CA 4525/08

Israel Oil Refineries Ltd.

v.

New Hampshire Insurance Co.

The Supreme Court sitting as the Court of Civil Appeals

[25 January 2010]

Before Vice President E. Rivlin, Justices E. Arbel and E. Rubinstein

Appeal of the Judgment of the Tel Aviv-Jaffa District Court in E.J. 189/03 (Tel Aviv-Jaffa) (President U. Goren) issued on 31 March 2008

Facts: The Tel Aviv District Court granted a petition for the recognition of a judgment rendered by an English court, which had declared that an insurance policy issued by the respondent (New Hampshire Insurance) to an Israeli company, Oil Refineries Ltd. – the appellant – was void on the grounds that a substantial matter had not been disclosed to the issuer. The respondent brought the action in the English court after its sibling company (AIG Europe, which had underwritten the policy) had been served a third party notice in an Israeli proceeding brought against the appellant. The District Court ruled that the foreign judgment in favor of the respondent should be recognized pursuant to s. 11(a) of the Foreign Judgments Law, which provides for the direct recognition of foreign judgments under specified conditions. Oil Refineries Ltd. appealed, on the grounds that the foreign judgment was issued in a proceeding initiated at a time that a parallel proceeding between the same parties had been pending in Israel.

Held: (Justice Arbel) The Foreign Judgments Law establishes a track for the recognition of foreign judgments (including sub-tracks for direct and indirect recognition) as well as a track for the enforcement of such judgments. The relevant track here is the direct recognition track (s. 11(a)), but the Foreign Judgments Law stipulates (in s. 11(a)(3)), with regard to such recognition, that the relevant treaty must allow only the recognition of judgments that are enforceable pursuant to Israeli law, thus requiring the court to determine which of the conditions for enforcement are to be applied to the direct recognition track. The best possible interpretation, based on a purposive reading of the statute's language, is to adopt an intermediate view of the interaction between the enforcement requirements and the direct recognition track. According to this view, not all the enforcement track conditions are to be applied, and only those that constitute the threshold requirements for

enforcement under Israeli law – i.e., those conditions that further the purpose that underlies the stipulation of requirements for enforcement – are to be applied with respect to the judgment for which recognition is sought.

Pursuant to this interpretation, the provisions of s. 6(a)(5), denying enforcement to a judgment rendered in a foreign court in which an action was brought while a parallel proceeding between the same parties was pending in an Israeli court, will apply here to the recognition of the English court's judgment. The sub-section should be applied to the direct recognition track – both because logic dictates that section 6(a) should be applied as a whole, and because its purpose – to prevent abuse of the ability to initiate a second proceeding in another country in order to avoid an Israeli court's judgment – conforms to the overall purpose of that track. Once the District Court had found that the foreign judgment had been rendered in a proceeding initiated while a parallel proceeding was pending in Israel, it should have applied s. 6(a)(5) and refused to recognize the English court's judgment.

(Vice President Rivlin, concurring). Section 11(a)(3) of the Foreign Judgment Law allows for recognition of a foreign judgment when the relevant treaty does not obligate Israel to recognize judgments in a manner that deviates significantly from Israeli law; the statute requires that in order to be recognized, the foreign judgment must qualify under the provisions of the relevant treaty. Nevertheless, the Israeli court retains discretion in terms of its ability to determine whether the recognition of the judgment is in compliance with treaty provisions. With respect to the pending proceeding provision of s. 6(a)(5), the statutory language does not grant the court discretion with regard to the non-enforceability of judgments rendered in actions brought while there is a parallel pending proceeding in an Israeli court, but the relevant treaty leaves the matter of enforcing such judgments up to the deciding court's discretion, Nevertheless, the treaty cannot be said to be one that deviates significantly from the relevant Israeli law. Pursuant to the statute, the Israeli court must take as its starting point the rejection of the judgment, while allowing the party seeking recognition to prove that circumstances justify a change from that initial position. Here the appellant has not met that burden, and the foreign judgment should not be recognized.

(Justice Rubinstein, concurring). The impact of the pending proceeding will be determined in accordance with the language of the treaty, rather than the language of the local statute. Although the treaty here confers discretion upon the court in this matter, that discretion should have been exercised so as to deny the judgment's recognition, based on considerations of the litigant's lack of good faith. Furthermore, the stipulation in s. 11(a)(3) that the treaty require only the recognition of judgments that "are enforceable pursuant to Israeli law" is a reference to s. 3 of the Foreign Judgments Law, the specific section establishing the requirements for allowing foreign judgments to be enforced, and not to s. 6, dealing with defenses against enforcement.

Legislation cited

Enforcement of Foreign Judgments Law, 5718-1958 – ss. 1, 6(a)(1)-(5), 6(b), 6(c), 11 (a)(1)-(4), 11(b), 11(c).

Israeli Supreme Court Cases cited

[1] CA 3441/01 *Anonymous v. Anonymous* [2004] IsrSC 58(3) 1.

[2] CA 490/88 *Coptic Motran of the Holy See of Jerusalem and Near East v. Adila* [1990] IsrSC 44(4) 397.

[3] CA 970/93 *Attorney General v. Agam* [1995] IsrSC 49(1) 561.

[4] FH 40/80 *Paul King v. Yehoshua Cohen* [1982] IsrSC 36(3) 701.

[5] HCJ 693/91 *Efrat v. Director of the Population Register* [1993] IsrSC 47 749.

[6] CA 499/79 *Ben* Dayan *v. IDS International Ltd.* [2004], IsrSC 38(2) 99.

[7] CA 423/63 *Rosenbaum v. Julie* [1964] IsrSC 18(2) 374.

[8] LCA 1817/08 *Teva Pharmaceutical Industries Ltd. v. Pronauron Biotechnologies Inc.* (2009) (unreported).

[9] CA 3924/08 *Goldhar Corporate Finance Ltd. v. Klepierre S.A.* (2010) (unreported).

[10] CA 7833/06 *Pamesa Ceramica v. Yisrael Mendelson Engineering Technical Supply Ltd.* (2010) (unreported).

[11] CA 1137/93 *Ashkar v. Hymes* [1994] IsrSC 48(3) 641.

[12] CA 1268/07 *Greenberg v. Bamira* (2009) (unreported).

[13] CA 10854/07 *Pickholtz v. Sohachesky* (2010) (unreported).

[14] LCA 346/06 *Hazan v. Club Inn Eilat Holdings Ltd.* (2006) (unreported).

[15] LCA 1674/09 *Lechter v. Derek Butang* (2009) (unreported).

[16] CA 1327/01 *Ephrayim v. Elan* [2010] IsrSC 56(6) 775.

[17] LCA 2733/07 *Amiron S. T. L. Finance and Investment Ltd. v. Wallach* (2007) (unreported).

Israeli District Court Cases Cited:

[18] EnfC (TA) 408/00 *Tower Air Inc. v. Companies Registrar* (2004) (unreported).

[19] CA (TA) 2137/02 *AIG Europe (UK) Ltd. v. Israel Oil Refineries, Ltd.* (2004) (unreported).

English cases cited:

[20] *Tuvyahu v. Swigi* [1997] EWCA Civ. 965.

Jewish law sources cited:

Mishna *Gittin*, Chapter 4, Mishna 3.

Treaties cited:

Convention between the Government of Israel and the Government of the United Kingdom of Great Britain and Northern Island Providing for the Mutual Recognition and Enforcement of Judgments in Civil Matters – arts. 2(1), 3(2), 3(4), 3(5), 4(1).

For the appellants: Attorney Y. Shelef, Attorney P. Sharon, Attorney S. Sheffer

For the respondent: Attorney E. Naschitz

JUDGMENT

Justice E. Arbel:

This is an appeal of a judgment issued by the Tel Aviv-Jaffa District Court in EnfC 189/03 (per President U. Goren) on 31 March 2008, granting the respondent's petition for recognition of a foreign judgment.

1. The respondent is the New Hampshire Insurance Company (hereinafter, also: "New Hampshire"), which is domiciled in the State of Delaware in the United States. In 1994, New Hampshire issued a third-party liability insurance policy to the appellant, Oil Refineries Ltd., which is engaged in, *inter alia*, the operation of oil refineries and the refining of petroleum and petroleum products (hereinafter: "ORL"). The insurance policy (hereinafter: "the policy") was valid from 1 August 1994 through 31 July 1995. The issuance of the policy was brokered by PWS International Ltd., a brokerage firm registered in England, and it was underwritten by AIG Europe Ltd. (UK) (hereinafter: "AIG"), which is a sibling company to New Hampshire, also domiciled in England.

2. On 29 June 1998, several farmers filed a suit (CA 2351/98) (hereinafter: "the Main Claim") against ORL and other companies for agricultural damages that they claimed had been caused as a result of their use of defective light mazut fuel which had been manufactured by ORL and sold by the other companies. On 20 September 2000, ORL amended its third party notice in the Main Claim, joining AIG as a third party.

3. On 16 October 2000, New Hampshire brought an action in an English court, seeking a judgment declaring that the policy was void based on the non-disclosure of a significant matter prior to its issuance. The significant matter was stated to be the claims for compensation that had been filed against ORL in 1990 in the Nazareth District Court by various flower growers, for damages caused to them from 1988 to 1989 due to the use of defective light muzat fuel manufactured by ORL. The English court allowed the claim and declared the policy to be void (hereinafter: "the foreign judgment"). ORL did not appeal the decision.

4. On 30 September 2002, New Hampshire filed an action by way of an originating motion in the Jerusalem District Court (EnfC 1256/02), seeking recognition of the foreign judgment pursuant to ss. 11(a) and 11(b) of the Enforcement of Foreign Judgments Law, 5718-1958 (hereinafter: "the Foreign Judgments Law" or the "Statute"). The Jerusalem District Court ruled that the motion should be moved to the Tel Aviv District Court, which had jurisdiction to adjudicate it.

Deliberation in the District Court

5. The Tel Aviv District Court heard the motion and held that the foreign judgment should be recognized pursuant to s. 1(a) of the Foreign Judgments Law, which outlines a track for the recognition of foreign

judgments – the court having ruled out the applicability of a different track that allows for the incidental recognition of a foreign judgment and which is outlined in s. 11(b) of the Statute.

6. The District Court determined that the Convention between the Government of Israel and the Government of the United Kingdom of Great Britain and Northern Island Providing for the Mutual Recognition and Enforcement of Judgments in Civil Matters (hereinafter: "the Convention") applied. The court also held that the Convention's provisions complied with the conditions established in ss. 11(a)(1) and 11(a)(2) of the Foreign Judgments Law – meaning that there was a treaty in effect between Israel and Great Britain that was applicable, and that Israel had undertaken to recognize the relevant type of foreign judgment.

