

# Arbitration in South Africa

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This note considers the framework for international arbitration in South Africa, as set out by the International Arbitration Act 2017 and in South African case law. It describes the most significant features of the international arbitral process in South Africa, including the law regarding arbitration agreements, the duties and powers of the tribunal, the arbitration proceedings, the role of state courts, and challenge to, and enforcement of, awards.

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## Scope of this note

South Africa is an arbitration-friendly jurisdiction. South African courts recognise that any party may choose arbitration as a legitimate and constitutionally permissible form of dispute resolution. Accordingly, the courts are willing to enforce any valid arbitral award on the same basis as a judgment of the High Court of South Africa, unless there is an exceptional reason for not doing so.

This note sets out the legal framework in South Africa for international arbitration, which is governed by the *International Arbitration Act 2017* (IAA 2017). The note also considers relevant case law on arbitration agreements, arbitral tribunals, arbitral process, awards, challenges to awards and enforcement.

## Sources of South African international arbitration law

The IAA 2017 came into force on 20 December 2017 with the aim of consolidating and updating South African law on international commercial arbitration.

The IAA 2017 applies to any international commercial dispute that the parties have agreed to submit to arbitration under an arbitration agreement and which relates to a matter that the parties are entitled to dispose of by way of arbitration, unless:

- The dispute is not capable of determination by arbitration under any law of the Republic.
- The arbitration agreement is contrary to the public policy of the Republic.

(Section 7, IAA 2017.)

Subject to section 13 of the Protection of Investment Act 22 of 2015, the IAA 2017 also binds public bodies and applies to any international commercial arbitration in terms of an arbitration agreement to which a public body is a party (section 5, IAA 2017).

The IAA 2017 incorporates the [UNCITRAL Model Law](#) with certain modifications, as shown in Schedule 1 to the IAA 2017. It provides for the recognition and enforcement of arbitration agreements and foreign arbitral awards in accordance with the [New York Convention](#), and it repeals the Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977. It also amends the Protection of Businesses Act 99 of 1978 (PBA 1978) to ensure that the restrictions imposed under the statute are inapplicable to the enforcement of foreign arbitral awards in South Africa.

While the IAA 2017 accords with international best practice on international arbitration generally, note that:

- It does not provide for the adoption of the [ICSID Convention](#).
- It does not apply to investments covered by the [Protection of Investment Act 22 of 2015](#), which sets forth government policy on the protection of foreign investments in South Africa and investor-state arbitration.
- It emphasises the point that, although a court may be empowered by legislation to determine a particular dispute, that does not mean that the dispute is not capable of resolution by arbitration.

The common law, which was not repealed by the IAA 2017, also applies to arbitration proceedings in South Africa (*Nkuke v Kindi 1912 CPD 529 531* and *Independent Municipal and Allied Trade Union v Northern Pretoria Metropolitan Substructure 1998 JOL 3642 (T); 1999 2 SA 234 (T)*). South Africa's common law is based on Roman Dutch law, with adopted principles from English arbitration law.

Where there is a conflict between the legislation and the common law, the legislation takes precedence.

## Key institutions and rules

### The Arbitration Foundation of Southern Africa (AFSA)

[AFSA](#), the most commonly used arbitral institution in South Africa, administers all types of dispute resolution, particularly arbitration. It was established in 1996 and is a joint venture between business and the legal and accounting professions. AFSA's head office is situated in Sandton, Johannesburg and it has regional offices in Pretoria, Cape Town and Durban. Parties may elect to arbitrate under the AFSA Commercial Rules for Arbitration, or for less complex matters under the Expedited Rules.

### The Arbitration Foundation of South Africa International

[AFSA International](#) is a division of AFSA that administers all cross-border disputes. The rules applicable to international disputes are based on the UNCITRAL Arbitration Rules, but with various amendments reflecting international best practice. According to its website, the AFSA case handlers have administered matters involving parties from countries such as Australia, France, Germany, the UK, Mauritius, Namibia, Netherlands, Nigeria, Norway, China, Singapore, Switzerland, Sweden, Tanzania and Zimbabwe. AFSA International is located at the offices of AFSA.

### China-Africa Joint Arbitration Centre (CAJAC Johannesburg)

[CAJAC Johannesburg](#) is a subsidiary of AFSA. CAJAC was established under the leadership of the China Law Society in answer to the need for a credible China-Africa dispute resolution mechanism, necessitated by the increasing trade between China and Africa. The CAJAC Johannesburg Rules have been designed keeping in mind international best practice, together with the particular needs of China and Africa.

## The Association of Arbitrators (Southern Africa)

The *Association of Arbitrators (Southern Africa)* was founded in 1979 to promote arbitration as a means of resolving disputes and to provide a body of competent and experienced arbitrators to ensure efficient arbitration proceedings. While not as commonly used as AFSA, the Association of Arbitrators is often used in construction-related disputes. The Association of Arbitrators has its head office in Sandton, Johannesburg and has branch offices in Durban and Cape Town.

