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INTERNATIONAL DISPUTE RESOLUTION IN AFRICA

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INDEX

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A disjointed approach to the enforcement of arbitral awards

There is little doubt that the promulgation of the International Arbitration Act 15 of 2017 that incorporated the United Nations Commission on International Trade Law (UNCITRAL) Model Law into the national law, was meant to improve South Africa's lure as an international commercial arbitration hub. The duty of our courts to support international arbitration and to give effect, where they can, to international arbitration agreements is therefore similarly unquestionable.

This context is necessary when considering the recent judgment of the High Court of South Africa, Gauteng Division, Johannesburg in *Kingdom of Lesotho and Another v Frazer Solar GMBH and Others* (33700/20) ZAGPJHC (9 May 2022). The dispute in Fraser Solar had its genesis in a supply agreement purportedly concluded between Fraser Solar and the Kingdom of Lesotho on 24 September 2018. The supply agreement was signed by a former Minister in the Office of the Prime Minister of the Kingdom of Lesotho at the time. The kingdom contended that the cabinet member, in purporting to act on behalf of the kingdom, had no authority to conclude the supply agreement or bind the kingdom to its terms. It further contended that despite purporting to oblige the kingdom to incur massive debt in order to purchase renewable energy products from Fraser Solar, the supply agreement was signed without any attempt to conduct a lawful procurement process, as required by the laws of the kingdom.

In the supply agreement, the parties chose arbitration as a mode of settling their disputes. They further nominated South African law as the law of arbitration to determine any disputes, chose Johannesburg as the seat of the arbitration, and agreed that arbitration would be conducted in terms of the rules of arbitration in force of the South African Association of Arbitrators.

Upon breach, Fraser Solar referred the matter to arbitration and obtained an arbitral award against the kingdom for an amount of €50 million, including interests and costs. The award was made an order of court by the High Court of South Africa, Gauteng Division, Johannesburg at the instance of Fraser Solar.

A disjointed approach to the enforcement of arbitral awards

CONTINUED

Both the award and the order were granted in the absence of the kingdom. Fraser Solar then took steps to attach the kingdom's assets in South Africa and Mauritius.

THE KINGDOM'S APPLICATIONS

Subsequent to the award being made an order of court, the kingdom brought three substantive applications, namely:

- an application in the Lesotho High Court to review, set aside and declare as void the supply agreement and the arbitration agreement embedded in the supply agreement;
- an application in the High Court of South Africa to rescind the court order that made the arbitral award an order of court and to review and set aside the arbitral award; and
- an application in the High Court of South Africa to stay the execution of notices of attachment and writs of executions arising from the award being made an order of court pending the outcome of the review application and the rescission application.

The Trans-Caledon Tunnel Authority also brought an application before the High Court of South Africa to challenge the writ of execution and notices of attachment issued in respect of its bank accounts.

POSTPONEMENT

The applications were consolidated and were due to be heard in the week of 16 May 2022. On the eve of the hearing, the kingdom sought a postponement of the rescission application indefinitely pending the review application in the Lesotho High Court. The kingdom contended that the rescission application should be postponed indefinitely to enable the review application in Lesotho to be finalised. The review application in Lesotho was to challenge the lawfulness and constitutionality of the decision to enter into the supply agreement, including the embedded arbitration clause.

Fraser Solar opposed the application on the basis that the South African court could not be asked to defer its determination to another country's courts and that the South African court was under an obligation imposed by national and international law to itself determine whether a ground existed for non-recognition or non-enforcement of the arbitral award.

VALIDITY OF THE SUPPLY AGREEMENT

In granting the indefinite postponement, the court in *Fraser Solar* found that it was *"pragmatic"* to let the review application in the Lesotho High Court (which the court said had prospects of success)

