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# **South Africa**

## **Arbitration Guide**

### **IBA Arbitration Committee**

#### **Contact**

**Des Williams**

**Werksmans Attorneys**

155 5th Street  
Sandton 2196  
Private Bag 10015  
2146  
Johannesburg  
South Africa

[dwilliams@werksmans.com](mailto:dwilliams@werksmans.com)

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## **I. Background**

### **(i) How prevalent is the use of arbitration in your jurisdiction? What are seen as the principal advantages and disadvantages of arbitration?**

Arbitration is a popular and widely used method of commercial dispute resolution in South Africa.

The principle advantages of arbitration are seen to be:

- the ability to choose a suitable arbitrator or, if the arbitrator is appointed by an arbitration organisation, the fact that generally suitable appointments are made;
- cost, when compared with litigation, although it is not always true that arbitration is less expensive than litigation;
- speed, although it is not always true that arbitrations are completed more quickly than litigation; and
- generally, the flexibility and informality of arbitration when compared with litigation.

The major disadvantages of arbitration are seen to be:

- in practice, arbitration can be even more costly than litigation;
- the greater flexibility of arbitration often makes it easier for the defendant to delay proceedings, particularly if the timetable is not tightly controlled by the arbitrator; and
- arbitration proceedings can be as protracted as litigation.

### **(ii) Is most arbitration institutional or ad hoc? Domestic or international? Which institutions and/or rules are most commonly used?**

Most arbitration is institutional and domestic, although there is increasing international arbitration activity in South Africa. The most popular domestic arbitration organisation is the Arbitration Foundation of Southern Africa (AFSA) and its rules are widely used. The most popular international arbitration organisations are the Court of Arbitration of the International Chamber of Commerce (ICC) and the London Court of International Arbitration (LCIA).

**(iii) What types of disputes are typically arbitrated?**

The range of commercial disputes which are submitted to arbitration is wide. Most arbitrations arise from arbitration clauses in commercial contracts and disputes therefore relate mainly to the performance or breach of those commercial contracts.

**(iv) How long do arbitral proceedings usually last in your country?**

Arbitral proceedings in South Africa usually last between one and two years.

**(v) Are there any restrictions on whether foreign nationals can act as counsel or arbitrators in arbitrations in your jurisdiction?**

There are no restrictions on whether foreign nationals can act as counsel or arbitrators in arbitrations in South Africa.

**II. Arbitration laws**

**(i) What law governs arbitration proceedings with their seat in your jurisdiction? Is the law the same for domestic and international arbitrations? Is the national arbitration law based on the UNCITRAL Model Law?**

The Arbitration Act 1965 is the applicable statute. The Arbitration Act provides for the settlement of disputes by arbitration tribunals according to the terms of written arbitration agreements and for the enforcement of the awards of such tribunals. The national arbitration law is not based on the UNCITRAL Model Law.

**(ii) Is there a distinction in your arbitration law between domestic and international arbitration? If so, what are the main differences?**

No distinction is drawn in South African arbitration law between domestic and international arbitration.

**(iii) What international treaties relating to arbitration have been adopted (eg, New York Convention, Geneva Convention, Washington Convention, Panama Convention)?**

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.

In 1997, South Africa acceded to the 1970 Convention on the Taking of Evidence Abroad in Civil or Commercial Matters of the Hague Conference on Private

International Law (the '1970 Convention'), subject to certain reservations and declarations. South Africa's succession to the 1970 Convention facilitates the obtaining of evidence abroad for use in litigation and arbitration.

- (iv) **Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?**

There is no rule in South African domestic arbitration law that provides the arbitral tribunal with any guidance as to which substantive law to apply to the merits of the dispute.

### III. Arbitration agreements

- (i) **Are there any legal requirements relating to the form and content of an arbitration agreement? What provisions are required for an arbitration agreement to be binding and enforceable? Are there additional recommended provisions?**

Under section 1 of the Arbitration 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 Arbitration Act. In practice, most commercial arbitration agreements are in writing and are regulated by the Arbitration Act.

