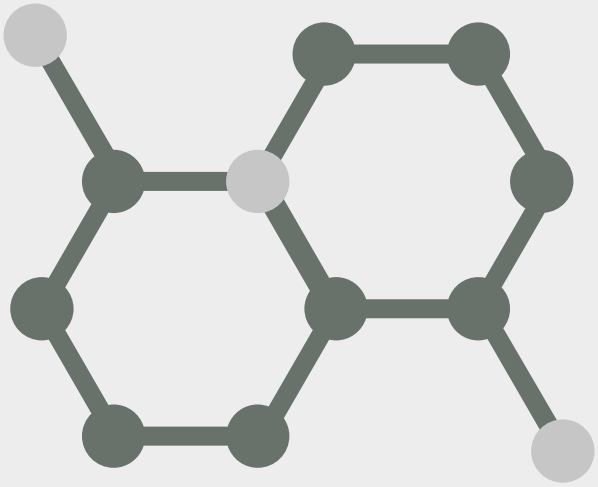
Overhauling arbitration in South Africa

South Africa needs law reform

Timothy Baker



It is almost 50 years since the most recent South African arbitration legislation was enacted. Could a new Act not only bring South Africa in line with international standards but also pave the way for the country to become an international arbitration centre for the whole of Africa?

In force for almost half a century, the Arbitration Act 1965 (as amended), which provides the legislative framework for arbitration in South Africa, is in desperate need of reform. The perception of the current laws as 'inadequate' and 'outdated' dissuades parties from selecting South Africa as their seat of arbitration, with the result that South Africa is lagging behind other developing countries, such as Mauritius, which have taken a more proactive stance. Despite this perception, and the continuous calls for legal reform, an amended Act is yet to be implemented. In the face of renewed criticism with the introduction of the draft Promotion and Protection of Investment Bill, there appears to be no better time to revisit the Arbitration Act, and address its shortcomings. It is, accordingly, significant that a new Arbitration Act appears to be on the agenda, despite being long overdue.

Current statutory framework

Arbitration in South Africa is currently governed by the Arbitration Act and the Recognition and Enforcement of Foreign Arbitral Awards Act 1977. The latter seeks to give effect to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which was signed at New York in 1958 (New York Convention). By becoming a party to the New York Convention, each state has agreed, subject to limited grounds of refusal, to enforce commercial arbitral awards made in other contracting states.

Shortcomings

An obvious difficulty is that the Arbitration Act was enacted in 1965 – prior to the New York Convention and the introduction of the UNCITRAL Model Law on International Commercial Arbitration. The UNCITRAL Model Law aims to promote uniformity in international arbitration procedures and limit the role of the national courts. Accordingly, the current legislation is not in alignment with international developments, with the situation only worsening over time.

The wording of the Arbitration Act provides no assistance in this regard. What is concerning is the extent to which the enforceability of an arbitration agreement lies within the courts' discretion. In particular, under section 3(2) of the Arbitration Act, the court can, where good cause is shown, set aside the arbitration agreement or order that any particular dispute referred to in the arbitration agreement shall not be referred to arbitration. In addition, the court may order that the arbitration shall cease to have effect with reference to any dispute referred. Furthermore, section 6(2) of the Arbitration Act provides that, where there is an arbitration agreement, the court may make an order staying such proceedings (instituted before a court) if it is satisfied that there is 'no sufficient reason' why the dispute should not be referred to arbitration. By way of contrast, under the New York Convention a court in such circumstances will refer the parties to arbitration.

These provisions undermine the arbitration process and can lead to costly and frustrating delays. This is because the extensive powers given to the courts can be abused by a recalcitrant party as a delaying tactic. While the latitude given to the courts need not be problematic, provided the courts adopt a pro-arbitration stance, the existence of such latitude leads to uncertainty and a possible resistance to arbitrating in South Africa. Legislation that strikes the correct balance between interventionist and respect for party autonomy is needed in this area.

Process of reform

In July 1998, the South African Law Commission produced a report on an International Arbitration Act for South Africa, in which it recommended that the UNCITRAL Model Law be adopted by South Africa for international commercial arbitrations. This was followed by a report on domestic arbitration, which was submitted in May 2001. Draft bills were also produced for consideration.

Despite the initial progress, further legislative action in this area has been slow. As is to be expected, the debate for reform has not been without political comment. Although there is a clear need for alternative dispute resolution mechanisms, there are those that hold the view that 'to strengthen arbitration is to weaken the courts'. Further, the situation was not assisted when the Judge President of the Western Cape High Court concluded, in a report in 2005, that arbitration undermines judicial transformation in South Africa – a contention that was rejected by the Cape Bar and the Arbitration Foundation of Southern Africa (AFSA).

Promotion and Protection of Investment Bill 2013

The concerns surrounding the Arbitration Act have gained momentum with the introduction of the draft Promotion and

Protection of Investment Bill 2013. The purpose of the Bill is to provide for the legislative protection of investors and promote investment in South Africa.

However, in terms of the draft Bill, foreign investors no longer benefit from a general right to resort to international arbitration to settle their investment disputes. Instead, a foreign investor that has a dispute in respect of action taken by the government or any organ of state may refer the dispute to mediation facilitated by the Department of Trade and Industry, to the local courts, or to arbitration in accordance with the Arbitration Act.

This appears to be a deliberate decision on the part of the legislature, with reference having been made to the uncertainty of international arbitration and the absence of the doctrine of precedent as two of the reasons why this route was not chosen.

Given the shortcomings of the Arbitration Act, the fact that recourse to international arbitration is excluded is a concern, particularly to foreign investors, who are often more familiar with international arbitration. The end result may be, somewhat ironically, to discourage investment on the basis that an investor may have concerns in relation to dispute resolution.

Time for new arbitration legislation

More recently, however, the South African Law Reform Commission has reconvened, and draft legislation is being reviewed and developed. It is clear that a new (and improved) Arbitration Act is needed. Not only would it bring South Africa in line with international standards but, with the correct legislative backdrop, South Africa (as an economic powerhouse in Africa) would be well poised to become an international arbitration centre for the wider African continent. Arbitration has the potential to be a lucrative foreign exchange earning industry – various parties are involved in an arbitration, which, if held in South Africa, would mean the use of local lawyers, hotels and other venues, and transcription and similar services. The influx of people from outside the country involved in arbitration can only have a positive spin-off effect in terms of boosting business in South Africa. This potential is yet to be realised. It is hoped that a new international arbitration Act will be implemented as soon as possible and, in doing so, that this will position South Africa to take centre stage on the African continent in relation to arbitral disputes.

Timothy Baker is a director in the Cape Town office of Norton Rose Fulbright.