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1 USE OF COMMERCIAL ARBITRATION
1.1 Describe the prevalence of commercial arbitrations as a method of settling disputes, both domestic and international.

Arbitration has become a popular method of commercial dispute resolution in South Africa. However, despite its popularity, South Africa has lagged behind in the development of international arbitration. South Africa should be seen as the obvious centre for the resolution of commercial disputes affecting parties not only in South Africa, but also in other African countries. In July 1998, the South African Law Commission submitted its report on its investigation into commercial arbitration. One of the core recommendations was the compulsory application of the UNCITRAL Model Law on International Commercial Arbitration and the embodiment of all South African legislation on international arbitration in a new International Arbitration Act. These recommendations were followed in 2001 by the Law Commission’s Domestic Arbitration Report, which included extensive and far-reaching recommendations regarding domestic arbitration. Although the recommendations regarding both international arbitration and domestic arbitration have not yet been implemented, there is widespread support for South Africa’s move towards the implementation of internationally-recognised arbitration procedures in the resolution of commercial disputes.

Unfortunately the popularity of arbitration has been a political issue in South Africa in recent years. In 2005 Judge John Hlope, who is the Judge President of the Cape Provincial Division of the South African High Court, suggested that black judges were the victims of real, actual or perceived racism in the South African legal system and that arbitration was inimical to judicial transformation in South Africa. Notwithstanding these views, there have been strong indications of support for arbitration by both the Supreme Court of Appeal and the Constitutional Court. It is to be hoped that this will encourage the reform of South African arbitration law and, more particularly, the application of the UNCITRAL Model Law on International Arbitration. These developments should also contribute to the growth of South Africa as a regional arbitration centre.

2 LAW ON ARBITRATION
2.1 What are the principal sources of law and regulation relating to domestic and international arbitration? (Describe the role of federal or state laws and relevance of court decisions.)

The Arbitration Act 1965 is the applicable statute. The Arbitration Act
provides for the settlement of disputes by arbitration tribunals in terms of written arbitration agreements and for the enforcement of the awards of such tribunals. The Arbitration Act does not draw any distinction between domestic and international arbitration.

In practice most commercial arbitration agreements are in writing and are therefore regulated by the Arbitration Act.

South Africa is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and the Recognition and Enforcement of Foreign Arbitral Awards Act 1977 was enacted to give effect to the New York Convention.

The court that has jurisdiction in relation to arbitration is the appropriate division of the High Court. There are a number of provincial and local divisions of the High Court. Judges are appointed by the Judicial Services Commission, which is an independent body. Judges are usually chosen from the ranks of practising senior advocates, attorneys or academics and they enjoy a high degree of autonomy and independence. The highest court in South Africa for non-constitutional matters is the Supreme Court of Appeal. It is situated in Bloemfontein and has appellate jurisdiction only. Its judgments are binding on all lower courts.

The Constitutional Court has jurisdiction throughout South Africa as a court of final instance over all matters relating to the interpretation, protection and enforcement of the provisions of the Constitution. Most constitutional disputes are first heard by the High Court. However, some constitutional matters fall exclusively within the jurisdiction of the Constitutional Court. There have not yet been any Constitutional Court decisions affecting arbitration.

2.2 List and briefly describe relevant arbitration statutes, international treaties and conventions.

The relevant arbitration statutes are the Arbitration Act (supra) and the Recognition and Enforcement of Foreign Arbitral Awards Act (supra).


South Africa has not yet ratified the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965. One of the recommendations contained in the South African Law Commission’s 1998 report on International Commercial Arbitration is that South Africa should follow the example of most other African countries and ratify the Washington Convention, as this would create the necessary legal framework to encourage foreign investment and further economic development in the region.
3 PRINCIPAL INSTITUTIONS

3.1 What are/describe the principal institutions and/or government agencies that assist in the administration or oversight of international and domestic arbitrations?

The two principal institutions that assist in the administration of international and domestic arbitrations are the Arbitration Foundation of Southern Africa (AFSA) and the Association of Arbitrators.

