

January 2018

## CONSTRUCTION LAW BULLETIN

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### ENFORCEMENT OF FOREIGN ARBITRATION AWARD

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#### INTRODUCTION

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In June last year the Johannesburg High Court handed down a judgment relating to an application by a foreigner for the enforcement of a foreign arbitration award granted against a foreign defendant. In other words, all parties concerned were foreigners or in legal terminology peregrini.

The case<sup>1</sup> involved a company registered in the United Kingdom, Balkan Energy Ltd (“Balkan”), and the Government of Ghana (“GoG”).

GoG had contracted with a foreign power company (“Powerco”) in terms of which Powerco agreed to supply and operate a dual fired diesel and gas power barge in Ghana to generate and supply electricity to GoG in terms of a Power Purchase Agreement.

The Power Purchase Agreement incorporated an arbitration clause requiring all disputes to be determined by arbitration.

The agreement included a clause in terms of which GoG waived any immunity that it was entitled to claim in relation to any legal proceedings against it or attachment of its assets by virtue of it being a sovereign state.

A dispute arose between Powerco and GoG which culminated in an arbitration award being issued against GoG in favour of Powerco in the sum of approximately US\$12,5m.

Powerco ceded its rights under the arbitration award to Balkan.

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<sup>1</sup> Balkan Energy Ltd and Another v Government of Ghana 2017(5) SA 428 GJ.

## **ENFORCEMENT**

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Balkan decided to enforce the arbitration award against GoG in South Africa, having learnt that GoG held approximately 6 400 000 shares in AngloGold Ashanti Ltd, a company registered in the Republic of South Africa and having its registered office in Johannesburg.

In doing so, Balkan invoked the provisions of the Enforcement of Foreign Arbitral Awards Act, 40 of 1977 (“the Recognition and Enforcement Act”), which provides as follows:

**“2. Foreign arbitral award may be made order of court and enforced as such**

- (1) Any foreign arbitral award may, subject to the provisions of sections 3 and 4, be made an order of court by any court.
- (2) Where any amount payable in terms of such award is expressed in a currency other than the currency of the Republic, the award shall be made an order of court as if it were an award for such amount in the currency of the Republic as, on the basis of the rate of exchange prevailing at the date of the award, is equivalent to the amount so payable.
- (3) Any such award which has under subsection (1) been made an order of court, may be enforced in the same manner as any judgment or order to the same effect.”

Balkan’s end game was to execute against GoG’s shares in AngloGold Ashanti once the High Court had issued an appropriate court order recognising the arbitration award, thereby rendering it enforceable as if it was a judgment of our courts.

Because Balkan and GoG were both foreigners, it was necessary for Balkan to make an attachment of GoG’s AngloGold Ashanti shares to confer jurisdiction on the Johannesburg High Court to entertain its application.

Ordinarily, our courts will not entertain cases involving two foreigners. However, where a case involves the enforcement of a foreign arbitral award, the court makes an exception, provided that any order granted by it will be effective in the sense that there are assets within its jurisdiction which can be executed against.

The Johannesburg High Court held that the Recognition and Enforcement Act was intended by the Legislature to invest in any Division in the Supreme Court of South Africa jurisdiction to recognise a foreign arbitral award, even one between peregrini. This being subject only to there being that degree of effectiveness provided by an attachment of property.

Balkan had to overcome one other hurdle in order to succeed in its application.

In terms of the Protection of Businesses Act, the enforcement of foreign awards in certain cases is precluded unless the permission of the Minister of Economic Affairs is obtained. This Act states:

- “1. Notwithstanding anything to the contrary contained in any law or other legal rule, and except with the permission of the Minister of Economic Affairs –

- (a) no judgment, order, direction, arbitration award, interrogatory, commission rogatoire, letters of request or any other request delivered, given or emanating from outside the Republic in connection with any civil proceedings and arising from any act or transaction contemplated in subsection (3), shall be enforced in the Republic; ....”

Our courts have interpreted this section of the Protection of Businesses Act to relate to transactions connected with raw materials or substances from which physical things are made.

Because the transaction which underpinned the arbitration award related to the supply of electricity, the restriction contained in the Protection of Businesses Act was found not to be applicable.

The Johannesburg High Court accordingly granted an order in favour of Balkan in terms of which GoG’s AngloGold Ashanti shares were placed under attachment to found jurisdiction and Balkan was given permission to institute application proceedings against GoG for an order enforcing the arbitration award.

## **NEW DEVELOPMENTS**

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Since this court decision, the International Arbitration Act, 15 of 2017, has been brought into force.

This Act repeals the Recognition and Enforcement Act and incorporates provisions for enforcing foreign arbitral awards by our courts.

In terms of the Act it will only be in extraordinary circumstances that our courts will not enforce foreign arbitral awards.

Interestingly, the Act also amends the Protection of Businesses Act by deleting the reference in the Act to arbitration awards, with the result that the restrictions in the Act no longer apply to the enforcement of foreign arbitral awards.

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