THE NEW DAWN IN

INTERNATIONAL ARBITRATION IN SOUTH AFRICA

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1. It has taken more than 24 years for South Africa to modernise its Arbitration law. The realisation that the World had moved beyond the domestic regime of arbitration and had developed a regime of rules peculiar to international arbitration was a long and hard battle fraught with political issues. There was also considerable debate as to whether the UNCITRAL Model Law should be adopted and to what extent the Act had to take cognisance of aspects which are particular to South Africa such as transparency of arbitrations in relation to disputes involving public bodies.
2. The promulgation of legislation which brings South Africa in line with international development will have a considerable impact on the construction industry. A number of international contractors are operating in Africa and there are South African contractors working outside the borders of South Africa. There has been a growing demand within the industry for appropriate legislation which would govern arbitrations in relation to cross-border disputes.
3. Another piece of legislation had also come under criticism. South Africa became a signatory to the New York Convention in 1976 and, in giving effect to it, passed the Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977. Although it had acceded to the Convention without reservation, it omitted one significant element, the recognition and enforcement of agreements to refer

disputes to arbitration. In South Africa recourse had to be had to the domestic Courts to enforce the agreement.

4. In 1978 SA passed The Protection of Businesses[1] Act which restricted the enforcement of certain foreign judgements, orders, directions, arbitration award and letters of request. The Act adversely reflected on South Africa giving full effect to the Convention.

5. The Model Law was certainly the best and most efficacious means of bringing South Africa into the global arena. It came into existence in December 1985 and was regarded by the General Assembly of the United Nations as more likely to lead to a realistic degree of harmonisation in practise. It limits the scope of interference by National Courts and emphasises the consensual nature of arbitration. It sets out to establish a core of mandatory provisions to ensure fairness and due process and to provide a framework for conducting international arbitrations. It also incorporates provisions clarifying certain issues relating to the enforcement of awards. In the context of South Africa it offered an Act which was universally understood and accepted.

[1] Act 99 of 1978

6. The decision was made to adopt the Model Law and to cure the problems created by the Recognition and Enforcement of Arbitral Awards Act. The passage to enactment was, as mentioned earlier, nevertheless, fraught with political sensitivity. This was finally overcome and the International Arbitration Act 15 of 2017 came into force in South Africa on 20 December 2017. It provides for the incorporation of the Model Law, repeals and replaces the Recognition and Enforcement of Foreign Arbitral Awards Act, 1977and amends The Protection of Businesses Act, 1978 insofar as it removes reference to arbitration from the legislation.

7. The objects of the International Act are to:
    - 7.1. Facilitate the use of arbitration as a method of resolving international disputes;
    - 7.2. Adopt the Model Law for use in international commercial disputes;
    - 7.3. Facilitate the recognition and enforcement of certain arbitration agreements and arbitral awards;
    - 7.4. Give effect to the obligations of SA under the Convention.

8. The Model Law applies in South Africa subject to the provisions of the Act and governs any international commercial dispute which the parties have agreed to submit to arbitration under an arbitration agreement and which relates to a matter which the parties are entitled to dispose of by agreement can be determined by arbitration, unless such dispute is not capable of determination by arbitration under any law of South Africa or the arbitration agreement is contrary to the public policy of South Africa. The agreement to arbitration is as defined in Article 7 of the Model Law.[2]

9. In interpreting the Model Law, the material to which an arbitral tribunal or a court may refer includes relevant reports of UNCITRAL and its Secretariat.[3]

10. Immunity of arbitrators and arbitral institutions is provided by Section 9. An arbitrator is not liable for the act or omission in the discharge or purported discharge of that arbitrator's functions as arbitrator unless the act or omission is shown to have been done in bad faith. The immunity extends to arbitral institutions.

[2] Section 7, Section 1
[3] Section 8

11. The Act expressly provides for the consolidation of arbitral proceedings and concurrent hearings. The parties to an arbitration agreement may agree to the consolidation of arbitral proceedings or that concurrent hearings be held but excludes the arbitral tribunal from ordering consolidation of arbitral proceedings or concurrent hearings absent the parties' agreement.[4] The provision does not appear to be peremptory and the Rules governing an arbitration could extend a tribunals jurisdiction in this regard.

