CONTRACTUAL LIABILITY OF STATE-OWNED ENTERPRISES IN INTERNATIONAL BUSINESS TRANSACTIONS: A SOUTH AFRICAN LEGAL PERSPECTIVE

by

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DECLARATION

I, _____1645874__________________(Student number, declare that this Research Report is my own unaided work. It is submitted in partial fulfillment of the requirements for the degree of Master of Laws (by Coursework and Research Report) at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.

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ABSTRACT

This research report examines the legal regime that governs South African state-owned enterprises (SOEs) as they participate in transnational commercial transactions (transactions involving multinational corporations foreign to South Africa). It primarily seeks to lay out the optimal path through which South African law would allow for the State to be held contractually liable for the SOE's failure to perform its international contractual obligations. Following this will be a comparative analysis between the principles of South African law and those of International Business Transactions Law regarding the same.

The South African legal framework that this paper examines comprises of the South African Company Law regime, the South African law of contract, and the South African administrative law regime. The legal framework to which this will be compared is International Business Transactions Law, which does not have such clearly delineated subcategories.

Issues which fall outside of the scope of this paper are the appropriate forum of the matter, the choice of law which applies to the contract, public international trade law, and the regulations of the World Trade Organization.

Key terms; state-owned enterprises, conflict of laws, transnational commercial transactions, private international law, piercing the corporate veil, contractual liability.

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1. INTRODUCTION

The central question that this paper addresses is this: how does South African (SA) law allow for the State to be held contractually liable for a State-Owned Enterprise's (SOE's) failure to perform its contractual obligations when that SOE is participating in transnational commercial transactions (TCTs) involving foreign multinational corporations (FMNCs)? It further questions whether the applicable South African legal framework is in alignment with International Business Transactions Law (IBTL).

The first question can be broken down into two sub-questions. Firstly – how is a State held liable for the conduct of something that is not *prima facie* the state?[1] This is a question of attribution of conduct and the legal framework most appropriate to answer this question comprises the South African Company Law and the South African Administrative law regimes. The second part of this question addresses contractual liability in transnational commercial transactions. The appropriate legal regime with which this sub-question will be addressed is the South African Law of Contract. According to Michael Feit, these two questions encompass the key issues arising out of contractual disputes involving SOEs and FMNCs.[2]

The follow-on question from the first relates to the international nature of the transactions that this paper concerns itself with. This paper is examining transnational commercial transactions which involve parties foreign to South Africa. Therefore, it will be appropriate to

[1] B Gu and C Xu 'Treatment Standards of State-Owned Enterprises as Public Entities: A Clash or Convergence across International Economic Law?' (2020) 50(3) *Hong Kong Law Journal* 1026.
[2] M Feit 'Responsibility of the State Under International Law for the Breach of Contract Committed by a State-Owned Entity' (2012) *Berkeley Journal of International Law* 142 - 176.

adduce whether the conclusion reached in SA law with regard to the first question is in alignment with international best practice. Thus part 2 of the paper will lay out the approach that IBTL would take to answer the first question, after which the paper will embark on a comparative analysis between SA law and IBTL.

In this paper, I argue that the optimal approach that foreign multinational corporations (FMNCs) should take to hold the SA governing party accountable for the failure of its SOEs to perform contractual obligations is to apply the doctrine of piercing the corporate veil to the actions of the SOE after which the FMNC should set out a case for contractual liability/breach of contract against the SOE. I will further lay out why this approach is correct both in the eyes of SA law as well as in the eyes of IBTL.

This paper acknowledges that in examining the participation of SOEs and States in TCTs, the topics which will be addressed do not amount to the totality of what may be written on the subject. Indeed, matters such as the applicable procedural law, the appropriate forum in which to hear the matter, and the way membership of the World Trade Organization may impact TCTs, although relevant, do not fall within the scope of this research report. These issues have been addressed by many legal scholars and in detail[3] and it would not be of much benefit for me to revisit those arguments in this research report.

[3] G Cordero-Moss *International Commercial Contracts* (2014).

1.1. Research Methodology

Documentary research was undertaken for this research report.

2. WHY TRANSNATIONAL COMMERCIAL TRANSACTIONS (TCTs)?

Seeing as this paper is examining the legal regime governing the participation of SOEs in TCTs, it is important to justify why these transactions are relevant to the broader legal literature. Why is it relevant to look at TCTs as opposed to any other type of transaction an SOE could participate in?

TCTs (otherwise known as international business transactions) involve two or more parties which do not share a nationality or are located in different legal jurisdictions. By virtue of this, when it comes to the legalities of these transactions there are many valid, competing, legal interests at play.[4] Thus, they are legally more complex than transactions which take place solely in one legal jurisdiction because of the presence of competing legal interests.[5]

In the era of globalization, international trade has seen a sharp increase as opposed to its scale before World War II. TCTs themselves have increased in number, scale and complexity and now comprise a significant amount of global trade and industry.[6] Because the increase in

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[4] D N Dagbanja 'Conflict of Legal norms and Interests in International Investment Law; Towards the Constitutional-General International Law Imperatives Theory' (2016) 6 *Transnational Legal Theory* 523 – 524.

[5] J Dugard 'The Nature and history of International Law' (2018) in J Dugard, M du Plessis, T Maluwa & D Tladi (eds) *Dugard's International Law: A South African Perspective* 5 ed (2018) 1 - 2.

[6] <<https://transportgeography.org/contents/chapter7/globalization-international-trade/>>.

TCTs is a relatively modern phenomenon, they have not been addressed in legal literature in as much depth as intranational transactions have been.[7] There is especially a lack of literature on these types of transactions written from a South African perspective.[8]

The legal complexity of these transactions and the relative lack of South African legal literature which addresses them justifies this paper's focus on them.

3. WHY STATE-OWNED ENTERPRISES?

The previous section of this paper justified the type of transaction being examined in this report. This section will address the reason for examining SOEs as parties to TCTs.

