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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, 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 (SALC) published a report which recommended that the UNCITRAL Model Law of 1985 be adopted by South Africa for international commercial arbitrations.<sup>3</sup> In 2001, in the face of the almost universal adoption of the UNCITRAL Model Law by countries in the process of updating their arbitration legislation and the ongoing development of

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<sup>3</sup> 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](http://www.justice.gov.za/salrc/reports/r_prj94_july1998.pdf).

international commercial law, the SALC then turned its attention to domestic arbitration legislation and submitted a comprehensive report on the status of South African domestic arbitration,<sup>4</sup> 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.<sup>5</sup>

The South African legislature has recently taken steps to implement the SALC's recommendations on international arbitration and the cabinet finally approved the text of the International Arbitration Bill<sup>6</sup> on 1 March 2017.<sup>7</sup> The Bill will now go through the legislature (it has passed through the National Assembly but will still need to progress through the National Council of Provinces)<sup>8</sup> before approval in the foreseeable future. If the National Council of Provinces passes the Bill without amendments, the Bill must be submitted to the President for assent. The Bill aims to incorporate the SALC'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. The promulgation of the Bill in its current form will:

- (a) incorporate the recognition and enforcement of foreign arbitral award provisions by giving effect to the New York Convention within its ambit — currently these provisions are contained in a separate act in South Africa;

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<sup>4</sup> Project 94: Domestic arbitration report dated May 2001, available at [www.justice.gov.za/salrc/reports/r\\_prj94\\_dom2001.pdf](http://www.justice.gov.za/salrc/reports/r_prj94_dom2001.pdf).

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

<sup>6</sup> [www.justice.gov.za/legislation/bills/2016-InternationalArbitrationBill.pdf](http://www.justice.gov.za/legislation/bills/2016-InternationalArbitrationBill.pdf)

<sup>7</sup> [www.gov.za/speeches/statement-cabinet-meeting-1-march-2017-2-mar-2017-0000](http://www.gov.za/speeches/statement-cabinet-meeting-1-march-2017-2-mar-2017-0000).

<sup>8</sup> [www.parliament.gov.za/press-releases/national-assembly-passes-international-arbitration-bill](http://www.parliament.gov.za/press-releases/national-assembly-passes-international-arbitration-bill).



- (b) amend the Protection of Businesses Act 1978 to remove any reference to arbitration awards from its ambit — currently the Minister of Economic Affairs’ permission is required for the enforcement of certain foreign arbitral awards. In practice, South African courts have the reputation of interpreting this law narrowly to permit enforcement;
- (c) exclude a public interest “veto” by the South African government over the recognition and enforcement of foreign arbitration awards, with certain exceptions, for example, when the subject matter is not arbitrable in South Africa or the enforcement is against public policy; and
- (d) provides that international commercial arbitrations with public bodies will be possible. Investor-state arbitrations will be regulated by a special regime under the Protection of Investment Act of 2015 which, when a date is set for its commencement, requires that parties to an investor-state dispute with the South African government first exhaust domestic remedies before a foreign investor can approach the government to consent to international investment arbitration proceedings.

Contrary to the arbitration regime adopted in the UK — 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.

While the proposed International Arbitration Bill 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.<sup>9</sup> Another recent development is the opening of the China-Africa Joint Arbitration Centre (CAJAC) in Sandton, Johannesburg, as an alternative to CIETAC. CAJAC enjoys the support of the China Law Society and was formed by an agreement between the Arbitration Foundation of Southern Africa (ASFA), Africa ADR, the Association of Arbitrators (Southern Africa) (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 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,<sup>10</sup> 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 BITs,<sup>11</sup> and its termination or sunseting of certain BITs with Germany, the Netherlands and others. South Africa is also not a party to ICSID. The Protection of Investment Act aims to restrict investor-state arbitration by a foreign investor against the South African government. Instead, 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 is for foreign investors is to approach the domestic courts in matters against

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<sup>9</sup> Accessed via [www.africaadr.com](http://www.africaadr.com).

<sup>10</sup> Act No. 22 of 2015, available at: [www.thedti.gov.za/gazettes/39514.pdf](http://www.thedti.gov.za/gazettes/39514.pdf).

<sup>11</sup> "South Africa not Averse to Bilateral Investment Treaties – Minister Davies" 2014-02-07 available at [www.thedti.gov.za/editmedia.jsp?id=2988](http://www.thedti.gov.za/editmedia.jsp?id=2988).



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.

## 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 Court<sup>12</sup> or the rules published and administered by the AFSA or ASA, being the major private arbitral institutions within South Africa. International disputes are typically governed by the rules of the ICC or the LCIA.

In addition, AFSA International, a new arm of the AFSA which will manage AFSA's cross-border case flow, has published international arbitration-specific rules. The AFSA International Rules will be applicable to international disputes administered by AFSA International and are based upon the UNCITRAL Rules, with some amendments. AFSA has also provided a model arbitration clause to insert into contracts should a party wish to make use of AFSA's administration facilities and rules.

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<sup>12</sup> 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].

## 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*,<sup>13</sup> the Supreme Court of Appeal (SCA) was asked to determine whether an arbitration agreement between the parties applied 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.

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, acting on behalf of a Congolese company known as DRC Copper and Cobalt Project SARL (“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 to incur 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.

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<sup>13</sup> [2014] JOL 32421 (SCA).



The merger then transpired, 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*,<sup>14</sup> emphasized that the South African law of arbitration “*is not only consistent with, but also in full harmony with, prevailing 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 his or her own jurisdiction — including the validity or existence of an arbitration agreement. In the result, there was no reason why the dispute before it 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.*<sup>15</sup> 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 onus on showing why the matter should not be referred to arbitration.

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<sup>14</sup> 2009 (4) SA 529 (CC).

<sup>15</sup> [2015] 1 All SA 513 (GJ).

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*.<sup>16</sup> 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 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 ...”*<sup>17</sup>

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.

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<sup>16</sup> [2015] 3 All SA 439 (GJ).

<sup>17</sup> Judge Brand J.A., *Judicial Review of Arbitrations Awards* Stell LR (2014), pages 2 – 247 to 264.



### C. Funding in international arbitration

Third-party funding is now permitted in South Africa. Previously the position on third-party funding was that these agreements were unlawful and as such, void. There has since been substantial case law declaring that where a third party is to fund a proceeding, such agreement is valid in law and is not contrary to public policy.

In *PricewaterhouseCoopers Inc and others v. National Potato Co-operative Limited*, the Supreme Court of Appeal held that an agreement to finance litigation in exchange for a part of the proceeds is in keeping with the right of access to justice. It is not in itself an offense of champerty. In short, the courts have held that a funding agreement will only be an abuse of process if it lacks good faith. The *PricewaterhouseCoopers* case has opened the way to more innovative funding of expensive litigation in South Africa, and this is an area that is gaining momentum.

However, the courts recognize that funding of this nature could lead to an abuse of process, and provision has been made for a third-party funder to be held jointly and severally liable for any adverse costs orders, particularly where they are no longer impartial and are actively involved in the case. There is generally no obligation on a party to disclose the existence of a third-party funding arrangement in order to bring the case.