AFSA provides and administers systems for the resolution of commercial disputes primarily by way of arbitration or mediation. It is a corporate partnership between the legal and accounting professions and business through institutional representatives. The advocates profession is represented through the Bars; the attorney and accounting professions through their leading members and the business community through the South African Chamber of Business (SACOB).

The Association of Arbitrators (Southern Africa) was formed in 1979 to promote arbitration as a means of resolving disputes, to provide a body of competent and experienced arbitrators and ADR specialists for appointment as required, to assist arbitrators and ADR specialists in the efficient discharge of their duties and to make arbitration and ADR more effective. The Association’s members are drawn mainly from professions in the construction industry, although lawyers are also actively involved in the association.

An important recent development was the launch in October 2009 of Africa ADR, which is a non-profit wholly independent arbitral institution that is to operate throughout Africa and the Indian Ocean islands. Africa ADR aims to be the arbitral link between those who invest in Africa and those who trade in Africa; between the business communities of Africa and abroad and between Africa and the international community.

4 ROLE OF THE NATIONAL COURTS

4.1 What is the relationship between agreements to arbitrate and access to the courts? Is there a presumption of arbitrability/policy support for arbitration? Will the courts stay court actions in favour of agreements to arbitrate?

Despite Judge Hlope’s criticism of arbitration, referred to in section 1 above, there is significant and widespread support for arbitration as an integral part of dispute resolution in South Africa. The report of the South African Law Commission on Domestic Arbitration, submitted in 2001, referred to the increasing recognition of arbitration ‘as an important method of resolving commercial and other disputes, which can help to relieve the pressure on the civil justice system’ and stated that ‘arbitration needs to be supported by appropriate legislation…’. Furthermore, in recent years, there have been strong indications for support of arbitration by both the Supreme Court of Appeal and the Constitutional Court. In Telcordia Technologies Inc v Telkom SA Ltd 2007 (3) SA 266 SCA, the Supreme Court of Appeal upheld the principle of party autonomy in arbitration proceedings and indicated that South Africa would continue to show a high degree of deference to
arbitration awards and that there would be minimal judicial intervention when reviewing international arbitration awards. In *Lufuno Mphaphuli and Associates (Pty) Ltd v Andrews and Another* CCT97/07 [2009] ZACC 6, the Constitutional Court also indicated its strong support for the principle of party autonomy in arbitration proceedings.

Generally the party seeking to avoid arbitration bears an onus that is not easily discharged. Although there are a number of factors that may be taken into account by the court in the exercise of its discretion and that may, individually or cumulatively, be sufficient to discharge the onus, the courts will generally refer to the following factors to justify exercising their discretion so as to allow arbitration:

- the importance of enforcing the arbitration agreement reached between the parties, in accordance with the maxim *pacta servanda sunt*;
- the fact that the alleged disadvantages of arbitration were foreseeable when the parties concluded the arbitration agreement; and
- the fact that the arbitrator would be able to use their expert knowledge to dispense with expert evidence which would be necessary to qualify the court, thereby saving time and costs.

The Arbitration Act provides for court support for arbitration in a number of respects. In terms of section 20 of the Act 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. Any such opinion is final and not subject to appeal and is binding on the arbitration tribunal and on the parties to the reference. Clearly, the court’s power in terms of section 20 goes beyond procedural issues, as the court has the power to determine a question of law arising in the course of the reference.

In terms of section 21 of the Arbitration Act, for the purpose of and in relation to a reference under an arbitration agreement, the court has the same power of making orders in respect of matters specified in the section as it has for the purposes of and in relation to any action or matter in that court. The matters specified include the following:

- security for costs;
- discovery of documents and interrogatories;
- the examination of any witness before a commissioner in the Republic or in the territory or abroad and the issue of a commission or a request for such examination;
- the giving of evidence by affidavit;
- securing the amount in dispute in the reference;
- substituted service of notice required by the Act or of summonses; and
- the appointment of a receiver.

The matters in respect of which the court has the same power of making an order, as it has for the purpose of and in relation to any action or matter in that court, in terms of section 21, also include the following forms of interim relief:
4.2 May an arbitral tribunal rule on a party’s challenge to its own jurisdiction (‘competence-competence’)? Need a tribunal suspend its proceedings if a party seeks to test jurisdiction in the courts?

