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International Arbitration 2021

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 (the 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 of 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. Although there are no official case figures available for 2020, unofficial sources confirm continued growth in AFSA referrals, including an uptake in the number of virtual arbitrations and hearings. These figures demonstrate a significant uptake in appetite for international arbitration in South Africa since the International Arbitration Act became effective.

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.

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 hearings 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 work-

ing towards developing technology designed for virtual hearings which would enable parties to participate in an arbitration from different geographic locations.

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. Firstly, 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 of conducting hearings and managing and exchanging documents in arbitrations.

Secondly, the COVID-19 pandemic has also 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 full suite of 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, has recently published a protocol for remote hearings, given 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 2020-21, due to South Africa's continued activity in these fields.

Recently, there has been a further uptake 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 are also starting to be felt in this sector and this will undoubtedly see a further rise in the number of international arbitrations in this area. It is also possible that the continued effect of the COVID-19 pandemic will result in a further increase in mining and shipping arbitrations.

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 2020-21, there has been a general reluctance by parties to initiate proceedings unnecessarily. This has led to an uptake in parties pursuing alternative means of dispute settlement (eg, mediation) prior to engaging in more formal proceedings such as arbitration. There has also been a notable uptake in referrals to independent experts for the resolution of disputes.

1.4 Arbitral Institutions

Arbitral Institutions in South Africa

AFSA and the Association of Arbitrators (Southern Africa) NPC (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 came into effect on 1 June 2021 (AFSA's International Rules).

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.

Local Preferences

The benefit of utilising South African arbitration organisations such as AFSA or the AASA to administer 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 to those institutions when it comes to the choice of an arbitral institution to administer arbitration proceedings.

There have been no new arbitral institutions established in South Africa in 2020 or 2021, 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 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

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 or that raises any public policy concerns will, at common law, be subject to additional scrutiny and will need to be decided by the South African judiciary.

3.3 National Courts' Approach

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. 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. South African jurisprudence on this point has, to a large extent, been informed by English law principles, which remain part of the 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.

3.4 Validity

The Principle of Severability (or Separability)

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

At common law, criminal matters, matters relating to an individual's status, including matrimonial matters, and matters raising public policy concerns are excluded from arbitration.

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 and matters that are excluded from arbitration.

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 UNICITRAL Model Law except where so provided in the UNICITRAL Model Law.

In terms of Article 16(3) of the UNCITRAL Model Law, a court may be requested to decide on the jurisdiction of the arbitral tribunal, which decision shall be subject to no appeal.

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 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 be reluctant to intervene in jurisdictional issues.

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 decide on the tribunal's jurisdiction. A party launching 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 deferential in respect of questions of admissibility and jurisdiction.

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, an opponent 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 further proceedings.

However, in terms of section 3 of the Arbitration Act, courts have a discretion to bypass the arbitration clause. Such a discretion must be judicially exercised and the courts will exercise it in instances where there are allegations of fraud, where the arbitrator is not to be trusted or is incapable of giving a decision and where there has been misconduct on the part of the arbitrator.

5.7 Third Parties

An arbitral tribunal may only assume jurisdiction over individuals or entities that are neither parties to an arbitration agreement nor signatories to the contract containing the arbitration agreement if those parties agree to this.

In the absence of agreement, an interested party may request a court to bypass 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 may lead to a multiplicity of proceedings, 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 order interim measures, unless otherwise agreed by the parties, for temporary measures, including in respect of procedural issues necessary to ensure ripeness for hearing, 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. The interim measures will be binding and

enforceable against the other party upon application to a competent court.

6.2 Role of Courts

International Arbitration Act

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

Foreign-seated arbitrations fall under the definition of international arbitrations under Article 1(3)(ii) of Article 17J of the UNCITRAL Model Law. In this regard, the aforementioned Article 17J would apply to any such foreign-seated arbitrations.

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 or other interim orders.

