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International Arbitration 2022

South Africa: Law & Practice and Trends & Developments

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SOUTH AFRICA

Law and Practice

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1. GENERAL

1.1 Prevalence of Arbitration

International arbitration is still a developing mode of alternative dispute resolution in South Africa, but its prevalence as a preferred dispute resolution method is increasing.

The most recent major development in this regard was the introduction of the International Arbitration Act 15 of 2017 (International Arbitration Act), which became effective on 20 December 2017. The International Arbitration Act incorporates the UNCITRAL Model Law on International Commercial Arbitration (UNCITRAL Model Law) into South African law. Schedule 1 to the International Arbitration Act is, in effect, a restatement of the UNCITRAL Model Law.

According to statistics released by one of South Africa's leading private arbitration institutions, the Arbitration Foundation of Southern Africa (AFSA), ten international disputes were referred to AFSA for arbitration between 2007 and 2016. In 2018, AFSA reported 18 referrals for international arbitrations (with a total quantum in excess of ZAR640 million). In late 2019, AFSA reported that its international arbitration referrals had increased to 24 new cases, with a total quantum of ZAR3 billion. These figures demonstrated a significant uptake in the desire for international arbitration in South Africa since the International Arbitration Act became effective. The number of new case referrals fell to 19 in 2020 as a result of the COVID-19 pandemic, but there was an increase to 21 new referrals in 2021. This included an increase in the number of virtual arbitrations and hearings.

International arbitration awards are enforced in terms of the International Arbitration Act, which incorporates the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (the New York Convention) into South African law, in line with international best practice.

International arbitration is most prevalent in contractual disputes where parties have included a dispute resolution mechanism in their contracts.

Although international arbitration is experiencing an uptake, domestic parties tend to resort to domestic arbitration for the resolution of their disputes. In this regard, AFSA is the most popular arbitral institute for the referral of domestic arbitrations.

1.2 Impact of COVID-19

General

Matters referred for international arbitration in South Africa are mainly cross-border commercial disputes. These commercial disputes involve, amongst other things, general contractual disputes, engineering and construction disputes and disputes involving share agreements and/or loan repayments. Given the relatively nascent state of a distinct international arbitration regime in South Africa, the general trend in this field at present is the uptake in the number of new matters being referred to local and international arbitral institutions.

With an increasing focus on international arbitration on the African continent, a host of jurisdictions have taken steps to increase their attractiveness as arbitration centres and safe seats for arbitration. South Africa is no exception and it has taken steps to secure its position in the international arbitration community through the promulgation of the International Arbitration Act, the development of AFSA's international arbitration division and various improvements to infrastructure and resources used in support of international arbitration.

The digitisation of South Africa's courts and the uptake of technologies facilitating virtual hear-

ings and e-discovery – all of which has been accelerated by the COVID-19 pandemic – has increased access both to arbitration proceedings held in South Africa and to South Africa's courts in instances where parties to arbitration proceedings are required to approach them for relief. South Africa's arbitral institutions are working towards developing technology designed for remote/virtual hearings.

Impact of the COVID-19 Pandemic

The COVID-19 pandemic has required South African courts to adapt to electronic hearings and case-management processes. This rapid uptake of digital court procedures has been valuable in several respects. First, it has demonstrated that the digital document management system that had been piloted before the COVID-19 pandemic is able to deal with the electronic filing of court documents, which in turn means not only that parties need not be physically present to attend to court-related administrative tasks, but that practitioners and judges are becoming far more comfortable with and confident in using electronic means of conducting hearings and managing and exchanging documents. This is very likely to encourage and increase the existing use of electronic means for the same purposes in arbitrations.

Second, the COVID-19 pandemic has required South African law firms and courts to hold hearings via online teleconferencing platforms. This will significantly expand access to international arbitrations seated in South Africa as it becomes increasingly less essential for legal representatives, litigants and witnesses to convene at a single location. With the option of attending an arbitration via a teleconference, parties are now able to enjoy the benefits of choosing South Africa as a seat for their international arbitration without the necessity of being physically present in South Africa.

AFSA, being the most popular arbitration organisation in South Africa, and the Association of Arbitrators (Southern Africa) NPC (AASA), which is another arbitral institution commonly used in South Africa, both published protocols for remote hearings last year, due to the increase in virtual hearings as a result of COVID-19.

1.3 Key Industries

The key industries in which South Africa has historically seen significant activity in international arbitration include mining, shipping, construction and certain financial sectors. These continue to be key industries for international arbitration in South Africa in 2021-22, due to South Africa's continued activity in these fields.

Recently, there has been an increase in international arbitration activity in the construction sector, due to the number of projects taking place both in South Africa and on the continent at large. The effects of COVID-19 continue to be felt in this sector and there has been a rise in the number of international arbitrations in this area.

While there is not yet any official data to suggest that the COVID-19 pandemic has resulted in decreased international arbitration activity in any particular industry in 2021-22, there appeared to have been a general reluctance by parties to initiate proceedings unnecessarily. This led to parties pursuing alternative means of dispute settlement (eg, mediation) prior to engaging in more formal proceedings such as arbitration. There was also a notable increase in referrals to independent experts for the resolution of disputes. With more time having lapsed since the worst of the pandemic, arbitration activity appears to be returning – although not yet at the level of pre-pandemic statistics.

1.4 Arbitral Institutions

Arbitral Institutions in South Africa

AFSA and AASA are amongst the most popular arbitration organisations used to resolve commercial disputes in South Africa, with AFSA being the most prominent and widely recognised institution.

AFSA is divided into a domestic and an international division. AFSA supervises and administers the resolution of cross-border disputes in accordance with its International Rules. Since the promulgation of the International Arbitration Act, AFSA has published revised International Arbitration Rules to bring them in line with the International Arbitration Act (which includes the UNCITRAL Model Law). These Revised International Arbitration Rules (AFSA's International Rules) came into effect on 1 June 2021.

International Institutions in South Africa

Aside from the local arbitral institutions, some South African-seated arbitrations are also referred to the International Court of Arbitration of the International Chamber of Commerce (ICC) and the London Court of International Arbitration (LCIA), although this is less common. Although the ICC reported that in 2018 it received 42 referrals from Sub-Saharan Africa and the LCIA reported 25 new matters, in very few of these cases were Sub-Saharan African countries chosen as the seat of arbitration. There does not appear to have been a material change to this position in the last year.

Local Preferences

The benefit of administering international arbitrations where the seat of arbitration is located in South Africa is the competitive pricing of arbitration services when compared with arbitration organisations based in more developed countries (such as the ICC and the LCIA). The fact that the local institutions are relatively well known to local parties also serves as an advantage.

There have been no new arbitral institutions established in South Africa in 2021 or 2022, and AFSA remains the most popular institution.

1.5 National Courts

There are no specific courts within South Africa that are designated to hear disputes related to international arbitrations or domestic arbitrations. Disputes relating to international or domestic arbitrations will be heard by the High Court that has jurisdiction over the dispute. This will generally be determined by the domicile of the defendant or respondent and/or the area where the cause of action arose.

