Dispute resolution and submission to jurisdiction are pertinent issues in cross-border financing transactions. When adviser South African clients on the choice between submitting disputes to the courts of a particular jurisdiction, or to arbitration, one of the key considerations is the likelihood that the final judgment or award will be enforced. Contract parties should be made aware of the respective regimes governing the enforcement of foreign judgments, versus foreign arbitral awards, before selecting the appropriate forum.

Court proceedings abroad

Should the parties submit their disputes to the jurisdiction of a foreign court, the enforceability of that court’s judgment in South Africa would be relevant. In terms of local law, the enforcement of foreign judgments is addressed under the Enforcement of Foreign Civil Judgments Act 32 of 1988 (the EFCJ Act).

Unfortunately, the EFCJ Act is inadequate in most cases.

The primary limitation of the EFCJ Act is that Namibia is currently the only designated country in respect of which enforcement provisions apply. Furthermore, the EFCJ Act is not based on reciprocity. It may give a party comfort that a Namibian judgment would be enforceable in South Africa, but currently that is all it achieves.

Hence the South African position on enforcement of foreign judgments is largely governed by common law. While not directly enforceable, foreign judgments will generally be recognised by a South African court if certain requirements are met. These include that the foreign court must have had international competency, that is, it must have exercised jurisdiction on grounds that South African courts regard as appropriate; the judgment must be final and conclusive; the judgment must not have been obtained by fraudulent means or be contrary to South African public policy; it must not have lapsed or been satisfied; must not be based on penal or revenue laws of the foreign state and enforcement must not be prohibited by the Protection of Businesses Act 99 of 1978.

Foreign judgments in a specified sum of money are enforceable if, when the action was instituted, the defendant was a resident of the foreign country. Recognition proceedings may
also be founded on submission to the foreign court's jurisdiction, although foreign judgments in respect of multiple or punitive damages may not be recognised or enforced in South Africa.

**Court proceedings at home**

It may seem that the straightforward option for a South African party is for disputes arising from a cross-border financing arrangement to be adjudicated by South African courts. However a judgment from a South African court against a foreign defendant must be enforced abroad.

South Africa is not a state party to the Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, and South African parties cannot rely on the reciprocal enforcement of commercial judgments. As the laws relating to enforcement of foreign judgments differ among jurisdictions, a South African plaintiff may be exposed to legal uncertainty notwithstanding that a South African court is selected under the contract. Such a plaintiff still runs the risk that the foreign court may decline to enforce the South African judgment abroad, for reasons forming part of foreign law.

**Arbitration abroad**

While court proceedings are often favoured in financing transactions due to the fairly limited range of facts in dispute (most proceedings arise from a failure to pay), there are good reasons for parties to consider submitting disputes to arbitration in cross-border transactions.

One such reason is that the Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977 (the REFAA Act) applies to foreign arbitral awards generally, not only to awards from specified jurisdictions. The REFAA Act provides a clear framework for the enforcement of foreign awards without resorting to common law; it simply provides that any foreign arbitral award may, subject to the provision of the REFAA Act, be made an order of court by any court. This gives a South African party comfort that disputes submitted to arbitration in a foreign jurisdiction may be enforced in South Africa regardless of where the arbitration took place. As an added benefit, the Act outlines the circumstances in which such an award will not be enforced.

**Arbitration at home**

Where contract parties choose to submit their disputes to arbitration in South Africa, a successful South African party would need to approach a foreign court for enforcement of the arbitral award in the foreign jurisdiction.

South Africa is a state party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. In terms of the New York Convention, every other contracting state agrees to recognise South African arbitral awards as binding, and enforce them in accordance with the rules of procedure of the territory where the award is relied upon. The circumstances when an award will not be enforced are also delineated.

The principle of reciprocity applies to the Convention. Contracting states may, if they so wish,
declare that they will apply the Convention in the recognition and enforcement of awards made only in the territory of another contracting state. States may also declare that the Convention will only be applied to differences arising out of legal relationships (whether contractual or not) that they consider to be commercial.

The effect is that, when contracting with counterparties from other states party to the Convention, South African entities can proceed with reasonable certainty that their arbitral awards will be recognised and enforced in those jurisdictions.

In the negotiation of cross-border financing transactions, regard should be had not only to the ease of obtaining a judgment or award, but also to the practicalities of enforcement. The legal regime governing enforcement of foreign arbitral awards offers a degree of clarity and, in some cases, reciprocity that is absent in respect of court proceedings.

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