Dispute Resolution

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SOUTH AFRICA

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DISPUTE RESOLUTION ALERT

Home or away? Establishing if domestic or international arbitration legislation applies

For over 50 years arbitrations in South Africa were governed by the Arbitration Act 42 of 1965. This legislation did not distinguish between, or prescribe different procedures for, international and domestic arbitrations. This changed in 2017 with the promulgation of the International Arbitration Act 15 of 2017 (International Act). Since then (subject to transitional provisions applicable to arbitrations that began prior to 2017) international arbitrations seated in South Africa are governed by the International Act, whereas domestic arbitrations continue to be governed by the 1965 legislation (Domestic Act).

Each act defines which arbitrations they apply to and will apply by default when those circumstances are satisfied. Over time, the circumstances, parties or the place of performance of the contract can evolve, meaning a contract that was '*international*' at the time of contracting becomes '*domestic*' in nature, and *vice versa*. However, the International Act provides that the test for internationality is applied to the circumstances that existed at the time the arbitration agreement was concluded, not at the time of any future arbitration.

Parties should therefore be alert to the default application of either the International Act or the Domestic Act when negotiating arbitration agreements, taking advice on the implications and consequences for the transaction and any potential future arbitration.

The differences between the acts

The Domestic Act predates the International Act by over 50 years. Therefore, not unexpectedly, the different acts apply for different procedures and priorities for arbitrations conducted under them. This can have significant consequences for the conduct and process of an arbitration and the enforceability of a final arbitral award.

The International Act incorporates (with some modifications) the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, 1985 (Model Law). The Model Law represents a global legal framework that over 100 legal jurisdictions, including prominent international arbitral hubs such as Singapore, Hong Kong, Kenya and Mauritius, have incorporated into their domestic law. It is designed to achieve greater worldwide standardisation and harmonisation of international arbitration legislation, assisting states to reform and modernise statutory frameworks to accommodate the features of international commercial arbitration.

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In South Africa, there are notable differences between the Domestic Act and the Model Law-derived International Act. These differences have significant consequences for the parties and the conduct of the arbitration process, including the:

- grounds and time limits for courts to set aside an arbitral award;
- circumstances in which court intervention is permitted;
- separability of the arbitration agreement (which determines whether it can survive a declaration of invalidity of the underlying contract);
- statutory protection available to arbitrators acting in good faith; and
- confidentiality applicable to the proceedings and the circumstances in which proceedings are heard in private or public.

Which act applies?

The International Act applies to arbitrations in South Africa that are (i) "*international*"; and (ii) "*commercial*". The Domestic Act is not applicable to any arbitration that is within the scope of the International Act. Consequently, if the "*international*" and "*commercial*" criteria are satisfied, then the arbitration is, by default, within the scope of the International Act and it is those provisions (including the relevant powers of the courts) that will apply.

The meaning of "*international*"

Article 1(3) of the International Act confirms that an arbitration is international if:

- the parties have their places of business (being the place most closely connected with the arbitration agreement if they have multiple places of business) in different states; or
- the place of arbitration, place of performance of a substantial part of the obligations, or place most closely connected which the subject matter of the dispute, is situated outside the state in which the parties have their place of business; or
- the parties agree that the subject matter relates to more than one country.

This scope is purposefully broadly drafted. In most circumstances ascertaining whether an arbitration is within the international scope will be straightforward, and UNCITRAL has confirmed in its Explanatory Note to the Model Law that that the criteria will be met in "*[t]he vast majority of situations commonly regarded as international*".

