AFSA ADVANCED PROGRAMME IN ALTERNATIVE DISPUTE RESOLUTION

ISSUED IN COLLABORATION WITH THE UNIVERSITY OF PRETORIA

INTERNATIONAL COMMERCIAL ARBITRATION

PROF DAVID BUTLER

MAIN BINDER

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Note: “All materials are updated for 2025”

SECTION A

GENERAL INTRODUCTION

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Elective Module: International Commercial Arbitration

The South African International Arbitration Act 15 of 2017 the AFSA International Arbitration Rules (2021) and the UNCITRAL Arbitration Rules (2010)

(September 2025)

Presented by Emeritus Professor David Butler

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Overview of discussion

- General introduction including an overview of the International Arbitration Act 15 of 2017
- Case study on international arbitration
- The various stages of an international arbitration under the UNCITRAL Model Law; the AFSA International Arbitration Rules and the UNCITRAL Arbitration Rules
- Requirements for the arbitral award
- Challenging / recognition and enforcement of the award
- Case study on challenging an arbitral award

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1) General Introduction

Definition of (private) arbitration

(See Lawsa par 75; *Lufuno Mphaphuli* case [2009] ZACC 6 paras 195-198)

- Process for resolving disputes;
- Arbitration takes place pursuant to an agreement (party autonomy)
- Arbitrator appointed by the parties;
- Arbitrator must comply with the rules of natural justice/ due process ("procedural fairness");
- Arbitrator's decision ("award") final.

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1.1 Reasons for the introduction of the UNCITRAL Model Law for international arbitration in South Africa

The UNCITRAL Model Law represents the international standard against which national arbitration legislation for international arbitration is measured. Over 90 countries have adopted the Model Law and at least 36 of these have adopted it with the 2006 amendments.

In Europe, only well-established venues for international arbitration have adopted their own modern legislation as opposed to the Model Law. In Europe, countries like Germany, Spain, Ireland, Austria, Poland and Belgium have adopted the Model Law, as have several countries in Asia and the Pacific rim.

In Africa, over 30 states now have modern arbitration legislation, including the 17 OHADA states and thirteen countries which have adopted the Model Law, including several in the SADC region, North and East Africa and Nigeria in West Africa.

OHADA's Uniform Act on Arbitration of 1999, replaced and updated in 2017, is mainly based on French legislation, but is certainly not incompatible with the Model Law.

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The SALRC recommended in 1998 that South Africa should adopt the Model Law for international arbitration. For the first time since Dullah Omar was moved from the Justice portfolio in 1999, the former Deputy Minister of Justice, John Jeffery began championing international arbitration legislation from early 2016.

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1.2 The laws applicable in an international arbitration

This is not an issue which arises in domestic arbitration. A state court dealing with an international commercial dispute will apply its own rules of procedure.

The laws which may require consideration in an international arbitration include the following:

- the proper law of the main contract, or the law applying to the substantive merits of the dispute;
- the law governing the arbitration agreement and the performance of the agreement;
- the law governing the parties' capacity to enter into the arbitration agreement;
- the curial law, or the law governing the arbitration procedure, often referred to as the *lex arbitri*; and
- the law(s) applying to the recognition and enforcement of the award.

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<u>The laws applicable in an international arbitration (continued)</u>

Law applicable to arbitration clause arguably most challenging to determine.

Parties often expressly determine applicable substantive law.

Arbitration clause can be subject to a different law (severability).

Traditionally, substantive law applied to arbitration clause as well.

Strong dogmatic arguments in favour of the law of the seat, where seat determined by parties.

English Sulamerica case (2012) – threefold test to determine proper law:

- Express choice;
- Implied choice;
- Law with the closest and most real connection.

Choice will depend on particular facts and commercial common sense.

Courts will prefer a choice leading to a valid arbitration agreement.

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In the *Sulamerica* case the main (insurance) contract was subject to Brazilian law and the arbitration clause provided for arbitration in London.

Partly because it was alleged that the arbitration clause was not enforceable under Brazilian law, the court decided that the arbitration clause had its closest and most real connection with English law. Subsequent case law (leading case):

Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb [2020] UKSC 38, the issue of the governing law of the arbitration agreement arose at the outset of the proceedings. The arbitration clause provided for ICC arbitration in London. However, this did not amount to an implied choice of English law for the arbitration agreement. As a general rule, the place chosen as the seat will have the closest and most real connection. (See para 170.) Majority held that generally choice of law for main contract will usually govern the arbitration clause. On the facts, parties did not choose applicable law for main contract. Accepted that Russian law had closest and most real connection. However, the court accepted that English law had the closest and most real connection to arbitration agreement, where parties has chosen London as the seat.

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Law Commission of England and Wales recently conducted an investigation into updates to the English Arbitration Act of 1999. Having carefully considered the issue, the Commission recommended a default rule that the law of the seat should govern the arbitration clause, unless the parties expressly provide otherwise. In the Commission's view, this approach promotes simplicity and certainty. In contrast, law as set out in *Enka v Chubb* was complex and led to uncertainty, leading to risk of satellite litigation. See the Law Commission's final report (no. 413) *Review of the Arbitration Act 1996.*

The Law Commission's view recently prevailed when the Arbitration Act of 2025 commenced on 1 August 2025. The 2025 Act added s 6A to the (English) Arbitration Act of 1996. S 6A provides that the parties may expressly stipulate the law to govern their arbitration agreement. [Party autonomy.] Failing such choice, *the law of the seat will prevail*.

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S 6A further provides that where the arbitration agreement is a clause in another contract, the choice of the governing law by the parties for that contract is not the express stipulation required to identify the law applicable to the arbitration clause, i.e. the law of the seat will prevail.

It is submitted that were a South African court to be confronted by this issue under the IAA, logic and simplicity would justify the South African court in following s 6A of the English Arbitration Act rather than the interpretation adopted in the *Enka* case.

AFSA International Rules 2021 apparently silent. Compare LCIA Rules (2020) art 16.4.

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1.3) The UNCITRAL Model Law and the International Arbitration Act of 2017

Characteristics of the Model Law

The drafters of the Model Law had four main aims:

- The first aim is to achieve the liberalisation of international arbitration by limiting the role of national courts and emphasizing party autonomy.
- Secondly, the Model Law aims to establish a defined core of mandatory provisions to ensure fairness and due process.
- Thirdly, the Model Law is intended to provide a framework for conducting an international commercial arbitration so that in the event of the parties being unable to agree on the procedure, the arbitration could still be completed.
- Finally, the drafters incorporated provisions to aid in the enforcement of awards and to clarify certain controversial practical issues, for example article 9, regarding the effect of an arbitration agreement on the powers of the court to grant interim measures.

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The form in which South Africa adopted the Model Law

The drafters intentionally chose the format of a model law, rather than a treaty (or convention), as a treaty has to be adopted as is, unless reservations are permitted. (For example, the New York Convention permits two reservations: the reciprocity reservation and the commercial reservation.)

Nevertheless, although a model law permits some flexibility, the more changes made by an adopting state, the more the drafters' goals of promoting harmonisation and uniformity will be undermined.

Therefore the drafters of the International Arbitration Act attempted to restrict changes to those reasonably necessary for the effective implementation of the Model Law in South Africa.

The Model Law can be adopted by incorporating it in the text of the enacting legislation. This inevitably means that the Model Law will be rewritten in the drafting style of the adopting state and could result in unintended amendments.

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Examples: Mauritius International Arbitration Act – Schedule 3 is an essential interpretation guide; the English text of the Quebec version – presumably the drafters took the French text of the Model Law and translated it into Quebec's own "English legalese".

The alternative is to incorporate the official English text in a schedule to the adopting legislation. The SALRC was strongly of the view that this approach should be followed by South Africa and this advice was followed.

See the International Arbitration Act s 6, read with the definition of "Model Law" in s 1 and Schedule 1.

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Interpreting the Model Law

"Article 2 A. International origin and general principles

1. In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

2. Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based."

Two further guides to the interpretation of SA version of the Model Law, contained in the Act itself. Firstly, s 2 provides that a word or expression in chapter 2 bears the same meaning as in the Model Law, unless inconsistent with the context and the Constitution.

Secondly, s 8 provides that the material to which an arbitral tribunal or court may refer when interpreting chapter 2 and the Model Law includes the travaux préparatoires ("relevant reports of UNCITRAL and its secretariat").