## Jurisdictional issues

### Kompetenz-kompetenz

South African courts have accepted that where the parties have agreed to arbitration as a dispute resolution mechanism, this includes giving the arbitrator(s) authority to rule on a jurisdictional objection (referred to in other jurisdictions as *kompetenz-kompetenz*). This is subject to a proper analysis of the interpretation of the agreement in question, to verify if this was in fact the parties' intention. In *Zhongji Development Construction Engineering Company Ltd v Kamoto Copper Company SARL [2014] 4 All SA 617 (SCA)*, Willis JA, writing the majority judgment, referred to *Fiona Trust and Holding Corporation and others v Primalov and others [2007] EWCA Civ 20* (upheld in *Fiona Trust and Holding Corporation and others v Primalov and others [2007] UKHL 40*), in support of the assumption that the parties to an agreement containing an arbitration clause intended that any dispute in relation to that agreement would be decided by arbitration.

However, any such ruling by the tribunal is subject to court review, either after the arbitral proceedings or, in exceptional circumstances, during the proceedings and before the award.

The IAA 2017 is silent on the jurisdiction of the arbitral tribunal and, accordingly, Article 16 of the Model Law applies. In this regard:

- The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement (*Article 16(1), Model Law*).
- A plea that the arbitral tribunal does not have jurisdiction must be raised not later than the submission of the statement of defence. A plea that the arbitral tribunal is exceeding the scope of its authority must be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings (*Article 16(2), Model Law*).
- The arbitral tribunal may rule on a plea referred to above either as a preliminary question or in an award on the merits (*Article 16(3), Model Law*).

### Arbitrability

At common law, cases relating to legal status, criminal cases, popular actions or actions involving infamy cannot be submitted to arbitration. This does not extend to arbitration of a civil action for damages arising from a crime or an action involving infamy.

Any international commercial dispute that the parties have agreed to submit to arbitration under an arbitration agreement, and which relates to a matter that the parties are entitled to dispose of by agreement, may be determined by arbitration. This is subject to the dispute not being capable of determination by arbitration under any law of South Africa or the arbitration agreement being contrary to the public policy of South Africa (*section 7, IAA 2017*).

As is common in many jurisdictions, in South Africa, public policy is not static, but varies from time to time and from place to place. When approaching the question of public policy, the interest of the community or public is very important, but simple justice between parties should also be pursued. Among the factors that determine public policy, the values enshrined in the Constitution of the Republic of South Africa Act 108 of 1996 are vital (*Sasfin (Pty) Ltd v Beukes 1989 1 All SA 347 (A), at paragraphs 8D and 9G*). Public policy in South Africa is rooted in the Constitution and the fundamental values that underlie it. These values include human dignity, equality, human rights and freedoms, non-racialism, and non-sexism. However, case law has shown that the courts usually exercise restraint when considering the public policy argument. For example, the courts recognise that it is important that there be certainty about the validity of agreements, and this certainty could be undermined by an arbitrary and indiscriminate use of the power to declare agreements contrary to public policy (*Sasfin (Pty) Ltd v Beukes*).

The common law cases above will provide a guideline as to the arbitrability of certain disputes falling within the ambit of the IAA 2017. In addition, the examples of statutory restrictions above will affect the arbitrability of a dispute under international arbitration.

For further discussion of arbitrability in international arbitration, see [Practice note, Arbitrability in international arbitration](#).

## Arbitration agreements

### Formal requirements

Arbitration agreements are contractual in nature (*De Lange v Presiding Bishop, Methodist Church of Southern Africa 2015 (1) SA 106 (SCA)*) and, accordingly, the general requirements for the existence of a contract must be met. This includes consensus (an agreement between the parties on the obligations that they wish to create), intention of the parties to be legally bound by the agreement, and awareness by the parties of the agreement.

Article 7 of Schedule 1 to the IAA 2017 defines an "arbitration agreement" as being an arbitration agreement referred to in Article 7 (option 1) of the Model Law. Accordingly:

- An arbitration agreement is "an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not".
- An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.
- The arbitration agreement must be in writing.

(*Article 7 (option 1), Model Law.*)

For the "in writing" requirement to be satisfied, generally it is the intention of the legislature that the written agreement should be signed by the parties to the agreement. However, a document can constitute an agreement even

if it was not signed by all the parties, provided that all of the parties adopted and acted on it (*Fassler, Kamstra and Holmes v Stallion Group of Companies (Pty) Ltd 1992 (3) SA 825 (W)*). Having only one person sign the agreement does not necessarily negate its validity. If the parties have "deliberately intended to record their agreement in writing and have shown that the document so produced constitutes an agreement between them", then the fact that the signature of one party is missing is of no consequence (*Mervis Brothers v Interior Acoustics 1999 (3) SA 607 (W)*).