7. The District Court also discussed the issue of whether the condition set out in s. 11(a)(3) of the Foreign Judgments Law requires that in order for a foreign judgment to be recognized, the relevant treaty must comply with all the Statute's conditions regarding the enforcement of a judgment. The court ruled that there was no such requirement, and held that in any event, s. 6(a) of the Foreign Judgments Law would not apply to the process of recognizing a foreign judgment through either the track outlined in s. 11(a) or the track outlined in s. 11(b). The court noted, among its reasons for reaching this conclusion, the legislature's interest in separating the requirements for recognizing a foreign judgment from the requirements for enforcing such a judgment – an objective which ruled out the possibility that s. 11(a)(3) was meant to also include within it all the requirements for the enforcement of a foreign judgment that are contained in the Foreign Judgments Law. Additionally, the court found that the legislative intent had been that an undertaking given in the framework of a treaty for the mutual recognition and enforcement of civil judgments, such as the Convention under discussion, is sufficient for the purpose of compliance with s. 11(a)(3). The court also relied on the case law of this Court regarding an incidental recognition – case law which has established that the conditions for the recognition of a foreign judgment should be less than those required for the enforcement of such a judgment.

8. The District Court held that the Convention's conditions for recognition had been met, as required by s. 11(a)(4) of the Statute. The court acknowledged that at the time the legal proceeding first began in the English court there had been a pending proceeding between the same two parties in the Israeli court, and that thus, pursuant to art. 3(5) of the Convention, the court could have refused to recognize the foreign judgment rendered by the

English court. Nevertheless, the court chose to recognize the foreign judgment on the basis of the principles and objectives that form the foundation of the laws of recognition – which include an interest in bringing the litigation of a matter to an end; the desire to do justice for the party winning the case; and a recognition that the country that had issued the foreign judgment was the proper forum for the adjudication of the matter. Additionally, the court clarified that there were grounds for recognizing the foreign judgment, as the foreign judgment could create an issue estoppel in Israel in light of the identity of the estoppel laws in Israel and in England.

9. The District Court also held that the English court had jurisdiction to adjudicate the matter which was the subject of the foreign judgment, as required by art. 3(a)(2) and 4 of the Convention. The court based its determination on the consent element mentioned in art. 4(1)(a) of the Convention, which is sufficient to confer international jurisdiction on the English court. The presence of such consent was inferred from the fact that ORL did not appeal the result of the proceeding regarding the lack of the English court's authority, for the purpose of leave to serve papers outside of the jurisdiction. The matter of ORL's consent was also inferred from the fact that the main deliberation, after the conclusion of the proceeding regarding extra-territorial service, continued normally until the judgment was rendered, and ORL did not appeal that judgment either.

10. The District Court rejected the appellant's argument that public policy prevented the recognition of the foreign judgment, pursuant to art. 3(2)(d) of the Convention, due to the judgment having allegedly been obtained in bad faith and as an abuse of legal proceedings. The court held that the public policy ground should be narrowly construed in the context of recognition of foreign judgments and that it would be appropriate to reject a foreign judgment on such a ground only rarely – noting that this case was not one of those rare occasions in which a public policy defense would suffice.

This appeal followed.

The parties' arguments

11. The appellant argues that the District Court erred in recognizing the foreign judgment despite its determination that there had been a pending proceeding between the same parties at the time that the British proceeding was initiated. It argues against the court's decision, which the court based on general principles of the rules regarding recognition of judgments, not to exercise its authority pursuant to art. 3(5) of the Convention dealing with the

recognition of a judgment in a proceeding that was initiated at the time that another proceeding was already pending, when – under the circumstances of this case – the respondent had behaved improperly and in bad faith. According to the appellant, the respondent's bad faith behavior in initiating legal proceedings also constitutes a violation of public policy, and therefore art. 3(2)(d) of the Convention would support the non-recognition of the foreign judgment as well. Additionally, the appellant argues that in this case the English court lacked jurisdiction, and that therefore the requirements of arts. 3(2)(a) and 4 have not been satisfied.

12. The appellant also argues that the District Court erred in holding that s. 11(a)(3) of the Foreign Judgments Law does not include a requirement that the conditions stipulated for enforcement of a foreign judgment must also be satisfied in order for the foreign judgment to be recognized. The appellant argues that such an interpretation is contrary to the language of the section. Because of this interpretation, the court did not make any determination as to whether the foreign judgment complied with the conditions stipulated in ss. 3, 4 and 6 of the Statute. An examination of these sections, the appellant argues, would have led to the conclusion that the foreign judgment should not be recognized, because the respondent had not provided proof regarding the foreign law; because the English court lacked international jurisdiction; because the respondent had acted in violation of public policy; and because of the initiation of the foreign proceeding while another proceeding regarding the same matter was pending.

13. The respondent, on the other hand, argues that the appeal should not be adjudicated on its merits since the matter has become purely theoretical and academic, as ORL is not entitled to any compensation or restitution pursuant to the policy, even if it is valid. Regarding the substance of the matter, the respondent argues that the appeal should be denied, based on the holdings of the District Court. In addition, the respondent argues that the District Court's finding that there was a pending proceeding – between the same parties and regarding the same matter – at the time that the proceeding was initiated in England was erroneous, because, the respondent argues, AIG was the party in the proceeding that was pending in Israel, while New Hampshire was the party in the proceeding that produced the foreign judgment. Thus, the respondent argues, the parties were not identical, as is required pursuant to both the Statute and the Convention.

Discussion and decision

14. First, the respondent's argument that the deliberation regarding this case is purely theoretical and academic must be rejected. It appears that there is a real dispute between the parties regarding the consequences of the policy's validity, and therefore it cannot be said that this is a purely theoretical matter. In any event, this question could arise in the future in other contexts, and I therefore find it appropriate to discuss the appeal on its merits.

15. The key issue in this case is the relationship between s. 11(a) of the Statute and the other provisions of the Statute, and whether the conditions stipulated in the Statute for the enforcement track will also apply with respect to the recognition track. Before turning to a discussion of this issue, we need to establish a foundation and describe the normative rules that apply in connection with the recognition of a foreign judgment.

Recognition of a foreign judgment

16. As is customary under Israeli law, a foreign judgment is not recognized automatically, and an absorption proceeding is required in order for it to become enforceable and recognized (CA 3441/01 *Anonymous v. Anonymous* [1], at pp. 11-12; CA 490/88 *Coptic Motran of the Holy See of Jerusalem and Near East v. Adila* [2], at p. 404; A. Shapira "Recognition and Enforcement of Foreign Judgments," 4 *Tel Aviv Univ. L. Rev. (Iyyunei Mishpat)* 509 (1976) (hereinafter: "Shapira 1"), at pp. 509-510; C. Wasserstein Fassberg, "Finality for Foreign Judgments," 18 *Hebrew Univ. L. Rev. (Mishpatim)* 35 (1988), at p. 37). The manner in which a foreign judgment is absorbed in Israel is regulated in the provisions of the Foreign Judgments Law.

17. The Foreign Judgments Law establishes two tracks for the absorption of a foreign judgment in Israel – one involving the enforcement of the foreign judgment and the other involving its recognition. A petition for the enforcement of a foreign judgment is in effect a petition for the enforcement of an existing debt between the parties, while the recognition of a foreign judgment is needed in situations that do not fit into the enforcement framework and in which the party requires a recognition of the foreign judgment itself and of the rights which it confers. Justice M. Cheshin noted the following with regard to the distinction to be made between the two tracks:

> 'The distinction made between enforcement and recognition is not coincidental nor is it an arbitrary one. Its source is in the

> difference between the type of judgments that are enforceable and those which are intended to be recognized directly, and in any event, in the difference between an act of enforcement and an act of direct recognition. Indeed, as my colleague has remarked, and as has been accepted as the rule and is the view taken by scholars, enforcement – at its core – deals with obligations imposed on one person vis-à-vis another (*in personam* obligations), while recognition does not involve the imposition of any debts and it is what the word signifies; it recognizes rights which can include property rights, including rights vis-à-vis the entire world – rights *erga omnes* – although these are not the only rights that can be covered by these judgments' (CA 970/93 *Attorney General v. Agam* [3], at p. 572).

18. Furthermore, the Statute establishes two sub-tracks within the recognition track. The first is outlined in s. 11(a), and it allows for a foreign judgment to be recognized as part of a proceeding that is initiated especially for that purpose (hereinafter: "the direct track"); the second is outlined in s. 11(b) of the Statute and enables the recognition of a foreign judgment as a matter which is incidental to another matter being adjudicated, and for the purpose of that adjudication only (hereinafter: "the indirect track"). Justice Goldberg described the distinction between the two tracks as follows:

> 'When one party alleges a finding contained in a foreign judgment in order to create an issue estoppel in a local litigation, the allegation is of an incidental recognition of the judgment. This is to be distinguished from direct recognition, which is necessary when the foreign judgment constitutes the ground for the cause of action in the local court, or when what is required is a declaration that the foreign judgment is to be enforced' (*Coptic Motran v. Adila* [2], at p. 404).

19. The legislature appears to have taken note of the substantive difference between the recognition and the enforcement tracks, and therefore established different procedures for these two tracks for the absorption of foreign judgments in Israel. Among the main differences between the two tracks is the fact that the Statute, as stated, provides for two sub-tracks for the recognition of a foreign judgment – the direct track and the indirect track – as compared to the single track established for the enforcement of foreign judgments; and the requirement stipulated in the Statute that there be a

bilateral or multilateral agreement for the purpose of direct recognition of a foreign judgment, a requirement which is not prescribed for the enforcement track.

20. Section 2 of the Statute provides that the authority to *enforce* a foreign judgment arises only in the framework of the Statute's provisions. The case law has dealt with the question of whether a foreign judgment can be *recognized* other than in that framework, and when the conditions stipulated in the Statute have not been met. In *Attorney General v. Agam* [3], this question was answered in the negative. The Court held that a foreign judgment could not be recognized outside of the tracks established in the Statute, even though the implications of such a rule create a certain difficulty. As Justice Goldberg wrote:

> 'There will be those who argue that the result we have reached – that a foreign order of inheritance can be absorbed in our law only through one of the tracks in the Enforcement Law – is not a desirable one, and that its significance is that foreign judgments from an entire area of law can be neither recognized nor enforced' (*ibid*. [3], at p. 569).

It should be noted that the source of the difficulty in allowing foreign judgments to be recognized only in the framework of the Foreign Judgment Law is that recognition through the direct track requires the existence of a treaty with the country in which the foreign judgment was rendered. This requirement significantly limits the possibility for direct recognition of foreign judgments since – at present – Israel is party to only four bilateral treaties (with Austria, the Federal Republic of Germany, Great Britain and Spain). We note that the indirect track does not provide a satisfactory solution for this difficulty in all cases. Thus, for example, in terms of the absorption of a foreign order of inheritance, the indirect track cannot be used, as the applicant's only interest is in the absorption of the foreign judgment itself – directly, and not as an aside to another matter (see *Attorney General v. Agam* [3]). In *Anonymous v. Anonymous* [1], President Barak considered the possibility of changing the rule:

> 'This result is both undesirable and harsh. It is doubtful whether the language of the Statute or its purpose requires it . . . Section 11 of the Statute, as originally drafted, did not refer at all to the possibility of direct recognition. This section is an addition to the Enforcement of Foreign Judgments Law . . . until that time, the

> parties would, as a matter of course, request recognition of a foreign judgment outside of the Statute. Nothing in the amendment's legislative history indicates that there was a desire to transform the direct recognition track into an exclusive track. In addition, as s. 2 of the Statute provides: "No foreign judgment will be enforced in Israel other than pursuant to this Statute." The section refers to enforcement and not to recognition, and even regarding enforcement it has been held that the enforcement of a foreign judgment will be permitted through a suit brought on the basis of the judgment, which is not pursuant to the Statute . . . It therefore appears that the time has come to rethink the validity of the *Agam* rule . . .' (*Anonymous v. Anonymous* [1], at pp. 14-15).

