Enforcement of Foreign Judgments
Edited by Louis Garb and Julian D.M. Lew
Supplement 37 (May 2016)

Enforcement of Foreign Judgments helps alleviate the time and costs of consulting foreign attorneys or government agencies for information regarding the specific procedures of individual nations and their policies towards enforcement of foreign judgments.

It addresses the most pertinent specifications, requirements, and legislation of each individual nation.

The following chapters are either new jurisdictions which have been added or existing chapters which have been reviewed and updated:

- **Botswana**
  Piyush Sharma Attorneys & Co.

- **Canada (Ontario)**
  WeirFoulds LLP, Barristers and Solicitors

- **Cyprus**
  Andreas Neocleous & Co LLC

- **Ecuador**
  Paz Horowitz Abogados

- **Estonia**
  Law firm Sorainen

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  Yoon & Yang LLC

- **Latvia**
  Spilbridge, Attorneys-at-Law

- **Lithuania**
  Law firm Sorainen

- **New Zealand**
  Hesketh Henry

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  Wikborg, Rein & Co.

- **Palestinian Authority**
  Equity Law Firm

- **Turkey**
  Karako Law Office
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List of Authors

Africa

Algeria
Adnane Bouchaib
Avocat à la Cour, bouchaib Law firm
20 rue Claude Debussy,
Algiers, Algeria
Tel.: +213 21 74 80 43
Fax: +213 21 74 80 44
E-mail: adbouchaib@yahoo.fr

Botswana
Piyush Sharma
Piyush Sharma Attorneys & Co.
LLB (UB); Post HR Law (Oxford)
PO Box Ad 34 ADC, Gaborone,
Botswana
Tel.: (+267) 72727272
Fax: (+267) 75555555
E-mail: sharma@sharma.co.bw
Website: www.sharma.co.bw

Cameroon
David Etah Akoh
Etah-Nan & Co (Attorneys)
PO Box 4736 Douala,
Cameroon
Tel.: +237 33 42 56 09/
Fax: +237 33 42 32 89
Mobile: 237 77 71 05 28
E-mail: etahnan@justice.com
Website: www.etah-nan.com

Egypt
Wagdi Maher Bishara
Nadoury & Nahas Law Firm
7 Lazoughli St., Isis Building,
Suite 35, Garden City,
Cairo,
Egypt
Tel.: (02) 795-9658
Fax: (02) 795-0080
Contact: Ashraf Nadoury
E-mail: nadorynahas@link.net
List of Authors

Kenya

Caroline Thuo Hamilton Harrison and Mathews Advocates, Commissioners for Oaths and Notaries Public ICEA Building, 4th Floor, Kenyatta Avenue P.O Box 30333-00100 GPO Nairobi

Tel.: +254 020 3258000/
Fax: +254 020 3258222
E-mail: hhm@hhm.co.ke
Website: www.hhm.co.ke

Nigeria

Ajomogobia & Okeke Main Office 2nd Floor Sterling Towers 20 Marina Lagos Nigeria

Tel.: +234 1 2719368/2719369, 4622687/4622688
Fax: +234 1 2630410/2635585
E-mail: ao@ajumogobiaokeke.com
Website: www.ajumogobiaokeke.com

Port Harcourt Plot F, 2AA d 2AB Shalom House Sanni Abacha Road G.R.A. Phase III Port Harcourt Rivers State

Tel.: 234-84-234267/
Fax: 234-84-234268
E-mail: phoffice@ajumogobiaokeke.com

South Africa

Warren Bank Sandton Advocates Chambers Group III 3rd Floor, Maisels Chambers, 4 Protea Place, Sandown, Sandton, South Africa

Tel.: +27 11 535-1800
Fax: +27 11 535-1865
Mobile: +27 82 6118822
E-mail: warren@law.co.za

Tunisia

Habib & Slim Malouche Malouche Law Firm Legal Services Immeuble Galaxie 2000 – Tour D Rue d’Arabie Saoudite 1002 Tunis Tunisia

Tel.: (216) 7179 13 64
Fax: (216) 7179 05 13
E-mail: hes.malouche@gnet.tn

22 – General Section
List of Authors

Zambia

Fatima Mandhu
School of Law
University of Zambia
Great East Road Campus
Lusaka
Zambia

Tel.: +260 955 771058
E-mail: fatimamandhu@gmail.com

Asia

Azerbaijan

Remells Law Firm
Contact Person: Rashid Aliyev
Azure Business Center
Nobel Avenue 15
Baku AZ 1025, Azerbaijan

Tel.: +99412.488.68.46
E-mail: Rashid.aliyev@remells.com
Website: www.remells.com

Brunei

Colin Y. C. Ong
Dr Colin Ong Legal Services
Suites 2-5, 2nd Floor
Gadong Properties Centre
Jalan Gadong BA1511

Tel.: (673) 22420913
Fax: (673) 2420911
E-mail: onglegal@brunet.bn
Website: www.essexcourt.net

Hong Kong

Ella Cheong
Ella Cheong Law Office
5006 Hopewell Centre
183 Queen’s Road East
Hong Kong

Tel.: +852 2810 7400
Fax: +852 2810 7411
E-mail: ellacheong@ellacheonglaw.com
Website: www.ellacheong.com

India

Lalit Bhasin
Bhasin & Co., Advocates
Supreme Court of India
10, Hailey Road, 10th Floor
New Delhi 110-001
India

Tel.: +91 11 2332 2601
Fax: +91 11 2332 9878
E-mail: lbhasin@gmail.com,
lbhasin@bhasinco.in
Website: www.bhasinco.in

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Indonesia

Winita E. Kusnandar
Kusnandar & Co.
PO Box 2057/JKT 10001
45, Jl. Jend. Sudirman Kav.
Aetna Danamon Tower II, 24th Floor
Jakarta 12930
Indonesia

Tel.: (62-21) 5771435
Fax: (62-21) 5771436
E-mail: kusnalaw@kusnandar.com
Website: http://www.kusnandar.com

Israel

Louis Garb
Louis Garb & Co., Law Offices
14 Zerach Barnet Street
Jerusalem 95404
and Tel Aviv
Israel

Tel.: +972 2 6528093
Fax: +972 2 6519306
E-mail: LGARB@netvision.net.il
Website: www.louisgarb.internationallaw.com

Japan

Takahiro Yamauchi & Naoko Kamimura
Nagashima Ohno & Tsunematsu
JP Tower, 2- 7- 2 Marunouchi Chiyoda-Ku, Tokyo 100-7036

Tel.: +81 3 6889 7000
Fax: +81 3 6889 8000
E-mail: info@noandt.com
Website: www.noandt.com/en/index.html

Jordan

Samah Sultan & Abdurrahman Awad
Ayla Legal Services Firm, Aqaba P.O. Box: 334,
Postal Code: 77110

Tel.: +962 3 2060006
Fax: +962 3 2060005
Mobile: +962 79 5902972,
+962 79 6600002
E-mail: samahsultan2001@yahoo.com
abdwad2003@yahoo.com
Website: www.aylalawfirm.com

