“Promoting Foreign Judgments: Lessons in Legal Convergence from South Africa and Nigeria” (Kluwer Law International B.V. 2019)

Pontian N. Okoli has provided the following extensive summary of the findings of his book, which is a revised version of his PhD thesis, completed at the University of Dundee.

In 2019, the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial matters came into being. It is a clear reflection of determined efforts to produce **a global legal framework** that can support the free movement of foreign judgments. One index of success concerning the 2019 Convention would be whether it promotes the free movement of foreign judgments in **different parts of the world including Africa**. Time will tell. For now, it is necessary to reduce the impediments to the free movement of foreign judgments on at least two levels: first, between African and non-African jurisdictions; and second, between African jurisdictions. The legal frameworks that concern both levels are essentially the same in most African jurisdictions. There is no African legal framework that is equivalent to the Brussels legal regime on the recognition and enforcement of foreign judgments in the European Union. Thus, litigants need to consider relevant legal frameworks in each country. Foreign judgment creditors must be conversant with appropriate laws to ensure recognition and enforcement of foreign judgments. Nigeria and South Africa are two major examples of African jurisdictions where such awareness is required.

Nigeria and South Africa are important for several reasons including their big economies and the fact that they are major political players in their respective

regions and have significant influence on the African continent. They also make for interesting comparative study –Nigerian jurisprudence is based on the English common law while South African jurisprudence is mixed – based on Roman Dutch law with a significant influence of English law. Also, Nigeria is not a member of the Hague Conference on Private International Law, but South Africa has been a member since 2002. Understanding why these two jurisdictions adopt their individual approaches to the recognition and enforcement of foreign judgments is critical to unlocking the potential to have rewarding relations with Africa in this regard. It is important to understand what brings both jurisdictions together and what separates both, with a view to determining how common perspectives to foreign judgments enforcement may be attained.

There are several bases for legal convergence. Both jurisdictions have two major legal frameworks on foreign judgments – statutory law and the common law. This two-track system is common in Africa and many parts of the Commonwealth including the United Kingdom which has more than one statute (and the common law) on foreign judgments. In Nigeria, there is still significant uncertainty as to which legal framework should apply to relevant cases. Nigerian case law clearly shows that statutory law remains the most important guide for litigants. Essentially, Nigeria relies on a statute of nearly a century old (the Reciprocal Enforcement of Judgments Act 1922 — Chapter 175, Laws of the Federation and Lagos 158). Conversely, statutory law is of less practical importance in South Africa where the Enforcement of Foreign Judgments Act 32 of 1988 has been extended to Namibia only.

The comparative study finds that it is generally easier for judgment creditors to enforce foreign judgments in South Africa than in Nigeria. Although there is much to discuss concerning legal uncertainties considering the confusing legal framework in Nigeria, case law demonstrates that the South African attitude to recognition and enforcement foreign judgments is instructive. A liberal legal framework that promotes the recognition and enforcement of foreign judgments should be founded in judicial and legislative attitudes that promote the free movement of foreign judgments. In this context, the theories that underpin the recognition and enforcement of foreign judgments are critical. The theories form the common foundation to which jurisdictions around the world can relate.

The statutory frameworks on foreign judgments are relatively recent. For example, the main Nigerian statute on the subject was patterned on the 1920 UK

on the Administration of Justice Act. However, foreign judgments were already being enforced in other jurisdictions as long ago as the nineteenth century through case law (such as *Schibsby v Westenholz* [1870] LR QB 155 and *Hilton v Guyot* 159 US 118 [1895]) which reflected the theories that underpin the recognition and enforcement of foreign judgments. The theories of reciprocity, obligation and comity have been applied with varying degrees of success in different jurisdictions. These theories either clearly apply to Nigerian and South African contexts (for example, through specific legislative provisions in Nigeria) or they have been discussed by the courts in both jurisdictions. The first step should be an agreement on what should drive the recognition and enforcement of foreign judgments. Each of these theories has been criticised rather substantially, and it may be difficult to build on any 'pure theory'. It would be helpful to adopt an approach that encourages the free movement of foreign judgments subject to a consideration of State interests. Such an approach would attach some degree of obligation in the recognition and enforcement of foreign judgments subject to narrow gaps for defence. This can be illustrated through the application of public policy to frustrate the recognition and enforcement of foreign judgments. Such an obligation should be qualified. Apart from drawing on an analysis of the major theories on the subject, adopting this qualified obligation approach has the benefit of a universal standpoint that is shaped by practical and political realities. This is more pragmatic than strictly applying any traditional theory that is entirely constructed within a legal culture or legal system.

Litigants should expect the enforcement of foreign judgments to be the rule rather than an exception. Fairness requires a consideration of litigant and State interests. Any approach that considers only one (or one at the expense of the other) is unlikely to be fair or acceptable to many jurisdictions including those in Africa. Already, the jurisprudence in both countries suggests that it would be fair to recover debts and there is scope to presume that foreign judgments should be enforced. This perspective of fairness has greatly influenced South African jurisprudence, and this may also partly account for why there is greater success in attempts to enforce foreign judgments even when the law is contested or may at first seem unclear. An example is *Richman v Ben-Tovim* 2007 (2) SA 203 where the respondent did not dispute the debt but argued that his mere presence in England was an insufficient basis for the English court to exercise jurisdiction. The South African Court of Appeal, however, considered that a 'realistic approach' was necessary and enforced the foreign judgment. Although some

scholars may criticise this judgment for endorsing ‘mere presence’ jurisdiction as it divides common law and civil law systems, the rationale behind the decision is instructive. If a ‘realistic approach’ is to be found, then there is a need to reflect on how to reduce the technicalities that impede the free movement of foreign judgments. Efforts to attain an effective global legal framework that African countries will find useful requires a realistic approach that factors in contextual realities. This realistic approach permeates other aspects of the process that leads to the recognition and enforcement of foreign judgments in Nigeria and South Africa.

