The International Arbitration Review

Seventh Edition

Editor
James H Carter

Law Business Research

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CONTENTS

EDITOR'S PREFACE

International arbitration is a fast-moving express train, with new awards and court decisions of significance somewhere in the world rushing past every week. Legislatures, too, constantly tinker with or entirely revamp arbitration statutes in one jurisdiction or another. The international arbitration community has created a number of electronic and other publications that follow these developments regularly, requiring many more hours of reading from lawyers than was the case a few years ago.

Scholarly arbitration literature follows behind, at a more leisurely pace. However, there is a niche to be filled by an analytical review of what has occurred in each of the important arbitration jurisdictions during the past year, capturing recent developments but putting them in the context of the jurisdiction's legal arbitration structure and selecting the most important matters for comment. This volume, to which leading arbitration practitioners around the world have made valuable contributions, seeks to fill that space.

The arbitration world is consumed with debate over whether relevant distinctions should be drawn between general international commercial arbitration and international investment arbitration, the procedures and subjects of which are similar but not identical. This volume seeks to provide current information on both of these precincts of international arbitration, treating important investor–state dispute developments in each jurisdiction as a separate but closely related topic.

I thank all of the contributors for their fine work in compiling this volume.

James H Carter
Wilmer Cutler Pickering Hale and Dorr LLP
New York
June 2016

Chapter 39

SOUTH AFRICA

Jonathan Ripley-Evans[1]

I INTRODUCTION

The South African legal system is a hybrid constitutional democracy consisting of common law (developed by judicial precedent), legislation passed by the legislative branch of the government, custom (e.g., banking custom and usage) and customary law (a parallel system of the indigenous laws of South African people) as its primary sources, with the Constitution of the Republic of South Africa, 1996 being the supreme law.

International arbitration law does not currently exist as a separate legislated branch of law. It is governed, together with domestic arbitration, by the Arbitration Act of 1965 (for ease of reference, we refer to this Act as 'the current Act'). It is important to note that, notwithstanding an indication that a new legislative framework will regulate international arbitration in South Africa, all international arbitrations are at present governed by the current Act.

South Africa is currently in the process of modernising both the law regarding international arbitration as well as aspects of the law relating to the protection of foreign investment in South Africa. Developments in both of these fields of law indicate a serious commitment by the government to the modernisation of its laws in accordance with international trends and acceptable standards – a commitment that has been developing for a number of years.

1 Jonathan Ripley-Evans is a director of Cliffe Dekker Hofmeyr.

II THE YEAR IN REVIEW

i Developments affecting international arbitration

History

To properly understand the current legislative landscape, as well as upcoming changes, a brief history of South Africa's development of its legislation on international arbitration is instructive.

South Africa promulgated the current Act almost 51 years ago. The current Act provides the statutory framework within which all arbitrations, both domestic and international, taking place within South Africa are to be conducted. The current Act was passed when international arbitration was in its infancy in South Africa, and as a result the current Act is a rather rudimentary piece of legislation. Because international arbitration was not an absolutely trusted method of dispute resolution, the South African courts were given a greater oversight role than is now regarded as acceptable (the current Act makes reference to a local court on no fewer than 78 occasions).

Under the current Act, for example, a court is given the power to order a foreign claimant in an arbitration against a locally based defendant to pay an amount as security for the costs of an arbitration (as permissible under the local rules of court).[2] While the intention behind this provision is to protect local citizens and companies from vexatious foreign litigants (over whom South African courts would not normally exercise jurisdiction), the effect was that foreign claimants were dissuaded from instituting arbitral proceedings in South Africa.

South Africa became a signatory to the New York Convention[3] in 1976, and in 1977 promulgated the Recognition and Enforcement of Foreign Arbitral Awards Act (Recognition Act).[4] The Recognition Act gave effect to the New York Convention and sought to streamline the enforcement of arbitral awards abroad. The wording used in the Recognition Act was permissive in nature, and a certain degree of discretion remained with the courts when requested to enforce international awards. The ambit of a court's discretion in this regard was, however, limited, and a decision not to enforce an international award could only be reached in certain circumstances, including due to grounds of public policy.[5]

Following South Africa's accession to the New York Convention and its subsequent promulgation of the Recognition Act, it appeared that South Africa intended taking the law of international arbitration seriously. However, South Africa then passed the Protection of Businesses Act in 1978,[6] the purpose of which was to restrict the enforcement of certain foreign judgments in South Africa, as well as orders, directions, arbitration awards and letters

2 Section 21(1)(a) of the current Act.

3 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).

