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South Africa

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Introduction

Arbitration has been adopted worldwide as a means of resolving domestic and international commercial disputes and South Africa is no exception. There is broad consensus that arbitration is the preferred form of dispute resolution for international commercial disputes in South Africa. That much is clear from a recent survey on international arbitration presented by the Arbitration Foundation of Southern Africa (AFSA), a leading domestic arbitration institution. According to the AFSA survey, expert determination through arbitration and mediation are preferred forms of dispute resolution.[1] Arbitration is also reported to be the least resisted one, with only 6% of the surveyed respondents saying it is their least favourable form[2] of dispute resolution.

Arbitration proceedings have traditionally been most used in the areas of shipping, insurance, building and engineering contracts but are now encountered in almost all forms of commercial agreements.[3] Domestic arbitrations in South Africa usually take place pursuant to fairly standard-type dispute resolution clauses in commercial agreements; such clauses typically provide for the referral of all disputes arising from the relevant agreement to an independent and impartial arbitral tribunal, the members of which is/are to be appointed by the parties either by subsequent consensus, or failing which via the procedure provided for in the clause governing the reference.

Consensual, private arbitrations are distinct from the mandatory arbitrations forming part of dispute resolution mechanisms for employer-employee relations facilitated by the Commission for Conciliation, Mediation and Arbitration (CCMA). The CCMA has exclusive jurisdiction to entertain all labour matters assigned to it by the Labour Relations Act 66 of 1995.[4]

The South African law relating to arbitrations in general was originally governed by the common law, mainly Roman-Dutch law,[5] but since 1965 it has been governed principally by the Arbitration Act 42 of 1965. The Arbitration Act was enacted to provide for the settlement of disputes by arbitration and for the enforcement of arbitration awards.[6] The Act applies to all domestic arbitration proceedings brought about through a written agreement, but it excludes from its ambit, matrimonial matters and matters relating to status.[7] The common law further excludes from the scope of arbitration: (i) matters concerning minor children;[8] (ii) actions of a juristic person which are *ultra vires* its articles of association;[9] (iii) criminal cases; (iv) cases concerning liberty; and (v) 'popular actions or actions involving infamy'. According to established principles of South African law, these sorts of status and personality-type matters are dealt with by judges who are armed with the transparent and public powers best suited for their adjudication.[10]

Efficiency of the process

In *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another* 2009 (4) SA 529 (CC), South Africa's apex court, the Constitutional Court, favourably compared arbitration with conventional litigation as more efficient for, among other things, its: (i) flexibility (as parties can determine the process to be followed by an arbitrator, including the manner in which evidence will be received, the exchange of pleadings and the like); (ii) its cost-effectiveness; (iii) its privacy; and (iv) its speed (particularly as often, no appeal lies from an arbitrator's award, or lies only in an accelerated form to an appellate arbitral body). The Constitutional Court further stated the following when affirming the constitutionality of arbitrations (para 197 and 198):

> 'In determining the proper constitutional approach to private arbitration, we need to bear in mind that litigation before ordinary courts can be a rigid, costly and time-consuming process and that it is not inconsistent with our constitutional values to permit parties to seek a quicker and cheaper mechanism for the resolution of disputes.
>
> The twin hallmarks of private arbitration are thus that it is based on consent and that it is private, i.e. a non-State process.'

The procedural rules governing an arbitration are usually set out in the contract's dispute resolution clause; such rules may also be jointly determined by the parties in consultation with the arbitrator at the very outset of the arbitration. In commercial arbitrations, the Uniform Rules of Court[11] or a similar procedural regime are often adopted; this is largely because of practitioners' familiarity with these Rules and because the Arbitration Act is largely silent as to the procedural aspects of reference. Parties may also adopt rules that are cognate with the procedural provisions of the English Arbitration Act, or the UNCITRAL Contractual Rules.[12]

One of the principal characteristics of arbitration is that the dispute is finally resolved without any reference to the courts. Parties do not have a right to appeal to the courts when aggrieved by what they regard as legal errors in an arbitral award. Appeals are limited to instances where the parties agree that the arbitral tribunal's award is subject to a private arbitral appeal. Such private appeal proceedings will be held under the framework established by the Arbitration Act and where the parties have agreed appeal procedural rules.

