whether such a contest to jurisdiction would have been successful in the foreign court since it would otherwise be unfair to require the defendant a contest if it was going to be an exercise in futility.[168] Thus, if the defendant can prove that any effort to challenge the jurisdiction of the foreign court was bound to fail, then the failure of the defendant to raise such an objection before the foreign court will not be construed as consent or submission. In that case, the jurisdictional criterion will not have been satisfied.[169] For instance, the foreign court assumes jurisdiction on the ground that the defendant has property in the jurisdiction[170] although there is no link between the property and the claim. Moreover, prior case law authorities in the court of origin shows that objections to jurisdiction on this ground are always unsuccessful and, based on this, the defendant did not challenge the jurisdiction of the court of origin. In such scenario, the judgment that will be given by the foreign court will not be recognised and enforced by the Requesting State (enforcing court) even though the defendant did not challenge the jurisdiction of the court and argued on the merits of the case.[171]

Article 5(1)(f) also makes provision for a situation where a challenge to the foreign court's exercise of jurisdiction would have been unsuccessful. This is a possibility in countries that adhere to the doctrine of *forum non conveniens*.[172] In such a situation, if the defendant does not invoke the doctrine and can show that even if the doctrine had been invoked, it would have been

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[163] Ibid para 179.
[164] In Ghana, issues about jurisdiction can be raised at any stage of the case. See *Amoasi v Twintoh* [1987-88] 1 GLR 554.
[165] Ibid (n 11) 422-423.
[166] Garcimatin and Saumier (n 64) para 180.
[167] Ibid.
[168] Ibid para 181.
[169] Nevertheless, to avoid such strategic conduct by the defendant, the Convention requires a relatively high standard of proof. It ought to be "evident" that a challenge to the jurisdiction would have been unsuccessful under the law of the foreign country. see Garcimatin and Saumier (n 64) para 182.
[170] In South Africa for instance, if the defendant is a foreign peregrines and the cause of action did not occur in the area of jurisdiction of the court, the property of the foreign peregrine can be attached to found jurisdiction and the court will thus exercise jurisdiction. This is referred to as attachment ad fundandam jurisdictionem. In that case, it is not additionally required for the peregrine defendant to submit to found jurisdiction of the court. See JP Van Niekerk, and WG Schulze, *The South African Law of International Trade: Selected Topics* (SAGA Legal Publications, Pretoria 2016) 325; ibid (n 11) 223.
[171] Garcimatin and Saumier (n 64) para 183.
[172] Ibid para 184.

unsuccessful under the laws of the foreign country, such a judgment by the foreign court is unenforceable.[173] These provisions are very essential but are presently missing in the legal regimes of Ghana with respect to the recognition and enforcement of foreign judgment.

Article 5(1)(g): the place of performance of a contractual obligation

Presently, place of performance is not recognised as basis of international competence under the private international law of Ghana. However, from a developmental perspective, this jurisdictional filter deserves special attention.[174] Neels has argued that the place of characteristic performance could be considered as a ground for international competence and he espoused reasons to fortify his stand.[175]

First of all, the place of performance is accepted as a ground of domestic jurisdiction in many countries.[176] The Brussels I (recast) provides for inter alia the place of delivery, which is the characteristic performance as a ground for jurisdiction.[177] Since Ghana trades with the European community, the recognition and enforcement of foreign judgment emanating from the courts of trade partners are very essential as it will boost investor confidence, and as a multiplier effect, it will lead to the creation of jobs and poverty alleviation.[178] Secondly, the place of the characteristic performance is a connecting factor which provides a real and substantial connection with a court.[179]

Thirdly, the place of performance, particularly the characteristic performance plays an essential role in the private international law of Ghana as it aids to indicate the default legal system and constitutes the most important connecting factor in determining the objective proper law[180] in the absence of express or tacit choice by the parties.

