Arbitration

Contributing editors
Gerhard Wegen and Stephan Wilske

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Arbitration 2019

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Preface

Arbitration 2019

Fourteenth edition

Getting the Deal Through is delighted to publish the fourteenth edition of *Arbitration*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Armenia, Chile and Pakistan.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Gerhard Wegen and Stephan Wilske of Gleiss Lutz, for their continued assistance with this volume.

GETTING THE
DEAL THROUGH

London
January 2019

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South Africa

Kirsty Simpson and Megan Rossouw

ENSafrica

Laws and institutions

1 Multilateral conventions relating to arbitration

Is your jurisdiction a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Since when has the Convention been in force? Were any declarations or notifications made under articles I, X and XI of the Convention? What other multilateral conventions relating to international commercial and investment arbitration is your country a party to?

South Africa acceded to the New York Convention on 3 May 1976, without reservation. South Africa is not a contracting state under the ICSID Convention.

2 Bilateral investment treaties

Do bilateral investment treaties exist with other countries?

South Africa has signed 49 bilateral investment treaties (BITs), of which, 13 remain in force. The government's stated intention in 2012 was to cancel all BITs with the European Union trade bloc as they come up for renewal, although the intention under the current governmental regime is unclear. It does intend for the regulation of investment protection (including dispute resolution) to take place under the domestic Protection of Investment Act No. 22 of 2015. Although this legislation is to be interpreted with reference to, inter alia, the country's Constitution and international law, it is criticised by some in regard to, inter alia, possibly allowing expropriation of foreign investments without compensation and doing away with international dispute resolution mechanisms in favour of domestic mediation, court proceedings or arbitration proceedings. There are also a number of multilateral treaties that South Africa is party to, through either the Southern African Development Committee or the Southern African Customs Union.

3 Domestic arbitration law

What are the primary domestic sources of law relating to domestic and foreign arbitral proceedings, and recognition and enforcement of awards?

International arbitration in South Africa is governed by the International Arbitration Act No. 15 of 2017. This Act legislates the adoption of the UNCITRAL Model Law and governs international commercial arbitrations (as defined in article 1(3) of the UNCITRAL Model Law). It replaces the Recognition and Enforcement of Foreign Arbitral Awards Act No. 40 of 1977 but adopts largely the same content of that Act, in line with international best practice.

The Arbitration Act No. 42 of 1965, which previously applied to both international and domestic arbitrations, continues to govern domestic arbitrations only.

Reference to both Acts is made in response to each question below.

4 Domestic arbitration and UNCITRAL

Is your domestic arbitration law based on the UNCITRAL Model Law? What are the major differences between your domestic arbitration law and the UNCITRAL Model Law?

International arbitration in South Africa is based on the UNCITRAL Model Law, subject to certain adaptations.

5 Mandatory provisions

What are the mandatory domestic arbitration law provisions on procedure from which parties may not deviate?

The International Arbitration Act makes it mandatory in international arbitrations to:

- apply the UNCITRAL Model Law, with certain adaptations; and
- keep confidential the award and documents, if the arbitration is held in private.

The mandatory provisions in the Arbitration Act relating to procedure in domestic arbitrations that the parties may not deviate from are:

- the referral to arbitration must be in writing;
- every party to the arbitration must be given written notice of the time and place where the proceedings will be held; and
- the award must be made in writing.

6 Substantive law

Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?

The International Arbitration Act requires arbitrators to apply the substantive governing law agreed by the parties (subject to public policy), and in the absence of agreement, they are required to apply the rule of conflict of laws and the lex causae.

7 Arbitral institutions

What are the most prominent arbitral institutions situated in your jurisdiction?

The Arbitration Foundation of Southern Africa (AFSA) is based in Johannesburg and is one of the leading arbitral institutions in South Africa. AFSA also provides facilities in Pretoria and Cape Town. AFSA's rules can be found on its website at www.arbitration.co.za. It has commercial, expedited and international arbitration rules. Administration fees do not include the arbitrator's fees and are calculated on a sliding scale according to the quantum of the claim, capped to a maximum of 60,000 rand (excluding value added tax (VAT)) per party.

Other arbitral institutions dealing with commercial arbitral disputes that are active in South Africa include the Association of Arbitrators (www.arbitrators.co.za) and the China-Africa Joint Arbitration Centre (www.cajacjhb.com).

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Arbitration agreement

8 Arbitrability

Are there any types of disputes that are not arbitrable?

The International Arbitration Act is inclusive as opposed to exclusive in that it applies only to those disputes prescribed as being 'international' – namely, where the places of business of the parties (when concluding the arbitration agreement) were in different countries; the place of the arbitration, the place of contractual performance or the place where the subject matter of the dispute is most closely connected, is outside the country in which the parties have their place of business; or the parties agree expressly that the subject matter of the arbitration agreements relates to more than one country.

National, provincial and local government and organs of state are bound by the International Arbitration Act in regard to foreign investment in the country, provided that it consents to international arbitration and then only after exhausting domestic remedies, as set out in the Protection of Investment Act. The request for a referral to arbitration is to be treated as 'administrative action'.

The Arbitration Act precludes matrimonial matters (including matters incidental to matrimonial matters) and matters relating to the status of a person from being referred to arbitration.

Criminal matters, certain regulatory disputes (such as antitrust or competition disputes, or reviews of administrative decisions in terms of the Promotion of Administrative Justice Act No. 3 of 2000) and certain municipal disputes may not be referred to arbitration.

9 Requirements

What formal and other requirements exist for an arbitration agreement?

The International Arbitration Act requires that the arbitration agreement be in writing or recorded in some other form (even if concluded orally or through conduct), including by way of electronic communication. A submission to arbitration through the exchange of pleadings without challenging the absence of an arbitration agreement constitutes a 'written' referral to arbitration in terms of this Act.