What makes SOEs particularly relevant in the discussion around TCTs is the shareholder relationship between the SOE and the State in which it is registered.[9] An SOE is an entity which is *prima facie* a juristic person in which the State has a majority shareholding.[10] Corporations registered in terms of company law theoretically have a profit-centred objective, that is to maximize the benefit for the shareholders of the corporation.[11] However, SOEs registered in

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[7] K Nowrot New *Approaches to the International Legal Personality of Multinational Corporations Towards a Rebuttable Presumption of Normative Responsibilities* (1993) at 1 – 2.
[8] < *https://www.trans-lex.org/the-lex-mercatoria-and-the-translex-principles_ID8#note_target_94* >
[9] P Blyschak 'State- owned Enterprises and International Investment Treaties; When are State—Owned Entities and their Investments Protected?' (2011) 6(2) *Journal of International law and International Relations* 2.
[10] B Gu and C Xu (see note 1 above) 1026.
[11] J Katzew 'Crossing the Divide between the Business of the Corporation and the Imperatives of Human Rights -The Impact of section 7 of the Companies Act 71 of 2008' (2011) *SALJ* (4) 692.

developing countries are utilized practically not only for the purpose of maximizing profit for the shareholder(s) but are used simultaneously as a vehicle through which the State seeks to achieve their public policy aims acting in the best interests of their citizens.[12]

In this, the duality of SOEs is made evident. They are *prima facie* private parties but they are so closely connected to a public party that the distinction between private and public actors is blurred when it comes to the conduct of the SOE.[13] The blurring of the lines between public and private parties is why it is important to address the way that the law treats SOEs as they participate in TCTs involving FMNCs. This is because public parties and private parties are treated differently from each other in both SA law and in IBTL.[14]

SOEs are participating increasingly in TCTs in the era of globalization[15] and their increasing participation warrants the investigation as to how their relationship with the State will impact the attribution of their conduct to the State in contractual disputes based on TCTs.

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[12] A Musacchio, F Monterio & S G Lazzarini, 'State-owned multinationals in international competition' (in R Grosse & K E Meyer (eds.) *The Oxford Handbook of Management in Emerging Markets* (2019) 2; A Rygh & G R G Benito 'Governmental goals and the international strategies of state-owned multinational enterprises: a conceptual discussion' (2022) 26 *Journal of Management and Governance* 1156; D Banani 'International Arbitration and Project Financing in developing countries: blurring the Public/Private Distinction' (2003) 26 *Boston College International and Comparative Law review* 355 – 384; M Landoni 'Corporatization and internationalization of state-owned enterprises: The role of institutional intermediaries' (2018) 31(2) *International Journal of Public Sector Management* 221 – 223.
[13] L Schicho 'Attribution and State Entities; Diverging Approaches in Investment Arbitration' (2011) 12(2) *Journal of World Investment and Trade* 283.
[14] J Dugard (see note 5 above) 1 – 2; JE Viñiales 'State of Necessity and Peremptory Norms in International Investment Law' (2008) 14(1) *Law & Bus Rev Am* 79; R Brunette, J Klaaren & P Nqaba 'Reform in the contract state: Embedded directions in public procurement regulation in South Africa' (2019) 36(40 *Development South Africa* 538.
[15] A Musacchio, F Monterio & S G Lazzarini (see note 12 above) at 2.

4. THE LEGAL FRAMEWORK IN SOUTH AFRICA AS IT RELATES TO SOES

Seeing as the SOEs that this paper is examining are South African, it is appropriate to first discuss the local regulatory environment surrounding SOEs and their participation in TCTs. As far as said regulatory environment is concerned, this paper will concern itself with three aspects of South African Law. The first is administrative law, the branch of law which addresses entities carrying out public functions and how they are held to account in their performance thereof.[16] The second area of South African law which we will examine is company law, which regulates all registered corporations including SOEs.[17] Finally, we will turn to the law of contract in South Africa which lays out how breach of contract and contractual liability may be adduced to any entity.[18] It is in examining how SOEs are regulated in light of these three branches of law that the answer to the first question of this research report may be ascertained.

5. ACCOUNTABILITY IN SOUTH AFRICAN LAW

To reiterate, the first question of this paper asks how best the State may be held contractually liable for its SOEs failure to perform contractual obligations whilst the SOE is participating in a TCT. There are many reasons why a party may elect to assert that the State is the appropriate counterparty to a contractual dispute. The state is presumed to possess greater material wealth than its entities and thus the FMNC may desire to bring the contractual claim

[16] Promotion of Administrative Justice Act 3 of 2000.
[17] The Companies Act 71 of 2008.
[18] D Bhana, M Nortje & E Bonthuys *Student's Guide to the Law of Contract* 4ed (2015).

against the state with the presumption that compensation or financial performance or payment of damages are more likely to occur than if they were to bring the claim against the SOE alone.[19]

When examining the accountability of a State for the actions of its SOE, the starting point from which many legal professionals depart would be to examine the administrative law regime of the State. This is because at its core administrative law addresses the attribution of conduct to a state – how to hold the administrative branch of the state accountable for the actions it has taken to achieve its policy aims.[20]

Administrative law and attribution in terms of it have been well addressed in legal scholarship[21] and so the aim of this paper is not to tread familiar waters in examining attribution of conduct according to administrative law as an end in itself. The purpose of this paper is to lay out the optimal path through which the State can be held liable for its SOEs conduct according to the law of contract. Administrative law is its own branch of law distinct from the law of contract, with its own standards and remedies that differ from contractual ones.[22] Attributing the conduct of the State per administrative law would thus be counterproductive as the application of administrative law would automatically change the

[19] M Feit (see note 2 above) 143 – 144.
[20] G Quinot (ed) *Administrative Justice in South Africa: An Introduction* (2015) at 78.
[21] Ibid.
[22] G Quinot (see note 20 above) 78.

nature of the dispute from being a purely contractual one to being primarily an administrative law dispute.[23]

However, administrative law and attribution of conduct to the State are near synonymous in the minds of South African legal practitioners[24] and raising a dispute based solely on the law of contract against the State for its SOE's actions may raise some questions as to why the dispute in question is not administrative in nature. This necessitates the establishment of a case justifying why administrative law should be circumvented. To justify why administrative law should not apply requires the alleging party to show that the factors that comprise an administrative law matter are not present – to preempt any objections as to the validity of the contractual remedy being sought and the type of matter being raised.

Circumventing the application of administrative law ironically necessitates discussing it.

5.1. Administrative Law

Administrative law in South Africa refers to the law governing the execution of administrative duties of the state.[25] It essentially determines what actions amount to acts of state or public acts as defined in the Constitution.[26] The central piece of legislation concerned here is the Promotion of Administrative Justice Act (PAJA)[27] which is the legislation that empowers

[23] C Hoexter 'Contracts in Administrative Law: life After Formalism?' (2004) 121(3) *SALJ* –596.
[24] Ibid at 598 & 605.
[25] G Quinot (see note 20 above).
[26] Constitution of the Republic of South Africa, 1996 sections 231 – 233.
[27] See note 16 above.

section 33 of the Constitution and effectively codifies common law principles of administrative law. Section 33 of the Constitution[28] and the PAJA[29] can be read together to summarize the South African position on administrative action.