An arbitrator is permitted to rule on the question of their own jurisdiction. However, a party may apply to have an award set aside where the arbitrator has exceeded their powers, which would include exceeding their jurisdiction.

Where one of the parties contests the validity of the agreement containing the arbitration agreement and alleges that the arbitrator has no jurisdiction, the arbitrator will proceed with the arbitration if, in their opinion, they clearly have jurisdiction. If, however, they are uncertain, they should decline to proceed with the arbitration and leave it to one of the parties to apply to court for a declaratory order.

5 USEFUL REFERENCES

5.1 Provide a selected bibliography of the most influential publications in or relied upon in the jurisdiction – books, journals, newsletters and pamphlets.

Books
David Butler & Eyvind Finsen Arbitration in South Africa: Law and Practice, Cape Town: Juta, 1993
Marcus Jacobs The Law of Arbitration in South Africa, Cape Town: Juta, 1977

Reports and discussion papers

6 AGREEMENT TO ARBITRATE

6.1 Are there form and/or content requirements for an enforceable agreement to arbitrate? How may they be satisfied?

In terms of section 1 of the Arbitration Act 1965 (the Act), ‘arbitration agreement’ is defined as meaning ‘a written agreement providing for the reference to arbitration of an existing dispute or any future dispute relating to a matter specified in the agreement, whether an arbitrator is named or designated therein or not’.

Although an oral arbitration agreement is not invalid, such agreements are regulated by common law and not by the Act. In practice, most
commercial arbitration agreements are in writing and are regulated by the Act.

Although an ‘arbitration agreement’ under the Act is required to be in writing, it is not necessary for the agreement to be signed by the parties or to be contained in one document. A written arbitration agreement may, for example, be concluded by an exchange of letters between the parties.

7 ARBITRABILITY

7.1 Is arbitration mandated for certain types of dispute?
Arbitration is not mandated for any type of commercial dispute in South Africa.

7.2 Is arbitration prohibited for certain types of dispute (restraints of fundamental public policy)?
In terms of section 2 of the Act, a reference to arbitration shall not be permissible in respect of:
- any matrimonial cause or any matter incidental to any such cause; or
- any matter relating to status.

Under the common law, arbitration may not be used in criminal proceedings. Arbitration is permitted where the only matter in dispute is an allegation of fraud pertaining to a civil claim, but the fact that fraud is alleged is a factor relevant to the court’s discretion whether or not to allow a particular dispute to be referred to arbitration.

In terms of the Insurance Act of 1943, notwithstanding any contrary provision of the policy or agreement relating thereto, the owner of a domestic policy is entitled to enforce their rights against the insurer in a court of competent jurisdiction. However, this is subject to the proviso that the policy ‘may validly provide that the amount of any liability under the policy shall be determined by arbitration in the Republic if the insurer demands that the said amount be so determined’. The statutory restriction on the use of arbitration in insurance matters therefore does not extend to disputes relating to quantum.

The general approach used in determining whether or not a dispute is arbitrable is that a party to a dispute seeking to refer the matter to arbitration will have to show that there is a valid arbitration agreement and that the dispute falls within the ambit of that agreement. If those requirements are met, and if the dispute is not one in respect of which arbitration is not permissible under the Act or common law, the general approach will be to enforce the arbitration agreement.

8 SEPARABILITY OF ARBITRATION CLAUSES

8.1 May an arbitral clause be considered valid even if the rest of the contract in which it is embedded is invalid?
In Wayland v Everite Group Ltd 1993 (3) SA 946 (W), the court held that it seemed to be eminently reasonable that a clause of a contract (including an arbitration clause) must stand or fall with the whole body of the contract, and not be declared excisable by the parties, or that such declaration should have
any validity merely on the ground of the parties having elected to say that the clause is severable from the contract. Where the signatures that validate the whole contract, including the disputed clause, are challenged, or where it is said that the signatures were not authorised on grounds which, if proved, would render the contract invalid and unenforceable between the ostensible parties to it, then the arbitration clause must stand or fall with the validity of the main contract, notwithstanding any contrary declaration by its signatories.

