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South Africa

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A. Legislation and rules

A.1 Legislation

The law of arbitration in South Africa derives from the common law, legislation and the Constitution of the Republic of South Africa, 1996. It is primarily regulated by the Arbitration Act 42 of 1965 (the “Arbitration Act”).

The Arbitration Act, extensively influenced by the English and UK Arbitration Acts of 1889 and 1950, recognizes the binding effect of an agreement to arbitrate and the referral of a dispute for determination by way of arbitration. The Arbitration Act follows traditional English principles, essentially reflecting the English legal position as it stood in 1965. Where the UK statutes have been amended to accommodate the development of international commercial law, South African legislation and the Arbitration Act have, on the contrary, not been simultaneously developed and remain unamended.

In July 1998, the South African Law Reform Commission (SALRC) published a report which recommended that the UNCITRAL Model Law on International Commercial Arbitration of 1985 be adopted by South Africa for international commercial arbitrations.³ In 2001, in the face of the almost universal adoption of the UNCITRAL Model Law by countries in the process of updating their arbitration

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³ Project 94 Arbitration: An International Arbitration Act for South Africa, report dated July 1998, available at www.justice.gov.za/salrc/reports/r_prj94_july1998.pdf.

legislation and the ongoing development of international commercial law, the SALRC then turned its attention to domestic arbitration legislation and submitted a comprehensive report on the status of South African domestic arbitration⁴ in which it was recommended, among other matters, that a new domestic arbitration statute be adopted, combining the best features of the UNCITRAL Model Law and the English Arbitration Act of 1996, while retaining otherwise effective provisions of the Arbitration Act.⁵

The South African legislature has recently taken steps to implement the SALRC's recommendations on international arbitration. On 17 March 2016 it published the International Arbitration Bill for comment and for consideration by the legislature.⁶ The bill aims to incorporate the SALRC's July 1998 recommendations to incorporate the UNCITRAL Model Law into South African law. The text of the UNCITRAL Model Law of 1985 (with amendments as adopted in 2006) is incorporated wholesale into the bill in Schedule 1, along with introductory provisions relating to the bill's application and interpretation.

Contrary to the arbitration regime adopted in the United Kingdom — where the Arbitration Act 1996 governs both domestic and international arbitration — the International Arbitration Bill aims to create a bifurcated arbitration system in South Africa whereby the bill, once promulgated, will exclude the Arbitration Act from application to international commercial arbitrations.

The bill further aims to incorporate provisions on the recognition and enforcement of foreign arbitral awards in line with the New York Convention. South Africa's current regime for the enforcement of international arbitration awards is contained in a separate piece of legislation.

⁴ Project 94: Domestic arbitration report dated May 2001, available at www.justice.gov.za/salrc/reports/r_prj94_dom2001.pdf.

⁵ P. Ramsden, *The Law of Arbitration* (2009) 1st Ed., p. 19.

⁶ International Arbitration Bill [B5-2016] 17 March 2016, available at [www.justice.gov.za/legislation/bills/2016-International ArbitrationBill.pdf](http://www.justice.gov.za/legislation/bills/2016-International%20ArbitrationBill.pdf).



A.2 Rules

In terms of the South African Arbitration Act as it presently applies — both to international and domestic arbitration proceedings — parties are essentially free to adopt procedures of their choice within the framework of the Arbitration Act. Indeed, the arbitration agreement may itself specify the rules of procedure to be followed, or the parties may leave it to the arbitrator to decide the procedure, subject essentially to the principles of natural justice and the broad procedural framework envisaged by the Arbitration Act.

Domestic arbitrations are typically conducted in terms of comprehensive rules adopted by agreement between the parties, importing either the Uniform Rules of Court⁷ or the rules published and administered by the Arbitration Foundation of Southern Africa (AFSA) or the Association of Arbitrators (Southern Africa) (ASA), being the major private arbitral institutions in South Africa. International disputes are typically governed by the rules of the International Chamber of Commerce (ICC) or the London Court of International Arbitration (LCIA).

B. Cases

B.1 Premature to approach the court prior to arbitrator's decision on jurisdiction

In *Zhongji Development Construction Engineering Company Limited v Kamoto Copper Company Sarl*,⁸ the Supreme Court of Appeal (SCA) was asked to determine whether an arbitration agreement between the parties would apply as regards certain invoices in dispute between them and whether the High Court was correct in dismissing an application for a declaratory order that a particular dispute was arbitrable.

⁷ Uniform Rules of Court: Rules regulating the conduct of the proceedings of the several provincial and local divisions of the High Court of South Africa (as at 26 June 2009).

⁸ [2014] JOL 32421 (SCA).