Arbitration Act

Section 21(1)(f) of the Arbitration Act empowers courts to make orders in respect of an interim relief. 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 effectiveness based on circumstances that warrant interim relief.

Emergency Arbitrators

Neither the International Arbitration Act nor the Arbitration Act makes provision for the appointment of an emergency arbitrator. However, the AFSA's International Rules allow a party requiring urgent interim or injunctive relief from the AFSA to make an application for such relief before, concurrently with, or immediately after the filing of a request for allocation to the arbitral tribunal. This application will be determined by an emergency arbitrator appointed by the Secretariat. This emergency arbitrator is required to decide the claim for emergency relief within 14 days of appointment. This order 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

Procedural issues 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 enables 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. It is likely that the consent of the parties would be sufficient in order for legal representatives from any legal background to be appointed. However, given that the procedural law for an arbitration seated in South Africa is South African law, legal representatives would need to comply with the provisions of the Legal Practice Act in order to appear before the South African courts (for example, 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; and
- 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

Appeal by Agreement Only

Unless the arbitration agreement provides otherwise, an arbitration award is final and binding and not subject to appeal on the merits. Each party to the arbitration must abide by and comply with the award in accordance with its terms.

The parties may vary this general position to cater for an appeal on any agreed grounds, as contemplated in section 28 of the Arbitration Act. In line with international best practice, the International Arbitration Act does not cater for an appeal. This, of course, does not prohibit the parties from agreeing to an appeal mechanism in their arbitration agreement.

Setting an Award Aside

In the absence of an appeal mechanism, the only method of disposing of a defective award is to have it set aside. In terms of Article 34 of the UNCITRAL Model Law, a court application for setting aside an award is the exclusive recourse against an arbitral award.

An arbitral award can only be set aside if the party making application to the court proves that:

- a party to the arbitration agreement lacked capacity to contract under the applicable law;
- the arbitration agreement is invalid under the applicable law, or in the absence of an agreement on the governing law, under South African law;
- the party making the application did not receive the required notice of the appointment of the arbitrator or of the arbitral proceedings, or was otherwise unable to present its case;
- the award addresses issues falling outside the reference to arbitration (however, if capable of being separated, those matters falling within the scope of the agreement will not be set aside); or
- the tribunal was constituted in contravention of the agreement between the parties.

Alternatively, an arbitral award can be set aside if a court finds that:

- the subject-matter of the dispute is not capable of settlement by arbitration under South African law; or
- the award is in conflict with public policy.

Under Article 34(5) of the UNCITRAL Model Law, an award is in conflict with public policy if:

- a breach of the arbitral tribunal's duty to act fairly occurred in connection with the making of the award and caused or will cause substantial injustice to the applicant; or
- the making of the award was induced or affected by fraud or corruption.

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, 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,

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.

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:

- all 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 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 delivers integrated legal services throughout Africa from eight offices in six jurisdictions, with over 400 lawyers. The firm provides 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. The firm has developed expertise across various business sectors and has experience in arbitrating under the rules of all major arbitral institutions. The firm's experience ranges from investment protection arbitrations, to arbitrations concerning joint ventures and commercial disputes. Ad hoc arbitrations are also regularly conducted under the UNCITRAL Arbitration Rules. The firm's 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 its ability to find innovative ways to settle disputes.

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Trends and Developments

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AFSA Leading the Way in Establishing South Africa as a "Safe" Seat for International Arbitration

Introduction

The Arbitration Foundation of Southern Africa (AFSA) is the leading arbitral institution in South Africa and is first choice for parties wishing to resolve commercial disputes in South Africa. Since the promulgation of the International Arbitration Act in December 2017 (the Act), AFSA has shown that it is leading the way in establishing South Africa as a "safe" seat for international arbitration, and has taken steps to position itself as an arbitral institution capable of competing with other popular international arbitral institutions.

AFSA has recently published a revised set of international arbitration rules, which came into effect on 1 June 2021 (the Rules). The development of the Rules was necessitated by the exponential growth in AFSA's international case load, which has more than doubled since the promulgation of the Act.