In Atteridgeville Town Council and another v Livanos t/a Livanos Brothers Electrical 1992 (1) SA 296 (A), the court concluded that an arbitration clause would survive the termination of a contract where the termination was a result of the repudiation of the contract. The court concluded that it was reasonable to infer that the parties, in that case, intended the provisions of the arbitration clause to operate even after their primary obligations to perform had come to an end, and therefore the arbitration clause survived the repudiation of the agreement.

9 QUALIFICATION/APPOINTMENT/LIABILITY OF ARBITRATORS

9.1 Are there specific provisions regulating the qualifications of arbitrators? Are there requirements (including disclosure) for ‘impartiality’ and ‘independence’, and do such requirements differ as between domestic and international arbitrations?

There are no specific provisions regulating the qualifications of arbitrators. There are also no requirements (including disclosure) for ‘impartiality’ and ‘independence’. However, the effect of section 33 of the Arbitration Act, which is discussed hereunder, is that an award made by an arbitrator who has not been independent, neutral and impartial, is liable to be set aside.

9.2 Are there provisions governing the challenge or removal of arbitrators? Do the courts or other jurisdictions play/have a role in any such challenge?

In terms of section 13(2)(a) of the Arbitration Act, the court may, at any time, on the application of any party to the reference ‘on good cause shown’ set aside the appointment of an arbitrator or remove them from office. For the purposes of the sub-section, the expression ‘good cause’ includes failure on the part of the arbitrator to use all reasonable despatch in entering on and proceeding with the reference and making an award or, in the case where two arbitrators are unable to agree, in giving notice of that fact to the parties or to the umpire.

Parties are free to appoint whomever they choose as arbitrator. However, a party may seek to have the appointment set aside, notwithstanding their agreement to the appointment of the arbitrator, if they are able to show a probability of bias.

9.3 Does legislation govern, or have the courts developed rules regarding the liability of arbitrators for acts related to their decision-making function?

There is no legislation governing the liability of arbitrators for acts related
to their decision-making functions, and there have been no South African cases in which an aggrieved party has succeeded in claiming damages from an arbitrator. In *Arbitration in South Africa* (supra), (at page 103) Butler and Finsen express the view that ‘when our courts come to consider this matter, they will hold that the arbitrator is not liable to the parties for want of skill or care in resolving the dispute and making the award, but may be liable for fraudulent misconduct that leads to his removal from office or the setting aside of his award, or for the negligent performance of or negligent failure to perform administrative duties’.

10 PARTY REPRESENTATION
10.1 Are there particular qualification requirements for representatives (‘counsel’) appearing in the jurisdictions?
There are no formal qualification requirements for party representatives appearing in South African arbitrations. In practice, parties are always represented by an attorney (solicitor) or by an advocate (barrister) instructed by an attorney.

11 PLACE OF ARBITRATION/PROCEDURES
11.1 Are there provisions governing the place (seat) of arbitration, or any requirement for arbitral proceedings to be held at the seat?
In terms of section 15(1) of the Arbitration Act, an arbitration tribunal ‘shall give to every party to the reference, written notice of the time when and place where the arbitration proceedings will be held...’.

Generally, the seat of the arbitration is determined by agreement between the parties. In the absence of agreement, the seat will be determined by the arbitration tribunal in terms of section 15(1) of the Arbitration Act.

There is no requirement for arbitral proceedings to be held at the seat and it is not uncommon for hearings in the same arbitration to be held at different places.

In terms of section 25(1), an award is required to be delivered by the arbitration tribunal with ‘the parties or their representatives being present and having been summoned to appear’. The award is not required to be delivered at the seat of the arbitration. In practice, parties usually agree that the award may be delivered by fax or email.

11.2 Are specific procedures mandated in particular cases, or in general?
The provisions of the Arbitration Act regarding procedure in arbitration proceedings are contained in sections 14 to 22 of the Arbitration Act. Generally, the rules of evidence as observed in a court of law are followed as far as possible, although an arbitrator may deviate from those rules, provided that in doing so they do not disregard the substance of justice.

