Has the sun set on South Africa's arbitration ambitions?

Kemi Adekoya and **Michael Mendelblat** of **Herbert Smith Freehills LLP** look at the new Arbitration Bill recently introduced to the South African Parliament that will apply to international arbitrations, which should increase its appeal as an arbitration venue.

KEY POINTS

- A new Arbitration Bill has been introduced into the South African Parliament
- It applies only to international arbitrations
- It incorporates most of the UNCITRAL Model Law
- Minimal court involvement is envisaged in international arbitrations
- Bringing South African arbitration law into line with the UNCITRAL model should promote growth and increase the attractiveness of the country as an arbitration venue

On 1 March 2017, the Cabinet of South Africa approved the introduction of the International Arbitration Bill (the Bill) into Parliament. The Bill replaces the 1965 Arbitration Act in respect of international arbitrations. The Bill aims to modernise South Africa's international arbitration regime and is a response to other African jurisdictions becoming increasingly attractive arbitration and investment destinations. The Deputy Minister of Justice and Constitutional Development, John Jeffrey, described the development of the Bill as 'the dawn of a new era in arbitration'. However, while the Bill is a welcome development, it has come very late in the day, and there are many countries in Africa that are ahead of South Africa in the race to become the region's arbitration hub. Thus the sun may already have already set on South Africa's ambitions to be the 'Gateway to Africa' for international arbitration.

Construction projects in Africa – a changing landscape

According to the 2014 United Nations report on World Urbanization Prospects, by 2050 Africa's current population of 1.2 billion will double. In light of this population growth and increasing urbanization, investment in infrastructure will continue to be an important part of the 'Africa Rising' story. New infrastructure investment opportunities have also opened up as result of the easing of geopolitical tensions and recognition by governments across the continent that they need to focus on diversifying their countries' economies away from the traditional bastions of oil and gas. As at June 2016, Africa's largest construction projects were worth a collective US$324 billion and infrastructure related business activities made up 13 per cent of all projects in Africa and accounted for 44 per cent of capital invested.

South Africa has the highest number of infrastructure projects, by country, in Africa and continues to account for the largest amount of infrastructure and capital project activity in Southern Africa with the South African government committing US$4 billion of its 2017 national budget to fund infrastructure projects. As to South Africa's future plans – speaking at the South Africa-Tanzania Business Forum Meeting in May 2017, South African President Jacob Zuma pronounced:

> 'South Africa is particularly going big on infrastructure development. Our domestic investments include the construction of ports, roads and railway systems as a path to stimulate economic growth and link us to our neighbours in Southern Africa, and eventually the rest of the continent.'

Arbitration is a facilitator for foreign direct investment in African construction projects

During his visit to the African Union in 2014, Chinese Premier Li Keqiang announced that China expects to achieve US$400 billion in trade volumes with Africa and raise its direct investment in the continent to US$100 billion by 2020. But China certainly isn't the only country investing in African infrastructure projects. In 2015 investment into infrastructure related areas including power, construction and ICT made up 44 per cent of all foreign direct investment into Africa. While China was responsible for 12.6 per cent of construction project funding, the UK was the largest foreign owner of projects in Africa (with the majority of owners being government or private domestic entities).

In 2015, foreign direct investment in Africa hit a record US$60 billion, five times its 2000 level. Africa is increasingly an attractive proposition for foreign investors, who see significant opportunities in Africa's non-commodities sectors. However, a foreign investor is likely to want to know what provision is made for the resolution of trade and investment disputes.

Most disputes in Africa are solved through commercial settlement, with companies and states alike preferring negotiation over the uncertainties of litigation. However, with the sharp increase in foreign investment across an array of sectors, including construction, the scope for formal dispute resolution in Africa has inevitably increased and will continue to do so. Of the formal dispute resolution mechanisms available, international arbitration is fast becoming the go-to method across the continent. Arbitration is regarded as a sign of a country being open for business and aware of investor concerns and market practice.

African governments are keen to promote the use of arbitration wherever possible to attract foreign investment. Conversely, foreign investors, who may be wary of proceedings in local courts, often prefer arbitration for its neutrality, flexibility, choice of rules and venue, and – in many instances – confidentiality. Investors are increasingly facing the option – and perhaps pressure – to agree to an African arbitral seat and institution.

South Africa has been slow out of the starting blocks

The number and sophistication of regional arbitration centres across the continent is increasing and will continue to be one of the key themes in the African arbitration narrative.

Over the years, a number of African jurisdictions have been jostling for position to be the continent's arbitration hub, however South Africa is only now taking its first steps towards becoming a contender for the role. South Africa has left it late to join the race, despite there being calls for it to develop as a regional centre for international commercial arbitration since the early 1990s.