2. GOVERNING LEGISLATION

2.1 Governing Law

International Arbitration Act 15 of 2017

The International Arbitration Act governs international arbitration in South Africa and is based largely on the UNCITRAL Model Law. The preamble to the International Arbitration Act provides "for the incorporation of the Model Law on International Commercial Arbitration" into South African law. The scope of this legislation is set out at section 7 of the International Arbitration Act, which provides that any international commercial disputes that the parties have agreed to submit to arbitration in terms of an arbitration agreement may be decided by arbitration, provided that the dispute is arbitrable. As such, the scope of application is particularly broad and arbitrations may be interpreted and construed as being international arbitrations if just one party to the arbitration agreement is from a different jurisdiction from any of the other parties. This assessment of the scope of application is set out

in more detail at Article 1, and in particular Article 1(3), of the UNCITRAL Model Law.

Applicability of the UNCITRAL Model Law

Section 6 of the International Arbitration Act incorporates the UNCITRAL Model Law into South African law. To this end, Schedule 1 to the International Arbitration Act constitutes an almost verbatim restatement of the Model Law. Section 8 of the International Arbitration Act deals with the interpretation of the Model Law and empowers an arbitral tribunal or a court to refer to relevant reports of the UNCITRAL Model law or its secretariat in this regard.

Divergence from the UNCITRAL Model Law

Apart from certain nuanced and permissible changes to the text of the UNCITRAL Model Law, there is no significant divergence from the UNCITRAL Model Law in South Africa's national legislation.

2.2 Changes to National Law

Arbitration Act 42 of 1965

The Arbitration Act 42 of 1965 (the Arbitration Act) was the only arbitration legislation in South Africa until the enactment and promulgation of the International Arbitration Act in 2017. The Arbitration Act is now applicable to domestic arbitrations only. It has been suggested by practitioners and academics that it requires amendment in order to modernise it to make it more suitable for the domestic practice of arbitration in South Africa in the modern age. To date, however, there have been no significant changes in the national arbitration law and it is not clear when any proposed amendments to the Arbitration Act will be tabled for consideration.

3. THE ARBITRATION AGREEMENT

3.1 Enforceability

Legal Requirements for an Enforceable Arbitration Agreement

The legal requirements for an arbitration agreement to be enforceable under the laws of South Africa are the same as the requirements for the validity and enforceability of a contract. This is determined at common-law level in accordance with South Africa's contract-law principles. The six legal requirements are:

- there must be consensus, or an intention to contract or enter into the arbitration agreement, amongst the parties;
- the parties to the contract must all have had legal capacity to enter into the contract;
- all formalities must be complied with – this usually does not include the requirement to reduce the agreement to written form, since oral agreements are valid in South African law; however, it is a requirement for an arbitration agreement (especially in international arbitrations) to be in writing in order to satisfy the requirements of Article II of the New York Convention, which have also been incorporated into South African law through the adoption of Article 7(2) of the UNCITRAL Model Law;
- legality – the purpose of the agreement must be legal and it must not fall foul of South African public policy;
- possibility – performance under the contract must be possible; and
- certainty – the contract must have definite or determinate content, so that the commitments can be enforced.

If an arbitration agreement can be shown to meet all of these requirements, it will constitute a valid and enforceable agreement in terms of South African law.

3.2 Arbitrability

Approach of the National Courts with Respect to Determining the Law Governing the Arbitration Agreement

The South African courts interpret contractual provisions (including governing law provisions) by looking at the ordinary grammatical meaning of the clause that has been agreed to by the parties. In the absence of express agreement, the courts will look to various other rules of construction, including the surrounding circumstances of the agreement. As such, where the law governing the arbitration agreement needs to be determined, any express written agreement between the parties will be upheld. Alternatively, where there is no express agreement or the provision is unclear, surrounding circumstances and rules of construction will be applied.

Article 19 of the UNCITRAL Model Law allows parties to agree to the seat of the arbitration. Where the parties fail to include an agreement to this effect, the arbitration will be administered in whatever manner the arbitral tribunal sees fit. This shall also apply where the parties have not agreed to the law governing procedure which is to be followed. South African courts will take guidance from this prior to making a determination on the law governing the arbitration agreement.

Approach of the National Courts with Respect to the Enforcement of Arbitration Agreements

Arbitration agreements are protected under the common law and by the Arbitration Act. In terms of the common law, no party may cancel the agreement to refer the matter to arbitration without just cause. While the courts have not adopted a single definition for "just cause", it is clear that this is often determined on a case-by-case basis at the court's discretion. Further, Section 3 of the Arbitration Act states that an arbitration agreement may only be terminated by consent of all the parties to the agreement, unless the agreement provides otherwise.

It is well-established that an arbitration clause does not exclude the court's jurisdiction. Both in terms of the common law and the Arbitration Act, a court has a discretion whether to uphold an arbitration clause or not. The party wishing to avoid arbitration bears the onus of proving that there is "good cause" or "sufficient reason" as to why the arbitration agreement should not be enforced.

Case law shows that this burden is not easily discharged, and the discretion of the court is seldom exercised. Until recently, South African jurisprudence on this point has, to a large extent, been informed by English law principles, which remain part of South African law. For example, in Russell v Russell 1880 14 ChD 471, the court stated that the cases in which the discretion against arbitration should be exercised were few and exceptional. Examples of instances where a court has exercised its discretion to set aside an arbitration agreement include where a defendant's counterclaim affects a third party who is not subject to the arbitration agreement, and when allegation(s) of fraud have been made.

The courts have not adopted a single definition for "good cause." Courts have stated that only in a "very strong case" will the discretion be employed, but they have not defined what a "very strong case" entails. What is clear is that the facts and circumstances surrounding the matter will determine whether the court should employ its discretion in this regard. More recently, in Tee Que Trading Services (Pty) Ltd v Oracle Corporation South Africa (Pty) Ltd [2022] ZASCA 68 (17 May 2022), the Supreme Court of Appeal upheld similar principles when it found that the UNCITRAL Model Law reflects the international approach to international commercial arbitration agreements and, unless an arbitration agreement

is null and void, inoperable and/or incapable of being performed, the South African courts are obliged to uphold the arbitration agreement, eg, by staying court proceedings pending a referral to international arbitration.

3.3 National Courts' Approach

Arbitrability under the Governing Law

Section 7 of the International Arbitration Act sets out the matters that are subject to international commercial arbitration in South Africa. While they are described in broad terms, it is clear from this section that certain matters are not capable of determination by arbitration and that one such instance of this occurs when the arbitration agreement is deemed contrary to public policy in South Africa.

In terms of Article 34(2)(b) of the UNCITRAL Model Law, the general legal principles on arbitrability set out at section 7 of the International Arbitration Act are extended and it is noted that a South African court may set aside any award that falls foul of these arbitrability requirements.

In terms of section 2 of the Arbitration Act, a reference to arbitration shall not be permissible in respect of any matrimonial cause or any matter incidental to any such cause and any matter relating to status.

General Approach to Arbitrability in South Africa

Aside from the statutory provisions referred to above, South African common law also applies with regard to the approach on arbitrability. Any matter relating to the status of an individual (which will need to be decided by the South African judiciary) or that raises any public policy concerns will, at common law, be subject to additional scrutiny.

3.4 Validity

The Principle of Severability

South African law recognises the principle of severability (or separability) when it comes to the validity and/or legality of contractual provisions. As such, if portions of an agreement are invalid or illegal, those portions of the agreement will be disregarded and the remaining, enforceable, provisions will remain.