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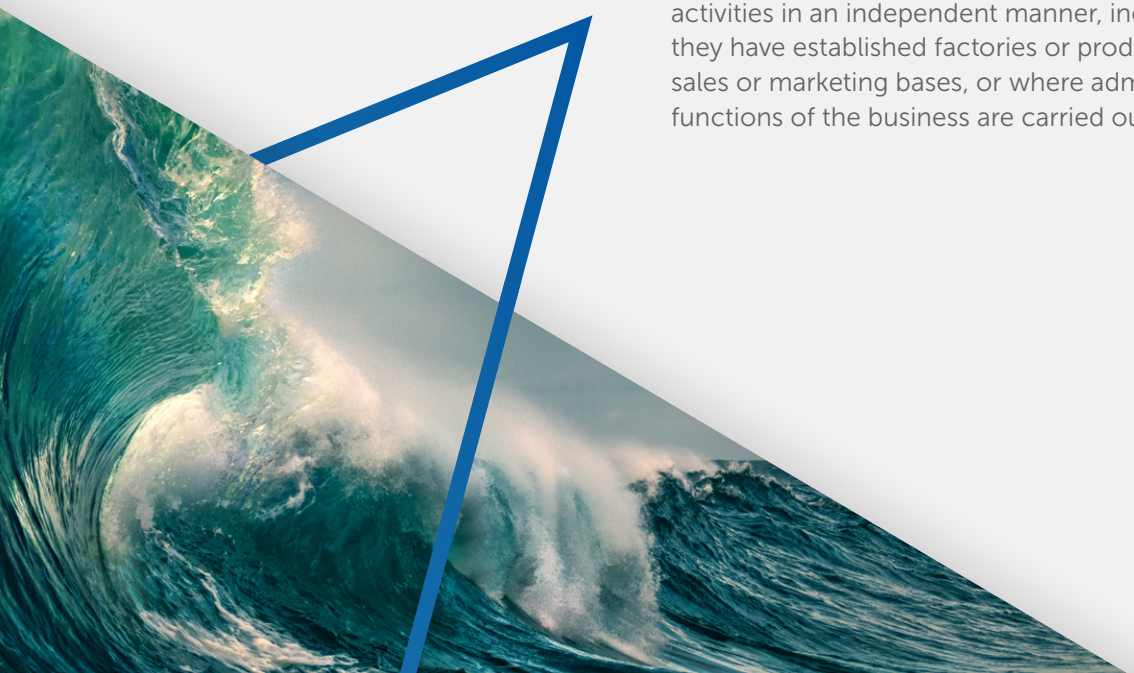

However, circumstances may arise where it is not expressly clear if the scope has been met, for example whether the performance of some, but not all, contractual obligations overseas constitutes a *"substantial part"* of the contract. It could also be difficult to ascertain where a party's place of business is if they fail to disclose sufficient information about their international commercial activities.

The interpretation and application of the international criteria has not been extensively tested before the South African courts. However, some interpretative guidance can be gained from other countries that have also adopted legislation identical or similar to the Model Law. In this respect UNCITRAL's Digest of Case Law on the Model Law ('*Digest*') which is available here. The Digest confirms that courts in other Model Law jurisdictions have determined that:

- A company's *"place of business"* can include any location from which a party participates in economic activities in an independent manner, including where they have established factories or production plants, sales or marketing bases, or where administrative functions of the business are carried out.
- The fact that a party's shareholders are international does not necessarily render the matter international.
- Only one international element needs to be satisfied for the arbitration to be deemed international. For example, an arbitration will be international if a contract is performed overseas, despite both parties having their places of business in the same state and the agreement being governed by the law of that state.
- In determining where a *"substantial part of the obligations"* is performed, courts have held that:
  - Where an agreement is for the sale of goods, the place of delivery and acceptance of goods, or the place of transfer of risks and loading operations, should be considered as a place where a substantial part of the obligations was performed.
  - *"Substantial"* could mean *'most of'* the obligations but could also mean a minority of obligations if they are nonetheless *"substantial"* in nature, such as the transport of goods between international ports.
  - The place where the breach of obligations occurred is not a relevant consideration.

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The meaning of "*commercial*"

The Model Law's commentary and footnotes call for a wide interpretation of "*commercial*" including the supply or exchange of goods or services; distribution agreements; construction; consulting; licensing; investment; financing; exploitation agreements or concession and joint ventures.