The Arbitration Act similarly requires that the arbitration agreement be in writing, without providing any formal requirements for the format of the written agreement, save that it must refer to an existing dispute or a future dispute contemplated by the parties to the arbitration agreement. The written terms can be agreed to expressly, tacitly or by conduct. The agreement to refer a dispute to arbitration is often included in general terms and conditions. The agreement need not be signed.

Unlike the International Arbitration Act, which provides that only written submissions to arbitration in foreign arbitral disputes will be recognised and enforced in South Africa, the Arbitration Act does not prevent oral submissions to arbitration to the extent that they may be governed by the common law (as opposed to the Arbitration Act itself).

10 Enforceability

In what circumstances is an arbitration agreement no longer enforceable?

The International Arbitration Act provides that an arbitration agreement may not be enforced if:

- a party lacked capacity to conclude the arbitration agreement;
- the agreement is invalid under the substantive law of the arbitration agreement, or failing agreement thereon, under South African law;
- the subject matter of the dispute cannot be referred to arbitration in terms of South African law; or
- the agreement is inoperative or incapable of being performed.

An arbitration agreement under the International Arbitration Act contained in a contract that is declared null and void survives a declaration of invalidity of the arbitration agreement.

The position is different for disputes decided in terms of the Arbitration Act, where an arbitration agreement contained in a contract does not survive the contract being found null and void, unless specific provision is made for this in the arbitration agreement. The death or insolvency of a party to an arbitration under the Arbitration Act does not nullify the proceedings, but rather stays those proceedings until such time as an executor or appropriate representative has been appointed and is in a position to continue with the proceedings.

In terms of the Arbitration Act, a court may set aside the arbitration agreement, or order that a particular dispute not be referred to arbitration or that the arbitration agreement shall cease to have effect, on good cause shown. (This includes where it is in the public interest for a court to determine the dispute.)

An arbitration agreement may only be terminated if the agreement provides for termination or all parties consent thereto.

11 Third parties – bound by arbitration agreement

In which instances can third parties or non-signatories be bound by an arbitration agreement?

The International Arbitration Act only applies to parties who submit to arbitration in terms of the written arbitration agreement and, therefore, does not recognise the binding of non-signatories to the agreement.

The Arbitration Act defines 'party' in an arbitration as a person that is 'a party to the agreement or reference, a successor in title or assign of such a party and a representative recognized by law of such a party, successor in title or assign'. Third parties such as assignees and successors-in-title, as well as trustees or liquidators in the event of sequestration or liquidation, are therefore bound by the arbitration agreement (see section 5 of the Arbitration Act in respect of insolvency).

An agent has no legal standing to sue on behalf of its principal in South African law.

12 Third parties – participation

Does your domestic arbitration law make any provisions with respect to third-party participation in arbitration, such as joinder or third-party notice?

No, not under the International Arbitration Act or the Arbitration Act (unless they relate to interpleader proceedings). Nothing precludes the extension of the arbitration agreement to third parties if the remaining parties to the arbitration agreement consent and the third party submits to the jurisdiction of the arbitration tribunal.

13 Groups of companies

Do courts and arbitral tribunals in your jurisdiction extend an arbitration agreement to non-signatory parent or subsidiary companies of a signatory company, provided that the non-signatory was somehow involved in the conclusion, performance or termination of the contract in dispute, under the 'group of companies' doctrine?

Holding companies and subsidiary companies are considered separate and distinct legal entities under South African law. The group of companies doctrine, therefore, does not apply to arbitrations in South Africa, and non-signatory holding or subsidiary companies are not considered parties to an arbitration agreement.

14 Multiparty arbitration agreements

What are the requirements for a valid multiparty arbitration agreement?

There are no formal requirements for the validity of a multiparty arbitration agreement in terms of the Arbitration Act other than the requirement that the agreement be in writing.

Constitution of arbitral tribunal

15 Eligibility of arbitrators

Are there any restrictions as to who may act as an arbitrator? Would any contractually stipulated requirement for arbitrators based on nationality, religion or gender be recognised by the courts in your jurisdiction?

Active judges may not act as arbitrators in private arbitrations. Retired judges require written consent from the Minister of Justice and Correctional Services before accepting a nomination as an arbitrator in a private arbitration. The parties may also prescribe restrictions as

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to who may act as an arbitrator, by agreement. There are otherwise no restrictions as to who may act as an arbitrator.

The parties may stipulate the preferred nationality or language of an arbitrator if there are legitimate grounds for doing so; for example, if the language of the arbitration is French or the substantive law relates to that jurisdiction, or to avoid a perception of nationality bias. However, parties may not unfairly discriminate against an arbitrator based on race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or birth, unless the discrimination is justified in terms of section 36 of the Constitution.

16 Background of arbitrators

Who regularly sit as arbitrators in your jurisdiction?

Advocates, attorneys and retired judges are primarily appointed as arbitrators, but it is not uncommon for industry experts such as architects, quantity surveyors and chartered accountants to sit as arbitrators for disputes relating to their particular fields.

17 Default appointment of arbitrators

Failing prior agreement of the parties, what is the default mechanism for the appointment of arbitrators?

If the International Arbitration Act applies and there is no agreement between the parties for the appointment of arbitrators, or a mechanism for appointment of the arbitrators:

- if there are to be three arbitrators, each party appoints one arbitrator, and the two duly appointed arbitrators appoint the third arbitrator and, failing that, the arbitrators will be determined by a court; and
- if there is to be a sole arbitrator the arbitrator will be determined by a court.

Similarly, in terms of the Arbitration Act, if the parties do not or are unable to agree to the identity of the arbitrators or to a mechanism that will provide for the appointment of the arbitrators, a party may apply to court for the appointment of the arbitrators after seven days of delivering a notice to the counterparty requesting the appointment of the arbitrators.

The arbitration rules agreed by the parties may also provide for the mechanism for the appointment of an arbitrator. For example, if the arbitration is governed by the AFSA Rules, and the parties are unable to agree to the arbitrators, the secretariat of AFSA will appoint the arbitrators after the first fees have been paid by the claimants and defendants in accordance with those rules.

