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How to Recognize and Enforce a Foreign Arbitral Award in the Kingdom of eSwatini?

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The answer to the question of how to recognize and enforce foreign arbitral awards in currently at least 164 jurisdictions worldwide usually starts with a reference to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). Not so in the Kingdom of eSwatini, one of the few jurisdictions who still do not apply the New York Convention.

Before turning to the question in the headline of this post, there is another burning question that needs to be answered first: Where is the Kingdom of eSwatini? The comparatively small country in Southern Africa formerly known as Swaziland officially changed its name a bit more than two years ago, on 19 April 2018. That was also the fiftieth birthday of Mswati III., King and Ingwenyama of eSwatini, who was born in 1968, the same year when Swaziland gained its independence from the United Kingdom. (Fun fact: The title "Ingwenyama" in the language siSwati translates to both "lion" and "king" – those who now think of "The Lion King" are not far off, as the isiZulu word "Ingonyama" has the same two meanings and appears in the movies' theme.) There were two reasons for the name change: First, Mswati III. wanted to use the country's original name again. Second, he wanted to put an end to the apparent confusion caused by the proximity of the name "Swaziland" to "Switzerland", a confusion that, as Swiss television reports, had caused letters intended to be sent to Switzerland to end up in Swaziland.

Now turning to the question in the headline, the answer is relatively easy in only two cases: If the award is an ICSID arbitral award or if the Reciprocal Enforcement of Judgments Act, 1922 applies.

The ICSID Convention has been in force in eSwatini since 14 July 1971. In addition, the Arbitration (International Investment Disputes) Act 1966, which came into force on 20 January 1967, declared the United Kingdom's Act of the same name applicable to eSwatini, with certain modifications. However, it seems like there has not been a single ICSID case against the Kingdom of eSwatini so far – only a publicly available Notice of Investment Dispute.

The Reciprocal Enforcement of Judgments Act, 1922 came into force on 27 January 1922 and provides that judgments from certain courts in certain jurisdictions may be registered, and thus enforced, in eSwatini. According to Section 2 of this Act, "judgment" also "…includes any award in proceedings on an arbitration if such award has, in pursuance of the law in force in the place where it was made, become enforceable in the same manner as a judgment given by a court in such place". The Act originally applied to certain courts in England, Ireland, and Scotland, and – by

virtue of the Schedule to the Reciprocal Enforcement of Judgments Rules, in force since 16 June 1923 – today extends to certain courts from Lesotho, Botswana, Zimbabwe, Zambia, Zanzibar, Malawi, Kenya, New Zealand, Western Australia, the rest of Tanzania (in addition to Zanzibar), Uganda, New South Wales, Victoria, the Territory of North Australia, and the Territory of Central Australia.

But what if the arbitral award is not an ICSID award and not an award falling under the Reciprocal Enforcement of Judgments Act, 1922?

The Arbitration Act, 1904 came into force on 28 July 1904 and, in its Section 17, contained in Part II on "References by consent out of Court" and titled "Award; how to be enforced", provides that "[a]n award which has been made an order of Court may be enforced in the same manner as a judgment or order to the same effect." Part III on "References under order of Court" contains a similar provision in its Section 22. However, the Act does not state the conditions for making an award an order of court. It also does not clarify whether these provisions apply only to domestic or also to foreign arbitral awards.

Three court decisions on the recognition and enforcement of foreign court decisions provide some guidance.

In the case of Economa Proprietary Limited v Leornard Charles Hudson (Case No. 1594/93), *Economa* had requested the recognition and enforcement of a South African court decision in Swaziland, and the High Court of Swaziland made a decision on 17 June 1994. In doing so, the court set an important precedent by holding that where the Reciprocal Enforcement of Judgments Act, 1922 does not apply (such as in relation to South Africa), a foreign court decision could be recognized and enforced under the Roman Dutch Common Law.