- (ii) **What is the approach of courts towards the enforcement of agreements to arbitrate? Are there particular circumstances when an award will not be enforced?**

The party seeking to avoid arbitration bears an onus which is not easily discharged. Although there are a number of factors which may be taken into account by the court in the exercise of its discretion and which 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 his expert knowledge to dispense with expert evidence which would be necessary to qualify the court, thereby saving time and costs.

- (iii) **Are multi-tier clauses (eg, arbitration clauses that require negotiation, mediation and/or adjudication as steps before an arbitration can be commenced) common? Are they enforceable? If so, what are the consequences of commencing an arbitration in disregard of such a provision? Lack of jurisdiction? Non-arbitrability? Other?**

Multi-tier clauses are common and are enforceable. If an arbitration is commenced in disregard of such a provision, the non-arbitrability of the dispute, at that stage, may be raised by the defendant, by way of a plea in the arbitration, or alternatively the defendant may apply to court for an order staying the arbitration.

- (iv) **What are the requirements for a valid multi-party arbitration agreement?**

The only requirement is that there must be a written arbitration agreement between all parties.

- (v) **Is an agreement conferring on one of the parties a unilateral right to arbitrate enforceable?**

Yes.

- (vi) **May arbitration agreements bind non-signatories? If so, under what circumstances?**

No. Arbitration agreements do not bind non-signatories.

#### **IV. Arbitrability and jurisdiction**

- (i) **Are there types of disputes that may not be arbitrated? Who decides – courts or arbitrators – whether a matter is capable of being submitted to arbitration? Is the lack of arbitrability a matter of jurisdiction or admissibility?**

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

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 as to whether or not to allow a particular dispute to be referred to arbitration.

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

The question whether a matter is capable of being submitted to arbitration is a matter of jurisdiction.

**(ii) What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an arbitration agreement? Do local laws provide time limits for making jurisdictional objections? Do parties waive their right to arbitrate by participating in court proceedings?**

Generally, a party to court proceedings who contends that the dispute is arbitrable will raise the arbitration agreement as a special plea in bar in the court proceedings. The party seeking to avoid the arbitration agreement may apply, under section 3(2) of the Arbitration Act, on good cause shown for an order:

- setting aside the arbitration agreement;
- stating that the particular dispute referred to in the arbitration agreement shall not be referred to arbitration; or
- stating that the arbitration agreement shall cease to have effect with reference to any dispute referred.

It has been held that an applicant who applies under section 3 for a matter not to be referred to arbitration bears an equally heavy onus as the plaintiff who resists a plea in bar that the proceedings should be stayed and the matter be referred to arbitration.

Local laws do not provide time limits for making jurisdictional objections, either by way of a special plea or an application to court in terms of section 3(2) of the Arbitration Act. Parties do not waive their right to arbitrate by participating in court proceedings. A party may, therefore, in addition to raising the arbitration agreement as a special plea, plead over on the merits, and this will not constitute a waiver of the right to arbitrate.

**(iii) Can arbitrators decide on their own jurisdiction? Is the principle of competence-competence applicable in your jurisdiction? If yes, what is the nature and intrusiveness of the control (if any) exercised by courts on the tribunal's jurisdiction?**

An arbitrator is permitted to rule on the question of his or her own jurisdiction. However, a party may apply to have an award set aside where the arbitrator has exceeded his powers, which would include exceeding his or her 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 his opinion, he clearly has jurisdiction. If, however, he is uncertain, he should decline to proceed with the arbitration and leave it to one of the parties to apply to court for a declaratory order.

## **V. Selection of arbitrators**

### **(i) How are arbitrators selected? Do courts play a role?**

Arbitrators are selected either by agreement between the parties or, in the absence of agreement, in accordance with the rules of the institution administering the arbitration. The courts do not play a role.

### **(ii) What are the requirements in your jurisdiction as to disclosure of conflicts? Do courts play a role in challenges and what is the procedure?**

There are no specific requirements regarding the disclosure of conflicts. However, the effect of section 33 of the Arbitration Act is that an award made by an arbitrator who has not been independent, neutral and impartial is liable to be set aside by the court in review proceedings instituted by the aggrieved party.