In practice, the procedure followed in many arbitrations is determined by the rules of the organisation administering the arbitration. For example, AFSA has detailed and comprehensive procedural rules which are generally applied in AFSA administered arbitrations.
12 EVIDENCE GATHERING
12.1 What is the general approach to the gathering and tendering of evidence at the pleading stage and at the hearing stage (production, discovery, privilege, use of witness statements etc)? Are there differences between domestic and international arbitrations?

Section 14(1) of the Arbitration Act gives the arbitrator extensive powers in relation to discovery and the production of documents.

The effect of sections 15 and 16 of the Arbitration Act is that the arbitrator generally has the same authority to order the disclosure of documents and things as the court would have if the arbitration were a civil action pending in the court.

In terms of section 21(1) of the Arbitration Act, one of the matters in respect of which the court has the same power of making orders as it has for the purposes of and in relation to any action or matter in that court, is the discovery of documents. The arbitrator has the same power in terms of sections 14 and 16 of the Arbitration Act. The most usual circumstance in which the parties will approach the court in matters of discovery or disclosure is when third party disclosure is sought and the third party fails to produce the documents specified in the summons issued in terms of section 16 of the Arbitration Act. A court order will then be sought compelling such disclosure by the third party.

12.2 What powers of compulsion or court assistance are there for arbitrators to require attendance of witnesses or production of documents, either prior to or at the substantive hearing? Is there a difference between domestic and international tribunals or as between parties and non-parties? Do special provisions exist for arbitrators appointed pursuant to international treaties (ie bilateral or multilateral investment treaties)?

Section 16 of the Arbitration Act provides for the summoning of witnesses. The issue of a summons to compel any person to attend before an arbitration tribunal to give evidence and to produce books, documents or things to an arbitration tribunal may be procured by any party to a reference in the same manner and subject to the same conditions as if the reference were a civil action pending in the court having jurisdiction in the area to which the arbitration proceedings are being or are about to be held. No person may be compelled by such a summons to produce any book, document or thing, the production of which would not be compellable on trial of an action.

13 INTERIM MEASURES/ROLE OF THE TRIBUNAL
13.1 Are there special provisions relating to the granting of interim and preliminary relief? Have the courts recognised and/or limited any such authority? Do the courts themselves play a role in interim relief in arbitration proceedings?

In terms of section 21 of the Arbitration Act, the court has the same power of making an order in respect of matters specified in the section as it has for...
the purposes of and in relation to any action or matter in that court. The matters in respect of which the court has such powers include the following forms of interim relief:

- the inspection or the interim custody or the preservation or the sale of goods or property;
- an interim interdict or similar relief.

In terms of section 26 of the Arbitration Act, unless the arbitration agreement provides otherwise, an arbitration tribunal may make an interim award at any time within the period allowed for making an award. The arbitrator is therefore not required to seek the assistance of the court to make such an interim award.

In practice, the courts do make orders in terms of section 21 of the Arbitration Act. The court must be satisfied that the matter in respect of which the interim relief is sought, is a matter specified in section 21 of the Arbitration Act, and that the order made is one which the court would have the power to make for the purposes of and in relation to a matter in that court. Examples of such matters include:

- an anti-dissipation interdict (which is similar to the well-known Mareva injunction in English law), which is used to prevent the disposal of the defendant’s property in a way that will affect any ultimate right that the claimant may have to levy execution upon that property;
- the right of an incola defendant to obtain security from a peregrine claimant in respect of costs.

14 TAXATION OF ARBITRATORS’ FEES

14.1 Does the state, or any of its sub-divisions, purport to tax domestically the fees of foreign arbitrators conducting hearings in the state? Is there a difference if the arbitration is ‘seated’ in the state or elsewhere?

There are no special provisions regarding the taxation of foreign arbitrator’s fees. Generally, fees earned by a foreign arbitrator who is non-resident in South Africa will not be taxed in South Africa.

15 DEFAULT PROCEEDINGS

15.1 Are there provisions governing a tribunal’s ability to determine the controversy in the absence of a party who, on appropriate notice, fails to appear at or seek adjournment of the arbitral proceedings?