4 Act 40 of 1977.

5 See the discussion below regarding the decision in *Cool Ideas 1186 CC v. Hubbard and Another* 2014 (4) SA 474 (CC), which is instructive despite concerning a domestic arbitration.

6 Act 99 of 1978.

of request, in order to protect South African citizens (and companies) from awards obtained in foreign jurisdictions that would not have been obtained in accordance with South African law. Some key provisions of the Protection of Businesses Act read:

> *Section 1(a):*
> *Notwithstanding anything to the contrary contained in any law or other legal rule, and except with the permission of the Minister of Economic Affairs:*
> *(a) no judgement, order, direction, arbitration award, interrogatory, commission rogatoire, letters of request or any other request delivered, given or issued or emanating from outside the Republic in connection with any civil proceedings and arising from any act or transaction contemplated in subsection (3), shall be enforced in the Republic.*
>
> *Section 1(3):*
> *In the application of subsection (1) (a) an act or transaction shall be an act or transaction which took place at any time, whether before or after the commencement of this Act, and is connected with the mining, production, importation, exportation, refinement, possession, use or sale of or ownership to any matter or material, of whatever nature, whether within, outside, into or from the Republic.*

Although the wording 'ownership to any matter or material, of whatever nature' is extremely vague, the High Court of South Africa[7] has interpreted this as relating only to mining and mineral products, and has ruled that the manufacture and sale of textiles, for example, did not fall within the ambit of the Protection of Businesses Act.

The Protection of Businesses Act has never been repealed or substantially amended to address the apparent contradiction between its wording and the wording of the Enforcement Act. Surprisingly, however, there is very little reported case law relating to disputes arising from this disconnect in respective pieces of legislation. The International Arbitration Act (New Act) will, however, remove the reference to arbitration in the Protection of Businesses Act so as to provide clarity and certainty with regard to the enforcement of international arbitral awards.

The period following the enactment of the Enforcement Act and Protection of Businesses Act coincided with South Africa's period of isolation, which largely explains why South African law on international arbitration did not develop in step with many other jurisdictions during this time.

In 1999, the South African Law Reform Commission (SALRC) submitted a report[8] in which it suggested that South Africa amend its arbitration laws to align itself with international best practice and to adopt the United Nations Commission on International Trade Law (UNCITRAL) Model Law.[9] The SALRC also recommended an amendment of the Protection of Businesses Act so as to remove any reference to the enforcement of foreign

7 *Chinatex Oriental Trading Co v. Erskine* 1998 (4) SA 1087 (C) at 1095F–1096C/D.

8 The Project 94 report is available at www.justice.gov.za/salrc/reports/r_prj94_july1998.pdf (accessed on 1 May 2016).

9 Ibid. at Chapter 2.

arbitral awards, and that South Africa adopt the Washington Convention[10] and subscribe to the International Centre for the Settlement of Investment Disputes (ICSID). A draft reformed arbitration bill[11] was also drafted by the SALRC. While the recommendations of the SALRC were met with great enthusiasm, various hurdles (mostly political) have hindered any progress in this field.

The New Act

In 2015, the Deputy Minister of Justice and Constitutional Development announced that the International Arbitration Bill would be passed in the (then) near future. The purpose of the reformulated International Arbitration Bill would be to incorporate the UNCITRAL Model Law into domestic law in South Africa and to align the current international arbitration law with international best practice. The International Arbitration Bill was approved by the Cabinet on 13 April 2016 but has not yet been tabled in Parliament. It appears that the proposed International Arbitration Bill will usher in the following changes to the current regime.

