

Client Update

South Africa Introduces New International Arbitration Bill

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The South African government recently announced a new International Arbitration Bill. The Bill incorporates the Model Law of the United Nations Commission on International Trade Law (the “UNCITRAL Model Law”) as the cornerstone of South Africa’s international arbitration regime. The Bill is a positive step toward promoting South Africa as an arbitral seat in the region and is consistent with efforts to attract foreign investment.

SOUTH AFRICA'S NEED FOR REFORM

South Africa’s arbitration laws have been seen as ripe for reform for some time. The South African Law Commission had already proposed a reform in its July 1998 project, *Arbitration: An International Arbitration Act for South Africa*. Concerns included that South Africa’s Arbitration Act No. 42 of 1965 (the “1965 Act”) invited excessive judicial intervention, undermining the attractiveness of South Africa as a seat, and that the Recognition and Enforcement of Foreign Arbitral Awards Act No. 40 of 1977 (the “REFAA”) created uncertainty because by giving courts wide discretion to set aside international arbitration awards or refuse their enforcement. The REFAA has been criticised as inconsistent with South Africa’s obligations under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the “New York Convention”).

On 15 March 2017, the South African Department of Justice announced that it will soon introduce the new International Arbitration Bill in the National Assembly. The Bill will incorporate the UNCITRAL Model Law “as the cornerstone of the international arbitration regime in South Africa”. At a seminar in October 2016 announcing “the Dawn of a New Era” for international arbitration in South Africa, Deputy Minister of Justice and Constitutional Development, John Jeffery, said: “[t]he Bill comes at an opportune time for our country to opt into the international standard for the resolution of commercial

disputes. Not only does it have the potential to attract foreign direct investment, but also to give greater legal protection to South African investments abroad.”

KEY PROVISIONS OF THE BILL

- The UNCITRAL Model Law will apply to all international arbitrations, with minor exclusions.
- The 1965 Act will continue to govern domestic arbitration.
- The UNCITRAL Model Law will also apply to arbitration proceedings involving public bodies. These proceedings will be held in public unless “for compelling reasons” the tribunal directs otherwise.
- The REFAA will be repealed, bringing the recognition and enforcement of awards in line with the New York Convention.

The Bill will apply to all international arbitration agreements, whether concluded before or after the commencement of the Bill. The Bill will not, however, affect proceedings already commenced under the REFAA or the 1965 Act before the Bill’s entry into force.

TAKEAWAYS FOR INVESTORS

Given its regional economic significance, South Africa is well-positioned to become an international arbitration hub. The government’s efforts to modernise its arbitration law are positive steps toward promoting South Africa as a leading arbitration seat in the region, alongside Mauritius and Nigeria.

This modernisation is part of South Africa’s initiative to restructure international arbitration consistently with its policy objectives. The Bill appears intended to complement the Protection of Investment Act No. 22 of 2015 (the “PIA”), which provided a new framework for arbitration of investment disputes in the wake of South Africa’s termination of many bilateral investment treaties. The PIA foresees domestic mediation of investment disputes and requires investors to exhaust local remedies in South Africa before seeking arbitration, which is subject to South Africa’s consent and would be between South Africa and the investor’s home State.

In this sense, developments in South Africa reflect those in other BRICS countries such as Russia and India. India also reformed its arbitration legislation in 2015 to limit judicial intervention and delay. Like South Africa, India very recently terminated 57 of its 83 BITs and has renegotiated others in line with its Model BIT 2015, which contains similar terms to South Africa’s PIA. And in

2016, Russia reformed its arbitration legislation to improve certainty and predictability (see our update [here](#)).

South Africa's new Bill is a welcome development that will make South Africa a more attractive seat in the region. The success of South Africa's, and other BRICS countries', reforms in attracting foreign investment remains to be seen.

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Please do not hesitate to contact us with any questions.