

DISPUTES

The International Arbitration Act spells opportunity for South Africa

7 March 2018 3 min read

With the coming into operation of the [International Arbitration Act^{\[1\]}](#) ("Act") on 20 December 2017, South Africa for the first time has a dedicated statute governing international arbitration. The Act brings South Africa into line with international best practice on international arbitration by providing for the incorporation of the United Nations Commission on International Trade Law (UNCITRAL) Model Law into South African Law.

The Model Law is the international "gold standard" for modern international arbitration statutes. It provides consistency and familiarity to foreign investors and international businesses, which generally prefer to have the same dispute resolution mechanisms in all their agreements, rather than having to deal with the unfamiliar law and procedure applied by domestic courts in each jurisdiction in which they do business. The Model Law provides an increasingly popular alternative to the divergent approaches taken in international arbitration statutes throughout the world; it has now been adopted by 11 countries in Africa and 78 globally, including many of our co-members in the Southern African Development Community, the African Union and the Commonwealth.

In addition to adopting the UNCITRAL Model Law, the Act re-commits South Africa to the recognition and enforcement of foreign arbitral awards, replacing the statute previously dealing with this. It does not however provide for South Africa's accession to the International Centre for Settlement of Investment Disputes (ICSID), as envisaged in the original version of the Act (drafted twenty years ago), because the South African government's policy has in the meantime become somewhat more averse to international arbitration as an investor-state dispute settlement (ISDS) mechanism. This is reflected in the Protection of Investment Act^[2], which makes international arbitration voluntary but not compulsory for the SA government in ISDS matters.

The Act gives rise to at least two major opportunities for South Africa. Firstly, it is hoped that the Act will assist South Africa to attract foreign direct investment and boost South Africa as a business destination by giving international businesses the comfort and certainty of a familiar and trusted dispute resolution mechanism for the protection and enforcement of their rights. Secondly, and more ambitiously, the Act might be leveraged to promote South Africa as an international or regional arbitration venue of choice – bearing in mind that arbitration is a consensual process, and the parties are therefore at liberty to select their venue, with a neutral venue often being preferred in order to nullify any perception of home-ground advantage. With its developed-world legal apparatus, convenient geographic location and prospects of enormous costs savings compared to the traditional arbitration center's such as Paris, London and New York, South Africa is now ideally positioned to market its major cities as international arbitration venues. Merely having the statutory and other infrastructure in place is no guarantee of immediate success in the development of an international arbitration venue, as the Mauritian experience has demonstrated. Nevertheless, the Act is a necessary and welcome first step towards unleashing South Africa's legal resources to create a regional arbitration destination of choice.

^[1] Act 15 of 2017

[2] Act 22 of 2015 – not yet proclaimed and hence not yet operative.



@werksmans