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Johannesburg Arbitration Week: South Africa: Destination of Choice for International Arbitration in Southern Africa

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South Africa's evolution into the premier destination for international arbitration in the Southern African Development Community ("**SADC**") region exemplifies its commitment to legal modernity, accessibility, and the highest international standards.

South African legal jurisprudence has come to enjoy significant influence in an increasingly globalised world where political, economic, social, and legal activities transcend territorial borders. As a State seeking to be a full participant in the global order, South Africa recognised, while establishing the judiciary as guardian of its constitutional democracy, that alternative forms of dispute resolution would also be important in ensuring access to justice and legal services.

Arbitration, in particular, has been a key mechanism for resolving complex disputes arising from international commercial contracts. In recent years, South Africa has gained prominence as being a premier venue and juridical seat for international arbitration in Southern Africa. This is not only in light of strong legislative and judicial protection of arbitration but also because South Africa is a well-connected commercial hub that can offer inexpensive and sophisticated arbitrations.

Evolution of International Arbitration in South Africa

While the use of arbitration as a dispute resolution mechanism in South Africa has a rich history, the Arbitration Act 42 of 1965 codified the settlement of disputes by arbitral tribunals. South Africa has also historically understood the importance of recognising and enforcing arbitral awards. In this regard, in 1976, South Africa acceded to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("**New York Convention**") which was given effect to by the promulgation of the (now repealed) Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977.

Recognising the increasing importance of international arbitration as a distinct and preferred means of dispute resolution in international commercial disputes, South Africa enacted the International Arbitration Act 15 of 2017 ("**IAA**") and has gained prominence as the leading seat for international arbitration in Southern Africa. The new legislative framework has provided clearer, more predictable, and internationally aligned procedures for conducting arbitration.

This pivotal legislation incorporates the UNCITRAL Model Law on International Commercial Arbitration of 1985 (with amendments as of 2006) and re-introduces the New York Convention, underscoring the country's alignment with global best practices in dispute resolution.

The transition towards a more arbitration-friendly legal environment has had a noticeable impact on the arbitration landscape within the country. It is an environment which allowed arbitral institutions such as the Arbitration Foundation of Southern Africa ("**AFSA**") to thrive. The arbitration user community requires a structured, efficient, and cost-effective alternative to traditional litigation. AFSA strives in its work to achieve those objectives and to be an integral component of the country's arbitration infrastructure, contributing significantly to its growth as a preferred arbitration destination.

The IAA has driven interest in international commercial arbitration in South Africa. AFSA's statistics bear this out. Prior to the enactment of the IAA, South Africa witnessed modest numbers of administered international arbitrations registered with AFSA. From 2009 to 2017, a total of 21 international arbitrations were registered. Post-enactment, however, there has been a significant increase in the volume of administered international arbitrations. The period from 2018 to 2023 marked a dramatic rise, with a total of 124 international arbitrations being registered, signalling a growing confidence in South Africa as a seat for international arbitration.

In addition, the revised AFSA International Arbitration Rules of 2021, aimed at leveraging best practices from renowned institutions such as the International Chamber of Commerce, International Court of Arbitration ("**ICC**") and the London Court of International Arbitration ("**LCIA**"), further bolster South Africa's attractiveness as an arbitration seat. An analysis comparing the years before and after the rule revision shows a sustained interest in administered international arbitrations, indicating that the combination of legislative updates and institutional enhancements resonates well with both domestic and international parties.

Legislative Framework and Judicial Support

The general shift towards increased usage of arbitration in South Africa can be attributed to legislative reforms and the judiciary's pro-arbitration stance, in terms of which South African courts are reluctant to intervene in arbitration proceedings.

From a legislative perspective, the IAA applies to international commercial arbitrations and provides that no court shall intervene in arbitration proceedings unless provided for in terms of the IAA. In this regard, the IAA grants certain powers to the courts for the purposes of assisting and supervising international arbitration proceedings, including taking evidence and granting interim protection measures. The IAA, however, expressly provides that the courts shall not grant such measures unless the arbitral tribunal has not yet been appointed and the matter is urgent, the arbitral tribunal is not competent to grant the relief sought, or the urgency of the matter makes it impracticable to seek such order from the tribunal.

The judicial landscape in South Africa regarding international commercial arbitration has also undergone significant evolution. This shift can be traced back to prior legal precedents, demonstrating a consistent trajectory toward fostering a pro-arbitration environment.

Before the IAA's promulgation, South African courts had already begun to show their support for

international commercial arbitration. A notable example is the case of *Zhongij Development Construction Engineering Company Ltd v Kamoto Copper Company SARL* [2014] SCA, where the Supreme Court of Appeal underscored the importance of international arbitration, party autonomy, and the integrity and independence of the arbitral process. The Court highlighted that beyond legal obligations, there is a socio-economic and political duty to endorse South Africa as a favourable venue for international arbitrations.

The enactment of the IAA marked a pivotal moment, aligning South Africa more closely with international best practices. The Supreme Court of Appeal's ruling in *Tee Que Trading Services (Pty) Ltd v Oracle Corporation South Africa (Pty) Ltd* [2022] SCA crystallised this shift. The Court decisively limited its own discretion in cases subject to international arbitration clauses, mandating that unless an arbitration agreement is void or inapplicable, litigation must be stayed in favour of arbitration. This reinforced the autonomy of arbitration agreements and streamlined the enforcement process, significantly bolstering South Africa's arbitration-friendly image.