Furthermore, 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 him from office.

### **(iii) Are there limitations on who may serve as an arbitrator? Do arbitrators have ethical duties? If so, what is their source and generally what are they?**

There are no limitations on who may serve as an arbitrator. There are no specific provisions regarding the ethical duties of arbitrators. However, an award made by an arbitrator who has not been independent, neutral and impartial is liable to be set aside.

### **(iv) Are there specific rules or codes of conduct concerning conflicts of interest for arbitrators? Are the IBA Guidelines on Conflicts of Interest in International Arbitration followed?**

There are no specific rules or codes of conduct concerning conflicts of interest for arbitrators. The IBA Guidelines on Conflicts of Interest in International Arbitration are increasingly being followed in arbitrations where questions regarding conflicts of interest arise.

## VI. Interim measures

- (i) **Can arbitrators enter interim measures or other forms of preliminary relief? What types of interim measures can arbitrators issue? Is there a requirement as to the form of the tribunal's decision (order or award)? Are interim measures issued by arbitrators enforceable in courts?**

Under 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. An interim award or order should be in writing, signed by the arbitrator. Interim measures may, for example, relate to:

- security for costs;
- discovery of documents and interrogatories;
- the giving of evidence by affidavit;
- interim interdicts, or similar relief.

Interim measures issued by arbitrators are enforceable in the courts.

- (ii) **Will courts grant provisional relief in support of arbitrations? If so, under what circumstances? May such measures be ordered after the constitution of the arbitral tribunal? Will any court ordered provisional relief remain in force following constitution of the arbitral tribunal?**

Under 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 purpose of and in relation to any action or matter in that court.

A wide range of matters is specified. Most commonly provisional relief will be sought in the form of an interim interdict pending the outcome of the arbitration. Such relief remains in force following the constitution of the arbitral tribunal.

- (iii) **To what extent may courts grant evidentiary assistance/provisional relief in support of the arbitration? Do such measures require the tribunal's consent if the latter is in place?**

The matters specified in section 21 include:

- discovery of documents and interrogatories;

- the examination of any witness before a commissioner in South Africa or abroad and the issue of a commission or a request for such examination.

Such measures do not require the tribunal's consent.

## **VII. Disclosure/discovery**

- (i) **What is the general approach to disclosure or discovery in arbitration? What types of disclosure/discovery are typically permitted?**

The general approach to discovery is similar to the approach in litigation. Parties are required to make full discovery of all relevant documents which are in their possession or under their control.

- (ii) **What, if any, limits are there on the permissible scope of disclosure or discovery?**

There are no limits on the discoverability of relevant documents which are in the possession or under the control of the parties, save to the extent that such documents are legally privileged.

- (iii) **Are there special rules for handling electronically stored information?**

There are no special rules for handling electronically stored information.

## **VIII. Confidentiality**

- (i) **Are arbitrations confidential? What are the rules regarding confidentiality?**

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.

- (ii) **Are there any provisions in your arbitration law as to the arbitral tribunal's power to protect trade secrets and confidential information?**

There are no provisions in South African arbitration law as to the arbitral tribunal's power to protect trade secrets and confidential information, but arbitrators generally are prepared to make appropriate orders in this regard.

- (iii) **Are there any provisions in your arbitration law as to rules of privilege?**

There are no provisions in South African arbitration law as to the rules of privilege. The rules of privilege are those which are applicable in litigation.

## **IX. Evidence and hearings**

- (i) Is it common that parties and arbitral tribunals adopt the IBA Rules on the Taking of Evidence in International Arbitration to govern arbitration proceedings? Is so, are the Rules generally adopted as such or does the tribunal retain discretion to depart from them?**

It is unusual for parties and arbitral tribunals to adopt the IBA Rules on the Taking of Evidence in International Arbitration to govern arbitration proceedings in South Africa.

- (ii) Are there any limits to arbitral tribunals' discretion to govern the hearings?**

There are no limits to arbitral tribunal's discretion to govern the hearings. The rules of evidence as observed in a court of law should be followed as far as possible, but the arbitrator may deviate from them, provided that in so doing he does not disregard the substance of justice.