In their case law, the trial courts have also expressed the view – which has not yet been discussed by this Court – that a foreign judgment may be recognized other than pursuant to the provisions of the Foreign Judgment Law if certain conditions are met. Thus, for example, the possibility of such recognition has been mentioned in insolvency proceedings (EnfC (TA) 408/00 *Tower Air Inc. v. Companies Registrar* [18]). However, it would appear that the case before us does not necessitate an in-depth examination of this important question, as it was not discussed by the District Court and the parties did not raise it in their pleadings. We nevertheless join in President Barak's call, made in the judgment in *Anonymous v. Anonymous* [1], for full and complete legislative regulation of the issue of recognition of foreign judgments.

21. In any event, since in this case the District Court ruled out the use of the indirect track, and as the parties are not appealing that part of the District Court's holding, we need only discuss the direct track. As noted above, this track is established in s. 11(a) of the Foreign Judgments Law, which itself includes four sub-sections:

> 11. (a) An Israeli court or tribunal will recognize a foreign judgment regarding which the following conditions have been met:
>
> (1) A treaty with a foreign country applies to it;
>
> (2) Israel has undertaken, in that treaty, to recognize foreign judgments of its type;

(3) The undertaking only applies to foreign judgments that are enforceable pursuant to Israeli law;

(4) The judgment satisfies all the conditions in the treaty.

Section 11(a) was added in 1977, some 19 years after the Statute was first enacted, and until that time the indirect track was the only track available pursuant to the Statute for the recognition of foreign judgments. The addition of the section was intended to establish a direct track for the recognition of foreign judgments within the framework of the Statute. The new section created a number of difficulties, among them, as stated, the section's requirement that Israel have entered into a treaty with the foreign country (see also *Attorney General v. Agam* [3] and *Anonymous v. Anonymous* [1]). An additional difficulty created by the section was the manner of its drafting. Thus, for example, Justice Mannheim noted that there is no substantive difference between the three conditions included in the section, and in his view "it appears that it would be both possible and desirable to draft these three sub-sections more coherently and with less complexity" (S. Mannheim, "Direct Recognition of Foreign Judgments, By Force of the Statute," 7 *Tel Aviv Univ. L. Rev. (Iyyunei Mishpat)* 703 (1980), at p. 704). An even greater linguistic problem arises in connection with s. 11(a)(3):

> 'Section 11(a)(3) provides as follows: "The undertaking only applies to foreign judgments that are enforceable pursuant to Israeli law." Two problems arise from this language in the section: first – what is the significance of the subjection of enforceability pursuant to the section to the provisions of the Enforcement Law (since in light of the unequivocal language of s. 2 of the Statute, no foreign judgment may be enforced in Israel other than pursuant to the Enforcement Law); second – what is the significance of the fact that this subjection refers not only to the judgment itself but also to the "undertaking" (which, in light of the language of sub-section (2), is Israel's undertaking, given in the above-mentioned treaty, to recognize certain foreign judgments)' (*ibid*., at p. 704).

The limited number of treaties to which Israel is a party, alongside the ambiguous wording of the sub-sections, has led to a situation in which only a few petitions have been submitted for recognition through the direct track, and thus even though more than thirty years have passed since the

amendment was enacted, this Court has not yet discussed this issue in depth (C. Wasserstein Fassberg, *Foreign Judgments in Israeli Law – Deconstruction and Reconstruction* (1996), at p. 53). The time has now come to clarify the matter and to determine which conditions are to be applied for the purpose of recognizing a foreign judgment pursuant to the direct track.

Examination of the conditions for the direct recognition track

22. As stated, the Statute presents four conditions relating to the direct recognition track. The first condition is that there must be a treaty to which Israel and the country in which the foreign judgment was rendered are parties. The second condition is a requirement that in the context of the agreement, Israel has agreed to recognize foreign judgments of the relevant type, such as pursuant to a provision in the treaty requiring that Israel must recognize foreign judgments in civil matters. The third condition in the section is that the undertaking must apply only to foreign judgments that are enforceable in Israel. The fourth and final requirement in the section is that the relevant treaty conditions have been satisfied.

23. Since in this case there is a treaty between Israel and England, and because it provides, in art. 2(1), that it will apply to judgments in any civil proceeding, the conditions established in s. 11(a)(1) and in s. 11 (a)(2) have been fulfilled. We have thus arrived at s. 11(a)(3), and the question arises as to its proper interpretation. What was the legislature's intention in using the term "enforcement" in the framework of s. 11(a)(3), which deals with the conditions established for the recognition track? Was the intention, as the appellant argues, to apply all of the conditions relating to the enforcement of foreign judgments to the procedure for the direct recognition of foreign judgments? Or is it the case, as the District Court believed, that a purposeful interpretation of the section should be used in order to restrict its application, so that not all of the conditions appearing in the Statute with respect to the enforcement of such judgments will apply to the direct recognition track? We note that if we adopt the District Court's approach, we must examine the actual significance of the requirement in s. 11(a)(3) of the Foreign Judgments Law, and determine the content that should be included within it.

Interpretation of s. 11(a)(3) of the Foreign Judgments Law

24. In order to interpret a section in a statute, we must examine it in a number of stages. First we must examine the statutory language and identify the linguistic options available for such interpretation. Only an interpretation that is grounded in the statutory language and which falls within the accepted linguistic possibilities may be used (A. Barak, *Legal Interpretation* (vol. 2, 'Statutory Interpretation,' 1993), at p. 82). At the second stage, we must investigate and disclose the purpose and objective of the legislation. A statute will be given the meaning which, among the linguistic possibilities, realizes the statute's purpose (FH 40/80 *Paul King v. Yehoshua Cohen* [4], at p. 715). The statute's purpose is comprised of its subjective and objective purposes. The subjective purpose is the purpose that the enacting legislature seeks to realize at the time that the statute was enacted. The objective purpose of statutory material is the purpose that the legislation is intended to achieve in a democratic, modern, society (HCJ 693/91 *Efrat v. Director of the Population Register* [5], at p. 764). In the last stage, if the legislative material has various purposes, we must exercise judgment in order to balance these various purposes, after assigning the proper weight to them. Note that the judge's determination at this stage will be reached within the framework of limitations established in the earlier stages. This balancing is to be carried out on the basis of, *inter alia*, the statutory language, the legislative intent, the social background, the legal background, and the basic principles (Barak, *Legal Interpretation, supra*, at p. 92).

Literal interpretation

25. As noted above, s. 11(a)(3) of the Statute establishes a requirement that the "undertaking only applies to foreign judgments that are enforceable pursuant to Israeli law". It appears that from a linguistic perspective, the language of the section could encompass more than one possibility, due to the ambiguity of the term "enforceable". The use of this term effectively creates an entire spectrum of linguistic possibilities regarding the application of the conditions for the enforcement of foreign judgments to the direct recognition track. Generally speaking, we can point to three main possibilities regarding the section. The first, as the appellant argues, would provide that all conditions stipulated for the enforcement of foreign judgments should be applied to the direct recognition track. This is a maximalist position. The second, a minimalist view, would interpret the term

"enforceable" as referring only to the enforceability of judgments that have the same basic nature as the particular foreign judgment, meaning judgments that fall within the area of law to which it belongs – such as civil judgments, criminal judgments, etc. According to this interpretation, the foreign judgment would only need to meet the basic definitional requirement appearing in s. 1 of the Statute: "a judgment rendered by a court in a foreign country regarding a civil matter, including judgments ordering the payment of compensation or damages to an injured party, even if not rendered in a civil case." The third possibility is an intermediate one, pursuant to which the foreign judgment would need to meet the basic requirements for the absorption of a foreign judgment in Israel. These requirements would constitute a sort of set of "red lines", at the basis of which is an interest in preventing the abuse of the legal process.

Thus, at the next stage, we must study the statutory purpose and choose the most appropriate option for interpretation, in light of that purpose.

Purposive interpretation: subjective purpose

26. The purpose of the legislative amendment that added s. 11(a) in 1977 was to enable compliance with bilateral and multilateral treaties. Before the amendment, Israel faced an obstacle in terms of entering into bilateral and multilateral treaties, so long as the matter of direct recognition in the State of Israel had not been formally organized by statute. The explanatory note to the draft law stated the following: "Section 11 constitutes an obstacle with respect to Israel's accession to these treaties. In order to overcome this obstacle, it is proposed to give force to these treaties . . ." (Draft Enforcement of Foreign Judgments (Amendment No. 2) Law 5737-1977, Draft Laws 246). Thus, it cannot be that an amendment which was intended to give force to bilateral treaties would lead to a situation in which those treaties could not be implemented because of numerous conditions included within the framework of the track for direct recognition of a foreign judgment – or to the creation of an asymmetry between the provisions of the Statute and those of a treaty. This means that the maximalist interpretation – according to which all the conditions stipulated for the enforcement of foreign judgments are imposed in connection with the direct recognition track as well – is not consistent with the subjective purpose. An additional indication that this interpretation is inconsistent with the legislative intent can be found in s. 11(c) of the Statute, which provides that "[t]he provisions of s. 6(b) and (c) will apply in proceedings involving the recognition of a foreign judgment pursuant to this section." Assuming that s. 11(c) applies to the direct track (see M. Shava, "Direct Conversion of a Foreign Judgment in Israel and the Rules Applying

To It," 35(2) *Ono Coll. L. Rev. (Kiryat HaMishpat)* 40 (2002)), the maximalist interpretation would render its language irrelevant – because, since s. 6(b) and s. 6(c) of the Foreign Judgments Law are a part of the provisions relating to the enforcement of foreign judgments, that would, according to the maximalist interpretation, apply to the direct track anyway, and there would be no need to specifically note that fact in s. 11(c).

Objective purpose

27. From the perspective of the objective purpose of the Statute as well, it would seem that the maximalist interpretation – according to which all the provisions regarding enforcement of foreign judgments contained in the Foreign Judgments Law would also apply to the direct recognition track – leads to several seemingly absurd results. First, this interpretation leads to an absurdity regarding the relationship between the enforcement track and the recognition tracks. The enforcement of a foreign judgment, by its nature, contains within it the recognition of that judgment, since a foreign judgment must be recognized before it can be enforced (Wasserstein Fassberg, *Foreign Judgments in Israeli Law*, *supra,* at p. 153). And as Professor Shapira has written, "the enforcement of a foreign judgment necessarily requires its recognition, but not every recognition of a judgment will necessarily lead to its enforcement. This means that a court will, as a matter of course but also as a matter of necessity, recognize every foreign judgment that it enforces, but it is not compelled to enforce every judgment that it is prepared to recognize" (A. Shapira, *Recognition and Enforcement* (vol. A), at pp. 511-512). Thus, necessarily, the conditions that apply to the recognition track will be less than those that apply to the enforcement track, or at least equal to them. Indeed, Justice Ben-Porat has held regarding the indirect track " . . . that the legal provisions regarding recognition will not be stricter than the terms for enforcement, since if the foreign judgment is of a quality that establishes that it should be enforced, it would, *a fortiori*, be suitable for recognition . . . according to my view, it is not possible that the Statute's conditions for recognition would be stricter than the conditions for enforcement . . . " (CA 499/79 *Ben Dayan v. IDS International, Ltd.* [6], at p. 105).

