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PRACTICE NOTE

A review of judicial enforcement of arbitral awards in South Africa

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Abstract

This article postulates the constitutional ethos of upholding contracts entered between parties on the principle of good faith in practice. This is aligned to the international principle of respecting party autonomy between parties in court. A party cannot easily negate upon a contract that stipulates that a dispute must be referred to arbitration and furthermore that the arbitration award is binding upon the parties and not subject to appeal. This article aims to discuss that there is judicial enforcement of arbitral awards in South African courts. There is no distinction between national and international enforcement of arbitral awards. The principle of party autonomy is the cornerstone of the enforcement of arbitral awards. From a South Africa perspective, both national and international legislation supports the recognition and enforcement of arbitral awards. This article elucidates the intricacies of the enforcement of arbitral awards and the protection of party's interests to the proceedings. This article explores the consequences of the antithetical approach to arbitration agreements and proceedings. The judiciary's practice is to uphold the contractual principle of consensus between the parties, as opposed to allowing

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parties to walk away from awards on frivolous reasons and renegading upon contractual terms.

1 | INTRODUCTION

This article investigates and explores the decisions from courts. The case law illustrates that the judiciary upholds contractual terms entered between the parties, which is sacrosanct. In the Constitution of the Republic of South Africa, section 34 provides that a dispute may be resolved before an 'independent or impartial tribunal or forum'. The importance of this article illustrates the nuances and technical consequences that arise in the enforcement of foreign arbitral awards. The quintessential aspect of enforcement is consensus between the parties by perfecting an arbitration agreement. In the absence of a written agreement between the parties, an award holds no force or effect. International law supports the notion that if there is no consensus for arbitration proceedings, then an award is ineffective for the resolution of the dispute, as it has no binding effectiveness. Lack of consensus by one party to arbitration proceedings, negates the effectiveness of an award, and consequentially the award becomes void.

2 | RESEARCH QUESTION AND MAIN OBJECTIVES OF THE STUDY

The research question is an examination of enforcement of arbitral awards in South Africa. This article explores the case law in relation to enforcement of foreign arbitral awards in practice. This article extrapolates the reasons of the cases aligned to international conventions for the enforcement of the awards. The lapsing of review or appeal does not negate challenging an award based on the legal principles of contract, namely a written agreement concluded with the party on the common law basis of consensus enforcing the arbitration agreement.

3 | LITERATURE REVIEW AND CASE LAW

There has been a selection of cases discussed that confirm international principles in relation to upholding the contractual principles of consensus, enforcing arbitration agreements and foreign arbitral awards.

In the case of *Phoenix Shipping v DHL Global Forwarding SA (Pty) Ltd and Bateman Projects Ltd t/a Bateman Engineered Technologies* (2012) (3) SA 381 the salient facts related to correspondence for a shipment of machinery. The parties of DHL and Bateman Projects never concluded a written agreement. A booking note was construed as the agreement, which was not the intention of Bateman as he did not sign the booking note. He did not authorize the shipment, without a written agreement. An award was granted in the London Court of International Arbitration against DHL and Bateman. The contentious issue is that the booking note was not an agreement, thereby rendering the award invalid. Phoenix Shipping Corporation, the applicant in the case, brought an application for the award to be made an order of court, to enforce the award before the South African high court. Judge Yekiso of the High Court made a portion of the award an order of court, which was not contested. The remainder of the award was

contested, which he deliberated upon. Judge Yekiso used international cases to deliberate the validity of the award, and further whether a court could investigate the validity of the award. The point that was raised was the period for appeal and review relating to the defense of jurisdiction, which lapsed in terms of English law that governed the arbitration proceedings, and the issue of contention was whether the award could still be challenged in the circumstances of the time lapse of the appeal.

The argument that was contended by DHL was based on section 73 of the English Arbitration Act in that the period of review and or appeal had lapsed, which prevented Bateman from raising any defense against the enforcement of the arbitration award (Yekiso, 2012, p. 23). Bateman's counsel raised a counter argument in terms of the common law to enforce the award, which argued that irrespective of national or international awards, the applicant needs to prove that the arbitrator had the necessary jurisdiction to make the award (Yekiso, 2012, p. 23). As a result the applicant needs to prove an arbitration clause as contained in the arbitration agreement (Yekiso, 2012, p. 23). Section 4(1)(b)(i) of the Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977 adjusts the common law to the manner that Bateman possesses an evidential burden to show that no agreement was concluded (Yekiso, 2012, p. 23). It is necessary to emphasize that section 3(a) (i) of the Recognition & Enforcement of Foreign Arbitral Awards provides that the application for an award to be made an order of court, is annexed with the original arbitration agreement together with a certified copy of the award (Yekiso, 2012, pp. 23–24).