Severability at Common Law

At common law, it is accepted that the fundamental principle to be applied when it comes to severability is the probable intention of the parties "as it appears in, or can be inferred from, the terms of the contract as a whole". In determining the probable intention of the parties, consideration will be given to whether:

- the objectionable provision is grammatically or notionally distinct from the rest of the agreement;
- the objectionable provision is subsidiary to the main purpose of the agreement; and
- the parties would have entered into the agreement without the provision.

If the answer to all of these questions is in the affirmative, then a court will find in favour of severability.

To the extent that the offending provisions strike at the root of the agreement, such that the agreement will be meaningless without them, the agreement will be considered void ab initio and none of the provisions will be actionable, including the arbitration agreement, unless the parties expressly provide otherwise. This was reaffirmed in a recent Supreme Court of Appeal case, Namasthethu Electrical (Pty) Ltd v City of Cape Town and Another [2020] ZASCA 74 (29 June 2020).

Validity under the UNCITRAL Model Law

The foregoing should also be read together with Article 16(1) of the UNCITRAL Model Law, which provides that an arbitral tribunal "may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement". Based on this provision, it is possible that an arbitral tribunal will find the arbitration agreement to be independent of the other terms of the contract and, therefore, the arbitration agreement may survive in instances where the rest of the contract is invalid or illegal.

4. THE ARBITRAL TRIBUNAL

4.1 Limits on Selection

In terms of Article 11(2) of the UNCITRAL Model Law, the parties are afforded full autonomy to select arbitrators, subject to deadlock procedures and other agreed appointment procedures. In this regard, see the default procedures in **4.2 Default Procedures**.

4.2 Default Procedures

Articles 11(3) and 11(4) of the UNCITRAL Model Law set out the procedures for the appointment of arbitrators where the parties are unable to agree either at all or under a set appointment procedure. In both instances, the appointment may be referred to the High Court of South Africa for determination in accordance with the applicable Article, as read with Article 6 of the UNCITRAL Model Law.

In multi-party arbitrations, there is no specific default procedure to be applied, but the procedures set out at Articles 11(3) and 11(4), as read with Article 6, of the UNCITRAL Model Law are broad enough to assist parties in this regard.

Articles 7 and 8 of AFSA's International Rules set out procedures for appointing arbitral tribunals.

4.3 Court Intervention

Extent of Court Intervention in the Selection of Arbitrators

Article 5 of the UNCITRAL Model Law provides that no court shall intervene in international arbitration proceedings except where permitted in terms of the International Arbitration Act and the Model Law.

As set out in **4.2 Default Procedures**, Articles 11(3) and 11(4) of the UNCITRAL Model Law allow for court intervention in the appointment of arbitrators where the parties are unable to agree either at all or under a set appointment procedure.

Limitation on a Court's Power to Intervene

Other than the general limitation set out above, there are no specific limitations on a court's power to intervene. However, it should be noted that the powers given to the courts by the International Arbitration Act and the UNCITRAL Model Law are narrow in their scope of application and are only applicable in the absence of agreement or failure by parties to agree to the appointment of arbitrators, as allowed in terms of the Act and Model Law.

4.4 Challenge and Removal of Arbitrators

Grounds for Challenge of Arbitrators

The grounds for challenging arbitrators are set out at Article 12 of the UNCITRAL Model Law. These include:

- any grounds giving rise to justifiable doubts as to his or her independence or impartiality; and
- if he or she does not possess the requisite qualifications agreed to by the parties.

It is important to note that these grounds may only be raised based on reasons of which either party became aware after the appointment of the

arbitrator. Further, the test for "justifiable doubts" requires that substantial grounds contending reasonable apprehension of bias by a reasonable person must be set out.

Article 13(1) of AFSA's International Rules provides for similar grounds to challenge arbitrators.

Procedure for Challenge of Arbitrators

The procedure for challenging arbitrators is set out at Article 13 of the UNCITRAL Model Law and allows for parties to agree to the procedure to be followed. Failing agreement, the party wishing to challenge an arbitrator must do so within 15 days after becoming aware of any ground for challenge and must send written reasons to the tribunal. In the event that the challenge is unsuccessful, the party challenging the arbitrator may approach the High Court of South Africa to pronounce on the determination. That determination will be final and is not subject to any appeal.

Article 13 of AFSA's International Rules provides for similar challenge and removal procedures.

4.5 Arbitrator Requirements

In terms of Article 12(1) of the UNCITRAL Model Law, a person who is approached to be an arbitrator must disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. The obligation to remain impartial and independent exists throughout the arbitrator's tenure and the arbitrator is under an obligation to disclose any circumstances that may arise which may compromise his or her impartiality.

Article 15.2(a) of AFSA's International Rules provides that the arbitral tribunal must act fairly and impartially and Rule 6(4) makes provision for an arbitrator to disclose immediately to the Secretariat any circumstances likely to give rise to justifiable doubt as to his or her independence or impartiality after appointment.

5. JURISDICTION

5.1 Matters Excluded From Arbitration

Common Law

In common law, criminal matters and matters relating to a person's status, including matrimonial matters, are excluded from arbitration on public policy grounds.

International Arbitration Act

Section 7 of the International Arbitration Act, as read with Article 34(2)(b) of the UNCITRAL Model Law, deals with arbitrability. The dispute must be capable of determination by arbitration under the law of South Africa and the arbitration agreement should not be contrary to public policy.

Arbitrability

See **3.2 Arbitrability**.

5.2 Challenges to Jurisdiction

Article 16 of the UNCITRAL Model Law empowers an arbitral tribunal to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.

5.3 Circumstances for Court Intervention

International Arbitration Act

Article 5 of the UNCITRAL Model Law provides that no court shall intervene in matters governed by the UNCITRAL Model Law except where so provided in the UNICITRAL Model Law.

The UNCITRAL Model Law sets out a closed list of circumstances in which a court may be called upon to lend its assistance and supervision in the conduct of an arbitration. The court may intervene to:

- break a deadlock in the appointment of arbitrators;
- determine a challenge to the appointment of an arbitrator;
- terminate an arbitrator's mandate due to the arbitrator's inability or failure to act; and
- determine the jurisdiction of an arbitral tribunal.

In terms of Article 34(1) and (2)(iii) of the UNCITRAL Model Law, a party may apply to a court for the setting-aside of an arbitral award where that award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration. A court can, if possible, set aside only that part of the award which contains decisions on matters not submitted to arbitration.

Arbitration Act

In terms of section 33(1)(b) of the Arbitration Act, a court may set aside an award by the arbitral tribunal where the tribunal has exceeded its powers. Courts are generally reluctant to interfere where the parties have agreed to resolve disputes by arbitration, but will deal with a challenge on jurisdiction. However, in instances where the parties have agreed that an arbitral tribunal may determine its own jurisdiction, courts will generally not intervene in jurisdictional issues. A shortcoming of the Arbitration Act is its failure to deal with the doctrine of "competence-competence" and its effect. This has been left to the courts to develop, and they have delivered a number of pro-arbitration judgments in this regard.

5.4 Timing of Challenge

In terms of Article 16(3) of the UNCITRAL Model Law, if an arbitral tribunal rules on its jurisdiction, an aggrieved party may request a court to determine the tribunal's jurisdiction. A party intending to institute such a court challenge must do so within 30 days of receipt of the arbitral tribunal's ruling.

5.5 Standard of Judicial Review for Jurisdiction/Admissibility

The standard of judicial review in South Africa is largely permissive and deferential to the parties' choices in respect of questions of admissibility and jurisdiction. There are narrow grounds for a judicial review and those grounds have been interpreted restrictively by the courts.

