KNOWLES HUSAIN LINDSAY INC
ATTORNEYS

ENFORCING DISPUTED FOREIGN ARBITRAL AWARDS

"It is a firmly established principle of the law of arbitration that awards are final." Hartzenburg J in Seton Co v Silveroak Industries Ltd *2000 (2) SA 215 (TPD)*

The Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977 (the Recognition Act) deals with arbitral awards made outside of the Republic of South Africa and which cannot be enforced in terms of the Arbitration Act 42 of 1965. For an arbitral award to be recognized it must not be in conflict with the Arbitration Act. The object of the Recognition Act is to make foreign arbitral awards an order of court in South Africa and to therefore render the awards enforceable within the jurisdiction of our courts.

Arbitration proceedings are increasing in popularity, both in South Africa and abroad, particularly as a result of the inclusion of arbitration clauses in commercial contracts, both local and international. As international trade and enterprise becomes ever more globalized, legislation such as the Recognition Act is utilized with more frequency. The importance of having legislation which deals specifically with the endorsement and ultimate enforcement of foreign arbitral awards cannot be overstated.

Difficulties arise, however, when an application is made in terms of the Recognition Act but the outcome of the arbitration is disputed by one of the parties. A recent judgment in the South Gauteng High Court dealt pertinently with the issue. In *Pendrell Corporation v Jay & Jayendra (PTY) LTD*, Mokgoatlheng J had to decide whether an arbitral award issued in London in November 2012 should be recognised in terms of section 2(1) of the Act. The application for recognition was opposed by the respondent on a number of bases, one of which was the fact that the respondent had instituted review proceedings in the England High Court and as such requested a postponement in terms of section 4(2) of the Act. Another contention relied upon by the respondent was the fact that evidence of fraud had allegedly come to light which would render the arbitral decision reviewable and it would therefore be

contrary to public policy (in terms of section 4(1)(a)(ii) of the Act) for the South African court to recognise and enforce such arbitral award until the issue of fraud had been dealt with.

In dealing with the respondent's contentions, the court first dealt with the application for postponement. The court stated in no uncertain terms that the court has a discretion to be exercised judicially in relation to postponements. Upon looking at the actions of the respondent over the preceding year, the court held that there had not been a *bona fide* attempt on the part of the respondent to gather evidence of the fraud which it alleged had taken place during the arbitration hearing. The court went as far as to say that the allegations of fraud and the resultant application for postponement were a 'patent stratagem' designed to delay the main application.

In terms of the Recognition Act, the court held that the ratio in the case of Seton *Co v Silveroak Industries Ltd* 2000 (2) SA 215 (TPD) was applicable. Where extraneous evidence is necessary in assessing whether the recognition of an arbitral award would be contrary to public policy, such as the alleged evidence of fraud in this case, the remedy available to the aggrieved party lies within the jurisdiction in which the arbitral award was made. It is not for the South African courts to decide whether the allegations of fraud alleged in this matter should alter the outcome of the arbitration proceedings - that is a decision that can only be made by the English courts (as the arbitration award was issued in London). In the case of *Pendrell,* the respondent had applied under the English Arbitration Act to have to award reviewed and set aside - this application failed. Their application for leave to appeal that decision was also dismissed. The respondent had not instituted an application in England to have the arbitral award set aside on the basis of the fraud which they allege impacted on the outcome of the arbitration proceedings.

The respondent further argued that the arbitral award could not be recognized as it related to the “use or sale of or ownership to any matter or material” as referred to in section 1(1)(a) of the Protection of Business Act 99 of 1978. If the award did fall within the ambit of the Protection Act, it could not be enforced without the permission of the Minister of Industry. The agreement which formed the basis for the arbitral award dealt with satellite technology and the maintenance thereof. The respondent

argued that since the technology in question utilized radio waves - which are part of the electromagnetic spectrum - this fell to be included in the definition of “matter or material”. The court, however, found in favour of the applicant who argued that the contract in dispute dealt solely with the operation and maintenance costs of the technology and not with the actual radio waves being used. The Protection Act was therefore not a barrier to the recognition of the arbitral award.

As a result, and in line with the decision of the court in *Seton,* Mokgoatlheng J found that there were no grounds upon which the application for recognition of the arbitral award should be denied or postponed. No proceedings had been instituted in England to have the award set aside due to fraud, nor had the respondent put any evidence before the court to show that the allegations of fraud were *bona fide*. The arbitral award in favour of Pendrell was made an order of the court and the respondent was ordered to pay the costs of the main application.

This case illustrates the way in which South African courts are having to grapple with dissatisfied parties in the enforcement of international arbitral awards. Thankfully, the Recognition Act is fairly straightforward and provides the necessary framework and guidance to the courts in this regard.

Written by Sarah Macqueen, candidate attorney (Litigation)