The principle of finality of awards is one that is clearly and firmly established as a cardinal principle of arbitration proceedings under both the South African common law[13] and by the Arbitration Act.[14] It is only under certain restricted circumstances, which are expressly prescribed in section 33(1) of the Act (involving instances of misconduct, gross irregularity and the like), that application can be made to the courts to review an award in order to either set it aside or to remit it to back the arbitrator for reconsideration.

Integrity of the process

The courts have displayed a high degree of deference to the validity of the arbitral process. Courts will not interfere with the decisions of arbitrators unless the award fails to meet the minimum standards barring injustice, such as if: (i) obtained fraudulently or through the arbitral tribunal's – (ii) misconduct, (iii) gross irregularity; and (iv) the exceeding of powers conferred on it.

In *Lufuno* (para 195) the Constitutional Court endorsed the integrity and validity of arbitration in the following emphatic terms:

> 'Private arbitration is a process built on consent in that parties agree that their disputes will be settled by an arbitrator. It was aptly described by Smalberger ADP in *Total Support Management (Pty) Ltd and Another v Diversified Health Systems (SA)(Pty) Ltd and Another* [2002 (4) SA 661 (SCA) para 25] as follows:
>
> "The hallmark of arbitration is that it is an adjudication, flowing from the consent of the parties to the arbitration agreement, who define the powers of adjudication, and are equally free to modify or withdraw that power at any time by way of further agreement."'

South African courts have clearly moved away from older and traditional notions of wanting to assiduously protect their own jurisdiction, by accepting and recognising that arbitration is an acceptable form of dispute resolution, with which courts should not lightly interfere.[15] Thus, by agreeing to arbitration, the parties limit the intervention of courts to the circumscribed grounds of procedural irregularities set out in section 33(1) of the Arbitration Act. By necessary implication, the parties to an arbitration agreement waive the right to rely on any further ground of review.

Privilege and disclosure

One of the attractive features of arbitration, especially for commercial litigants, is the privacy or confidentiality of arbitration proceedings. By contrast, court proceedings and records in South Africa are ordinarily held in public and are assessable to the general public.[16] One of the usual advantages of private arbitration as opposed to conventional litigation is the desire of the parties to avoid publicity; this feature of privacy has been found to be constitutionally defensible (*Lufuno* paras 213–215). It is generally accepted that the privacy of the hearing is a natural consequence of the arbitration agreement.

Costs and funding

The costs of arbitration proceedings, unless the arbitration agreement provides otherwise, are at the discretion of the arbitration tribunal which shall, if it awards costs: (i) give directions as to the scale on which such costs are to be taxed; and (ii) may direct to whom, (iii) by whom, and (iv) in what manner such costs or any part thereof shall be paid; (v) may tax or settle the amount of such costs or any part thereof; and (vi) may award costs as between attorney and client (section 35 of the Arbitration Act).

One of the well-known drawbacks of private arbitration is the high cost associated with arbitration. The costs of the losing party are greater in arbitrations than in conventional litigation because they include the arbitrator's fees, costs of the venue and the transcription services costs above the ordinary costs of litigation. However, the relatively more efficient, specialised and expeditious resolution of disputes through arbitration offsets the high costs associated with it.

Costs have similarly been a major issue around international arbitration for some time.[17] According to the AFSA survey presentation, corporations are taking action to reduce costs and delay – seen as the two difficult pillars of international arbitration – by recruiting specialist in-house counsel, which effects more control over costs and delay through dealing with the matters internally.

The survey presentation added that corporations were looking at alternative fee arrangements: 61% of the survey respondents had some kind of capped fees or blended rates and a number had a basic fee, a discounted rate or a success fee that was either based

on the result in damages or a percentage of the fee; and only 10% of the respondents had a pure contingency fee arrangement.[18]

Interim relief

Although the parties to an arbitration agreement agree to resolve their dispute extra-curially, the effect of that agreement is not entirely to exclude the jurisdiction of the courts. The court at common law and in terms of the Arbitration Act retains certain powers in relation to the dispute (i) prior to the commencement of arbitral proceedings, (ii) during those proceedings, and (iii) after the award. These powers may loosely be called powers of assistance; they include powers of recognition and enforcement, and to give interim relief.