The UNCITRAL Model Law (subject to specific exclusions) will be given the effect of law in South Africa, and will apply to all international commercial disputes arbitrated, or awards being enforced, in South Africa. The Enforcement Act will be repealed and replaced by a chapter dealing with the enforcement of foreign arbitral awards that corresponds with current international trends and expectations. The local courts' powers and influence over international arbitral proceedings will be further reduced, and the proposed provisions will provide for only exceptional circumstances under which an international arbitral award may be set aside by a court. The proposed International Arbitration Bill is unlikely to incorporate any reference to South Africa's accession to the Washington Convention[12] or the implementation of the ICSID dispute resolution mechanisms.[13]

It is anticipated that the International Arbitration Bill will come into force during the course of 2016. The coming into force of the International Arbitration Act, as the Bill will then be known, will bring an end to a period of almost 30 years of legislative silence in the field of international commercial arbitration. The enactment of the New Act should bring with it much-needed confidence in the legislative framework applicable to international commercial arbitration in South Africa. This development comes at an opportune time in light of recent developments on the African continent regarding international arbitration and South Africa's involvement in establishing the China Africa Joint Arbitration Centre (CAJAC). However, until such time as the New Act takes effect, the current legislative regime will continue to apply.

10 The Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 1965, available at icsid.worldbank.org/ICSID/StaticFiles/basicdoc_en-archive/ICSID_English.pdf (accessed on 1 May 2016).

11 See footnote 8, an annexure to the Project 94 report.

12 See footnote 9.

13 In addition, the New Act will, *inter alia*, provide a statutory immunity to arbitrators, while the requirement to deliver an arbitral award with the parties 'being present' will fall away.

Arbitral organisations

The two main arbitral institutions in South Africa are the Arbitration Foundation of South Africa (AFSA) and the Association of Arbitrators (AOA). While both organisations also administer international arbitrations, neither is a specialist international arbitration organisation. In an effort to develop a specialised international arbitration offering, Africa ADR was formed, which sought to address alternative dispute resolution with a particular focus on Africa, mainly dealing in international disputes.

Recent developments include an initiative led by the China Law Society in the signing of the Beijing Consensus[14] on 5 June 2015. The purpose and intent of the Beijing Consensus is 'to review the traditional friendship existing between China and Africa; to observe the latest development trends of international arbitration; and to envision the cooperative prospects of establishing the China-Africa Joint Dispute Resolution Mechanism.'

On 17 August 2015, the Johannesburg Consensus[15] was signed 'to re-affirm and extend the sentiments and decisions contained in the Beijing Consensus'.[16]

The signing of the above-mentioned Consensuses are of fundamental importance in light of the rapid and substantial growth of trade and investment in Africa by Chinese entities. Traditionally, the majority of disputes arising out of trade and investment in Africa have been resolved through arbitrations administered by well-recognised and often European-based organisations (the International Chamber of Commerce and the London Court of International Arbitration). In recent years, however, a growing need has developed to arbitrate African disputes in Africa.

A major challenge facing China–Africa trade and investment relations is the disconnect between contrasting legal systems and ideals. It makes sense, therefore, to avoid questions regarding the sovereignty of nations and to refer disputes to international arbitration.

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14 The Beijing Consensus was signed by a wide range of Chinese trade commissions, arbitral bodies and universities, as well as delegates from Africa, and identifies the pressing need to establish a China–Africa dispute resolution mechanism in support of mutual trade and investment. Information is available at arbitration.co.za/pages/CAJAC.aspx (accessed 1 May 2016).

15 The Johannesburg Consensus on establishing the China–Africa joint dispute resolution mechanism being the China Africa Joint Arbitration Centre of Johannesburg and Shanghai, 17 August 2015. Information is available at arbitration.co.za/pages/CAJAC.aspx (accessed 1 May 2016).

16 Signatories to the Johannesburg Consensus are the City of Johannesburg, the Shanghai international arbitration Centre, the China Law Society, the Hainan Arbitration Commission, the International Integral Reporting Council, the King Commission on Corporate Governance, the China Research Centre of Legal Diplomacy, KPMG Inc, the South African Grain Arbitration Service Association, the China Africa Legal Research Centre, the China Africa Legal Training Base, the Cape Bar, the Johannesburg Bar, the Pretoria Bar, Bowman Gilfillan Africa Group, Cliffe Dekker Hofmeyr; Clyde & Co, OMS Attorneys, Edward Nathan Sonnenberg, Eversheds (SA) Inc, Fluxmans, Hogan Lovells, Mkhabela Huntley Adekeye, Norton Rose, Phukubje Pierce Masithela, Geldenhuys Malatji, Sefalafala Inc, Tshisevhe, Gwina Ratshimbilani Inc, Tugendhaft Wapnick Banchetti, Webber Wentzel and Werksmans.