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Scope of application

Model Law article 1

Definitions of "international" and "commercial".

Certain provisions have extra-territorial application (art 1(2)).

In South Africa, art 1 determines which arbitration statute will apply.
See *IDC of SA Ltd v Kalagadi Manganese (Pty) Ltd* [2025] ZASCA 70 paras 14-18.

Transitional provisions (s 20).

Party autonomy:

Many provisions "default" provisions.

Some provisions "contract in": e.g. art 33(1)(b) – interpretation of award.

Mandatory provisions to ensure due process – arts 18 and 24(2)-(3).

Powers of court also mandatory.

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Powers of the court

Article 5: "In matters governed by this law, no court shall intervene except where so provided in this law.

Art 8: enforcement of arbitration agreement – court must stay court proceedings unless arbitration agreement null and void, inoperative or incapable of being performed".

Art 11: Appointment of arbitrators

Arts 13 and 14 Challenge and removal of arbitrators

Art 16 Review of preliminary ruling on jurisdiction

Arts 9, 17H, 17I, and 17J: Interim measures

Art 27: Court assistance with taking evidence

Arts 34-36 Challenging, recognition and enforcement of award.

(Regarding art 34, see separate Note on *Nigeria v P&ID Ltd* and the problem of "fraudulent" awards, especially D1 at p 8-9 on *Contax Partners v KFH-Kuwait* (2024) an attempt to enforce an award "fabricated" in Kuwait in England.)

Art 6: SA court with jurisdiction.

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Enhanced powers for the arbitral tribunal
Compare article 19 with s 14(1) of the 1965 Act.
General power vs list of specific powers.
Additional specific powers: articles 16, 17 and 17A, and 26.
South African adaptations and additions:
International Arbitration Bill Chapter 1: General Provisions
Chapter 2: International Commercial Arbitration
S 6 Model Law to have force of law
S 7 Arbitrability
S 8 Interpretation
S 9 Immunity
S 10 Consolidation
S 11 Confidentiality

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Schedule 1
Article 6 Court
Article 10: Default position – sole arbitrator
Deletion of articles 17B and 17C
Article 17J: Court-ordered interim measures
Article 31(5)-(7) Interest and costs
Minor changes to articles 34-36.
Chapter 3 of IAA ss 14-19
Purpose of ch 3- see s 3(d).
See separate notes on NYC and ICCA Guide.
Background:
Views of Sanders quoted on p 1.
Main improvements of NYC, compared to two treaties from 1920s.

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NYC (continued)

Convention has two objects:

Recognition and enforcement of arbitration agreements;

Recognition and enforcement of foreign arbitral awards.

Analysis of articles I-VII

Art I applies NYC to "foreign arbitral awards". What is an "arbitral award"?

Art I deals with scope and permissible reservations: reciprocity and commercial reservations.

Art II (Recognition and enforcement of arbitration agreements)

Purpose quoted on p 3.

Requirements for arbitration agreement, including writing.

Enforcement of arbitration agreements (art II(3))

Court obliged to enforce agreement subject to narrow proviso. Position under previous legislation: Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977:

Art II deliberately omitted (see notes footnote 34).

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NYC Art II (continued)

The court of a member state has a limited discretion: the parties shall be referred to arbitration, "unless it finds that the said agreement is null and void, inoperative or incapable of being performed." (ICCA Guide 53-55.)

Effect on court's jurisdiction. Common-law courts retain jurisdiction but stay court proceedings in favour of arbitration.

Should court perform "full review" or "*prima facie* review" before staying its proceedings? Art 8(1) Model Law follows art II(3) and proposal to include "manifestly" rejected. Convention does not adopt a position. ICCA Guide supports *prima facie* test.

Easier to justify in context of Model Law: arts 8 and 16 need to be read together.

Canadian courts favour *prima facie* test, with exceptions. Australian courts favour *prima facie* test.

England not a Model Law jurisdiction. S 9 corresponds to art 8 and ss 7 and 30 to ML art 16. *Harbour Assurance* under common law and *Fiona Trust* under 1996 Act.

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NYC Art II (continued)

DHL Project & Chartering Ltd v Gemini Ocean Shipping Co Ltd (Re Newcastle Express) [2022]. Court of Appeal: Males LJ distinguishes between contract validity – is arbitration agreement directly impeached? – and contract formation. If case concerns contract formation doctrine of separability cannot apply.

Proposed SA position under Model Law: arts 8 and 16 should be read together. Preference for *prima facie* test, unless merits approach upfront required.

SA variation of art 16(3). Read with art 5, no room for declaratory relief. See also *Zhongji* case.

Art III Duty of courts of contracting state regarding recognition and enforcement of awards.

Art IV deals with the court application and art V sets out the defences.

Art V was adapted and forms the basis of both arts 36 and 34 of the Model Law, although art 34 of course has no equivalent in the NYC.

Setting aside at seat may in appropriate circumstances result in "issue estoppel" or *res judicata* – see UK PC decision at p 10-11 of Notes.

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NYC Art V (continued)

Art V was adapted and forms the basis of both arts 36 and 34 of the Model Law, although art 34 of course has no equivalent in the NYC.

Art V contains exhaustive list of defences. First five grounds must be raised by party.

Last two may be raised by the court. (Compare IAA s 18(1) and ML art 36(1) and (3).

See art V(a) enforcement contested by person allegedly not party to arbitration agreement.
SA *Phoenix Shipping* case and UK SC case *Dallah Real Estate*. Enforcement court may make fresh decision.

Art V grounds should be narrowly construed. Same goes for SA "addition" in art 36(3).

Art VI (postponement of enforcement decision).

Setting aside at seat may in appropriate circumstances result in "issue estoppel" or *res judicata* – see ICCA Guide 112-115 and s 18(3) and Model Law art 36(2) and compare NYC art V(1)(e). Postponement in *Phoenix Shipping/Dallah Real Estate* pointless.

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NYC Art VII

See IAA s 19, which specifically refers to right of enforcement in ML art 35.

Interaction between NYC (regarding awards) and ch 3 of IAA

(Notes 12.)

IDC of SA Ltd v Kalagadi Manganese (paras 14-18). Necessary to decide which arbitration statute apples.

Ch 3 IAA applies to recognition of "foreign arbitral awards" in SA. SA cannot be the seat.

ML arts 35 and 36 of ML in Schedule 1 concerned with recognition and enforcement of awards in arbitrations dealing with international commercial disputes, including where SA is the seat.

Substantial overlap possible, but it will still depend on the particular facts of the Particular case. (End of slides for NYC Notes.)

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1.4 The AFSA International Arbitration Rules (2021)

Background and principal characteristics, including role of AFSA Court

Tribunal's general powers and conduct of proceedings

The role of the "appointing authority"

Innovative features: expedited procedure; emergency arbitrator; early dismissal; administrative secretary; party representatives; third party funding.

Interim measures (contrasted with position under (domestic) Arbitration Act of 1965.

Multi-party arbitrations dealt with in detail.

Expedited procedures – article 10.

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1.5 <u>The UNCITRAL Arbitration Rules (2010)</u>

Principal characteristics

\` Ad hoc arbitration

The role of the "appointing authority"

The different functions of the applicable arbitration law and the designated rules

Interaction between designated arbitration law and designated rules

<u>Overview of the UNCITRAL Expedited Arbitration Rules of 2021</u>

Contained in appendix.

Scope of application.

Interaction with "standard rules" (footnote 1).

Aim: award within <u>six</u> months (exceptionally <u>nine</u> months) of appointment of arbitral tribunal.

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SECTION B

PARTS 3 - 6

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Elective Module: International Commercial Arbitration

(September 2025)

The various stages of an international arbitration under the Model Law and the AFSA International / UNCITRAL Arbitration Rules

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1) Juridical seat of arbitration – factors and consequences

Need to distinguish between the juridical seat of the arbitration and the physical venue for the hearings.

Model Law art 20(2): Unless otherwise agreed by the parties, the arbitral tribunal may direct that hearings be held at any venue or location which it considers appropriate.

Thus, the seat ought to be determined primarily with reference to legal considerations: the quality of the arbitration law for International arbitration and the quality and availability of the judges.

Factors like convenience, accessibility and quality of the facilities can, if necessary, be addressed by a change of venue.