18 Challenge and replacement of arbitrators

On what grounds and how can an arbitrator be challenged and replaced? Please discuss in particular the grounds for challenge and replacement, and the procedure, including challenge in court. Is there a tendency to apply or seek guidance from the IBA Guidelines on Conflicts of Interest in International Arbitration?

Parties may consent to the appointment of an arbitrator being set aside.

The International Arbitration Act provides that an arbitrator's appointment may be challenged if there are justifiable doubts as to his or her independence or impartiality, or if the arbitrator lacks the qualifications agreed by the parties.

The parties can agree the procedure for setting aside the appointment of an arbitrator and, failing agreement on such process, the aggrieved party must provide to the arbitral tribunal a written statement of the reasons for the challenge. The challenged arbitrator can withdraw or the other parties to the dispute can agree on the removal of the arbitrator, failing which, the arbitral tribunal will decide the challenge.

If a challenge to the appointment is unsuccessful, an aggrieved party may refer the dispute to a court with jurisdiction within 30 days of receipt of notice of the decision from the arbitral tribunal. There is no appeal from the decision handed down by the court. The arbitration may continue pending the court proceedings.

The Arbitration Act stipulates that a party may apply to court to set aside the appointment of an arbitrator if 'good cause' exists. Good cause includes, but is not limited to, 'failure on the part of the arbitrator or umpire to use all reasonable dispatch in entering on and proceeding with the reference and making an award or, in a case where two arbitrators are unable to agree, in giving notice of that fact to the parties or to the umpire'. Examples of grounds to challenge an arbitrator's appointment also include where a reasonable apprehension of bias or impartiality has been proved by the party applying for the removal of an arbitrator (similar to grounds of 'justifiable doubts' in terms of the International Arbitration Act).

In either event:

- a court may take cognisance of the IBA Guidelines on Conflicts of Interest in International Arbitration (IBA Guidelines) to determine whether an arbitrator should be removed. This will be of persuasive but not binding value; and
- unless the agreement provides otherwise, the death of the arbitrator is not grounds for termination of the arbitration. Where the appointed arbitrator refuses to act, becomes incapable of acting, dies, is removed from office or has his or her appointment terminated, or is set aside, and a contrary intention is not expressed in the arbitration agreement, the party or parties that appointed him or her may appoint another arbitrator in his or her place.

Once an arbitrator has been removed, the court is permitted to appoint an alternative arbitrator as a replacement, subject to the process set out in the Arbitration Act or the International Arbitration Act, whichever is applicable.

19 Relationship between parties and arbitrators

What is the relationship between parties and arbitrators? Please elaborate on the contractual relationship between parties and arbitrators, neutrality of party-appointed arbitrators, remuneration and expenses of arbitrators.

The relationship between the parties and the arbitrators is contractual in nature and subject to the agreed terms with the arbitrator, the arbitration agreement and the law. Although it is not a requirement, arbitrators are usually appointed by way of a brief from the parties' legal representatives. The arbitrator usually advises the parties at the outset what his or her costs and expenses of the arbitration will be and the manner of payment by the parties, as well as any other terms.

Notwithstanding any one party nominating an arbitrator, the arbitrator is required to act impartially and fairly in respect of all the parties to the arbitration. The arbitrator is also required to comply with the terms of the arbitration agreement and the law.

20 Immunity of arbitrators from liability

To what extent are arbitrators immune from liability for their conduct in the course of the arbitration?

The International Arbitration Act provides that arbitrators are not liable for any act or omission in the discharge of his or her arbitral functions, unless the act or omission is shown to have been done in bad faith.

The Arbitration Act, however, does not provide for immunity for arbitrators against liability for their conduct in the course of the arbitral proceedings. Certain arbitration rules regulate arbitrators' immunity from liability, and thus immunity may be incorporated by the parties through reference to the rules being applied. For example, the AFSA Rules grant immunity to arbitrators 'for any act or omission relating to an arbitration in which he was the arbitrator, except for deliberate misconduct by him'.

Jurisdiction and competence of arbitral tribunal

21 Court proceedings contrary to arbitration agreements

What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an existing arbitration agreement, and what time limits exist for jurisdictional objections?

In these instances, a party seeking to enforce the arbitration agreement may raise a special plea of arbitration, whether in action or application

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proceedings. In action proceedings, the special plea is raised when responding to the summons (or if an amendment to the plea does not prejudice the other side and is permitted, thereafter). This may then be decided as a separated issue before the hearing of the merits of the matter. In application proceedings, the special plea is usually raised in the answering affidavit and can only be raised thereafter with leave of the court.

Alternatively, in respect of disputes under both the International Arbitration Act and the Arbitration Act, a court may stay legal proceedings before it on application by a proactive party if the parties to that dispute are parties to an arbitration agreement that governs the dispute. A party wishing to raise this jurisdictional point may do so at any time after entering an appearance to defend a matter, but must do so before any pleadings are delivered or further steps in the proceedings are taken. Defences to such an application include that the arbitration agreement is null and void, inoperative or incapable of being performed.

In terms of the International Arbitration Act, arbitral proceedings may be commenced or continued, and an award may be made, while the jurisdictional issue is pending before the court.

22 Jurisdiction of arbitral tribunal

What is the procedure for disputes over jurisdiction of the arbitral tribunal once arbitral proceedings have been initiated, and what time limits exist for jurisdictional objections?

The International Arbitration Act provides that the arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. A decision by the arbitral tribunal that the contract is null and void does not result in the invalidity of the arbitration clause. Such issue must be raised at the earliest possible opportunity, as simply filing a statement of defence without raising the issue will be construed as consent to arbitration.