Recent rulings further affirm this commitment. In 2023, the High Court of South Africa cemented the country's reputation as an arbitration-friendly jurisdiction in numerous judgments that emphasised party autonomy and avoided judicial intervention.

- In *GFE MIR Alloys and Minerals SA (Pty) Ltd v Momoco International Limited* [2023] ZAGPJHC, the Court rejected a leave to appeal against an order enforcing an arbitral award and ordered that the award should be enforced pending any future appeals the losing party may wish to lodge. The Court emphasised that public policy considerations support the general rule that arbitration awards should be enforced by South African courts.
- In *Lukoil Marine Lubricants DMCC v Natal Energy Resources and Commodities (Pty) Ltd* [2023] ZAKZPHC, the Court stayed a court application for the return of goods and the re-payment of certain funds pending finalisation of arbitration proceedings in London. In making this order, the Court emphasised that the agreement between the parties provided for disputes arising from the agreements to be resolved by way of arbitration in England, in terms of English law, and saw no reason to depart from the terms of those agreements.
- In *IDS Industry Service and Plant Construction South Africa (Pty) Ltd v Industrius D.O.O.* (A5010/2022; 15862/2020) [2023] ZAGPJHC, the Court declined to stay the enforcement of an arbitral award in Industrius' favour pending the conclusion of action proceedings brought by IDS which, if successful, would entirely extinguish IDS' debt to Industrius under the arbitration award by way of set-off. In doing so, the Court agreed with the Court a quo's finding that South African courts should exhibit a "pro-enforcement bias" which favours the enforcement of foreign arbitral awards over delaying enforcement.

International Reach and Arbitration Infrastructure

A robust enabling legal framework and a high degree of judicial protection of arbitration have done well in fostering the growth of international arbitration in South Africa. A further feature that adds to South Africa's attractiveness as an arbitration destination is its strong and vast legal profession, with experience across all major sectors.

In this context, it bears mention that South African jurisprudence is a vibrant, interwoven tapestry of distinct legal systems: English procedural law, Roman-Dutch substantive private law, African

customary law, and all-permeating constitutional supremacy, which promotes the rule of law in the Anglo-American tradition. This makes South African lawyers remarkedly agile in understanding legal systems in an increasingly globalised and ever-changing world. There is also considerable bench strength and sophistication in the South African legal market. South African legal practitioners have for decades been facilitating significant and multifarious commercial transactions and resolving complex commercial, domestic, and cross-border disputes. It is difficult to conceive of a commercial transaction or dispute which is of a nature that has not been handled by lawyers in South Africa. This provides an excellent platform for the growth of South Africa as a destination for complex international commercial arbitration work.

AFSA's experience also shows the strength and development of South Africa's arbitral institutions.

- In addition to the marked increase of arbitration cases being heard in South Africa, the composition of parties involved in AFSA international arbitrations reflects significant international engagement, with 70.64% hailing from the SADC region and the remaining 29.36% of parties originating from non-African nations.
- There is similar diversity on the legal representation front. While there is a preponderance of counsel from SADC countries (predominantly South Africa, but also significantly featuring professionals from Eswatini, Zimbabwe and Botswana), there are also legal representatives from other countries on the continent, as well as the United Kingdom, the United Arab Emirates, and Sri Lanka.
- AFSA International Panel of Arbitrators is versed in a variety of specialised sectors such as construction, energy, and technology, facilitating the changing nature of global disputes and equipping arbitration practice for new horizons.
- Despite the above, AFSA has managed to contain the cost of international arbitrations, as compared to other reputable arbitral institutions, with the average cost of undergoing an AFSA international arbitration being approximately ZAR 747,796.32 (around USD 40,690.88).

Nurturing and developing world-class arbitral institutions such as AFSA further enhances South Africa's position as an attractive arbitration seat on the African continent and beyond.

South Africa enjoys an esteemed position as a refined and sophisticated arbitration hub in the Southern African region. It offers efficient, cost-effective, and adaptable arbitration solutions, as well as world-class infrastructural and technological facilities, which collectively affirm its status as a leading destination for regional and international arbitration endeavours.

Conclusion and Future Outlook

South Africa has successfully established itself as the premier choice for international arbitration within the SADC region and beyond. This position stems from a robust blend of advanced legislative measures, judicial support, state-of-the-art physical and technological infrastructures, and a rich reservoir of legal expertise.

As South Africa commemorates three decades of democracy, it seeks to build on its sophisticated arbitration infrastructure and decades of experience to offer an attractive seat and venue for international arbitrations from all over the world. The country continues to strengthen its arbitration framework, striving for greater international collaboration and welcoming parties worldwide to leverage its arbitration services.

Building on these themes and opportunities, AFSA and its partners warmly welcome the international arbitration community to the inaugural Johannesburg Arbitration Week, taking place April 9-11, 2024, focusing on key initiatives that are shaping and transforming the dispute resolution landscape within the African region.

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