5.6 Breach of Arbitration Agreement

International Arbitration Act

In terms of Article 8 of the UNCITRAL Model Law, a court before which an action that is the subject of an arbitration agreement is brought may, on request, stay the proceedings and refer the parties to arbitration. An exception to this will be if the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed.

Arbitration Act

The courts have held that an agreement by the parties to refer a matter to arbitration should be respected. If a party commences court proceedings in breach of an arbitration agreement, the other party may apply to the court in terms of Section 6 of the Arbitration Act to stay the court proceedings so that the dispute can be referred to arbitration. Alternatively, in action proceedings, a party may raise a special plea contending that the dispute before a court should have been referred to arbitration instead and thus potentially attain a stay of proceedings.

However, in terms of Section 3 of the Arbitration Act, courts have a discretion as to whether to enforce an arbitration agreement. Arbitration agreements are not enforced in exceptional circumstances, see **3.3 National Courts' Approach**.

5.7 Jurisdiction Over Third Parties

An arbitral tribunal may only assume jurisdiction over a dispute involving the rights and obligations of individuals or entities that are not parties to an arbitration agreement if those parties agree to arbitrate the dispute.

In the absence of agreement, an affected party may request a court to not enforce an arbitration agreement on the basis that not all the parties to the dispute or with an interest in the dispute are parties to the arbitration agreement. Such an order may be sought where different arbitration proceedings or court proceedings may lead to a multiplicity of proceedings dealing with the same dispute, with the risk of conflicting decisions and increased costs.

6. PRELIMINARY AND INTERIM RELIEF

6.1 Types of Relief

Article 17(1) of the UNCITRAL Model Law empowers arbitral tribunals to grant interim measures, unless otherwise agreed by the parties, for temporary measures, including in respect of procedural issues, such as separating issues or compelling the filing of submissions. A party seeking interim relief should first satisfy the arbitral tribunal that (i) it will suffer harm that cannot be repaired by an award of damages and that is substantially greater than the harm that the party against whom the interim measure is claimed will suffer, and (ii) there is a reasonable possibility that the party will succeed on the merits of the claim. An interim measure will be binding and, upon application to a competent court, enforceable against the other party.

6.2 Role of Courts

International Arbitration Act

Article 17J of the UNCITRAL Model Law empowers courts to grant interim measures. The courts, however, are only allowed to grant interim measures where (i) an arbitral tribunal has not yet been appointed and the matter is urgent; (ii) the arbitral tribunal is not competent to grant the order; or (iii) the urgency of the matter makes it impractical to seek the relief from the arbitral tribunal.

Article 17J also applies to arbitration proceedings which have their seat outside of South Africa.

Under Article 17J of the UNCITRAL Model Law, the courts can grant the following interim relief:

- orders for the preservation, interim custody or sale of any goods which are the subject-matter of the dispute;
- orders securing the amount in dispute but not an order for security for costs;
- orders appointing liquidators;
- other orders to ensure that any award which may be made in the arbitral proceedings is not rendered ineffectual by the dissipation of assets by the other party; or
- interim interdicts (injunctions) or other interim orders.

Arbitration Act

Section 21(1) of the Arbitration Act empowers courts to grant interim measures. An arbitration agreement does not oust the jurisdiction of a court. Accordingly, a party that wishes to obtain interim relief may elect to approach either an arbitral tribunal or a court. The choice of forum will depend on circumstances that warrant interim relief.

Emergency Arbitrators

Neither the International Arbitration Act nor the Arbitration Act make provision for the appointment of an emergency arbitrator. However, the AFSA International Rules allow a party requiring urgent interim or conservatory relief to make an application for such relief before, concurrently

with, or immediately after filing a request for arbitration. That application is determined by an emergency arbitrator appointed by the AFSA International Secretariat. The emergency arbitrator is required to decide the claim for emergency relief within 14 days of appointment. Any decision of the emergency arbitrator may be confirmed, varied, discharged or revoked by the arbitral tribunal once it has been constituted. Importantly, this only applies to parties who concluded their arbitration agreements after 1 June 2021.

6.3 Security for Costs

Article 17(2)(e) of the UNCITRAL Model Law empowers an arbitral tribunal to make an interim award for security of costs, but the arbitral tribunal is only allowed to make the award against a claiming or counter-claiming party. Furthermore, Article 17J(1)(b) expressly states that the courts' power to grant interim relief does not include security for costs.

7. PROCEDURE

7.1 Governing Rules

The procedural rules in international arbitrations are subject to agreement between the parties. This is guaranteed by Article 19 of the UNCITRAL Model Law. In the absence of agreement, the International Arbitration Act empowers arbitral tribunals to make rulings on procedural issues, taking the UNCITRAL Model Law into consideration.

The most commonly used arbitration rules in South Africa are the following:

- AFSA's Arbitration Rules;
- the AASA's Arbitration Rules;
- the UNCITRAL Arbitration Rules;
- the ICC Arbitration Rules; and
- the LCIA Arbitration Rules.

7.2 Procedural Steps

No specific procedural steps are required by law in South Africa. As previously mentioned, Article 19 of the UNCITRAL Model Law provides the parties with autonomy to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.

7.3 Powers and Duties of Arbitrators

The International Arbitration Act empowers an arbitral tribunal to:

- rule on its own jurisdiction;
- grant interim measures;
- conduct the arbitration in a manner that it considers appropriate if the parties fail to agree on a procedure;
- determine the judicial seat of the arbitration if the parties fail to agree on the judicial seat; and
- decide whether it is necessary to hold oral hearings for presentation of oral arguments.

7.4 Legal Representatives

Specific Qualifications for Appearing in South Africa

In terms of Section 25 of the Legal Practice Act 28 of 2014 (the "Legal Practice Act"), a legal practitioner who is enrolled and practising as an advocate or an attorney has the right to appear on behalf of any person before any board, tribunal or similar institution. In order to be enrolled and admitted as a legal practitioner, the person must either be a South African citizen or permanent resident in South Africa (see Section 24 of the Legal Practice Act).

Position under the International Arbitration Act

The International Arbitration Act is silent on the qualifications or requirements needed for legal representatives appearing in international arbitrations seated in South Africa. In the event of a challenge to the ability of a legal representative

to represent a party in an international arbitration, the tribunal can make a ruling on that issue. AFSA's International Rules appear to permit legal representation by a person who is not admitted as a legal practitioner under the Legal Practice Act. However, legal representatives would need to comply with the provisions of the Legal Practice Act in order to appear before the South African courts (eg, to obtain court-ordered interim measures).

8. EVIDENCE

8.1 Collection and Submission of Evidence

General

There are no specific provisions in the International Arbitration Act requiring disclosure of all relevant documents by the parties to an arbitration, as is the case in South African court proceedings.

The UNCITRAL Model Law

Article 19(1) of UNCITRAL Model Law provides that the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings and, in the absence of such an agreement, the tribunal may conduct the arbitration as it considers appropriate, subject to the provisions of the International Arbitration Act and the UNCITRAL Model Law. These powers include the power to determine the admissibility, relevance, materiality and weight of any evidence.

The UNCITRAL Model Law does not contain any provisions on disclosure of documents by a party to the other parties and/or the arbitrator, privilege, use of witness statements or cross-examination. These aspects are all subject to the parties' agreement and, failing agreement, to the discretion of the tribunal to conduct the arbitration as it considers appropriate.