In essence, where an institution has acted in a manner empowered by legislation or public policy to carry out a public function, the actions carried out in doing that amount to administrative action.[30] South African case law has expanded on this principle to explain that the performance of a public function occurs where a party is either; (1) acting under the direction of a member of the executive to carry out public policy[31] or; (2) has been delegated responsibility for implementing public policy/legislation by the person explicitly empowered by the legislation/policy.[32] Importantly, the case of *President of the Republic of South Africa v South African Rugby Football Union* confirmed that the approach taken towards adducing the presence of administrative action is a functional one, focusing on the public nature of the action being taken by the functionary[33] rather than the identity of the functionary itself.[34]

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[28] See note 26 above 231 – 233.
[29] See note 16 above.
[30] G Quinot (see note 20 above) 78.
[31] See note 16 above s1. *Minister of Defence and Military Veterans v Motau and Others* 2014 (5) SA 69 (CC) para 33.
[32] Ibid. *Chirwa v Transnet Ltd* 2008 (4) SA367 (CC) para 186.
[33] This is performance of a public function. In the case of *Chirwa v Transnet Ltd and Others* 2009 (4) SA 367 (CC) four factors which are indicative of the presence of public power were adduced. These factors were laid out in paragraph 186 of the judgement and are as follows; *(1)* the coercive relationship between the entity and its state, *(2)* the public impact of the decision, *(3)* the origin of the power being exercised and, *(4)* if the decision is necessarily in the interests of the public.
[34] *President of the Republic of South Africa v South African Rugby Football Union* 200 (1) SA 1 (CC).

Thus, where an SOE has either been mandated to perform a public function in terms of legislation or has been delegated authority to do so by a person empowered by legislation to delegate the authority (such as a government representative), any action taken by the SOE in doing so that fulfils the rest of the requirements in section 1 of the PAJA would amount to administrative action. This would include any contractual obligations that the entity is bound to perform for the purposes of achieving the aims of the legislation/public policy or the instruction by the state representative.[35]

To achieve the objective of holding the State contractually liable, the party alleging that the law of contract is the applicable law to a dispute would thus have to show that the above factors that make a matter administrative in nature are not present. Thus, in this paper the first step towards holding the state contractually liable is counterintuitive – that is to disprove that the SOE, in failing to perform their contractual obligations, was performing a public function in accordance with administrative law.

Once it has been shown that the dispute between the SOE and the FMNC is not administrative in nature, the SOE would no longer be viewed as a public entity but as a private entity – with the state acting as a shareholder in the same manner as any private, natural or juristic person. Establishing this fact permits us to turn to the area of law which would allow the FMNC to hold the State (as a private actor) contractually liable for the actions of the SOE – South African Company Law.

[35] Ibid.

5.2. Company Law

South African Company Law dictates that an SOE is a separate legal entity from its shareholder (the state).[36] This juristic personality means that the SOE is presumed to have the capacity to enter contractual relationships and be bound to perform in terms of those contracts.[37] Furthermore, separate legal personality means that liability for contractual obligations is *prima facie* attributed to the company and not to the shareholder.[38]

Considering this principle, the starting point of private contractual disputes involving an SOE is that the SOE is a private party whose conduct is not attributable to the state. It is only through the application of an exception to this principle of company law that the conduct of the SOE may be attributed to the state. This exception is a divergence from the normative principle of separate juristic personality - where the corporate veil is pierced.

5.3. Piercing the Corporate Veil

The starting point of the divergence of the *prima facie* attribution of a corporation's conduct to the entity itself is the application of the doctrine of piercing the corporate veil. This is a general legal principle that applies to all corporations, regardless of the type of shareholder.

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[36] See note 17 above s 19(1). *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* 1993 (2) SA 784 (C) 815I.
[37] Ibid s 20.
[38] See note 17 above s 19(1).

In South African law, this doctrine is codified in section 20(9) of the Companies Act.[39] The section reads;

> 'If … a court finds that the incorporation of the company, any use of the company, or any act by or on behalf of the company, constitutes an unconscionable abuse of the juristic personality of the company as a separate entity, the court may—
>
> (a) declare that the company is to be deemed not to be a juristic person in respect of any right, obligation or liability of the company or a shareholder of the company …; and
>
> (b) make any further order the court considers appropriate to give effect to a declaration contemplated in paragraph (a).'[40]

In essence, veil piercing in South Africa is undertaken where the juristic personality of a company has been abused or used in a manner that the law did not intend.[41] Where juristic personality has been misused, courts have found that it would be appropriate to set aside the 'veil' of juristic personality and hold the persons behind the abuse liable for the harmful results of their abuse of juristic personality.[42] This doctrine seeks to protect third parties from circumstances where a person would commit a wrongful act against the third party and then use the corporation as a means of escaping liability. [43]

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[39] Ibid s 19(1).
[40] Ibid.
[41] Ibid.
[42] FHI Cassim, MF Cassim , R Cassim, R Jooste, J Shev & JL Yeats (see note 45 below) 41 – 43.
[43] Ibid. *Ex Parte Gore NO and Others* 2013 2 All SA 437 (WCC).

The question that follows logically is this; what amounts to an unconscionable abuse of juristic personality? The Companies Act[44] presents a clear vision on how companies are supposed to operate in South Africa. This includes a clear delineation of the rights of shareholders and directors. In particular, whilst shareholders are entitled to benefit from their contribution and have a say in most major business decisions, it is the directors who are entitled to manage the day-to-day operations of the company – including the approval and conclusion of contracts and performance of contractual obligations.[45] Furthermore, directors have a fiduciary duty to promote the best interests of the company as a whole, and not one shareholder or group of shareholders in particular.[46] It thus follows that obscene levels of interference by shareholders in the day-to-day operation of a company for the purposes of escaping liability that should duly fall on the shareholder would be a factor that would support the conclusion that there has been an abuse of juristic personality.[47] especially where the shareholders and not the company have benefitted most from their interference in said operations.[48] Where that excessive interference amounted to a misuse of the corporate form, according to the ruling in *City Capital SA Property Holdings Ltd v Chavonnes Badenhorst St Clair Cooper NO*[49] it would be appropriate in SA law to pierce the corporate veil and attribute the actions of the SOE to the shareholder.

[44] See note 17 above s 19(1).
[45] FHI Cassim, MF Cassim, R Cassim, R Jooste, J Shev & JL Yeats *Contemporary Company Law* 3 ed (2021) 42 - 43.
[46] Ibid 514 - 515.
[47] *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* 1995 2 All SA 543 (A).
[48] Ibid 42 – 43. *City Capital SA Property Holdings Ltd v Chavonnes Badenhorst St Clair Cooper NO* (85/2017) [2017] ZASCA 177.

[49] *City Capital SA Property Holdings Ltd v Chavonnes Badenhorst St Clair Cooper NO* (85/2017) [2017] ZASCA 177.