The venue should be determined with regard to the general convenience – not that of the presiding arbitrator.

Rules: AFSA International art 18; UNCITRAL 18 – expected differences regarding the roles of the AFSA Court and the tribunal.

2

2) Juridical seat of arbitration – (continued)

Dispute resolution clause and choice of seat when the clause is still being negotiated:

African (substantive) law and the European seat

OR

European (substantive) law and the African seat.

At a SOAS conference in Kigali, Rwanda, in May 2018, two European-based practitioners submitted that the obvious choice was the first option.

I strongly disagree.

Possible compromise – European seat and African venue, but the costs of using the court at the European seat prohibitive for the African party.

South African lawyers need to promote (in Africa) their own abilities and the advantages of South Africa as a seat in Africa.

3

3) <u>Prerequisites for arbitration imposed by the parties' dispute resolution clause</u>

Multi-tiered dispute resolution clause:

- Negotiation;
- Mediation;
- Arbitration.

The first two stages can be drafted so as to be enforceable.

Makate v Vodacom 2016 4 SA 121 (CC) paras 95-103.

Emirates Trading Agency LLC v Prime Mineral Exports Private Ltd [2014] EWHC 2104 (Comm).

Mediation:
Cable & Wireless PLC v IBM United Kingdom Ltd [2002] EWHC 2059 (Comm)

DKH Retail Ltd v City Football Group Ltd [2024] EWHC 3231 (Ch) paras 28-43, applying *Churchill* case [2023 CA]

See also: *Republic of Sierra Leone v SL Mining Ltd* [2021] EWHC 286 (Comm): relates to admissibility, not jurisdiction.

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4) Commencement of arbitration proceedings

When does arbitration commence?

Model Law art 21; UNCITRAL Rules art 3.2 and compare AFSA International Rules art 3(3) and (4).

Procedure:

Notice of arbitration / Request for Arbitration (Rules art 3)

Response to the notice of arbitration / Answer to the Request (Rules art 4)

Note that the two notices:

- Provide valuable information to the institution if it has to appoint arbitrators;
- Enables the tribunal to engage in effective case management immediately after its appointment.

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5) Appointment of a three-member arbitral tribunal

Advantages of a three-member tribunal?

Model Law art 11.

Art 11(1): nationality. See also Rules art 6(7) / 6(8).

Art 11(2): default procedure.

Rules: UNCITRAL Rules Arts 7-10; AFSA International Rules art 6-9. Normal position.

If institutional assistance is required, the UNCITRAL Rules advocate list system (see art 8.2).

Duty of disclosure, both sets of Rules Art 11;
Model Law art 12(1).

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6) <u>Challenge of the arbitrator</u>

Model Law art 12.2 grounds; art 13 procedure – default procedure; mandatory court review; art 14 ("Failure or impossibility to act"); art 15 (appointment of substitute arbitrator).

AFSA International Rules art 13; procedure 13(3); removal of arbitrator art 13(7) – compare Model Law art 14(1); limitation of liability art 37.

UNCITRAL Rules art 12 (see also art 12.3); art 13 challenge procedure - appointing authority; art 16 exclusion of liability – compare s 9 of the International Arbitration Act.

Recent case: *Halliburton Company v Chubb Bermuda Insurance Ltd* [2020] UKSC 48

AFSA International / UNCITRAL Rules art 14(2) / 15: Repetition of hearing?

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7) <u>First case management meeting</u> and provisional timetable (including seat of arbitration and language of proceedings)

UNCITRAL Rules art 17, 18, and 19; Model Law art 20 and 22.

AFSA International Rules art 15 on the tribunal's power and conduct of proceedings, including art 15(3) on the case management conference.

Art 16 deals in some detail with the Administrative Secretary (AS).

Note art 16(5) – AS shall not charge any additional fees.

Art 12 – Early dismissal.

Purpose: may only be made on application.

Time limit: within 30 days of the constitution of the tribunal.

Two-stage process followed by order or application – reasons may be in summary form.

No equivalent to Arts 12 and 16 in the UNCITRAL Rules.

8

Basic provisions in the Model Law on arbitral procedure:

Art 19 (powers) subject to mandatory provisions in art 18 and art 24, particularly 24(2) and (3), to ensure due process.

Compare the UNCITRAL Rules art 17.

(Note: too limited power for joinder in Rules art 17.5.)

13.6) <u>Challenge to the tribunal's jurisdiction</u>

Model Law art 16; AFSA International / UNCITRAL Rules art 31 / 23.

Art 16(1) deals with both Kompetenz-Kompetenz and separability, but these are actually separate doctrines, which in certain circumstances overlap.
Scope of separability doctrine in Art 16(1).

Art 16(2): plea of jurisdiction must be raised to avoid waiver.

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Note that the party is not precluded from raising a jurisdictional challenge by having participated in the appointment of the tribunal.

Art 16(3): Plea as to jurisdiction can be dealt with as a preliminary question or in an award.

In the former case, there is an immediate right to court review.

Is this available if the tribunal rules that it does not have jurisdiction on certain issues? (See South African adaptation to article 16(3).)

Note that art 16(3) contains procedural safeguards to prevent a court application from being abused as a delaying tactic.

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8) **Defining issues in dispute**

Model Law art 23; UNCITRAL Rules arts 20-22.

Statements of Claim and Defence are intended to be more comprehensive and candid than court pleadings and should be accompanied by all documents on which the party relies. (AFSA International Arbitration Rules art 17 refer to Statement of Case and Statement of Defence (see also 17(6). "Memorials" are certainly an option under art17.

3.8) Disclosure of documents

Model Law arts 19 and 24(3); UNCITRAL Rules art 27(3); AFSA International Rules art 15(5)(e).

Note too Model Law art 19(2); UNCITRAL Rules art 27.4 and AFSA International Rules art 15(5)(f) regarding admissibility of evidence:

Admissibility, relevance, materiality, and weight.

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9) Interim measures

(Model Law arts 17, 17A and 17J, UNCITRAL Rules art 26 and AFSA International Rules Arts 24 & 25 and 11 (emergency arbitrator).

Definition: Model Law art 17(2) including 17(2)€ and (3).

Principle: the court and tribunal (once appointed) have concurrent jurisdiction to grant interim measures in support of the arbitration.

Court not necessarily the court at the seat - see ML art 1(2).

Court or tribunal?

Two examples:

Preservation of evidence;

Security for costs.

Note the South African version of Model Law art 17J.

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9.1) The law(s) applying to the merits of the dispute

See the Model Law, art 28 AFSA International Rules Art 19 and the UNCITRAL Rules Art 35.

9.2) Powers on default

See Model Law art 25; AFSA International Rules art 17(7) & (8), 15(5)(h) and UNCITRAL Rules art 30.

9.3) Closure/termination of proceedings

Model Law art 32; UNCITRAL Rules art 31.

9.4) AFSA International Arbitration Rules: additional provisions

Art 26 Party representatives (compare UNCITRAL Rules art 5)

Art 27 Third-party funding

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Multiple contracts:

Starting point IAA s 10; UNCITRAL Rules art10 and art 17(5) on joinder

Compare AFSA International Arbitration Rules art 9 and 28 -30:

Detailed provisions on joinder,
intervention and consolidation, with different procedures before and after the appointment of the tribunal.

Confidentiality: compare IAA s 11 and AFSA International Rules art 36.

10) <u>Requirements for an arbitral award</u>

Model Law articles 30-33; AFSA International Rules articles 33-34; UNCTRAL Rules articles 33-39

Requirements for an arbitral award;
Settlement;
Costs;
Correction, interpretation, and additional award.

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11) Challenging / recognition and enforcement of the awar

Model Law, Arts 34-36, with local refinements.

Grounds for challenge or refusing enforcement (based on New York Convention Article V).

Pro-enforcement bias: onus on the party challenging the award or resisting enforcement. The Court has discretion in the Arts 34 and 36 of the Model Law, as under Art V of NYC.

Useful case on public policy defence: *Betamax Ltd v State Trading Corporation (Mauritius)* [2021] UKPC 14

Model Law: Arts 34 and 36 basically use the same grounds. Compare s 31 of the 1965 Act – grounds on which enforcement may be refused, unclear.

Note the partial definition of public policy added to arts 34 and 36 in Schedule 1.

Overview of procedure. (Art 35 – compare NYC Art IV).