In terms of section 15(2) of the Arbitration Act, if any party to the reference at any time fails, after having received reasonable notice of the time when and place where the arbitration proceedings will be held, to attend such proceedings without having shown previously to the arbitration tribunal good and sufficient cause for such failure, the arbitration tribunal may proceed in the absence of such party.

16 THE ARBITRAL AWARD

16.1 Must an award take any particular form, eg in writing, signed, dated, place, the need for reasons, delivery etc?

The formal requirements for an award made in terms of the Arbitration Act
are the following:
• in terms of section 24(1), the award must be in writing and signed by all the members of the arbitration tribunal;
• in terms of section 23, the award must be made within the period prescribed by the Act or the arbitration agreement or within any extended period allowed by the parties or the court;
• in terms of section 25, the award is required to be delivered by the arbitration tribunal, the parties or their representatives being present or having been summoned to appear.

The substantive requirements of an arbitral award are that the award should be certain, final, possible, lawful, and *intra vires*.

16.2 Are there limits on arbitrators' powers to fashion appropriate remedies, eg punitive or exemplary damages?
The Arbitration Act does not impose any limitations on the types of damages that may be awarded in arbitration. However, one of the requirements for the enforcement of an arbitration award is that the enforcement must not be contrary to public policy. Generally, the policy of South African law and practice is that for both the breach of contract and the assessment of the quantum of damages, the injured party is entitled to no more than compensation for the damages actually suffered by them; the award of punitive damages in such instances is alien to the South African legal system. However, it has been held that the mere fact that awards are made on a basis not recognised in South Africa does not entail that they are necessarily contrary to public policy; whether an award is contrary to public policy depends largely on the facts of each case.

In terms of section 29 of the Arbitration Act, where an award orders the payment of a sum of money, such sum shall, unless the award provides otherwise, carry interest as from the date of the award and at the same rate as a judgment debt. In South African law, mora interest is governed by the Prescribed Rate of Interest Act 55 of 1975. The Minister of Justice prescribes a rate of interest for the purposes of the Act from time to time. The current prescribed rate is 15.5% per annum.

17 RE COURSE FROM AN AWARD
17.1 Are there provisions governing modification, clarification or correction of an award?
In terms of section 32(1) of the Arbitration Act, the parties to a reference may within six weeks after the publication of the award to them, by any writing signed by them, remit any matter which was referred to arbitration to the arbitration tribunal for reconsideration and for the making of a further award or a fresh award or for such other purpose as they may specify.

In the absence of agreement, the court may, on the application of a party, made within six weeks after the publication of the award, on good cause shown, remit any matter that was referred to arbitration to the arbitration tribunal for reconsideration and for the making of a further award or a fresh award or for such other purpose as the court may direct.
17.2 May an award be appealed to or set aside by the courts? If so, on what grounds and by what procedures?

In terms of section 28 of the Arbitration Act, unless the arbitration agreement provides otherwise, an award shall, subject to the provisions of this Act, ‘be final and not subject to appeal and each party to the reference shall abide by and comply with the award in accordance with its terms’.

In practice, it is becoming increasingly common for parties to agree that the award will be subject to appeal in accordance with, for example, the AFSA rules.

An award may be set aside in terms of section 33 of the Arbitration Act where:

- the arbitrator has misconducted themselves in relation to their duties as arbitrator; or
- the arbitrator has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded their powers; or
- an award has been improperly obtained.

In Telcordia Technologies Inc v Telkom SA Ltd 2007 (3) SA 266 SCA, the Supreme Court of Appeal upheld the principle of party autonomy in arbitration proceedings and indicated that South Africa would continue to show a high degree of deference to arbitration awards and that there would be minimal judicial intervention when reviewing international commercial arbitration awards.

18 ENFORCEMENT OF AWARD

18.1 What are the procedures and standards for enforcing an award? Is there a difference between ‘domestic’ and ‘non-domestic’ awards?

South Africa is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The Recognition and Enforcement of Foreign Arbitral Awards Act 1977 was enacted to give effect to the New York Convention.

The court may, on its own initiative, refuse to grant an application for the recognition of a foreign arbitral award if the court finds that:

- a reference to arbitration is not permissible in South Africa in respect of the subject matter of the dispute; or
- the enforcement of the award would be contrary to public policy in South Africa.