City Capital[50] is of particular use to us in this discussion as in this case the SCA linked the abuse of corporate form to the failing of the shareholders to treat individual companies within a group of companies as distinct juristic persons – instead treating them as if they were one whole corporation. Seeing as the shareholders had behaved in such manner historically, they could not later rely on the separate legal personalities of the corporations in order to escape liability where prior they had ignored any distinction between the corporates bodies.[51] This is because, where an abuse of juristic personality has caused harm to another party, and the harm caused may not be redressed by bringing suit against the entity, the veil piercing doctrine is available in order to ensure that a just and equitable outcome may be achieved for the harmed party.[52]

This reasoning may be applied to SOEs in our case. Where the State party as a shareholder has abused the corporate form of the SOE by failing to treat it as a separate entity, or any other form of abuse of the corporate form such as its use for fraudulent behaviour, then according to *City Capital,* it would be appropriate to pierce the corporate veil and hold the state accountable in a manner that would prevent an abuse of the corporate form.[53] Thus, where the state or state actors have unduly interfered with the regular operations of the SOE for its own benefit (either through the overt exercise of control or indirectly through the representative on the board of directors with the intention of escaping liability that should duly fall upon the State) and that interference amounts to misuse of juristic personality, there

[50] Ibid.
[51] Ibid para 30.
[52] Ibid.
[53] Ibid.

appears to be no reason not to pierce the corporate veil and hold the state actor liable for the harm causing conduct.

Therefore, it can be concluded that in order to attribute to the state the failure of the SOE to perform its contractual obligations the doctrine of piercing the corporate veil is the optimal legal principle to apply.

6. CONTRACTUAL LIABILITY IN SOUTH AFRICAN LAW

Once the case has been made for the attribution of conduct to the state in a way that allows for the dispute to remain contractual, it thus turns to answer the second sub question – relating to the contractual liability of the State. In essence, the question being asked here is, "How do we prove breach of contract by the SOE/State?"

The aim of the party alleging that breach of contract is present is for that party (the FMNC in this case) to be granted a remedy for the breach of contract. The ways in which this remedy is achieved is through either; *(a)* specific performance of the obligations; *(b)* cancellation of the contract and/or; *(c)* the award of contractual damages.[54] Where a breach of contract by an SOE has occurred, the FMNC that is counterparty to the contract will be entitled to these remedies and the achievement of these remedies will be the aim of the FMNC in bringing forth a contractual dispute.[55]

[54] Bhana, Nortjie & Bonthuys (see note 18 above) 14. Specific performance
[55] Ibid.

However, where the party that has failed to perform its obligations is held *not* to have breached the contract, the party alleging the breach will not have access to the above contractual remedies for breach.[56] This is an undesirable outcome for FMNCs who are particularly seeking contractual remedies and thus it is important for legal professionals practicing in this area of law to be aware of the potential pitfalls that may arise in cases where contractual liability is in question. The following discussion will address the general rules of contract that will apply to these circumstances and the aforementioned pitfalls that could befall an FMNC seeking contractual remedies.

6.1. *Pacta Sunt Servanda* and Breach of Contract

The principle of *pacta sunt servanda* is extremely important in the law of contract. It speaks to the binding of contracting parties to their agreement and a subsequent obligation to perform in terms of the agreement. *Pacta sunt servanda* means that in the event of a party failing to perform the contractual obligations in the manner prescribed by the agreement, the party which has failed to perform is in breach of contract.[57]

In terms of the SOEs and FMNCs concerned in this paper, the failure of the SOE to perform its obligations to the FMNC would be a *prima facie* breach of contract, regardless of the party to whom the conduct of the SOE is attributed. However, in South African law there are exceptions to this rule in terms of which the contractual obligations would be voided and thus no breach of contract would be present in spite of the non-performance of the obligations.

[56] Ibid 15.
[57] Ibid.

These exceptional circumstances occur when it has become impossible or illegal to perform the contractual obligations.[58]

6.2. Supervening Impossibility of Performance

In terms of South African law of contract, impossibility of performance is one defence against the assertion of contractual liability on the part of one party. Impossibility in SA law is the objective impossibility of performance of the contractual terms by any party.[59] Where the impossibility of the performance of contractual obligations is subjective (that is, only impossible to the party in question) impossibility of performance will not be a defence available against the validity of the contract.[60]

Impossibility is subject to certain requirements; that the cause of impossibility was unforeseeable at the time of signing the contract, that performance is rendered objectively impossible, and that the impossibility has not been caused by the actions of the party seeking to escape or suspend liability.[61] In the event that the defence of impossibility is applicable, the SOE would not be liable for its obligation under the laws of contract as impossibility of performance renders a contract void.[62]

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[58] S Van Der Merwe, LF Van Huyssten, MF Reinecke & GF Lubbe *Contract General Principles* (3 ed) (2007) 174 – 188.
[59] Ibid 186.
[60] Ibid at 188.
[61] *Grobbelaar No v Bosch* 1964 (3) SA 687 (E).
[62] *Nuclear Fuels Corporation of SA (pty) Ltd v ORDA Ag* 1996 (4) SA 1190 (A) 1213A.

So notably, where the performance of the SOEs contractual obligations to the FMNC is objectively impossible, where the impossibility was not foreseeable and where the impossibility was not brought about by the actions of the SOE, a court would not hold that the SOE is liable for breach of contract for failing to perform its obligations. Instead, the court will deem the impossible terms of the contract void, denying the FMNC access to contractual remedies.

6.3. Supervening Illegality

The second circumstance under which liability for the performance of the contract may not be attributed to an entity is where performance would be against the legal convictions of the community.[63] This is because where the performance of a contract is deemed to be illegal, the contract (or the illegal terms of the severable contract) becomes impossible to perform and must be voided by a court of law.[64]

There are two ways in which supervening illegality may arise. The first and most obvious circumstance is where new legislation has rendered the contract illegal. In terms of this, new laws or regulations would have been promulgated after the contract was entered into which prohibits the performance of the contract.[65] Supervening illegality may have the effect of rendering performance impossible but this is not always the case.[66] South African case law

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[63] Bhana, Nortjie & Bonthuys (see note 18 above) 186 – 187.