An irony in this case, is that DHL had challenged the jurisdiction and validity of the arbitrator in relation to the proceedings (Yekiso, 2012, p. 24). DHL did not seek to depend upon an arbitration agreement in the London arbitration proceeding yet in stark contradiction they seek to rely on that same agreement that was denied for the enforcement of the award against Bateman (2012, p. 24). It is evident that both the common law and the Recognition and Enforcement of Foreign Arbitral Awards Act contain the provisions that an arbitration agreement is peremptory for the enforcement of an award (Yekiso, 2012, p. 24). Judge Yekiso confirmed an English decision that affirmed the common law position in relation to the enforcement of an arbitral award. The case that Judge Yekiso confirmed was *Christopher v Brown Ltd v Genossenschaft Oesterreichischer* [1953] ALL ER 1039 and the four aspects raised in this English case for enforcement of arbitral awards was firstly a contract that contains the arbitration clause. Secondly that the dispute is referred to arbitration in terms of the contract and thirdly the arbitrators are appointed in terms of the arbitration clause and lastly to prove that the award was made, and the amount of the award was not settled in payment (Denning & Hodson, 1953, p. 1039).

It was argued by DHL's representatives that Bateman was prohibited from activating a defense on the ground of jurisdiction due to the English statutory estoppel as contained in section 67(1) read respectively with section 70(2) and (3) together with section 73 of the English Arbitration Act (Yekiso, 2012, p. 25). In answering this contentious issue of whether the principle of estoppel prevented Bateman from challenging the award, Judge Yekiso referred to a high court case. In the case of *Seton Co v Silveroak Industries Ltd* 2000 (2) SA 215 (T) it was held that the court cannot prohibit the recognition of a foreign award on the basis that there was fraud committed without exhausting all remedies within the foreign jurisdiction of the award (Hartzenburg, 2000, p. 215). This case provided for the instance where the parties did not contradict the award (Yekiso, 2012, p. 26). However, when moral turpitude becomes an issue, it needs to be proven by extrapolating the necessary evidence to challenge the validity of an award (Yekiso, 2012, p. 26). It is contrary and against public policy to have no agreement and still have an award. It cannot be binding and is a contradiction to legal order, and both national and international laws (Yekiso, 2012, p. 27).

The court referred to an English Supreme Court decision in the matter of *Dallah Real Estate and Tourism Holding Company v Government of Pakistan* 2010 4 KSC 46 which dealt with similar facts as the *Phoenix Shipping* case. An award was granted in the International Chamber of Commerce in Paris (Yekiso, 2012, p. 28). The enforcement of the award was undertaken in England, and the Government of Pakistan alleged that there was no jurisdiction for the tribunal to grant the award in Paris (Yekiso, 2012, p. 28). It was argued by the Applicant that the Government of Pakistan should have challenged the award in Paris and could not do so in England. However, the contention was rejected by the English Supreme Court and that the estoppel rules did not apply. It was held that jurisdiction may still be challenged in England irrespective of the rules in Paris (Yekiso, 2012, p. 28). In further substantiation of rejecting the basis for allowing the challenge, the Supreme Court of England held as per Lord Mance, that article V(1)(c) of the New York Convention and section 103(5) of the English Arbitration Act, did not possess any clause that made it peremptory to challenge an award at the seat of arbitration only (Yekiso, 2012, p. 28). It was further contained in section 103(f) of the English Arbitration Act, which did not exclude 'jurisdictional challenge of a foreign award' (Yekiso, 2012, p. 29). The English Arbitration Act also provides the exact provision 'to section 4(1)(b)(v) of the Recognition and Enforcement of Foreign Arbitral Awards Act' (Yekiso, 2012, p. 29). Judge Yekiso used section 233 of the Constitution of the Republic of South Africa as guidance in the interpretation of legislation to include 'a reasonable interpretation of the legislation or statutory enactment that is consistent with international law' (Yekiso, 2012, p. 29). Accordingly, the order of the court held that the application to hold Bateman accountable in terms of the award was dismissed (Yekiso, 2012, p. 31).