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Thank you!

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SECTION C

CASE STUDIES 1 SLIDES

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Case Study on International Arbitration (September 2025)

Assumptions regarding law:

The case study is based on the current legal position, i.e. after the commencement of the International Arbitration Act 15 of 2017.

To the extent that Malaysian arbitration law is relevant, it must be assumed that Malaysia has adopted the UNCITRAL Model Law of 1985 without alteration.

1

Case Study: Basic facts

A Malaysian manufacturer contracts with a South African company to manufacture certain machinery in Malaysia and then to deliver it to the South African company in South Africa. The terms of the contract appear from a written order sent by the South African party to the Malaysian manufacturer on 20 August 2021. In terms of the order, the Malaysian manufacturer should accept it by signing and returning a copy of the order to the purchaser in South Africa. The manufacturer fails to do so and simply delivers the machinery.

The order form contains the following arbitration clause:

> "All disputes arising out of or in relation to this contract shall be referred to arbitration in Gauteng, South Africa under the UNCITRAL Arbitration Rules of 1976."

2

The Malaysian manufacturer uses a South African subcontractor to make certain components of the machinery. There is no arbitration clause in the contract between the Malaysian manufacturer and the South African subcontractor.

Shortly after its installation in South Africa and before the full purchase price has been received, the machine malfunctions and is badly damaged in the process. The South African purchaser alleges that the machinery had a major defect for which the manufacturer is liable. The Malaysian manufacturer denies liability on this basis and states that any malfunction has been caused by the failure of the South African purchaser to follow the operating instructions.

3

In the alternative, the Malaysian manufacturer alleges that the problem was caused by defective components furnished by the South African subcontractor, who is therefore liable to indemnify the manufacturer for any damages, which it may have to pay to the South African purchaser. The South African party submitted a Notice of Arbitration under the UNCITRAL Arbitration Rules, which was Received by the Malaysian party on 5 July 2022.

Problem 1(a)
Assume that the South African purchaser wishes to refer the dispute to arbitration in South Africa. Is there a valid arbitration agreement for purposes of the International Arbitration Act 15 of 2017?

4

Why does the International Arbitration Act apply? See s 20(1), read with the UNCITRAL Rules article 3.2). Compare *Delta Beverages v Blakey Investments (Pty) Ltd* [2020] ZAKZDHC 36 paras 4 and 17 and see *Industrial Development Corporation of South Africa Ltd v Kalagadi Manganese (Pty) Ltd* [2025] ZASCA 70 paras 14-18.

International Arbitration Act Schedule 1

Article 7. Definition and form of arbitration agreement

…

(2) The arbitration agreement shall be in writing.

(3) An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.

Problem 1(b)

Would your answer differ if the validity of the agreement had to be determined according to Malaysian arbitration law?

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UNCITRAL Model Law (original 1985 version)

"Article 7--Definition and form of arbitration agreement

(1)

(2) The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement … ."

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Compare Arbitration Act 42 of 1965 section 1 "arbitration agreement".

New York Convention article II(2):

"The term 'agreement in writing' shall include ... an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams."

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Problem 1(c)

Assuming that there is a valid arbitration agreement, which version of the UNCITRAL Arbitration Rules will apply?

See the 2010 Rules, article 1.2.

The offer was made after 15 August 2010 and the arbitration agreement was concluded after that date.

The parties are normally presumed to have referred to the Rules in effect on the date of the commencement of the arbitration (as determined by article 3.2).

However, here the arbitration agreement refers expressly to the UNCITRAL Arbitration Rules of 1976.

Presumption does not apply. Unlikely that this is what the parties intended.

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Problem 2(a)

Assume that there is a valid arbitration agreement. If the Malaysian manufacturer sues the South African purchaser in the South African high court for the balance of the purchase price, is the South African party entitled to have the action stayed so that the matter can be referred to arbitration?

9

UNCITRAL Model Law (SA version)

"Article 8 Arbitration agreement and substantive claim before court

(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, … stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed."

Compare the wording of s 6 of the SA Arbitration Act 42 of 1965:

S 6(2) The court must be satisfied that there "is no sufficient reason" why the dispute should not be referred to arbitration.

The court in an international arbitration therefore no longer has a discretion not to enforce the arbitration agreement.

10

Problem 2(b)

Could the Malaysian party successfully apply to the South African high court for an order that the arbitration agreement should cease to have effect?

11

The 1965 Arbitration Act section 3(2) states:

"The court may … on good cause shown (a) set aside the arbitration agreement … or (c) order that the arbitration agreement shall cease to have effect".

However, under s 4(1) of the International Arbitration Act of 2017, the 1965 Act does not apply to an arbitration subject to the Model Law.

See also article 5 of the Model Law:

"In matters governed by this Law, no court shall intervene except where so provided in this Law."

Answer clearly "No!"

<u>Problem 3(a)</u>

How many arbitrators are required in the absence of an agreement on this point between the parties?

12

Compare and the International Arbitration Act sch 1 article 10 and
the UNCITRAL Rules article 7.

Problem 3(b)

Assume that the Malaysian manufacturer (as respondent in the arbitration) fails to nominate an arbitrator. What happens in this event and who appoints the tribunal?

13

See the UNCITRAL Arbitration Rules articles 9(2) and 6.

Compare the International Arbitration Act of 2017 Schedule 1, article 11(2) and (3). The latter is a default or "contract-out" provision.

Problem 4

Assume that the South African purchaser appoints an arbitrator who although being an experienced commercial lawyer is also the brother-in-law of the South African company's managing director. Is the Malaysian party, in principle, entitled to object to the appointment and if so, who must decide on this objection in the first instance?

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As to the principle, see the UNCITRAL Rules, articles 11 and 12 and the Model Law article 12.

Note the difference in the test between article 11 and 12 of the Rules (compare the SA version of the Model Law article 12(1) and article 12(2) and (3).

As to the procedure compare the UNCITRAL Rules article 13 with the UNCITRAL Model Law article 13.

15

Problem 5

Assume that a suitable arbitral tribunal has at last been appointed and that the arbitration is going to take place in Gauteng. Assume further that the Malaysian manufacturer has received a substantial portion of the purchase price, but is still exposed to a very large claim for damages. The Malaysian respondent in the arbitration for tactical reasons therefore alleges that its contract with the South African party is illegal, being subject to South African law while contravening certain South African statutory regulations and that the arbitration clause is for this reason also invalid.
How should the arbitral tribunal deal with this allegation and has the Malaysian party forfeited its right to challenge the validity of the arbitral proceedings by participating in the appointment of the tribunal?

16

See the UNCITRAL Rules article 23 and the UNCITRAL Model Law article 16. South African law common law now similar, thanks to the *Zhongji Development v Kamoto Copper* case [2014] ZASCA 160, 2015 1 SA 345 (SCA).

Problem 6

Assume that the Malaysian respondent hears that the South African purchaser has called another South African company to repair the machine, making it impossible for the Malaysian company to prove its case. What can it do and whom should it approach for relief?

See the UNCITRAL Rules article 26; and the International Arbitration Act of 2017 Schedule 1 articles 9, 17, 17A, 17H, 17I and 17J. [1965 Act s 21 not relevant.]

17

Problem 7

Is the Malaysian party entitled to obtain full disclosure of documents ("discovery") against the South African claimant as in a high court action?

See the UNCITRAL Rules article 27(3) and compare the Model Law articles 19 and 24(3).

Compare the South African Act of 1965 s 14(1)(a)(i) and s 21(1)(b).

18

Problem 8

Is the arbitral tribunal obliged to apply rules of substantive law to the merits of the dispute, and if so, which system must it apply?

See the UNCITRAL Rules article 35(1) and compare the Model Law article 28(1) and (2).

19

Problem 9(a)

Assume that an award has been given by the arbitral tribunal in Gauteng against the Malaysian manufacturer, in which it has been ordered to pay a substantial amount of damages to the South African purchaser. The Malaysian party believes that the award is wrong on the merits. Can the Malaysian party seek to have the award set aside on this basis?

See article 34 of the Model Law and compare the SA Arbitration Act of 1965, s 33.

20

Problem 9(b)

Although most of the Malaysian party's assets are in Malaysia, it has a valuable asset in South Africa in the form of its shares in its South African registered subsidiary. Would it be more beneficial (in principle) to challenge the award in a South African court or to resist its recognition and enforcement by a South African court?