[64] Ibid. S Van Der Merwe, LF Van Huyssten, MF Reinecke & GF Lubbe (see note 80 above) 174.
[65] Ibid at 165. W Blair (see note 134 below) at 412.
[66] H Fazilatfar 'The Impact of Supervening Illegality on International Contracts in a Comparative Context' (2012) 45(2) *Comparative and International Law Journal of Southern Africa* 178 – 184.

takes into considerations factors such as whether the parties foresaw the risk of upcoming illegality and undertook the risk despite this awareness,[67] whether the conduct that the legislation or policy sought to avoid would take place if the contract was performed,[68] as well as the cumulative effect of holding the contract to be illegal in adducing whether the illegality makes the contract impossible to perform and thus void.[69] At the heart of the issue of illegality is whether the performance of the illegal term would cause the event that the laws seek to avoid to take place.[70]

The second circumstance under which the *boni mores* would render performance of the contract undesirable is where the performance would be contrary to public policy on the basis of unconscionability.[71] In essence, if the performance of the contract by the SOE would be exploitative and grossly unfair to one party, then courts may undertake a balancing act to decide whether the performance of the contract should be permitted or not.[72] In the event that all surrounding factors (of which fairness may be a heavily weighted factor)[73] indicate that upholding the contract would be contrary to public policy, then the SOE may escape liability for performance.[74] The circumstances under which contracts have been found to be contrary to public policy tend to be where the terms of the contract are found to be

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[67] Ibid, I Willemyns 'Disciplines on State-Owned Enterprises in international Economic Law: Are We Moving in the Right Direction?' (2016) 19 *Journal of International Economic Law* 665.
[68] *Pottie v Koetzee* 1954 (3) SA 719 (A).
[69] *Cool ideas 1186 CC c Hubbard* 2014 (4) SA 474 (CC) para 43.
[70] Bhana, Nortjie & Bonthuys (see note 18 above) 162 – 164.
[71] *Barkhuizen v Napier* (2007) (5) SA 323 (CC) para 28 – 30 & 80.

[72] Ibid.
[73] *Botha v Rich* NO 2014 (4) SA 124 (CC).
[74] DGS Chong 'Contractual Illegality and Conflict of Laws' (1995) 7(2) *Singapore Academy of Law Journal* 303 – 315.

unreasonable and the performance of the unreasonable terms would result in an unjust and unconscionable outcome.[75]

One may critique the ability of a State to be relieved of contractual liability based on supervening illegality brought about by a change in legislation. Illegality in SA law renders a contract void because it makes it impossible to perform the terms of the contract.[76] However, in cases whereby illegality arose from statutory provisions, those provisions were promulgated by the state. The obvious critique thus follows – can the state rely on impossibility of performance arising from supervening illegality that it brought about? Would this not contradict the essential requirement of impossibility – that one cannot rely on impossibility that one brought about oneself in order to escape from contractual liability?[77] Herein lies the one downside to the previous exercise in proving that the SOE was not acting as a public actor – the actions of the SOE in this dispute are seen through the lens of a private actor and so there is no legal connection between the State's action in promulgating the legislation and the subsequent inability of the State (as an actor to whom the conduct of an SOE was attributed) to perform the terms of the contract as a private party.[78] It is this potential pitfall that FMNCs instituting cases against the state should be aware of as this circumstance may determine whether the FMNC desires to institute a case based in the law of contract as laid out above or whether they would prefer to resort to a more traditionally administrative-law based matter based on the prospects of success.

[75] *Beadica 231 CC v Trustees for the time being of the Oregon Trust* 2020 (5) SA 247 (CC).
[76] S Van Der Merwe, LF Van Huyssten, MF Reinecke & GF Lubbe (see note 80 above).
[77] *Grobbelaar No v Bosch* 1964 (3) SA 687 (E).
[78] C Hoexter (see note 23 above) at 615.

The above considerations are relevant as they encompass the factors that would remove the liability of the state for its failure to perform the contractual obligations it had towards the FMNC. As such, to achieve the goal of holding the State liable, the FMNC would have to pre-emptively disprove the presence of any of the above factors that remove contractual liability.

7. THE ANSWER TO THE FIRST QUESTION

It may thus be adduced that in order to hold the South African State contractually liable for the actions of its entity, it is necessary to establish two things. First, that the actions of the SOE did not amount to administrative action but that the doctrine of piercing of the corporate veil would be appropriate to apply in this case. Second, that the actions of the state did amount to breach of contract and would not be justified in terms of the South African law of contract. With these two factors present and provable, an FMNC would have a solid case for breach of contract against the SA state itself.

8. WHY COMPARE SOUTH AFRICAN (SA) LAW TO INTERNATIONAL BUSINESS TRANSACTIONS LAW (IBTL)?

This paper has so far examined the South African legal regime concerning the participation of SOEs in commercial transactions. However, the types of transactions being considered are TCTs which by nature involve many parties of various legal jurisdictions.[79] In transnational transactions, sovereign rights may come into conflict with other sovereign rights or valid legal

[79] <<http://www.lawyers-picovschi.com/article-international-commercial-contract-part-2.html>>.

interests that are worthy of protection.[80] This is because states possess inherent rights to regulate and legislate within their own boarders without the intervention of foreign parties and when TCTs occur the two parties involved in the transaction are regulated and protected by the local laws.[81] The conflict occurs when the local laws of one jurisdiction conflict with the laws of another – which could necessitate the subordination of the legal principles of one jurisdiction to the other in a legal dispute. This subordination of one local law to another is in conflict with the principle of non-intervention with a state's lawmaking/enforcing process. This conundrum is addressed by conflict of laws in international law.[82]

International law is, in a broad sense, the consolidation of the legal convictions of the international legal community.[83] It is the result of the navigation of dispute resolution in which a multiplicity of national and international legal interests are at play, a consensus of legal principles and doctrines that have emerged as 'common' over time in practice.[84] [85]

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[80] Dagbanja (see note 4 above) 523 – 524.
[81] D N Dagbanja (see note 4 above) 523 – 524.
[82] J Dugard (see note 5 above).
[83] Ibid.
[84] J Davidson 'Illegality and Public Policy in the Conflict of Laws' (1966) 12 *Howard L.J.* 332 – 333. P Hay, M Rheinstein & UM Drobnig 'conflict of laws' (2022) Encyclopedia Britannica *https://www.britannica.com/topic/conflict-of-laws.* In this article IBTL is referred to as conflict of laws. These terms are interchangeable.
[85] J Dugard & T Tladi 'Sources of International Law' in J Dugard, M du Plessis, T Maluwa & D Tladi (eds) *Dugard's International Law: A South African Perspective* 5 ed (2018) 30 - 37.

IBTL is an area of international law which seeks to regulate transactions involving private entities.[86] This is opposed to public international law which seeks to regulate sovereign entities.[87]

The conflicting legal interests at play in TCTs is why it would be appropriate to undertake a comparative analysis between the previously mentioned principles of SA law and the principles of IBTL.