CAJAC was formed pursuant to the signing of the Johannesburg and Beijing Consensuses, being a collaboration between AFSA, Africa ADR and AOA representing African interests, and the Shanghai International Arbitration Centre representing Chinese interests. CAJAC is also supported by the China Law Society, and will be the authorised China–Africa arbitration and mediation institute.[17]

CAJAC will initially operate out of two offices based in Shanghai and Johannesburg, with plans to expand it to other areas of Africa in due course. CAJAC has published its own model clause for the reference to arbitration as well as its own rules for the conduct of arbitration proceedings administered by it.[18] CAJAC will also maintain a panel of suitably qualified arbitrators, initially selected from candidates practicing in either South Africa or China. As CAJAC's influence in the rest of Africa grows, so too will the representation of other African countries on the panel of approved arbitrators grow.

Mr Gu Zhaomin, director-general of the overseas liaison department of the China Law Society and honorary chair of CAJAC said the following about the initiative:

> *Against this background of globalisation and international trade this is the reason why we establish and set up the China Africa Arbitration Centre [...] to resolve any disputes arising from commercial trade and investments.* [sic][19]

At the signing of the Johannesburg Consensus, Mr Bao Shaokun, the vice-chair and secretary chair of the China Law Society, said:

> *'The Chinese ruling party as well as the Government emphasises the development good relationship between China and African countries [...] Our emphasis is on the mutual development of a mutual relationship with African partners ... The China-Africa Dispute Resolution Mechanism is [...] a huge step forward [...] A Joint Arbitration Centre will benefit all the parties... We think that this is the best opportunity to create such a joint arbitration body.* [sic][20]

The establishment of CAJAC is an extremely important development in the field of international arbitration in South Africa and, read together with the changes to the legislative framework, display a serious intention on South Africa's part to establish itself as a major player in the field of international arbitration.

ii Arbitration developments in the local courts

Domestic commercial arbitration proceedings in South Africa are, for the most part, conducted privately. One of the major benefits to parties having recourse to arbitration proceedings is the privacy they offer. As such, the development of arbitration often occurs outside the South African court system, leading to relatively few reported judgments directly regarding cross-border commercial disputes. It is, however, worth noting that under the proposed International Arbitration Bill, all international arbitrations involving the state as

17 Ibid.

18 www.cajacjhb.com/systems/cajacjhb/useruploads/files/CAJAC_RULES.pdf.

19 From a speech at the signing of the Johannesburg Consensus on 17 August 2015, the China Africa Joint Arbitration Centre, Johannesburg, Information and Update 2015.

20 Ibid.

a party will be held in public, unless the arbitrator determines otherwise for compelling reasons.[21] Interestingly, there appears to be no presumption as to the confidentiality of proceedings in the International Arbitration Bill; as such, this will be determined by the arbitration agreement concluded between parties, or alternatively the rules governing the proceedings.

At present, both domestic arbitration and international arbitration are governed by the current Act, and decisions concerning the interpretation of arbitration clauses (despite their domestic nature) and arbitration in general are instructive. The decision in *Zhongji Development Construction Engineering Co Ltd v. Kamoto Copper Co SARL*,[22] discussed below, was the single decision in South Africa dealing directly with a cross-border commercial arbitral dispute. The other decisions, while being instructive, must be regarded as only having persuasive authority in regard to international arbitrations.

In the *Zhongji* case, the South African Supreme Court of Appeal (SCA) delivered what arguably is the most important judgment relating to international arbitration in recent years. The facts in Zhongji are briefly as follows: Zhongji Development Construction Engineering Company Ltd (Zhongji), a Chinese registered company, concluded two agreements with DRC Copper and Cobalt Project SARL (DCP), a Congolese registered company. One agreement was described as an 'interim' agreement and the other the 'main' agreement. The main agreement included an arbitration clause, while the interim agreement did not. Both agreements were concluded outside South Africa, and the works that were the subject of both agreements were to be performed in the Democratic Republic of Congo.

DCP was dissolved[23] and replaced by Kamoto Copper Company SARL (Kamoto), another Congolese registered company. Zhongji had invoiced DCP for all work performed under both the interim and main agreements. Kamoto denied liability for DCP's obligations and further denied that the arbitration agreement was binding on it. Zhongji applied to the High Court for an order declaring that Kamoto was liable for DCP's obligations, and that the dispute between it and Kamoto was arbitrable. The High Court refused to grant the order. Zhongji then appealed to the SCA.