Further, the Model Law on the Recognition and Enforcement of Judgments in the Commonwealth[181] also makes provision for the recognition of the place of performance as a ground of international competence in article 5(1)(g).[182] Thus, in principle, despite the adoption of the Hague Convention, if Ghana adopts the Model law on Recognition and Enforcement of Foreign Judgments which is applicable to commonwealth countries, the place of performance will

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[173] The courts of Ghana adheres to the doctrine of *forum non conveniens*. See generally Moran and Kennedy (n 27).
[174] Ibid (n 10) 6.
[175] Ibid (n 10) 6-8.
[176] Ibid (n 10) 7.
[177] Article 7 of Brussels I (recast) provides: "A person domiciled in a Member State may be sued in another Member State:
(1)(a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;
(b) for the purposes of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:
– in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered, or
– in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided;
(c) if point (b) does not apply, then point (a) applies."
[178] Ibid (n 10) 7.
[179] Ibid (n 10) 8.
[180] Ibid (n 10).
[181] Model Law on the Recognition and Enforcement of Foreign Judgements (2015) <https://www.thecommonwealth.org/default/files/> accessed on 5 February, 2022.
[182] Article 5(1): "A court in the State of origin is deemed to have had jurisdiction if: -… (g) the proceedings related to a contractual obligation that was or should have been performed in the State of origin."

consequently become a ground for international competence in Ghana since Ghana is a member of the Commonwealth.[183] The significance of the place of performance has also been advanced by Okoli who proposes that the place of performance should be given principal significance as the connecting factor to be considered especially in terms of commercial contracts.[184]

However, Neels argues that there may be complexities in construing place of performance as a ground of international competence.[185] This is because it is unclear whether the place of performance refers only to the place of the "characteristic performance"[186] or it also includes the place of payment.[187] Another problem arises if the characteristic performance is carried out in more than one country.

Also, there is also the problem of determining the place of performance in the absence of an agreed place of performance by the parties. The Hague Judgment Convention provides that in the absence of an agreed place of performance by the parties, the law applicable to the contract will help to determine the place of performance.[188] Nevertheless, this provision is not going to work for countries like South Africa, traditional common law countries like Canada or Australia or States that use the Restatement Second.[189] This is because in such legal systems, in the absence of choice of law by the parties, the place of performance, especially the place of the characteristic performance, plays an important role in indicating the default applicable legal system or at least constitutes the most important connecting factor in determining the objective proper law of the contract.[190] Thus, the place of performance is needed to determine the proper law. However, the place of performance is not known, thus making it not feasible for such legal systems.[191] Nevertheless, some of these potential difficulties are assuaged by the decisions of the European court[192] in the context of supranational jurisdiction under the Brussels I (recast), and this may

[183] Member countries per <https://thecommonwealth.org/member countries/> accessed on 5 February, 2022.
[184] C Okoli, *Place of Performance: A Comparative Analysis* (Hart Publishing, London 2020) 62.
[185] Ibid (n 10) 8.
[186] For instance, the place of delivery of the goods under a contract of sale.
[187] For instance, in India, place of payment of money has been interpreted as a place of performance. See *ABC Laminart v A.P. Agencies* (1989) 2 SCC 163; KB Agrawal, and V Singh, *Private International Law in India* (Kluwer Law International, The Netherlands 2009) 231.
[188] 2019 Hague Judgments Convention, art 5(1)(g)(ii).
[189] Twenty-three (23) States in the United States of America (USA) follow the Restatement Second in contract conflicts namely: Alaska, Arizona, Colorado, Connecticut, Delaware, Idaho, Illinois, Iowa, Kentucky, Maine, Michigan, Mississippi, Missouri, Montana, Nebraska, New Hampshire, Ohio, South Dakota, Texas, Utah, Vermont, Washington and West Virginia. See SC Symeonides, 'Choice of law in the American courts in 2012: twenty-sixth annual survey' (2013) 61 The American Journal of Comparative Law 217, 278-285.
[190] Ibid (n 10) 8. See also Ibid (n 11) 329-336; EA Fredericks, *Contractual Capacity in Private International Law* (Doctoral thesis, University of Leiden 2016) 13-16; EA Fredericks, and JL Neels, 'The proper law of a documentary letter of credit – Part 1' (2003) 15 SA Merc LJ 63, 69; JL Neels, and EA Fredericks, 'The music performance contract in European and Southern African Private International Law – Part 2' (2008) 71 THRHR 529, 535; E Schoeman, C Roodt, and M Wethmar-Lemmer, *Private International Law in South Africa* (Kluwer Law International, The Netherlands 2014) 53, 55-56.
[191] However, the situation will be different in Rome I countries. This is because per article 4 of Rome I, in the absence of choice of applicable law by the parties, per art.4 the default applicable law in a contract for the sale of goods is the law of the country where the seller has his habitual residence. Having identified the applicable law, that helps to determine the place of performance. Thus, it is not a problem for Rome I countries.
[192] In the case of Color Drake, the ECJ decided in the context of complex contracts (where delivery must place in different places or countries) that the "principal place of performance" provides the only jurisdictional connecting factor on the basis of "efficient organization of the proceedings." See Ibid (n 10) 8; U Grušic, 'Jurisdiction in complex contracts under the Brussels I Regulation' (2011) 7 JPIL 321, 321-338; ECJ *Color Drack GmbH v Lexx International Vertriebs GmbH* C386/05 (3 May 2007) [2007] ECR I3699.

guide the courts in Ghana.[193] It is thus recommended that Ghana recognises the place of performance of a contractual obligation, especially the place of characteristic performance,[194] as a ground of international competence.