Of particular interest from a South African legal perspective are the claims of universality and general applicability of their doctrines and legal principles that International Law and IBTL claims to possess – absent of which they would be of little use in dispute resolution.[88] General applicability of laws brings legal certainty to a decentralized area of law (such as the international law regime).[89] Thus, when examining IBTLs usefulness as a standard against which to measure local laws, it is apt to determine whether there is an abundance of legal regimes that would dispute the substance of alleged international legal norms. International law has typically been tested against 'western' legal norms and found sufficient.[90] However, for this regime to be a truly reliable depiction of general legal principles, it cannot rely solely on alignment with western norms.[91] Herein lies the utility of comparing principles derived in international law to that of 'developing' nations such as South Africa – the alignment of these regimes would enhance the notion of universality of international law whilst simultaneously

[86] J Dugard (see note 5 above) 3.
[87] Ibid 2.
[88] Ibid.
[89] Ibid.
[90] DD Bradlow 'Differing conceptions of development and the Content of International development Law' (2005) *SAJHR* 49 – 50.
[91] KP Berger (see note 129 below).

ensuring that SA law is in alignment with international best practice.[92] This is why this research paper involves a comparative analysis between the legal regimes of SA law and IBTL.[93]

It must be noted that the international law mentioned in this article is not the same as that mentioned in the South African Constitution.[94] Constitutionally, 'international law' comprises of international agreements (treaties and custom) that have been ratified by South Africa's legislature as well as legal principles accepted as law by virtue of being customary international law that is not inconsistent with constitutional provisions.[95] To compare international law as defined by the constitution to SAL would be redundant as the ratified treaties and customary laws of international law already form a part of SAL.[96] Instead, this paper will focus on principles of law found either in agreements that have not been formally ratified in South Africa or foreign legal principles that have not yet been acknowledged by South African legal scholars as customary international law but which are still widely accepted as part of the international legal regime by international law scholars. In short, international law in this paper does not refer to a single body of law but it is used as shorthand for a collection of foreign laws and transnational agreements that hold no legal authority in South Africa but may be of persuasive value due to their widespread international use.

9. ACCOUNTABILITY IN INTERNATIONAL BUSINESS TRANSACTIONS LAW

[92] Ibid; S Farran, E Örücü& S P Donlan (eds) *A Study on Mixed Legel Systems: Endangered, Entrenched or Blended* (2014).
[93] Ibid.
[94] See note 26 above sections 231 – 233.
[95] Ibid s 231(2)
[96] Ibid.

As in SA law, this paper will first address the approach IBTL takes towards the attribution of conduct to the state. Whilst IBTL does not operate in clearly distinct categories like local laws do,[97] it does take a similar approach towards the attribution of conduct, separating the law applicable to attribution to public entities versus attribution to private entities.[98]

When examining principles of attribution of conduct to be found in international law, principles akin to administrative law have been developed to address whether the SOE is deemed to be a private or a public functionary.[99] These developments have occurred specifically in international arbitration proceedings wherein the public/private nature of the SOE had to be established as one party had alleged the appropriate counterparty in the suit to be the State as a public party.

It is trite to restate the primary goal of this research report and as such this section of the paper will begin with the assumption that it is understood why the FMNC should seek to establish a case for why the conduct of the SOE should not be attributed to the state as a public actor. Thus, this section of the paper will first discuss how to disprove that the conduct of the SOE should be attributed to the State as a public actor. It will then turn to IBTL principles of company law to set out a case for attribution to the state as a private actor.

9.1. Disproving Attribution of Conduct to the State as a Public Party

[97] P Hay, M Rheinstein & UM Drobnig (see note 84 above).
[98] J Dugard (see note 5 above) 1 - 2.
[99] M Feit (see note 2 above) 145 – 151; Berman (ibid).

International tribunals have grappled with the question of when it is right for the conduct of an SOE to be attributable to its state owner. Over the course of time and through hearing numerous cases, a functional approach has developed towards the attribution of conduct to the state.[100] The development of these principles culminated in the creation of the International Law Commission's articles on State Responsibility.[101] Chapter two of the ILC articles explicitly deals with attribution in articles 5, 7, 8 and 9.[102] Each provision provides for circumstances under which the conduct of a non-state organ will be attributed to the state. In essence, they reflect the position that where a party is exercising public power or acting under the control or authority of the state in performing a public function, the conduct of that party is attributable to the state. Article 5 specifically describes the exercise of a public function or governmental authority as an action attributable to the state.[103]

Article 7 extends the attributable conduct to actions that exceed the authority or go against the instruction given by a state but are still conducted in the course of exercising governmental power.[104] Article 8 attributes the conduct of a party that is wholly controlled by the state to the state and article 9 attributes the exercise of governmental authority in the absence of an official authority.[105] This reflects a functional approach whereby the actions of an entity in exercising powers that are governmental in nature or acting according to state mandate in carrying out public policy are attributable to the state. These principles of

[100] M Feit (see note 2 above) 144 – 150.
[101] 1970 I.C.J. 3 (Feb 5) paras 56—58. See L Schicho (see note 13 above) 285.
[102] Ibid.
[103] Ibid.
[104] Ibid.
[105] Ibid.

attribution have been put into play in contractual disputes and the results have been laid out below.

In the case of *Maffezini v Spain,*[106] the tribunal underwent a functional test to determine whether the actions of the SOE (SODIGA) were attributable to the state. The tribunal noted that the test involved examining specific acts for the purposes of determining whether they were, "essentially commercial rather than governmental in nature."[107] The tribunal asserted that purely commercial acts would not be attributed to the Spanish state, but governmental acts or acts of state would be attributed.[108]

In the case of *Jan de Nul v Egypt*,[109] the court further followed the functional approach regarding the attribution of conduct of a non-state organ to the state. In this case, the tribunal expressly noted that the conduct of the SOE would not be attributable in terms of art 5 of ICSID as the conduct of the SOE was not an exercise of governmental power for the benefit of the public but was rather a purely commercial act akin to the types of conduct one would expect from a private party.[110] Once again, this reflects a functional approach to the attribution of conduct to the state in international law.

[106] *Maffezini v Spain* (2001) 16 ICSID Rev-FILJ 248.
[107] Ibid para 52.
[108] Ibid.
[109] *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13.
[110] Ibid paras 163 – 164 & 169.