Interestingly, neither party before the court was South African. The appellant, a Chinese company known as Zhongji Development Construction Engineering Company Limited, was invited by a South African company, Bateman Minerals & Metals (Pty) Limited (“Bateman”), acting on behalf of a Congolese company known as DRC Copper and Cobalt Project SARL (the “DCP”), to tender for the supply and construction of piling and civil works at the DCP’s mining site near Kolwezi in the Democratic Republic of Congo. Their main agreement contained an arbitration clause providing for arbitration to be administered by the ASA in accordance with its Rules.

The works then became fraught with delays and other complications and were ultimately suspended pending merger talks between the DCP and the respondent, Kamoto Copper Company Sarl (“Kamoto”). All the while, the appellant (which had already incurred costs and commenced certain works) was instructed to continue incurring additional costs and expenses in relation to the works. Bateman assured the appellant that all such costs, expenses and works performed would be reimbursed. An interim agreement was concluded to tide the appellant over, although this agreement, concluded under time pressure and on the simplest of terms, was silent on dispute resolution procedures.

The merger then took place, with Kamoto assuming certain of the DCP’s obligations under the various agreements. Kamoto refused to make certain payments allegedly due to the appellant. Kamoto also refused to submit to arbitration, relying on the merger, the interim agreement’s silence as to arbitration, the fact that neither party was South African, and that all aspects of the agreements and the works took place outside of South Africa.

The SCA, quoting with approval from the Constitutional Court’s decision in *Lufuno Mphaphuli & Associates (Pty) Ltd. v. Andrews and another*,⁹ emphasized that the South African law of arbitration “is not only consistent with, but also in full harmony with, prevailing

⁹ 2009 (4) SA 529 (CC).



international best practice in the field.” The SCA went on to note that, just as London constitutes a convenient neutral forum for the conduct of arbitrations, so too does South Africa, and the courts in South Africa have a legal, a socioeconomic, and a political duty to encourage the selection of South Africa as a venue for international arbitrations.

The SCA went on to find that, under the Rules of the ASA, an arbitrator is able to decide matters relating to their own jurisdiction, including the validity or existence of an arbitration agreement. In the result, there was no reason why the dispute should not be decided by the arbitration tribunal prior to an approach to the courts. The SCA held that the process of arbitration must be respected and the appellant’s application was accordingly premature, perhaps unnecessary, even noting that it was in some respects ironic.

This approach has been recently followed by the High Court in *Stieler Properties CC v. Shaik Prop Holdings (Pty) Ltd.*¹⁰ When considering whether or not to hear a dispute that was the subject of an arbitration agreement, the court confirmed that while court proceedings were competent, the party resisting the referral of the dispute to arbitration carried a heavy burden on showing why the matter should not be referred to arbitration.

B.2 Restricted grounds to review arbitral award

The South African courts’ respect for the arbitral process was further confirmed in the case of *Eskom Holdings SOC Ltd v. Khum MK Investments & Bie Joint Venture (Pty) Ltd and Others.*¹¹ The applicant sought to review and set aside a partial award made by the third respondent, the arbitrator in a contractual dispute with the first and second respondents, who were the first and the second claimants against the applicant as defendant in the arbitration. The judge cited

¹⁰ [2015] 1 All SA 513 (GJ).

¹¹ [2015] 3 All SA 439 (GJ).

from an article by Judge Brand (Judge of Appeal) regarding the restricted grounds of review of an arbitration with approval:

*“South African legislation governing the review of arbitration awards has been underpinned and applied so as to provide only narrow grounds for review and these have in turn been restrictively interpreted. In the result, while the courts have demonstrated a willingness to assist parties deprived of a fair hearing by procedural wrongs, they have limited their reviews to these alone and have refused jurisdiction in cases that requested their reviews of the arbitrator’s legitimate exercise of discretion. The courts have therefore maintained their lack of jurisdiction to enquire into the correctness of the conclusion arrived at by arbitrators on the evidence before them. In the result, the integrity of the arbitration process is preserved save for in cases where the arbitrator himself has discredited it through mala fides, gross irregularity or the exercise of powers not conferred upon him ...”*¹²

The court concluded that the applicant’s allegations of gross irregularity, misconduct, bias and incompetence against the arbitrator were without any basis, and various frank exchanges that occurred at the arbitration did not constitute sufficient grounds for intervention. The court found the arbitrator had also correctly rejected the defenses raised by the applicant on the matter of an estoppel. The review application was dismissed with costs.