The Rules were developed in order to align AFSA's international arbitration procedures with international best practice and the Rules are now comparable to the rules of other international arbitral institutions, including the International Court of Arbitration of the International Chambers of Commerce (ICC) and the London Court of International Arbitration (LCIA), which are two of the most historically popular institutions used to administer international arbitration disputes.

Some of the more noteworthy additions to the Rules, as against comparative provisions in the ICC and LCIA Rules, are considered as follows:

- the establishment of an AFSA Court and Secretariat;
- the introduction of expedited arbitration procedures in certain cases;
- the introduction of summary judgment-type procedures;
- the availability of urgent interim relief procedures;
- confidentiality; and
- virtual hearings.

In addition to the Rules, AFSA has also developed a protocol for remote hearings in order to deal with the challenges that have been created by the COVID-19 pandemic (the Protocol) which, when compared with guidelines published by the LCIA and the ICC, illustrates that the Protocol not only compares favourably to these guidelines, but demonstrates additional provisions which facilitate the efficient procedure and resolution of arbitration proceedings. The Protocol, and the main issues it seeks to address in virtual hearings administered by AFSA, are examined in further detail below.

Noteworthy Additions to the Rules Compared to the ICC and LCIA Rules

The AFSA International Court and International Secretariat

The most significant change in the Rules is the introduction of the AFSA International Court (the Court) and an AFSA International Secretariat, which is led by its Secretary General. The function of the Court is to supervise the administra-

tion of the resolution of disputes brought before AFSA. This includes the power to appoint arbitrators and to deal with challenges to appointments as well as issues raised in respect of AFSA or the arbitral tribunal's jurisdiction and to make decisions regarding any arbitral challenges brought under the Rules. The Secretariat assists the Court in performing these administrative functions and carries out the day-to-day operations of the Court. The members of the Court consist of senior international and African practitioners.

This structure will allow AFSA to benefit from even more international expertise, while dedicating resources to the close supervision and support of arbitrations administered by AFSA under the Rules.

An International Court of Arbitration is also established under the ICC Rules. It similarly does not (itself) resolve disputes. Instead, the ICC Court is charged with administering arbitrations. The ICC Court is assisted in discharging its administrative functions by the Secretariat of the ICC, which operates under the direction of the Secretary General.

Expedited arbitration procedures

The Rules allow a party to an arbitration to apply for an expedited procedure in respect of any claim up to the value of USD500,000. This expedited procedure allows the Secretariat, on behalf of the Court, to:

- abbreviate any time-limits provided for under the Rules;
- appoint a sole arbitrator, notwithstanding any contrary provisions in the empowering arbitration agreement;
- decide the dispute on the basis of documentary evidence only (unless it is entirely appropriate to hold a hearing); and
- communicate the final award within six months from transmission of the case file to the Arbitral Tribunal.

The Rules allow for the early dismissal of a claim or defence on the basis that it is manifestly without legal merit or manifestly outside the jurisdiction of the Arbitral Tribunal. An application for early dismissal must be made within 30 days of the constitution of the Arbitral Tribunal and is required to set out in detail the factual and legal basis in support of the application.

The LCIA Rules set out the steps that the Arbitral Tribunal can take to expedite the arbitration procedure, such as limiting the length of submissions or limiting the length of testimony. Additionally, an Arbitral Tribunal is given a three-month deadline from close of submissions to issue a final award to the parties.

The ICC Rules were amended to introduce an expedited procedure which applies in cases in which the amount in dispute does not exceed USD3 million.

While these rules all differ in scope, and offer parties different advantages and disadvantages, it is apparent that a party seeking a truly expedited result may prefer AFSA over the LCIA, for the sole reason that it will get a final determination in less than a third of the time it would if it were to approach the LCIA (provided that the quantum of the dispute falls within the threshold for expedited procedures).

Summary judgment-type procedures

As previously set out, the Rules allow for the early dismissal of a claim or defence on the basis that it is manifestly without legal merit or manifestly outside the jurisdiction of the Arbitral Tribunal.

