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The Know How to Enforcing Foreign Arbitration Awards in South Africa

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Legislative Framework

After much anticipation, the South African International Arbitration Act 15 of 2017 ("new Act") was welcomed by arbitration practitioners in December 2017. The intention of the new Act has been to incorporate the UNCITRAL Model Law as the cornerstone of the international arbitration regime in South Africa. The South African Arbitration Act 42 of 1965 remains applicable to domestic arbitrations.

One of the most significant changes in the new Act was the incorporation of the Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977 (the "REFAA Act") which was promulgated to give effect to the New York Convention, that was signed by South Africa in 1976. The REFAA Act recognised that a foreign arbitral award is binding between parties and is capable of being enforced by way of application to the court, to have the award made an order of the court. To avoid duplication of legislation, the REFAA Act has been repealed in its entirety and replaced by the new Act.

Procedure

The court application to have a foreign arbitral award made an order of a court is a fairly lengthy process. A Notice of Motion and Founding Affidavit is lodged by the Applicant (the party wanting to enforce the award) at a High Court in South Africa that has jurisdiction over the matter. Jurisdiction is usually determined with reference to the principal place of business or the location of the assets of the Respondent (the party against whom the award is being enforced). In terms of section 17 of the new Act, the application is required to be accompanied by the original foreign arbitral award and the original arbitration agreement in terms of which the award was made,

both authenticated for use in the High Court, together with certified copies of the award and the agreement.

The application is issued by the Registrar of the High Court served on the Respondent by the Sheriff of the court. The Respondent can then elect to oppose the application or not. Should the Respondent elect to oppose the application, it is required to file a Notice of Intention to Oppose within the time period set out in the Notice of Motion (between 5 to 10 days). Thereafter, the Respondent is required to file an answering affidavit on the Applicant within 15 days of serving its Notice of Intention to Oppose. The Applicant will then be afforded an opportunity to file a Replying Affidavit, within 10 days of receipt of the Respondent's Answering Affidavit.

In terms of the High Court Rules, an Applicant is entitled to make an application to the court on an urgent basis, in accordance with Rule 6(12) of the Uniform Rules of Court. In this instance, the time periods are reduced and general procedure applicable to applications is shortened. However, the Applicant would be required to motivate as to why the matter is urgent, for example, that the Respondent is in the process of disposing of all its assets in South Africa. Should the court find that grounds for urgency do not exist; the matter will be enrolled on the ordinary motion court roll.

Advantages and Pitfalls

When it comes to enforcing arbitration awards, time is of utmost importance. When a matter is placed on the ordinary court roll and the application is opposed, the hearing usually takes places approximately 4-6 months after the matter is enrolled – a pitfall with enforcement in South Africa. It is no secret that a successful party to arbitration wants to have the award enforced as soon as possible so as to receive what it is entitled to, and therefore a 4-6 month delay in enforcement can cause prejudice to the successful party. If the application is not opposed, the application can be heard approximately 1-2 months after the relevant time period has lapsed for the Respondent to serve its notice of intention to oppose.

When a party is considering opposing the enforcement of a foreign arbitral award, section 18 of the new Act is important and sets out the various grounds on which the enforcement of a foreign arbitral award will be refused. If a court finds that a reference to arbitration where the subject matter of the dispute is not permissible under the laws of South Africa or where the award is contrary to public policy, the court will refuse to recognise or enforce the foreign arbitral award.

Where a party against whom the award is sought to be invoked can prove (1) a party to the arbitration agreement had no capacity to contract, (2) the arbitration agreement is invalid under the law to which the parties are subjected to, (3) that he or she did not receive notice of the appointment of the arbitrator or the arbitration proceedings or was not able to present his or her case, (4) the award deals with disputes not contemplated by or falling within the terms of reference, (5) the arbitration procedure was not in accordance with the arbitration agreement or laws of the country in which the arbitration took place, or (6) the award is not yet binding on the parties or has been set aside or suspended by a competent authority, the court may refuse to recognise or enforce a foreign arbitral award.

There is currently no case law dealing with section 18 of the new Act, however, as the wording of section 18 mirrors that of section 4 of the REFAA Act, the below cases remain significant when dealing with refusal of recognition and enforcement of foreign arbitral awards. South African law recognises the principle of judicial precedent. It is very likely that case law decided upon with reference to the REFAA Act will still bear precedential value when deciding case law under the new Act.

In the case of Seton Co v Silveroak Industries Ltd (2000 (2) A 215 (T)), the Respondent opposed an application to have an award by a French arbitral tribunal for damages in favour of the Applicant recognised by the High Court, on the grounds that the award was tainted by a fraud committed on the tribunal by the Applicant. The Respondent contended that the South African High Court should refuse the enforcement of the award by virtue of the provisions of section 4(1)(a)(ii) of the REFAA Act in that it was contrary to public policy to recognise an award obtained through fraud. The Respondent conceded that it did not have evidence on the affidavit to substantiate the allegation of fraud, but that there was someone who, if subpoenaed to give viva voce evidence, would give the necessary evidence.