28. Second, the maximalist interpretation will lead to an absurd result regarding the relationship between the direct and indirect recognition tracks. The reason for this is that the holding in *Ben Dayan v. IDS International*, *ibid*., [6] was that the indirect recognition track does not require compliance with all the enforcement conditions in the Foreign Judgments Law, while the

maximalist interpretation suggests that full compliance with all the Statute's enforcement conditions is required for the direct recognition track. This is an illogical position, since the main track – the direct recognition of a foreign judgment – would then involve the need to prove the fulfillment of many more conditions than would be required for the secondary and alternative indirect recognition track. This situation would create additional burdens for both litigants and the courts, as reliance on an earlier recognition of a foreign judgment in any future litigation arising in connection with that judgment is possible only when the recognition has been accomplished through the direct recognition track. In contrast, when the indirect track is used, the deliberation regarding the foreign judgment's recognition is only incidental to the adjudication of the main matter, and a court will therefore need to re-adjudicate the issue of that recognition in any future litigation that arises. This means that the indirect track necessitates a new deliberation regarding the recognition of the foreign judgment each time the matter of its recognition arises, instead of enabling one substantive deliberation in a single proceeding (see M. Shava, "Direct Conversion of a Foreign Judgment in Israel," *supra,* at p. 44). An interpretation that imposes stricter requirements for the more efficient direct recognition track creates a situation in which litigants will prefer the less efficient indirect track because compliance with its conditions will be easier.

29. On the other hand, a minimalist interpretation providing that only s. 1 of the Foreign Judgments Law is relevant to the direct track is also problematic. If this approach is followed, a foreign judgment could theoretically qualify for recognition in Israel even though it had been obtained through fraud or was rendered by an entity which had no jurisdiction to do so, because the "red lines" provisions established in the Foreign Judgments Law with respect to the enforcement track would not be applied to the direct recognition track. It is important to note that the treaties to which Israel is currently a party have provisions that are similar – if not identical – to those that appear in the Foreign Judgments Law and which apply to the direct recognition track pursuant to s. 11(a)(4), which requires compliance with the provisions of the relevant treaty. Nevertheless, it would seem to be appropriate to leave in place the "security net" of the red lines that had been established by the legislature regarding the enforcement of a foreign judgment – so that they will always apply, regardless of the language of a specific treaty, even with respect to the recognition of a foreign judgment through the direct track.

30. I have concluded from the above analysis that in terms of a purposive view, an intermediate interpretation is to be preferred over either a maximalist or a minimalist interpretation. It is therefore necessary to examine which of the statute's provisions that apply to the enforcement track should also be applied to the track for the direct recognition of foreign judgments according to an intermediate interpretation. The only sections of the Statute to be applied should be those which, in the legislature's view, constitute a type of threshold requirement or a set of red lines regarding the enforcement of foreign judgments. The remaining provisions – those that are substantively related to the enforcement track only – should not be applied to the direct track. Additionally, the provisions to be included must be examined with reference to an additional basic distinction between the enforcement and the recognition tracks. According to the Foreign Judgments Law, a treaty is not required in order for a foreign judgment to be enforced, and it is therefore not necessary that a particular foreign judgment comply with the provisions of any treaty. Thus, it □□□□□□□□logical that all the conditions for enforcement, included those that are beyond the basic threshold requirements, should be organized in a statute. In contrast, regarding the direct recognition of foreign judgments, countries should be allowed a range of freedom with respect to the manner in which the recognition of foreign judgments is arranged, through agreements that they reach amongst themselves. Therefore, the only conditions to be applied to the direct recognition track should be those basic requirements without which it is not possible to recognize any foreign judgment whatsoever.

Application of s. 6 to the direct recognition track

31. In this case, the question arises as to whether s. 6(a) of the Foreign Judgments Law also applies to the direct recognition track. (The appellant's other arguments relate to grounds for recognition regarding which there is an overlap between the provisions of the law and those of the Convention, and it is therefore clear that these grounds will apply with respect to the foreign judgment in this case.) As to section 6(a) of the Foreign Judgments Law, captioned "Defense Against Enforcement", it provides as follows:

> 6. (a) A foreign judgment will not be declared enforceable if one of the following has been proven to the court:
>
> (1) The judgment was obtained through fraud;
>
> (2) The opportunity given to the defendant to make arguments and to bring evidence, prior to the

issuance of the judgment, was not, in the view of the court, reasonable;

(3) The judgment was rendered by a court that lacked jurisdiction to issue it pursuant to the rules of international private law that apply in Israel;

(4) The judgment is in conflict with another judgment that has been issued regarding the same matter between the same litigants, and which remains in force;

(5) At the time that the action was brought in the court in the foreign country, another action regarding the same matter and between the same litigants was pending before an Israeli court or tribunal.

This section thus establishes a threshold condition with respect to the enforcement of foreign judgments. The purpose of this section is to prevent the possible abuse of proceedings for the enforcement of such judgments. The defenses included in this section form a sort of set of red lines regarding the issue – such that if one of them is crossed, the enforcement of the foreign judgment in Israel will not be allowed. Therefore, in accordance with the intermediate interpretation, this is a section that should apply to the direct track as well. Thus, for example, s. 6(a)(1), which refers to a defense against the enforcement of a foreign judgment based on it having been obtained through fraud, should be applied to the direct recognition track, as it is clear that a foreign judgment that was obtained through fraud should be neither enforced nor recognized. This rule, it would seem, should serve as a framework for all of the bilateral treaties to which Israel becomes a party – a condition without which there should be no treaty, and the importance of which this Court has emphasized in the past (*Anonymous v. Anonymous* [1], at pp. 17-18; Wasserstein Fassberg, *Foreign Judgments*, at pp. 55-56; A. Shapira, "Recognition and Enforcement of Foreign Judgments," 5 *Tel Aviv Univ. L. Rev. (Iyyunei Mishpat)* 38 (1976) (hereinafter: "Shapira 2"), at pp. 42-43). The other sub-sections of s. 6(a) also constitute basic rules regarding the recognition of foreign judgments. Section 6(a)(2) refers to a situation in which the defendant did not have a reasonable opportunity to argue the case during the course of the foreign proceeding. Section 6(a)(3) refers to the requirement that the foreign judgment must have been rendered by a court that had jurisdiction to do so pursuant to the rules of private international law followed in Israel. Section 6(a)(4) refers to a situation in which the foreign

judgment conflicts with a judgment rendered in the same matter between the same parties and which remains in force. All these are basic conditions which, from a purposive view, must undoubtedly be imposed on the recognition track as well, according to the interpretation analyzed above. "And it has already been held that the recognition rules must be influenced by the enforcement rules such that a harmonious relationship will be established among them" (*Ben Dayan v. IDS International* [6], as cited by President Barak in *Anonymous v. Anonymous* [1], at p. 17).

32. Unlike the other sub-sections of s. 6(a) of the Foreign Judgments Law, there is a certain ambivalence as to whether or not s. 6(a)(5) should be applied to the track for the direct recognition of foreign judgments. This sub-section creates a defense against the enforcement of a foreign judgment if "[a]t the time that the action was brought in the court in the foreign country, another action regarding the same matter and between the same litigants was pending in an Israeli court or tribunal." The ambivalence is due to the fact that on its face, the sub-section is not equal in its severity to the other red lines that are established in s. 6(a). In my view, the sub-section should be applied to the direct track, notwithstanding this distinction – both because of linguistic interpretation issues and because of the purposive aspect. From a linguistic perspective, it is logical to apply all of s. 6(a) of the Foreign Judgments Law as a single unit rather than breaking it up into its components, and it appears that this is what the legislature had actually intended. There is nothing in the Statute's language that provides a basis for separating between the different sub-sections of s. 6(a). Regarding the purposive aspect, I believe that the purpose of s. 6(a)(5) is a proper one, in terms of there being a need for a requirement that any foreign judgment comply with it as a preliminary condition for its recognition. The objective of the section is to prevent a situation in which a litigant against whom a proceeding has been initiated in Israel would have the option of responding by simultaneously appealing to a foreign forum regarding the same subject and regarding the same matter – in order to reach what is from his perspective a better result – and then concluding the process in the foreign forum and finally seeking to have the foreign judgment recognized in Israel (Shapira 2, *supra*, at pp. 55-56; Wasserstein Fassberg, "Finality for Foreign Judgments," *supra*, at pp. 22-23). The achievement of this objective is relevant to both the process of enforcing foreign judgments and the process of recognizing them. Thus, in my view, this section must be included within the core set of rules that restrict a court's flexibility with respect to the recognition of foreign judgments.

33. Nevertheless, this sub-section needs to be interpreted in a purposive manner which is in conformity with the objectives of the direct recognition track's, such that the recognition of a foreign judgment will be denied only in cases that constitute an abuse by one of the parties of the possibility of being able to make use of two different proceedings in two different countries. Thus, for example, in this case, such an interpretation would lead to the conclusion that there is no real conflict between s. 6(a)(5) of the Foreign Judgments Law and art. 3(5) of the applicable Convention. Article 3(5) of the Convention provides as follows: "Where the court applied to is satisfied that, at the time when proceedings were instituted in the original court in the matter in dispute, proceedings as to the same matter between the same parties were pending before any court or tribunal of the country of the court applied to, the latter may refuse to recognise the judgment of the original court." Article 3(5) of the Convention does grant the court discretion – discretion which does not arise under s. 6(a)(5) of the Foreign Judgments Law – to decide whether it will exercise its right to refuse to recognize the foreign judgment when there is a pending proceeding. Nevertheless, I believe that by using a purposive interpretation, and through the use additional legal tools, it is possible to outline a complete overlap between the circumstances in which a court must exercise its right to refuse to recognize a foreign judgment in accordance with the Convention, and the circumstances in which a court will determine that s. 6(a)(5) of the Foreign Judgments Law should not be applied. An example of this would be a case in which a company that had initiated a proceeding in a foreign forum had no knowledge of a third party notice that had been served upon its sibling company but which was effectively directed at the company itself, in a proceeding in the country in which the petition for recognition has been brought. In such a situation, art. 3(5) of the Convention should be applied such that the court, because of the circumstances, would decide not to exercise its right to refuse to recognize the judgment. At the same time, under these circumstances, the court would be required – even pursuant to s. 6(a)(5) of the Foreign Judgments Law – to hold that a pending proceeding defense would not be allowed, since in such a case the parties in the two proceedings would not actually be identical, as they are required to be pursuant to the language in that section. An additional example would be a case in which the party that initiated the proceeding in the foreign forum is the party that later bases its defense on the existence of a pending action, after the foreign forum had ruled against it. In such a situation, a court would likely, pursuant to art. 3(5) of the Convention, exercise its discretion and decide to recognize the foreign judgment. In such

circumstances, the court could, pursuant to s. 6(a)(5) as well, use an estoppel ground against the party raising the defense.