The LCIA Rules contain an express provision which grants the Arbitral Tribunal the power to make an early determination and dismiss any claim or defence which is manifestly without merit, inadmissible or outside the Arbitral Tribunal's jurisdiction.

Similarly, the ICC Rules provide for the parties to bring an application for the expeditious determination of one or more claims or defences, on grounds that such claims or defences are manifestly devoid of merit or fall manifestly outside the Arbitral Tribunal's jurisdiction.

In this regard, AFSA's summary judgment-type procedures are in line with international best practice and this makes it attractive for parties who would potentially be seeking swift and effective relief at an early stage of the arbitral proceedings.

Urgent interim relief procedures

The Rules allow a party who requires urgent interim or injunctive relief to make an application for that relief before, concurrently with, or immediately after the filing of a request for allocation to the Arbitral Tribunal. This application will be determined by an emergency arbitrator appointed by the Secretariat. This emergency arbitrator is required to decide the claim for emergency relief within 14 days of their appointment. This order may be confirmed, varied, discharged, or revoked by the Arbitral Tribunal once it has been constituted. Importantly, this applies only to parties who concluded their arbitration agreements after 1 June 2021.

Under the LCIA Rules, an emergency arbitrator may determine the amount of the legal costs relating to the emergency proceedings and the proportions in which the parties shall bear the legal costs and the arbitration costs of the emergency proceedings. Additionally, the amended rules allow the emergency arbitrator to revisit the emergency arbitration award prior to the constitution of the regular tribunal. In particular, the emergency arbitrator on their own motion, or upon application by a party can confirm, vary, discharge or revoke, in whole or in part, their earlier orders and/or issue an additional order.

The ICC Rules now provide for the appointment of an emergency arbitrator who has the power to grant various orders on an expeditious basis. This relief would be used in addition to ancillary applications being made to relevant courts, and orders made by the emergency arbitrator will not bind the Arbitral Tribunal which is subsequently appointed.

AFSA's inclusion of urgent interim relief measures is once again in line with international best practice and can be considered a key addition to the Rules, having regard to the importance of urgent interim relief in certain matters.

Confidentiality

Parties to an international arbitration administered by AFSA are required to keep confidential all awards in the arbitration, together with all materials and documents created or used during the arbitration procedure. Similarly, the deliberations of the Arbitration Tribunal shall remain confidential, and shall not be disclosed unless it is required under applicable law. There are exceptions to this confidentiality rule, and the publication of awards by default (either where there is no objection in writing within 30 days of the notification of the award or, where there is such an objection, publication in an anonymised or pseudonymised form).

The LCIA Rules require tribunals to consider with the parties at an early stage whether it is appropriate for parties to adopt any:

- information security measures to protect the information shared in the arbitration; and

- means to address the processing of personal data produced or exchanged in the arbitration in light of any applicable data protection regimes.

The LCIA Rules also grant tribunals and the LCIA the power to issue any appropriate directions regarding information security or data protection which shall be mandatory on the parties.

The ICC Rules state that the work of the ICC Court is of a confidential nature which must be respected by everyone who participates in it, in whatever capacity. The ICC Court lays down the rules regarding the persons who can attend the meetings of the ICC Court and its Committees, and the list of those who are entitled to have access to materials related to the work of the ICC Court and its Secretariat.

Given the fundamental importance of confidentiality in international arbitration proceedings, the inclusion of these provisions is essential to the competitiveness of arbitral institutions.

Virtual hearings

Any hearing before the Arbitration Tribunal can take place by any other means that the Arbitration Tribunal considers appropriate under the relevant circumstances, which includes by video or telephone conference.

The LCIA Rules state that communications can be undertaken in any other mode; however, this is subject to prior approval. Further, Arbitral Tribunals are granted the power to convene hearings as they see fit, including by way of video technologies if it considers that to be appropriate.