Korea

Jay K. Lee
Yoon & Yang LLC
19th Floor, ASEM Tower
517 Yeongdong-daero
Gangnam-gu, Seoul
Korea

Tel.: +82 2 6003 7590
Fax: +82 2 6003 7806
List of Authors

Lebanon

Mohamed Alem & Leila Y. Alem
Alem & Associates
Alem & Associates 126 Foch Street,
Beirut Central DistrictBeirut 2012 6609,
Lebanon
Tel.: +961 (1) 99 97 17
Fax: +961 (1) 99 96 07
E-mail: mohamed.alem@alemlaw.com
leila.alem@alemlaw.com
contact@alemlaw.com
Website: www.alemlaw.com

Malaysia

Ira Biswas
Chooi & Company
Level 23 Menara Dion
27 Jalan Sultan Ismail
50250 Kuala Lumpur
Tel.: +603 2055 3888
DID: +603 2055 3901
Fax: +603 2055 3880
E-mail: ibiswas@chooi.com.my
Website: www.chooi.com.my

John Mathew
Heng Yee Keat
Christopher & Lee Ong
Level 22, Axiata Tower
No. 9 Jalan Stesen Sentral 5
Kuala Lumpur Sentral
50470 Kuala Lumpur
Tel.: +603 2273 1919
Fax: +603 2273 8310
E-mail: john.mathew@christopherleeong.com,
yee.keat.heng@christopherleeong.com
Website: www.christopherleeong.com

Myanmar

Min Thein & Kexian Ng
Rajah & Tann NK Legal Myanmar
Company Limited
Room 007, Inya Lake Hotel
No. 37, Kaba Aye Pagoda Road
Mayangone Township
Yangon
Myanmar
Tel.: +95 9 73040763
Fax: +95 1 957903
E-mail: min.thein@rajahtann.com
Website: kexian.ng@rajahtann.com
http://mm.rajahtannasia.com

Pakistan

Farrukh Zia Shaikh
Barrister at Law & Advocate
Supreme Court of Pakistan
Zia G. Shaikh
Barristers-at-Law & Advocates
102, First Floor
Progressive Square
Shahrah-e-Faisal
Karachi 75400
Pakistan
Tel.: + 92 (21) 3585 1779 / 3437 1489 / 3455 2902
Mobiles: + 92 333 235 4244 / 300 823 4134
E-mail: fzs@ziashaikh.com
Website: www.ziashaikh.com
List of Authors

**Palestinian Authority**

Lubna Katbeh & Tareq Touqan  
Equity Law Firm  
Ramallah – Balou, Nijmeh 3 Building, second floor  
Tel.: +972 2 2420055  
Fax: +972 2 2420066  
E-mail: lkatbeh@elg.ps; ttouqan@elg.ps

**People’s Republic of China**

Jingzhou Tao  
28/F, South Tower, Beijing Kerry Center, 1 Guanghua Road, Chaoyang District, Beijing  
The People’s Republic of China  
Tel.: +8610 5829 1303  
Fax: +8610 5829 1313  
E-mail: Jingzhou.tao@dechert.com

**Philippines**

Eduardo de los Angeles  
Romulo Mabanta Buenaventura  
Sayoc & de los Angeles  
21st Floor, Philamlife Tower  
8767 Paseo de Roxas, 1226 Makati City  
Philippines  
Tel.: +632-555-9555  
Fax: +632-810-3110  
Website: www.@romulo.com

**Singapore**

Harish Kumar, Goh Seow Hui & Jonathan Toh  
Rajah & Tann Singapore LLP  
9 Battery Road #25-01  
Straits Trading Building  
Singapore 049910  
Tel.: +65 6232 0360 (Harish Kumar)  
+65 6232 0598 (Jonathan Toh)  
Fax: +65 6428 2117 (Harish Kumar)  
+65 6428 2155 (Jonathan Toh)  
E-mail: harish.kumar@rajahtann.com; jonathan.toh@rajahtann.com  
Website: www.rajahtann.com

**Taiwan**

Nigel N.T. Li & Rebecca Hsiao  
Lee & Li, Attorneys-at-Law  
7th Floor, 201 Tun Hua North Road  
Taipei, Taiwan 105  
Republic of China  
Tel.: +886-2-2715-3300  
Fax: +886-2-2713-3999  
E-mail: nigelli@leeandli.com; rebeccahsiao@leeandli.com  
Website: www.leeandli.com

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List of Authors

**Thailand**

Stephen Frost  
Bangkok International Associates  
17th Floor, ITF Tower  
140/36-38 Silom Road  
Bangkok 10500  
Thailand  
Tel.: +66 2 231 6201/6455  
Fax: +66 2 231 6204  
E-mail: sfrost@bia.co.th  
Website: www.bia.co.th

**Vietnam**

Dang The Duc  
Managing Partner, & Steve Jacob  
Indochine Counsel  
Ho Chi Minh  
City and Hanoi,  
Vietnam  
Tel.: +848 3823 9640  
Fax: +848 3823 9641  
E-mail: duc.dang@indochinecounsel.com

**Australia and Oceania**

**Australia**

Michael Pryse  
Partner, Herbert Smith Freehills  
Melbourne  
101 Collins Street,  
Melbourne  
Victoria 3000  
Australia  
Tel.: +61 3 9288 1234  
Fax: +61 3 9288 1567  
E-mail: Michael.Pryse@hsf.com

**New Zealand**

Margaret A. Helen Macfarlane,  
Sarah Holderness,  
Gennise Luen, Michael O’Brien &  
Nina Thomson of Hesketh Henry  
Level 14, PwC Tower  
188 Quay Street  
Auckland 1010 NZ  
Tel.: 64-9-375-8700  
Fax: 64-9-3094494  
E-mail: lawyers@heskethhenry.co.nz  
Website: www.heskethhenry.co.nz

**North America**

**The Bahamas**

C.R. Matthew Paton  
LennoxPaton, Chambers  
3 Bayside Executive Park  
West Bay Street & Blake Road  
Nassau, The Bahamas  
Tel.: +1 242 502 5000  
Fax: +1 242 328 0566  
E-mail: crmpaton@lennoxpaton.com  
Website: www.lennoxpaton.com

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List of Authors

British Virgin Islands
Phillip R. Kite
Harney Westwood & Riegels
Craigmuir Chambers
PO Box 71
Road Town, Tortola
British Virgin Islands
Tel.: +1 284 494 2233
Fax: +1 284 494 3547
E-mail: phillip.kite@harneys.com

Canada (British Columbia)
Chuck Blanaru & Jennifer M. Moir
Heath Law LLP, Barristers & Solicitors
200 – 1808 Bowen Road
Nanaimo, British Columbia
V9S 5W4
Tel.: (250) 753-2202
Fax: (250) 753-3949
E-mail: cblanaru@vancouverislandlawyers.com
Website: jmoir@nanaimolaw.com

Canada (Ontario)
Hilary Book
Partner, WeirFoulds LLP, Barristers and Solicitors
Suite 4100, 66 Wellington Street West,
Toronto, Ontario
Canada M5K1B7
Tel.: +1 416 365 1110
Fax: +1 416 365 1876
E-mail: hbook@weirfoulds.com