## Substantive requirements

Parties can submit to arbitration all or certain disputes that have already arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not (*Article 7(1) (option 1), Model Law*).

## Separability

An arbitration clause that forms part of a contract will be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void will not, of itself, result in the invalidity of the arbitration clause (*Article 16(1), Schedule 1, IAA 2017; Article 16(1), Model Law*).

For further discussion of separability in international arbitration, see [Practice note, Separability of arbitration agreements in international arbitration](#).

## Seat and place of arbitration

The juridical seat of arbitration (referred to in the UNCITRAL Model Law as the "place of arbitration") is determined in accordance with Articles 20(1) and 31(3) of Schedule 1 to the IAA 2017 (which repeats Articles 20(1) and 31(3) of the Model Law) (*section 15, IAA 2017*). Accordingly, the parties are free to agree on the place of arbitration. Failing such an agreement, the place of arbitration will be determined by the tribunal having regard to the circumstances of the case, including the convenience of the parties (*Article 20(1), Schedule 1, IAA 2017; Article 20(1), Model Law*). The award must state the date and the place of arbitration (*Article 31(3), Schedule 1, IAA 2017; Article 31(3), Model Law*).

## Third parties and multi-party arbitration

Parties may agree that the arbitral proceedings be consolidated with other arbitral proceedings, or that concurrent hearings be held, on such terms as may be agreed. The arbitral tribunal may not order consolidation of arbitral proceedings or concurrent hearings unless the parties agree (*section 10, IAA 2017*).

## Arbitral tribunal

### Number of arbitrators

The parties are free to determine the number of arbitrators. Failing that determination, the number of arbitrators will be one. This differs from Article 10 of the Model Law in that the Model Law provides for three arbitrators as the default position as opposed to one (*Article 10, Schedule 1, IAA 2017*).

### Difference between a chairperson and an umpire

An umpire steps in where the two party-appointed arbitrators disagree. At that point, the umpire is empowered to take over the decision-making function, effectively as a sole arbitrator.

By contrast, a third arbitrator who is a chairperson or president takes part in the decision-making process from the outset. He or she will have the casting vote if the other two arbitrators disagree.

The use of umpires is much less prevalent in practice in South Africa today.

Neither the IAA 2017 nor the Model Law makes reference to the use of an umpire in international arbitral proceedings.

## Selecting an arbitrator

In international arbitration proceedings, the parties are free to agree on the procedure for appointing the tribunal (*Article 11(2), Schedule 1, IAA 2017; Article 11(2), Model Law*). Failing such an agreement:

- In an arbitration with three arbitrators, each party must appoint one arbitrator, and the two appointed arbitrators will appoint the third arbitrator. If a party fails to appoint the arbitrator within 30 days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within 30 days of their appointment, the appointment will be made, on request of a party, by the court or other authority specified in Article 6 of Schedule 1 to the IAA 2017.
- In an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, they will be appointed, on request of a party, by the court or other authority specified in Article 6 of Schedule 1 to the IAA 2017.

(*Article 11(3), Schedule 1, IAA 2017; Article 11(3), Model Law*.)

Where there is an agreed appointment procedure and the parties, arbitrators or a third party (such as an institution) either fail to act or perform as required, or are unable to reach an agreement, a party may request a court or other authority specified in Article 6 of Schedule 1 to the IAA 2017 to take necessary measures (*Article 11(4), Schedule 1, IAA 2017; Article 11(4), Model Law*).

The court specified in Article 6 of Schedule 1 to the IAA 2017 to perform the functions under Article 11(3) and (4) is:

- The High Court within the area of jurisdiction where the arbitration is being, is to be, or was held.
- The division with jurisdiction over a South African party, or if there is no South African party, the Gauteng Division of the High Court seated in Johannesburg, if the place within the Republic where the arbitration is to take place has not yet been determined, until that place is determined.

If the arbitration is institutional in nature, that institution may maintain a list of arbitrators that may be appointed (for example, AFSA has a list of arbitrators (see *AFSA: Panel of arbitrators*)).

If the arbitration is ad hoc in nature, parties must agree on the arbitrator(s) to be appointed, or alternatively, they may agree to a particular method under which the arbitrator(s) are to be appointed. For instance, the parties to the arbitration agreement may provide for the number of arbitrators to be appointed, as well as an arbitration institution, centre or person to act as appointing authority. The UNCITRAL model arbitration clause provided for in the UNCITRAL Arbitration Rules 2010 and 2013 (the most recognised set of ad hoc arbitration rules) is an

example of a set of rules which includes these provisions (see *Standard clause, UNCITRAL: standard recommended arbitration clauses*). Otherwise, parties frequently adopt the *Uniform Rules of Court* (which govern civil procedure in the High Court of South Africa) in respect of their ad hoc arbitration proceedings.