- (iii) How is witness testimony presented? Is the use of witness statements with cross examination common? Are oral direct examinations common? Do arbitrators question witnesses?**

There are no rules which apply for the production of written and/or oral witness testimony. The use of witness statements with cross examination is common. Oral direct examinations are also common. Arbitrators do question witnesses during direct examination and during cross examination.

- (iv) Are there any rules on who can or cannot appear as a witness? Are there any mandatory rules on oath or affirmation?**

There are no rules on who can or cannot appear as a witness. There is no requirement that the witness must be sworn in before the tribunal. The usual (but not invariable) practice is that witnesses are sworn in.

- (v) Are there any differences between the testimony of a witness specially connected with one of the parties (eg, legal representative) and the testimony of unrelated witnesses?**

There are no differences between the testimony of a witness specially connected to one of the parties and the testimony of unrelated witnesses. The question will always be as to the weight to be given to the evidence of a particular witness.

- (vi) **How is expert testimony presented? Are there any formal requirements regarding independence and/or impartiality of expert witnesses?**

There are no formal requirements regarding expert witnesses. Usually, expert evidence is presented in an expert report prior to the hearing. The expert usually gives oral evidence with reference to his report and is subjected to cross examination. Issues regarding independence or impartiality will generally be raised in cross examination.

- (vii) **Is it common that arbitral tribunals appoint experts beside those that may have been appointed by the parties? How is the evidence provided by the expert appointed by the arbitral tribunal considered in comparison with the evidence provided by party-appointed experts? Are there any requirements in your jurisdiction that experts be selected from a particular list?**

It is not common for arbitral tribunals to appoint experts other than those appointed by the parties.

- (viii) **Is witness conferencing ('hot-tubbing') used? If so, how is it typically handled?**

Witness conferencing is used, particularly between expert witnesses. The arbitrator will often encourage experts to meet and to record their agreement regarding issues (and the areas in which no agreement can be reached) in a minute of their meeting.

- (ix) **Are there any rules or requirements in your jurisdiction as to the use of arbitral secretaries? Is the use of arbitral secretaries common?**

There are no rules or requirements as to the use of arbitral secretaries and the use of arbitral secretaries is not common.

## **X. Awards**

- (i) **Are there formal requirements for an award to be valid? Are there any limitations on the types of permissible relief?**

The formal requirements for an award made in terms of the Arbitration Act are the following:

- The award must be in writing and signed by all the members of the arbitration tribunal.
- 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.

- 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*.

**(ii) Can arbitrators award punitive or exemplary damages? Can they award interest? Compound interest?**

Arbitrators cannot award punitive or exemplary damages, as such awards are not enforceable in South Africa. Interest can be awarded. Where interest is awarded on a statutory basis, simple interest will be awarded. However, compound interest will be awarded if the parties have agreed that the claim forming the subject matter of the arbitration will attract compound interest.

**(iii) Are interim or partial awards enforceable?**

Interim or partial awards are enforceable.

**(iv) Are arbitrators allowed to issue dissenting opinions to the award? What are the rules, if any, that apply to the form and content of dissenting opinions?**

Arbitrators are permitted to issue dissenting opinions. There are no specific rules that apply to the form and content of dissenting opinions.

**(v) Are awards by consent permitted? If so, under what circumstances? By what means other than an award can proceedings be terminated?**

Awards by consent are permitted. There are no specific rules applicable to awards by consent. Generally, the arbitrator will require the consent to be in writing or to be 'on the record' in the hearing.

Arbitration proceedings can also be terminated by settlement.

**(vi) What powers, if any, do arbitrators have to correct or interpret an award?**

Under section 32(1) of the Arbitration Act, the parties to an arbitration may within six weeks after the publication of the award to them, by any writings 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, within six weeks after the publication of the award, on good cause shown, 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 the court may direct.

## **XI. Costs**

- (i) Who bears the costs of arbitration? Is it always the unsuccessful party who bears the costs?**

Costs are generally, but not always, borne by the unsuccessful party.