Article 5(1)(j): non-contractual obligations

Article 5(1)(j) is one of the novel provisions in the 2019 Hague Convention. It concerns judgments in respect of a non-contractual obligation arising from physical injury, death, damage to or loss of tangible property, and the act or omission directly causing such harm occurred in the State of origin. The place where the harm eventually occurred is irrelevant. This provision marks a departure from the position of regional and municipal legal systems that recognise jurisdiction exercised by the court in the country where the harm occurred.[195] The importance of the limitation to a "single jurisdictional connection" and the placement of a ceiling on the types of harm covered by this provision is that it will help to minimise interpretive complexities that have shown up in other systems.[196] It also purges the quandary of whether long-lasting suffering and pain in the State of origin resultant of a physical injury that was sustained in another State is adequate to constitute jurisdiction in the State of origin.[197] The private international rules of Ghana is however bereft of such provision.

CONCLUDING REMARKS

The significance of cross-border commerce to the economic development of Ghana cannot be overemphasized.[198] As set out at the commencement of this work, the common- law grounds of international competence, which have further been codified in the statutes of Ghana is very narrow, restricting it to merely residence, presence and submission. However, the Hague Convention provides a broader scope for conferring international competence on the foreign courts and the subsequent possibility of recognising and enforcing judgments rendered by it. The Hague Convention has the advantage of providing business partners with a simple, efficient, and predictable structure with regards to the recognition and enforcement regime;[199] it will also reduce related cost.[200]

The Hague Convention is the latest legal framework on recognition and enforcement of foreign judgments. It encapsulates the modern accepted basis for recognising and enforcing foreign judgments across borders. This will help to accelerate economic engagement and development of Ghana and her trade partners, majority of which are member States of the Hague Conference, if they all become Contracting Parties to the Convention.

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[193] Ibid (n 10) 8.

[194] Per the Giuliano and Lagarde Report, the characteristic performance is the one that gives a contract its name and for which the payment is due. See M Giuliano and P Lagarde, 'The Report on the Convention on the Law Applicable to Contractual Obligations' [1980] 1QJ C-282/20.

[195] See the interpretation of Brussels I Recast, art. 7(2) by the ECJ in cases such as *Shevill v Presse Alliance SA* (Case C-68/93) [1995] ECR I-415 para 20; *Kronhofer v Marianne Maier* (Case C-168/02) [2004] ECR I-6009 para 16. see also Nygh & Pocar (n 74) para 135-149; Garcimatin and Saumier (n 64) para 203.

[196] Garcimatin and Saumier (n 64) para 204.

[197] Ibid para 205; *Club Resorts v Van Breda* (n 53) para 89.

[198] See generally N Verter, 'International Trade: The position of Africa in Global Merchandise Trade' in MJ Ibrahim, (ed) *Emerging issues in economics and development* (InTech Open, London 2017) 65-88.

[199] The Judgments Project (n 62); Khandeira (n 62) 9.

[200] The Judgments Project (n 62).

RECOMMENDATION

The material conditions in the life of a country at any stage influence the level of development of private international law.[201] These factors include growth in international trade and investment, and advancement in technology.[202] It is therefore recommended that Ghana signs and ratifies the Hague convention so that they become beneficiaries of the global developments in private international law, especially those on grounds of international competence of foreign court. Alternatively, it is suggested that in the event Ghana does not want to be a Contracting State to the Hague Convention, it can amend its existing legal framework on recognition and enforcement of foreign judgments and incorporate these novel grounds of international competence of foreign courts as provided for in article 5 of the 2019 Hague Convention.

[201] See generally P Kalensky, *Trends of Private International Law* (Springer, The Netherlands 1971).

[202] RF Oppong, 'Private International Law in Africa: The Past, Present, and Future' (2007) 55 The American Journal of Comparative Law 677, 678.

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