An important contextual reality is the characterisation process. How the Nigerian or South African courts characterise a foreign judgment can make a great difference in terms of recognition and enforcement. The way forward is not to create more categories, but to focus on how the foreign judgment may be enforced subject to considerations of fairness to both the litigants and the State. This perspective of ‘cosmopolitan fairness’ also facilitates the attainment of practical solutions in issues that concern jurisdictional grounds. To ensure a realistic approach, and in considering a fair approach for litigants and the State, it is critical to reflect on what ultimate end should be attained. If that end is promoting the free movement of foreign judgments, then it is reasonable to put the onus on the judgment debtor. This does not mean that foreign judgments would be enforced regardless of potential injustice or unfairness to the judgment debtor. However, placing the onus on the judgment debtor implies that the application of jurisdictional grounds should be based on promoting the free movement of foreign judgments. At least four traditional bases of jurisdiction are common to Nigeria and South Africa: mere presence, residence, domicile and submission. A new perspective to this subject may consider what purpose each jurisdictional ground should serve and the aims that should be achieved. The Nigerian legal framework, in principle, reflects this approach of considering jurisdictional grounds in a progressive and purposive manner. In Nigeria, doing business or carrying on business is a common thread that runs through all the jurisdictional grounds. There is also a patchwork of jurisprudence concerning individual grounds of jurisdiction. In South Africa, residence needs to be ascertained on a case-by-case basis as neither Nigerian nor South African statutory laws define residence.

In the context of jurisdictional grounds, the lack of interpretational certainty in

both countries suggests that there is considerable scope to adopt any approach or combination of approaches that helps to solve problems in a practical way. In dealing with impediments to enforcing foreign judgments in a manner that ensures sustainable progress, there should be a clear consideration of systematic flexibility. In other words, fine demarcations in the context of traditional jurisdictional grounds may not be of practical help in efforts to facilitate the recognition and enforcement of foreign judgments. Any bias against a jurisdictional ground should be re-evaluated in a manner that factors in contextual realities. There should be a consideration of international commercial realities and in a fast-evolving global order that is driven by increasingly complex international commercial transactions. Any approach that focuses on territorial considerations vis-à-vis jurisdictional grounds does not reflect this global order in which increased movement, complex international commercial transactions and the borderless nature of the Internet are important features. This global order requires a result-oriented approach rather than a recourse to any traditional approach that is driven by technicalities. For example, the question should not be whether a judgment debtor was 'present' in the foreign country but what would amount to presence that is effective for the purposes of enforcing foreign judgments. This reasoning may be replicated for residence or domicile as well.

The need for a 'realistic approach' also extends to public policy. There are clear foundations in Nigerian and South African law that support a narrow application of public policy during legal proceedings to recognise and enforce foreign judgments. This is so although there have been significant interpretational difficulties in both jurisdictions and judgment debtors try to frustrate the enforcement of foreign judgments by relying on defences that are anchored to public policy. For example, characterising damages awarded by the foreign court as compensatory rather than punitive could help to ensure judgment creditors do not go away empty-handed. This is especially so where such judgment creditors are entitled to realising their foreign judgments.

Legal certainty and predictability cannot be driven by a purely circumstantial application of legal principles or consideration of legal issues. But it is also true that the law should not stand still. In this regard, it is instructive that Nigeria and South Africa have areas of possible legal convergence even though they operate considerably different legal cultures. However, the domestic jurisprudence of their different legal cultures does not undermine their common perceptions of

fairness and the need to enforce foreign judgments. What is lacking considerably is the right attitude to ensure that the laws already in existence are interpreted progressively and purposively. This requires a robust institutional approach that is driven by the courts. Of course, clear and certain statutory laws should be in place to promote the free movement of foreign judgments. However, legal comparative analysis concerning Nigeria and South Africa demonstrates that the use of statutory laws does not necessarily guarantee legal certainty. The relative success of South Africa in enforcing foreign judgments has been driven by the courts considering the common law. Statutory law has been extended to only one African country. Any foreign legal instrument or convention (at the global or regional level) cannot function effectively without courts that are inclined to recognise and enforce foreign judgments. For example, article 10 of the 2019 Judgments Convention provides that the court addressed may refuse the recognition or enforcement of a foreign judgment if the damages do not actually compensate a judgment debtor for actual loss suffered. The role of the courts is critical to the success of such legal provisions.

The possibility of African countries such as Nigeria (that are not members of the Hague Conference) ratifying the 2019 Convention cannot be discounted. There is a growing trend of countries signing up to Hague Conventions even though they are not members of the Conference. However, both African and non-African countries require robust legal and institutional frameworks that will support the free movement of foreign judgments. Such legal frameworks should be anchored to an appropriate paradigm shift where necessary.