The Place of Africa on the Global Stage of Foreign Judgments Enforcement

By:

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Inevitably, disputes arise in the course of international commercial transactions and civil matters generally. In such cases, litigants will seek to ensure effective outcomes during legal proceedings. The Hague Conference on Private International Law has coordinated efforts to attain an effective global legal framework on the recognition and enforcement of foreign judgments. In this regard, such efforts have focused on harmonising jurisdictional rules in civil and commercial matters.

Many scholars would have found it rather difficult to predict the turn of events after the 1971 Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters was concluded. Only five countries demonstrated any form of commitment: Albania, Cyprus, Kuwait, the Netherlands and Portugal. Kuwait's commitment is noteworthy partly because it was not a contracting party to the Hague Conference – a position that remains

unchanged. The fact that Kuwait acceded to the 1971 Convention only in 2002, more than two decades after that Convention entered into force, highlights the continuing importance of foreign judgments.

Since 1971, international commercial transactions have become more complex and it was a matter of time before further efforts to attain a convention would be initiated. The Hague Judgments Project that started in 1992 was ambitious. The initial part of that Project resulted in the 2005 Choice of Court Convention, but this fell short of the original ambition of the Conference which was a broad convention that would focus on international jurisdiction and recognition and enforcement rules. In 2012, the Council on General Affairs and Policy decided to resume work on the Judgments Project with a more modest ambition to focus on rules of indirect jurisdiction. This resulted in the 2019 Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial matters. The 2019 Judgments Convention is a clear reflection of determined efforts to produce a global legal framework that can support the free movement of foreign judgments.

There have been many developments since 1971 in terms of membership and Africa has had more, but not adequate, representation at the level of membership of the Hague Conference. One implication of such developments is that it is rather difficult to predict how much commitment African countries will have to the 2019 Convention. Clearly, one of the indices of a successful 2019 Convention will be how many countries (including those in Africa) sign up to the convention and how useful litigants find it in their efforts to enforce judgments obtained abroad. There is already evidence that African countries will sign up to Hague conventions if they consider it necessary. An example is the 1993 Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption. Several African countries have demonstrated different forms of commitment to the Convention even though they are not members of the Hague Conference – a trend that is not limited to Africa.

This trend could be encouraging or potentially misleading depending on the perspective from which it is assessed. On the one hand, the hope is perhaps that African countries will find more Hague conventions useful and be committed to them. On the other hand, the question is whether signing up to

such conventions (including the 2019 Judgments Convention) will address the challenges associated with the recognition and enforcement of foreign judgments in African countries. This question needs to be considered from several perspectives.

There is merit in aligning with a global trajectory on foreign judgments, but African countries should ensure they are able to maximise the benefits of such conventions. It is may not be practical to ignore the impediments to the free movement of foreign judgments in African countries and assume that any convention would, ipso facto, obviate the need to address such impediments. There is a tendency for some African courts to spend an inordinately long time to decide cases especially as litigants explore options of appeal are sometimes complicated by the existing jurisprudence on issues. It is possible that most countries in the world, including Africa, will be committed to the Hague conventions eventually – especially the 2019 Judgments Convention. However, it is important to consider what happens before then. Litigants will still have recourse to the local legal frameworks and jurisprudence in African countries.

The attitude of courts is important. A major step is to avoid technicalities. The avoidance of technicalities is anchored to judicial attitudes. There is of course something to be said about statutory laws that are convoluted or technical and there are several statutory frameworks that could be clearer or more effective. Nigerian and South African contexts provide insightful illustrations here. Essentially, Nigeria relies on a statute of nearly a century old (the Reciprocal Enforcement of Judgments Act 1922 — Chapter 175, Laws of the Federation and Lagos 158). Conversely, statutory law is of less practical importance in South Africa where the Enforcement of Foreign Judgments Act 32 of 1988 has been extended to Namibia only. Nigerian courts drive Nigerian jurisprudence by interpreting statutory law on foreign judgments while South Africa does so by extensive reliance on the common law since statutory law is of very limited application. The role of the courts will remain important for a long time and their attitude to foreign judgments cannot be disregarded.

The question of how courts characterise foreign judgments can be critical as illustrated through *Access Bank Plc v Akingbola* (2014) 3 CLRN 124. In that case, the Lagos High Court focused on the corporate nature of the subject

matter vis-à-vis the Nigerian Companies and Allied Matters Act. Thus, that court did not enforce the English judgment. Although it is a High Court case, it remains a good example of how African courts need to reflect on what the focus should be. The exhaustive philosophy, an important element of which was a strict territorial or even parochial approach, that underpinned that judgment has not been addressed by appellate courts. That case proved that a consideration of traditional bases of jurisdiction is important, but such jurisdictional rules cannot lend themselves to automatic enforcement. Sustainable progress in the area of foreign judgments should be anchored to a deeper consideration vis-à-vis judicial attitude. Otherwise, neat categories concerning the bases on which courts can enforce foreign judgments will be of limited practical use.

South African courts generally have adopted a rather pragmatic approach which has led to a clearer inclination to promote the free movement of foreign judgments. Several South African cases including *Richman v Ben-Tovim* 2007 (2) SA 203 where the South African Court of Appeal enforced a foreign judgment, have gravitated to a presumption of enforcement. Beyond a consideration of jurisdictional bases, that case clearly demonstrated the importance of judicial attitude to the recognition and enforcement of foreign judgments. African courts should strive for legal certainty and predictability of course, but there needs to be clarity on what the focus should be in efforts to promote the free movement of foreign judgments. Such focus could be to enforce foreign judgments and thus be less inclined to indulge applications that are aimed at frustrating the enforcement of foreign judgments based on technicalities.

Foreign judgments have not been impeded for want of jurisdictional bases in African countries such as Nigeria or even South Africa. Residence, domicile, presence and submission are some traditional bases that have shaped the jurisprudence of many African countries, especially due to their colonial history. Such jurisdictional bases remain important to varying degrees, although there is scope to debate whether they are enough. The question is not so much whether there should be more or alternative jurisdictional bases as how a pragmatic approach should be adopted to ensure effective legal outcomes. A well-articulated focus on enforcing foreign judgments (subject to an appropriate

balance between the interests of litigants and States) can be expressed through any set of principled criteria. Such criteria can then be juxtaposed with any jurisdictional basis or set of bases. This is one way by which African countries can assess their need to be committed to any convention on foreign judgments.

A consideration of how Africa can fit into a global system of recognising and enforcing foreign judgments is important. However, it is also important for African countries to consider the extent to which their local jurisprudence can support an external system subject to domestic ratification. If African countries need a convention to improve their local jurisprudence in any significant manner, then sustainable development in this area of law may be more challenging than necessary. If, however, an external framework will be complementary to a robust jurisprudence in individual African countries that supports the free movement of foreign judgments, then there is much hope for a future that will factor in political realities and socio-economic partnership. African countries should decide how best to position themselves to maximise the benefits of any relevant Hague conventions.

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