

## February 2018

On 19 December 2017, (former) President Jacob Zuma assented to the International Arbitration Act 15 of 2017 (the IAA). The IAA sees South Africa become the 11th African country to incorporate the United Nations Commission on International Trade Law (UNCITRAL) Model Law (the Model Law) into its national law and can only be regarded as a move in the right direction.

### **The previous regime**

Prior to the introduction of the IAA, all arbitrations in South Africa were governed by the Arbitration Act of 1965 (the Arbitration Act). The Arbitration Act, which does not distinguish between domestic and international arbitrations, merely provides a basic guide to the settlement of disputes by arbitration tribunals in terms of arbitration agreements and for the enforcement of arbitral awards. However, with respect to international arbitrations, the Arbitration Act was severely deficient and was heavily criticised, in particular for affording South African courts an excessive supervisory role.

In addition to the Arbitration Act, the Recognition and Enforcement of Foreign Arbitral Awards Act of 1977 (the Recognition and Enforcement Act) was enacted to give effect to South Africa's obligations in terms of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). In terms of the Recognition and Enforcement Act, any foreign arbitral award could be made an order of court by a competent South African court. Despite the enactment of the Recognition and Enforcement Act, little more was done to develop the South African law relating to international arbitrations.

### **The new era**

The enactment IAA brings about welcome development to an area of law that for a number of years had remained stagnant. In this regard, the IAA modernises South African law and brings South African law in line with international developments and best practice in respect of international arbitration proceedings.

As mentioned, the IAA sees the incorporation of the Model Law into South African law. The Model Law is the most widely accepted law governing international, as well as domestic, arbitrations. For the purposes of the IAA, any international commercial dispute that the parties have agreed to submit to arbitration under an arbitration agreement and that relates to a matter the parties can

dispose of by agreement may be determined by arbitration. Unless the dispute is not capable of determination by arbitration under the laws of South Africa or if the arbitration agreement is contrary to public policy.

The IAA excludes the operation of the Arbitration Act with respect to international arbitrations, save for the application of section 2 of the Arbitration Act in the case of recognition and enforcement of arbitration agreements and foreign arbitral awards under the IAA. Accordingly, the enactment of the IAA brings about a much-needed departure from the heavily deficient provisions of the Arbitration Act.

In addition to the above, the IAA represents the introduction of a "one stop shop", bringing about a welcome consolidation, as it repeals the Recognition and Enforcement of Foreign Arbitral Awards Act of 1977 and expressly provides for the recognition and enforcement of foreign arbitral awards. In terms of the IAA a foreign arbitral award must be recognised and enforced in South Africa, subject to limited exception. The IAA, therefore, allows South Africa to give effect to its obligations under the New York Convention, without relying on the existence of a separate piece of legislation.

The IAA also sees the amendment of the Protection of Businesses Act of 1978 (the Business Act), by providing for the deletion of the words "arbitration award/awards" from section 1, section 1D and 1G. Prior to the enactment of the IAA, the Business Act, in clear contradiction to South Africa's obligations under the New York Convention, restricted the enforcement of various foreign judgments, including arbitration awards, in South Africa and afforded the executive oversight over the enforcement of such awards. The amendment to the Business Act through the enactment of the IAA, therefore, sees the introduction of welcome clarity and certainty regarding the enforcement of foreign arbitration awards, and reiterates South Africa's commitment to the New York Convention.

The IAA further develops South African law by expressly providing that public bodies are bound by the act and that the provisions of the IAA apply to any commercial international arbitration to which a public body is a party, subject to section 13 of the Protection of Investment Act 2015. A public body for the purposes of the IAA includes any department of state, administration, municipality or functionary exercising a public power or performing a public function.

The enactment of the IAA means that arbitrations administered by the Arbitration Foundation of Southern Africa (AFSA) and the China Africa Joint Arbitration Centre (CAJAC) will be subject to the Model Law. Recently, AFSA and CAJAC announced the opening of their new national headquarters and arbitration centre in Sandton, a move that, when considered in light of the enactment and effect of the IAA, makes South Africa an attractive destination for international arbitrations. The enactment of the IAA, together with the establishment of CAJAC, represents a growing trend to accommodate international arbitrations in South Africa.

## **The verdict**

In the modern world the ability to do business across borders is a necessity in order to exploit opportunities, build relationships and grow brands. Further, despite political and economic uncertainty, Africa, and in particular South Africa, remains a highly attractive investment destination. With this in mind, the IAA is a welcome development and sees the creation of a mechanism through which South African companies doing business outside the country and foreign companies in South Africa can achieve justice.

The IAA provides a sense of familiarity and security to foreign investors, who can now settle disputes through an efficient arbitration system in South Africa. Accordingly, the IAA has the potential to facilitate investment and growth in a declining economy. In addition, by removing the uncertainties that came with the Arbitration Act, Recognition and Enforcement Act, and Business Act, the IAA creates legal certainty for both South African and foreign entities.

While many nations around the world, including many on the African continent, have already adopted the Model Law, its adoption in South Africa is a long overdue step in the right direction.

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