Section 21 of the Arbitration Act provides the court with such number of residual powers as to make orders with regard to interim relief. It provides, without derogating from any power, which may be vested in an arbitration tribunal for itself giving interim relief, that the court shall have the same power of making orders in respect of (subsection (1)):

> '*(a)* security for costs;
>
> *(b)* discovery of documents and interrogatories;
>
> *(c)* the examination of any witness before a commissioner in the Republic or abroad and the issue of a commission or a request for such examination;
>
> *(d)* the giving of evidence by affidavit;
>
> *(e)* the inspection or the interim custody or the preservation or the sale of goods or property;
>
> *(f)* an interim interdict or similar relief;
>
> *(g)* securing the amount in dispute in the reference;
>
> *(h)* substituted service of notices required by this Act or of summonses; and
>
> *(i)* the appointment of a receiver, as it has for the purposes of and in relation to any action or matter in that court.'

In anticipation of the arbitral tribunal potentially being constituted by non-lawyers, section 20 of the Act further makes provision for referring questions of law for determination to the court. It provides:

> 'An arbitration tribunal may, on the application of any party to the reference and shall, if the court, on the application of any such party, so directs, or if the parties to the reference so agree, at any stage before making a final award state any question of law arising in the course of the reference in the form of a special case for the opinion of the court or for the opinion of counsel.'

Enforcement and challenge of an award

Arbitration awards may, under the Arbitration Act, be made orders of court so as to ensure their enforceability as such (section 31 of the Arbitration Act). In the process of doing so, the court to which application is so made, may, before making the award an order of court, correct in the award any clerical mistake or any patent error arising from any accidental slip or omission (section 31(2); *cf* section 30).

Nonetheless, since it is the parties themselves who agree to refer a dispute to arbitration, they accept that the award of their chosen arbitral tribunal will bind them finally.[19] For that reason, arbitration awards may only generally be challenged by a dissatisfied party on the

limited grounds set out in section 33(1) of the Act, as pointed out earlier.

Once finalised, absent voluntary and timely compliance with the award by the losing party, the award is enforceable by the successful party. The enforcement is done through an application to the make the award an order of court. In such an application the successful party, in seeking to enforce the award, must establish that (i) it has an award in its favour, (ii) which can properly be made an order of court. And if satisfied of these requirements being met, the court may make the award an order of court (section 31(1) Arbitration Act).

The court, when dealing with such an application, will not concern itself with possible errors of fact or law of the arbitrator in making the award, but only with the propriety of the award and the curial force of a court order. This approach of courts is consistent with the policy, not only in South Africa, but also internationally, to strike a balance between party autonomy and judicial intervention in a way that attaches considerable weight to party autonomy.[20] A court will not normally order the enforcement of an award where compliance with the award would constitute a criminal offence, as this would be contrary to public policy.[21]

In *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA), the Supreme Court of Appeal outlined, as follows, the relevant principles that apply to the review of private arbitration awards under the Arbitration Act:

(a) before resorting to the review grounds as provided in section 33(1) of the Arbitration Act, the point of departure is to establish the nature of the inquiry, as well as the arbitrator's duties and powers;

(b) the resort by the parties to private arbitration, as a natural corollary, limited the grounds of interference by the courts to those set out in section 33(1) of the Arbitration Act, with the parties being unable to then resort to any further grounds of review as provided for at common law, or otherwise;

(c) a qualification to the general principle that an irregularity related to the conduct of the proceedings rather than to the merits, was that a 'gross irregularity' was committed where the decision-maker misconceived the whole nature of the enquiry, i.e. he misconceived his mandate, or his duties in connection therewith;[22] and

(d) an arbitrator has the right to be wrong on the merits of the case, and such errors do not constitute the arbitrator exceeding his powers, but rather errors committed within the scope of his mandate, which are non-reviewable.

Cross-border litigation

South Africa is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the New York Convention, adopted by a United Nations diplomatic conference on 10 June 1958 and which entered into force on 7 June 1959.[23] The principal aim of the Convention is to ensure the enforcement of foreign arbitral awards and that State parties give full effect to arbitration agreements by censuring attempts to circumvent arbitration agreements.

South Africa ratified the Convention on 3 May 1976 and domesticated it through enacting the Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977, which came into effect on 13 April 1977. The Recognition Act provides: (i) that foreign arbitral awards may be made an order of a South African court and enforced as such (section 2); (ii) for and how applications should be made for an arbitral award to be made an order of court (section 3); and (iii) when an order of court may be refused (section 4).