According to the ILC articles and their application in legal disputes, in IBTL attribution of conduct of an SOE to the state is determined by the actions being taken by the SOE. If the SOEs actions are public action in accordance with the local law of the SOE, then the conduct of the SOE is attributable to the state as a public party – rendering the any subsequent contractual disputes as public-private disputes.[111]

It is clear that the ILC article are slightly similar to South Africa's administrative law in that they provide a great framework for the attribution of conduct of an SOE to its state but also subsequently render the nature of the dispute as no longer being solely contractual in nature. In fact, the ILC articles focus solely on internationally wrongful acts.[112] According to Feit, the breach of a contract may be an internationally wrongful act only when it is done in a manner that is unique to the state and may amount to expropriation or the breach of a treaty term requiring fair and equitable treatment of the FNMC.[113] Thus in utilizing the ILCs provisions of attribution, the FMNC would have to show that there was a breach of contract and that the breach of contract amounted to an internationally wrongful act such as expropriation without adequate compensation or the breach of a term of an investment treaty with the state.[114] Feit suggests that proving this would be impossible and I am inclined to agree with his conclusion as the distinction between the 'public law' type of dispute and a dispute based primarily in the law of contract is one that is not easy to bridge. Thus, a FMNC would have to disprove the presence of factors that would render the conduct of the SOE attributable to the

[111] I Willemyns (see note 67 above) 665.
[112] See note 101 above.
[113] M Feit (see note 2 above) 153 – 157.
[114] Ibid.

state. These would be the principles of company law through which the conduct of a company is attributed to its shareholder(s).

9.2. Company Law

IBTL holds to the consensus that the SOE is a private entity and is treated as such *prima facie*.[115] The implications of this is that the SOE is *prima facie* a separate legal entity from its state shareholder and thus the state possesses limited liability for its legal obligations.[116] The state is thus *prima facie* not directly bound by all binding agreements with its SOEs. This is the starting point of any dispute with an SOE on an international scale.[117] Where a divergence occurs is in the unique circumstances under which the assumption of separate personality of the SOE from the state can be rebutted. In these instances, the actions of the SOE can be attributed to the state, including the liability for the SOEs contractual obligations.[118] This divergence occurs where the veil-piercing doctrine is applied.

9.3. Piercing the Corporate Veil

Piercing the corporate veil in IBTL is a doctrine in terms of which the actions of a corporation are attributed to its shareholders. The extent to which this doctrine is applied lays on a spectrum from it being a remedy of last resort to it being a statutorily available remedy.[119] A broad understanding of the doctrine is that, in the event of an unconscionable abuse of the

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[115] Y Khandelwal, 'Corporate Personality' (2021) 26 *Supremo Amicus* 607-621.
[116] AW Machen Jr 'Corporate Personality' (1910-1911) 24(4) *Harvard Law Review* 253 – 267.

[117] Ibid.
[118] G Rosenberg ‘State as a Party to Arbitration’ (2004) 20(4) *Arbitration International* 387 - 390.
[119] R Grantham ‘Case Note: The Corporate Veil; An Ingenious Device’ (2013) 32(2) *the University of Queensland Law journal* 311 – 315.

juristic personality of a company, the actions (and liabilities) of a company may be attributed to its members.[120] An abuse of juristic personality is, for example, to utilize a company for the purposes of wholly escaping liability for personal obligations.[121]

In the case of *Barcelona Traction, Light and Power Co., Ltd. (Belg v Spain)*[122] the veil-piercing doctrine was accepted in international law. This means that where a state has misused the juristic personality of an SOE, an arbitral tribunal or other dispute resolution forum will likely hold that the state may be liable for the performance of the obligations of the SOE as they relate to the abuse of juristic personality. And where the corporate veil has been pierced the performance of the contract itself is, according to Feit, attributable to the state.[123]

Thus, IBTL concurs with SA law's position on the optimal path towards attributing conduct to the state as a private actor. First, by disproving that the SOEs actions were the performance of a public function in terms of the *boni mores* of the legal jurisdiction in which it is registered and secondly; by applying the doctrine of piercing the corporate veil.

10. CONTRACTUAL LIABILITY IN INTERNATIONAL BUSINESS TRANSACTIONS LAW

[120] NL Georgakoopoulos 'Contract-Centered Veil Piercing' (2007) 13(1) *Stan JL Bus & Fin* 123; E Lilienfeld 'Simplified Veil-Piercing' (2022) 16(2) *Virginia Law and Business Rev*iew 381 – 382; PB Oh 'Veil-Piercing' (2010) 89(1) *Texas Law Review* 81 – 146.
[121] Ibid.
[122] 970 I.C.J. 3 (Feb 5) paras 56—58.
[123] M Feit (see note 2 above) 151. J. Beermann 'Administrative-Law-Like Obligations on Private[ized] Entities' (2002) 49(6) *UCLA Law Review* 1717 – 1738.

Once the conduct of the SOE has been attributed to the State as a private actor, IBTL follows a similar path to SA law in that the subsequent step in laying out a case for the state to be held contractually liable would be to prove breach of contract. This section will lay out the relevant principles of the law of contract in IBTL.

10.1. Pacta Sunt Servanda *and Breach of Contract*

It is trite to restate the principle of *pacta sunt servanda* and its central place in the laws of contract. Regardless of the legal jurisdiction in question, the principle that people are bound to keep their contractual obligations is the lodestone of contract law.[124] The contract reigns supreme and failure of a party to perform in terms of the contract is a prima facie breach of contract.[125]

Breach of contract thus has obvious consequences. For an SOE a finding of liability for breach of contract in IBTL could result in a tribunal ruling that either the SOE or the State either perform in terms of the contract or compensate the MNC for its losses incurred due to the SOEs breach.[126] However, in circumstances where the contractual liability of the SOE or state may be waived or excused, the FMNC will not have access to contractual remedies for breach of contractual obligations and would have to resort to a different type of claim (which may prove unsatisfactory) in order to remedy any harm caused by the failure of the SOE to perform its obligations.[127]

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[124] TE Carbonneau 'The exercise of contract freedom in the making of arbitration agreements' (2003) 36 *Vanderbilt Journal of Transnational Law* 1189.
[125] J E Viñiales (see note 14 above).
[126] Ibid.
[127] FR Fucci (see note 129 below).

It is thus apt to lay out circumstances under which liability may not arise for nonperformance of a contract to determine the circumstances under which PIL would deem it inappropriate for the parties to be held so liable.[128]

The defenses against contractual liability in IBTL stem largely from the nature of TCTs. TCTs are at their core risky, often more risky than contractual relationships between parties within one state. Some risks are foreseeable and accounted for in terms of the contract, others less so.[129] It is the unforeseeable risks in transnational transactions that the law seeks to mitigate by removing contractual liability where these risks arise – to promote the participation of parties in TCTs.[130]

10.2. *Force Majeure*

Where the defence of *force majeure* arises, there has been an event, unforeseen by the parties to a contract, that causes the delay or suspension of the performance of the contract.[131] A *force majeure* is more than just a shifting of the economic balance of the contract, it is an event which could justify either suspending the operation of liability for

[128] Dl Grace 'Force Majeure, China & the CISG: is China's New Contract Law Step in the Right direction' (2001) 2 *San Diego international Journal* At 191.
[129]KP Berger 'Renegotiation and adaptation of international investment contracts: The role of contract drafters and arbitrators' 2003 *Vanderbilt Journal of Transnational Law* 52; FR Fucci 'Hardship and changed circumstances as grounds for adjustment or non-performance of contracts. Practical considerations in international infrastructure investment and finance' (2007) *TDM* (1 – 3).
[130] Ibid.
[131] Brunner *Force Majeure and Hardship under General Contract Principles: Exemption for Nonperformance in International Arbitration* (2008) 75.

