CLIFFE DEKKER HOFMEYR

THE CURRENT LANDSCAPE OF ARBITRATION IN SOUTH AFRICA

Presenter: Jackwell Feris
Assisted by: Buhle Duma

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Arbitration in South Africa

International Arbitration Act 15 of 2017

- Came into effect 20 December 2017
- Replaced the Arbitration Act 1965 – and focused specifically on international arbitration.
- Incorporated the UNCITRAL Model law
- Provides for some uniqueness around confidentiality, especially when an organ of state is party to the arbitration .

Arbitration Act 42 of 1965

- Continues to be applicable for domestic arbitrations.
- There is a promises underway to harmonize the domestic and international arbitration laws.

Promotion and Protection of Investment Act no 22 of 2015

- Deal with investment dispute resolution against the South African government – provide for mediation as preferred means of dispute settlement. Allows for government to consent to international arbitration.

New York Convention – member of Convention

The Washington Convention – not a member of Convention

GENERALLY, the South African courts have always maintain the sanctity of arbitration agreements and will not be slow to enforce.

INTERNATIONAL COMMERCIAL ARBITRATIONS IN SOUTH AFRICA – THROUGHT THE CASES

2019:

- ***Government of the United Republic of Tanzania v Hermanus Philippus Steyn*** **(28994/2019) [2019] ZAGPJHC 312 (4 September 2019); 2019 JDR 1690 (GJ) ("Reconsideration Judgment") –**

- **Enforcement proceedings. Contention that: An arbitration award made an order of court ceased to exist. Judge erred** - Only once a foreign arbitral award has been set aside or annulled in the seat of arbitration in accordance with article V(1)(a) of the New York Convention and section 18(1)(b)(vi) of the South African International Arbitration Act it is considered to cease to have legal existence and has become null.

- The approach adopted by Judge Twala in the Reconsideration Judgment to consider the Steyn Award as having ceased to exist for recognition and enforcement purposes in South Africa did not accord with what is contemplated by the New York Convention and the South African International Arbitration Act.

2019:

- Seat of arbitration in Johannesburg – shareholders agreement: **Vedanta Resources Holding PLC** successfully obtained an injunction order on 23 July 2019 from the South African High Court against ZCCM Investment Holdings PLC, ordering ZCCM to cease from taking any further steps in the winding-up proceedings of Konkola Copper Mines Plc in Zambia, pending the final determination of an arbitration under the terms of a shareholders' agreement between the parties.

- The Johannesburg High Court provided the following reasons, amongst others, for its final order:

  - the issues raised by ZCCM in the winding-up application related to matters flowing from the shareholders' agreement, which issues were disputed by Vedanta and accordingly constituted disputes under the arbitration clause of the shareholders' agreement; and

  - although all issues in dispute were based in Zambia, the seat of arbitration was Johannesburg and the court thus had exclusive jurisdiction to entertain the injunction application by virtue of article 17J of the UNICTRAL Model Law on International Commercial Arbitration incorporated in the International Arbitration Act, 2017

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Arbitration in South Africa

Kingdom of Lesotho v Frazer Solar GMBH and Others (2020/33700) [2023] ZAGPJHC 1486 (31 August 2023)

Facts

- This matter arises from a contract purportedly, concluded between the Kingdom of Lesotho “KOL” and a Germany company Frazer Solar GMBH (“FSG”). The supply agreement purported to oblige KOL to borrow money from German financial institutions and use that money to buy energy-efficient light bulbs and solar geysers from FSG. The supply agreement ultimately led to an arbitration award and an order of this court in favour of FSG. The minister who purportedly signed the supply agreement on behalf of the KOL was Minister Tsolo.

- Having considered submissions from only FSG, the arbitrator held that (1) he had jurisdiction over KOL ; and (2) he awarded a sum of liquidated damages against KOL. FSG then sought an order making the arbitration award an order of this court. This order was granted on an unopposed basis.

- Kol brought an application in the Lesotho High Court to review and set aside the decision to enter into the supply agreement and the arbitration agreement it contained. The Lesotho High Court declared the decision to enter into the supply agreement, the supply agreement and the arbitration agreement void and invalid *ab initio*.

Issues requiring determination

- Whether a case for the rescission of the order of Lamont J has been made out on various grounds including whether (1) the arbitration award should be set aside under Article 34 of the Model Law and to what extent, the court should recognize the findings of the Lesotho High Court.

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Issues requiring determination

- It was submitted by KOL that this case turns on the following question: *'Did the Kingdom of Lesotho ever agree that its disputes with FSG in connection with the Supply Agreement would be subject to Arbitration in South Africa, thus waiving its sovereign immunity?'* If the answer to this question is 'no', then the following consequences occur:

(a) the Arbitration clause contained in the supply agreement was then invalid;

(b) there was no consent to arbitrate;

(c) the arbitrator's finding that he had jurisdiction was wrong; and

(d) this court never had jurisdiction to make the arbitration award an order of court.

- FSG's argument on authority is that:
  - ❖ Minister Tsolo had actual authority to conclude the Arbitration Agreement because of section 10 of the Lesotho Government Proceedings and Contract Act 4 of 1965.
  - ❖ Even if he lacked actual authority, a foreign Cabinet Minister can bind the state with either actual authority or with ostensible authority and therefore the requirements of ostensible authority were met in this matter.