From the general to the particular

34. In my view, since the District Court has held that in this case there had been a pending proceeding in Israel between the same parties and regarding the same matter at the time that the proceeding was initiated in the foreign forum, it should have applied s. 6(a)(5) of the Foreign Judgments Law, and it should therefore have refused to recognize the foreign judgment in this case.

I note further that the respondent's argument that there were actually different parties in the proceedings in Israel and in England must be rejected. The District Court's holding clearly indicates that New Hampshire knew of the existence of a pending proceeding in Israel, and even filed its suit in England as a result of the existence of this proceeding and in order to use the foreign judgment within the context of the Israeli proceeding. The initiation of the proceeding in the foreign country was the first and the easy opening for New Hampshire and for AIG – a step they took without having made any attempt to exhaust the possible legal measures in Israel. Thus, for example, they could have argued in an Israeli court that clause 13 of the insurance policy contained a stipulation of jurisdiction, pursuant to which all disputes were to have been resolved in English courts only – a point I raise without expressing an opinion as to whether such a stipulation would have been valid (Y. Zussman, *Civil Procedure* (vol. 7, 1995), at pp. 41-42). Regarding this matter, I note that Attorney Paul Cha's testimony, given on behalf of New Hampshire and quoted extensively in the District Court's opinion, appears to indicate that New Hampshire and AIG had acted improperly vis-à-vis the appellant. Thus, for example, AIG represented itself as the insurer for the policy in one proceeding, while in another proceeding, New Hampshire represented itself as the insurer. In light of these matters, the lower court was justified in holding that under the circumstances of the case, even though the parties in the two proceedings were technically different parties, they should nevertheless be viewed as being identical, from a substantive perspective.

35. Because I have determined that s. 6(a)(5) of the Foreign Judgments Law applies to the circumstances of this case, there is no need for a discussion of the appellant's arguments relating to non-compliance with the Convention provisions. I nevertheless note, as a matter that is beyond what is necessary, that the foreign judgment in this case does not comply with the Convention's conditions, as s. 11(a)(4) of the Foreign Judgments Law requires, and thus, in light of the District Court's holdings and the

circumstances of the case, it should have refused to recognize the foreign judgment pursuant to art. 3(5) of the Convention.

Therefore, if my view is accepted, the appeal should be allowed and the recognition of the foreign judgment should be withdrawn. The respondent will pay attorney's fees in the amount of NIS 20,000, along with the costs of the litigation.

Vice President E. Rivlin

1. I have read the learned opinion of my colleague, Justice E. Arbel, and I agree with the result that she has reached. I nevertheless wish to add and explain my position regarding the interpretation of the Enforcement of Foreign Judgments Law, 5718-1958 (hereinafter: "the Foreign Judgments Law" or "the Statute").

The original language of the Statute established two tracks for the absorption of foreign judgments: the *enforcement* track, which granted the court authority to order the enforcement of a foreign judgment in Israel; and the *indirect recognition* track, which enabled a court to incidentally recognize a foreign judgment in the course of the adjudication of a matter within its jurisdiction, with such recognition being valid for the purpose of that matter, "if the court sees that it is right and just to do so" (s. 11(b) of the Statute). The Statute as it was drafted at the time did not establish a *direct recognition* track which would enable a court to issue a judgment that declared the full recognition of a foreign judgment. It was believed that the absence of a direct recognition track meant that the legislature did not wish to interfere with the English common law rules, which had been followed in Israel prior to the enactment of the Enforcement of Foreign Judgments Law (see Mannheim, "Direct Recognition of Foreign Judgments," *supra*, at p. 704). Section 11(a), which was added to the Statute in the Enforcement of Foreign Judgments Law (Amendment No. 2) 5737-1977 (hereinafter: "the Statutory Amendment"), created a third track within the Statute – the track for the direct recognition of foreign judgments, in situations in which the State of Israel has, through a treaty, committed itself to recognizing foreign judgments of the relevant type, and has made that commitment to the country in which the foreign judgment was rendered.

2. However, very few petitions for direct recognition have been adjudicated since the Foreign Judgments Law was amended. The Statute's requirement that such recognition be dependent on the existence of a treaty

has led to a situation in which petitions for direct recognition are adjudicated only rarely. This is because the State of Israel has signed only very few treaties relating to the recognition of foreign judgments, and most of these apply to civil and commercial judgments, which by their nature primarily include obligations that are capable of being enforced and which do not necessitate any use of the direct recognition track. This Court has ruled in the past that foreign judgments may not be recognized other than in the framework established in the Statute – and thus, when there is no treaty between Israel and the country in which the judgment was rendered, there is still no possible application of the direct recognition track. (See *Attorney General v. Agam* [3], and for criticism of the rule in *Agam,* see *Anonymous v. Anonymous* [1]). Additionally, as my learned colleague Justice Arbel has noted, the vague language of s. 11(a) creates substantial difficulties in terms of its implementation. Thus, "[the path] opened by s. 11(a) is so narrow and full of obstacles that it is doubtful it will ever be used" (Mannheim, "Direct Recognition of Foreign Judgments," *supra*, at p. 710). In light of this, there are few cases in which the court is likely to decide the matter of the application of the track established for the direct recognition of foreign judgments, and this Court has not yet examined s. 11(a) thoroughly (see Wasserstein Fassberg, *Foreign Judgments in Israeli Law*, *supra*, at pp. 51-52). The case before us presents a rare opportunity to discuss our interpretation of s. 11(a).

The s. 11(a) condition – the undertaking

3. Section 11(a) establishes the conditions for the direct recognition of a foreign judgment:

> 11. (a) An Israeli court or tribunal will recognize a foreign judgment regarding which the following conditions have been met:
>
> (1) A treaty with a foreign country applies to it;
>
> (2) Israel has undertaken, in that treaty, to recognize foreign judgments of its type;
>
> (3) The undertaking only applies to foreign judgments that are enforceable pursuant to Israeli law;
>
> (4) The judgment satisfies all the conditions in the treaty.

Two central problems arise in the context of the interpretation of s. 11(a)(3):

> '[F]irst – what is the significance of the subjection of enforceability pursuant to the section to the provisions of the Enforcement Law (since in light of the unequivocal language of s. 2 of the Statute, no foreign judgment may be enforced in Israel other than pursuant to the Enforcement Law); second – what is the significance of the fact that this subjection refers not only to the judgment itself but also to the "undertaking" (which, in light of the language of sub-section (2), is Israel's undertaking in the above-mentioned treaty, to recognize certain foreign judgments)' (Mannheim, "Direct Recognition of Foreign Judgments," *supra*, at p. 704).

My colleague Justice Arbel focused on the interpretation of the first difficulty – the significance of the stipulation that foreign judgments may be recognized only subject to the conditions for enforcement that are established in Israeli law. In my review of the interpretation of s. 11(a), I wish to discuss the second obstacle regarding its interpretation – the meaning of the subjection of the *undertaking* to the requirements for enforcement. My colleague's starting point, according to which the requirement applies to the *foreign judgments* for which recognition is sought – is not an obvious point. It appears to me that we cannot ignore the fact that the section relates its requirements to the undertaking that the State of Israel has given, and not to the foreign judgment for which recognition is sought.

The language of the Statute provides that "the *undertaking* applies only to foreign judgments that are enforceable pursuant to Israeli law" (emphasis added). The word "undertaking" appears first in sub-section (2), where the section refers to the undertaking that Israel has given in the treaty with the foreign country. The "undertaking" in sub-section 2 is therefore an undertaking pursuant to an international treaty dealing with the issue of the enforcement of foreign judgments. Thus, it appears that the simple literal interpretation of s. 11(a)(3) is that the condition established in that sub-section for the direct recognition of a foreign judgment is that the treaty pursuant to which the recognition of the foreign judgment is being sought must apply only to foreign judgments that are enforceable pursuant to Israeli law. As is known, when a court is required to interpret legislative material, it may not attribute to that material any meaning that deviates from the range of linguistic possibilities (A. Barak, *Legal Interpretation, supra*, at p. 82). The natural and normal interpretation of the section is that the requirement of

conformity to the Israeli law of enforcement will apply to the treaty through which the State of Israel has given an undertaking, and this is the interpretation that is consistent with the statutory language.

4. The correctness of this interpretation is made clearer in light of the original text of the proposed amendment of the Enforcement Law, and in light of the explanatory material that accompanied it. According to the proposed amendment, s. 11(a) was intended to serve as a continuation of s. 13, which deals with the Minister of Justice's authority to enact regulations regarding the operation of the Statute. The original proposed text of the section was the following:

> 'If a treaty with a foreign country provides that Israel undertakes to recognize foreign judgments as described in the treaty, and the undertaking applies only to foreign judgments that are enforceable pursuant to Israeli law, the Minister of Justice may, with the approval of the Knesset's Constitution, Law and Justice Committee, order that such foreign judgments be recognized if they satisfy all the conditions in the treaty' (Draft Enforcement of Foreign Judgments (Amendment No. 2) Law 5737-1977, Draft Laws 246).

The explanatory notes to the proposal stated that "a condition for the use of this authority [the Minister of Justice's authority to give force to the Treaty – E.R.] will be that Israel has not, in the relevant treaty, undertaken to recognize foreign judgments that cannot be ordered to be enforced pursuant to the existing law". The intention behind this amendment to the Statute was thus to avoid the situation that had existed until that time, when the only track available pursuant to the Statute was the indirect recognition track – a track in which the matter of the recognition of the foreign judgment was left to the absolute discretion of the court, in each and every case. Under those circumstances, doubt arose as to whether the State of Israel could make any commitments to recognize foreign judgments, since there was no certainty that these judgments would be recognized by the Israeli courts (see the deliberations for the first reading of the Draft Law, Knesset Proceedings 80, 427). The original intention of the section was that it would give the Minister of Justice the power to absorb international treaties into Israeli law by giving force to an unlimited number of judgments. Since the intention was that the Minister's authority would not be limited to a particular judgment, it was not possible to focus the enforceability requirement such that it would apply to the judgment for which recognition is sought, and instead the enforceability

requirement could refer only to the entire treaty (Mannheim, "Direct Recognition of Foreign Judgments," *supra*, at pp. 707-708). The authority conferred upon the Minister was nevertheless limited to a power to recognize only those treaties that conform to Israeli law and which do not require Israel to recognize foreign judgments that are not enforceable. For some reason, which is not made clear in the explanatory notes to the Draft Law or in the Knesset Proceedings, the text of the amended Statute was changed such that the power to recognize foreign judgments was granted to the courts rather than to the Minister of Justice. However, the statutory language regarding the enforceability requirement remained in place and with it the section's purpose – to limit the recognition of treaties that do not conform to Israeli law concerning the enforcement of judgments. In light of this, the correctness of an interpretation that views s. 11(a)(3) as presenting conditions regarding the treaty, rather than in connection to the judgment for which recognition is being sought, becomes clearer. (And see also Wasserstein Fassberg, *Foreign Judgments in Israeli Law*, *supra*, at p. 51: "When there is such a treaty, the conditions for recognition are the terms of the treaty. There is no substantive statutory condition for the recognition of such a judgment . . .").