The Arbitration Act does not prevent an arbitral tribunal from considering its own jurisdiction. However, a court is not bound by that decision and may review a decision by an arbitral tribunal that it has jurisdiction to hear an arbitration. If the arbitration agreement expressly provides for an arbitral tribunal to consider its own jurisdiction, a court will be reluctant to interfere in that process before the arbitral tribunal has considered its jurisdiction.

A party that objects to the arbitral tribunal's jurisdiction must do so at the beginning of the arbitral process and before any further steps are taken. Similar provisions are contained in the AFSA Rules.

Arbitral proceedings

23 Place and language of arbitration

Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings?

In terms of the International Arbitration Act, arbitrators may decide the geographic location for the hearing of witnesses, experts or the parties, or for the inspection of goods, other property or documents. Similarly, the arbitral tribunal can decide the language of the arbitration, which will then apply to any written statement by a party, any hearing and any award, decision or other communication by the arbitral tribunal. The arbitral tribunal may order that any documentary evidence shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal

If the parties are unable to agree on a venue for the arbitral proceedings, the arbitral panel is entitled by virtue of the Arbitration Act to determine the time and place where the proceedings will be held. In making this decision, the arbitral tribunal will consider what is convenient to all the parties to the arbitration, the location of witnesses and any other relevant factors that may reasonably be considered. Similar considerations apply if the arbitral tribunal is required to determine the language of the arbitral proceedings. Interpreters can be made available to assist in the translation of evidence. The AFSA Rules provide for the same flexibility.

24 Commencement of arbitration

How are arbitral proceedings initiated?

In terms of the International Arbitration Act, the process is initiated by the written request for the referral of the dispute to arbitration. The Arbitration Act does not prescribe any formal requirements to commence arbitration proceedings, save that the dispute is arbitral and that a valid arbitration agreement exists between the parties (albeit that this may be disputed during the course of the proceedings). However, the arbitration agreement usually provides for a written declaration of the dispute.

Different arbitration rules may contain different referral requirements. For example, the AFSA Rules require a written request for arbitration, which must include:

- the names and details of the parties;
- a copy of the written arbitration agreement and a statement that the dispute falls within the ambit of that agreement;
- a statement confirming the locus standi of each party;
- the nature of the dispute together with all the material facts and statement relied upon to support the claim;
- the relief sought;
- copies of the primary documents relied upon in support of the claim (for example, the underlying contract);
- the claimant's proposal as to the number of arbitrators and their identities; and
- payment of the first fee.

The claimant must deliver sufficient copies for each of the arbitrators and parties to the arbitration.

The arbitration must be referred in accordance with any periods stipulated within the arbitration agreement, and cognisant of any extinctive prescription or time-barring laws that may apply.

25 Hearing

Is a hearing required and what rules apply?

The fundamental requirement is that both parties are permitted an opportunity to be heard, whether they make representations or lead evidence in writing or orally. The parties are entitled to have the matter determined based on a stated case (ie, an agreed set of facts).

In terms of the International Arbitration Act, and subject to any contrary agreement by the parties, the arbitral tribunal decides whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials. However, unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party. Sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purposes of inspection of goods, other property or documents must be given. All statements, documents or other information supplied to the arbitral tribunal by one party shall be communicated to the other party. Also, any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties.

The Arbitration Act similarly allows the arbitral tribunal or the parties, or both, to determine whether a hearing is necessary. This position is also reflected in certain arbitration rules such as the AFSA Rules.

26 Evidence

By what rules is the arbitral tribunal bound in establishing the facts of the case? What types of evidence are admitted and how is the taking of evidence conducted?

Arbitral tribunals tend, but are not required, to observe the South African Law of Evidence, which was initially based on and has been adapted from English law. They are bound by principles of natural justice.

The tendency is towards resolving disputes of fact by leading oral evidence, with reference to documentary evidence where applicable. The use of witness statements has become more common, but cross-examination still takes place. Any person with personal knowledge of a fact may give evidence, including parties and party officials. Witnesses and experts tend to be called and appointed by the parties, but witnesses may be summoned to appear before the arbitral tribunal.

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The International Arbitration Act requires parties to submit with the statement of claim or defence all documents they consider to be relevant, or may add a reference to the documents or other evidence they will submit. It also permits the arbitral tribunal, or a party with the approval of the arbitral tribunal, to issue a subpoena out of the High Court to compel the attendance of witnesses before the tribunal to produce documents or give evidence, or to issue the commission or request for taking evidence outside its jurisdiction.

The Arbitration Act permits the arbitral tribunal to order the discovery and production of documents, inspect goods or property, and appoint a commissioner to take evidence of witnesses in South Africa or another jurisdiction. Unless the arbitration agreement provides otherwise, the arbitral tribunal may administer oaths to witnesses; examine parties appearing before it and require them to produce documents in their possession; and receive evidence by affidavit.

Any agreed rules will regulate much of the process. In terms of the AFSA Rules, the arbitral tribunal may require that the parties provide each other with a list of names of witnesses to be called and a summary of their evidence, failing which, a witness may not be called. The AFSA Rules also permit the taking of evidence through electronic means, provided that all parties have an adequate opportunity to examine those witnesses.

Although arbitral tribunals are permitted to seek guidance from the IBA Rules on the Taking of Evidence in International Arbitrations, they historically tend not to do so unless agreed by the parties. This is likely to change with the promulgation of the International Arbitration Act.

27 Court involvement

In what instances can the arbitral tribunal request assistance from a court, and in what instances may courts intervene?

In terms of the International Arbitration Act, a court may only intervene in the following limited circumstances envisaged in the UNCITRAL Model Law:

- appointing arbitrators;
- challenging the appointment of arbitrators;
- deciding whether an arbitrator's mandate has been terminated owing to an inability to perform his or her functions, or a failure to act without undue delay;
- deciding preliminary point of jurisdiction of the arbitrator, once the arbitrator has issued a ruling in this regard (the decision of the court is not appealable and the arbitral proceedings may continue pending a decision by the court);
- in limited circumstances, granting interim relief;
- assisting in taking evidence;
- setting aside awards; and
- enforcing foreign arbitral awards.