In dismissing the appeal, the SCA stated the following:

> *This means that on Zhongji's own version the very issues on which it sought judicial pronouncement fell to be dealt with by the arbitration tribunal. This was because the rules place the question of the scope of the arbitrator's jurisdiction and whether any particular dispute falls within that jurisdiction in the hands of the arbitrator. That is entirely permissible. If the arbitration tribunal in due course makes an award concerning the disputed invoices, it must make findings on the second and third defences raised by Kamoto in the application. In doing so it would give effect to the terms of the arbitration clause relied on by Zhongji. If the high court were to have pronounced on these issues, it would have acted contrary to the provisions of the arbitration clause by determining issues that are within the province of the arbitrator in terms of the arbitration agreement. A court is not entitled to do that unless an order has been granted in terms of s 3(2)(b) of the Act that those particular disputes shall not be referred to arbitration. No such order has been sought or granted. This approach, and the underlying rationale for circumscribing the powers of a*

21 International Arbitration Bill, Paragraph 11.

22 2015 (1) SA 345 (SCA).

23 As a result of a merger between DCP and Kamoto.

> *court which has jurisdiction conferred by an arbitration agreement, shows appropriate deference for the autonomy of the parties to decide on the forum which should resolve their disputes. The supreme irony of the application is that Zhongji, in ostensibly seeking to enforce the arbitration clause, in effect sought to have the court act contrary to some of the terms of the agreement it invoked.*[24]

The effect of *Zhongji* is that the South African courts have now definitively confirmed the extent of their powers in matters subject to international arbitration. The South African courts will not interfere in matters that are subject to the exclusive jurisdiction of an arbitrator.[25] While it may appear that this judgment limits the powers of the courts as conferred in the current Act, it is in accordance with international expectations in relation to international arbitration proceedings and should be welcomed. This judgment has highlighted the shortcomings of the current Act, with particular reference to international arbitrations. *Zhongji* has helped pave the way for the introduction of the International Arbitration Bill (or International Arbitration Act, as it will be known once passed into law), which will bring South African international arbitration law in line with international best practice.

The dearth of cases on international arbitration in South African courts is a good indication of the courts' reluctance to interfere in international arbitrations (and arbitrations generally) and, on the strength of the dicta in *Zhongji*, the SCA has confirmed South Africa's commitment to the field of international arbitration and the fact that the South African courts have only a limited role to play in the administration of such arbitrations.

Although not as recent as *Zhongji*, in 2014 the Constitutional Court had occasion to consider the enforceability of an arbitral award directed at the performance of an act prohibited by statute. The decision in *Cool Ideas 1186 CC v. Hubbard and Another*[26] was handed down in the context of a dispute between a homeowner and an unregistered builder. The genesis of the dispute was that the homeowner had engaged Cool Ideas to construct a home. Cool Ideas was not registered under the Housing Consumers Protection Measures Act,[27] so it enlisted another company, Velvori, to complete the work. The homeowner raised issues with the standard of the work on completion of the home, and invoked the arbitration clause in the construction agreement to refuse to make the final payment for the project and claim payment of 1.2 million rand to herself for remediation of the defective work.

The eventual arbitration award favoured Cool Ideas, and the homeowner was ordered to pay Cool Ideas for the work. The homeowner did not do this, raising the fact that Cool Ideas was not a registered home builder as justification (albeit for the first time), and that therefore that the award could not be enforced and was void as it envisaged performance contrary to Section 10(1) of the Housing Consumers Protection Measures Act.[28] Cool

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24 See footnote 18 at Paragraphs [53] to [55].

25 Subject to defined instances as detailed in the current Act, for example, in addition to those mentioned in footnote 28, instances where the enforcement of the award would be against public policy or would bring about the perpetuation of an unlawful act.

26 2014 (4) SA 474 (CC).

