Cross-Border Commercial Dispute Agreements: Developments in South Africa

By:

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The advent of a new international arbitration regime for South Africa has placed agreements on cross-border commercial dispute resolution under the magnifying glass. To what extent are these agreements enforced in South Africa? The 2017 Act aims to promote South Africa as a venue for international arbitration. The Act endorses party autonomy and limits curial intervention in the arbitration process. Two of the most significant features of the 2017 Act are the following. First, it incorporates the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration ("UNCITRAL Model Law") into South African law. Second, it repeals the Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977, with full effect being accorded to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) ("New York Convention").

The UNCITRAL Model Law enshrines party autonomy – upon request by a party

a court must stay proceedings and refer the parties to arbitration, unless “the agreement is null and void, inoperative or incapable of being performed” (art 8(1)). It must be noted, though, that the UNCITRAL Model Law only applies to international commercial arbitration; domestic arbitration is still regulated by the Arbitration Act 42 of 1965. The 1965 Act has been criticised for not giving adequate recognition to party autonomy and for allowing excessive judicial intervention in the arbitration process. In terms of section 6(2) courts have a discretion whether to give effect to an arbitration agreement, based on whether the “court is satisfied that there is no sufficient reason why the dispute should not be referred to arbitration in accordance with the agreement” and then ordering a stay of proceedings “subject to such terms and conditions as it may consider just”.

The New York Convention also enshrines party autonomy – article II(3) is similar to article 8(1) of the UNCITRAL Model Law (see also s 16(1) of the 2017 Act). However, the original implementing legislation of the New York Convention in South Africa, the Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977, did not give full effect to South Africa’s obligations under the Convention. Although the text of the Convention was published in the Government Gazette (GN 1028 in *Government Gazette* 5160, 18 June 1976), it was not incorporated into the 1977 Act. To make matters worse, the 1977 Act did not contain a provision for the enforcement of arbitration agreements. This meant that arbitration agreements were treated in terms of the 1965 Act (see above), which applied to both domestic and international arbitration at the time. With the abolition of the 1977 Act, party autonomy is now fully entrenched in the 2017 Act.

While international arbitration agreements will now be given full effect in South Africa, the position regarding international choice of court agreements (also known as jurisdiction clauses or forum clauses) is not entirely clear. South African private international law lacks a well-developed jurisprudential foundation in respect of choice of court agreements.

There is a strong policy in favour of giving effect to foreign (exclusive) choice of court agreements, based on party autonomy and sanctity of contract (*MV Spartan-Runner v Jotun-Henry Clark Ltd* 1991 (3) SA 803 (N), 806G-H;

Blanchard, Krasner & French v Evans 2002 (4) SA 144 (T), [11]; *Foize Africa (Pty) Ltd v Foize Beheer BV and Others*2013 (3) SA 91 (SCA), [28*(a)*]). However, there is no clearly defined distinction between the two main types of choice of court agreements – exclusive and optional. It seems as if courts treat choice of court agreements in favour of foreign courts as exclusive (invoking the authority of *The Eleftheria* [1969] 2 All ER 641 (PDA)). Choice of court agreements in favour of South African courts are based on submission to jurisdiction by consent, often in the form of the designation of a *domicilium citandi et executandi* for service of process and legal notices. These may be regarded as tacit, optional choice of court agreements, provided that the intention to submit to the jurisdiction of the court is clearly established (*Beverley Building Society v De Courcy and Another* 1964 (4) SA 264 (SR), 270D; *Hay Management Consultants (Pty) Ltd v P3 Management Consultants (Pty) Ltd* 2005 (2) SA 522 (SCA), [15]).

What is clear though, is that a neutral choice of court agreement in favour of a South African forum, with no proper jurisdictional connections to that forum, will not ground jurisdiction. Contractual submission to jurisdiction amounts to prorogation – an extension of an already existing ground of jurisdiction by subjecting one's person to the court (*Veneta Mineraria Spa v Carolina Collieries (Pty) Ltd* 1987 (4) SA 883 (A), 894A-B; *contra Negro v SAR* 1911 TPD 979, 981). This means that parties to an international commercial contract can choose South Africa as a neutral arbitration venue, while it is not possible to do the same for litigation.

This Hague Choice of Court Convention, which is often called the "litigation" counterpart of the New York Convention, contains a similar provision to that of the New York Convention (art II(3); see also the UNCITRAL Model Law (art 8(1)) – in terms of article 5(1): "The court or courts of a Contracting State designated in an exclusive choice of court agreement shall have jurisdiction to decide a dispute to which the agreement applies, unless the agreement is null and void under the law of that State."

In the light of the strong stance on party autonomy adopted by South Africa in the 2017 Act, accession to the Choice of Court Convention must now be a priority. It will force South African private international law to define and

develop its theory and practice in respect of choice of court agreements, exclusive as well as optional in order to distinguish between the two, and to identify other types of choice of court agreements further down the line.

South Africa now has an international arbitration regime that represents best practice internationally. However, there is a serious need to develop a proper jurisprudential framework for choice of court agreements. The challenge is to create a viable litigation counterpart to international arbitration agreements. It should be possible for parties to not only choose South Africa as a neutral *arbitration* venue, it should also be possible for them to choose South Africa as a neutral *litigation* forum.

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