Peter L. Biro
President and CEO, Newcon Optik
105 Sparks Ave., Toronto, ON
M2H 2S5 Canada
Tel.: +416-663-6963
Fax: +416-663-9065
E-mail: pbiro@newcon-optik.com

Canada (Quebec)
Antonietta Melchiorre & James Woods
Lapointe Rosenstein Marchand Melançon, L.L.P.
1250 René-Lévesque Blvd.
West, Suite 1400
Montreal, Quebec
Canada H3B 5E9
Tel.: +1 514 925-6355
Fax: +1 514 925-5055
E-mail: antonietta.melchiorre@lrmm.com

United States
Allan T. Slagel & Daniel R. Saeddi
Taft Stettinius & Hollister LLP
Suite 2800
111 E. Wacker
Chicago, Illinois 60601
USA
Tel.: +1 312 527 4000
Fax: +1 312 527 4011
E-mail: aslagel@taftlaw.com,
dsaeddi@taftlaw.com
Website: www.taftlaw.com

28 – General Section
List of Authors

Central America

Bermuda

Keith Robinson
Appleby
Canon’s Court
22 Victoria Street
PO Box HM 1179
Hamilton HM EX
Bermuda

Tel.: +1 441 295 2244
Fax: +1 441 292 8666
E-mail: krobinson@applebyglobal.com

Cayman Islands

Andrew Bolton
Appleby (Cayman) Limited
Clifton House
75 Fort Street
P.O. Box 190 KY1-1104
Grand Cayman
Cayman Islands

Tel.: +1 345 949 4900
Fax: +1 345 949 4901
E-mail: abolton@applebyglobal.com

Guatemala

Armando Mérida
Mérida & Asociados
20 calle 12-51 ‘A’ zona 10
Guatemala

Tel.: +502 2366 7427
Fax: +502 2366 7423
E-mail: amerida@meridayasociados.com.gt
Website: www.meridayasociados.com.gt

Mexico

Marcos Berkman Margolis
BBL Legal Abogados, S.C.
San Francisco Núm. 2, Pisos 5 y 6
Colonia del Valle
C.P. 03100, México, D.F.

Tel.: +52 55 5687 0411
Fax: +52 55 5669 1582
E-mail: mberkman@bbl-legal.com.mx
Website: www.bbl-legal.com.mx

Panama

David J. Arosemena
Castro & Berguido
Edificio Vallarino
6th Floor, Panama City
Panama

Tel.: +507 264 0506
Fax: +507 264 0516
E-mail: darosemena@castroberguido.com
Website: http://www.castroberguido.com

Foreign Judgments – Suppl. 37 (May 2016)
List of Authors

South America

Argentina

Alberto Molinario
Marval, O’Farrell & Mairal,
Av. Leandro N. Alem 928
C1001AAR Buenos Aires
Argentina
Tel.: +54 11 4310-0100
Ext. 2601
Fax: +54 11 4310-0200
E-mail: ADQM@marval.com
Website: www.marval.com

Brazil

Adriana Camargo Rodrigues
Adriana Camargo Rodrigues Advocacia
Praça Ramos de Azevedo, 209-61
01037-010 Sao Paulo, SP
Brazil
Tel.: +55 11 3218-7171
Fax: +55 11 3218-7172
E-mail: acr@acr.adv.br
Website: www.acr.adv.br

Chile

Francisco Javier Illanes, Juan Antonio Parodi & Constanza Lichtemberg
Cariola Díez Pérez-Cotapos y Cía. Ltda.
2711 Andrés Bello Ave.
19th Floor
Santiago, Chile
Tel.: +56 (2) 360 40 00
Fax: +56 (2) 360 40 30
E-mail: jparodi@cariola.cl
fjillanes@cariola.cl
cliichtemberg@cariola.cl
Website: www.cariola.cl

Colombia

Eduardo Zuleta
Gómez-Pinzón Zuleta
Abogados S.A.
Calle 67 No. 7-35, Of. 1204
Bogotá, D.C. Colombia
Tel.: +571 3192900. Ext. 256
Fax: +571 3210295
E-mail: ezuleta@gpzlegal.com
Website: www.gpzlegal.com

Ecuador

Xavier Sisa Cepeda & Bruce Horowitz
Paz Horowitz Abogados,
Site Center, Torre 1, Piso 3,
Calle del Establo y Calle E, Cumbayá
Quito, Ecuador
Tel.: (593-2) 398–2900
Fax: (593-2) 398–2999
E-mail: bhorowitz@pazhorowitz.com
xsisa@pazhorowitz.com
Website: www.pazhorowitz.com
List of Authors

Uruguay

Federico Formento
Rincón 487, 4th Floor.
Montevideo, 11.000,
Uruguay
Tel.: +598 29157468
Fax: +598 29161352
E-mail: fformento@fs.com.uy
Website: www.fs.com.uy

Venezuela

Angel Gabriel Viso
Viso, Rodriguez, Cottin, Medina,
Ramírez & Asociados
Edificio Multicentro Los Palos Grandes,
PH, Avenida Andrés Bello,
cruce con Primera Transversal,
Los Palos Grandes,
Caracas, 1060-A,
Venezuela
Tel.: +58 212 283 24 54,
283 84 97
Fax: +58 212 283 84 28,
283 11 06
E-mail: angelg.viso@vrcabogados.com.v

Europe

Austria

Friedrich Schwank & Thomas Pichler
Stock Exchange Building
34 Wipplingerstrasse, Vienna,
A-1010 Austria
Tel.: +43 1 5335704
Fax: +43 1 5335706
E-mail: offices@schwank.com
Website: www.schwank.com

Belarus

Alexei Anischenko &
Mikalai Markounik
Masherova av. 76A 4th floor
Minsk 220035
Belarus
Tel.: + 375 17 203 84 96
Fax: + 375 17 203 77 02
E-mail: Mikalai.markounik@vmp.by
Website: www.vmp.by

Belgium

Karel Mul
Mul Law Offices
Jan Van Rijswijcklaan
194A b. 6 at B-2020 Antwerp
Belgium
Tel.: +32.3.237 34 26
Fax: +32.3.237.07 44
E-mail: info@drmul.com
Website: www.drmul.com
List of Authors

Republic of Bulgaria

Rossitsa Voutcheva, Peter Mihaylov & Dilyan Nachev
BWSP Ilieva, Voutcheva & Co Law Firm
28 ‘Hristo Botev’ blvd., 4th floor, SOFIA 1000,
Bulgaria
Tel.: 359 2 981 49 53
Fax: 359 2 980 59 82
E-mail: office@ivlawfirm.com
Website: www.ivlawfirm.com

Cyprus

Chrysanthos Christoforou
Andreas Neocleous & Co. LLC
Neocleous House
195 Archbishop Makarios III Avenue
PO Box 50613
Limassol
CY- 3608
Cyprus
Tel.: 357 25 110000
Fax: 357 25 110001
E-mail: chrysanthos@neocleous.com

Czech Republic

JUDr. Jiří Hrádek & Mgr Miloš Kocí
Schönherr s.r.o.
nám. Republiky 1079/1a,
Prague 1,
Postal code 110 00,
Czech Republic
Tel.: 420 225 996 500
Fax: 420 225 996 555
E-mail: j.hradek@schoenherr.eu
Website: www.schoenherr.eu