Difference between setting aside and refusal of recognition and enforcement.
See the UNCITRAL Model Law article 36(1) and compare article 34(2).

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SECTION C

CASE STUDIES 2 SLIDES

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AFSA
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AFSA / University of Pretoria
Module on International Commercial Arbitration
Case Study 2 on International Arbitration Awards
(September 2025)

Assumptions regarding law:

The case study is based on the assumption that the events took place after the commencement of the International Arbitration Act 15 of 2017 on 20 December 2017.

1

A commercial contract between an English company and a South African company provides that the contract is subject to English law. The dispute resolution clause provides in part:

"Within ten business days of receipt by a party of a notification of the existence of a dispute, the parties must refer the dispute for resolution by mediation in Sandton, Gauteng, under the UNCITRAL Conciliation Rules (as amended in the addendum to this Agreement), by a sole mediator appointed at the request of either party by AFSA.

If mediation fails to produce a settlement within thirty business days of the appointment of the mediator or in the event of the prior termination of the mediation proceedings under the relevant Rules, either party may refer the dispute to arbitration in Sandton, Gauteng under the UNCITRAL Arbitration Rules currently in force, and the parties hereby designate AFSA to act as the appointing authority under the said Rules. The arbitral tribunal must comprise three arbitrators, all of whom must be members of AFSA's international arbitration panel."

2

The Addendum includes the following amendments or additions to the UNCITRAL Conciliation Rules:

"Article 2 (Commencement of conciliation proceedings) is substituted as follows:

'(1) The conciliation commences when the party initiating conciliation sends the other party a written notification to conciliate under these rules, briefly identifying the subject of the dispute. …'"

Article 15 (Termination of conciliation proceedings) provides in article 15(1) inter alia that the conciliator or one of the parties may unilaterally declare the conciliation proceedings to be terminated, but subject to article 15(2).

3

Article 15(2) provides:
"The conciliator may not issue a declaration under paragraph (1)(b) and a party may not issue a written declaration under paragraph (1)(d) before both parties have attended a meeting convened by the conciliator under article 9(1), at which the conciliator has explained the benefits of conciliation in the circumstances and has outlined the proposed conciliation process."

A dispute involving a substantial amount of money subsequently arose and the English company as claimant required the dispute to be referred to conciliation. A conciliator was duly appointed by AFSA at the request of the Claimant. The conciliator convened a meeting and both parties, as requested by the conciliator, submitted written statements before the meeting. At the meeting Respondent was represented by a senior executive, assisted by lawyers. However, Claimant was represented by a junior executive, who stated that he had no authority to participate.

4

He then handed over a written declaration by Claimant purporting to terminate the conciliation proceedings, and withdrew.

The Claimant then submitted a notice of arbitration under article 3 of the UNCITRAL Arbitration Rules.

Each party subsequently appointed an arbitrator and at the request of the two arbitrators, AFSA duly appointed the presiding arbitrator. The arbitrator appointed by the Claimant was an English barrister, the arbitrator appointed by the Respondent was a South African Senior Counsel and the presiding arbitrator was a retired South African judge. The English Claimant expressly confirmed that it had no objection to the presiding arbitrator being of the same nationality as the Respondent.

5

The arbitral tribunal convened a case management meeting and in consultation with the parties proceeded to draw up a provisional timetable. However, at the outset, Respondent challenged the tribunal's jurisdiction on the basis that there had not been due compliance with the provision for conciliation. Respondent therefore requested the tribunal to stay the arbitration proceedings. The tribunal, having asked both parties for their views, dismissed the application on the basis that there had been adequate compliance The tribunal then directed that the arbitration should continue. Respondent stated that its further participation in the arbitration was under reservation of all its rights.

The arbitration proceeded. After the evidentiary hearing and receiving written and oral argument from the parties' lawyers, the tribunal made its award. The award was substantially in favour of the Claimant although the amount awarded was considerably less than the Claimant's initial claim in its Notice of Arbitration and its subsequent Statement of Claim.

6

The Respondent subsequently applied to the Gauteng High Court in Johannesburg for the award to be set aside on each of the following grounds:

- The tribunal's lack of jurisdiction to proceed with the arbitration because of non-compliance with the provision for conciliation;
- The fact that the English barrister appointed as arbitrator by the Claimant, at the time of his appointment, was not a member of AFSA's international arbitration panel, a fact only discovered by the Respondent after the award; and
- The failure by the tribunal, when making its award on costs under article 42, to take into account an offer "without prejudice save as to costs" made by the Respondent at the start of the arbitration hearing. The offer was for appreciably more than the amount ultimately awarded by the tribunal. The existence and terms of the offer were duly disclosed to the tribunal once it had made its award on the merits and before it made its award on costs.

7

Discuss briefly the extent to which each of these grounds could succeed with reference to relevant provisions of article 34 in Schedule 1 of the International Arbitration Act.

Regarding the first ground, you must also briefly consider the position, with reference to relevant policy and practical considerations, on the assumption that the tribunal's finding that there had been adequate compliance with the provision for conciliation was objectively incorrect.

8

Article 34--Application for setting aside as exclusive recourse against arbitral award

…

(2) An arbitral award may be set aside by the court … only if:

(a) the party making the application furnishes proof that: …

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law;

(b) the court finds that: …

(ii) the award is in conflict with the public policy of the Republic.

…

9

(5) For the avoidance of doubt, and without limiting the generality of paragraph (2)(b)(ii) of this article, it is declared that an award is in conflict with the public policy of the Republic if -

(a) a breach of the arbitral tribunal's duty to act fairly occurred in connection with the making of the award which has caused or will cause substantial injustice to the applicant; …".

10

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Ground 1:

The enforceability of the provision for conciliation is not an issue. See *Cable & Wireless PLC v IBM United Kingdom Ltd* [2002] EWHC 2059 (Comm) and in South Africa *Makate v Vodacom* 2016 4 SA 121 (CC) paras 95-103.

In England, it has been decided in *Emirates Trading Agency Llc v Prime Mineral Exports Private Ltd* [2014] EWHC 2104 (Comm) that a clause providing that the parties to a dispute must first seek to resolve the dispute or claim by friendly discussion was enforceable and a precondition for the arbitral tribunal's jurisdiction.

On the facts, a decision that the tribunal exceeded its jurisdiction and therefore the award must be set aside makes a mockery of arbitration as a cost-effective means of resolving disputes.

This conclusion is also contrary to the assumption that the inclusion of such a clause makes "commercial sense".

11

Ground 1 (continued)

There are two possible answers.

The first is to treat the clause as a mandatory procedural requirement, rather than a precondition, which excludes the arbitral tribunal's jurisdiction. The erroneous decision by the tribunal would also not amount to a reviewable irregularity and the court would not be required or entitled to make its own determination on the matter.

The second is to rely on a distinction, which has been made for some years in investment arbitration, between the jurisdiction of the arbitral tribunal and the admissibility of claims in proceedings before that tribunal. Admissibility issues pre-suppose that the tribunal has jurisdiction over the claim.

(see e.g. : *Republic of Sierra Leone v SL Mining Ltd* [2021] EWHC 286 (Comm)

12

Ground 2

English barrister not a member of AFSA's international panel at the time of his appointment.

Onus on objector. (Respondent in arbitration).

Tribunal may set aside award if composition of the arbitral tribunal not in accordance with arbitration agreement.

What is the prejudice to the objector?

Court should use its discretion not to set aside the award.

13

Ground 3

The failure by the tribunal, when making its award on costs under article 42, to take into account an offer "without prejudice save as to costs" made by the Respondent.

[Under s 33 of 1965 Act – "tribunal exceeded its powers"?

Rather tribunal failed to exercise power which it did have properly.]

Was the arbitration procedure unfair? Problem rather with decision-making process.

Under South African law – Leadtrain case. Costs award subject to same standard of review as award on the merits.

Remittal under Model Law art 34(4) restricted – ground justifying setting aside must first be proved.

14

Ground 3 (continued)

Public policy partly defined in art 34(5) – SA version.

Not contrary to public policy to enforce an award only because it is wrong.

Conclusion: Award should stand.

Thank you!

