Kluwer Arbitration Blog

The Intersection of Arbitration Agreements and Shareholder Remedies in South Africa

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There is extensive commentary on South Africa's evolution into a pro-arbitration jurisdiction. Its courts have long issued strong pro-arbitration judgments under the 1965 Arbitration Act ("**Domestic Arbitration Act**") and, more recently, under the (relatively) new 2017 International Arbitration Act ("**IAA**"). Johannesburg also hosted the inaugural Johannesburg Arbitration Week in 2024, bringing together delegates from around the world and further reinforcing South Africa's pro-arbitration stance. However, in light of a 2012 High Court judgement issued before the enactment of the IAA, uncertainty remains as to whether disputes under section 163 of the Companies Act – its shareholder oppression remedy proceedings – can be subject to arbitration.

The International Arbitration Act: International Alignment

The introduction of the IAA marked the formal incorporation of the UNCITRAL Model Law ("**Model Law**") into South Africa's arbitral landscape, solidifying the country's commitment to being recognised as a pro-arbitration jurisdiction.

Under the IAA an arbitration is considered international if the parties to the arbitration agreement have their place of business in different states at the time of concluding the arbitration agreement. It is also deemed international if the place of arbitration, the location where substantial contractual obligations are performed, or the subject matter of the dispute is closely connected to a different state. The parties may also agree that the arbitration involves more than one country, thereby elevating it to an international arbitration.

South Africa's courts have consistently upheld a strong stance in support of the arbitral process. For instance, South Africa's penultimate Court, the Supreme Court of Appeal ("**SCA**"), in *Tee Que Trading Services (Pty) Ltd v Oracle Corporation South Africa (Pty) Ltd and Another (case no 065/2021) [2022] ZASCA 68 (17 May 2022)*, held that:

> *"The Model Law reflects the international approach to international commercial arbitration agreements that, unless an arbitration agreement is null and void, inoperable or incapable of being performed, courts are obliged to stay action proceedings pending referral to arbitration."*

Arbitration Agreements in South Africa: A Sanctified Agreement

South Africa's arbitration framework upholds the sanctity of arbitration agreements. Section 3 of its Domestic Arbitration Act limits a court's ability to interfere with an arbitration agreement. Only in instances where 'good cause' is shown, may a court set aside an arbitration agreement. Section 6 of the same Act empowers a party wishing to enforce an arbitration agreement to seek a stay of court proceedings pending arbitration. Notably in these instances, the burden falls on the party attempting to bypass arbitration to justify why the agreement should not be enforced.

The IAA takes a more assertive approach. Section 7(2) ensures that an arbitration agreement cannot be disregarded solely because a specific law grants jurisdiction to a court over a matter covered by an arbitration agreement. Article 8 of Schedule 1 to the IAA states that a court may only refuse to stay proceedings pending arbitration if the arbitration agreement is found to be null, void or inoperative. Together, these provisions reflect the South African legislature's intention to prevent arbitration agreements from being bypassed merely because a law, such as section 163, grants jurisdiction to a court on a particular subject matter.

Section 163 – Exclusive Court Power?

Section 163 of South Africa's Companies Act is designed to give shareholders legal recourse if they feel oppressed by the actions of another, often majority, shareholder. If a company, through the way its business is conducted, or through the exercise of a director's powers is deemed oppressive, a concerned shareholder may apply to court under section 163 for relief.

However, to be successful, the shareholder must demonstrate that the action in question is indeed oppressive or unfairly prejudicial. Section 163 grants the court wide-ranging powers to provide various remedies to an oppressed shareholder, including ordering the issuance or exchange of shares or even directing a company to commence business rescue proceedings. The main challenge with arbitration in this context is that an arbitrator lacks the power to grant certain remedies available to courts under section 163, such as ordering that business rescue proceedings must commence.