The s. 11(a) condition – "that are enforceable"

5. Thus, what is the significance of the requirement that the undertaking given in the treaty with the foreign country apply only to foreign judgments that are enforceable in Israel? My view in this matter, like the view of my colleague, Justice Arbel, is that the phrase "that are enforceable" cannot be interpreted in a manner that strips it of all content and which mandates the acceptance of all treaties – even those that are in conflict with the requirements of the Foreign Judgments Law (as stated in para. 29 of Justice Arbel's opinion). I also agree that the term should not be construed very narrowly – i.e., in a manner that requires that each treaty include every one of the conditions for enforcement pursuant to Israeli law, and that recognition of foreign judgments pursuant to a treaty will not be possible whenever the treaty diverges from the provisions of Israeli law, even if only in some minor way (as stated in para. 26 of my colleague's opinion). This type of narrow interpretation would mean that the use of the term "enforceable" signifies that "it would seem that in order to create a situation in which the section cannot be utilized at all, it would be sufficient that the treaty directs the courts to recognize a judgment in any case that does not fit into the narrow confines of the Enforcement Law" (S. Mannheim, "Direct Recognition of Foreign Judgments," *supra*, at p. 707). Thus, according to the narrow interpretation, whenever an agreement makes it possible to recognize a

judgment that cannot be enforced in Israel and which does not comply with all the conditions for enforcement pursuant to Israeli law – the foreign judgment may not be recognized. Thus, for example, in a case such as the instant one, in which the Convention leaves room for discretion in the event of a pending proceeding, and does not require that the foreign judgment not be enforced, the foreign judgments to which the Convention applies will not be recognized (even if the foreign judgment itself meets the statutory requirements, such as when there was no pending proceeding involving the same matter). This interpretation leads to a situation in which s. 11 cannot be used at all, and the application of the direct recognition track will lack even the most minimal content, and it is therefore inconsistent with the Statute's objectives. (See also Wasserstein Fassberg, *Foreign Judgments in Israeli Law*, *supra*, for a description of the differences between the provisions of the various treaties that Israel has signed, and the provisions of the Enforcement Law, *supra*, at p. 49.)

6. Another possible interpretation is that the statute requires that the provisions of the treaty be consistent with the *norms* for the enforcement of foreign judgments, such that the "enforceability" requirement is understood to disallow recognition of treaties that require the Israeli courts to deviate substantially from the conditions for enforcement prescribed by Israeli law. The purpose of the amendment was to enable the absorption of international treaties into Israeli law, with s. 11(a) intended to serve as the channel through which treaty provisions relating to the direct recognition of foreign judgments would be absorbed (see Wasserstein Fassberg, *Foreign Judgments in Israeli Law, supra*, at pp. 51-52). When this interpretation is used, the section effectively creates "red lines" that are intended to limit the government's ability to approve treaties that do not conform to the values of Israeli law. This interpretation does not empty the Statute of all content, and it also conforms to both the Statute's language and its objective. An interpretation that creates too many obstacles which prevent the absorption of treaties and judgments is not in harmony with the purpose of this legislation. It is therefore appropriate to understand s. 11(a)(3) such that it prohibits a court from recognizing a foreign judgment pursuant to a treaty that obligates Israel to recognize judgments that deviate substantially from the provisions of Israeli law.

According to this interpretation, the conditions set out in s. 11(a) apply only to the treaty pursuant to which the recognition of a foreign judgment is being sought, while the Statute does not add any conditions that apply to the

foreign judgment itself. If the foreign judgment is covered by the provisions of the applicable treaty, and so long as that treaty does not require Israel to enforce foreign judgments that deviate substantially from those that are enforceable pursuant to Israeli law – the court will recognize the foreign judgment. However, this does not mean that the court cannot make its own determination regarding the foreign judgment or that it has no discretion regarding the recognition of the foreign judgment itself. The court remains the final arbiter with regard to whether the treaty conditions have been met. Israeli law becomes involved in the absorption of foreign judgments through the requirement that the judgment must be subject to a treaty that is consistent with Israeli law. The court's ability to exercise discretion is also needed because the conditions established for enforcement pursuant to Israeli law – in light of which the court determines whether the treaty is deserving of recognition – themselves grant the court a certain range of discretion. The discretion that the court exercises when it decides whether to grant the remedy is derived from Israeli law, and is exercised in its spirit. In effect, it may be presumed that the legislature chose to confer upon the court the power to grant direct recognition of foreign judgments, rather than to empower the Minister of Justice to do so, precisely because of an understanding of the need for the exercise of judicial discretion regarding this matter.

From the general to the particular

7. As stated, this case involves a foreign judgment rendered in a country with which the State of Israel does have a treaty, and in which it undertook to recognize foreign judgments of this type. Does the treaty apply only to foreign judgments that are enforceable in Israel? I believe that the answer to this question is affirmative. The Convention Between the Government of Israel and the Government of the United Kingdom of Great Britain and Northern Ireland regarding the Mutual Recognition and Enforcement of Judgments in Civil Matters, Israel Treaties 22, at p. 55 (hereinafter: "the Convention"), necessarily includes most of the conditions for the enforcement of foreign judgments that are included in the Foreign Judgments Law. The Convention provides that a judgment will not be recognized or enforced if it has been obtained through fraud (art. 3(2)(c) of the Convention and s. 6(a)(1) of the Statute); if a judgment was given by a body lacking authority to render it (art. 3(2)(b) of the Convention and ss. 6(a)(3) and 3(1) of the Statute); if the defendant has not been given a reasonable opportunity to defend against the action (art. 3(2)(b) of the Convention and s. 6(a)(2) of the Statute); or if the recognition of a judgment could harm the security of

the State or is inconsistent with public policy (art. 3(2)(d) of the Convention and ss. 3(3) and 7 of the Statute). However, the Convention does not contain any provision that is parallel to s. 5 of the Foreign Judgments Law, which establishes a limitations period of 5 years for the enforcement of foreign judgments. However, as stated, I believe that it is not necessary that there be an absolute identity between the terms of the relevant treaty and those of the Enforcement Law. The shortened limitations period is not part of the essential "core" of the Statute – and consequently its absence from the Convention should not be viewed as a deviation that prevents the absorption of the Convention within Israeli law.

8. The Convention's terms are different from those of the Statute with respect to an additional matter, which is relevant to our case – the fact that the Convention allows the court to exercise discretion concerning the recognition of a foreign judgment even if there is a pending proceeding:

> 'Where the court applied to is satisfied that, at the time when proceedings were instituted in the original court in the matter in dispute, proceedings as to the same matter between the same parties were pending before any court or tribunal of the country of the court applied to, the latter *may* refuse to recognise the judgment of the original court' (art. 3(5) of the Convention. Emphasis added – E.R.).

In contrast, the Statute provides that if "[a]t the time that the action was brought in the court in the foreign country, another action regarding the same matter and between the same litigants was pending before an Israeli court or tribunal" – the foreign judgment will *not be declared to be enforceable* (s. 6(a)(5) of the Statute). Similarly, even in a case in which the foreign judgment is in conflict with a different judgment that has been rendered regarding the same matter and between the same litigants – the Convention allows the court to exercise judgment, while the Statute provides that in such a case the foreign judgment will not be recognized (art. 3(4) of the Convention and s. 6(a)(4) of the Statute). Does this mean that the Convention cannot be recognized at all because of its deviation from the "narrow confines" (in Mannheim's words) of the Statute? As stated, my view is that the Convention should not be disqualified entirely on the ground that it allows for the exercise of discretion where the Statute establishes an inflexible rule, so long as it does not deviate from the core provisions of the Statute. The discretion that the Convention allows is consistent with the Statute's provisions regarding the enforcement of foreign judgments, and is

also consistent with its spirit. My colleague Justice Arbel, based on her own reasons, also reaches the conclusion that art. 3(5) does not conflict with s. 6(a)(5). In my view, and with the necessary changes, the core principles of the Statute are clearly reflected in the Convention, such that it is consistent with the Statute and includes all the red lines that are set forth in it.

9. In light of this, the lower court retained the right to exercise discretion in terms of deciding whether to recognize the foreign judgment, even though it was rendered at a time that a parallel proceeding was pending in Israel. However, in the context of this exercise of discretion, the court must strive to achieve conformity between the Statute's requirements for the enforcement of foreign judgments and its requirements for recognition. This conformity must express, *inter alia*, the assumption that forms the court's starting point in deciding whether to recognize a foreign judgment that had been issued even when there was another parallel pending proceeding in Israel. The Statute provides, as stated, that a foreign judgment will not be enforced if, at the time the action was brought in the foreign court, there was a proceeding between the same litigants and regarding the same matter which was pending in Israel. Amos Shapira has noted the logic of this rule:

> 'A foreign judgment that has been obtained under circumstances that indicate that a local proceeding was ignored or that an attempt was made to bypass it will not be given force in Israel. A litigant who makes light of a pending local proceeding or who maneuvers in order to avoid it has committed an abuse of legal proceedings and undermines the primary principles of fairness in the judicial process. The Israeli court will not assist such a party in implementing a judgment obtained abroad, so as not to assist in the commission of the misdeed' (Shapira 2, at pp. 55-56,; see also Wasserstein Fassberg, *Foreign Judgments in Israeli Law*, *supra*, at pp. 22-23).

These remarks, made in connection with the enforcement of foreign judgments, apply as well to the issue of direct recognition. In either case, the issue is a possible impairment of the local court's authority and an abuse of existing legal proceedings – whether through the enforcement of the foreign judgment or through its recognition in a manner that gives it effect under Israeli law. There is no difference, for this purpose, between a judgment that is enforceable and which a litigant seeks to enforce, and a judgment that does not involve any operative obligation and which a litigant seeks to have recognized directly in Israel. There are those who believe that there is no persuasive reason for distinguishing between the requirements for

recognition and the requirements for enforcement, or that the distinction made by the Statute is not based on any substantive differences between the two tracks. (For further discussion, see Wasserstein Fassberg, *Foreign Judgments in Israeli Law, supra,* at pp. 153-154.)

There is thus a reasonable basis for applying the same logic both to the enforcement of foreign judgments and to their direct recognition, so that in the event of a "pending proceeding", the court's starting point should be the non-recognition of a foreign judgment. In order for a judgment to be recognized in such a situation, the court will need to be persuaded that there are sufficiently strong reasons that justify its recognition, even though a parallel proceeding was pending in an Israeli court at the time the foreign proceeding was initiated. The burden of proving the existence of such grounds is imposed on the party seeking the recognition of the judgment.