In terms of both the South African common law and section 4 of the Recognition Act, a South African court will recognise and enforce a foreign arbitral award if the following requirements are met:[24]

(i) there was a valid submission to arbitration;

(ii) the reference to arbitration concerns a matter which it is permissible to refer to arbitration in the Republic and the award is not contrary to public policy;

(iii) the arbitration tribunal was duly constituted and its proceedings were in accordance with the law of the country where the arbitration took place;

(iv) the award was not obtained by fraud or by means contrary to the principles of natural justice;

(v) the award falls within the jurisdiction of the tribunal; and

(vi) the award is final.

International arbitration

In terms of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, an arbitration is 'international' if:[25] (a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; (b) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country; or (c) one of the following places is situated outside the State in which the parties have their places of business:

(i) the place of arbitration if determined in, or pursuant to, the arbitration agreement; or

(ii) any place where 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.

Although the Model Law was specifically compiled for international commercial arbitration, some countries have decided to adopt it (with minor adaptations) for both domestic and international matters and for all disputes, not only for commercial disputes.[26] In July 1998 the South African Law Commission published a report which recommended that the UNCITRAL Model Law on International Commercial Arbitration of 1985 should be adopted by South Africa for international commercial arbitrations.[27] The purpose of the Model Law is to contribute towards the uniformity of the law of arbitral procedures and to promote the fair and efficient settlement of disputes arising in international commercial relations.[28] The Model Law reflects 'best arbitral practice'.

The Commission's recommendations on International Arbitrations have been acted on by the Legislature. The International Arbitration Bill published in *Government Gazette* No 40687 of 15 March 2017 is intended to incorporate the Model Law of the United Nations Commission on International Trade Law (UNCITRAL) as the cornerstone of the international arbitration regime in South Africa. The UNCITRAL Model Law was developed to address the widely divergent approaches taken in international arbitration throughout the world and to provide a modern and easily adapted alternative to outdated national regimes.

The Bill aims to: provide anew for the recognition and enforcement of foreign arbitral awards; repeal the Recognition and Enforcement of Foreign Arbitral Awards Act, 1977; amend the Protection of Businesses Act, 1978; and provide for matters connected therewith.

Mediation and ADR

As with the other ADR processes, mediation is only possible if there is a mutual agreement between the parties to subject themselves to mediation. Contractually, the mediator is normally given a time frame within which to mediate a settlement or compromise.[29] If a settlement or compromise has not been attained within that time-frame then the claimant, if still dissatisfied, may commence the next step in the multi-step dispute resolution process, which would generally be to escalate the dispute to arbitration.[30] The agreement to mediate usually nominates a mediator or sets out how the mediator is to be appointed.[31]

The result of a successful mediation is a settlement or compromise that is captured in an agreement which both parties have signed. This agreement is legally binding in the same way and to the same extent as any other legal contract. The mediator may assist in drafting the settlement agreement.[32]

Future direction of South African arbitration

In October 2014, the Deputy Minister of Justice and Constitutional Development said that the International Arbitration Bill comes at an opportune time for South Africa, to opt into the international standard for the resolution of commercial disputes. He said that not only does it have the potential to attract foreign direct investment, but that it also gives greater legal protection to South African investments abroad.[33]

Arbitration is increasingly recognised as an important mode of dispute resolution which alleviates the pressures on the civil justice system. Nonetheless, given South Africa's history of apartheid and an enduring ill-legacy of systemic discrimination, pro-transformation advocates have on occasion viewed private arbitration as a hindrance to the imperative of a post-apartheid transformation of the legal profession. Their concern is that through diverting the adjudication of large complex commercial matters from adjudication before an increasingly diverse bench, arbitration may entrench past patterns of discrimination and exclusion within the legal profession. This concern is amplified by the fact that more often than not parties will select retired judges, the majority of whom are white males, as their arbitrators. On the other hand, there are indications that litigants eschew court proceedings as a method of commercial dispute resolution because of perceptions as to the bench's perceived lack of commercial experience. Professor Olivier states, *inter alia*, in this regard that:

> '*There is a rise in arbitration in commercial matters, often before retired judges, resulting in less significant commercial litigation being conducted in the courts*.'[34]

Despite substantive concerns about the use of arbitration proceedings as a preferred method of dispute resolution, it is clear that over the past two decades South African courts have created the jurisprudential bedrock for the continued efficacy of both domestic and international arbitral procedures held within South Africa. It is hoped that as South Africa's post-apartheid dispensation continues to mature, the concerns about arbitration being the preserve of the previously advantaged will be addressed as part of broader initiatives designed to promote more cost-effective access to dispute resolution mechanisms.