In the case of Tsabile Mamba v Bhadala Mamba (Case No. 1451/09), the High Court of Swaziland, in its decision of 13 January 2011, reversed its decision in *Economa v Hudson*, although without explicitly mentioning it. One of the parties had requested the recognition and enforcement of a court judgment from the United States of America. As the Reciprocal Enforcement of Judgments Act, 1922 did not apply, the court – at least according to *Economa v Hudson* – would have had to apply Roman Dutch Common Law. Yet the court did not do so. Instead, it relied on Article 252(1) of the 2005 Constitution of the Kingdom of Swaziland, which as far as relevant here states that "…Roman Dutch Common Law … shall be applied and enforced as the common law of Swaziland except where and to the extent that those principles or rules are inconsistent with this Constitution or a statute." The reasoning of the High Court of Swaziland was that the Reciprocal Enforcement of Judgments Act, 1922 was a statute with which the Roman Dutch Common Law rules on the recognition and enforcement of foreign court decisions were inconsistent.

On 21 February 2020, the High Court of eSwatini – in the case of Improchem (Pty) Limited v USA Distillers (Pty) Limited (Civil Case No. 1130/17) explicitly overruled the decision in *Mamba v Mamba* and reinstated the rule established in *Economa v Hudson*. It is now once again good law in eSwatini that foreign court decisions can be recognized and enforced by application of Roman Dutch Common Law if they do not fall under the Reciprocal Enforcement of Judgments Act, 1922.

Moreover, the *Improchem* decision is directly relevant to the recognition and enforcement of foreign arbitral awards. The parties had arbitrated in 2012 and 2013, and an arbitrator then made an award on 31 January 2014. Afterwards, an arbitral tribunal heard an appeal against the award and

handed down a modified award on 17 September 2014. *Improchem* moved an application in the Gauteng Local Division of the High Court of South Africa, seeking to have the appeal award made an order of court, and the court did so on 31 August 2016. This South African decision is not publicly available, according to footnote 8 in another South African decision. Improchem's request in eSwatini was for the recognition and enforcement of that South African court judgment.

The following findings in the decision may help to assess how the courts of eSwatini will treat similar requests in the future:

Relying on the South African leading case in Jones v Krok, the court held that "…the argument on public policy would ordinarily refer to orders or judgments that have been obtained through fraudulent means or where the order that was obtained in the foreign jurisdiction is illegal in the jurisdiction where it is sought to be recognized and enforced."

With regard to the scope of review, the court explained that "[t]here is no doubt in my mind that there is no basis in law upon which I can enquire into the merits of the appeal award."

Finally, on the question of whether the South African arbitral award could have been recognized and enforced in eSwatini directly, without first making it an order of court in South Africa, *Mlangeni* J provided the following answer:

> "It appears to me that for purposes of enforcing the award in this country there was no need to first make it in order of court in South Africa. The application could, in my view, have been made in this jurisdiction where the Respondent is believed to have assets. On the other hand nothing has been lost by making it an order of court in South Africa – except, of course, the escalating litigation costs. The route to recognise and enforce the award in this country would have been shorter and cheaper."

For those willing to recognize or enforce a foreign arbitral award in eSwatini, the decision in *Improchem v USA Distillers* thus has the following consequences:

1. Foreign arbitral awards can be recognized and enforced either directly in eSwatini or after having been recognized and declared enforceable in their country of origin.
2. There will be no review on the merits of the foreign arbitral award.
3. There will only be a limited review for violations of public policy.

At the same time, the *Improchem* decision does not answer the question of whether the legal basis for a recognition and enforcement of foreign arbitral awards is the Arbitration Act, 1904 or Roman Dutch Common Law (or a combination of both), and it does not list the requirements that need to be fulfilled for a successful application.

To sum up, the High Court of eSwatini's recent decision in *Improchem v USA Distillers* receives praise as it provides several positive clarifications.

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This entry was posted on Thursday, June 18th, 2020 at 8:00 am and is filed under Enforcement, Foreign arbitral awards, Kingdom of eSwatini
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