10. It seems to me that under the circumstances of this case, there are good reasons not to recognize the foreign judgment. The respondent, using the name New Hampshire, initiated the proceeding in the foreign court only a short time after it was joined as a third party in the proceedings in Israel, where the named defendant was AIG – although it is clear that for the purposes of the proceedings before us, the companies are identical. On the other hand, when the respondent sought recognition in Israel of the foreign judgment that had been issued in its favor – it was willing to acknowledge the identity between the parties and sought to base a legal argument on that identity. The respondent's actions indicate an attempt to avoid the litigation that was pending in Israel. The District Court, which reached a different conclusion, had reviewed the key theories that form the foundation for the recognition of foreign judgments, and considered those factors that relate to the need to bring an end to litigation and to increase the efficiency of such proceedings. These considerations arise whenever the recognition of a foreign judgment is needed, and they are independent of the particular facts of a specific dispute. The fact that the non-recognition of a foreign judgment means it will be necessary to conduct a new proceeding in order to adjudicate questions that have already been decided in the context of the foreign judgment is not sufficient to justify a sweeping recognition of the foreign judgment. In certain cases, there may be efficiency grounds that would actually justify the non-recognition of certain foreign judgments, when there is a need to reduce, from the beginning, the incentive to initiate additional proceedings in a foreign country.

An additional factor that the District Court took into consideration was the possibility that the *res judicata* rule would apply to the dispute. Such a possibility is, however, unlikely. Without a judicial act that recognized it, a foreign judgment has no validity in and of itself (see for example *Anonymous v. Anonymous* [1], at pp. 11-12; Shapira 2, at p. 509; CA 423/63 *Rosenbaum v. Julie* [7]). So long as the judgment that was rendered in the foreign country lacks force under Israeli law, no *res judicata* has arisen in any proceeding in Israel (see also Wasserstein Fassberg, "Finality for Foreign Judgments," *supra,* at pp. 52-53). Thus, the question as to whether a *res judicata* has been created will depend on whether there is a foreign judgment that is valid in the State of Israel, and not *vice versa*. Additionally, the argument that in the case before us the English court was the appropriate forum for the adjudication of the matter does not, of itself, justify the initiation of proceedings in the foreign court while ignoring the Israeli proceeding. If a litigant believes that the State of Israel is not the proper forum for the adjudication of a matter, the litigant can make that argument within the context of the proceeding in the Israeli court that has already commenced its deliberation of the case – as a measure that respects that Israeli court's authority.

Indeed, as I have noted, the range of possibilities for the recognition of foreign judgments can be broadened, and the narrow opening allowed for the absorption of such judgments within the current Statute is not enough. However, the expansion of this opening need not reach, specifically, those cases in which recognition makes it possible to bypass proceedings that are pending in Israel. Instead the framework needs to be expanded by making the Statute more accessible in situations in which there is some benefit achieved through the recognition of the foreign judgment, with the expansion being based on an overall view of Israel's commercial and legal needs.

Therefore, and since I have not been persuaded of the presence of any grounds that justify recognition of the foreign judgment that is before us – I also believe, as does my colleague Justice Arbel, that the foreign judgment should not be recognized. I agree with the opinion of my colleague Justice Arbel, that the appeal should be allowed and the recognition of the foreign judgment should be withdrawn.

Justice E. Rubinstein

A. I have read my colleagues' comprehensive opinions, and I also agree with the result proposed by my colleague Justice Arbel and joined by my colleague Vice President Rivlin.

B. Article 3(5) of the "Convention Between the Government of Israel and the Government of the United Kingdom of Great Britain and Northern Ireland Regarding the Mutual Recognition and Enforcement of Judgments in Civil Matters", Israel Treaties 22, at p. 55, provides as follows:

> Where the court applied to is satisfied that, at the time when proceedings were instituted in the original court in the matter in dispute, proceedings as to the same matter between the same parties were pending before any court or tribunal of the country of the court applied to, the latter may refuse to recognise the judgment of the original court.

Since, at the time that the original action was brought (16 October 2001) in the English court (the "Original Court"), a third party notice had already been filed (on 20 September 2000) against AIG in the proceeding that was already pending in the Tel Aviv District Court ("the Court of Application"), the Convention grants the District Court discretion to determine that it will not recognize the foreign judgment. (The mechanism – "the pipeline" for the injection of the treaty terms into Israel's internal law – is s. 11(a)(4) of the Enforcement of Foreign Judgments Law, 5718-1958 – hereinafter: "the Statute"; regarding the identity of the parties, see para. 34 of Justice Arbel's opinion and para. 10 of the Vice President's opinion.) The District Court (President Goren) described in detail – primarily in the legal sense – why, notwithstanding the court's discretion to refuse the petition for recognition, such recognition was in fact appropriate (paras. 22-25). I nevertheless agree with the views of my colleagues (as stated in the paragraphs mentioned above).

C. I would further note that the Convention grants *discretion* when there is a claim that there is a parallel pending proceeding, and it may be that there is a certain difference here between the provisions in the Convention and the provisions of s. 6(a)(5) of the Statute. The Statute uses seemingly sweeping language – "will not be declared to be enforceable":

> 'A foreign judgment will not be declared to be enforceable if one of the following is proven to the court:
>
> . . .
>
> (5) at the time that the action was brought in the court in the foreign country, another action regarding the same matter and between the same litigants was pending before a court or tribunal in Israel.'

(See para. 8 of the Vice President's opinion; and in contrast, regarding the revocation of the discretion, see also LCA 1817/08 *Teva Pharmaceutical Industries Ltd. v. Pronauron Biotechnologies, Inc.* [8].) In my view, which I will expand upon below, to the extent that there is a difference between the language of s. 6(a)(5) and the provision in the Convention, it is the route that is outlined in the Convention (discretion) that should be followed when the subject is the *recognition* of the foreign judgment. Since the Convention grants discretion, the exercise of such discretion should also involve serious consideration of the good faith of the party requesting the recognition (compare CA 3924/08 *Goldhar Corporate Finance Ltd. v. Klepierre S.A.* [9]). Regarding our case, my colleague the Vice President responded to the matter of the respondent's attempts to "avoid the litigation that was pending in Israel" (para. 10). These attempts would also appear to include the claims that the respondent raised in the context of the deliberation regarding service on the respondent's counsel (CA (TA Dist.) 2137/02 *AIG Europe (UK) Ltd. v. Israel Oil Refineries Limited* [19]).

The impression received from the respondent's overall behavior is that it did not act in pure good faith. I find this to be the case even though I am aware that the appellant – for its own reasons – did not appeal the English judgment, and it has become final.

D. I therefore believe that the discretion that the Convention has conferred upon the court should have led it to reject the petition for recognition – and for this reason I concur in the result reached by my colleagues. Since both of them also responded in detail to the arguments regarding the interpretation of the Statute, I will deal with the matter only briefly – but I will first note that my main impression is that the existing legal situation is unsatisfactory and unclear, and that the time has come to re-organize the issue. I write this thirty years after the then student (and now Judge) Shaul Mannheim wrote his critical article "Direct Recognition of Foreign Judgments," *supra*. It appears that in the years since then, not only has there not been any legislative response to the difficulties that he noted, but these difficulties have in fact only increased, in light of this Court's ruling in CA 970/93 *Attorney General v. Agam* [3].

From the general to the particular

E. I have examined the question of the significance of the existence of a pending proceeding in Israel from the perspective of art. 3(5) of the Convention (cited above), and not from the perspective of s. 6(a)(5) of the Statute. This reflects an approach regarding the interpretation of s. 11(a) of

the Statute, one which is somewhat different from that of my colleagues, and I will now discuss it briefly. Section 11 of the Statute provides as follows:

> 11. (a) An Israeli court or tribunal will recognize a foreign judgment regarding which the following conditions have been met:
>
> (1) A treaty with a foreign country applies to it;
>
> (2) Israel has undertaken, in that treaty, to recognize foreign judgments of its type;
>
> (3) The undertaking only applies to foreign judgments that are enforceable pursuant to Israeli law;
>
> (4) The judgment satisfies all the conditions in the treaty.
>
> (b) By way of a deliberation concerning a matter within its jurisdiction and for the purpose of the main matter, a court or tribunal in Israel may recognize a foreign judgment, even if sub-section (a) does not apply to it, if the court or tribunal has found that it is right and just to do so.
>
> (c) The provisions of s. 6(b) and (c) will apply in proceedings involving the recognition of a foreign judgment pursuant to this section.

As to the dispute between my colleagues – concerning the question or whether the conditions of s. 11(a)(3) are to be applied to the *judgment* for which recognition is being sought or to the *treaty* by virtue of which the recognition is being sought – I share the view of my colleague the Vice President. I also believe that the condition that the "undertaking only applies to foreign judgments that are enforceable pursuant to Israeli law" requires that a determination be made as to whether the *treaty* ("the undertaking") does indeed apply only to foreign judgments that are enforceable in Israel; and does not require a determination as to whether the *judgment* for which recognition is sought meets these conditions (see the Vice President's reasoning in para. 4 of his opinion; Mannheim, "Direct Recognition of Foreign Judgments," *supra*, at p. 707). Under these specific circumstances, and for the purpose of the case before us, I also find that the Convention which is the basis of this proceeding complies with these conditions.

F. For these reasons, in my view, it is not necessary to determine whether the appellant has a good defense pursuant to s. 6(a)(5) of the Statute. The court is obliged (pursuant to s. 11(a)(4) of the Statute) to examine whether "it [the judgment for which recognition is sought – E.R.] satisfies all the conditions in the treaty". The reference is to *the conditions in the treaty – not the conditions in the Statute.* "The conditions for recognition will be established in each case in accordance with the treaty between Israel and the country in which the judgment was issued" (Wasserstein Fassberg, *Foreign Judgments in Israeli Law*, *supra,* at p. 52). It appears that the treaty is to be examined according to the tests established in the Statute, and the judgment is to be examined according to the tests established in the treaty.

G. Thus, in cases in which the treaty confers discretion upon the Court of Application, and in which – according to the language of the treaty and in accordance with its objective – there are a number of possible legitimate results, it is appropriate, as my colleague the Vice President wrote, to "strive to achieve conformity between the Statute's requirements regarding the enforcement of foreign judgments and its requirements for recognition" (para. 9 of the Vice President's opinion). A common sense view and the judicial aspiration for the most harmonious possible interpretation would require this. However, as a rule, when the subject is a document signed by two countries whose internal laws differ on this matter, I believe that the signatory countries' main commitment is to an interpretation of the treaty which is in accordance with that document's own language – and only secondarily to its conformity with their own internal legal systems. "So far as interpretation of the treaty is concerned, it would appear that significant weight should be attached to international uniformity and a desire for harmony with outcomes that are reached in foreign countries" (CA 7833/06 *Pamesa Ceramica v. Yisrael Mendelson Engineering Technical Supply Ltd.*, [10]). There is good reason, I believe, and certainly within the framework of an international business system, to maintain harmony between different countries in terms of the interpretation to be given to the same treaty – both with respect to legal certainty and out of a duty of fairness to the various "players" who should not be compelled to discover that when they move from country to country, they will be faced with a differing interpretation of the same language. This is certainly the case in terms of a multilateral treaty, but it is also true with respect to a bilateral treaty, as is the case here.