Practice

As previously mentioned, there are several administering bodies based in South Africa, each of which has its own procedural rules. For example, where parties have agreed that their dispute will be administered by AFSA (one of the most prevalent South African arbitration institutions) and the arbitration is an international arbitration, AFSA's International Rules would apply. These rules provide that the arbitral tribunal may conduct the proceedings in any such manner as it deems appropriate. This includes, among other things, upon the application of any party or upon its own initiative, but in either case only after giving the parties a reasonable opportunity to state their views, the power by the arbitral tribunal to:

- order any party to make any documents, goods, samples, property, sites or things under its control available for inspection, examination or analysis by the arbitral tribunal, any other party, any expert to that party and any expert to the arbitral tribunal;
- order any party to produce to the arbitral tribunal and to other parties any documents or copies of documents in their possession, custody or power which the arbitral tribunal decides are relevant;
- decide upon the admissibility, relevance or weight of any material tendered by a party on any issue of fact or expert opinion; and
- decide the time, manner and form in which any such material should be exchanged between the parties and presented to the arbitral tribunal.

It is also common in South African-seated arbitrations for parties to agree to apply the South African Uniform Rules of Court, subject to certain agreed adjustments. In the event that the South African Uniform Rules of Court are utilised, Rule 35, pertaining to discovery, will ensure that the parties make full and complete discovery of all

relevant documents and recordings pertaining to the case. Relevance is an elastic concept, which is ascertained with regard to the background and nature of the dispute in question.

8.2 Rules of Evidence

The rules of evidence applicable to international arbitrations seated in South Africa are derived from South African common law and the Law of Evidence Amendment Act 45 of 1988. These are the same rules of evidence that are applicable to domestic matters. In addition, parties and tribunals may also look to softer forms of law (eg, the International Bar Association (IBA) Rules on the Taking of Evidence in International Arbitration) for guidance on points not covered by the South African laws on evidence. As always, the rules of evidence may be agreed to by the parties and/or incorporated into the parties' arbitration agreement.

8.3 Powers of Compulsion

In terms of Article 27 of the UNCITRAL Model Law, an arbitral tribunal or a party to the arbitration (with the approval of the tribunal) may request a Registrar of the division of the High Court, or the clerk of a Magistrate's Court in whose jurisdiction the arbitration takes place, to exercise their powers to issue a subpoena to compel the attendance of a witness before a tribunal in order to give evidence or produce documents. Failure to comply with a subpoena without reasonable excuse is an offence.

The High Court uses the same powers as it has for the purposes of civil proceedings before the High Court to make an order for the issue of a commission or request for taking evidence outside of its jurisdiction ie, where a witness is not located in South Africa.

As previously mentioned, Article 17J of the UNCITRAL Model Law allows for court-ordered interim measures, which may include, for example, an order for the preservation and/or custody of evidence. Further, Chapter IVA of the UNCITRAL Model Law sets out the position in relation to interim measures in general, with Article 17 setting out the power of an arbitral tribunal to order interim measures, including:

- maintaining or restoring the status quo pending determination of the dispute;
- preserving evidence that may be relevant and material to the resolution of the dispute; and
- preserving assets.

AFSA's International Arbitration Rules provide that an arbitral tribunal may order interim measures in order to:

- maintain or restore the status quo pending determination of the dispute;
- take action that would prevent, or refrain from taking action that is likely to cause:
  (a) current or imminent harm; or
  (b) prejudice to the arbitral process itself;
- provide a means of preserving assets out of which a subsequent award may be satisfied; or
- preserve evidence that may be relevant and material to the resolution of the dispute.

9. CONFIDENTIALITY

9.1 Extent of Confidentiality

Arbitration between Private Parties

The International Arbitration Act is silent on the issue of confidentiality between private parties to an arbitration agreement. Nevertheless, as a general common-law principle of contract law, parties may agree on the confidentiality of arbitral proceedings in their arbitration agreement. To the extent that they do, this will be valid and binding between those parties, but not on third parties. In cases in which the parties wish for third parties (eg, fact or expert witnesses)

to maintain confidentiality, this will need to be ensured through the conclusion of a separate, written confidentiality agreement.

In terms of the AFSA International Arbitration Rules, as a general principle, parties are to keep confidential all:

- awards in the arbitration;
- materials in the arbitration created for the purposes of the arbitration;
- other documents produced by another party in the proceedings not otherwise in the public domain unless such disclosure is required:
  (a) by legal duty;
  (b) to protect or pursue a legal right; or
  (c) to enforce or challenge an award in legal proceedings before a state court or other legal authority.

AFSA may publish all arbitral awards in an anonymised or pseudonymised form, unless a party to the arbitration proceedings objects in writing to that publication within 30 days after notification of the award to the parties.

Arbitrations Involving Public Bodies

Section 11 of the International Arbitration Act provides that, where a public body is a party to arbitration proceedings, these proceedings will be public unless the arbitral tribunal finds that there are compelling reasons to direct otherwise.

The International Arbitration Act further provides that, if the arbitration is held in private, the award and all documents created for the arbitration (which would include pleadings, witness statements and the like) which are not in the public domain must be kept confidential by the parties and tribunal, except where the disclosure of such documents may be required by reason of a legal duty or to protect or enforce a legal right.

The AFSA International Rules similarly apply to international arbitrations involving public bodies, where such proceedings are being administered by AFSA.

10. THE AWARD

10.1 Legal Requirements

In terms of Article 31 of the UNCITRAL Model Law, an arbitral award must:

- be in writing;
- be signed by the arbitral tribunal;
- state the reasons upon which it is based (unless the parties have agreed that no reasons shall be given);
- state its date and the juridical seat of arbitration; and
- be delivered to all parties (a copy will suffice).

No time-limits for the delivery of the award are stipulated in terms of the International Arbitration Act.

10.2 Types of Remedies

Provided that the subject-matter of the arbitration is arbitrable and that there are no public policy concerns, an arbitral tribunal may award any remedy available to it based on the governing law of the agreement between the parties. Accordingly, relief can include damages, specific performance, final interdicts (injunctions), declaratory orders, costs and interest. As a general point of law, punitive damages will not be awarded and/or enforced under South African law.

The remedies are determined with reference to the arbitration agreement, the nature of the dispute and the relief sought by the parties.

10.3 Recovering Interest and Legal Costs

Recovering Interest

Article 31(5) of the UNCITRAL Model Law provides that a tribunal may award interest on such a basis and on such terms as the tribunal considers appropriate and fair in the circumstances, also having regard to the currency in which the award was made, commencing not earlier than the date on which the cause of action arose and ending not later than the date of payment.

In terms of section 29 of the Arbitration Act, parties are entitled to recover interest at either an agreed rate or, alternatively, if no rate has been agreed between the parties, the amount is calculated in accordance with the Prescribed Rate of Interest Act 55 of 1975.

Recovering Legal Costs

The issue of costs is at the discretion of the arbitration tribunal (unless the parties agree otherwise). Generally, in line with the South African law position, costs are awarded in favour of the successful party.

In terms of Article 31(6) of the UNCITRAL Model Law, an arbitral tribunal is entitled to pronounce upon:

- the party entitled to costs;
- the party who shall be liable to pay the costs;
- the amount of those costs or the method of determining that amount; and
- the manner in which those costs are to be paid.