In terms of the Arbitration Act, unless otherwise agreed by the parties, an arbitration tribunal has limited powers to request the assistance of the courts to intervene in an arbitration. Instances where courts may intervene include:

(i) to extend the fixed period for a claim to be referred to arbitration prescribed in the arbitration agreement, if undue hardship would otherwise be caused (subject to prescription or time-barring in terms of the law);
(ii) to determine questions of law arising in the course of the arbitral reference at any stage prior to the issue of a final award, in certain instances;
(iii) to subpoena witnesses;
(iv) to order the appointment of an umpire to act as sole arbitrator, in lieu of the arbitrators;
(v) to extend the period for the making of an award;
(vi) to grant security for costs;
(vii) with regard to orders relating to discovery of documents and interrogatories;
(viii) with regard to orders relating to the examination of any witness before a commissioner in South Africa or abroad, and the issue of a commission or a request for such examination;
(ix) to allow the giving of evidence by affidavit;
(x) to allow the inspection, interim custody, preservation, or the sale of goods or property;
(xi) to grant an interim interdict or similar relief;
(xii) to secure the amount in dispute in the reference;
(xiii) to authorise substituted service of notices required in terms of the Arbitration Act or of summonses;
(xiv) to appoint a receiver; and
(xv) unless the parties agree otherwise, to authorise service of documents.

The powers in (vi) to (xiv) in regard to the Arbitration Act do not preclude an arbitrator exercising these same powers if he or she is vested with those powers.

28 Confidentiality

Is confidentiality ensured?

The International Arbitration Act provides that international arbitration proceedings to which a public body is a party are held in public, unless for compelling reasons, the arbitral tribunal directs otherwise. However, where the arbitration is held in private, the award and all documents created for the arbitration that are not otherwise in the public domain must be kept confidential by the parties and tribunal, except to the extent that the disclosure of such documents may be required by reason of a legal duty or to protect or enforce a legal right.

The Arbitration Act does not provide for the confidentiality of the arbitration proceedings. However, arbitration proceedings are by their nature confidential and such a term is implied in the arbitration agreement. There are no provisions in South African law as to the arbitral tribunal's power to protect confidential information. However, appropriate orders may be sought, made or agreed between the parties, depending on the facts.

Interim measures and sanctioning powers

29 Interim measures by the courts

What interim measures may be ordered by courts before and after arbitration proceedings have been initiated?

Regarding disputes being resolved in terms of the International Arbitration Act, a court may only grant interim measures (a decision that is not subject to appeal), if:

- the arbitral tribunal has not yet been appointed and the matter is urgent;
- the arbitral tribunal is not competent to grant the order;
- the urgency of the matter makes it impractical to seek such order from the arbitral tribunal; or
- a competent arbitral tribunal has already determined the matter.

Interim measures that can be granted are limited to:

- orders for the preservation, interim custody or sale of any goods that are the subject matter of the dispute;
- an order securing the amount in dispute but not an order for security for costs;
- an order appointing a liquidator;
- any other orders to ensure that any award that may be made in the arbitral proceedings is not rendered ineffectual by the dissipation of assets by the other party; or
- an interim interdict or other interim order.

The Arbitration Act permits a High Court to grant interim interdictory or similar relief. This does not detract from the power of the arbitration tribunal to do so, should such power be vested in it.

Parties often expressly confirm in arbitration clauses that urgent or interim relief may be sought from a court, in order to avoid disputes in this regard. Certain arbitration rules also provide for urgent relief being sought from the arbitration tribunal itself. A court will not easily non-suit a party that cannot secure effective interim relief at arbitration, in light of section 34 of the Constitution (being the right of access to court or to have a dispute determined by an appropriate, independent and impartial forum).

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30 Interim measures by an emergency arbitrator

Does your domestic arbitration law or do the rules of the domestic arbitration institutions mentioned above provide for an emergency arbitrator prior to the constitution of the arbitral tribunal?

Neither the International Arbitration Act nor the Arbitration Act make provision for emergency arbitrators. However, provision is made for urgent arbitration proceedings under certain arbitration rules, such as the AFSA Rules. Interim relief can also be secured as indicated above.

31 Interim measures by the arbitral tribunal

What interim measures may the arbitral tribunal order after it is constituted? In which instances can security for costs be ordered by an arbitral tribunal?

The arbitral tribunal appointed for disputes under the International Arbitration Act may, unless otherwise agreed by the parties, grant an interim measure, to:

- maintain or restore the status quo pending determination of the dispute;
- take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;
- provide a means of preserving assets out of which a subsequent award may be satisfied;
- preserve evidence that may be relevant and material to the resolution of the dispute; or
- only in the event of a claiming or counter-claiming party, order the provision of security for costs.

The position under the Arbitration Act depends on the arbitration agreement and applicable arbitration rules. For example, the AFSA Rules empower the arbitration tribunal to make rulings or give interim awards of an interlocutory and procedural nature, including in respect of costs and the implementation of interim awards. Where the arbitration tribunal does not have the necessary power, the court will likely come to the aid of a party.

Security for costs may be granted where there is reason to believe, based on credible evidence, that the company from whom security is required, will be unable to pay the arbitration and legal costs.

32 Sanctioning powers of the arbitral tribunal

Pursuant to your domestic arbitration law or the rules of the domestic arbitration institutions mentioned above, is the arbitral tribunal competent to order sanctions against parties or their counsel who use 'guerrilla tactics' in arbitration? May counsel be subject to sanctions by the arbitral tribunal or domestic arbitral institutions?

Arbitrators have a broad discretion to ensure procedural fairness in the arbitration process, including with respect to 'guerrilla tactics'. This is expressly confirmed in certain arbitral rules. For example, the AFSA Rules provide that the arbitrator shall have the widest discretion and powers allowed by law to ensure the just, expeditious, economical and final determination of all the disputes raised in the proceedings, including the matter of costs.