This case illustrates the importance of reducing an arbitration agreement to writing. The agreement is the cornerstone of the proceedings, in that it dictates the various aspects of law, enforcement and the selection of the arbitrators, requisite authority and jurisdiction to hear the dispute.

In *Telcordia Technologies Inc v Telkom SA Ltd* [2007] 2 All SA 243 (SCA), a case of the Supreme Court of Appeal, it was stated that there are specific powers conferred upon the arbitration, such as to determine the interpretation of the contract and whether that interpretation is correct or incorrect (Harms, 2007, p. 243). The arbitrator determines the law that is applicable in governing the dispute and lastly to determine the admissibility of evidence that the parties present (Harms, 2007, p. 243). In *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another* (CCT 97/07) [2009] ZACC 6, the arbitration award was taken on appeal, but the appeal failed, as the procedures conducted in the arbitration were held to be fair and honored the arbitration agreement between the parties (Kroon, 2009, p. 6).

In the case of *Shippel v Morkel and Another*, [1977] 1 SA 429 (C) Van Winsen J stated that "Our courts have accepted that in deciding upon matters submitted to them arbitrators are required to follow, at any rate in broad outline, the precepts which govern the procedure employed in the course of judicial proceedings...This would also appear to be the position in England..." (Van Winsen, 1977, p. 429). Similarly, the judiciary has upheld the decisions of arbitrators awards provided it was valid, and this meant that an award was made an order of court without objection.

It was evident in the *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* (CCT16/98) [1999] ZACC 11 it was held that tribunals are required to be impartial in hearing disputes. It is applicable to criminal, civil, quasi-judicial and administrative proceedings (Chaskalson, 1999, paragraph 35). Perceived bias impairs the proceedings and the authority to adjudicate the dispute. Bansal and Aggarwal (2017) postulate that the case law does not support and enforce awards that are contrary to public policy doctrine, this is acclimated to the principles of natural justice.

In the case of *IDS Industry Service and Plant Construction South Africa (Pty) Ltd v Industrius D.O. O* Case no: 15862/2020 in Gauteng Division, Johannesburg, the applicant applied for security for costs against a foreign respondent (Bezuidenhout, 2020, p. 1). The uniform rules of court 47(3) provide for specific instances in which security will be granted against a foreign litigant. There were no exceptional circumstances shown to justify why security for costs should be granted, when an arbitral award was already granted against the Applicant in the interlocutory procedure. The request for security was seen as a delaying tactic to frustrate the execution of the award that was granted.

4 | JUDICIAL ENFORCEMENT OF ARBITRAL AWARDS IN SOUTH AFRICA

It is pertinent that Constitutions are aligned with the sociological needs of society and that Constitutions adapt accordingly, which is known as constitutional axiology, which Criscuolo proposes in relation to upholding the principle of party autonomy (Criscuolo, 2017, p. 360). In ensuring that awards are enforceable it is important that parties adhere to the basic principles of common law and their national laws. The constitutional axiology provides the relevance of law to the people's lives that fosters obedience to law and authority.