27 Act 95 of 1998.

28 See footnote 25. Section 10(1) of the Housing Consumers Protection Measures Act provides as follows: '(1) No person shall – (a) carry on the business of a home builder; or (b) receive any consideration in terms of any agreement with a housing consumer in respect of the sale or

Ideas suggested that it was not required to register because it had engaged a registered home builder (Velvori) to conduct the actual construction. Cool Ideas therefore went ahead with an application to have the arbitral award made an order of court.[29]

The High Court found in favour of Cool Ideas, suggesting that there is 'no authority for the proposition that s 31(1) of the [current Act] confers a discretion on the court to refuse the application [to make an arbitral award an order of court] if it finds the award to be incorrect'.[30]

This finding is in line with the overarching principle that the South African courts will not regard themselves as courts of appeal in this type of enforcement application, and will enforce arbitral awards unless particular circumstances exist. In this case, one of those circumstances existed. On appeal to the SCA, the decision of the High Court was overturned, and the SCA refused to order the enforcement of the award because it was clearly contrary to a statutory provision. On final appeal to the Constitutional Court, it too found that such an arbitral award could not be sanctioned and enforced by the courts, despite the general principle alluded to above, as this would sanction an illegality. The Constitution Court stated:

> *What we are seized with here is therefore not the correctness or otherwise of the arbitral award, but with the question whether the award ought to be made an order of court if the court order would be contrary to a plain statutory prohibition [i.e. the prohibition contained in section 10(1) of the Housing Consumers Protection Measures Act]. [...] It cannot be expected of a court of law in such circumstances to disregard a clear statutory prohibition – that would be inimical to the principle of legality and the rule of law.*[31]

The Constitutional Court regarded the arbitral award, in circumstances such as these, to be contrary to public policy. However, the Court went on to state:

> *That is not to say that a court can never enforce an arbitral award that is at odds with a statutory prohibition. The reason is that the constitutional values require courts to 'be careful*

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construction of a home, unless that person is a registered home builder.'

29 Section 31 of the current Act provides that:

> *(1) An award may, on the application to a court of competent jurisdiction by any party to the reference after due notice to the other party or parties, be made an order of court.*
> *(2) The court to which application is so made, may, before making the award an order of court, correct in the award any clerical mistake or any patent error arising from any accidental slip or omission.*
> *(3) An award which has been made an order of court may be enforced in the same manner as any judgment or order to the same effect*

30 See footnote 22 at Paragraph [16]. Reasons a court might set aside an arbitral award are contained in Section 33 of the current Act, namely misconduct by the arbitrator, gross irregularity in the proceedings or where an arbitral award is improperly obtained. A court is also empowered in terms of Section 32(2) of the current Act to remit an award back to an arbitrator on the request of a party showing good cause.

31 See footnote 2 at Paragraph [55].

> *not to undermine the achievement of the goals of private arbitration by enlarging their powers of scrutiny imprudently. Courts should respect the parties' choice to have their dispute resolved expeditiously in proceedings outside formal court structures.*[32]

The decision of the Constitutional Court in *Cool Ideas* cements the approach that courts will in general protect party autonomy and enforce arbitral awards; however, this is tempered by the possibility of the courts refusing to do so where the arbitral award offends public policy.

Interestingly, Paragraph 18 of the International Arbitration Bill provides that a court may only refuse to enforce an award in circumstances where 'a reference to arbitration of the subject-matter of the dispute is not permissible under the law of the Republic; or the enforcement of the award is contrary to the public policy or was made in bad faith'. The 'bad faith' provision is new, and may well lead to further litigation on its interpretation.

A somewhat older but no less important case concerning the interpretation of (domestic) arbitration clauses is the case of *North East Finance (Pty) Ltd v. Standard Bank of South Africa Ltd*.[33] In this case, the parties had entered into a settlement agreement to end their relationship, and that settlement agreement contained an arbitration clause that provided the following:

> *In the event of any dispute of whatsoever nature arising between the parties (including any question as to the enforceability of this contract but excluding the failure to pay any amount due unless the defaulting party has, prior to the due date for such payment, by notice in writing to the other party disputed liability for such payment), such dispute will be referred to arbitration in the manner set out below.*[34]

The bank alleged that fraud induced the conclusion of the settlement agreement, which, in South African law, rendered it voidable at the instance of the bank. The bank therefore chose to walk away from the contract, thereby voiding it. The bank subsequently refused to put the question as to whether fraud had in fact occurred to arbitration, as it believed the arbitration clause fell with the contract. The SCA affirmed that it is indeed possible for parties to agree that the validity of their agreement be determined by arbitration even though the arbitration clause is part of the impugned contract.[35] However, if the parties wish to do so, they must be ensure to draft the clause in a manner that makes this fact abundantly clear. In this case, the SCA found that in light of the prevailing circumstances, it could not be said that the parties had contemplated and agreed that the validity and enforceability of the agreement induced by misrepresentations should be questions subject to arbitration.

iii Investor–state disputes

In South Africa, there is no obligation on parties to an arbitration to report the existence of the arbitration or of the outcome of such an arbitration. South Africa is also not a party to ICSID; therefore, the authors cannot state unequivocally that these are the only investor–state disputes involving South Africa.