As to the latter, the arbitration tribunal's dissatisfaction with the manner in which a party has conducted itself will usually reflect in an appropriate costs order being made against that party (including counsel).

Section 22 of the Arbitration Act also provides that any person who does the following shall be guilty of an offence and liable on conviction to a fine of up to 100 rand or imprisonment for up to three months, provided that in connection with the interrogation of any such person or the production of any such book, document or thing, the law relating to privilege as applicable to a witness subpoenaed to give evidence or to produce any book, document or thing before a court of law shall apply:

- without good cause, fails to appear in answer to a summons to give evidence before an arbitration tribunal;
- having so appeared, fails to remain in attendance until excused from further attendance by the arbitration tribunal;
- upon being required by an arbitration tribunal to be sworn or to affirm as a witness, refuses to do so;
- refuses to answer fully and to the best of his or her knowledge and belief any question lawfully put to him or her during the arbitration proceedings;
- without good cause, fails to produce before an arbitration tribunal any book, document or thing specified in a summons requiring him or her to produce it; or
- while arbitration proceedings are in progress, wilfully insults any arbitrator or umpire conducting such proceedings, or wilfully interrupts such proceedings, or otherwise misbehaves in the place where such proceedings are being conducted.

Awards

33 Decisions by the arbitral tribunal

Failing party agreement, is it sufficient if decisions by the arbitral tribunal are made by a majority of all its members or is a unanimous vote required? What are the consequences for the award if an arbitrator dissents?

In terms of the International Arbitration Act, in arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made, unless otherwise agreed by the parties, by a majority of all its members. However, questions of procedure may be decided by a presiding arbitrator, if so authorised by the parties or all members of the arbitral tribunal

In terms of the Arbitration Act, where the arbitration tribunal consists of two arbitrators, their unanimous decision shall be the decision of the tribunal (if they cannot agree, they may refer the issue to an umpire). Where the arbitration tribunal consists of more than two arbitrators, the decision of the majority of the arbitrators is the decision of the tribunal. Where the arbitrators, or a majority of them, do not agree in their award, the matter shall thereupon become referable to the umpire, unless the arbitration agreement otherwise provides.

34 Dissenting opinions

How does your domestic arbitration law deal with dissenting opinions?

Neither the International Arbitration Act nor the Arbitration Act provide for dissenting opinions. Such opinions are not the decision of the arbitration tribunal, although they may assist in appeal or review proceedings that follow the arbitration proceedings.

35 Form and content requirements

What form and content requirements exist for an award?

In terms of the Intentional Arbitration Act, the award must be made in writing and signed by the arbitrators or a majority of them. The award must include the reasons, unless the parties agree otherwise or it records a settlement between the parties. The award must record the date and juridical seat of the arbitration.

In terms of the Arbitration Act, an award must be in writing and must be signed by all the members of the arbitration tribunal. The award will usually, unless the parties agree otherwise, contain reasons for the decision. If a minority of the members of a tribunal refuse to sign the award, such refusal shall be mentioned in the award but shall not invalidate it.

36 Time limit for award

Does the award have to be rendered within a certain time limit under your domestic arbitration law or under the rules of the domestic arbitration institutions mentioned above?

The International Arbitration Act does not prescribe the time limit for the rendering of an award.

In terms of the Arbitration Act, the arbitration tribunal shall, unless the arbitration agreement provides otherwise, make an award within four months of the date of appointment or requested appointment of the arbitrator. The parties may agree to extend this date, and often do so. A court may also extend this period.

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Domestic arbitration rules may also make provision for this. For example, the AFSA Rules provide that the arbitrator must make his or her final award as soon as may be practicable, and in any event, no later than 60 calendar days after completion of the hearing, unless the parties agree in writing to an extension of this period, or as extended by the secretariat in exceptional circumstances.

37 Date of award

For what time limits is the date of the award decisive and for what time limits is the date of delivery of the award decisive?

The International Arbitration Act, in certain instances, differentiates between the date of the award and receipt of the award. The date of the award is important insofar as the arbitral tribunal may, on its own initiative, correct an error in the award within 30 days of the date of the award, whereas a party must request the arbitral tribunal to correct any error in the award within 30 days from receipt of the award.

In terms of both the International Arbitration Act and the Arbitration Act, any challenge to the award is brought with reference to the date of delivery of the award (and not the date of the award).

In terms of the Arbitration Act, the award is required to be delivered to the parties present or having been summoned to appear and is deemed to be published to the parties on the date of such delivery. Parties often contract out of the requirement that the award be delivered to parties in person and agree to a mode of publication of the award. The date of the award is then the date on which the award is published in the agreed mode.

38 Types of awards

What types of awards are possible and what types of relief may the arbitral tribunal grant?

The default position (subject to any contrary agreement of the parties) is that the arbitration tribunal may make any type of award, whether of an interim or final nature, as well as a consent order and specific performance of a contract, other than awards on precluded matters or outside the terms of reference, referred to more fully above.

39 Termination of proceedings

By what other means than an award can proceedings be terminated?

Arbitration proceedings may be terminated by agreement between the parties for whatever reason (including settlement). An award may be granted by default.

In terms of article 32 of the International Arbitration Act, arbitral proceedings may also be terminated if the arbitral tribunal issues an order for termination of the arbitral proceedings where:

- the claimant withdraws his or her claim, unless the respondent objects thereto and the arbitral tribunal recognises a legitimate interest on his or her part in securing final settlement of the dispute; or
- the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

40 Cost allocation and recovery

How are the costs of the arbitral proceedings allocated in awards? What costs are recoverable?

Under both the International Arbitration Act and the Arbitration Act, the award of costs is subject to the discretion of the arbitral tribunal.