For more discussion on selection of arbitrators, see *Practice note, Selection of party-nominated arbitrators*.

## Termination of appointment

In international arbitration proceedings, an arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to their impartiality or independence, or if they do not possess qualifications agreed to by the parties. A party may only challenge an arbitrator for reasons of which they become aware after the appointment has been made (*Article 12, Schedule 1, IAA 2017; Article 12, Model Law*).

Parties may agree on a procedure for challenging arbitrators (*Article 13(1), Schedule 1, IAA 2017; Article 13(1), Model Law*). Failing such an agreement, within 15 days of becoming aware of the appointment or of the circumstances referred to in Article 12, a party must send a written statement of the reasons for the challenge to the tribunal. Unless the challenged arbitrator withdraws from office, or the other party agrees to the challenge, the tribunal will decide on the challenge (*Article 13(2), Schedule 1, IAA 2017; Article 13(2), Model Law*). If the tribunal rejects the challenge, the challenging party has 30 days to request the court or authority specified in Article 6 to decide on the challenge, which will be final and not subject to appeal (*Article 13(3), Schedule 1, IAA 2017; Article 13(3), Model Law*).

If an arbitrator becomes unable to perform their functions, or fails to act without undue delay, their mandate terminates if they withdraw from office or if the parties agree on the termination (*Article 14(1), Schedule 1, IAA 2017; Article 14(1), Model Law*). Where the mandate of an arbitrator terminates, a substitute arbitrator will be appointed according to the rules applicable to the appointment of the arbitrator being replaced (*Article 15, Schedule 1, IAA 2017; Article 15, Model Law*).

## Tribunal's rights and duties

### Right to remuneration

Neither the IAA 2017 nor the Model Law makes reference to the right to remunerate arbitrators.

### Duties of arbitrators and umpires

In addition to acting in accordance with the arbitration agreement and the IAA 2017, there is a further duty on an arbitrator to act fairly towards the parties when deciding the dispute (*Johan Louw Konstruksie (Edms) Bpk v Mitchell 2002 3 SA 171; Lufuno Mphaphuli and Associates (Pty) Ltd v Andrews 2009 6 BCLR 527 (CC); 2009 4 SA 529 (CC), at paragraph 221*). In doing so, the arbitrator must exercise care, proceed diligently and act impartially and without any personal interest in the proceedings (*Graaff-Reinet Municipality v Jansen 1917 CPD 604 607*). Arbitrators may not delegate their power or function to another (*Mervis Brothers v Interior Acoustics 1999 3 SA 607 (W)*) and are bound by relevant substantive law in making their decisions on the merits (*Dickenson and Brown v Fisher's Executors 1915 AD 166 176*). However, parties may agree to authorise the arbitrator to determine a dispute by referring to general considerations of justice and fairness (*Amalgamated Clothing and Textile Workers Union of SA v Veldspun (Pty) Ltd 1994 1 All SA 453 (A); 1994 1 SA 162 (A) 167H*).

Parties arbitrating under the IAA 2017 must be treated with equality and be given a reasonable opportunity to present their case (*Article 18, Schedule 1, IAA 2017*). This differs from Article 18 of the Model Law which provides that parties will be given a "full" opportunity to present their case.

## Arbitral proceedings

For arbitration proceedings to commence, there must be a real dispute that is governed by a valid arbitration agreement. An arbitral tribunal must have also been validly appointed.

### Commencing the proceedings

The procedure to commence arbitral proceedings is most often set out in the relevant arbitration agreement or the rules that the parties have chosen to govern the proceedings. A dispute must have already arisen before either party can take any step that commences arbitration proceedings. Such a step must advance the arbitration proceedings (*Wilmington (Pty) Ltd v Short and McDonald (Pty) Ltd 1966 (4) SA 33 (D)*).

South African courts have noted that the giving of notice for the appointment of an arbitrator may constitute a step that commences arbitration proceedings (*Wilmington (Pty) Ltd v Short and McDonald (Pty) Ltd*).

Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent (*section 20(2), IAA 2017 and Article 21, Schedule 1, IAA 2017; Article 21, Model Law*).

### Conduct of the proceedings

The arbitral proceedings are largely governed by the arbitration agreement. Parties can decide on the rules that are to regulate the proceedings or agree to submit to the rules of an arbitral institution.