12. It was finally decided in relation to the issue concerning public bodies that, unless the arbitral tribunal directs otherwise, such arbitrations would not be confidential. However, in relation to other arbitrations, these will be confidential and the award or documents created for the arbitration which are not otherwise in the public domain are required to be kept confidential by the parties and the tribunal, except to the extent that the disclosure of such documents may be required by reason of a legal duty or to protect or enforce a legal right.[5]

13. Significantly the Act also incorporates an optional conciliation process subject to the parties agreement and directs the parties attention to the UNCITRAL Conciliation Rules set out in Schedule 2 to the Act.[6]

[4] Section 10
[5] Section 11.
[6] Section 13

14. The Act incorporates Article1 (3) of the UNCITRAL Model Law which provides that the arbitration is international if the party to an arbitration agreement had, at the time of the conclusion of that agreement, their places of business in different states; or one of the following places situated outside the state in which the parties have their places of business; (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement; (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject matter of disputes is most closely connected; or the parties have expressly agreed that the subject matter of the arbitration relates to more than one country

15. In interpreting the Model Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith [7]

16. Chapter 3 deals with the regulation and enforcement of arbitration agreements and foreign arbitral awards. The Act repeals and replaces the earlier legislation and provides, in addition to the enforcement of foreign arbitral awards, for an arbitration agreement to be recognised and enforced in South Africa as required by the Convention.[8]

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[7] Article 2A

17. A foreign arbitral award is binding between the parties to a foreign arbitral award and can be relied upon by these parties by way of defence, set-off or otherwise in any legal proceedings.[9]

18. In order to enforce the foreign arbitral award, the party must produce the original award and the original arbitration agreement in terms of which an award was made duly authenticated or a certified copy of the award and of the agreement to arbitrate. It must be accompanied by a sworn translation of the arbitration agreement or arbitral award authenticated if it is in a language other than one of the official languages of the of South Africa.[10]

19. In relation to the enforcement of an agreement Article 8 of the Model Law applies, with necessary changes, to arbitration agreements, namely, a Court before which an arbitration is brought in a matter which is the subject of an arbitration agreement shall, if the parties so request, but not later than submitting his first statement of the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

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[9] S16 (2)
[10] Section 17

20. The refusal of recognition or enforcement of the award falls into two categories:[11]

- If the Court finds that a reference to the arbitration of the subject matter of the dispute is not permissible under the law of South Africa or the recognition or enforcement of the award is contrary to the public policy of South Africa; and

- The party against whom the award is in favour, proves to the satisfaction of the Court that:

  - A party to the arbitration agreement had no capacity to contract under the law applicable to that party;

  - the arbitration is invalid under the law to which the parties have subjected it, or where the parties have not subjected it to any law, the arbitration agreement is invalid under the law of the country in which the award was made;

  - that he or she did not receive the required notice regarding the appointment of the Arbitrator of the arbitration proceedings or was otherwise not able to present his or her case;

[11] Section 18

- The award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration, or contains decisions on matters beyond the scope of the reference to arbitration, subject to the revisions of sub-section 2;

- The constitution of the arbitration tribunal or the arbitration procedure was not in accordance with the relevant arbitration agreement or, if the agreement does not provide for such matters, where the law of the country in which the arbitration took place; or

- The award is not yet binding on the party or has been set aside or suspended by a competent authority of the country in which, under the laws of which, the award was made.[12]

21. The Act, accordingly, entrenches the two most important elements of the Treaty namely that National Courts are compelled to recognise and enforce arbitration agreements and awards emanating from another country contracting the state and there are limited grounds upon which a Court can refuse to recognise and enforce the award.

[12] S18

22. For the purpose of this paper I will concentrate on the issue of public policy due to the particular situation South Africa finds itself in having achieved a true democracy in 1994 and have revisited the question of public policy in relation to a transforming society.

23. Public policy is divided into two categories, procedural and substantive. The legal convention does not provide any guidelines as to what satisfies the test of public policy. The consideration of the various Court decisions on public policy in various countries has of itself been controversial.

24. There has been increasing acceptance in various jurisdictions that public policy in relation to the subject matter of a dispute must be measured against international public policy rather than domestic public policy.[13]The question will be whether the Courts in SA will follow the dictates of domestic law guided by the Constitution in relation to public policy or fall in line with the international trend.

