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DISPUTE RESOLUTION **ALERT**

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Enforcing South African judgments in two key jurisdictions: England and the US

Favourable judgment in hand, South African litigants would be forgiven for thinking their victory is all but won. Those looking to execute rulings against foreign opposing parties may, however, still have some way to go. If an opposing party has no executable property and no other presence in South Africa, successful parties may have to cross borders to recover their dues. Each country greets foreign judgments with its own set of rules. This article discusses the processes and difficulties of enforcing South African judgments in two key jurisdictions: England and the US.

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England

The starting point for enforcing a foreign judgment in England is that a new set of proceedings must be issued in England, unless one of the exceptions to this common law doctrine apply, in which case the judgment may simply be registered. However, no such exceptions apply to South African judgments. A successful party is therefore required to sue the English party in an English court, based on the foreign judgment as a debt, and then seek summary judgment on the basis that there is no defence to the merits of the claim.

Generally speaking, a South African judgment will be recognised and enforced by an English court where:

1. the judgment is conclusive and final; that is, not subject to an appeal;
2. the judgment was granted by a court regarded as "competent to do so" by English courts, which court must also have had jurisdiction under the rules of English private international law;
3. the judgment was granted no more than six years prior to the commencement of proceedings in the English court;
4. the judgment is not inconsistent with an earlier South African judgment between the same parties regarding the same subject matter, or with a previous judgment given by the English courts;
5. the judgment does not contain an award for multiple damages (ie. where the amount of damages awarded is calculated by multiplying an assessed compensation sum awarded to the claimant);
6. the South African court did not grant judgment contrary to a governing law, jurisdiction or dispute resolution clause, such as a clause requiring parties first to refer a matter to arbitration;
7. the judgment is not payable in respect of taxes, fines or penalties, which are generally only due in South Africa, and will not be enforced by a foreign court;
8. the judgment was not obtained fraudulently; and
9. enforcing the judgment would not offend English public policy or violate the Human Rights Act 1988.

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Enforcing South African judgments in two key jurisdictions: England and the US*...continued*

A South African claimant may bring a claim in the court in an EU state where the defendant is based (including England for as long as it is a member of the EU) and that court may accept jurisdiction notwithstanding the fact that South African law must be applied.

The defence most commonly employed by foreign judgment debtors in practice is that the South African court lacked jurisdiction. Under the rules of English private international law, for a South African court to have jurisdiction, the defendant must have either been present within South Africa, or submitted to the jurisdiction of the South African court. The latter is particularly difficult to prove where there is no governing law and jurisdiction clause in a contract, and where the defendant has ignored South African proceedings entirely.

These difficulties were highlighted by the English Supreme Court in Lucasfilm Limited and others v Ainsworth and another [2011] UKSC 1328, in which the contract contained no governing law and jurisdiction clause, and the English defendants were not present in the jurisdiction where judgment was granted. As a result, the English courts declined to enforce the judgment, on the basis of the foreign court's lack of jurisdiction.

However, difficulties in establishing jurisdiction in a South African court are not the end of the road for a claimant. Proceedings may still be commenced from scratch in England or other EU member states. Although each jurisdiction in the EU has its own procedures to enforce foreign judgments, the rule set out by the European Court of Justice in Owusu v Jackson (C-281/02) is generally applicable to EU member states. The Owusu principle requires that a court in an EU member state may not decline jurisdiction on the basis that a court outside of the EU would be better placed to hear the case. This means that a South African claimant may bring a claim in the court in an EU state where the defendant is based (including England for as long as it is a member of the EU) and that court may accept jurisdiction notwithstanding the fact that South African law must be applied.

US

The procedure to be followed in the US is more complicated, since there is no uniform federal law governing the enforcement of foreign judgments. Most states have, however, adopted the 1962 Uniform Money-Judgments Recognition Act and the 2005 Foreign-Country Money Judgments Recognition Act (Acts). The Acts apply to foreign judgments that grant or deny recovery of a sum of money, but not to matrimonial or family matters, or to taxes, fines or penalties (as in England).

States without such legislation rely on the common law, as set out in Hilton v Guyot 159 U.S. 113 (1985), to enforce foreign judgments. The court in Hilton held that the merits of a foreign case need not be tried afresh in the US, provided that there was a full and fair trial before a court of competent jurisdiction, conducting the trial impartially and on regular proceedings, and that the defendant was allowed an opportunity to appear to defend the action.

The majority common law approach regarding the recognition and enforcement of foreign judgments is reflected in the Restatement (Third) of Foreign Relations Law (Restatement),

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which is broader than the Acts in that it specifically recognises foreign judgments affecting status and determining interests in property.

Unlike the English scheme, the US does not allow for enforcement by means of judgment registration in any circumstances, and civil proceedings must therefore be instituted in the relevant US court by a claimant from any foreign jurisdiction, including South Africa. While the procedure to be followed is state-dependent, the following principles regarding enforcement of South African judgments are generally applicable:

1. the judgment must be final and enforceable in South Africa, which must be confirmed by an affidavit from an admitted South African legal practitioner;
2. judgment must have been granted by an adjudicative body, and not through an alternative form of dispute resolution;
3. US courts are obliged to refuse to enforce judgments where due process was not followed in obtaining the judgment (including insufficient notice to the defendant), or the South African court did not have person or subject matter jurisdiction;
4. US courts may refuse to enforce a South African judgment where the judgment was obtained fraudulently; that is, where fraud prevented the defendant obtaining knowledge of the action or fully defending the suit;
5. US courts may refuse to enforce a South African judgment where the cause of action is contrary to public policy, or to an agreement of the parties; and
6. US courts may refuse to enforce a judgment that conflicts with a prior inconsistent South African or US judgment.

It is noteworthy that the US, the UK (including England) and South Africa are all signatories of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517, in terms of which foreign arbitral awards are uniformly enforced by courts based on similar principles as those for enforcing foreign judgments, with exceptions tailored to arbitration.

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Enforcing South African judgments in two key jurisdictions: England and the US*...continued*

Parties should be weary that the South African judgment may nevertheless be shallow if the defendant has no presence or property in South Africa, and the claimant then has to follow the judgment debtor to England or the US.

Conclusion

The various complexities of the procedures in both jurisdictions, as well as the lack of uniformity in the US, means that South African entities contemplating litigation should, in addition to any other relevant factors, practically consider the prospects of successfully enforcing a judgment against an English or American individual or entity, particularly where the defendant is not in South Africa, and/or has no property in South Africa, and parties have not concluded an agreement with a jurisdiction and governing law clause. In fact, even where personal jurisdiction is established, parties should be weary that the South African judgment may nevertheless be shallow if the defendant has no presence or property in South Africa, and the claimant then has to follow the judgment debtor to England or the US. This is particularly troublesome where the quantum is relatively low, since costs of enforcing the judgment in England or the US may then exceed the amount claimed.

Lucinde Rhoodie, Pauline Manaka and Georgia Speechly

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