In the conduct of proceedings in an international arbitration, the following provisions are relevant:

- Where the arbitration is held in private, the award and all documents, which are not otherwise in the public domain, must be kept confidential by the parties and tribunal, except where disclosure of those documents may be required for legal reasons. Proceedings to which a public body is a party are held in public, unless there are compelling reasons for the tribunal to direct otherwise (*Article 11, IAA 2017*).
- Parties to an arbitration agreement may refer a dispute to conciliation, before or after referring the dispute to arbitration, subject to the terms of the agreement (*Article 12, IAA 2017*).
- Parties must be treated with equality and be given a reasonable opportunity to present their case (*Article 18, Schedule 1, IAA 2017; Article 18, Model Law*).
- Parties may agree on procedure, and failing that agreement, the tribunal will conduct the arbitration in a manner it considers appropriate, including the power to determine the admissibility, relevance, materiality and weight of any evidence (*Article 19, Schedule 1, IAA 2017; Article 19, Model Law*).
- Parties may agree on the place of arbitration. Failing an agreement, the tribunal will determine the place, having regard to the circumstances of case and convenience to parties (*Article 20, Schedule 1, IAA 2017; Article 20, Model Law*).
- Parties may agree on the language to be used in the proceedings. Failing such an agreement, the tribunal will determine the language (*Article 22, Schedule 1, IAA 2017; Article 22, Model Law*).



- Unless otherwise agreed, in the statements of claim and defence, and within the time agreed between the parties, the claimant must state the facts supporting their claim, the points at issue and the relief or remedy sought, and the respondent must state their defence in respect of these particulars. Parties may submit all relevant documents with their statements (*Article 23, Schedule 1, IAA 2017; Article 23, Model Law*).
- Unless otherwise agreed, the tribunal will decide whether to hold a hearing or whether proceedings will be conducted on a documents-only basis. All statements, documents or other information supplied to the tribunal by one party must be communicated to the other party (*Article 24, Schedule 1, IAA 2017; Article 24, Model Law*).
- On the default of a party:
  - if the claimant fails to communicate its statement of claim, the tribunal will terminate the proceedings;
  - if the respondent fails to communicate its statement of defence, the tribunal will continue with proceedings; and
  - if any party fails to attend a hearing or produce documentary evidence, the tribunal may continue with the proceedings and make the award on the evidence before it.

(*Article 25, Schedule 1, IAA 2017; Article 25, Model Law*.)

- Unless otherwise agreed, the tribunal may appoint experts to report to it on specific issues and may require a party to give the expert any relevant information. Following an expert report, the expert may participate in a hearing, unless parties decide otherwise (*Article 26, Schedule 1, IAA 2017; Article 26, Model Law*).
- The tribunal, or a party with the approval of the tribunal, may request from a competent court of the state, assistance in taking evidence (*Article 27, Schedule 1, IAA 2017; Article 27, Model Law*).

## Decisions of the tribunal

In arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal will be made, unless otherwise agreed by the parties, by a majority of all its members. Questions of procedure may be decided by a presiding arbitrator, if so authorised by the parties or all members of the arbitral tribunal (*Article 29, Schedule 1, IAA 2017; Article 29, Model Law*).

## Powers of the courts to support arbitral proceedings

South African courts have consistently supported the autonomy of arbitral proceedings according to international best practice. Therefore, the courts will generally not interfere with arbitral proceedings unnecessarily (see *Lufuno Mphaphuli and Associates (Pty) Ltd v Andrews and another 2009 (4) SCA 529 (CC)* and *Zhongji Development Construction Engineering Company (Ltd) v Kamoto Copper Company SARL 2015 (1) SA 345 (SCA)*).

## General powers of the court

Regarding the general powers of the court that are vested by the IAA 2017, the following provisions are relevant:

- No court shall intervene in matters governed by the Model Law, except where so provided in the Model Law (*Article 5, Schedule 1, IAA 2017; Article 5, Model Law*).
- The functions referred to in the following Articles will be performed by the High Court within the area of jurisdiction that the arbitration is being, will be or was held, or the division with jurisdiction over a South African party:
  - Article 11(3) (where parties fail to agree on an arbitrator);
  - Article 11(4) (where a party fails to comply with the appointment procedure agreed on to determine the arbitrator(s));
  - Article 13(3) (where a party may refer the challenge of an arbitrator to court);
  - Article 14 (where a party may request a court to decide the termination of the mandate of an arbitrator);
  - Article 16(3) (where party may refer the ruling on a preliminary question to a court); and
  - Article 34(2) (where an award may be set aside by a court for the reasons set out in Article 34(2) of the Model Law).

However, if there is no South African party, and the place of arbitration is not yet determined, the Gauteng Division of the High Court seated in Johannesburg will have jurisdiction, until the place of arbitration is determined. An exception to the above rules on the courts that have jurisdiction is that for purposes of Article 8 of Schedule 1 to the IAA 2017 (arbitration agreement and substantive claim before court), the "court" includes a magistrates' court (*Article 6, Schedule 1, IAA 2017*).