- (ii) What are the elements of costs that are typically awarded?**

Costs awarded will generally include the taxed costs of the parties' legal representatives, the arbitrator's fees, experts' fees, fees and disbursements payable to the arbitration institution and similar fees and disbursements.

- (iii) Does the arbitral tribunal have jurisdiction to decide on its own costs and expenses? If not, who does?**

The arbitral tribunal does not have jurisdiction to decide on its own costs and expenses. The arbitrator's fees are generally agreed or determined by the arbitration institution.

- (iv) Does the arbitral tribunal have discretion to apportion the costs between the parties? If so, on what basis?**

The arbitral tribunal has an unfettered discretion to apportion costs between the parties.

- (v) Do courts have the power to review the tribunal's decision on costs? If so, under what conditions?**

The courts do not have the power to review the tribunal's decision on costs.

## **XII. Challenges to awards**

- (i) How may awards be challenged and on what grounds? Are there time limitations for challenging awards? What is the average duration of challenge proceedings? Do challenge proceedings stay any enforcement proceedings? If yes, is it possible nevertheless to obtain leave to enforce? Under what conditions?**

Under 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 himself in relation to his duties as arbitrator;
- the arbitrator has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded his powers; and
- an award has been improperly obtained.

Review proceedings are instituted by way of application to the High Court. The average duration of such proceedings is between 12 and 18 months and further delays can occur if leave to appeal to a higher court is granted. Review proceedings do not automatically stay enforcement proceedings. However, it will generally be difficult for an applicant to obtain an enforcement order if review proceedings are pending.

**(ii) May the parties waive the right to challenge an arbitration award? If yes, what are the requirements for such an agreement to be valid?**

Parties may waive the right to challenge an arbitration award and generally such agreements will be upheld.

**(iii) Can awards be appealed in your country? If so, what are the grounds for appeal? How many levels of appeal are there?**

Under section 28 of the Arbitration Act, unless the arbitration agreement provides otherwise, an award shall, subject to the provisions of the Arbitration 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 which provide for appeals to be heard by an AFSA appeal tribunal. Usually, this will be an appeal in an AFSA administered matter against the award of a sole arbitrator.

**(iv) May courts remand an award to the tribunal? Under what conditions? What powers does the tribunal have in relation to an award so remanded?**

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 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 the court may direct.

### **XIII. Recognition and enforcement of awards**

- (i) What is the process for the recognition and enforcement of awards? What are the grounds for opposing enforcement? Which is the competent court? Does such opposition stay the enforcement? If yes, is it possible nevertheless to obtain leave to enforce? Under what circumstances?**

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 to have the award made an order of court. The procedure is by way of provisional sentence and is quick and effective. 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 according to the terms of an arbitration agreement, that the arbitrator was appointed and that there was a valid award in terms of the reference.

Opposition does have the effect of staying the enforcement, as there can be no enforcement until an order is obtained.

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 of 1977 was enacted to give effect to the New York Convention. The procedure for the enforcement of international arbitration awards is set out in the Recognition and Enforcement of Foreign Arbitral Awards Act.

- (ii) If an *exequatur* is obtained, what is the procedure to be followed to enforce the award? Is the recourse to a court possible at that stage?**

Where the award is sought to be enforced outside South Africa, the procedure to be followed will be determined by the requirements of the jurisdiction in which the award is sought to be enforced. Where a foreign arbitral award is sought to be enforced, an application to court should be made in terms of the Recognition and Enforcement of Foreign Arbitral Awards Act.

- (iii) Are conservatory measures available pending enforcement of the award?**

Conservatory measures are available pending the enforcement of the award. The most usual remedy will be in the form of an anti-dissipation interdict (which is similar to the well-known Mareva injunction in English Law).

- (iv) What is the attitude of courts towards the enforcement of awards? What is the attitude of courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?**

There is strong court support for arbitration in South Africa and the courts will generally enforce domestic and international arbitration awards, subject to the provisions of the Arbitration Act and the Recognition and Enforcement of Foreign Arbitral Awards Act respectively. However, the courts will not enforce foreign awards set aside by the courts at the place of arbitration.