25. The IBA study on public policy[14] found that:

[13] See for example Scherk v Alberto-Culver Co, United States Supreme Court, 417 US 506 (1974); Soler v Mitsubishi United States Supreme Court, 2 July 1985, Mitsubishi Motor Corporation (Japan) v Soler Chrysler-Plymouth, Inc (USA), 473 US 614 (1985)
[14] 2015

> "not surprisingly, the review of the public policy concept in the more than 40 jurisdictions covered so far in the study conducted by the sub-committee of the IBA confirms that it is difficult to clearly apprehend and impossible to precisely define."

and

> "when it refers to the basic or fundamental rules on which a society rests or to more 'coloured' values such as justice, fairness and morality, which is expressly given an international character or not, public policy is a ground for refusing recognition or enforcement of foreign awards under Article B (2)(b) of the Convention is overwhelmingly considered to include only a very limited number of fundamental rules or values."

and

> "in the vast majority of jurisdictions, Courts narrowly apply these rules and values by requiring a certain level of intensity for a given circumstance to be held contrary to public policy."

26. Violations of procedural public policy appear to be more likely to result in denial of enforcement of a foreign award than alleged violations of substantive public policy.

27. Certain procedural irregularities appear to be almost universally accepted as affecting public policy, with the consequence that, when the enforcing courts find merit in the allegation, they systematically refuse to recognise and enforce the foreign award. These include:

- Violation of equal opportunity to present one's case;
- An award obtained by fraud or based on falsified documents;
- An award obtained following bribery or threats to an arbitrator;
- Violation of the right to be heard or of due process.

28. Other procedural violations had been generally regarded as being contrary to public policy, although not universally or systematically applied, such as violation of res judicata and the lack of independence and impartiality of the arbitrator.

29. Substantive public policy appears to be less prone to universal or "transcendental" values or rules, rather than the prohibition of giving effect to "illegal" contracts. (i.e entered into for the purpose of carrying out an illegal (criminal) activity) rendering the drawing up of a catalogue of its manifestations a difficult task. The SA law in relation to the illegality of contracts is well developed and encompasses, for example, contracts injurious

to the State or administration of justice, contracts encouraging crime, delict and other unlawful acts and contracts injurious to the institution of marriage.[15]

30. There is little authority as to the approach the SA courts will take in relation to the enforcement of international awards . Public policy is a question of fact and not law[16]and changes with "the general sense of the community, the boni mores, manifested in public opinion. Cameron JA in Brisley v Drotsky [17]observed in relation to the domestic consideration of public policy:

"The 'legal convictions of the community'-a concept open to misinterpretation and misapplication-is better replaced, as the Constitutional Court has itself suggested, by the 'appropriate norms of the objective value system embodied in the Constitution"

31. Kahn[18] suggests, however, that 'public policy should be construed narrowly when considering the enforcement of international awards and confined to the violation of fundamental principles of justice or morality, such as fraud by the successful party. This may not go so far as to suggest that the Court will prefer an international perception of public policy rather than a domestic view.

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[15] See Christie The Law of Contract p and the cases referred to therein

[16] Aquilius (Mr. Justice Van den Heever) "Immorality and illegality in Cointract" (1941) 58 SALJ 346, Ryland v Edros 1997 (2) SA 690 © @704B;Amod v Multilateral Motorvehichle Accident Fund 1999 (1) SA 319 (A)

[17] 2002 (4) SA 1 (SCA) @35D

[18] E Kahn 'Conflict of Laws' 1977 Annual Survey of SA Law 564 to 573 a7 570-1

32. If the Courts take a domestic view of public policy cognisance might be taken of the concept of Ubuntu which has been introduced into South African law. It is not easily defined but brings together many of the elements of transformation in a changing society and reflects elements of public policy. It may have introduced an element of good faith into the Roman Dutch common law which had previously regarded as an underlying principle rather than an actionable right.

> "While Ubuntu envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality. Its spirit emphasises respect for human dignity, marking a shift from confrontation to conciliation."[19]

and

> "The ethos of an instinctive capacity for an enjoyment of love towards our fellow men and women; the joy and fulfilment involved in recognising their innate humanity; the reciprocity this generates in interaction within the collective community; the richness of the creative emotions which it engenders and the moral energies which it

[19] Madala J, State v Makwanyane

releases both in the givers and the society which they serve and are served by it."[20]

33. In the writers view, it is more likely that a Court in SA will take cognisance of international public policy in relation to procedural irregularity and will apply public policy narrowly in relation to substantial irregularity. The purpose of the Act would be defeated if this was not the case. There is considerable merit in South Africa adopting and applying its perception of international public policy rather than taking an insular approach. Certainty as to how the Courts will apply the law is essential if South Africa is to achieve confidence in the ability of a party to an international arbitration of his/her ability to enforce the award. It will lend credibility and predictability to the application of the Act and neutralise any fears that a foreign entity may have as to its application. Hopefully the SA Courts will be guided by the decisions of other jurisdictions and the guidelines as suggested by the IBA.

