

INTERNATIONAL ARBITRATION ON THE AFRICAN CONTINENT

KEY INSIGHTS FROM SOUTH AFRICA AND MAURITIUS



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Two international arbitration experts from Africa provide insights into international arbitration in both South Africa and Mauritius. Priyesh Daya is a partner and dispute resolution specialist at Webber Wentzel (South Africa based law firm) and Mushtaq Namdarkhan is a partner and dispute resolution specialist at BLC Robert & Associates (Mauritian based law firm).

7 QUESTIONS

2 KEY JURISDICTIONS

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Mushtaq Namdarkhan
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1 DO SOUTH AFRICA AND MAURITIUS BOTH RECOGNISE INTERNATIONAL ARBITRATION AWARDS?



SOUTH AFRICA:

Yes - South Africa's International Arbitration Act, which incorporates the UNCITRAL rules, provides for the recognition and enforcement of international arbitration awards. South Africa is also a party to the New York Convention, which it ratified in 1976 and domesticated in 1977.



MAURITIUS:

Yes - Mauritius has enacted the New York Convention into its domestic law by means of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 2001 (CREFAAA). The International Arbitration Act 2008 further provides that CREFAAA also applies where the seat of the arbitration was Mauritius. The procedure for the recognition and enforcement of international arbitration awards is found in the Supreme Court (International Arbitration Claims) Rules 2013.

2 WHY SHOULD PARTIES CONSIDER ELECTING EITHER SOUTH AFRICA OR MAURITIUS AS THE SEAT OR VENUE FOR INTERNATIONAL ARBITRATIONS?



SOUTH AFRICA:

The two main features that make South Africa attractive as a seat or venue for international arbitrations are:

- Affordability – The Arbitration Foundation of Southern Africa is a private dispute resolution authority which manages and administers international arbitrations, with its head office in Sandton, Johannesburg. AFSA's fees for administering international arbitrations are reasonable, ranging from USD 1000 to USD 54 950, with emergency arbitrator applications costing USD 3000.
- Resources & infrastructure – AFSA Sandton offer fantastic venues which are well equipped and can accommodate up to 30 people for arbitrations and provide for breakaway rooms as well as for online virtual hearings. AFSA also recently published new international rules, which reflect best international practice and makes provision for multi-party/multi-contract issues, expedited procedures, third-party funding, emergency arbitrations and joinder.



MAURITIUS:

The three main features that make Mauritius attractive are:

- Strong legislative framework based on internationally recognised instruments, e.g., international arbitration legislation based on the UNCITRAL Model and incorporation of the New York Convention in domestic law;

- Arbitral institutions which are cheaper than in many of the developed jurisdictions, whose rules are drafted and tailored for international arbitration, and who have state of the art hearing facilities; and
- A robust judicial system which understands its role in supporting arbitration at various stages, composed of specialist "Designated" Judges and whose decisions are subject to final appeal to the Judicial Committee of the Privy Council in London. This court structure ensures that the case law develops in line with international trends.

3 WHO ARE THE MAIN BODIES THAT ADMINISTER ARBITRATIONS IN SOUTH AFRICA AND MAURITIUS, AND DO THEIR RULES PROVIDE FOR INTERNATIONAL ARBITRATIONS?



SOUTH AFRICA:

One of the main bodies which administers arbitrations in South Africa is the Arbitration Foundation of Southern Africa (AFSA), which recently published new international rules. These reflect best international practice and makes provision for multi-party/multi-contract issues, expedited procedures, third-party funding, emergency arbitrations and joinder. As of last year, AFSA had administered 92 international matters. Most of the nationality of the parties involved in international arbitrations administered by AFSA are other African countries, with Mauritian parties making the most use of the service, followed by Botswana and Zimbabwe. Examples of European countries who have made use of the service include the UK, Switzerland, Spain, Italy and Ireland. US parties have also made use of the service.



MAURITIUS:

The two main institutions are the Mauritius Chamber of Commerce and Industry Arbitration Centre (MARC) and the Mauritius International Arbitration Centre (MIAC). MARC existed previously to cater for domestic arbitrations but has since 2018 adapted its rules to be suited for international arbitrations. The appointing authority is the MARC Court composed of leading arbitration practitioners from Africa, Asia and Europe. MIAC used to exist as LCIA-MIAC, a joint venture between the LCIA and the Mauritian Government until that partnership was ended in 2018. MIAC's rules are based on the UNCITRAL Rules and the appointing authority is the Secretary-General of the Permanent Court of Arbitration, which has an office located in Mauritius. Arbitration clauses providing for MIAC or MARC arbitration are commonly found in constitutions and shareholders' agreements of global business (offshore) companies and in international project contracts where parties of at least two different nationalities are involved.