Denmark

Jens Rostock-Jensen & Jakob Dahl Mikkelsen
Kromann Reumert
Sundkrogsgade 5
2100 Copenhagen East
Denmark
Tel.: 45 38 77 44 50
Fax: 45 70 12 13 11
E-mail: jrj@kromannreumert.com
jdm@kromannreumert.com
Website: www.kromannreumert.com

England and Wales

Steven Philippsohn
PCB Litigation LLP
4th Floor
90 Chancery Lane
London WC2A 1EU
United Kingdom
Tel.: 44 (0)20 7831 2691
Fax: 44 (0)20 7404 9435
E-mail: snp@pcblitigation.com
Website: www.pcblitigation.com

32 – General Section
### Estonia

Carri Ginter & Veikko Puolakainen  
Law firm SORAINEN  
Pärnu mnt. 15  
10141 Tallinn, Estonia

<table>
<thead>
<tr>
<th>Tel.</th>
<th>+372 640 0900</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fax:</td>
<td>+372 640 0901</td>
</tr>
<tr>
<td>E-mail:</td>
<td><a href="mailto:estonia@sorainen.com">estonia@sorainen.com</a></td>
</tr>
<tr>
<td>Website:</td>
<td><a href="http://www.sorainen.com">www.sorainen.com</a></td>
</tr>
</tbody>
</table>

### European Union

Dr Stephan Wilske,  
Maître en Droit, LL.M.,  
Lautenschlagerstraße 21  
D-70173 Stuttgart  
Germany  
and  
Prof. Dr Gerhard Wegen, LL.M.  
Lautenschlagerstraße 21  
D-70173 Stuttgart  
Germany

<table>
<thead>
<tr>
<th>Tel.:</th>
<th>+49 711 8997-152</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fax:</td>
<td>+49 711 855096</td>
</tr>
<tr>
<td>E-mail:</td>
<td><a href="mailto:stephan.wilske@gleisslutz.com">stephan.wilske@gleisslutz.com</a></td>
</tr>
<tr>
<td>Website:</td>
<td><a href="http://www.gleisslutz.com">www.gleisslutz.com</a></td>
</tr>
</tbody>
</table>

### Finland

Peter Backström  
Backström & Co Ltd. Attorneys  
Attorneys at Law  
Kasarmikatu 44  
FI-00130 Helsinki  
Finland

<table>
<thead>
<tr>
<th>Tel.:</th>
<th>+358-09-6689 940</th>
</tr>
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<tbody>
<tr>
<td>Fax:</td>
<td>+358-09-6689 9410</td>
</tr>
<tr>
<td>E-mail:</td>
<td><a href="mailto:peter.backstrom@backstrom.fi">peter.backstrom@backstrom.fi</a></td>
</tr>
<tr>
<td>Website:</td>
<td><a href="http://www.backstrom.fi">www.backstrom.fi</a></td>
</tr>
</tbody>
</table>

### France

Olivier G. Binder  
Avocat à la Cour  
Partner,  
GRANRUT Law firm  
91, rue du Faubourg Saint Honoré - 75008 Paris

<table>
<thead>
<tr>
<th>Tel.:</th>
<th>+33.1.53.43.15.15</th>
</tr>
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<tr>
<td>Fax:</td>
<td>+33.1.53.43.15.00</td>
</tr>
<tr>
<td>E-mail:</td>
<td><a href="mailto:o.binder@granrut.com">o.binder@granrut.com</a></td>
</tr>
<tr>
<td>Website:</td>
<td><a href="http://www.granrut.com">www.granrut.com</a></td>
</tr>
</tbody>
</table>

### Germany

Dr Stephan Wilske,  
Maître en Droit, LL.M.,  
Lautenschlagerstraße 21  
D-70173 Stuttgart  
Germany  
and

<table>
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<td>+49 711 855096</td>
</tr>
<tr>
<td>E-mail:</td>
<td><a href="mailto:stephan.wilske@gleisslutz.com">stephan.wilske@gleisslutz.com</a></td>
</tr>
<tr>
<td>Website:</td>
<td><a href="http://www.gleisslutz.com">www.gleisslutz.com</a></td>
</tr>
</tbody>
</table>
List of Authors

Prof. Dr Gerhard Wegen, LL.M.
Lautenschlagerstraße 21
D-70173 Stuttgart
Germany
Tel.: +49 7118997-156
Fax: +49 711855096
E-mail: gerhard.wegen@gleisslutz.com

Gibraltar

Lewis Baglietto Qc & Moshe Levy
Hassans,
57/63 Line wall Road
PO Box 199
Gibraltar
Tel.: +350 20079000
Fax: +350 200
E-mail: info@hassans.gi
Website: www.gibraltarlaw.com

Greece

Alkistis Christofilou
I.K. Rokas & Partners Law Firm
25 Boukourestiou Street
106 71 Athens
Greece
Tel.: +30 210 361 6816
Fax: +30 210 361 5425
E-mail: a.christofilou@rokas.com
Website: www.rokas.com

Guernsey

St. John A. Robilliard
Mourant Ozannes
1, Le Marchant Street
St. Peter Port
Guernsey
GY1 4HP
Tel.: +44 (0) 1481 723466
Fax: +44 (0) 1481 713839
E-mail: stjohnrobilliard@mourantozannes.com

Hungary

Péter Nógrádi
Attorney-at-Law, Nógrádi Law Firm
H-1037 Budapest,
Montevideo str 3/A,
Hungary
Tel.: +36 1 240-6354
Fax: +36 1 240-6353
E-mail: nogradilaw@nogradilaw.hu

Ireland

Gearoid Carey &
Julie Murphy O’Connor
70 Sir John Rogerson’s Quay
Dublin-2
Ireland
Tel.: +353 1 232 2000
Fax: +353 1 232 3333
E-mail: Gearoid.carey@matheson.com
Julie.murphy-oconnor@matheson.com
Website: www.matheson.com

34 – General Section

Foreign Judgments – Suppl. 37 (May 2016)
List of Authors

Isle of Man

Christopher Brooks
Advocate, M&P Legal
New Court Chambers
23-25 Bucks Road
Douglas
Isle of Man
IM99 2EN
Tel.: +44(0)1624 695800
Fax: +44(0)1624 695801
E-mail: cmb@mplegal.im
Website: www.mplegal.im

Italy

Tiziana Tampieri
Studio Tampieri e Associati
Via Guido Reni, 4
40125 Bologna
Italy
Tel.: +39 51 237655
Fax: +39 51 264425
E-mail: tiziana.tampieri@gmail.com
Website: www.studiolegaletampierieassociati.com

Jersey

Anthony Dessain & Edward Drummond
Bedell Cristin
PO Box 75
26 New Street
St Helier
Jersey
Tel.: +44 (0) 1543 814814
Fax: +44 (0) 1534 814815
E-mail: anthony.dessain@bedellgroup.com
edward.drummond@bedellgroup.com
Website: www.bedellgroup.com