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SECTION D

NIGERIA V P&ID

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AFSA Elective Module – International Commercial Arbitration (2025)

Note on *Nigeria v P&ID Ltd*

By David Butler[1]

A personal note:

My recollection is that I first became aware of the arbitration between the Federal Republic of Nigeria v P&ID Ltd in the year that the Final Award was published in 2017. In August or September of that year, I was teaching in a programme presented by a Nigerian friend for prospective Nigerian arbitrators, including a fair proportion of Nigerian judges, who were planning the next stage of their professional career once they retired from the bench. The programme hosted by my friend was being presented in London. My recollection is that the victor in the arbitration proceedings, having received an award made in London was trying to enforce it there. As the award of approximately six billion US dollars represented a considerable portion of Nigeria's annual budget, the reaction of the Nigerians to this award was one of shock and horror. They wanted to know my views on how Nigeria could resist enforcement or, preferably have the award set aside. At that time the factual basis on which the award was subsequently set aside by the English Commercial Court[2] in October 2023 was unknown to the arbitral tribunal, the government of Nigeria and their legal team.

This is an extraordinary case which nevertheless contains important warnings to the international arbitration community. Although the arbitration arose from a contract, the Nigerian government that had to deal with the consequences of the award was different from the government that had been in office at the time the contract with P&ID Ltd had been concluded. The policy issues raised are typical of those that can arise in an investment dispute between a foreign investor and the host state.

I only became aware of the 2023 judgment at the recent AFSA Johannesburg Arbitration Week in April 2024, where the case was referred to but not discussed. What can we learn from the English judgment of October 2023?

Overview of this note

- The background facts
- The section 68 application for setting aside under the English Arbitration Act
- The role of section 73 of the English Arbitration Act (Loss of right to object) and the Court's conclusion
- The judicial postscript - some comfort for South Africa resulting from the IAA of 2017.

(Note: The background facts are set out below based on those contained in the judgment of the Commercial Court of October 2023.)

A The background facts

1) The main facts regarding the purpose of the agreement (the "GSPA" or Gas Supply and Processing Agreement for Accelerated Gas Development) appear from its objective (quoted in paras 142 and 578 of the judgment, namely:

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[1] Emeritus Professor and Research Fellow in mercantile law, Stellenbosch University, Western Cape South Africa.

[2] See *Federal Republic of Nigeria v Process & Industrial Developments Ltd* [2023] EWHC 2638 (Comm).

"to provide for the construction of Gas Processing Facilities by P&ID encompassing the provision of Wet Gas by the Government and the processing of the said Wet Gas by P&ID utilising two or more process streams with a total capacity of up to 400 MMSCuFD together with all utilities, support and maintenance facilities at the Site and the provision of Lean Gas by P&ID to the Government as set forth in this Agreement and its Appendices and to operate and maintain the facilities in an efficient manner."

2) The GSPA was signed on 11 January 2010. It was concluded between the federal government of Nigeria and P&ID Ltd, a company registered in the British Virgin Islands and co-founded by two Irish businessmen Michael Quinn and Brendan Cahill.

3) Nigeria has a chronic shortage of electricity. Gas from oil production is flared (burnt) when it could be used to generate electric power. The GSPA was part of Nigeria's policy called the Accelerated Gas Development Project, which attempted to tackle the problem. Nigeria was to supply wet gas to Gas Processing Facilities (GPFs) constructed by P&ID Ltd. P&ID was to strip the gas into lean gas (comprising about 85% by volume of the wet gas). Nigeria would receive the lean gas free of charge and use it to generate electricity. The remaining natural gas liquids were to be retained and sold by P&ID. The GSPA had a planned duration of 20 years. Nigeria supplied no wet gas and P&ID did not construct any GPFs. The arbitration commenced in the 3rd year of the GSPA, in proceedings brought by P&ID against Nigeria pursuant to the arbitration clause in the GSPA. The tribunal comprised Sir Anthony Evans, a retired English judge, nominated by P&ID, Chief Bayo Ojo SAN who was nominated by Nigeria and the presiding arbitrator was Lord Hoffmann, a retired senior English judge. (See paras 1-9.)

4) On 17 July 2015, the tribunal issued a partial final award on liability, finding that Nigeria had committed repudiatory breach of the GSPA, which was terminated after P&ID accepted the repudiation. The final award dealing with quantum was made on 31 January 2017. The majority awarded US $ 6.6 billion to P&ID as damages with interest at 7%. Chief Bayo Ojo SAN issued a dissenting opinion.

5) Nigeria challenged the awards at the court of the seat (the Commercial Court in London) based on alleged bribery, corruption and perjury, which allegedly occurred from the negotiation of the GSPA until the final award.[3] Crucial documents, some damaging to P&ID, were disclosed once their solicitors changed at a late stage of the proceedings (para 16). Unlike their predecessors, the new solicitors respected their professional duties and complied with court orders. The witness evidence available to the court was limited by the deaths of several significant persons, including Michael Quinn, who died in 2015. (See paras 16 and 20.)

6) Although there was incompetence on the part of Nigerian officials, Nigeria's attack on the awards was based on dishonesty (para 28).

7) In the years prior to the GSPA, Quinn and Cahill had acquired a track record of managing complex projects in Nigeria (para 31). For this purpose, they established a group of companies (the ICIL Group) and P&ID Ltd became part of this group (paras 34 and 39). In its written

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[3] See paras 10-11 of the judgment. Para 11 reads: "Before this Court, the Commercial Court in London, Nigeria challenges the Award on Liability and the Final Award ("the Awards"), and an award on jurisdiction. It makes allegations of bribery, corruption and perjury. The allegations extend to the GSPA, but they then extend further across the arbitral process as a whole from arbitration agreement to Final Award." Clause 20 of GSPA refers to London as the venue of the arbitration (see the annex to judgment).

closing argument prior to judgment, P&ID conceded that "some evidence of corrupt or apparently corrupt activity with the ICIL group of companies has come to light" (para 41). This concession is arguably an understatement.

8) Before the GSPA was entered into in early 2010, one Mrs Grace Taiga became the Legal Director at the (Nigerian) Federal Ministry of Petroleum Resources. Prior to this, while she was still at the Ministry of Defence she or members of her family then a subsequently received payments from Quinn, Cahill or the ICIL group. (See paras 54 and 55.)

9) P&ID was originally established for purposes of Project Alpha in 2006, for which P&ID became the project manager (paras 60 and 63). P&ID incurred significant costs as project manager (para 65). However, P&ID still required wet gas and the opportunity arose to acquire this from Nigeria (paras 68-69). The ideal location for Project Alpha was Calabar (rather than Lagos as initially planned) because of gas infrastructure that Nigeria planned to build in the area (para 72). Any project at Calabar would be but one among a number (para 85). The proposed project at Calabar changed significantly: the idea of the proposed propylene plant was abandoned, and the gas processing plant was divided to be dependent on two supply streams of wet gas to be provided in two phases (para 92). The plant would be re-engineered making no use of the preparation done for Project Alpha and P&ID would become plant owner instead of the project manager (paras 96-97). The negotiations led to the signing of a Memorandum of Understanding (MoU) between the Ministry of Petroleum Resources and P&ID regarding the Calabar project on 22 July 2009 (para 107).

10) A little more than a month after the signing of the MoU, Mr Hitchcock representing P&ID met with Mrs Grace Taiga on 27 August 2009 to discuss the format for the GSPA (para 124). Mrs Taiga wrote to the Minister of Petroleum Resources attaching a draft of the GSPA on 18 December 2009 (para 129). No mention was made of the desirability of obtaining further legal advice (para 131). On 11 January 2010 the GSPA was signed by the Minister for Nigeria (with Mrs Taiga as witness) and by Mr Quinn for P&ID.

11) For context, it is important to note that over the next two years at least nine further agreements were signed under the Accelerated Gas Development Project with different energy companies by the Ministry of Petroleum Resources (para 135). As in the case of the GSPA, none of these contracts were submitted to Nigeria's Infrastructure Concession Regulatory Commission for the required certification (para 156). Also, by 2014 it appears that none of the other contracts had been implemented (para 157).

12) The content of the GSPA is explained from para 136 of the judgment, with the objective, quoted above, set out in para 142. Article 9 provided for a Joint Operating Committee (see para 146.) Articles 6 and 7 set out the respective responsibilities of the Government and P&ID (see paras 148 and 149).