- A court may stay court proceedings and refer the parties to arbitration where a matter is subject to a valid arbitration agreement (*Article 8, Schedule 1, IAA 2017; Article 8, Model Law*) (see *Stay of court proceedings commenced in breach of arbitration agreement*).
- The arbitral tribunal, or a party with the approval of the arbitral tribunal, may request from a competent court assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence (*Article 27, Schedule 1, IAA 2017; Article 27, Model Law*).
- Sections 16 to 18 of the IAA 2017 set out the provisions on the recognition and enforcement of arbitration agreements and awards. However, those provisions do not affect any other right to rely on or to enforce a foreign arbitral award, including the right conferred by Article 35 of Schedule 1 to the IAA 2017 (*section 19, IAA 2017*). Therefore, an arbitral award, irrespective of the country in which it was made, will be recognised as binding and, on an application in writing to the competent court, will be enforced subject to the grounds for refusing recognition and enforcement in Article 36 of Schedule 1 to the IAA 2017 (*Article 35, Schedule 1, IAA 2017; Article 35, Model Law*). Article 35(3) of Schedule 1 to the IAA 2017 sets out when the recognition or enforcement of the arbitral award will be considered contrary to the public policy of the Republic of South Africa.

## Court powers regarding interim measures

Before or during the arbitral proceedings, a party may request a court to grant an interim measure of protection (*Articles 9(1) and 17J, Schedule 1, IAA 2017; Articles 9 and 17J, Model Law*). However, the powers under Article 17 of Schedule 1 to the IAA 2017 have been adapted from Article 17 of the Model Law (see *Interim awards and measures*).

## Stay of court proceedings commenced in breach of arbitration agreement

If a party requests, not later than when submitting their first statement on the substance of the dispute, a court may stay those proceedings and refer the parties to arbitration, unless it finds that the agreement is null and void, inoperative or incapable of being performed (*Article 8(1), Schedule 1, IAA 2017; Article 8(1), Model Law*). Where such a claim has been brought, the arbitral proceedings may be commenced or continued, and an award may be made, while the issue is pending before court (*Article 8(2), Schedule 1, IAA 2017; Article 8(2), Model Law*).

## Arbitral awards

The IAA 2017 contains various requirements in relation to arbitral awards.

### Timing of the award

Neither the IAA 2017 nor the Model Law set out a default time limit for making an award.

### Form of the award

An award will be made in writing and will be signed by the arbitrator(s). In arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal will suffice, provided that the reason for any omitted signature is stated (*Article 31(1), Schedule 1, IAA 2017; Article 31(1), Model Law*). The award must state the reasons on which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under Article 30 (*Article 31(2), Schedule 1, IAA 2017; Article 31(2), Model Law*). The tribunal may award interest and also has the discretion to decide on the award of costs (*Article 31(5) and (6), Schedule 1, IAA 2017*).

### Publication of the award

After the award is made, a copy signed by the arbitrators in accordance with Article 31(1) will be delivered to each party (*Article 31(4), Schedule 1, IAA 2017; Article 31(4), Model Law*).

## Interim awards and measures

Article 17 of Schedule 1 to the IAA 2017 provides for the power of both the arbitral tribunal and the court to order interim awards and measures and has been slightly adapted from Article 17 of the Model Law.

With regard to interim awards ordered by the arbitral tribunal, Articles 17 to 17H of Schedule 1 to the IAA 2017 differ from Articles 17 to 17H of the Model Law in the following material respects:

- Article 17(2)(e) and (3) have been added to Schedule 1 to the IAA 2017, which allow the arbitral tribunal to order a party to provide security for costs at any time before the final award. This measure may only be ordered against a claiming or counter-claiming party.

- Articles 17B and 17C of the Model Law deal with preliminary orders and have been omitted from, and therefore do not apply under, the IAA 2017. Any other references to preliminary orders in the Model Law have been omitted from the IAA 2017.
- Article 17H(2) of Schedule 1 to the IAA 2017 differs slightly from Article 17H(2) of the Model Law. The latter provides that a "party who is seeking or has obtained recognition or enforcement of an interim measure shall promptly inform the court of any termination, suspension or modification of that interim measure", whereas the IAA 2017 omits the words "or has obtained".

With regard to interim measures ordered by the court, Article 17J of Schedule 1 to the IAA 2017 differs from Article 17J of the Model Law in the following material respects.

Unlike in the Model Law, Article 17J(1) of Schedule 1 to the IAA 2017 expands on the powers of the court to order interim measures in relation to arbitration proceedings. Under this provision, the court may issue:

"(a) orders for the preservation, interim custody or sale of any goods which are the subject matter of the dispute;

(b) an order securing the amount in dispute but not an order for security for costs;

(c) an order appointing a liquidator;

(d) any other orders to ensure that any award which may be made in the arbitral proceedings is not rendered ineffectual by the dissipation of assets by the other party; or

(e) an interim interdict or other interim order."