The ICC Rules stipulate that tribunals may, after proper consultation with the parties and consideration of the relevant facts and circumstances, decide to hold hearings by remote means.

The Protocol

In order to further the provisions relating to virtual hearings contained in the Rules, and to cater for the difficulties that parties have encountered as a result of the COVID-19 pandemic, AFSA has published a detailed remote hearing protocol, which aims to provide guidance to parties on the efficient conduct of remote hearings in respect of arbitrations administered by AFSA.

The Protocol provides for, amongst other things, the following of importance.

- Participants in a remote hearing must be able to participate effectively and equally in the remote hearing, with the minimum basic requirements such as a stable internet connection, an appropriate remote hearing venue and suitable devices.
- Remote hearing breakaway rooms should not be accessible in any manner to any of the participants not granted access thereto, in order to ensure the integrity of deliberations, consultations and caucus proceedings.
- Experts and witnesses will give evidence from a remote hearing witness room containing the necessary technical equipment. A camera is required in front of the witness in order to ensure that he or she is clearly visible, and an overhead wide-angle camera with a view of the witness and the entire remote hearing room is also required, in order to ensure that there is nobody else present in the room. The tribunal may ask a witness to move his or her camera to provide a 360-degree view of the venue to ensure no unauthorised persons are present.
- The bundle of documents must be made available in electronic format to all participants in Optical Character Recognition (OCR) format to allow it to be text-readable and searchable. The parties should agree and identify any documents that may be shared with all, or some, of the participants and

should ensure that documents are not incorrectly or improperly shared with participants who should not have access to them.
- The parties are to agree, or the tribunal can decide, on the physical presence of an independent legal representative to observe the production of oral evidence via remote hearing by a witness.
- Measures to ensure the preservation of the confidentiality of the hearing.
- The remote hearing platform must allow for the recording of the hearing, with that recording to be made available to the parties within 24 hours of the platform recording being made available, subject to confidentiality and the recording not being distributed to witnesses that have yet to testify.

The Protocol conforms with international standards and is comparable to similar protocols developed by other international arbitral institutions. In some respects, including the approach in respect of evidence to be given by witnesses and experts, the Protocol is more developed than other protocols.

The SADC Panel

On 11 December 2020, the Southern African Development Community (SADC) division of AFSA established the inaugural SADC Panel of International Commercial Arbitrators (the SADC Panel). The SADC Panel consists of experienced practitioners nominated by the 15 SADC Bar Associations, with those nominations based on globally competitive criteria.

The SADC Panel has been hailed as a significant step towards the promotion of international arbitration in the SADC region, but also within the African context. The establishment of the SADC Panel may result in magnifying the development in the SADC region, resulting in attracting more investments.

The AFSA SADC Division has also been involved in the training of arbitrators in the SADC region.

The SADC Panel is another initiative by AFSA which illustrates that, in addition to setting itself up as a competitive international arbitral institution, it is establishing itself regionally as well.

Conclusion

As can be seen from the foregoing, the Rules are, at least with regard to the specific provisions dealt with herein, aligned with the LCIA and ICC Rules. This similarity is deliberate, as the AFSA Drafting Committee actively sought to create synergy between the Rules and the rules applicable to other foreign arbitral institutes. This is because such an alignment would bring about familiarity for foreign practitioners, which in turn will facilitate greater participation in South African-based arbitration procedures for foreign parties. This, along with the introduction of the Protocol that is similarly aligned with international standards underscores South Africa's suitability as a seat for international arbitration.

Bowmans delivers integrated legal services throughout Africa from eight offices in six jurisdictions, with over 400 lawyers. The firm provides 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. The firm has developed expertise across various business sectors and has experience in arbitrating under the rules of all major arbitral institutions. The firm's experience ranges from investment protection arbitrations, to arbitrations concerning joint ventures and commercial disputes. Ad hoc arbitrations are also regularly conducted under the UNCITRAL Arbitration Rules. The firm's 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 its ability to find innovative ways to settle disputes.

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