Costs traditionally follow the result, unless there has not been substantial success in the matter; the arbitrator seeks to show displeasure as to the conduct of the parties; or it is not in the public interest to grant costs.

In terms of the International Arbitration Act, when making a costs award, the arbitral tribunal may take into account the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner. Although the party responsible for the costs, the nature of the costs and the quantum of the costs or method of determining the same, may be decided by the arbitrators, unless the agreement provides otherwise, arbitrators tend to grant all of the costs actually incurred (which may include the arbitrators' fees, the arbitration institution's administration fees, venue hire, the stenographer's fees, travel expenses and expert witness fees), as well as all or most of the legal fees actually incurred. Moreover, the International Arbitration Act provides that a party requesting an interim measure shall be liable for any costs and damages caused by the measure to any party if the arbitral tribunal later determines that, in the circumstances, the measure should not have been granted. The arbitral tribunal may award such costs and damages at any point during the proceedings.

If a cost award is made in terms of the Arbitration Act, the costs will usually include the arbitrator's fees, the arbitration institution's administrative fee, venue hire, stenographer's fees, travel expenses and expert witness fees. In regard to legal fees, the arbitration tribunal must direct the scale upon which the legal fees are to be taxed (such as party–party, attorney and client, or attorney and own client scale). This scale is referenced to a High Court tariff, which is a schedule of fixed fees chargeable for each action taken by the legal team. The fees fixed are about 20–30 per cent of the actual fees incurred. The cost order may be taxed by the arbitration tribunal, or failing that, the taxing master of the High Court. Parties often agree that a cost consultant be appointed to tax the bill of costs. Any provision contained in an arbitration agreement under the Arbitration Act to refer future disputes to arbitration, to the effect that any party or the parties thereto shall in any event pay their own costs or any part thereof, is void.

41 Interest

May interest be awarded for principal claims and for costs, and at what rate?

The International Arbitration Act provides that, unless otherwise agreed by the parties, the arbitral tribunal may award interest on such basis and on such terms as the tribunal considers appropriate and fair in the circumstances, also having regard to the currency in which the award was made, and commencing no earlier than the date on which the cause of action arose and ending not later than the date of payment.

In terms of the Arbitration Act, unless the award provides otherwise, interest is levied on the payment of a sum of money in terms of an award, from the date of the publication of the award to date of payment in full. The interest rate is occasionally prescribed in the Government Gazette in terms of the Prescribed Rate of Interest Act No. 55 of 1975. It is currently 10 per cent per annum.

Proceedings subsequent to issuance of award

42 Interpretation and correction of awards

Does the arbitral tribunal have the power to correct or interpret an award on its own or at the parties' initiative? What time limits apply?

In terms of the International Arbitration Act:

- within 30 days of receipt of the award (or such other period as may be agreed), an aggrieved party may request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors, or any errors of a similar nature. Only if so agreed by the parties, and within the same period, an aggrieved party may request the arbitral tribunal to clarify the interpretation of a specific point or part of the award;
- within 30 days of the date of the award, the arbitral tribunal may correct any error on its own initiative; and
- unless otherwise agreed by the parties, a party may, within 30 days of receipt of the award, request the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award. If the arbitral tribunal considers the request to be justified, it shall make the additional award within 60 days.

The Arbitration Act provides that an arbitration tribunal may correct in any award any clerical mistake or any patent error arising from any accidental slip or omission. This can be done at any time prior to the award being made an order of court.

Arbitration rules may vary the default position in either Act, to the extent referred to above. For example, the AFSA Rules provide that a party may, within 14 calendar days after publication of the award, apply to the arbitration tribunal to correct in the award any clerical or

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typographical errors, any patent errors arising from any accidental slip or omission, errors in computation, or any errors of a similar nature.

A court may further, if approached to make an award an order of court, correct in the award any clerical mistake or any patent error arising from any accidental slip or omission.

43 Challenge of awards

How and on what grounds can awards be challenged and set aside?

Courts display deference to arbitrators and will not easily interfere in arbitration awards.

An appeal on the merits is only permissible if the parties agree to such appeal.

The award is otherwise final and binding, subject only to review on limited procedural grounds (ie, there is no appeal on the merits, unless agreed by the parties).

The International Arbitration Act provides that a court may set aside an arbitral award on application to court within three months of the date of receipt of the award.

An award may be set aside under that Act if:

- the aggrieved party proves that the party to the arbitration agreement was under some incapacity or the agreement is invalid under the agreed substantive law or, failing any indication thereon, under South African law;
- the aggrieved party was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or was otherwise unable to present his or her case;
- the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside;
- the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of the UNCITRAL Model Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with the UNCITRAL Model Law;
- the subject matter of the dispute is not capable of settlement by arbitration under South African law; or
- the award is in conflict with public policy.

The Arbitration Act provides that an arbitration award may be set aside on application to court within six weeks of publication of the award. The grounds for setting aside the award are:

- misconduct;
- gross irregularity;
- arbitrators exceeding their powers; and
- the award being obtained improperly.

The parties to a dispute under the Arbitration Act may agree to remit any matter to the arbitrator for reconsideration within six weeks of publication of the award, which must be finalised within three months (unless otherwise agreed or directed).

Insofar as a court is called upon to set aside the award on grounds of the commission of an offence as set out in Chapter 2 of the Prevention and Combating of Corrupt Activities Act No. 12 of 2004, such application must be made within six weeks of the discovery of that offence, and in any case, no later than three years after the date on which the award was published.

44 Levels of appeal

How many levels of appeal are there? How long does it generally take until a challenge is decided at each level? Approximately what costs are incurred at each level? How are costs apportioned among the parties?

The appeal from the arbitration tribunal (if any) is governed by agreement between the parties; there is no right to an appeal in the absence of agreement between the parties. The appeal is usually heard by a larger tribunal. The duration of the appeal is governed by the availability of the parties, but it is usually resolved within months. Given that no new evidence is usually led, the costs are fairly limited (save that the record must be transcribed and the costs of the arbitration tribunal are usually higher).