Unlike the Model Law, Article 17J(2) of Schedule 1 to the IAA 2017 provides:

"That the court shall not grant an order in terms of paragraph (1) of this Article, unless:

the arbitral tribunal has not yet been appointed and the matter is urgent;

the arbitral tribunal is not competent to grant the order; or

the urgency of the matter makes it impractical to seek such order from the arbitral tribunal,

and the court shall not grant any such order where the arbitral tribunal, being competent to grant the order, has already determined the matter."

Further, Article 17J(3) of Schedule 1 to the IAA 2017 provides that the decision of the court in relation to any requests made under Article 17J(1) will not be subject to appeal and Article 17J(4) of Schedule 1 to the IAA 2017 confirms that the court shall have no powers to grant interim measures other than those contained in that Article.

For an example of a case where the court granted an interim injunction in support of an arbitration, under Article 17J(1) of Schedule 1 to the IAA 2017, see *Vedanta Resources Holding Ltd v ZCCM Investment Holdings plc and Lungu, Milingo NO (in his official representative capacity as the Provisional Liquidator of Konkola Copper Mines PLC) (Case No 2019/23462)*, discussed in [Legal update, Zambia state mining company ordered to cease winding-up proceedings pending final determination of arbitration \(South African High Court\)](#).

## Specific performance

Neither the IAA 2017 nor the Model Law makes reference to an award of specific performance.

## Binding nature of the award

Irrespective of the country in which it was made, an award is binding and, on application in writing to the competent court, will be enforced subject to the grounds for refusing recognition and enforcement in this law (*Article 35, Schedule 1, IAA 2017; Article 35, Model Law*).

Further, an award that is made in the territory of a state other than South Africa, will be recognised and enforced in South Africa, as required by the New York Convention, and will be binding between the parties (*section 16, IAA 2017*).

## Interest on amount awarded

Unless otherwise agreed by the parties and subject to Article 28 on the rules applicable to the substance of the dispute, the arbitral tribunal may award interest on that basis and on such terms as the tribunal considers appropriate and fair in the circumstances, also having regard to the currency in which the award was made, commencing not earlier than the date on which the cause of action arose and ending not later than the date of payment (*Article 31(5), Schedule 1, IAA 2017*).

## Correction and remittal of award

Unless otherwise agreed by the parties, within 30 days of receipt of the award, a party, with notice to the other party, may require the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors or any errors of a similar nature (*Article 33(1)(a), Schedule 1, IAA 2017; Article 33(1)(a), Model Law*). If

so agreed by the parties, a party, with notice to the other party, may also request the arbitral tribunal to give an interpretation of a specific point or part of the award (*Article 33(1)(b), Schedule 1, IAA 2017; Article 33(1)(b), Model Law*).

The tribunal may correct any such errors on its own initiative (*Article 33(2), Schedule 1, IAA 2017; Article 33(2), Model Law*). Further, a party may request the tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award (*Article 33(3), Schedule 1, IAA 2017; Article 33(3), Model Law*).

## Challenges to awards

When a person is approached in connection with a possible appointment as an arbitrator, they must disclose any circumstances likely to give rise to justifiable doubts as to their impartiality or independence. This obligation continues through the arbitral proceedings. An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to their impartiality or independence, or if they do not possess qualifications agreed to by the parties (*Article 12, Schedule 1, IAA 2017; Article 12, Model Law*). The IAA 2017 also goes a step further than the Model Law and provides that "justifiable doubts" require substantial grounds for contending that a reasonable apprehension of bias would be entertained by a reasonable person in possession of the correct facts (*Article 12(3), Schedule 1, IAA 2017*).

Failing an agreement between the parties on a procedure for challenging the arbitrator, a party who intends to challenge an arbitrator must, within 15 days of becoming aware of the constitution of the tribunal or of any circumstance referred to in Article 12, send a written statement of the reasons for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws from their office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge (*Article 13(2), Schedule 1, IAA 2017; Article 13(2), Model Law*).

If a challenge is unsuccessful, the challenging party may, within 30 days after having received notice of the decision rejecting the challenge, request the court or other authority specified in Article 6 to decide on the challenge (*Article 13(3), Schedule 1, IAA 2017; Article 13(3), Model Law*).

## Enforcement of arbitral awards

### Awards made in accordance with the IAA 2017

The IAA 2017 gives effect to the New York Convention, to which South Africa has been a signatory since 1976. Sections 16 to 18 of the IAA 2017 deal with the recognition and enforcement of arbitration agreements and foreign arbitral awards, which must be read together with Articles 35 and 36 of Schedule 1 to the IAA 2017 and the Model Law.

