
# INTERNATIONAL ARBITRATION IN SOUTH AFRICA – A NEW CHAPTER

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## LEGAL BRIEF JUNE 2019

The enactment of the International Arbitration Act 2017 ("International Arbitration Act"), which applies the United Nations Commission on International Trade Laws Model Law ("the UNCITRAL Model Law) to international arbitration, marks an important step in the development of international arbitration in South Africa. South Africa is now able to assert its position as the leading regional arbitration centre in the Southern African region. The modernisation of South African international arbitration will lead to similar modernisation of domestic arbitration practice and, ultimately, to the enactment of a new Domestic Arbitration Act to replace the existing Arbitration Act of 1965 ("Arbitration Act"). However, this article will focus on international arbitration with reference to the new International Arbitration Act, but also with broader reference to the development of international arbitration on the African continent and, more specifically, in the Southern African region.

### BACKGROUND

In 1998, the South African Law Reform Commission recognised that South Africa was increasingly seen to be the obvious centre for the resolution by arbitration of commercial disputes affecting parties not only in South Africa, but also in other African countries, and that it was essential therefore that South African arbitration proceedings should be brought into line with those in other developed countries. Nineteen years later, in December 2017, the new International Arbitration Act became operative.

The long delay was largely attributable to negative perceptions of arbitration in some quarters. However, it became increasingly apparent that South Africa was losing a valuable opportunity to become an important regional arbitration centre and that this was because the long overdue reform of the Arbitration Act had not been implemented. This led to the Commission being requested to update its 1998 report and recommendations, which it did in 2013. In its summary of the proposed amendments to the International Arbitration Bill prepared in 2013, the Commission emphasised the importance of the Model Law and noted, from a broader African perspective, that of the 54 members of the African Union, at least 30 now have modern arbitration legislation for International Arbitration, and five of these are in the SADC region. South Africa is the 11th African country to have adopted the Model Law.

It is against this background that the International Arbitration Act was enacted. In the modern international arbitration world, African countries are broadly divided into two groups, namely the Organisation for the Harmonisation of Corporate Law in Africa ("OHADA") group and the Model Law group. Of the 30 African countries mentioned by the Commission as having modern international arbitration legislation, 27 fall into one of these two groups – 16 in the OHADA group and 11 in the Model Law group. It is widely recognised that the Uniform Act governing arbitration in the OHADA countries is aligned with the fundamental principles espoused by the Model Law.

South Africa has recognised that no country can expect to establish its place in the world of international arbitration without modern international arbitration legislation. Foreign parties will only be comfortable about seating international arbitrations in South Africa if they have the assurance of knowing that South Africa's international arbitration laws meet recognised international standards and benchmarks. This is an assurance which South Africa could not give with the Arbitration Act. However, with the enactment of the International Arbitration Act, South Africa's position has changed and that assurance can now be given.

## THE MODEL LAW

The International Arbitration Act applies the UNCITRAL Model Law to international arbitration.

UNCITRAL has probably done more than any other institution to develop and promote international commercial arbitration. The New York Convention, the UNCITRAL Arbitration Rules and the UNCITRAL Model Law are three of the most important legal instruments to have assisted the worldwide development of international arbitration. The Model Law is designed to assist States in reforming and modernising their laws on arbitral procedure so as to take into account the particular features and needs of international commercial arbitration. It covers all stages of the arbitral process from the arbitration agreement, the composition and jurisdiction of the arbitral tribunal and the extent of court intervention through to the recognition and enforcement of the arbitral award. It reflects worldwide consensus on key aspects of international arbitration practice. The amendments and revisions adopted in 2006 include the modernisation of the requirements for an enforceable arbitration agreement and a more comprehensive legal regime dealing with interim measures in support of arbitration.

UNCITRAL's focus on uniformity is of fundamental importance. As South Africa moves into an arbitration world, where parties are from vastly different national backgrounds and often have experience of legal systems, which differ significantly, it is important that every effort should be made to harmonise and modernise the "rules of the game". In any such process, it must also be recognised that there may be some issues where particular countries are not prepared to go along with the broader consensus. The process must therefore be flexible enough to accommodate and provide differing views on specific issues, but the ultimate objective should always be to achieve harmonisation and uniformity, wherever possible.

One of the most important features of the Model Law is that the grounds for setting aside an arbitral award in terms of the Model Law have to do with procedural, jurisdictional and public policy issues. The relevant provisions of the Model Law stand in stark contrast to the provisions of the Arbitration Act, which provide far more extensive grounds for review. The adoption of the Model Law follows the international trend towards limiting and restricting court interference in arbitration. The grounds for review of international arbitration awards in South Africa are now very much more limited than those which previously applied under the Arbitration Act.

## INTERNATIONAL ARBITRATION IN THE SOUTHERN AFRICAN REGION

The International Arbitration Act has now been in force for 17 months. In that time, there has been significant growth and the number of international arbitrations now being heard in South Africa has increased considerably. The Arbitration Foundation of Southern Africa ("AFSA"), through its newly established international division, is playing an important role in promoting this growth. International organisations, including the International Chamber of Commerce Court of Arbitration are also playing an important role. Increasingly, African arbitrations are being seated in Africa and, more specifically, in the Southern African region. Arbitrators are being appointed from this region. After many years of delay, South Africa is now playing a key role, as the leading regional arbitration centre in the region, in providing acceptable procedures, arbitrators and venues for the resolution by arbitration of international commercial disputes in the region.

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