performance or it could result in the termination of obligations and restitution of benefits.[132] In essence, *force majeure* acts akin to impossibility in international law and removes contractual liability from the party alleging the defence.[133] Notably, supervening illegality of the performance of contractual obligations may be a *force majeure* which excuses a party of contractual liability for the performance of an obligation which has subsequently become illegal to perform.[134]

Necessary for the application of *force majeure* as a defence against contractual liability is that the performance of the contract is both objectively impossible and that the impossibility did not arise out of the actions of the party instituting this defence. Where private parties allege this defence there is no problem in adducing whether they are responsible for the impossibility. Concerns arise where the party alleging *force majeure* is the state which has brought about the circumstances that caused the delay or impossibility of performance. As a general rule the defence of *force majeure* is not available to the person who caused *force majeure* to arise, the state is not exception to this rule so where *force majeure* has been cause by the actions of the state and the actions of the SOE are attributable to the state this defence

[132] I Schwenzer, 'Force Majeure and Hardship in International Sales Contracts' (2009) 39(4) *Victoria University of Wellington Law Review* 714; D Maskow 'Hardship and Force Majeure' (1992) 40(3) *American Journal of Comparative Law* 657- 669.
[133]D Maskow (ibid) at 663.
[134] W Blair 'Interference of public law in the performance of international monetary obligations' in Giovanoli (ed) *International Monetary Law. Issues for the New Millenium* (2000) 395 – 412.; J Davidson (see note 84 above). 332 – 333.

will not succeed on the part of the SOE and the FMNC will be granted remedies for the SOEs breach of contract.

10.3. Hardship

The principle of hardship applies where an unforeseen shift in the surrounding circumstances of the contract result in the performance of the contract being overly onerous to one party.[135] Contractual relationships are based on a certain 'economic equilibrium'.[136] An unforeseen imbalance caused by external forces causes hardship for the party obliged to perform in now detrimental conditions.[137] IBTL has found this to be an unjust and undesirable outcome and thus the principle of hardship provides for the renegotiation of the terms of the contract in order for the contract to reflect the new economic balance of the parties.[138] This principle applies only in exceptional circumstances as courts are reluctant to intervene in contractual obligations in the 'ordinary' course of business.[139]

The consequence of a successful defence of hardship is the obligation of the two contracting parties to attempt to renegotiate the terms of the contract in good faith to reflect the original intentions of the earlier contract.[140] It is trite to note that a successful defence of hardship in a breach of contract claim cancels the contractual liability of the party that has successfully raised the defence.[141]

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[135] Ibid at 1351. UNIDRIOT Principles of International Corporate Contracts Art 6.2.2.
[136] I Schwenzer (see note 132 above) 709 – 710.
[137] D Maskow (see note 132 above) at 663.
[138] Ibid 663 – 664.
[139] Ibid.
[140] Ibid.
[141] D Maskow (see note 132 above).

11. QUESTION TWO: THE COMPARATIVE ANALYSIS

The previous sections of this paper have addressed substantive legal principles of SAL and IBTL. This section comprises of a comparative legal analysis between the two legal regimes (SA law and IBTL) and will address their similarities, differences, and the ways in which either legal regime may contribute to the other.

11.1. Attribution and Accountability

The core principles of attribution of conduct in SAL and IBTL are similar. At first glance, both legal regimes hold that an SOE is *prima facie* a separate legal entity to the state, a private party accountable for its own actions. [142] It is further evident that both SAL and IBTL envision that the veil piercing doctrine can be used effectively in order to attribute the conduct of the SOE to the State as a private party.

SAL and IBTL are in alignment when it comes to general principles of attribution. When it comes to the attribution of conduct to the state that is not based on veil piercing, there is a minuscule divergence in the applicable principles of these two regimes. SAL's administrative law regime does take a functional approach to attribution but the consequence of a successful allegation that the actions of the SOE amount to administrative action is a subordination of the contractual relationship to judicial review in terms of administrative justice.[143] This

[142] The Companies Act 71 of 2008 s 19(1) &
[143] C Hoexter (see note 23 above).

process is similar to that found in IBTL in which a hearing based on the law of contract may commence even where the attribution of conduct to the state stems from the basis of public action. IBTL of course requires an additional dispute to be brought, that the breach of contract amounts to an internationally wrongful act.[144] This may seem different at face value but in reality, these legal principles are in alignment in that the result is a subordination of the contractual claim to that of either just administrative action (in SAL) or internationally wrongful acts (IBTL). The difference here is strictly in vocabulary.

From the analysis of SA law and IBTL, a general rule appears to emerge that may apply to the attribution of conduct of an SOE to its state and its impact on contractual liability. An FMNC may pierce the corporate veil of the SOE to reveal that the state is the appropriate counterparty, where the state has not exercised public power that is administrative in nature and thus the dispute would note become administrative in nature but remain an issue of the law of contract and company law. As stated earlier, such a dispute has not yet arisen in South African law and it will be interesting to see how the law in South Africa could develop to accommodate for those circumstances.

11.2. Contractual Liability

From the discussion above, it is evident that, whilst the general principles of liability and defences against liability are aligned, there is one principle in IBTL for which SAL has no counterpart. This is the principle of hardship as a defence against liability for private

[144] M Feit (see note 2 above).

parties.[145] The closest that SA law gets to this principle is the requirement that performance for a contract not be against the *boni mores* of society. The defence of hardship has developed and spread so far as to almost amount to customary IBTL[146] and thus this paper argues for its inclusion in the South African law of contract by virtue of its near customary law status in IBTL.

12. CONCLUSION

It may thus be concluded that both South African law and IBTL – although possessing slight differences – are in alignment when it comes to the process of holding the State liable for its SOE's failure to perform its contractual relations in the course of a TCT. First, the foreign MNC alleging the breach of conduct should establish the matter as contractual in nature and not administrative in nature. Secondly, the MNC should prove that the state is the appropriate party to whom the conduct of the SOE should be attributed, by application of the doctrine of piercing the corporate veil. Finally, the FMNC should establish that there has been a breach of contract in line with the law of contract and that there are no legal grounds that would justify the SOE's failure to perform its contractual obligation(s). In this manner, both SA law and IBTL agree that the State may be held accountable and contractually liable for the conduct of its SOEs participating in international business transactions.

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[145] I Schwenzer (see note 132 above) 714.
[146] D Maskow (see note 132 above) 657- 669.

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