11. REVIEW OF AN AWARD

11.1 Grounds for Appeal

Recovering Interest

Article 31(5) of the UNCITRAL Model Law provides that a tribunal may award interest on such a basis and on such terms as the tribunal considers appropriate and fair in the circumstances, also having regard to the currency in which the award was made, commencing not earlier than the date on which the cause of action arose and ending not later than the date of payment.

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- the party who shall be liable to pay the costs;
- the amount of those costs or the method of determining that amount; and
- the manner in which those costs are to be paid.

11.2 Excluding/Expanding the Scope of Appeal

Parties can agree to expand or exclude the scope of appeal or challenge under national law. There are no grounds of appeal available without express agreement between the parties.

11.3 Standard of Judicial Review

The standard of judicial review in South Africa is deferential to the merits of a case. In reviewing an arbitration award, the court may – in accordance with section 33 of the Arbitration Act and

on the application of any party to the arbitrator after due notice to the other party/parties – make an order setting the award aside, if it can be shown that:

- any member of an arbitration tribunal has misconducted himself or herself in relation to his or her duties as arbitrator;
- an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers; or
- an award has been improperly obtained.

12. ENFORCEMENT OF AN AWARD

12.1 New York Convention

Accession to the New York Convention

South Africa acceded to the New York Convention on 3 May 1976 without any reservations.

Incorporation of the New York Convention into South African Law

Given that the Arbitration Act contained no express provisions dealing with international arbitration in South Africa, the Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977 was enacted to cater specifically for the enforcement of international arbitration awards in South Africa. This piece of legislation largely mirrored the provisions of the New York Convention and remained in force until it was repealed following the enactment of the International Arbitration Act. By virtue of Chapter 3, as read with Schedule 3 of the International Arbitration Act, the New York Convention remains a part of South African law.

12.2 Enforcement Procedure

Procedures and Standards for Enforcing an Award in South Africa

Chapter 3 of the International Arbitration Act deals with the recognition and enforcement of arbitration agreements and foreign arbitral awards.

The procedure for enforcing an award in South Africa is relatively simple and is set out at section 17, as read with section 18, of the International Arbitration Act. The party seeking to enforce the award must make an application on notice to the High Court of South Africa, setting out the grounds for the application. When doing so, the party seeking recognition and enforcement must produce evidence. The applicant must therefore provide the following:

- the original award and the original arbitration agreement in terms of which the award was made, duly authenticated, or a certified copy of that award and of that agreement; and
- if in a foreign language, a sworn translation of the arbitral award and arbitration agreement into an official South African language, duly authenticated.

The court may accept other documentary evidence regarding the existence of the foreign arbitral award and arbitration agreement as sufficient proof, where the court considers it appropriate to do so.

In terms of section 18 of the International Arbitration Act, the South African courts may refuse to recognise or enforce a foreign arbitral award on the same grounds as those listed in Article V of the New York Convention. Section 18 of the International Arbitration Act is a restatement of Article V of the New York Convention.

Awards that Have Been Set Aside at the Seat

If an award has been set aside at the seat of the arbitration, it will not be capable of being recognised and enforced in South Africa. This is because it will not meet the recognition and enforcement criteria set out in section 17 of the International Arbitration Act. Where there is no evidence of a final award, the party seeking to enforce it in South Africa will be unable to do so. It would also be contrary to South African public policy to enforce an award that has been set aside. The public policy defence is catered for in terms of section 18(1)(b) of the International Arbitration Act.

Awards Subject to Ongoing Set-Aside Proceedings at the Seat

While there is no settled case law confirming that awards subject to ongoing set-aside proceedings at the seat will be stayed, there is authority to suggest that South African courts would adopt this approach at the very least "as a procedural measure". In Transnet Limited v Ed-U-College (Port Elizabeth) (NPC) 2018 JDR 0471 (ECG), it is acknowledged that, where an injustice would be done by not staying execution (and indeed enforcement) pending a decision in arbitration or other proceedings, a suspension of proceedings (read to include a suspension of enforcement proceedings pending a resolution of the proceedings at the seat) would be appropriate.

Sovereign Immunity

The state or a state entity would only be able to raise the defence of sovereign immunity in circumstances where it is clear that the state or state entity did not intend to conclude an arbitration agreement or to enter into arbitration proceedings. As a general principle of the law of contract, if a state entity voluntarily concludes an arbitration agreement, it would be held to that agreement by the South African courts. It may be for this reason that the option for state entities to conclude arbitration agreements has specifically been carved out in legislation. For example, section 13(4) of the Protection of Investments Act 22 of 2015, provides that the "government may consent to international arbitration in respect of investments covered by this Act, subject to the exhaustion of domestic remedies".

12.3 Approach of the Courts

General Approach toward the Recognition and Enforcement of Arbitration Awards

As previously set out, section 16 of the International Arbitration Act stipulates that foreign arbitral awards are deemed to be recognised and enforceable in the South Africa and a party may, on application, have a foreign arbitral award declared an order of court, which is enforceable in the same manner as any judgment or order of court.

At domestic law level, section 31 of the Arbitration Act empowers the South African courts to make an arbitration award an order of court upon application by one of the parties. In instances where there is a patent clerical error or mistake arising from any accidental slip or omission, the court is empowered to correct any such error or mistake prior to making the award an order of court.

In some instances, the South African courts have applied section 33(1)(b) of the Arbitration Act with a view to setting aside an award on the grounds of gross irregularity. This happened in Palabora Copper (Pty) Ltd v Motlokwa Transport & Construction (Pty) Ltd [2018] ZASCA 23, where, at paragraph [8], the following was stated: It suffices to say that where an arbitrator for some reason misconceives the nature of the enquiry in the arbitration proceedings with the result that a party is denied a fair hearing or a fair trial of the issues that constitutes a gross irregularity. The party alleging the gross irregularity must establish it. Where an arbitrator engages in the correct enquiry, but errs either

on the facts or the law, that is not an irregularity and is not a basis for setting aside an award. If parties choose arbitration, courts endeavour to uphold their choice and do not lightly disturb it. The attack on the award must be measured against these standards.

Refusal to Enforce Foreign Arbitral Awards on Public Policy Grounds

Being a common-law jurisdiction, South Africa adopts a similar approach to the public policy defence as those raised in other common-law jurisdictions, eg, England and Wales. To this end, the public policy defence is upheld sparingly and only in the most compelling of circumstances. This assists in controlling the application of this defence that has so often been described as an "unruly horse".

In Cool Ideas 1186 CC v Hubbard and Another [2014] ZACC 16, the Constitutional Court set aside an arbitral award on the grounds of public policy. This was a rare example of a successful challenge to an arbitral award on the ground of public policy. The court, in this case, declined to enforce an arbitral award because to do so would allow it would be contrary to a statutory prohibition (because it would allow a builder not registered in terms of the Housing Consumers Protection Act 95 of 1998 to claim compensation, which it should be prohibited from doing).

It can therefore be said that the public policy defence may be raised successfully in circumstances where the most egregious breaches of public policy are committed or where there will be a significant impact on a particular (and potentially vulnerable) class of persons in South African society.

13. MISCELLANEOUS

13.1 Class Action or Group Arbitration

South African legislation does not specifically exclude class-action arbitration or group arbitration.