H. As in Israel, there is not much English case law dealing with the Convention that is the subject of this proceeding (although see, for example,

Tuvyahu v. Swigi 1997] EWCA Civ. 965 [20]). However, in the spirit of the above discussion, as there are differences between Israel's Enforcement of Foreign Judgments Law and its principles, on the one hand, and the parallel English statute (the Foreign Judgments (Reciprocal Enforcement) Act 1993), on the other hand, an interpretation that is directed only at conformity with the provisions of the internal law will naturally lead to two different interpretations in the two countries; this is an utterly undesirable result with respect to an international treaty. An example of one of the differences between the two statutes would be in relation to the ability to enforce a non-final judgment. Section 3(2) of Israel's Statute provides as follows:

> 'An Israeli court may declare that a foreign judgment is enforceable if it finds that the following conditions have been met with regard to it . . . (2) the judgment is not subject to appeal.'

Section 3 of the English statute provides the following:

> 'For the purposes of this section, a judgment shall be deemed to be final and conclusive notwithstanding that an appeal may be pending against it, or that it may still be subject to appeal, in the country of the original court.'

(Regarding the differences between the English law and the Israeli law concerning this matter, see also *Ben Dayan v. IDS International* [6], at p. 105; Shapira 1, *supra*, at pp. 527-528.) In a context which is very similar to ours (the differences in language between s. 6(a)(4) of the Statute and the provisions of 5(1)(6) of the treaty with the Federal Republic of Germany), Justice M. Cheshin wrote the following:

> 'The rule of interpretation is indeed that a statute and a treaty should be conformed with each other; that the two should work together and should not conflict with each other (see A. Barak, *Legal Interpretation*, *supra*, at p. 575), but a peace-building bridge can only be built between two sides that are close to each other – not between two elements between which there is a great divide' (CA 1137/93 *Ashkar v. Hymes* [11], at p. 659).

"*Foreign judgments that are enforceable pursuant to Israeli law*"

I. As stated above, I agree with my colleague the Vice President that the statutory language indicates that the requirement contained in s. 11(a)(3) – "the undertaking applies only to foreign judgments that are enforceable

pursuant to Israeli law" – refers to the treaty ("the undertaking") and not to the specific judgment for which recognition is sought. However, I am not certain that the only possible interpretation of the term "foreign judgments that are enforceable pursuant to Israeli law" is the intermediate interpretation that my two colleagues have proposed.

J. I myself would propose that the phrase (in s. 11(a)(3)) "foreign judgments that are *enforceable* pursuant to Israeli law" (emphasis added – E.R.) should be read as an internal reference to s. 3 of the Statute, which is captioned "Conditions for Enforcement"; the reference should possibly even be only to the specific condition contained in s. 3(3) that "the obligation in the judgment is *enforceable* pursuant to the laws for the enforcement of judgments in Israel". This would be in the spirit of the interpretation given for that condition in the explanatory note to the Draft Enforcement of Foreign Judgments (Amendment) Law 5734-1974:

> [i]f the Israeli law does not have the tools that make it possible to enforce the foreign judgment or to enforce it in some other manner, such as through specific performance of a contract for personal service (Draft Laws, 1974 – at p. 172).

In any event, I believe that this is not a reference to s. 6 of the Statute, which (according to its caption) deals with "Defenses Against Enforcement". In my view, the conditions are to be understood as constituting one matter, and the defenses are deemed to be a different matter. (Regarding the differences between conditions and defenses – primarily in terms of burdens of proof – see CA 1268/07 *Greenberg v. Bamira* [12], at para. 13; CA 10854/07 *Pickholtz v. Sohachesky* [13].)

K. In terms of interpretation, a strong indication that the expression "enforceable pursuant to the law of Israel" in s. 11(a)(3) does not refer to the defenses listed in s. 6 of the Statute can be found, in my view, in s. 11(c):

> (c) The provisions of s. 6(b) and (c) will apply in proceedings involving the recognition of a foreign judgment pursuant to this section.

In my view, this section, which also applies to direct recognition pursuant to s. 11(a) (see M. Shava*, Direct Conversion of a Foreign Judgment, supra*, at p. 40, n. 20), indicates two things: (1) if not for its express provision, none of the conditions of s. 6 would apply to proceedings pursuant to s. 11 (nor would they apply through s. 11(a)(3)); and (2) that only the "provisions of s. 6(b) and (c)" apply to proceedings pursuant to s. 11. Furthermore, I believe

that it cannot be said that the legislature – which, according to my colleague the Vice President sought to limit the power of the executive branch to enter into certain agreements – would have reserved for that branch the discretion to determine the "threshold conditions or set of red lines" (per Justice Arbel, in para. 30 of her opinion), or to decide among the various interpretations that my colleagues have discussed.

L. A review of the legislative history of the Foreign Judgments Law also indicates that the legislature's tendency had been to enable the government to enter into treaties for the recognition of foreign judgments with *greater ease* – and not to increase the difficulties involved by adopting threshold requirements from Israel's internal law (see the explanatory notes to the Draft Enforcement of Foreign Judgments (Amendment) Law 5734-1974, Draft Laws, supra at p. 172; the explanatory notes to the Draft Enforcement of Foreign Judgments (Amendment No. 2) Law 5737-1977, Draft Laws 246; C. Goldwater, "Amendments to the Foreign Judgments Enforcement Law", 10 *Isr. L. Rev.* 247 (1975), at p. 248). The question may be asked as to why a respondent should not, in the context of a petition for the *recognition* of a foreign judgment, benefit from the same defenses that a respondent can rely upon in a petition for *enforcement*. The answer is that a respondent does in fact benefit from those particular defenses (or from similar defenses) that the State saw fit to include in the framework of the treaties that it has signed. In order to make matters clear, I note that some variation of the "pending proceeding" defense is included in all four treaties that Israel has signed (see, in addition to the article which is the subject of this case: art. 5(3) of the treaty with Austria, (Israel Treaties 21, at p. 149); s. 5(1)(5) of the Schedule to the Enforcement of Foreign Judgments Regulations (Treaty with The Federal Republic of Germany), 5741-1981; art. 4(e)(1) of the treaty with Spain (Israel Treaties 30, at p. 714)).

Pending proceedings and public policy

M. I would like to comment further on the matter of public policy. The current proceeding focuses on the nature of the exception dealing with "pending proceedings" (*lis alibi pendens*) – an argument which, in appropriate circumstances, will enable a stay of proceedings even in a situation in which the two proceedings are being conducted within the same internal legal system. (For a survey, see U. Goren, *Issues in Civil Procedure* (10th ed., 2009), at pp. 116-117.) The Convention recognizes another exception dealing with cases that conflict with public policy – although there

it is combined with the exception dealing with cases that have an adverse impact on "the sovereignty or security of the State" (art. 3(2)(d)); and in the Statute, it is combined with language referring to the requirement that "the obligation in the judgment is enforceable pursuant to the laws for the enforcement of judgments in Israel" (s. 3(3); the exception relating to cases having an adverse impact on sovereignty or security has been given a separate section, s. 7). The fact that the exception dealing with public policy can be situated in different contexts – together with matters affecting the security of the State (as in the Convention), or together with the condition involving conformity with the internal law (as in the Statute) – may indicate that there is a certain similarity in principle between the concept of public policy and the other exceptions to enforcement and recognition – including, in my view, the exception dealing with "a pending proceeding".

N. Indeed, Israel's internal law provides a variety of reasons for a stay of a proceeding based on "a pending proceeding". Some of these are clearly utilitarian – such as the concept of avoiding additional burdens for litigants and for the legal system (see U. Goren, *Issues in Civil Procedure*, *supra*, at p. 116; LCA 346/06 *Hazan v. Club Inn Eilat Holdings Ltd.* [14], at para. 4); some of them are closer in their nature to the public policy concept – such as the idea of mutual respect among different courts (LCA 1674/09 *Lechter v. Derek Boateng* [15], at para. 22; CA 1327/01 *Ephrayim v. Elan* [16], at pp. 781-782), and the prevention of conflicting rulings (LCA 2733/07 *Amiron S. T. L. Finance and Investment Ltd. v. Wallach* [17]). Without blurring the practical differences between the various exceptions, it appears that from a preliminary and distant perspective, there could be a certain amount of interfacing between the concepts. Furthermore, with regard to the same issue within the internal legal system, when a court needs to rule on a "pending proceeding" argument, it should weigh "good faith utilization of a right" considerations (S. Levin *Law of Civil Procedure – Introduction and Basic Principles* (2nd ed., 2008), at p. 124). The ideational proximity to the super-principle of public policy (regarding this matter, see also *Teva v. Pronauron* [8]), and the importance attributed to good faith should be a court's guiding light when it exercises the discretion conferred upon it by the Convention. For this reason I believe that the discretion granted by the Convention should have led to the result reached by my two colleagues. As a side point, I note that in Jewish law, the principle of public policy is referred to by a global, perhaps universal and elegant term – *'tikkun olam*' [repairing the world] – as in, for example "Hillel the elder enacted the pruzbul [a deed deposited with

the rabbinical court to which the monetary sabbatical year does not apply– E.R] due to a concern for *tikkun olam"* (Mishna *Gittin*, Chapter 4, Mishna 3).

Conclusion

O. As stated above, I believe that s. 11(a)(3) presents minimalist threshold requirements, the purpose of which is to restrict the *State* in terms of its ability to enter into international treaties, and it does not obligate the *courts* to examine whether the respondent in the petition for a specific recognition has a good defense pursuant to s. 6 of the Statute (while, of course, defense claims based on treaty provisions are examined pursuant to s. 11(a)(4)). I do not wish to put a final finish on this matter, since it is not necessary to decide it in order to decide the issue presented by the current case. Furthermore, the approach that I am proposing is likely to give rise to various difficulties, since even if it is possible to determine that those who drafted the Convention had made an effort to conform it to the threshold requirements of Israeli law, I am not certain that this objective was achieved in full (with regard to s. 3(3) of the Statute, in particular). It may be that from this perspective, my colleague Justice Arbel's proposal is a desirable one, but in my view it is difficult to reconcile it with the statutory language – and this may be the foundation for a new arrangement. I therefore agree with the result reached by my two colleagues – i.e., that the appeal should be allowed. Going beyond what is needed, as stated, I also agree with the Vice President's position that the requirement presented in 11(a)(3) refers to the relevant treaty and not to the judgment for which recognition is sought, but I would give this section a narrower interpretation than is given to it by my colleague.

P. And after all this has been stated, there is a much greater *practical* difficulty, which relates to the fact that the four existing treaties – even if they do meet the requirements stipulated in the Statute – provide only a partial solution to the practical need for the recognition of foreign judgments from all over the world. At present, only four treaties have been signed, and the last of them was signed twenty years ago (although it should be noted that the Convention which is the subject of this case was updated in the early part of the last decade); this is despite the fact that s. 11 was enacted in 1977 and the fact that since that time, many additional states have established diplomatic relations with Israel. Not only do these four treaties provide solutions for only four countries, they do so only partially – because they do not apply to all types of judgments. It is clear that in light of the real need

(which may be presumed to exist, at least, in light of the phenomenon of globalization) for a mechanism that allows for the recognition of foreign judgments (especially for the recognition of judgments *in rem*), and in light of the restrictive rule established in *Attorney General v. Agam* [3], there is a need to re-think the regulation of this area, since the 1977 amendment does not appear to have succeeded. I agree with the views of my colleagues regarding this matter as well.

Appeal allowed.
8 Tevet 5771
15 December 2010