Michael Wilkins, M.B.E.
Viscount of the Royal Court
Morier House
St. Helier
Jersey
Tel.: +44 (0) 1543 441450/441401
Fax: +44 (0) 1534 441399
E-mail: M.Wilkins@gov.je
Website: www.gov.je

Latvia

Arita Linde
Spilbridge, Attorneys-at-Law
Valnu Str. 3-24, Riga, LV-1050,
Latvia
Tel.: +371 67507722;
Fax: +371 29414541
E-mail: arita.linde@spilbridge.com
Website: http://www.spilbridge.com
List of Authors

Liechtenstein

Dr iur. Markus Wanger
Rechtsanwalt – FClArb
Aeulestrasse 45
P.O. Box 1608
FL-9490 Vaduz
Liechtenstein

Tel.: +423 237 52 52
Fax: +423 237 52 53
E-mail: wanger@wanger.net
Website: www.wanger.net

Lithuania

Renata Beržanskiene
Law firm SORAINEN
Jogailos g. 4
LT-01116 Vilnius
Lithuania

Tel.: +370 5 2685 040
Fax: +370 5 2685 041
E-mail: renata.berzanskiene@sorainen.com
Website: www.sorainen.com

Luxembourg

François Moyse
Avocat à la Cour
Partner
DSM Di Stefano Moyse
55-57, rue de Merl
B.P. 2648 L-1026
L-2146 Luxembourg

Tel.: +352 262 562-1
Fax: +352 262 562-2
E-mail: fmoyse@dsmlegal.com
Website: www.dsmlegal.com

Monaco

Jean-Charles S. Gardetto
Avocat-Defenseur a la Cour
19 Boulevard des Moulins
MC 98000 Monaco
Principaute de
Monaco

Tel.: +377.92.16.16.17
Fax: +377.93.50.42.41
E-mail: info@gardetto.mc

The Netherlands

Peter Bernard Hemmes
Glenn C. Haulussy LL.M.
Westblaak 5,
3012 KC Rotterdam

Tel.: +31-10-4148614
Fax: +31-10-4149415
E-mail: ghaulussey@thelawcompany.nl
List of Authors

Norway
Kaare Andreas Shetelig &
Ola Haugen
Wikborg, Rein & Co.
Kronprinsesse Märthas pl. 1
N-0160 Oslo
Norway
Tel.: +47 22 82 75 00
Fax: +47 22 82 75 01
E-mail: kas@wr.no
oha@wr.no

Poland
Michał Gruca
Schönherr Stangl Lutz Sp.k
ul. Próża na 9
PL-00-107 Warszawa
Poland
Tel.: +48 22 223 09 16
Fax: +48 22 223 09 02
E-mail: m.gruca@schoenherr.eu
Website: www.schoenherr.eu

Portugal
Guilherme Santos Silva, Francisco
Patrício & Mariana Duarte
Abreu & Associados, Sociedade de
Advogados, RL
Av. das Forças Armadas, 125,12º
1600-079 Lisboa
Portugal
Tel.: + 351 21 729 18 00
Fax: +351 21 723 18 99
E-mail: guilherme.s.silva@abreuadvogados.com

Romania
Vitzman, Webster & Partners
2 Univii Blvd, bl. 8A, et 5-7
ap. 24, 25, sector 4,
Bucharest RO-76104
Romania
Tel.: +40 1 335 4803
Fax: +40 1 337 0738
E-mail: hugo.vitzman@vwp.ro
Website: www.vwp.ro

Russia
Vladimir Melnikov
Herbert Smith Freehills CIS LLP
10, Ulitsa Nikolskaya
109012 Moscow
Russian Federation
Tel.: +7 (495) 363 65 00
Fax: +7 (495) 363 65 01
E-mail: vladimir.melnikov@hsf.com
Website: www.herbertsmithfreehills.com
List of Authors

Scotland
Douglas Blyth, Partner
Maclay Murray & Spens LLP
1 George Square, Glasgow
Scotland
Tel.: +44 330 222 1664
Fax: +44 141 248 5819
E-mail: Douglas.Blyth@mms.co.uk

Serbia
Borivoje Trgovčević
Attorney-at-Law
Law Office of B. Trgovčević
Kneginje Zorke 9a/13
11000 Belgrade
Serbia
Tel.: +381 11 2430644
Fax: +381 11 2430644
E-mail: btrgovcevic@yahoo.com
Website: www.belgradelawoffice.com

Slovak Republic
Jozef Mesároš & Eva Komrsková
Jurisinvest, advokátska kancelária, v.o.s.
Pluhová 5
831 03 Bratislava 3
Slovak Republic
Tel.: +421 2 44455326
Fax: +421 2 44455329
E-mail: jurisinvest@jurisinvest.sk

Spain
Isabel Escudero & Ángeles Subirá
BROSA, Abogados y Economistas, S.LP
Avenida Diagonal No. 598
08021 Barcelona, Spain
Tel.: +34 93 2404151
Fax: +34 93 2022907
E-mail: www.info.bcn@brosa.es
Guturbay No. 6
28001 Madrid
Spain
Tel.: +34 91 5934244
Fax: +34 91 5930455
E-mail: www.info.mad@brosa.es
Gran Via 42
48011 Bilbao
Spain
Tel.: +34 94 4355380
Fax: +34 94 4239382
E-mail: www.info.bio@brosa.es
List of Authors

Sweden

Mikael Berglund
Enforcement Director,
Lars Berlin and Cecilia Peterson
Attorneys-at-Law
Box 284,
SE–746 26 Bålsta
Sweden

Tel.: +46171467019
Fax: +46171469641
E-mail: lawyer@berlin.se,
Cecilia.Peterson@berlin.se
Website: www.berlin.se

Switzerland

Nedim Peter Vogt & Matthew Reiter Bär & Karrer AG
Brandschenkestrasse 90
8027 Zurich
Switzerland

Tel.: +41 58 261 50 00
Fax: +41 58 261 50 01
Website: www.baerkarrer.ch

Turkey

Nedim Karako
KARAKO LAW OFFICE
Ortaklar Caddesi,
Mevlut Pehlivan Sokak
Multinet Plaza No.12/2
Şişli – Istanbul – Turkey

Tel.: +90 212 347 7150
Fax: +90 212 347 7083
E-mail: info@karako.av.tr
Website: www.karako.av.tr

Ukraine

Andreas Neocleous & Co, Kiev office
24/7, Instytutska Street, Suite 12
Kiev 01021
Ukraine

Tel./Fax: +38 044 2534495
E-mail: kyiv@neocleous.com
Website: www.neocleous.com
www.neocleous.com.ua
List of Authors
This chapter is up-to-date as of March 2016
Africa
1. **Uniformity of Law and Regulations**

Botswana is not divided into states and is therefore governed by one central government. It is to be noted at this point that Botswana’s common law is a combination of the Roman Dutch common law and the English Common law. South Africa happens to also apply Roman Dutch law and therefore in the Botswana courts South African cases are highly persuasive and widely applied. Wherever reference is made herein to South African Law or to a South African Precedent, it is because the law of Botswana is silent on the point and the South African law or precedent would be highly persuasive.