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Acknowledgment

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Endnotes

1. 'Corporate choices in international arbitration', *De Rebus* 2013 (July) 15.
2. *Ibid*.
3. Peter Ramsden & Kelly Ramsden, *The Law of Arbitration: South African and International Arbitration* (2009).
4. Section 115 of the Labour Relations Act 66 of 1995. See also *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 (CC) paras 258–260; *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another* 2009 (4) SA 529 (CC) para 198).
5. *Lazarus v Goldberg and Another* 1920 CPD 154.
6. See the long title of the Arbitration Act.
7. Section 2 of the Arbitration Act.
8. *Ressel v Ressel* 1976 (1) SA 289 (W); *Estate Setzen v Mendelsohn and Another* 1948 (3) SA 292 (C). See also *In Re Marriage of Bereznak* U.S. California Appellate Districts (07/24/03) H025176.
9. *Grobbelaar en 'n Ander v De Villiers NO en 'n Ander* 1984 (2) SA 649 (C).
10. Voet 4.8.10, Percival Gane, *The Selective Voet being the Commentary on the Pandects* by Johannes Voet [1647–1713] (Paris Edition, 1829) at 1698–1704.
11. Rules regulation the conduct of the proceedings of the several Provincial and Local Divisions of the Court of South Africa.
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13. *Dutch Reformed Church v Town Council of Cape Town* (1898) 15 SC 14 at 20; *Dickenson & Brown v Fisher's Executors* 1915 AD 166 at 174.
14. Section 28 of the Arbitration Act.
15. *Aveng (Africa) Ltd (Formerly Grinaker-Lta Ltd) T/A Grinaker-LTA Building East v Midros Investments (Pty) Ltd* 2011 (3) SA 631 (KZD) para 13.
16. Section 32 of the Superior Courts Act 10 of 2013; and *Cape Town City v South African National Roads Authority and Others* 2015 (3) SA 386 (SCA) paras 12–22.
17. 'Corporate choices in international arbitration', *De Rebus* 2013 (July) 15.
18. *Ibid*.
19. *Amalgamated Clothing & Textile Workers Union of SA v Veldspun (Pty) Ltd* 1994 (1) SA 162 (A) 169G-H.
20. *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic and Others* 2014 (1) SA 381 (WCC) para 11. See also *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA) para 4 in the context of international commercial arbitrations; and *cf Lufuno*

Mphaphuli & Associates (Pty) Ltd v Andrews and Another 2009 (4) SA 529 (CC) paras 28 and 73; and *Road Accident Fund v Cloete NO and Others* 2010 (6) SA 120 (SCA) para 36 in the context of domestic arbitrations.

21. *Cool Ideas 1186 CC v Hubbard* 2014 (4) SA 474 (CC) para 58.
22. *Telcordia* paras 71–73.
23. Article XII of the New York Convention.
24. David Pistorius *Pollak on Jurisdiction* 2 ed (1993) at 179. Compare with Article V of the New York Convention.
25. Article 1(3) of the UNCITRAL Model Law on International Commercial Arbitration. As adopted by the United Nations Commission on International Trade Law on 21 June 1985, and as amended by the United Nations Commission on International Trade Law on 7 July 2006.
26. For example, *Zimbabwe Broadcasting Corporation v Flame Lily Broadcasting (Pvt.) Ltd*: Harare High Court 15 December 1999 No HH-249-99, CLOUT case 322.
27. SALRC Report Project 94 Report on "Arbitration: An International Arbitration Act for South Africa" July 1998, accessed at http://salawreform.justice.gov.za/reports/r_prj94_july1998.pdf, on 27 June 2017. See also Peter Ramsden & Kelly Ramsden, *The Law of Arbitration: South African and International Arbitration* (2009) at part II at 18.
28. Article 1(3) of Model Law.
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30. *Ibid*.
31. *Ibid*.
32. Peter Ramsden & Kelly Ramsden, *The Law of Arbitration: South African and International Arbitration* (2009) at part I at 3.
33. 'South Africa's new International Arbitration Bill brings … dawn of new era', *De Rebus* 2016 (Dec) 14.
34. See Morné Olivier, 'The selection and appointment of judges' in Cora Hoexter & Morné Oliver (contributing eds), *The Judiciary in South Africa* (2014) at 152. (Footnote omitted.)

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