32 See footnote 2 at Paragraphs [56] and [57].

33 2013 (5) SA 1 (SCA).

34 Ibid. at Paragraph [4].

35 Ibid. at Paragraph [16].

Pending

Oded Besserglik v. Republic of Mozambique[36] remains pending before ICSID.[37] The dispute invokes the Mozambique–South Africa bilateral investment treaty (BIT), which is still in force. The claimant is South African, and the respondent filed its counter-memorial on 22 April 2016. The claim concerns alleged expropriation of prawn-fishing quotas of a joint fishing operation in which the claimant had invested.[38]

Completed

Foresti and others v. Republic of South Africa[39] was concluded through discontinuation before ICSID in 2010, and was based on the now-terminated Belgium–Luxembourg/South Africa BIT.[40]

Status of BITs in South Africa

Many BITs entered into by South Africa were concluded at the time of South Africa's political transition into a constitutional democracy in an effort to comfort foreign investors and to encourage further investment in the country. Since 1994, South Africa has systematically strengthened the regime protecting foreign investors against expropriation. The Constitution further guarantees protection against expropriation without compensation.

Since 2001, there has been a steep rise in international investment disputes, which has encouraged many countries (South Africa included) to review their BITs. During the period between 2007 and 2010, South Africa reviewed its BITs and reached the following conclusions:

> *Certain proponents argue BITs attract FDI and offer protection to foreign investors in jurisdictions where legal regime is weak or biased against foreigners. This premise no longer holds true in SA. There is no clear relationship between BITs and increased FDI inflows (referring to World Bank and UNCTAD studies, amongst others); South Africa receives no FDI from many countries with whom it has a BIT in place and it receives FDI from countries without BITs in place (USA, Japan, India); SA now offers robust investor protection, which is guaranteed in the Constitution.*[41]

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36 ICSID Case No. ARB (AF)/14/2.

37 Under the ICSID additional facility provisions.

38 International Centre for the Settlement of Investment Disputes (ICSID), Cases: icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/AdvancedSearch.aspx?cs=CD27;CD28&cte=CD18&cntly=ST157 (accessed 1 May 2016).

39 ICSID Case No. ARB (AF)/07/1. For an analysis of the *Foresti* decision, see Brickhill J and du Plessis M, 'Two's company, three's a crowd: Public interest intervention in investor-state arbitration (Piero Foresti v South Africa)', 2011 *South African Journal of Human Rights* 27 1 152–66.

40 ICSID: icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1651_En&caseId=C90 (accessed 1 May 2016). The discontinuance was pursuant to an agreement reached between the parties in December resulting in partial satisfaction of the claimants' claims.

41 South Africa and Bilateral Investment Treaties, presented by Xavier Carim, Deputy Director General, Department of Trade and Industry to the 26th Annual Labour Law Conference at the Sandton Convention Centre on 31 July 2013: www.saiia.org.za/speeches-presentations-other-events-materials/792-2013-09-06-pres-xavier-carim-sa-bits-dti/file.

In addition, the review highlighted serious deficiencies in first-generation BITs arising from the lack of precision and ambiguities in the drafting of core legal provisions. It therefore appears that BITs clear the way for foreign (not domestic) investors to challenge almost any measure deemed to undermine their 'expectation' of profit. This, in turn, undermines the domestic legal system and can pose challenge to democratic decision making.[42]

The Deputy Minister of Trade and Industry stated at a session hosted by the South African Chamber of Commerce and Industry:

> *We have found that there is no correlation between the existence or non-existence of bilateral investment treaty and the flow of direct foreign investment. There are countries with whom we have bilateral treaties, but almost no investment. Conversely, there are countries we have no bilateral treaties with such as Japan, United States of America and India, but we have a significant flow of investment from those countries. Our investment sources are diversified.*[43]