A foreign arbitral award can only be enforced in South Africa after being made an order of court, after which it can be enforced in the same manner as any judgment or order to the same effect as the award (*section 16(3), IAA 2017*). An application to the court (a court of a provincial or local division of the High Court of South Africa) for an order under section 16(3) must be accompanied by the original foreign arbitral award and the original arbitration agreement, authenticated in the appropriate manner to enable them to be produced in court. If the award or arbitration agreement is in a language other than one of the official languages of South Africa, they must be accompanied by a sworn translation into one of the official languages, authenticated in the appropriate manner to enable them to be produced in court. The official languages are Afrikaans, English, Xhosa, Zulu, Sotho, Tswana, Northern Sotho, Venda, Tsonga, Swati and Ndebele. The court may, at its discretion, accept other documentary evidence as sufficient proof of the existence of the foreign arbitral award or arbitration agreement (*section 17, IAA 2017*).

The court may refuse to enforce the award only on the following grounds, which reflect the grounds for refusing enforcement under the New York Convention:

- The subject matter of the dispute is prohibited from being settled by arbitration under South African law.
- The recognition or enforcement of the award would be contrary to South African public policy.
- Under the applicable law, the parties had no capacity to contract, or the agreement was invalid under the law to which the parties have subjected it or of the country in which the award was made.
- The party against whom enforcement is sought did not receive the required notice of the appointment of the arbitrator or of the arbitration proceedings concerned, or was otherwise not able to present their case.
- The award deals with a dispute not contemplated by, or falling within the provisions of, the relevant reference to arbitration, or contains decisions on matters beyond the scope of the reference to arbitration. However, if the decisions which fall outside the scope of the reference can be separated from the decisions within scope, that part of the award containing decisions on matters referred to arbitration may be enforced.
- The constitution of the tribunal was, or the arbitration proceedings were, not in accordance with the 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.
- If the court is satisfied that there is an application to set aside the award pending before the competent authority of the country in which, or under the law of which, the award was made, the court has a discretion to adjourn the application for enforcement. If it does so, it may order the party against whom enforcement is sought to give appropriate security.

*(Section 18, IAA 2017 and Article 36, Schedule 1, IAA 2017; Article 36, Model Law.)*

Article 36 of Schedule 1 to the IAA 2017 goes a step further than Article 36 of the Model Law by setting out two situations where the recognition and enforcement of an award would be contrary to public policy. It provides that, for the purposes of avoiding any doubt and without limiting the generality of Article 36(1)(b)(ii), the following circumstances would be contrary to public policy:

- A breach of the tribunal's duty to act fairly occurred in connection with the making of the award which has caused or will cause substantial injustice to the party resisting recognition or enforcement.
- The making of the award was induced or affected by fraud or corruption.

*(Article 36(3)(a) and (b), Schedule 1, IAA 2017.)*

The PBA 1978 must also be kept in mind when the enforcement of foreign awards is sought. The PBA 1978 prohibits, or imposes conditions on, the enforcement of certain foreign awards in South Africa, which arise from any act or transaction which took place at any time before or after the commencement of the PBA 1978 and is connected with mining, production, importation, exportation, refinement, possession, use or sale of or ownership to any matter or material, of whatever nature, whether within, outside, into or from South Africa.

The PBA 1978 provides that no foreign judgment, order, direction, interrogatory, *commission rogatoire*, letter of request or other request relating to any civil proceedings and arising from the aforementioned acts or transactions shall be enforced in South Africa unless the party seeking the enforcement obtains the permission of the Minister of Economic Affairs.

The PBA 1978 prohibits (irrespective of whether the Minister's permission has been obtained) the recognition or enforcement of:

- Foreign awards ordering the payment of multiple or punitive damages (*section 1A*).
- Any liability that arises from any bodily injury of any person resulting directly or indirectly from the consumption or use of or exposure to any natural resource of South Africa (*section 1D*).

## Costs and third party funding

Unless otherwise agreed by the parties, the tribunal has a discretion in the way it awards the allocation of costs, the amount to be paid, or the method of determining the amount of costs (*Article 31(6), Schedule 1, IAA 2017*).

In exercising its discretion under Article 31(6), the tribunal may take into account the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner (*Article 31(7), Schedule 1, IAA 2017*).

In South Africa, there is no legislation governing third party funding. In addressing the legality of champertous agreements in litigation (which is defined as the support of litigation by a stranger in return for a share of the proceeds of the action), the Supreme Court of Appeal in *Price Waterhouse Coopers Inc v National Potato Co-Operative Ltd 2004 6 SA (SCA)* has held that third party litigation funding agreements are recognised in South Africa, because the civil justice system has developed its own inner strength. The court examined and endorsed some champertous agreements by holding that these agreements are not necessarily contrary to public policy or void, as long as they do not constitute an abuse of the process.

In considering whether third party funding in an international arbitration would be allowed, this must be viewed not only in the light of current case law (such as *Price Waterhouse Coopers Inc v National Potato Co-Operative Ltd*), but consideration must also be given to the Constitution of South Africa, which guarantees the right to access to justice. Furthermore, South African courts, if confronted with such an issue, are also likely to consider the position in foreign jurisdictions, such as Australia and England, as having persuasive force.

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