Kluwer Arbitration Blog

Arbitration in South Africa Receives Another Boost

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International arbitration is on the rise in South Africa. This is partly a result of the country's new arbitration law, which was passed in 2017, but now the process has been given a further boost by the publication by the Arbitration Foundation of Southern Africa (**AFSA**) of its draft International Arbitration Rules (the **Draft Rules**), which are currently out for public consultation and comment.

A new law

When South Africa's International Arbitration Act (**IAA**) was passed three years ago, it was a significant development in the region. Many parties choose arbitration in their international agreements; however, this is only desirable if an arbitration is seated in a jurisdiction where courts give support when needed, but otherwise do not interfere. The IAA entrenches this approach. Being based on the UNCITRAL Model Law, it provides a familiar framework for administering an arbitration, clarity of process and procedure, and certainty that foreign arbitration agreements and awards will be recognised and enforced within the jurisdiction. It also helps reassure outsiders that the process will be neutral, without biased interventions from local courts. All this gives parties in neighbouring countries (and beyond) the confidence to seat their arbitrations in South Africa.

Draft rules

A good arbitration law is only one side of the equation, however. Other factors that parties look for include a developed judicial system, good physical and technological infrastructure, established arbitrators and arbitral institutions, and modern arbitral rules. So far South Africa has lacked only the latter; however, AFSA is now plugging this gap with the publication of their Draft Rules. These have been crafted to comply with the laws of the major sub-Saharan jurisdictions, but do not appear specifically parochial in any obvious way. On the contrary, they incorporate a number of procedures developed recently by leading global institutions, and strike a careful balance on many sensitive and important issues such as expedited procedures, early dismissal, confidentiality/transparency and third party funding. They also make provision for remote hearings, which may remain in fashion after the current COVID-19 pandemic has gone away (Art 21(6)).

Abbreviated procedures

For a long time arbitration trailed behind the courts in dealing with weak cases expeditiously. Courts will often strike out flawed claims, grant summary judgment, or grant default judgment when a defendant refuses to cooperate. Arbitrators, on the other hand, are traditionally unable or unwilling to make similar awards. There are good reasons for this, the main one being the concern that a summary award might be challenged in the courts for procedural irregularity. However, there is a clear need for frivolous cases to be disposed of quickly, and the leading arbitral institutions have at last begun to deal with this. The draft rules do so too, following the examples of SIAC and ICC, and ICSID before them. Article 12 of the draft rules provides for 'Early Dismissal' wherever a claim or defence is manifestly without legal merit or manifestly outside the jurisdiction of the tribunal. Applications for Early Dismissal must be made promptly, though, and within 30 days of the constitution of the tribunal, and the application papers must be reasonably detailed. It is not sufficient to set out a brief argument in the hope that it can be fleshed out later with facts and legal reasoning (Art 12(2)).

Another way in which the draft rules allow suitable claims to be dealt with quickly is by providing for an 'Expedited Procedure' (Art 10). This is basically the normal arbitration procedure but with less scope for document production, tighter deadlines, and a final award delivered without any (or fully stated) reasons within six months of the tribunal receiving the papers. Again, this is not new, but it is not universal either, and so it is positive and encouraging to see the procedure included here. The key point is that it is suitable not only for low value claims, but also for higher value ones which are relatively simple, or where the parties have a particular interest in having their dispute dealt with quickly. Article 10(1) allows the procedure where sums in dispute total no more than USD 500,000, or where both parties wish to use it.

The extent to which parties agree to use the procedure is not clear. A similar procedure in the English courts, for instance, has hardly been used since it was put in place in 2015.[1)] In arbitration there is the added complication that an expedited procedure sometimes requires the appointment of a sole arbitrator, regardless of whether the arbitration agreement specifies a three-person tribunal (Art 10(3)(b)). That can catch parties unawares. However, it is certainly helpful that the Draft Rules include an abbreviated procedure in these economically difficult times.

Even where cases are conducted in the normal way and over an extended period, there are circumstances in which urgent action is called for, in particular injunctive or similar relief early on in the proceedings. This is another area in which arbitration has for a long time lagged behind litigation, leaving parties obliged to make applications to the courts. However, the Draft Rules follow those of the ICC, LCIA and others in allowing for the appointment of an emergency arbitrator before the tribunal proper is constituted (Art 11).

Transparency v. confidentiality

In several respects, then, the Draft Rules follow emerging best practice in many welcome ways. In other respects, though, the drafting committee (supported by an advisory board including such luminaries as Lord Hoffmann and Professor Julian Lew) has had to pick its way through more difficult issues. Third party funding is one of those. Should funding be disclosed to other parties and the tribunal, or is it a private matter for the party receiving funding?

Since many arbitrators have links to funders, there is a growing acceptance that funding should be disclosed to some degree, so that any potential conflicts are brought into the open. However, this raises the question of how much should be disclosed of the funding arrangements. AFSA has taken a minimalist approach, requiring only the disclosure of the existence of an arrangement and the identity of the funder (Art 27(2)). This may not please opponents, who would no doubt like some insight into the funder's terms, not least because they might affect the opponent's ability to recover costs if it wins. However, the drafting committee clearly thought this unnecessary and also potentially problematic, since the terms on which funding is offered necessarily reflect the funder's assessment of a claim's chances of success. As regards to recovery of costs, Art 25 provides for security for costs which should allay any fears.

The draft rules on funding also exclude party representatives from the definition of 'Third Party Funder'. This means that lawyers who enter into damages-based agreements with their clients are not obliged to disclose this.

The tension between a party's right to confidentiality and the desire for transparency is also an issue in relation to the publication of arbitral awards. Again, there is a change of public mood here, and many think that a greater level of openness would benefit arbitration as a whole, allowing awards to be scrutinised more often and arbitration case law to develop more quickly. The problem, however, is that parties' attitude to confidentiality is rather different when they come to consider their own disputes. There is a strong feeling that these should be private, and the confidentiality of arbitration is after all considered to be one of its main advantages.

In this respect AFSA follows the LCIA's general approach of confirming the general principle of confidentiality but allowing defined exceptions. Some of these are inevitable, arising from overriding legal rights or duties (Art 36(1)), but there is also a provision allowing AFSA to publish all arbitral awards in an anonymised or pseudonymised form, provided no party objects. The key point here is that this is an opt-out procedure,[2)] and objections must be submitted in writing within a short time (30 days after notification of the award), so parties must be aware of Art 36 and the need to act quickly (Art 36(3)).

Wider consultation

The draft rules are clearly a major step forward for arbitration in South Africa, and already the product of careful thought and consultation. AFSA should be commended for seizing the opportunities offered by the IAA and potentially transforming the country as a hub for international dispute resolution in the region. It is important that the draft rules are as user-friendly as they can be, and take into account all views, so it is appropriate that AFSA is now consulting more widely and seeking the views of the arbitration community generally. The public consultation ends on 31 August 2020. Comments on the draft rules should be sent to comments@arbitration.co.za before that date.

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References

?1 The Shorter Trials Scheme: Practice Direction 57AB in the English Civil Procedure Rules.

?2 In contrast to Art 30.3 of the 2014 LCIA rules, which provides that “LCIA does not publish any award or any part of an award without the prior written consent of all the parties and the Arbitral Tribunal.”

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