C. Trends and observations

C.1 Trends

Commercial arbitration is a long-established mechanism for dispute resolution in South Africa. It has become increasingly popular in the last decade due to the relative speed and certainty with which resolution of disputes may be obtained, particularly in comparison to

¹² Judge Brand J.A., “Judicial Review of Arbitrations Awards” *Stell LR* (2014) pp. 2 – 247 to 264.



the staffing and resource constraints in the court system, which have resulted in backlogged court trial rolls and increasingly unaffordable access to courts. Arbitration is viewed in South Africa as a particularly flexible procedure for resolving disputes — the parties are at liberty to modify the procedure in accordance with the nature and extent of the particular dispute as well as the amount at stake.¹³

While the proposed International Arbitration Bill (examined in detail above) is the most significant recent development in South African law as regards private arbitration, arguably the most significant development in recent years affecting cross-border commercial dispute resolution in South Africa was the October 2009 launch of Africa ADR, an initiative of the Southern African Development Community (SADC). Africa ADR is a regional dispute resolution forum for the determination of cross-border disputes within the SADC region, established in conformity with the resolutions of the General Assembly of the United Nations, which encourage the use of alternative and appropriate methods for the resolution of civil disputes.¹⁴ It is hoped that this forum will result in substantial changes in the manner in which cross-border arbitration agreements are concluded between parties within South Africa. Africa ADR is ready to commence its business operations. It has drawn up and confirmed its rules and procedures for arbitrations, mediations and conciliations. It is in the process of establishing local organizing committees in all the countries in which Africa ADR will operate.

Another recent development is the opening of the China-Africa Joint Arbitration Centre (CAJAC) in Sandton, Johannesburg as an alternative to the China International Economic and Trade Arbitration Commission (CIETAC). CAJAC enjoys the support of the China Law Society and was formed by an agreement between AFSA, Africa ADR, the ASA, and the Shanghai International Trade Arbitration Centre. CAJAC will operate from both South Africa and China — disputes relating to business in Africa will be dealt with in

¹³ Butler & Finsen, *Arbitration in South Africa: Law and Practice* (1993) p. 2.

¹⁴ Accessed via www.africaadr.com.

Johannesburg and disputes relating to business in China will be dealt with in Shanghai. CAJAC is seen as a welcome development for African parties skeptical of holding arbitrations outside the African continent.

Finally, the Protection of Investment Act,¹⁵ promulgated in 2015, is due for imminent operation. The act will frame the treatment of foreign investors and their domestic investments by the state in South Africa. The act must be understood in the context of South Africa's intention to review and possibly cancel certain existing bilateral investment treaties (BITs),¹⁶ and its termination or "sunsetting" of certain of its BITs with Germany, the Netherlands and others. South Africa is also not a party to International Centre for the Settlement of Investment Disputes (ICSID).

The Protection of Investment Act aims to restrict investor-state arbitration by a foreign investor against the South African government. The act aims to frame the treatment of foreign investment in terms of the foreign investor's rights to lawful, procedurally fair and reasonable administrative action under local administrative law. The Protection of Investment Act will prescribe domestic mediation as a first step to a foreign investment dispute, provided the investor and the government can agree on the appointment of the mediator. An alternative for foreign investors is to approach the domestic courts in matters against the state. The Protection of Investment Act contains a provision for the South African government to consent to international arbitration, but this is subject to the exhaustion of domestic remedies. In addition, only state-to-state arbitration, as opposed to investor-state arbitration, will be permitted. The controversial act has polarized views and was reportedly heatedly debated in parliament. Critics have been vocal in their opposition to the legislation, while the incumbent Minister of Trade and Industry resolutely defended it.

¹⁵ Act No. 22 of 2015, available at: www.thedti.gov.za/gazettes/39514.pdf.

¹⁶ "South Africa not Averse to Bilateral Investment Treaties – Minister Davies" 2014-02-07 available at www.thedti.gov.za/editmedia.jsp?id=2988.



C.2 Observations

The government's decision to revisit its domestic legislation on international arbitration and bring it in line with international best practice should be welcomed. It is clear that new legislation, in particular the International Arbitration Bill, is being introduced with a view to encourage the growth of South Africa as a seat in international arbitration.

The South African government's position on BITs and foreign investment disputes against it, which has concerned many South African companies that rely on foreign investments, cannot be ignored. The risk of loss of foreign direct investment is very real and concerns all stakeholders in the South African economy, especially where South Africa's policies are put first to the detriment of foreign investors.

However, the South African government's intentions — to keep up with international trends and prioritize its objectives, along with its apparently renewed appreciation for the broader commercial benefits of arbitration — are positive developments. While the Protection of Investment Act may not strike the right balance between protecting South Africa's own policies and encouraging investment, only time will tell whether the new regime is likely to discourage investment.