The International Arbitration Act 15 of 2017 (the Act) is primary legislation in South Africa and incorporates the applicability of the UNCITRAL model law rules for commercial disputes. The Act acceded the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards and implemmented the Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977 Act dealing with enforcement of foreign arbitral awards. Section 16 of the Act provides for the recognition and enforcement of arbitration agreements and foreign arbitral awards, this provides for the executability of an award to have force and effect. Section 17 deals with the evidence to be produced by the party that seeks the recognition or enforcement of the award, which provides for record of the proceedings in hearing the award. Section 17(1)(a)(i) also postulates that there must be an original arbitration agreement and furthermore that the award must be authenticated according to the requisite foreign documents that will be produced at court. This section provides for the importance of the arbitration agreement that is pivotal to the proceedings of arbitration. Section 18 contains the provision relating to the refusal of recognition or enforcement, which sets out instances that an award will not be recognized, that it accords with the principles of natural justice. Section 18(1)(a)(i) sets out the instance where the award is not recognized because it is not permissible under the law of the Republic, when there are instances of conflict of laws with South Africa. Section 18(1)(a)(ii) provides for the instance when the recognition or enforcement of the award is contrary to the public policy of the Republic. There are other instances under section 18(1)(b)(i) which provides for when a party did not have the requisite capacity to enter into the agreement, this refers to no locus to enter into an agreement that amounts to the agreement being void. Section 18(1)(b)(ii) provides that the agreement cannot be enforced because it is invalid under the law of the country. Section 18(1)(b)(iii) provides for the instance that the required notice relating to the appointment of the arbitrator was not provided. Section 18(1)(b)(iv) is relevant when the award deals with a dispute beyond the scope of the arbitration agreement. Section 18(1)(b)(v) applies when the constitution of the arbitration tribunal does not provide for the hearing of the dispute as set out in the arbitration agreement. Section 18(1)(b)(vi) sets out that the award has been set aside by a competent authority in which country the award was made. This Act supports the notion of executability of awards in the most instances and protecting the principle of party autonomy of the parties that are sacrosanct.

Emre (2019, p.503) explores the concept of public policy and the impact of bona fides on enforcement of arbitral awards. When the enforcement of the arbitral award, and the law that governs the seat of arbitration is against public policy then enforcement becomes a contentious issue. Whenever there is a rift or difference with public policy, and it is not bona fide, then enforcement of the award is prevented (Emre, 2019, p. 517). Alignment of the seat of arbitration to the normality of public policy is standard is necessary for enforcement of foreign arbitral awards. Mahantesh (2021, p. 3701) argues that the public policy defense against enforcement of an arbitral award, should only be activated as an exception, as the intended purpose of the legislators as set out in the New York Convention. Akoto (2021, p. 64) elucidates that the notion of public policy can be seen as a protector and amorphous depending on the parties narrative in avoidance or enforcement of arbitral awards. Practitioners are acutely aware of the nebula of options that public policy norms can create, and it is always important to factor these considerations into the arbitration agreement as well as the seat of the law of arbitration.

The cases heard in South Africa, elucidate that the judiciary is hard-pressed to renegade upon arbitration agreements. Parties that have concluded arbitral agreements are bound by their arbitral awards, nationally and internationally, unless there are exceptional grounds for review. In terms of case law, the exceptional grounds of review have not been ventilated at court, where a party has been successful. This position is aligned to both the domestic and international legislation in support of enforcement of arbitral awards, which also encourages foreign investors to choose South Africa as a seat of arbitration and to elect the choice of law to govern the arbitral hearings.

5 | DATA COLLECTION

The data that is collated is a desktop study of case law, which focuses on specific issues of enforcement of arbitral awards.

6 | DATA ANALYSIS

The data analysis consists of the analysis of case law, legislation and academic articles. The research methodology that is employed is a desktop study.

7 | CONCLUSION

It is evident that when parties have a valid agreement in place, the award is valid and binding between the parties. It is apparent that in the absence of an agreement, then consensus becomes an issue and then an award cannot be binding upon the parties. The party that disputes the validity of the agreement does not need to raise the invalidity at the seat of the arbitration but may also do so in the country that enforces the arbitration. In the absence of an arbitration agreement the arbitration award is void. The period of review and appeal is not applicable to circumstances when there was no conclusion or consensus of an arbitration agreement between the parties. The national legislation such as the International Arbitration Act is aligned to the UNCITRAL model law and the New York Convention on the Enforcement of Foreign Arbitral Awards. In the practice of alternative dispute resolution, arbitration hearings and agreements is the cornerstone of recognition of awards. An award cannot be valid without consensus between the parties to hold an arbitration hearing and deliberate a hearing. In the interpretation of an arbitration

agreement, the principles of contract operate simultaneously to the agreement between the parties. Public policy norms and standards also play a role, in relation to the flow of enforcement at the seat of arbitration. The law of enforceability must be aligned to public policy norms. It is on this basis that it is submitted that there is judicial enforcement of arbitral awards in South African courts.

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CONFLICT OF INTEREST

I confirm that I do not have a conflict of interest.

DATA AVAILABILITY STATEMENT

All the data is available as referenced in the paper.

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