If the award is subjected to a review application, such application may take six to 12 months to be determined in the High Court. These applications can become costly if there is a lengthy record to peruse and analyse. A Commercial Court has recently been established in the Johannesburg High Court with an express mandate of dealing with, inter alia, arbitration disputes. The Commercial Court's process is aimed at expediting the resolution of any such disputes and is case managed by a judge allocated to the matter for its duration.

The review decision of the High Court may be subject to appeal (to either a full bench of three judges of the High Court or the Supreme Court of Appeal, in the event that leave to appeal is granted). Relatively speaking, the cost of an appeal is limited, as it includes perusal of the record, preparation of argument and the hearing. The appeal endures for one to two years.

If there is a constitutional issue or it is in the interests of justice, the Constitutional Court may also consider an application to review that arbitral award. That could endure for another year.

Costs usually follow the result, unless there has not be substantial success in the matter; the arbitrator seeks to show displeasure as to the conduct of the parties; or it is not in the public interest to grant costs.

45 Recognition and enforcement

What requirements exist for recognition and enforcement of domestic and foreign awards, what grounds exist for refusing recognition and enforcement, and what is the procedure?

Courts support the recognition and enforcement of arbitration awards.

A domestic arbitration award under the Arbitration Act may, on application to a court of competent jurisdiction by any party to the reference after due notice to the parties, be made an order of court. The award may not be recognised if, for example, it is contrary to public policy, such as in instances where it sanctions an act that is unlawful in terms of statute.

In regard to foreign arbitral awards, South Africa is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. In terms of article 35 of the International Arbitration Act, an application to recognise the award must be accompanied by the original foreign arbitral award concerned or a copy thereof and, if necessary, accompanied by a sworn translation.

The recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may only be refused where:

- a party to the arbitration agreement was under some incapacity or the agreement is invalid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
- the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or was otherwise unable to present his or her case;
- the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his or her case;
- the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside;
- the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of the UNCITRAL Model Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with the UNCITRAL Model Law;
- the subject matter of the dispute is not capable of settlement by arbitration under South African law; or
- the award is in conflict with the public policy of South Africa.

Once it is made an order of court, the award may be enforced in the same manner as any judgment or order to the same effect.

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46 Time limits for enforcement of arbitral awards

Is there a limitation period for the enforcement of arbitral awards?

Arbitration awards are considered 'debts' in terms of the Prescription Act No. 68 of 1969 (the Prescription Act) (which is considered adjectival law under South African law). Accordingly, they must be enforced within three years of receipt of the award or within which the party could have acquired knowledge of the award exercising reasonable care. Once the award has been made an order of court, it lapses after 30 years in terms of the Prescription Act.

47 Enforcement of foreign awards

What is the attitude of domestic courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

Unless the foreign award has been set aside for circumspect reasons, courts will be unlikely to enforce a foreign award that was legitimately set aside by the courts at the seat of the arbitration. They will tend to support the principle of sovereignty.

48 Enforcement of orders by emergency arbitrators

Does your domestic arbitration legislation, case law or the rules of domestic arbitration institutions provide for the enforcement of orders by emergency arbitrators?

An order granted by an emergency arbitrator may be enforced by a court on an urgent basis, if grounds for urgency exist. Such grounds generally include commercial urgency.

49 Cost of enforcement

What costs are incurred in enforcing awards?

It is difficult to estimate costs in a vacuum. If unopposed, the application ought to cost about US$10,000. If opposed, it could cost between US$20,000 and US$35,000, depending on the complexity of the issues in dispute.

Other

50 Judicial system influence

What dominant features of your judicial system might exert an influence on an arbitrator from your jurisdiction?

South African arbitrators are trained in and inclined towards adversarial processes similar to the English legal system. Disputes of fact are resolved by oral evidence. Discovery is required in respect of relevant documentation, rather than US-style discovery. The use of written witness statements has become more common. Party officers may testify. The values and rights contained in the Constitution may also influence an arbitrator.

51 Professional or ethical rules applicable to counsel

Are specific professional or ethical rules applicable to counsel in international arbitration in your jurisdiction? Does best practice in your jurisdiction reflect (or contradict) the IBA Guidelines on Party Representation in International Arbitration?

There are no specific professional or ethical rules applicable to counsel in international arbitrations, but the international best practice in accordance with the IBA Guidelines is persuasive. The usual ethical and regulatory rules will apply to legal representatives governed by the regulatory authorities for advocates and attorneys registered and on the roll in South Africa.

52 Third-party funding

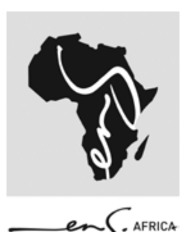
Is third-party funding of arbitral claims in your jurisdiction subject to regulatory restrictions?

Third-party funding is accepted but currently unregulated, save to note that a third-party funder may be held liable for an adverse costs order in an arbitration that it funds.

53 Regulation of activities

What particularities exist in your jurisdiction that a foreign practitioner should be aware of?

South Africa is a preferred arbitration destination in Africa, as it is an excellent jurisdiction to utilise as a seat for arbitrations. The legal system is well developed; arbitrators and counsel have deep experience in arbitration; the infrastructure of the country is good; there is a growing public transport system (particularly in major centres such as Johannesburg); and it is cost-effective. Visa requirements are dependent on, inter alia, the traveller's country of departure. Witnesses may enter the country from certain jurisdictions on a 90-day visitor's visa upon arrival. Counsel and arbitrators will be required to secure a section 11(2) visa with authorisation to work, which is typically issued within five to 10 days, provided all necessary paperwork is submitted. VAT is generally not levied on services rendered by foreign counsel or arbitrators in South Africa. Arbitrators may not award punitive or exemplary damages, as such damages would be unenforceable under South African law.



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