Class Actions Referred to Arbitration

In South Africa, to date, there have been no class actions referred to arbitration for determination. Class actions in South Africa need to be certified following an application to court to proceed as such. It is conceivable that, once a class has been certified with the leave of the court, there would be no prohibition on the parties agreeing to have the issues determined by arbitration. This would be achieved by a written arbitration agreement in terms of which an arbitrator (or panel of arbitrators) is appointed to adjudicate the dispute and make a ruling that is final and binding (unless a right of appeal is agreed).

Group Arbitration

It is interesting to note that in South Africa an arbitral tribunal decided a group arbitration involving the Gauteng Department of Health and parties affected by the deaths of mentally ill patients at the Life Esidimeni Health Care Centre. This was a statutorily appointed body.

13.2 Ethical Codes

Counsel – Advocates and Attorneys

South African counsel, as officers of the High Court, are required to act in accordance with high standards of ethical conduct. These are contemplated in the Legal Practice Act and its associated code of conduct. In addition, if counsel, as advocates, are members of the Bar Council in their province, they are required to act in accordance with the Bar Council of South Africa's uniform rules of professional ethics, as prescribed.

Arbitrators

Arbitrators' ethical codes are subject to the provisions of the International Arbitration Act and the Arbitration Act. Further, since many arbitrators in South Africa are usually also advocates, they are further required to adhere to their professional prescribed standards of ethical conduct.

13.3 Third-Party Funding

Third-party funding is permitted in South Africa. However, it is presently not regulated by domestic law. Civil case law may be instructive with respect to third-party funding in arbitral proceedings.

Article 27 of AFSA's International Rules provides that where a Third-Party Funding Agreement is entered into, the Funded Party shall notify all other parties, the Arbitral Tribunal, and the Secretariat of both the existence of a Third-Party Funding Agreement, and the identity of the Third-Party Funder.

13.4 Consolidation

Section 10 of the International Arbitration Act states that parties to an arbitration agreement may agree that the arbitral proceedings be consolidated with other arbitral proceedings. The tribunal is not empowered to order consolidation in the absence of agreement by the parties.

Article 30 of AFSA's International Rules provides for consolidation if:

- parties have agreed to the consolidation;
- all the claims in the arbitrations are made under the same arbitration agreement, and the same Arbitral Tribunal has been constituted in each of the arbitrations or no Arbitral Tribunal has been constituted in the other arbitration(s); or
- the arbitration agreements are compatible, the same Arbitral Tribunal has been constituted in each of the arbitrations to be consolidated or no Arbitral Tribunal has been constituted in the other arbitration(s), and:
  - (a) the disputes arise out of the same legal relationship(s); or
  - (b) the disputes arise out of contracts consisting of a principal contract and its ancillary contract(s); or
  - (c) the disputes arise out of the same transaction or series of transactions.

There is no similar provision within the Arbitration Act permitting the consolidation of domestic arbitral proceedings. It therefore stands to reason that a South African court would not be able to consolidate arbitration proceedings without the consent of the parties.

13.5 Binding of Third Parties

Arbitration Agreement

Third parties may not be bound by an arbitration agreement in South Africa unless they agree to be so bound. While a South African court has a wide discretion to make any order it deems reasonable and justifiable within the bounds of the law (and therefore, in theory, could bind a foreign third party to an arbitration agreement), the courts have proven themselves to be respectful of arbitration and have therefore not made such an order.

Arbitration Award

In general, foreign third parties will also not be bound by an arbitration award, unless that third party consents to be bound, in which case a South African court may enforce that consent through the recognition and enforcement of the award.

Bowmans with over 400 lawyers, delivers integrated legal services throughout Africa from eight offices in six jurisdictions. We provide practical advice to an international client base at every stage of the arbitration process, from drafting appropriate arbitration clauses, to conducting pre-arbitral negotiations and arbitral proceedings and, ultimately, to enforcing arbitral awards. We have developed expertise across various business sectors and have experience in arbitrating under the rules of all major arbitral institutions. Our experience ranges from investment protection arbitrations, to arbitrations concerning joint ventures and commercial disputes. We also regularly conduct ad hoc arbitrations under the UNCITRAL Arbitration Rules. Our membership of, and active participation in, regional arbitration associations (such as the China Africa Joint Arbitration Centre; Kenya's Chartered Institute of Arbitrators and Dispute Resolution Centre; the Arbitration Foundation of Southern Africa; and the Association for International Arbitration in Uganda) aids our ability to find innovative ways to settle disputes.

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Trends and Developments

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South Africa's Supreme Court of Appeal's Interpretation of the International Arbitration Act 15 of 2017 Affirms South Africa as a "Pro-arbitration" Jurisdiction

Introduction

In December 2017, South Africa promulgated the long-anticipated International Arbitration Act No 15 of 2017 (the IA Act) to regulate international arbitration. Prior to the IA Act, all arbitration activity in South Africa was governed by the Arbitration Ac, No 42 of 1965 (the Arbitration Act), and there was no formally recognised distinction between domestic and international arbitrations.

The IA Act incorporates the UNCITRAL Model Law. In addition, it repealed the Recognition and Enforcement of Foreign Arbitral Awards Act of 1977 and expressly provides for the recognition and enforcement of foreign arbitral awards through the incorporation of the Convention on Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention).

In the recent case of Tee Que Trading Services (Pty) Ltd v Oracle Corporation South Africa (Pty) Ltd (case no 065/2021) [2022] ZASCA 68 (17 May 2022) (the TQ case), the South African courts had the opportunity to interpret aspects of the IA Act for the first time since its enactment. The TQ case marks an important development in South Africa's jurisprudence on international arbitration in that it provides further assurance that South Africa is a "pro-arbitration" jurisdiction with courts that will purposively enforce the IA Act.

Case Discussion

Background facts

During 2004, a South African company, Tee Que Trading Services (Pty) Ltd (TQ), held a licence agreement with I-Flex Solutions Limited (I-Flex), a company based in India. The licence agreement granted TQ a right to sub-licence a specific software system to the South African Post Office (SAPO). The licence and sub-licence agreements (the licence agreements) both contained arbitration and governing law clauses in terms of which any disputes arising out of the agreements would be referred to arbitration.

The licence agreement between TQ and I-Flex recorded that disputes between the parties would be referred to international arbitration in London, England, in terms of the laws of England and Wales. The sub-licence agreement between TQ and SAPO recorded that disputes would be resolved in South Africa, according to South African law and that the rules of arbitration of the International Chamber of Commerce (ICC) would apply.

In 2005, I-Flex was acquired by Oracle Corporation South Africa (Pty) Ltd (Oracle) and it was agreed between TQ and Oracle that the licence agreements would remain in place. In addition to this, TQ entered into the Oracle Partner Network Agreement (OPNA) in terms of which TQ's relationship with I-Flex would be extended to Oracle and provided for TQ to distribute Oracle's other programs, services and equipment.

Over time, TQ and Oracle entered into two further agreements: the Oracle Licence and Services Agreement (OLSA) and the OPN Full Use

Distribution Agreement (FUDA), which both recorded that disputes arising out of the agreements would be determined by South African courts, in accordance with South African law. We refer to the OPNA, OLSA and FUDA as the "network membership agreements".

High Court proceedings

In March 2018, TQ instituted a claim against Oracle and SAPO in the Gauteng Division of the High Court of South Africa (held at Pretoria) in terms of which it claimed that Oracle and SAPO had breached the licence agreements by contracting directly with each other to the exclusion of TQ. TQ claimed damages in an amount of ZAR61.6 million.

