INTERNATIONAL INSTITUTE OF CONSTRUCTION ARBITRATORS (IICArb)

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INTERNATIONAL ARBITRATION – MAKING AN AWARD IN BY DEFAULT AN ORDER OF THE COURT

In many instances, a dispute is referred to arbitration and determined - even if cross-border. This was precisely what happened in the matter of Industrius D.O.O v IDS Industry Service and Plant Construction South Africa (Pty) Ltd (the "case" or the "matter")[1]

Facts of the matter

This matter related to an opposed application of an arbitral award given on 9 June 2020 to be made an order of the court. Industrious wanted an order that IDS pay its costs in the main arbitration and counterclaim.

The agreement itself is an arbitration agreement as defined in article 7 of the International Commercial Arbitration ("Model Laws") as incorporated by the International Arbitration Act 15 of 2017 ("the Act") for enforcement of an international arbitral award, and this is common cause between the parties.

[1] **Industrius D.O.O v IDS Industry Service and Plant Construction South Africa (Pty) Ltd (2020/15862) [2021] ZAGPJHC 350 (20 August 2021)**

IDS ceased participation in the proceedings, the result being that the arbitration proceeding in its absence and a final award which upheld Industrious' claim and dismissed IDS' counterclaim.

IDS contended that the counterclaim issue had not been determined; therefore, it was free to pursue its counterclaim(s) in the courts of South Africa.

Legal question

IDS also contends that because the counterclaim was dismissed by default, the arbitrator's award in that regard is not final and that the doctrine of res judicata does not apply and that this is a trite principle.

An arbitral award made in terms of Model law can only become impermissible to enforce under certain conditions in section 18 of the Act:

"(a) If the court finds that-

(i) a reference to arbitration of the subject matter of the dispute is not permissible under the law of the Republic; or

(ii) the recognition or enforcement of the award is contrary to the public policy of the Republic; or

(b) the party against whom the award is invoked, proves to the satisfaction of the court that—

(i) a party to the arbitration agreement had no capacity to contract under the law applicable to that party;

(ii) the arbitration agreement is invalid under the law to which the parties have subjected it, or where the parties have not subjected it to any law, the arbitration agreement is invalid under the law of the country in which the award was made;

(iii) that he or she did not receive the required notice regarding the appointment of the arbitrator or of the arbitration proceedings or was otherwise not able to present his or her case;

(iv) the award deals with a dispute not contemplated by, or not falling within the terms of the reference to arbitration, or contains decisions on matters beyond the scope of the reference to arbitration, subject to the provisions of subsection (2);

(v) the constitution of the arbitration tribunal or the arbitration procedure was not in accordance with the relevant arbitration agreement or, if the agreement does not provide for such matters, with the law of the country in which the arbitration took place; or

(vi) the award is not yet binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made."

The onus rests on the party alleging and proving grounds set out in section18 of the Act, precisely the position here.

Conclusion

The court found that Act and Model Law do not allow the court to refuse or delay the enforcement of an award. Not on the basis that a party has instituted other proceedings unrelated to the arbitral award or have no bearing on the finality or enforceability of the arbitral award. Although this decision is not binding precedent, it serves as a valuable indication of the approach taken by our courts in regards to the biding nature of cross-border disputes resolved by arbitration.

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