4 WHAT EFFECT HAS THE COVID-19 PANDEMIC HAD ON INTERNATIONAL ARBITRATIONS IN SOUTH AFRICA AND MAURITIUS?



SOUTH AFRICA:

Covid-19 realities drove the need to implement measures to allow for the hosting of virtual hearings. In response to this, AFSA recently published, a remote hearing protocol. The purpose of the protocol was to provide guidance to parties on efficient conduct of remote hearings in respect of AFSA administered arbitrations to ensure that one party does not enjoy an advantage over the other.



MAURITIUS:

During the times of the pandemic where travel was severely restricted, some parties agreed to conduct hearings virtually, using a recognised protocol (such as the Africa Arbitration Academy protocol). In instances where parties still preferred to have physical hearings to hear witnesses: cases were postponed allowing for travel arrangements to be made in good time because of strict quarantine requirements in Mauritius; and interlocutory applications were either heard virtually, telephonically or on the basis of written submissions.

5 WILL THE AFRICAN CONTINENTAL FREE TRADE AREA AGREEMENT (AfCFTA) PRESENT OPPORTUNITIES FOR INTERNATIONAL ARBITRATION IN SOUTH AFRICA AND MAURITIUS?



SOUTH AFRICA:

South Africa put in place the legal and the administrative processes for preferential trade under the AfCFTA on 1 January 2021. Dispute resolution mechanism are provided for under the AfCFTA, and member States have the freedom to either refer disputes which arise under the implementation of the AfCFTA to a specialised AfCFTA dispute settlement body, panel or appeal body or to agree to refer disputes to arbitration and to agree on the procedures to be used in the arbitration proceedings. Given this, there is a strong likelihood that we may see international arbitrations arising out of disputes under the AfCFTA.



MAURITIUS:

The increase in trade resulting from AfCFTA would likely increase the number of more complex contracts between commercial parties in which they agree to resolve disputes by arbitration. Mauritius is a signatory of AfCFTA and is therefore bound by the dispute settlement mechanism therein to resolve disputes among states.

6 HAVE SOUTH AFRICA AND MAURITIUS RATIFIED THE PARIS AGREEMENT, AND IF SO, WHAT CLIMATE OR ENVIRONMENTAL CHALLENGES FACE SOUTH AFRICA AND MAURITIUS WHICH MAY RESULT IN DISPUTES?



SOUTH AFRICA:

The Paris Agreement was ratified on 1 November 2016. South Africa submitted its updated first nationally determined contribution in September 2021, which committed to a long-term goal of decarbonising the South African economy, with a specific focus on the electricity sector. To attain this goal, South Africa will require major investment to be made into low-carbon infrastructure. These infrastructure projects (which will likely be governed by standard construction contracts, that contain arbitration as a dispute resolution mechanism) will probably see the rise of construction-related disputes.



MAURITIUS:

At the COP 26 Summit in November 2021, the Honourable Prime Minister of Mauritius committed to: (i) Reduce gas emissions by 40% by 2030; (ii) Achieve 60% of green energy in the country's energy mix by 2030; (iii) Phase out coal in electricity generation before 2030; (iv) Promote a circular economy involving 70% of waste from landfills by 2030; (v) Encourage the use of electric vehicles; and (vi) Promote smart agriculture and island wide tree planting programmes. To give effect to these commitments substantial investments will be required in renewable energy plants, both from domestic and international investors. Promoters and contractors would expect arbitration clauses in development and construction contracts to ensure having a swift, expert and certain dispute resolution mechanism.

7 WHAT ARE THE CHALLENGES FACING INTERNATIONAL ARBITRATION IN SOUTH AFRICA AND MAURITIUS IN THE FUTURE AND HOW COULD THESE CHALLENGES BE OVERCOME?



SOUTH AFRICA:

One of the main challenges faced by South Africa is that of perception and competing with the commonly used arbitral seats and venues of London and Paris, which are generally perceived as independent and neutral. For this reason, London and Paris are often included as seats or venues under dispute resolution clauses. Initiatives such as the African Promise seek to address these perceptions, and advocate for the use of African arbitrators, venues, and seats.



MAURITIUS:

With Covid-19, it was not been possible for a couple of years for Mauritius to host in-person international conferences to prominently showcase the attractive features of the jurisdiction as an international arbitration seat. We are now able to resume these events and regain the old momentum that followed the passing of the International Arbitration Act in 2008.

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