Oracle brought an application to stay the High Court proceedings pending referral of the dispute to international arbitration under the auspices of the ICC in terms of the licence agreements. Given the recent promulgation of the IA Act, Oracle argued that the Arbitration Act 42 of 1965 (the Arbitration Act), which governs domestic arbitrations in South Africa, did not apply to the licence agreements.

Oracle further contended in the alternative that, even if it were to be found that the licence agreements contemplated domestic arbitration as a result of them having been drafted and concluded prior to the promulgation of the IA Act, the pending action should be stayed pending referral of the dispute in terms of Section 6 of the Arbitration Act which provides as follows:

(1) If any party to an arbitration agreement commences any legal proceedings in any court (including any inferior court) against another party to the agreement in respect of any matter agreed to be referred to arbitration, any party to such legal proceedings may at any time after entering appearance but before delivering any pleadings or taking any other step in the proceedings, apply to that court for a stay of such proceedings.

(2) If on any such application the court is satisfied that there is no sufficient reason why the dispute should not be referred to arbitration in accordance with the agreement, then the court may make an order staying such proceedings subject to such terms and conditions as it may consider just.

TQ contended that the dispute resolution clauses stipulated in the network membership agreements superseded the arbitration agreements stipulated in the licence agreements and that the business relationship between the parties was governed by the network membership agreements. In this regard, TQ asserted that, given that all of the parties were based in South Africa and that the cause of action arose in South Africa, it would not be in the interests of any of the parties to refer the dispute to international arbitration.

The High Court found that the provisions of the UNCITRAL Model Law on International Commercial Arbitration, which forms part of the IA Act, applied to the licence agreements and concluded that it was compelled to order a stay of the proceedings pending referral of the dispute to arbitration in accordance with Article 8 of the Model Law.

Importantly, the court held that, under the IA Act, the court had no discretion not to order a stay of proceedings.

SCA Appeal

TQ appealed the decision of the High Court to the Supreme Court of Appeal (the SCA).

In considering whether the arbitration and governing law clauses in the licence agreements were superseded by the dispute resolution

clauses in the network membership agreements, the SCA found that it was an "absurdity" for TQ to seek to hold SAPO to the network membership agreements to which SAPO was not a party, especially where TQ failed to provide a plausible explanation as to how the network membership agreements would be incorporated into the sublicence without SAPO's consent.

In this regard, the SCA noted that the licence agreements regulated specific rights between TQ, Oracle and SAPO in respect of the I-Flex software and the network membership agreements regulated membership to the business relationship between TQ and Oracle based on TQ's membership of the Oracle network.

Moreover, in concluding the network membership agreements, Oracle assured TQ that its rights under the licence agreements would not be negatively affected by the network membership agreements. Accordingly, the SCA found that it was inconceivable that the network membership agreements rendered the arbitration and governing clauses in the licence agreements inoperative.

The SCA also considered whether the IA Act and the Model Law (which is set out at Schedule 1 to the IA Act) applied to the dispute between the parties.

Article 1(1) of the Model Law applies to international commercial arbitration, subject to any agreement in force between South Africa and any other State(s). Article 1(2) states that the provisions of the Model Law apply only if the juridical seat of the arbitration is in South Africa, although there are some exceptions to this.

Article 1(3) of the Model Law provides that an arbitration is international if:

- the parties to the arbitration have, at the time of the conclusion of the arbitration agreement, their places of business in different States; or
- one of the following places is situated outside the State in which the parties have their places of business:
  - (a) the place of arbitration, if determined in, or pursuant to, the arbitration agreement;
  - (b) any place whether a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject matter of the dispute is most closely connected; or
  - (c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.

The SCA found that the only sensible interpretation of Article 1(2) is that, if the juridical seat of the arbitration is in the territory of South Africa, the provisions of the IA Act and the Model Law must apply.

The SCA held that when TQ and Oracle extended the terms of the original contract between TQ and I-Flex, they were aware of the location of their businesses and chose to retain the arbitration and governing law clauses as they were. The licence agreements clearly provided for the settlement of disputes through international commercial arbitration. Both the specified seat (London) and the applicable rules (ICC) rendered the arbitration an international arbitration.

The SCA noted that there is nothing prohibiting parties in South Africa from choosing a place of arbitration that is outside of South Africa. Article 20 of the Model Law provides that the parties are free to agree on the juridical seat of arbitration.

In this regard, the SCA held that the Model Law reflects the international approach to international commercial arbitration agreements that,

unless an arbitration agreement is null and void, inoperable and/or incapable of being performed, courts are obliged to stay action proceedings pending the referral to arbitration. In this case the arbitration and governing law agreements between Oracle, TQ and SAPO remained valid and operative.

In addition, and as a consequence of South Africa having ratified the New York Convention, the provisions of the New York Convention are included and incorporated into South African legislation at Schedule 3 of the IA Act. Article II of the Schedule provides that each contracting state is required to recognise an agreement in writing in terms of which the parties agree to submit their differences to arbitration.

Accordingly, the SCA found that there was no valid basis to interfere with the arbitration agreement in the licensing agreements.

The appeal was therefore dismissed. In line with the doctrine of *stare decisis*, this judgment is binding on all the lower courts.

Significance of the Case

The TQ case is a positive and important development in South African international arbitration law as it confirms that South African courts do not have the power to interfere with disputes that are subject to an international arbitration agreement (unless the arbitration agreement is invalid and unenforceable) and are required to stay any court proceedings pending the referral of the dispute to international arbitration. There is therefore no discretion for the South African courts to elect to hear matters that are subject to international arbitration.

As such, the judgment of the SCA is a clear indication to the domestic and international community that South African courts will enforce the IA Act and that any proceedings brought before the courts that ought to have been referred to arbitration will be stayed pending and in favour of the institution of the arbitration proceedings.

This development should also give parties seeking to subject their agreements and contractual arrangements to international arbitration in South Africa reassurance and confidence that the South African courts will not interfere with their decision to have matters adjudicated by way of international arbitration, notwithstanding that both parties may even be situated in South Africa.

In the result, South Africa's recognition of international arbitration agreements is a further step in affirming South Africa as a "pro-arbitration" jurisdiction and a "safe" seat for international arbitration.

Contributed by: *Jane Andropolous, Clement Mkiva, Jonathan Barnes and Jackie Lafleur,* ***Bowmans***

Bowmans with over 400 lawyers, delivers integrated legal services throughout Africa from eight offices in six jurisdictions. We provide practical advice to an international client base at every stage of the arbitration process, from drafting appropriate arbitration clauses, to conducting pre-arbitral negotiations and arbitral proceedings and, ultimately, to enforcing arbitral awards. We have developed expertise across various business sectors and have experience in arbitrating under the rules of all major arbitral institutions. Our experience ranges from investment protection arbitrations, to arbitrations concerning joint ventures and commercial disputes. We also regularly conduct ad hoc arbitrations under the UNCITRAL Arbitration Rules. Our membership of, and active participation in, regional arbitration associations (such as the China Africa Joint Arbitration Centre; Kenya's Chartered Institute of Arbitrators and Dispute Resolution Centre; the Arbitration Foundation of Southern Africa; and the Association for International Arbitration in Uganda) aids our ability to find innovative ways to settle disputes.

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