- (v) **How long does enforcement typically take? Are there time limits for seeking the enforcement of an award?**

There are no time limits for seeks the enforcement of an award. The procedure is quick and effective and generally it should be possible to obtain a recognition and enforcement order within two to three months.

#### **XIV. Sovereign immunity**

- (i) **Do state parties enjoy immunities in your jurisdiction? Under what conditions?**

No. Under section 10(1) of the Foreign States Immunities Act 87 of 1981, a foreign state which has agreed in writing to submit a dispute which has arisen, or may arise, to arbitration, shall not be immune from the jurisdiction of the courts of South Africa in any proceedings which relate to the arbitration.

- (ii) **Are there any special rules that apply to the enforcement of an award against a state or state entity?**

No. Generally, the procedure applying to the enforcement of an award against a foreign state or state entity will be the procedure under the Recognition and Enforcement of Foreign Arbitral Awards Act.

#### **XV. Investment treaty arbitration**

- (i) **Is your country a party to the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States? Or other multilateral treaties on the protection of investments?**

South Africa has not signed and ratified the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States, or any other multilateral treaties on the protection of investments.

- (ii) **Has your country entered into Bilateral Investment Treaties with other countries?**

South Africa has entered into a number of bilateral investment treaties with other countries.

## **XVI. Resources**

- (i) **What are the main treatises or reference materials that practitioners should consult to learn more about arbitration in your jurisdiction?**

The main reference materials that practitioners should consult to learn more about arbitration in South Africa are the following:

### **Books**

- David Butler and Eyvind Finsen, *Arbitration in South Africa: Law and Practice* (Juta 1993).
- Marcus Jacobs, *The Law of Arbitration in South Africa* (Juta 1977).
- *The Law of South Africa*, WA Joubert (ed) (2nd edition Vol 1, LexisNexis Butterworths 2003).

### **Reports and discussion papers**

- South African Law Commission 'Project 94: An International Arbitration Act for South Africa' (1998).
- South African Law Commission 'Project 94: Domestic Arbitration' (2001).
- South African Law Commission 'Arbitration: a draft International Arbitration Act for South Africa', Project 94: Discussion Paper 69 (1977).

- (ii) **Are there major arbitration educational events or conferences held regularly in your jurisdiction? If so, what are they and when do they take place?**

There are no major arbitration educational events or conferences which are held on a regular basis. However, there is considerable interest in arbitration and educational events and conferences are held from time to time, usually in Johannesburg or in Cape Town.

## **XVII. Trends and developments**

- (i) **Do you think that arbitration has become a real alternative to court proceedings in your country?**

Arbitration has become a real alternative to court proceedings in South Africa and is becoming increasingly popular, particularly as a method of commercial dispute resolution.

**(ii) What are the trends in relation to other ADR procedures, such as mediation?**

Mediation is also becoming increasingly popular in South Africa, although there it is still relatively unusual for commercial contracts to provide for the submission of disputes to mediation.

**(iii) Are there any noteworthy recent developments in arbitration or ADR?**

Although arbitration has become a popular method of commercial dispute resolution, South Africa has lagged behind in the development of international arbitration. Although the Law Commission has made extensive and far-reaching recommendations regarding both international arbitration and domestic arbitration, these recommendations have not yet been implemented. The delay in the implementation of much needed reform of legislation relating to arbitration is largely attributable to the fact that the popularity of arbitration has become a political issue. In certain quarters it has been suggested that arbitration is inimical to judicial transformation in South Africa. The issue is one which was referred to by the Law Commission in its domestic arbitration report in 2001, in which reference was made to the danger of a perception ‘particularly among black lawyers, that some white members of the legal profession see arbitration as a form of “privatised litigation”, enabling them and their corporate clients to avoid courts which increasingly comprise black judicial officers.’

Notwithstanding these views and sensitivities, there is strong court support for arbitration in South Africa, and it is to be hoped that this will encourage the reform of South Africa arbitration law, and, more particularly, the application of the UNCITRAL Model Law in international arbitration. The implementation of these much needed reforms would contribute to the growth and development of South Africa as a significant regional arbitration centre.