Peel and Others v Hamon J&C Engineering (Pty) Ltd and Others – The Source of Tension

The apparent tension between section 163 and the enforceability of arbitration agreements in South Africa came to the fore in the South Gauteng Division of the High Court's 2012 decision of *Peel and Others v Hamon J&C Engineering (Pty) Ltd and Others [2013] 1 All SA 603 (GSJ)* (*"**Peel**"*). Here, the applicant launched oppression remedy proceedings under section 163, while the respondents contended that the dispute fell within the scope of an existing arbitration agreement and should be referred to arbitration. However, the court dismissed the respondents' argument, holding that an arbitrator lacks the authority to grant the broad range of remedies provided under Section 163. In paragraph 68 of its judgment, the court stated:

> *"However, if I am incorrect in the above determination, I believe that the arbitration defence should also not succeed on the following grounds. The present application is brought under the provisions of sec 163 of the new Companies Act. The entity that is supposed to conduct the arbitration process, namely AFSA, clearly does not have the powers to grant the relief as envisaged in sec 163 of the new Companies Act, only a Court does."*

The type of relief to which the court referred to in *Peel* includes, for instance, an order to commence business rescue proceedings. However, when considering the broad range of remedies available under section 163, there are numerous other forms of relief that an arbitrator is competent to grant. These may include orders for the payment of compensation to an aggrieved party, or for the setting aside of an agreement. Importantly, the mere fact that a party seeks relief which only a court can grant does not automatically justify bypassing an arbitration agreement. An arbitrator retains the authority to resolve the factual disputes between the parties as agreed upon. Once the arbitral tribunal has made its findings, the successful party is then entitled to approach a competent court to seek the relief available under section 163.

***Peel*: An Outdated Approach?**

Given the *Peel* judgment was handed down in 2012 and therefore before the enactment of the IAA it can be argued that its position is now outdated. The IAA clearly establishes that, in cases where the subject matter of the dispute falls within the scope of the arbitration agreement, oppression remedy proceedings must be referred to arbitration.

This approach is consistent with South Africa's stance on the interpretation of agreements, in which the fundamental departure point is the language of the provision itself, along with the context and the purpose of the provision. In another SCA ruling, the court in *Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (24) SA 593 (SCA)* ("**Endumeni**") cautioned judges to:

"…be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation."

The suggestion that the *Peel* judgment is outdated aligns not only with South African legal principles but also with the approach in other jurisdictions. For example, England has dealt with similar issues regarding the enforceability of arbitration agreements and the oppression remedy. The English oppression (or "unfair prejudice") remedy and statutory support for the enforceability of arbitration agreements closely mirror that of South Africa.

In the English Court of Appeal case of *Fulham Football Club (1987) Ltd v Richards [2011] EWCA Civ 855 ("**Fulham**")*, the court addressed the relationship between the oppression remedy and arbitration agreements, stating that the unavailability of certain remedies to an arbitral tribunal does not render the dispute non-arbitrable. In other words, the tribunal's inability to grant specific relief does not prevent parties, such as those to a shareholder's agreement, from agreeing to arbitrate the factual aspects of their dispute. In Fulham, Fulham Football Club was not actually seeking remedies which were outside the arbitral tribunal's powers. However, the court commented

obiter that even where a party was seeking a remedy which could only be granted by the court, the arbitration agreement should operate as an agreement to first let the arbitrator decide on the subject matter of the claim and on whether a lesser remedy would be suitable before approving an application to the court based on the arbitrator's findings. The two-stage process suggested *obiter* in *Fulham* is not without its challenges, not least the potential for duplication of proceedings and differences of opinion between an arbitral tribunal and the courts.

Conclusion

While South Africa has made significant strides in adopting pro-arbitration measures, it is crucial to acknowledge that there are still areas in need of modernisation to align with international best practices. One such area is the interaction between the oppression remedy and the enforceability of arbitration agreements. Although the *Peel* judgment remains precent in South Africa, the incorporation of the Model Law into the country's arbitration framework, coupled with South Africa's growing acceptance of arbitration, suggests that South Africa's stance should rather mirror the approach taken by the English Court of Appeal in *Fulham*. It remains to be seen whether *Peel* will be overturned in future.

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