34. However, having mapped the legal terrain, the Act only provides the appropriate platform for South Africa to become a significant player in the global arbitration world. It is for South Africa to take up the challenge and

[20] Mohammed J, State v Makwanyane

create the appropriate environment so that it becomes a sought-after seat for international arbitration.

35. The Courts had already, prior to the enactment of the International Act, stepped up to the platform. The judgement of the Supreme Court of Appeal in Telcordia Technologies v Telkom SA Ltd [21] provided a re-affirmation that the fundamental principles underlying international arbitrations are alive and well in South Africa.

36. The Constitutional Court in Lafuno Mphaphuli & Associates (Pty) Ltd v Andrews & Another[22], referring to both the English Act of 1996 and the UNCITRAL Model Law, emphasised the consensual nature of arbitration and and noted that

"Most jurisdictions in the World permit private arbitration of disputes and also provide for the enforcement of arbitration awards by the ordinary courts. With the growth of global commerce, international commercial arbitration has increased significantly in recent decades. This growth has been fostered in part, by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) which provides for the enforcement of arbitration awards in contracting parties and which has had a

[21] 2007 (3) SA 266 (SCA)
[22] (2009) ZACC 6

profound effect on arbitration law in many jurisdictions. It has also been revised by the adoption of the Model Law on International Commercial Arbitration (the UNCITRAL Model Law) by the United Nations Convention on International Trade Law in 1985 which was amended in 2006 and which has been adopted in many jurisdictions."

37. Furthermore there have been significant steps taken to ensure that South Africa is an appropriate venue for international arbitrations. In anticipation of the introduction of the International Arbitration Act, the Arbitration Foundation of Southern Africa ("AFSA') launched AFSA International. It has developed rules which are compatible with the rules published by the leading administrative international arbitration bodies. The Secretariat is skilled in administering arbitrations. A panel of skilled international and domestic arbitrators has been established. This panel of arbitrators, beyond South Africa, include, for example, practitioners from Australia, Vietnam, Hong Kong, Singapore, Europe, North America and South America.

38. AFSA International is already administering a considerable number of international arbitrations..

39. In December 2015, the Forum on China-Africa Cooperation (FOCAC) Countries decided to establish the China Africa Joint Arbitration Centre (CAJAC). Section 6 of the Johannesburg plan reads that the parties will:

> "..work together to establish a 'China Africa Joint Arbitration Centre'*".*

40. The philosophy envisages trade and industry between countries in the cross-continents to be based on mutual respect, on inclusivity and goodwill between the participants. Accordingly, the CAJAC needed itself to reflect the spirit of inclusivity and cooperation which is integral to belt and road structure. Its fundamental purpose is to provide the essential infrastructure necessary to enhance investment, trade and industry. And, more than that: it would serve as a bridge, bringing the legal and business communities of China and Africa together.

41. The initial driving force was the FOCAC Legal Forum, largely driven by the China Law Society.

42. The first decision was not to create CAJAC in isolation, or to confine it to one location. CAJAC was to be built using existing legal institutions available in FOCAC countries where institutions had the necessary resources to conduct international arbitrations and mediations of a high standard.

43. CAJAC has also laid the pathway for the BRICS (the acronym for grouping Brazil, Russia, China and South Africa) Arbitral Model and the creation of the BRICS Arbitration Centre. AFSA is a member of the BRICS Arbitration Expert Committee pursuant to the Moscow declaration. The purpose of the committee is to ensure uniformity in the manner in which various BRICS Arbitral Centres function.

44. AFSA International, the China Africa Joint Arbitration Centre and the prominent position that South Africa has taken in relation to BRICS in the BRICS Arbitration Committee and the establishment of BRICS Arbitration Centre in South Africa places South Africa on the stage of international arbitration which, amongst others, will be welcomed by the construction industry. It is a suitable venue with all the necessary skills and facilities. It is the dawn of a new era.