As a result of the conclusions reached by the government regarding the inappropriateness of the existing BITs, South Africa has expressed its intention to review and possibly cancel certain existing BITs,[44] which would coincide with an amendment to the local laws that would offer appropriate protection to foreign investors. Of the 49 BITs signed by South Africa, only 24 have actually come into force. During the period since 2012, South Africa has cancelled nine of its BITs.[45]

The Protection of Investment Act was published on 15 December 2015. It seeks to regulate and formalise the protection afforded to foreign investors investing in South Africa. In a media statement dated 23 January 2016, the Department of Trade and Industry stated the following:

> *The Protection of Investment Act seeks to achieve a number of objectives. First, it clarifies the level of protection that an investor may expect in South Africa, thereby removing any uncertainty about what is the applicable investment protection legislation in South Africa. Second, and most importantly, the Act aligns South Africa's investment protection obligations with the Constitution of the Republic of South Africa. It should be noted that the introduction of such investment protection legislation is consistent with recent global trends. Countries such as Canada, Australia, India, Brazil and Indonesia have all undertaken reviews of their Bilateral Investment Treaties (BITs) with a view to enacting reforms.*[46]

Importantly from an international arbitration perspective, Section 13(5) of the Protection of Investment Act provides only for the international arbitration of investment disputes once

42 Ibid.

43 www.thedti.gov.za/editmedia.jsp?id=2988.

44 South Africa not Averse to Bilateral Investment Treaties. Minister Davies. www.thedti.gov.za/editmedia.jsp?id=2988.

45 Austria on 11 November 2014; Belgium on 7 September 2012; Denmark on 31 August 2014; France on 1 September 2014; Germany on 22 October 2014; The Netherlands on 1 November 2013; Spain on 23 December 2013; Switzerland on 1 November 2013; and the United Kingdom on 1 September 2014.

46 www.thedti.gov.za/editmedia.jsp?id=3630.

all domestic remedies have been exhausted, and only with the consent of the government of South Africa. It is therefore clear that the government now regards international arbitration as a means for the resolution of investment disputes as an exception to the rule, and not to be the preferred method of resolving such disputes.

Such conduct may, at first sight, appear to be a deterrent to foreign investment, but once regard is made to international trends in this particular field, South Africa's move to retain a certain degree of control over the resolution of disputes relating to foreign investment in South Africa should not be alarming. In fact, such move is likely to contribute to the positive development of South African jurisprudence in this field, with more and more judgments and decisions regarding investment disputes likely to be published in the future.

III OUTLOOK AND CONCLUSIONS

Eventually, concerns surrounding South Africa's outdated international arbitration laws will dissipate with the coming into force of the New Act. Notwithstanding the best efforts of numerous advocates for South Africa as a seat for international arbitrations, they have, until now, effectively been fighting with one hand tied behind their backs.

With the recent establishment of CAJAC and the promise of the resolution of international disputes between Chinese and African parties, the timing of the coming into force of the New Act (provided that this occurs in 2016 as planned) is opportune. It is expected that this area of the law will see significant growth both in South Africa and Africa in the near future.

South Africa already has the necessary infrastructure to successfully administer international arbitrations, and very soon will have the required legislative framework that will enable it to establish itself as the choice seat for international arbitration in Africa.

It is also the intention of the government to pass an updated version of the current Act, which will be applicable to domestic arbitrations only. This will put the last remaining piece in place in South Africa's arbitration legislative framework.

Appendix 1

ABOUT THE AUTHORS

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Jonathan is a director in the dispute resolution department of Cliffe Dekker Hofmeyr, based in its Johannesburg office. Jonathan began his career as a candidate attorney at Cliffe Dekker Hofmeyr in 2009 and was appointed as an associate in 2011. In 2013, Jonathan was promoted to senior associate and in 2016 became a director. Jonathan obtained his BCom (law) degree from the Rand Afrikaans University, his LLB degree from the University of Johannesburg, his LLM degree from the University of Saarland (Germany) and an advanced certificate in alternative dispute resolution through the University of Pretoria in collaboration with the Arbitration Foundation of South Africa (AFSA). Jonathan is a member of the Law Society of the Northern Provinces and a member of the Chartered Institute of Arbitrators, and is an AFSA accredited mediator and arbitrator. Jonathan's practice comprises mainly general commercial litigation with a particular focus on alternative dispute resolution.

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