A disjointed approach to the enforcement of arbitral awards

CONTINUED

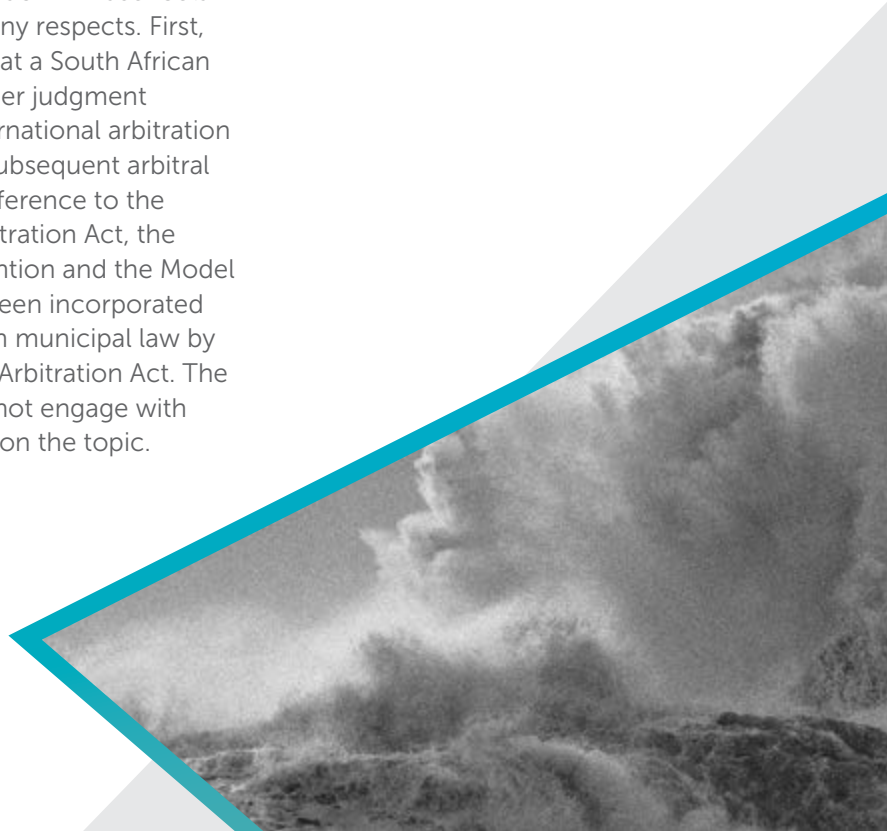
proceed to determine the validity of the supply agreement and only thereafter would the validity of the subsequent act be determined in the rescission application. This was because the court was of the view that if the supply agreement was a nullity from the outset, every subsequent act which depended on the validity of the supply agreement would also be invalid. The court cited no authority for this finding.

The court in *Fraser Solar* was also of the view that if the rescission application was decided before the review application in the Lesotho High Court, the South African court determining the rescission application would be deprived of the benefit of the Lesotho High Court's first instance determination of the validity of the supply agreement. This would mean that the South African court in the rescission application would be at a serious risk of giving effect to an arbitral award and default judgment which could subsequently be based upon unlawful and invalid breaches of the kingdom's procurement laws and Constitution. The court found that this would constitute significant prejudice to the broader public interest and administration of justice. The court cited no authority for these propositions either.

A TROUBLING APPROACH

The court's approach in *Fraser Solar* is troubling in many respects. First, it is worrisome that a South African court would render judgment regarding an international arbitration agreement and subsequent arbitral award without reference to the International Arbitration Act, the New York Convention and the Model Law, which has been incorporated into South African municipal law by the International Arbitration Act. The court simply did not engage with international law on the topic.

Second and perhaps even more troublingly, it is for a South African court to determine whether a ground for recourse against an arbitral award is established; not the courts of Lesotho. The New York Convention, the Modal Law and the International Arbitration Act are all clear on this score. The South African court could not permissibly defer its determination to the Lesotho courts.



A disjointed approach to the enforcement of arbitral awards

CONTINUED

Third, the court in *Fraser Solar* relied on *Trustees for the time being of the Burmilla Trust and Another v President of the RSA and Another* (64/2021) [2022] ZASCA 22; [2022] 2 All SA 412 (SCA) (1 March 2022) for the proposition that it was for the domestic courts to exercise jurisdiction to hear and determine the validity of decisions and international tribunals must "*give appropriate weight to the determination by the domestic courts of such issues*" and that "*exercise restraint when evaluating decisions of municipal courts despite not being bound by those decisions*". Putting aside the fact that the thrust of that proposition came from the minority judgment, it is important to keep in mind that in international law, states bear responsibility for unlawful acts of state organs, even if accomplished outside the limits of their competence and contrary to domestic law[1]. So the fact that the High Court in Lesotho may ultimately review and set aside the supply agreement as null and void, is but one of the many factors that the arbitral tribunal would consider. It is not decisive.

Perhaps even more importantly, the court in *Fraser Solar* was not sitting as an international tribunal. It was rather sitting to consider a postponement of the rescission application of the court order that made the arbitral award an order of court and the application to review and set aside the arbitral award. The International Arbitration Act, the New York Convention and the Model Law were therefore aptly applicable.

While the pronouncement in *Fraser Solar* will probably have no precedent-setting effect and will most likely be overturned in future matters, such findings can potentially undermine South Africa's efforts in establishing itself as a regional "*go-to*" hub for international commercial arbitration.

VINCENT MANKO

[1] *Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt (ICSID Case No. ARB/84/3); Ioannis Kardassopoulos v Georgia (ICSID Case No. ARB/05/18) and Amco Asia Corporation v Republic of Indonesia (ICSID Case No. ARB/81/1)*