Following the end of apartheid, there was recognition of an urgent need to consider whether or not South Africa should adopt the 1985 Model Law on International Commercial Arbitration, as adopted by the United Nations Commission on International Trade Law (the Model Law). The Model Law has been adopted by many countries, and as at June 2017, some 75 countries had adopted arbitral legislation based on the Model Law.

The South African Law Commission published a report in 1998 recommending that South Africa incorporate the Model Law.

The Law Commission introduced their report by stating:

> 'The ending of the economic isolation of South Africa is leading to increased regional trade and economic links with other countries. As parties to international business transactions favour arbitration … it is important that the country's arbitration law should be in line with international norms.'

The Bill was classified by Parliament in 2002 as one of the 'urgent bills of a high priority', however it has taken another 15 years for the Law Commission's recommendations for to be introduced. The first draft of the Bill was the victim of legislative languor and was never formally tabled.

At last! An International Arbitration Bill for South Africa

Finally, following a lengthy stakeholder engagement process, on 1 March 2017 the Cabinet of South Africa approved the introduction of the Bill into Parliament. The South African government had expressed hopes that the Bill would be ready to be signed into law in the middle of 2017, however at the time of writing it is still not known when the Bill will be enacted. The stated aim of the Bill is to:

> '… improve access to justice services and to ensure

> the realisation of the National Development Plan target of expanding trade and investments and positioning South Africa in the world.'

Cabinet also recognised that reforming South Africa's arbitration laws could:

> '... contribute to increased economic growth and investment as well as ensure that South Africa is an attractive venue for parties around the world to resolve their commercial disputes.'

As a preliminary point, it should be noted that the Bill only applies to international arbitrations, and therefore the 1965 Arbitration Act will continue to govern domestic arbitrations. Investor-state disputes are subject to a different statutory regime, namely the Protection of Investment Act which was signed into law in December 2015 but is not yet in force. Pursuant to the Protection of Investment Act, South Africa will no longer subject itself to investor-state arbitration, but the government may consent to international arbitration between the state of South Africa and the home state of the investor. While the Protection of Investment Act contains a provision for the South African government to consent to international arbitration, this is subject to the exhaustion of domestic remedies.

The Bill will:

- incorporate, with amendments, the UNCITRAL Model law which has already been used as the basis of arbitration law in other African jurisdictions, including Kenya, Madagascar, Mauritius, Nigeria, Rwanda, Tunisia, Uganda, Zambia and Zimbabwe;
- allow for contracting parties to use conciliation proceedings in accordance with the UNCITRAL Conciliation Rules to settle their disputes;
- incorporate the wording of the stand-alone Recognition and Enforcement of Foreign Arbitral Awards Act 1977 (REFAAA). REFAAA will then be repealed in its entirety once the Bill is enacted. The Bill excludes a public-interest 'veto' by the government over the recognition and enforcement of foreign arbitral awards, however an award will still not be recognised and enforced if it is impermissible under South African law, is contrary to public policy or was made in 'bad faith';
- remove any reference to 'arbitration awards' from the ambit of the Protection of Businesses Act 1978, such that that Act will no longer apply to the enforcement of foreign arbitral awards;
- also bind public bodies and apply to any arbitration agreement to which a public body is a party (save for investor-state arbitrations which will be governed by the Protection of Investment Act); and
- grant arbitrators immunity for acts or omissions arising during the course of the discharge of their function, unless the act or omission is shown to have been done in bad faith.

The Model Law envisages minimal court involvement in arbitrations. This is a significant departure from the 1965 Arbitration Act, which gives the South African courts a wide discretion to set aside foreign awards or refuse their enforcement. While the South African courts have exercised restraint in interpreting the 1965 Act, the Bill provides much needed certainty that international arbitrations will not be frustrated by the local courts.

Can slow and steady win the race?

It is difficult not to feel that South Africa's delay in reforming its international arbitration regime has placed it significantly behind other African jurisdictions in the race to become the region's arbitral hub. In 2007 South Africa was selected to host the Permanent Court of Arbitration's (PCA) Regional Facility for Africa, but after waiting two years for South Africa's legislative reform, the PCA moved its seat to the Mauritius, which adopted the Model Law in 2008. The Mauritius has since developed award winning arbitration facilities in collaboration with the London Court of International Arbitration.

However, we must not forget that the continent is huge: there is certainly room for more than one arbitration hub. The South African government has demonstrated its interest in setting up an international arbitration centre, and has already established the China-Africa Joint Arbitration Centre which officially opened on 26 November 2015 and serves as an international arbitration venue for disputes involving parties from China and Africa.

South Africa can therefore keep hope that the adoption of the Bill does not come too late to assist it in becoming a regional and international arbitration centre. **CL**