The court held that section 4(1)(a)(ii) of the REFAA Act provided that a court would only refuse to recognise a foreign arbitral award if on the face of the award and the arbitration agreement it was clear that the agreement was contrary to public policy. To successfully claim that the award was obtained under fraudulent means (and therefore against public policy), there ought to be no extraneous evidence to persuade the court that the agreement in question was an illegal agreement. The Respondent was required to approach the French court to have the award set aside on the grounds of alleged fraud and parallel to that, make an application for a stay of the Applicant's application to have the arbitral award enforced, pending the outcome of the Respondent's application to have the arbitral award set aside in France. The South African High Court found no reason not to recognise the award, and therefore the Applicant's application for recognition and enforcement succeeded.

In Phoenix Shipping Corporation v DHL Global Forwarding SA (Pty) Ltd and Another (2012 (3) SA 381 (WCC)), Phoenix and DHL approached the Western Cape High Court for an order for the recognition and enforcement of a London arbitral award. Bateman Ltd resisted the application on the grounds that it was never a party to the agreement referred to in the request for arbitration, that the arbitrator had accordingly lacked jurisdiction over it, and that the enforcement of the award would, therefore, be contrary to public policy. DHL relied on the booking note, which provided that the parties submitted to London arbitration. DHL contended that the arbitrator had made an award against Bateman Ltd and that Bateman Ltd had failed to satisfy the arbitral award, which the court was then obliged to enforce.

The court held that the booking note issued by Phoenix did not, in South African law, constitute a binding contract of carriage for the transportation of Bateman Ltd.'s machinery in terms of which the parties submitted any dispute to arbitration. Arbitration is characterised by its consensual nature and there was nothing to suggest that there ever was a consensus (either between Bateman Ltd and DHL or between Bateman Ltd and Phoenix) to conclude a contract in terms of which the parties had agreed to submit to arbitration. Both the common law and the REFAA Act recognised the importance of an arbitration agreement as a prerequisite to the enforcement of the arbitral award. In this case, as a fact, there had not been a valid agreement concluded between DHL and Bateman Ltd, agreeing to arbitration in terms of either English law or South African law. DHL had accordingly failed to allege and prove a valid arbitration agreement. Absent an arbitration agreement, no arbitrator could claim jurisdiction to determine a dispute and an order for the recognition and enforcement of a foreign arbitral award, which on the face of it was invalid, would be contrary to the principles of public policy.

Whilst it may take some time to have a foreign arbitral award made an order of a court in South Africa, parties can be confident that the South African courts will continue to uphold the principles of public policy and remaining practical and impartial when deciding to recognise and enforce a foreign arbitral award.

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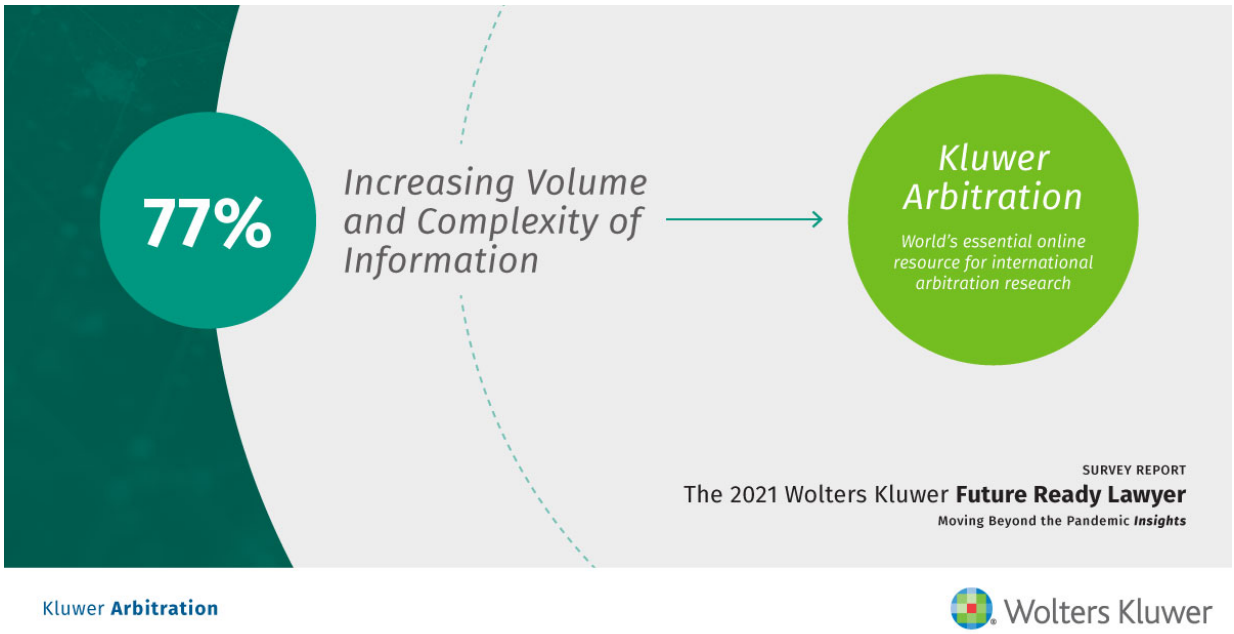

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