The other defences that may be raised by the party against whom the enforcement of the award is sought are as follows:

- that the parties to the arbitration agreement concerned had, under the law applicable to them, no capacity to contract, or the agreement is invalid under the law to which the parties subjected it or of the country in which the award was made;
- the party did not receive the required notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise not able to present their case;
- the award deals with a dispute outside the provision of the reference
to arbitration or contains decision on matters beyond the scope of the reference;
• the constitution of the arbitration tribunal or the arbitration proceedings was not in accordance with the relevant arbitration agreement or with the law of the country in which the arbitration took place;
• the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made.

Unless one of the defences referred to above is established, the foreign arbitral award may be made an order of court and is then enforced in the same manner as a judgment of the court.

Where the award complies with the requirements of the Arbitration Act and is made pursuant to an ‘arbitration agreement’ as defined in the Arbitration Act, the successful party may apply to court, in terms of section 31(1) and (3) of the Arbitration Act, to have the award made an order of court. The procedure is a quick and effective remedy for the enforcement of the award.

The court will not consider the merits of the dispute. All that the applicant is required to prove is that the dispute was submitted to arbitration in terms of an arbitration agreement, that an arbitrator was appointed and that there was a valid award in terms of the reference.

19 CONFIDENTIALITY OF PROCEEDINGS
19.1 What are the confidentiality requirements of the arbitral process, i.e. existence of the arbitration, pleadings, documents produced, hearing, award?

The Arbitration Act does not provide for the confidentiality of arbitration proceedings. However, even if the arbitration agreement does not expressly provide that the arbitration proceedings are confidential, such a term will be implied.

A party may not disclose information about the arbitration to an outsider without the consent of the other party to the arbitration, except for the purposes of court proceedings arising from the arbitration. The question whether information disclosed in arbitral proceedings can be referred to and/or relied on in subsequent proceedings between the same parties will therefore depend on whether the subsequent proceedings arise from the arbitration. In practice, however, a party will often be able to obtain information disclosed in arbitration proceedings through the discovery and disclosure procedures that are available in subsequent proceedings.

Arbitration proceedings are not protected by confidentiality in court proceedings arising from the arbitration.

A further difficulty is that witnesses are not bound by any implied term of confidentiality, and are therefore not obliged to respect the confidentiality of the arbitration proceedings.

In South Africa, in principle, relevant evidence remains admissible, even if illegally obtained. If a transcript of arbitration proceedings is obtained
without the consent of the parties, it may still be admissible in evidence in other proceedings, even if improperly obtained.

20 UNIQUE JURISDICTIONAL ATTRIBUTES

20.1 Is there any particular aspect of the approach to arbitration in the jurisdiction that bears special mention?

As indicated above, the popularity of arbitration has become a political issue in South Africa. However, arbitration is deeply entrenched as a dispute resolution mechanism in South Africa and it is unlikely that this will affect the popularity of arbitration in the longer term.

Although South Africa has lagged behind in the development of international arbitration and has not hitherto been regarded as a user-friendly forum for international arbitration, there have been important and encouraging developments in recent years. Most importantly, the Supreme Court of Appeal and the Constitutional Court, which are South Africa’s two highest courts, have clearly stated their support for arbitration and have recognised that arbitration is widely used for the resolution of disputes, both domestically and internationally. It is hoped that this recognition will accelerate the long overdue reform of South African arbitration law and that the legislature will now take steps to implement the recommendations made by the Law Commission in its 1998 Report on International Arbitration and its 2001 Report on Domestic Arbitration.

20.2 Do the national courts have jurisdiction to deal with procedural issues arising during an arbitration?

In terms of section 21 of the Arbitration Act, for the purpose of and in relation to a reference under an arbitration agreement, the court has the same power of making orders in respect of matters specified in the section as it has for purposes of and in relation to any action or matter in that court. The matters specified are set out in 4.1 above, and include certain procedural issues.

In terms of section 20 the Act, an arbitration tribunal may, on the application of any party to the reference and shall, if the court, on the application of 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. This power goes beyond procedural issues, as the court has the power to determine a question of law arising in the course of the reference.