Again, the interpretation of this has not been extensively tested before the South African courts but the Digest confirms that courts in other Model Law jurisdictions have determined that:

- The term should be interpreted broadly to encompass a wide spectrum of activities.
- Agreements for contractor or consultancy services and contracts entered into between a company and a director could be commercial. However, labour and employment disputes in an employer/employee relationship may not be.
- A transaction does not need to involve '*commercial persons*' to be commercial. For example, a residential property sale can constitute a commercial transaction, and pursuant to Article 1(4) of the International Law, if a party is an individual then their place of habitual residence will serve instead of their "*place of business*" for the purpose of determining if an arbitration is international.

Veronica Connolly

DISPUTE RESOLUTION ALERT

Legal fees gone wild: A case of costs, controversy and common sense

The South African legal system witnessed a sobering showdown in the case of *Sports Tavern & Restaurant and Others v Executor Estate Late Santos* (HCAA 01/2023) [2025] ZALMPPHC 17 (5 February 2025), with arguments revolving around what constitutes "*reasonable legal fees*". The matter centred on a bill of costs submitted by the appellants (Sports Tavern and Others), where a striking R20,000 was claimed as a day fee by an attorney in an unopposed Rule 30 application that became postponed.

The issue in this case was whether an attorney with right of appearance who appeared in the High Court to move an unopposed application under Rule 30 was entitled to claim a day fee similar to that of advocates. This question touches on the interpretation of Rule 69, Item A10, and Rule 70 of the Uniform Rules of Court, as well as relevant case law.

The appellants argued that attorneys with the right of appearance in the High Court should be entitled to fees equivalent to those of advocates, as per Item A10 of the Tariff of Fees under Rule 70. This item suggests that attorneys performing the functions of advocates in the High Court should have their fees determined in accordance with Rule 69. Rule 69(5) provides that where no specific tariff applies, the taxing master has the discretion to allow fees that are reasonable. This discretion is central to determining whether a day fee is justified.

Rule 70 outlines the taxation process for attorneys' fees and emphasises that costs must reflect reasonable remuneration for necessary work properly done. The taxing master must balance indemnifying the successful party with ensuring fees remain within reasonable bounds.

Background

The taxing master initially allowed R5,400 for the appearance, but the respondent challenged this figure. In subsequent reviews, the court reduced the attorney's fees further to a modest R1,752 for 1,5 hours of work. But this wasn't the end of the matter – the appellants insisted their original claim was justified, citing the uncertainty in the rules regarding tariffs for attorneys appearing in the High Court.

Judge Muller, who presided over the appeal, criticised the appellants for persisting in their demand for such an exorbitant fee. Highlighting the difference in complexity between unopposed and opposed applications, he emphasised that a seasoned attorney should have known better. Ultimately, the court set the attendance fee at R3,500, striking a balance between what was deemed reasonable and what aligned with the principles of justice.

Legal fees gone wild: A case of costs, controversy and common sense

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Conclusion

In delivering the judgment, the court also underscored a larger issue plaguing the legal profession: spiralling legal costs. Judge Muller pointed out the public perception of these costs as unaffordable and called for better oversight to prevent "*egregious overreaching*" by legal practitioners. The judgment was referred to the Legal Practice Council for further consideration, signalling a firm stance against exploitative practices.

This case raises critical questions about the responsibilities of legal professionals and the role of the judiciary in regulating costs. On the one hand, attorneys should be fairly compensated for their expertise and efforts. On the other hand, the profession must balance this with ethical considerations and the broader goal of accessibility to justice.

The original R20,000 charge was as an example of what many would perceive as overreach, potentially eroding public trust in the legal system. The court reminded the taxing master of its responsibilities and remarked that the time has come for instances of overreaching to be reported to the registrar for onward reporting to the Legal Practice Council.

Legal practitioners must reflect on their duty not just to their clients but to society as a whole. As Judge Muller aptly noted, making the High Court accessible doesn't necessarily mean making it affordable. If the profession is to maintain its dignity and public confidence, it must tread carefully in navigating the fine line between reasonable remuneration and opportunism.

Roy Barendse and Divina Naidoo

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BBBEE STATUS: LEVEL ONE CONTRIBUTOR
Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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