2. **Judgments**

2.1. **Definition**

The committee of nations and international commerce require that foreign judgments be recognized and enforced in each other’s country as far as possible. In Botswana as in other countries this is usually achieved by a statute which under certain conditions recognizes as judgments decisions of foreign courts. The Court also takes into consideration the following factors for the enforcement of a foreign judgment: whether the parties are all peregrines; whether the parties are domiciled in the country or residents of the country – *Gyimah v. The Attorney-General In re Ex Parte Application of Vivian Gyimah.*

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1. 2010 1 BLR 646.
In the Gyimah case, the court made reference to the case of Pretorius v. Sweiger (ii) 1979-1980 B.L.R. 129 where the following statement was made:

‘If both plaintiff and defendant are peregrines and there is no ground of jurisdiction ratione rei sitae, rei gestae or contractus - none has been averred - the Court will not entertain the action and would not even if the defendant were to submit to the jurisdiction. The time of the Court should not be taken up with disputes, having nothing to do with Botswana, between persons neither domiciled nor resident here.

2.2 Categories

(a) Money judgments – South African courts will recognize judgments that are not contrary to the country’s public policy. If the Defendant a) was resident in the country over which the foreign court exercised jurisdiction or; b) submitted to the jurisdiction of the foreign court by conduct or agreement, then the South African courts will recognize and enforce the judgment.2

The following requirements were specifically referred to in the leading case on the subject, Jones v. Krok 1995 (1) SA 677 (A):

(1) the foreign court must have had international competence as determined in terms of South African law;

(2) the judgment must be final and must not have become superannuated;

(3) the enforcement of the judgment must not be contrary to South African public policy (which includes the rules of natural justice);

(b) Specific performance – There is no authority regarding this area in Botswana. Such judgment would be enforceable in South Africa to the extent that it is capable of implementation in South Africa.3

(c) Injunctions – no case authority available in Botswana or South Africa on the enforcement of foreign court injunctions.

(d) Arbitration awards – The Convention on the Recognition and Enforcement of Foreign Arbitral Awards was adopted by a United Nations diplomatic conference on 10 June 1958 and entered into force on 7 June 1959. The Convention requires courts of contracting states to give effect to private agreements to arbitrate and to recognize and enforce arbitration awards made in other contracting states. Botswana ratified the convention on 20 December 1971. In the case of Good v. The Attorney-General4 the court stated that international treaties to which Botswana was a signatory did not have the force of law until incorporated in the domestic law. Section 24(1) of the Interpretation Act (Cap 01:04) provided that such international conventions and treaties as far as they had not been incorporated into domestic law may be used as an aid in the construction of the Constitution.

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2. South Africa – prepared by Advocate Warren B. Bank, Advocate of the High Court of South Africa, member of the Johannesburg Bar and student of the Honourable Society of Gray’s Inn, London and is included in the present volume.

3. Ibid.

4. 2005 (1) BLR 462 (HC).
and of statutes. Where it was possible to do so without doing violence to the language used, an interpretation consonant with Botswana’s international obligations subscribed to in conventions with other states should prevail.

(e) Personal status (divorce, matrimonial, inheritance, adoption, insolvency) –

The common law of Botswana on recognition of foreign divorce decrees is a mixture of the Roman Dutch common law and English common law. The principle of law for the recognition of foreign decrees is that only decrees granted by the courts of the domicile of the parties at the time of their marriage should be recognized, and that a married woman takes on the domicile of her husband on her marriage.

(f) An award for multiple/punitive damages would be enforceable. The courts of Botswana are however noticeably more reserved than courts of other jurisdiction with regards to the quantum.

(g) A judgment which is in itself a recognition of a previous foreign judgment.

(h) Foreign interim order are enforceable for:

(i) relief pendente lite;

(ii) maintenance and custody. The High Court of Botswana is the upper guardian of every single minor within the Republic of Botswana. The children would therefore have to be present in Botswana.

(i) Judgments against the local State or any of its organs.

(j) Judgments which are not enforceable would be as according to section 11 of the Judgments (International Enforcements) Act where it appears to the President that the treatment in respect of recognition and enforcement accorded by the courts of a certain country to judgments given in the superior courts of Botswana is substantially less favourable than that accorded by the courts of Botswana to judgments of the superior courts of that country, the President may by statutory instrument order that except in so far as the President may otherwise direct, no proceedings shall be entertained in any court of Botswana for the recovery of any sum alleged to be payable under a judgment given in a court of that country.

– foreign fiscal judgments (income tax and customs duties) are enforceable as well.

All above-mentioned judgments are enforceable to the extent that they fall within the provisions of the Judgments (International Enforcements) Act.

2.3. Reciprocity

Reciprocity of enforcement on the part of the foreign courts is an essential for the enforcement by local courts as shown by section 11 of the Judgments (International Enforcements) Act mentioned above.

In the case of T Schouten’s Imports (PTY) Ltd v. Wintercom Botswana (PTY) Ltd, the court stated that proof of a claim based on a foreign judgment did not depend on reciprocal enforcement of judgments and that by virtue of the

5. 1984 BLR 111 (HC).
provisions of the Evidence (Commonwealth and Foreign Acts of State and Judgments) Act (Cap. 10:03) (1973 Rev.), judgments of courts of justice in all foreign states could be proved in courts of justice in Botswana or before any person having by law authority to hear, receive and examine evidence and that they could be proved by the production of authenticated copies of the judgment purporting to be sealed with the seal of the foreign court. Once such a judgment was proved it would be an evidence, and in the case of a money judgment it would be a good evidence of the existence of a debt at the time it was given. It is important to note that this case refers specifically to the foreign judgment being used as evidence of the existence of a debt and not the actual enforcement of a foreign judgment.

In South Africa, a successful reciprocity is not an essential factor but may be taken into consideration by the court.\(^6\)

3. **Currency Regulations and Restrictions**

(a) *Section 21 of the Bank of Botswana Act states as follows:* ‘The framework for determining the external value of the Pula shall be determined by the President on the recommendation of the Minister after consultation with the Bank.’ There is really no restriction as to transfer of funds in foreign currency. The value of the judgment would have to be converted to the local currency in order to ensure that the judgment amount has been accurately satisfied.

(b) There is no restriction, and therefore this question is non applicable.

(c) The value of the judgment may have to be converted to the local currency for ease of reference; however there is no statutory provision that makes such conversion mandatory.

