

Comments on South African International Arbitration Bill due in by end of week

Interested parties, wishing to comment on the South African International Arbitration Bill, have until Friday 28 July 2017 to do so.



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The notice calling for comments, and information on how to submit comments, is available [here](#). The Bill has already progressed through several stakeholder engagement processes and it is hoped that it will be ready to be signed into law by the end of 2017.

According to Michelle Wright, partner in the dispute resolution practice at Baker McKenzie in Johannesburg, once enacted, the Bill will regulate international arbitration proceedings in South Africa and the enforcement of foreign arbitral awards.

“Arbitration is increasingly becoming the preferred mode of commercial dispute resolution and the chosen path of recourse for the protection of investor and commercial rights across the continent. As the world becomes more globalised and ongoing international investment interest grows across Africa, a sound international arbitration framework provides international businesses with comfortingly familiar processes.

She says that international businesses are understandably cautious about litigating disputes in local courts, where it can be difficult to enforce foreign court decisions. International arbitration thus provides a variety of dispute resolution mechanisms that are flexible, consent-based, robust, expedient, and universally understood.

“Equally attractive to business is the globally adopted New York Convention, which allows for the relatively simple enforcement of a foreign arbitral decision in national courts, where the assets of a company may lie. There are currently 33 African states that are signatories to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, obliging them to recognise and give effect to arbitral processes undertaken through other signatory states.”

The legislative overhaul is partly due to South Africa’s 1965 Arbitration Act no longer reflecting international best practice, which has moved on considerably since the 1960s. The Bill excludes the 1965 Arbitration Act from application to international commercial arbitrations – meaning that the current Arbitration Act will still cover domestic arbitrations. It is also partly in response to other jurisdictions gaining popularity as arbitration and investment destinations in Africa, such as Mauritius and Kenya.

“By introducing this Bill, the South African Government hopes to promote South Africa as a hub for regional arbitrations, with its attendant skills development and revenue opportunities,” explains Wright.

Bill incorporates Model Law

Rebecca Browning, an associate in the dispute resolution practice, says, “To modernise the law relating to international arbitrations, the Bill will incorporate the South African Law Reform Commission’s recommendations to incorporate the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration. The Bill incorporates the 2006 Revision of the Model Law, which has been adopted by numerous countries (including Zimbabwe) and it is seen as the gold standard for international and domestic arbitration.

“The incorporation of the Model Law will allow for the recognition and enforcement of foreign arbitral award provisions by giving effect to the New York Convention within its ambit, currently these provisions are contained in a separate Act.

“In addition, it will amend the Protection of Businesses Act 1978 to remove any reference to arbitration awards from its ambit - currently the Minister of Economic Affairs’ permission is required for the enforcement of certain foreign arbitral awards. The Model Law also means that a public interest ‘veto’ by the South African Government over the recognition and enforcement of foreign arbitration awards, with certain exceptions, will be excluded. In addition, the Model Law provides that international commercial arbitrations with public bodies will be possible. Investor-state arbitrations, however, will be regulated by a special regime under the Protection of Investment Act.

Protection of Investment Act

“The Protection of Investment Act 22 of 2015 was passed in late 2015, with the principle aim of strengthening South Africa’s ability to attract foreign investment, increase exports and maintain a balance between the rights and obligations of all investors in South Africa. Though it has yet to come into force, the Act will largely replace Bilateral Investment Treaties (BITs) between South Africa and other countries, which typically provided for state-to-state mediation or arbitration as the preferred method of dispute resolution. The Department of Trade and Industry has published draft rules for mediation in investor-state dispute resolution under the Protection of Investment Act.”

“The reluctance to permit investor-state investment arbitration must be understood in terms of the government’s stance on protecting its ‘policy space’ regarding Black Economic Empowerment (BBBEE) practices and preferential procurement practices and concerns that international tribunals may not find BBBEE a compelling exception from the international standards of treatments for investors in South Africa.”

“The Protection of Investment Act provides for the settlement of investment disputes by arbitration, but only after all domestic remedies have been exhausted. Investor-state international investment law disputes will therefore not fall under the

International Arbitration Act, if promulgated in its current form, but will fall under the Protection of Investment Act.

“The Government’s decision to revisit its domestic legislation and bring it in line with international best practice should be welcomed. The International Arbitration Bill is being introduced with a view to allowing foreign businesses recourse against and by private or commercial enterprises in South Africa through locally seated arbitration. Whether the country does become an attractive international arbitration destination, however, remains to be seen.”

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