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The Separability Test

- The doctrine of separability requires direct impeachment of the arbitration agreement before it can be set aside. This is an exacting test. The argument must be based on facts specific to the arbitration agreement. Allegations that are parasitical to a challenge to the validity to the main agreement will not do.'

- 'It would have to be shown that whatever the terms of the main agreement or the reasons for which the agent conclude it, he would have had no authority to enter into an arbitration agreement.'

The Rescission of the Court Order

The Kingdom's case for rescission of the order of this court is based on three separate grounds:

1. In terms of Uniform Rule 42, the order was erroneously sought or granted.

2. The Kingdom never consented to the supply agreement, including the arbitration clause the court did not have jurisdiction over the Kingdom.

3. In terms of the common law, the Kingdom has explained the reasons for its default of appearance before this court and seeks rescission of the court order on the basis of a bona fide defence which enjoys extraordinarily strong prospects of success.

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Judgement

- On a conspectus of all the factor taken into consideration and the submissions made by the parties, the Court concluded that the time bar in Article 34(3) of the Model Law as domesticated and adopted by the IAA, must be interpreted as a rigid time bar, subject only to relaxation in relation to the specific cases of fraud and corruption that are identified in Article 34(5) b. There is no basis upon which a tacit general power to condone non-compliance can be read into the Model Law.

- When each of the factors in section 36 of the Constitution are weighed together, to the extent that Article 34(3) of the Model Law as adopted and adopted by the IAA limits the fundamental rights of access to court, it constitutes a reasonable and justifiable limitation.

- The application was dismissed with costs

Arbitration in South Africa

Lukoil Marine Lubricants DMCC v Natal Energy Resources and Commodities (Pty) Ltd (12583/21P) [2023] ZAKZPHC 31 (16 March 2023)

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Facts

- In 2016, the applicant Lukoil Marine Lubricants DMCC ("Lukoil") and the respondent Natal Energy Resources and Commodities ("Natal“) entered into a distribution and sales agreement for marine lubricants. After various disputes had arisen between the parties, Lukoil and Natal concluded a settlement agreement and a Service Provider Agreement under which Natal stored and sold goods supplied to it by Lukoil.

- Both the Settlement Agreement and the Service Provider Agreement included arbitration clauses which provided for disputes to be resolved through arbitration in London under the rules of the London Maritime Arbitrators Association and governed by English law.

- Lukoil subsequently alleged that Natal had breached the Service Provider Agreement in various ways and purported to terminate the agreement. As a result, it commenced proceedings in the South African courts for the return of goods supplied to Natal under the framework of the Service Provider Agreement, together with re-payment of approximately US$ 500,000.

- In response, Natal raised an argument that the matter was to be resolved by arbitration in London, alternatively, that the dispute proceed to trial in accordance with the provisions of the Settlement Agreement and the Service Provider Agreement.

Arbitration in South Africa

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Judgement

- The Kwazulu-Natal Division of the High Court (P C Bezuidenhout J) held that the application should be stayed pending the finalization of arbitration proceedings in London in accordance with the Parties' agreements.

- The Court considered that because there was a dispute which could not be determined from the papers before it, the correct approach was for the matter to be decided in arbitration proceedings.

- The decision of the High Court provides affirmation of the pro-arbitration approach adopted by the South African courts in the context of the International Arbitration Act and serves as a reminder of the principle of separability, which provides that an arbitration agreement is separate and independent of the underlying agreement in which it is contained.

Arbitration in South Africa

(GFE MIR Alloys and Minerals SA (Pty) Ltd v Momoco International Limited [2023] ZAGPJHC 946 (24 August 2023))

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Facts

- In 2020, Momoco International Limited ("Momoco") obtained an arbitral award (in proceedings conducted under the rules of the China International Economic and Trade Arbitration Commission (CIETAC) by a tribunal seated in Beijing) requiring payment of substantial sums by GFE-MIR Alloys and Minerals SA (Pty) Ltd ("GFE") for goods supplied to, but not paid for by, GFE.
- When GFE failed to comply with that award, Momoco applied to the High Court for the recognition and enforcement of the foreign arbitral award in South Africa under s.16 of the IAA. In response, GFE argued that Momoco was guilty of tax evasion in the United Kingdom and sought to resist recognition and enforcement of the award as contrary to public policy under section 18 of the International Arbitration Act (IAA).
- The High Court held that GFE had not shown that enforcement of the arbitral award would be against public policy and declared that the arbitral award is made an order of court pursuant to the IAA.
- GFE applied for leave to appeal the order recognizing the foreign arbitral award. Momoco applied for a declaration that the order remained operational and executable in full, regardless of GFE's application for leave to appeal.

Judgment

- Where a party seeks to avoid contractual consequences on the basis that they are **contrary to public policy**, that party bears the burden of proof. GFE had not met that burden. Because the appeal thus had no reasonable prospect of success and there was no other compelling reason why an appeal should be heard, the application was dismissed. The court also declared that the order recognizing the foreign arbitral award continued to operate.
- The case exemplifies a clear recognition of South Africa's obligations as a signatory of the New York Convention.
- It also provides an indication that the South African courts may interpret the public policy exception in the IAA narrowly, and thus adopt a hands-off approach to challenges to the recognition and enforcement of foreign awards and applications to set aside arbitral awards issued in South Africa.

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