4. **Documentary Requirements**

Section 12 (1) of the authentication of documents Act states that a document signed in any Commonwealth country shall be sufficiently authenticated if authenticated by the certificate of a notary public, under his signature and seal of office, the mayor or provost of any town under his signature and seal of office, the permanent head of a Government Department, the Registrar or Assistant Registrar of a court of justice having unlimited jurisdiction, the High Sheriff of a county or any person designated for the purposes of the Convention as an authority competent to issue a certificate or ‘apostille’. Notwithstanding any other provisions contained herein, a document signed in any other country shall be sufficiently authenticated if authenticated by a suitable certificate under the signature and seal or stamp of office of-(a) a member of the Diplomatic Branch of the Botswana Foreign Service attached to a Botswana Embassy or High Commission in such country; or (b) a person shown by the certificate of:

(i) a member of the Diplomatic Branch of the Botswana Foreign Service attached to a Botswana Embassy or High Commission in such country;
(ii) a person holding an office in such country equivalent to that of Secretary of State or Under Secretary of State;
(iii) a Diplomatic or Consular Officer of such country serving in Botswana, Lesotho, Swaziland or the Republic of South Africa; or
(iv) a British Consular Officer attached to a British Embassy or High Commission in such country, where such country has no member of the Diplomatic Branch of the Botswana Foreign Service accredited thereto on a residential basis, to be duly authorized to authenticate such document by the law of such country,
(a) The laws recognize a company’s ability to act and therefore no authorization need be proved.
(b) Basic allegations in the founding affidavit reflecting the fact that the judgment was passed and now needs to be enforced as well as the general facts of the matter such as the identification and address details of the parties should suffice.
(c) Faxed supporting documents or notarized copies suffice were they have been sufficiently authenticated according to the provisions of the Authentication of Documents Act.

5. CONVENTIONS

– Civil Procedure – Botswana is not a signatory
– National Law v. Law of Domicile – Botswana is not a signatory
– Recognition of Companies – Botswana is not a signatory
– Maintenance of Children – Applicable Law – Botswana is not a signatory
– Maintenance of Children – Enforcement – Botswana is not a signatory
– Service Abroad – Botswana is a signatory
– Choice of Court – Botswana is not a signatory
– Enforcement of Judgments – Botswana is not a signatory
– Divorce – Recognition – Botswana is not a signatory
– Administration of Estates – Botswana is not a signatory
– Maintenance – Enforcement – Botswana is not a signatory
– Maintenance – Applicable Law – Botswana is not a signatory
– Matrimonial Property – Botswana is not a signatory
– Civil Aspects of Abduction of Children – Botswana is not a signatory

6. AUTHENTICATION OF DOCUMENTS

Section 6 of the Botswana Authentication of Documents Act states as follows: In any criminal or civil proceedings a document:

(a) purporting to bear the signature of any person holding office under the State; and
(b) bearing a seal or stamp which purports to be a seal or stamp of the department, office or institution to which such person is attached, shall on its mere production, without proof of such signature, seal or stamp, be presumed to have been signed by such person, unless it is proved not to have been signed by him.

Section 10 of the said Act states that section 6 shall apply in respect of a document emanating outside Botswana, which purports to bear the signature of any person holding office under the State in any place outside Botswana as they apply in respect of a document emanating in Botswana which purports to bear the signature of any person holding such office therein.

7. TRANSLATION OF DOCUMENTS

(a) The English language is the language used by the court which does not need any translation for the court. However, a person who is not conversant with the English language, be it a party or a witness in the matter, may request translation. Order 65 states that any person of full age may be admitted and enrolled by the court as a sworn translator in any language upon satisfying the court as to his competency. Order 66 of the Rules of the High Court states that: Where the evidence of any proceedings is given in any language with which the court or a party or his representative is not sufficiently conversant, such evidence shall be interpreted by a competent interpreter, sworn to interpret faithfully and to the best of his ability in the languages concerned.

(b) The Rules of the High Court merely require that the translator be a sworn translator as according to Order 65 of the Rules. The said Order requires that: a sworn translator must have his proficiency in the language which he intends to translate duly certified in writing, after examination held not more than six months before the date of his application by a competent sworn translator of not less than five years standing and if there is no sworn translator of sufficient standing within its jurisdiction the judge may appoint as examiner any person whom he considers to be duly qualified to hold such examination. After admission and enrolment, the translator shall, before commencing to exercise the functions of his office, take an oath or make an affirmation which shall be subscribed by him in the form provided in the rules.

8. REOPENING OR REVIEW OF JUDGMENTS

(a) Section 7 of the Judgments (International Enforcement) states that on an application duly made by any party against whom a registered judgment may be enforced, the registration of the judgment shall be set aside if the registering court is satisfied:

(i) that the judgment is not a judgment and was registered in contravention of the Act;
(ii) that the courts of the country of the original court had no jurisdiction in the case;

(iii) that the judgment debtor, being the defendant in proceedings in the original court, did not (notwithstanding that process may have been duly served on him in accordance with the law of the country of the original court) receive notice of those proceedings in sufficient time to enable him to defend the proceedings and did not appear;

(iv) that judgment was obtained by fraud;

(v) that the enforcement of the judgment would be contrary to public policy in the country of the registering court; or

(vi) that the rights under the judgment are not vested in the person applying for registration.

(b) Yes. According to section 7 of the Act, the registration of a foreign judgment may be set aside on grounds that the judgment was obtained by fraud.

9. Pending Procedure

(a) A foreign judgment will not be enforced unless it is final and conclusive in its effect.

(b) It is a common law principle that the noting of an appeal automatically suspends the execution or implementation of a decision – Botswana Power Corporation Workers’ Union v. Botswana Power Corporation (No 2) 1998 BLR 276 (IC).

10. Defences

Defences are available to the defendant:

– the foreign court had no international competence to decide the case, if the jurisdiction is in this way challenged, the onus is on the plaintiff to prove the jurisdiction;
– that the foreign judgment was not final;
– that the foreign judgment is contrary to the public policy of the local country;
– where the judgment is contrary to a local statute;
– where the judgment was obtained by fraud, forgery or perjury, including suppression of material documents.7

11. Jurisdiction

(a) If the issue of jurisdiction is not raised then it will be assumed the foreign court was properly seized with the matter. If the issue is raised the court will consider the facts before it and reach a determination.

7. Supra.
(b) Jurisdiction is determined according to the local court’s law. Judgments (International Enforcements) Act is the statute mainly governing the enforcement of foreign judgments in Botswana.

(c) (i) Consent to the foreign jurisdiction or – Section 7(2) (a) of the Act states that in the case of a judgment given in an action in personam the foreign shall be deemed to have had jurisdiction where 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 threatened with seizure, in the proceedings or of contesting the jurisdiction of that court; or the judgment debtor was a plaintiff in, or counterclaimed in, the proceedings in the original court; or 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 of the courts of the country of that court;

(ii) Section 7(2) (a) and (b) of the above-mentioned Act states that if the judgment debtor, being a defendant in the original court, was at the time when the proceedings were instituted resident in, or being a body corporate had its principal place of business in, the country of that court; or if the judgment debtor, being a defendant in the original court, had an office or place of business in the country of that court and the proceedings in that court were in respect of a transaction effected through or at that office or place then the foreign court will be deemed to have had jurisdiction.

(d) (i) Where jurisdiction was contested: The jurisdiction issue will have to be raised from the onset as a preliminary defence.

(ii) Where jurisdiction was not contested: Section 7 of the Act as mentioned above provides that a defendant who has defended the proceedings in the foreign court may not raise the defence of jurisdiction later.

(e) (i) No. A default judgment has the same consequences as any other judgment.