13) In para 152 the court states "the GSPA better deserves the description of an outline than a fully developed contract for a 20 year multi-billion US dollar project". Para 154 of the judgment goes on to state: "But the core point is that the drafting of the GSPA exposed Nigeria to the very risk or argument that led to the Awards in such a vast sum, should it not deliver wet gas even where P&ID had not built any Gas Processing Facilities." (See also para 175.)

14) The court states at para 160 that it will not make a final conclusion regarding bribery and the GSPA as the parties agreed to arbitration and this may be a matter for the tribunal (para 160).

A different position can apply to the arbitration agreement in article 20 because of the doctrine of separability (para 161), which can give rise to an issue regarding the jurisdiction of the arbitral tribunal which may be a matter for the court. The court does however state in the judgment where it finds the presence of dishonesty or corrupt motives (para 163). At para 170 Knowles J stated that he was quite satisfied that payments were made to Mrs Taiga to incentivise and reward her for the conclusion of the GSPA. The payments were kept secret from Nigeria and the court was quite satisfied that certain payments were bribes paid to her on behalf of P&ID. By some standards the amounts were not large in absolute terms but US $5000 was an amount equal to her annual salary (para 171). She was also one of the federal government of Nigeria's senior (in-house) lawyers (para 174).

15) Between the signing of the GSPA to the commencement of the arbitration, significant changes in Nigerian leadership occurred. The Minister of Petroleum Resources was replaced. The president died and was replaced by the vice-president, Mr Goodluck Jonathan.

16) Land for the project was approved at Calabar by the government of Cross River State (see para 184) but it was not acquired by P&ID because they did not pay the approximately US $140 000 purchase price (para 187). Assertions by P&ID to the new minister regarding progress with project finance and engineering were false (see paras 188-192).

17) Between January 2012 and July 2012 further payments were made to Mrs Taiga and her family. These payments were in preparation for possible arbitration or settlement and deliberately concealed from Nigeria (para 198).

18) On 22 August 2012, P&ID commenced arbitration against Nigeria relying on the arbitration clause in the GSPA (para 201). During the arbitration, items from Nigeria's internal legal documents, subject to legal professional privilege, were deliberately transmitted to P&ID (para 211). P&ID's then solicitor and counsel appreciated that the documents transmitted included privileged documents (paras 214-215).

19) On 20 March 2013 P&ID accepted Nigeria's repudiatory breach of the GSPA and terminated it. On the face of it the contract was at an end and P&ID had a claim for damages (paras 218-219).

20) The oral hearing before the arbitral tribunal on liability took place on 1 June 2015 and lasted half a day (para 304).[4] Knowles J stated it was not for him to decide the merits of the dispute on liability (para 313). But he did have to look at what was argued and what was not argued, because this is said to have been affected by corruption, including "of Nigeria's lawyers" (i.e. their legal representatives in the arbitration?) In para 314 the judge raised certain stand-out questions, including the brevity of the GSPA , and assuming that the tribunal's conclusion on liability was correct, the question: "How did Nigeria come to agree to a GSPA in such catastrophic terms?"

21) Paras 316 and 317 of the judgment are sufficiently important to merit being quoted in full:

> 316. "If the Tribunal had known of bribes around the time of the GSPA the entire picture would have had a different complexion. And so too if the Tribunal had known that Nigeria was not, during the Arbitration process itself, enjoying confidentiality of advice within the legal professional privilege to which it was entitled.
> 317. Further the Tribunal did not know that Mr Michael Quinn's evidence was knowingly false in representing that 'all the project finance was in place' and that (for the GSPA

[4] See also the tribunal's own summary of its award on liability at para 308-311.

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rather than Project Alpha in 2008) '90% of the engineering designs had been completed'."

22) The court then went on to deal with the quantum stage of the arbitration which lasted between 17 July 2015 and 31 January 2017 (para 318). This included a reference to the attempt by Nigeria on 23 December 2015 to have the award on liability set aside in an application to the Commercial Court in England by relying on s 68(2)(d) and (f) of the English Arbitration Act of 1996.The application was out of time and the application for an extension of time was dealt with as a preliminary issue. The application was dismissed as the proposed challenge had no merit (see paras 333-335). Shortly afterwards in February 2016 the Economic and Financial Crimes Commission (EFCC), a Nigerian law enforcement agency, started an investigation into P&ID.

23) The court summarised the majority's award on quantum at paras 365-396. Knowles J, as in the case of the award on liability then looked at what was argued and what was not argued. At para 400 it was noted that the tribunal did not know and could not be expected to know the receipt and retention by P&ID of "Nigeria's Internal Legal Documents" still continued. The payments to Mrs Taiga and members of her family also continued throughout the arbitration at the instigation of P&ID. This was also deliberately concealed from the tribunal and Nigeria. The purpose of these payments was to keep her "on-side", thus suppressing from the tribunal that she had been bribed by P&ID when the GSPA was entered into (para 404). These payments also continued after the Final Award (para 406).

24) On 17 and 19 September 2019, Mrs Taiga, Mr Cahill and P&ID were charged with a number of offences under Nigerian law, including corrupt practices and intent to defraud (para 413). Only on 29 October 2021, more than a year after Sir Ross Cranston granted Nigeria's application for an extension of time to challenge the awards,[5] did Nigeria become aware, through a letter from P&ID's new solicitors of the abuse by P&ID of Nigeria's "Internal Legal Documents" (para 419).

25) Nigeria's allegation that its former lead counsel in the arbitration, Mr Shasore SAN was corrupt, was specifically rejected by Knowles J, particularly as Nigeria had continued to brief both him and his firm during 2018 and 2021 in a subsequent arbitration claim brought by Sunrise Power and Transmission Co against Nigeria (see para 445).

26) Allegations made by Nigeria against other named persons were not accepted by the court because the evidence was not sufficiently convincing or reliable.

27) The extremely long judgment dealing with the court's factual findings was probably made to ensure the fairness of the process and to ensure that finality was at last achieved in the long-running dispute between P&ID and Nigeria. The judge rejected an application for leave to appeal against his judgment and as yet, there are only rumours regarding possible further attempts to take the judgment by Knowles J on appeal to higher courts.

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[5] *Federal Republic of Nigeria v Process & Industrial Development Co* [2020] EWHC 2379 (Comm).

B The section 68 application for setting aside under the English Arbitration Act (paras 473-517 of the judgment)

> "Section 68 is not there to give you a remedy if you instruct an honest lawyer who makes a mess of it or doesn't take an available point. That is just tough. You have made your arbitration bed and you lie on it."[6]

1) A party wishing to challenge an arbitral award made in England by reason of a serious irregularity must rely on section 68, which is subject to section 73 (referred to below).[7] "Serious irregularity" is defined in section 68(2). Nigeria relied on section 68(2)(g) which identifies as a serious irregularity "the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy". See further paras 473-476.

2) It is accepted by the English courts that a high threshold applies to section 68, particularly where there is reliance on fraud (see para 477). Considerations of public policy should be approached with extreme caution. As previously stated by Moore-Bick J: "It has to be shown that there is some illegality or that the enforcement of the award would be clearly injurious to the public good or, possibly, that enforcement would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the powers of the state are exercised." (see para 478). In para 480, the court correctly held that the question whether the GSPA was procured by bribery and the consequences were matters for the tribunal, not the court.

3) An overall plan from the start to procure an award would fall under s 68(2)(g) (see para 488). While P&ID Ltd was prepared to bribe in the course of its business, it lacked the sophistication to extract large sums of money from Nigeria through an arbitration or corrupt settlement. Its appointment of a person of undoubted expertise and independence as its arbitrator is contrary to such a plan (para 491). P&ID Ltd did not plan from the outset not to perform the GSPA but simply to use it as a device to get an award or settlement. Three things amounted to an irregularity in the sense of an award fraudulently obtained and the way in which they were procured was contrary to public policy (para 493). The first was relying on evidence which was material but which it knew to be false i.e. Michael Quinn's so-called explanation of how the GSPA came about, when he did not mention the bribery of Mrs Grace Taiga to achieve that end (para 494). Secondly, they continued to pay her into the arbitration period to supress from the tribunal and Nigeria that she had been bribed when the GSPA came about (para 495). The third was their improper retention of Nigeria's legal documents during the arbitration to monitor Nigeria's position and awareness, rather than returning the documents unread (para 496). These are central to Nigeria's challenge under s 68 (para 497). (See also paras 512 and 515.)