(ii) Yes. failure to enter appearance to defend, failure to submit subsequent pleadings, or failure to appear at any hearing would be regarded as a ground to grant a default judgment. Order 30 rule 1(1) of the Rules of the High Court state that where the writ of summons is endorsed for a debt or liquidated demand only and the defendant fails, or all the defendants fail, if more than one, to enter appearance thereto, the Registrar may, on application by the plaintiff, enter final judgment against that defendant (including judgment declaring immovable property secured by a mortgage bond specially executable) for any sum not exceeding the sum endorsed on the writ, together with interest at the rate specified, if any, and if no rate is specified at the rate of 10% per annum to the date of payment, and costs and proceed with the action against the other defendants, if any.
(f) If the foreign court accepted a clause conferring exclusive jurisdiction on the foreign court, the local court can decide to review the judgment on that ground. Section 7 of the Act would apply in this instance in that if the local court were to decide for example that the enforcement of such clause or judgment would be contrary to public policy then it could set aside the registration of the said judgment and it would not be enforceable in Botswana.

(g) Yes. The respondent must be a citizen/resident, own assets or carry on business in the local country for an application for enforcement to be submitted – Gyimah v. The Attorney-General mentioned above. 8

12. **Contractual Waiver**

(a) A prior contractual waiver of service or notice would not be recognized by the local courts as this would be contrary to the public policy of Botswana and such judgment would therefore not be enforced.

(b) No. The local court would not enforce a foreign judgment although it was granted after a contractual waiver of procedural requirements usually imposed by the local court.

13. **Service Requirements**

There is no specific requirement that the service procedure be identical to that of the Botswana courts.

14. **Cession**

(a) The South African courts will recognize a cession of the judgment on proof of the existence of the cession, which need not be in writing. 9

(b) No, 10 such cession cannot confer any advantages in the proceedings before the local court.

15. **Interim Relief**

(a) An application for a temporary interdict may be made and shall be granted once the following requirements have been met by the applicant. It must, first, be shown that the applicant has a clear legal right to the issue of the interdict, or at least a right ‘prima facie established though open to some

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8. 2010 1 BLR 646.
10. *Ibid*.
doubt’, second, that there is a well grounded apprehension of irreparable harm to the applicant if the relief is not granted and he ultimately succeeds in establishing his right, and finally, that the balance of convenience favours the granting of the relief sought.

(b) Yes. If interim relief is allowed, the local court would require that the foreign applicant provide security usually in the form of money, the amount of which would be determined by the circumstances of each case.\(^{11}\)

16. **INTEREST**

(i) In terms of the original judgment, interest will be that awarded by the court of the designated country until date of registration of the judgment.\(^ {12}\)

(ii) Interest runs from the date of registration to date of payment in terms of the prescribed rate or the rate fixed by the court of the foreign country, whichever is the lower.\(^ {13}\)

17. **TIME OF ENFORCEMENT AND SUBSEQUENT ACTION**

(a) The estimated time period from the date of filing of the application until the date of the enforcement of the foreign judgment:

(i) **If unopposed** – where a period of fourteen days has passed after service of the application on the Respondent(s) and there is no opposition, the applicant may set down a date to appear before the court and such date shall be allocated based on the court schedule. The passage of twenty-one days is required where the Respondent(s) are outside of a 100km radius of the Court.

(ii) **If opposed** – The time of enforcement will be much longer due to the documents of opposition to be filed and the arguments to be filed and heard before the court. The party opposing will have to file the opposing documents within a period of fourteen days if they are within a 100km radius of the court and twenty-one days if they are outside 100km radius. The passage of time before the enforcement of the judgment shall be determined by the court schedule and the particular period of time cannot be ascertained. The time before enforcement shall depend on each case in its particularity.

(b) **If the judgment is enforced by the local court, it is enforceable as follows:**

(i) attachment of property – movable – The Deputy Sheriff as an officer of the Court has the mandate to attach, physically remove the

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property and have it sold at auction. This shall however be on the instructions of the Plaintiff/Creditor, based on a writ of attachment and execution issued by the court.

(ii) immovable – The Deputy Sheriff as an officer of the court shall attach and have the property sold as according to the writ of attachment issued by the court.

civil imprisonment – Order 53 of the High Court Rules deals with civil imprisonment. The Deputy Sheriff having made a return of nulla bona or not sufficient goods on a writ of execution, the judgment creditor may cause to be issued a summons commanding the judgment debtor to pay the amount of the judgment, and, unless he does so to show cause at a time and place stated why an order for personal attachment should not be decreed against him.

(i) bankruptcy/liquidation – the procedures of liquidation as according to the provisions of the companies Act of Botswana would have to be followed.

(ii) restraint on leaving the country – the restrained person’s passport is usually confiscated and kept until such a time that the restraint is lifted.

(c) The attachment of property and sale of same for the payment of the debt or civil imprisonment where the debt cannot be paid.

(d) In the event of an appeal from a decision granting or refusing to grant enforcement:

(i) There is an automatic right of appeal.

(ii) The usual time period for such an appeal from the High Court to the Court of Appeal is six weeks.

(iii) Yes.

18. EXPENSES, LEGAL FEES AND SECURITY FOR COSTS

(a) The High Court requires a payment of fees or postal stamps to be placed on the documents to be filed, the stamps being the equivalent amount in cost.

(b) Fees may be charged on either attorney and own client scale, which the attorney sets and agrees with his client or party and party scale which is provided for by the rules of the court or client and attorney scale which is double the party-party scale.

(c) Yes. A lawyer is permitted, should he so wish, to enter into a fee contingency agreement.

(d) The entire portion of the applicant’s fees is recoverable in the event of the applicant’s success.

(e) The applicant would have to give security for costs (apart from an application for interim relief dealt with under 15(b)).

14. Ibid.

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19. **Bankruptcy/Liquidation**

(a) Yes.\textsuperscript{15}

(b) The foreign trustee would have power to deal with local assets provided s/he is recognized by the local courts.\textsuperscript{16}

20. **Lawyers (Who Can Appear?)**

Once one has been admitted as an attorney in Botswana, one may appear in courts in Botswana except for the customary court and the small claims court.

21. **International Treaties**

22. **Cross-Examination of Affidavit’s Deponent**

(a) If a supporting affidavit is required, it is left to the court’s discretion to request cross-examination of the deponent. The court may request viva voce evidence for clarification or may refer the matter to trial where there are disputes of fact.

(b) In the event that the Defendant wanted to cross examine the Deponent in an Affidavit, he would be required to give security for the travelling expenses of the deponent. The Court would order costs to be covered by the Defendant.

23. **Required Affidavit**

An application is usually initiated with a ‘founding affidavit’. The form of the affidavit is as according to the Rules of the High Court, Order 13.

24. **New Action Instead of Enforcement**

(a) Yes. A new action may be instituted on the original cause of action instead of making application for enforcement based on the judgment. The jurisdiction of the local court to entertain the matter will however have to be proven and confirmed.

(b) The period of prescription for oral agreements is three years while it is six years for claims based on written agreements.

\textsuperscript{15} Ibid.
\textsuperscript{16} Ibid.

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25. **PRESCRIPTION**

There is no specific period specified from granting of the judgment in the foreign country must action be initiated in the local country.

26. **STATES/CANTONS**

Botswana’s law is uniform all across the country as the country is not divided into separate states or jurisdictions.