4) S 68 also requires that the serious irregularity must cause substantial injustice to Nigeria (paras 498-499). In *RAV Bahamas v Therapy Beach Club*[8] the Privy Council quoted the 1996 Saville Report on the proposed test for a substantial injustice (see para 500). The Privy Council correctly focuses on due process, not on the correctness of the decision. Also, substantial injustice is established where if the irregularity had not occurred, the outcome of the arbitration

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[6] Lord Wolfson KC, counsel for P&ID Ltd, in his closing argument, quoted in para 591 of the judgment.

[7] S 68(1) states:"(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award.
A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3)."

[8] [2021] UKPC 8.

might well have been different (para 504).[9] The core fact in the present case was the bribery of Mrs Grace Taiga when the GSPA was being made and its false concealment by Michael Quinn in his witness statement (para 509).

5) From a South African perspective, see also the addition of article 34(5) to the South African version of the Model Law, which includes in the definition of public policy a breach of the tribunal's duty to act fairly, which caused or will cause substantial injustice.

C The role of section 73 of the English Arbitration Act and the Court's conclusion (paras 518-577)

Section 73 of the English Arbitration Act of 1996 states:

"73. Loss of right to object

(1) If a party to arbitral proceedings takes part, or continues to take part, in the proceedings without making, either forthwith or within such time as is allowed by the arbitration agreement or the tribunal or by any provision of this Part, any objection-

(a) that the tribunal lacks substantive jurisdiction,

(b) that the proceedings have been improperly conducted,

(c) that there has been a failure to comply with the arbitration agreement or with any provision of this Part, or

(d) that there has been any other irregularity affecting the tribunal or the proceedings, he may not raise that objection later, before the tribunal or the court, unless he shows that, at the time he took part or continued to take part in the proceedings, he did not know and could not with reasonable diligence have discovered the grounds for the objection.

(2) Where the arbitral tribunal rules that it has substantive jurisdiction and a party to arbitral proceedings who could have questioned that ruling-

(a) by any available arbitral process of appeal or review, or

(b) by challenging the award, does not do so, or does not do so within the time allowed by the arbitration agreement or any provision of this Part, he may not object later to the tribunal's substantive jurisdiction on any ground which was the subject of that ruling."

1) Section 73 of the English Act ("Loss of right to object") can be compared to article 4 of the UNCITRAL Model Law ("Waiver of right to object"). A cursory comparison immediately reveals that the English provision is considerably more detailed. Note that the IAA 15 of 2017, schedule 1 article 34(3), starting with "unless" in the fourth line, contains an addition based on the concluding part of s 73(1) of the English Act, also starting with "unless" in the line after sub-para (d). This gives additional relevance to the portion of the judgment dealing with s 73 in a South African context.)

2) The judgment explains the concluding part of s 73(1) as follows: "it is unnecessary for an applicant to have had actual knowledge of the grounds of objection in order for him to lose his right to challenge the award. If the respondent can show that the applicant took part or continued to take part in the proceedings without objection after the grounds of objection had arisen, the burden passes to the applicant to show that he did not know, and could not with reasonable diligence have discovered, those grounds at the time." (Para 521.)

[9] See para 34 of the Privy Council's exposition quoted in para 500 of the Commercial Court's judgment.

3) The requirement under section 73(1)(d) is "could not with reasonable diligence". The court regards this wording as very important. However, Nigeria, in its written opening in the court proceedings leading to the 2023 judgment stated the test as follows: "In this respect, the test is not whether Nigeria's legal team could by any means have discovered P&ID's dishonesty, but whether it should have done so". What are the two obvious departures from the wording of s 73(1)(d)? (Para 533.)

4) The same matter was raised by P&ID in its closing argument (see paras 552-563, which include the judge's analysis. Following ion from this analysis, the judge concluded in para 564: "None of the points to which P&ID draws attention would have enabled an allegation of bribery to be raised or made in the present case, or of the dishonesty in Mr Quinn's witness statement in not referring to bribes. Nor, even if I take them together, do I consider that the points show that reasonable diligence required Nigeria to look for bribery in this case."

5) The court subsequently dealt with the concept "reasonable diligence in s 73(1)(d): "But the reasonable diligence with which I am concerned is confined to reasonable diligence that would 'have discovered the grounds for the objection', that is of the 'award being obtained by fraud or the award or the way in which it was procured being contrary to public policy' because of bribery or corrupt payments, because of false evidence in connection with them, and because of what happened with Nigeria's Internal Legal Documents. Nothing in my judgment began that path until *after* the Arbitration …". (Para 569, my emphasis.)

6) The court concluded that Nigeria had not lost its right to challenge the award under s 68(2)(g) because of the provisions of s 73(1)(d): "Under section 73, Nigeria has shown me that, at the time it took part or continued to take part in the Arbitration, it did not know and could not with reasonable diligence have discovered the grounds for its objection under section 68(2)(g). Accordingly, it did not lose its "right to object" under section 68(2)(g)."

7) The court's conclusion regarding Nigeria's challenge to the award under s 68(2)(g) is set out in para 574: "In the circumstances and for the reasons I have sought to describe and explain, Nigeria succeeds on its challenge under section 68. I have not accepted all of Nigeria's allegations. But the Awards were obtained by fraud and the Awards were and the way in which they were procured was contrary to public policy."

D The judicial postscript (paras 578-595 of the judgment)- some comfort for South Africa as a result of the IAA

> "But this is a highly unusual case, although one that draws attention to matters of wider importance. Quite apart from the consequences for the parties, the matter touches the reputation of arbitration as a dispute resolution process."[10]

1) In para 581, the judge reflects on how easily the outcome could have been different, with an English court directing that the arbitral award against Nigeria had to be enforced. Judge Knowles hoped that regardless of his conclusion, the facts and circumstances of the case would provoke reflection on the part of the arbitration community, particularly where a state is involved as one of the parties (para 582). The case clearly reveals that having an arbitral tribunal of great expertise and experience is not enough to prevent a miscarriage of justice (para 583). The gravity of the situation is illustrated by the recent English decision of *Contax Partners Inc BVI v Kuwait Finance House (KFH-Kuwait)*, which concerned a successful application to set aside an order for the enforcement in London of a fabricated arbitral award

[10] See para 14 of the judgment.

which had ostensibly been made in what turned out to have been a fake arbitration apparently held in Kuwait.[11]

2) The judge, in the October 2023 judgment in *Nigeria v P&ID* with an appropriate expression of diffidence, drew attention to four points, which are to some extent interconnected (para 484):

3) The first concerned the drafting of major commercial contracts involving a state. Nigeria has the largest economy in Africa. Nevertheless, the terms of the GSPA as a result of bribery and corruption were very unbalanced in favour of P&ID Ltd. The same imbalance could have been caused by inexperience and lack of resources. The overall risk to states and their indigent populations is considerable (para 585).

4) The second concerned the disclosure (or discovery) of documents. Disclosure of documents ordered by the English and foreign courts from P&ID Ltd and third parties *subsequent* to the final award enabled the truth to be revealed. The writer is a strong advocate of the need for arbitral tribunals to vigorously control disclosure of documents in arbitrations. There is nevertheless the need actively to guard against a miscarriage of justice. (Compare para 586.)

5) The third concerned "[participation] and representation in arbitrations over major disputes involving a state". Although the court did not find corruption on the part of Nigerian lawyers representing Nigeria in the arbitration, legal representatives of Nigeria, experts, politicians and civil servants, by not delivering work of an adequate standard, failed to enable the state of Nigeria to participate properly in the arbitration. As a result "the Tribunal did not have the assistance that it was entitled to expect, and which makes the arbitration process work" (para 587). The court rightly asked what the tribunal should have done in the circumstances (para 588). Section 33 of the English Act sets out the duties of the tribunal. Although the tribunal could arguably have adopted a more interventionist approach under s 33(1)(b), the tribunal is required to act fairly and impartially between the parties (s 33(1)(a)), which seems to require that the parties be treated equally.

6) Fourthly, the court turned to confidentiality in significant arbitrations involving a state. The privacy of arbitration hearings results in the absence of public or press scrutiny. Judge Knowles asks if greater visibility in arbitrations involving a state or state-owned entity could be part of the answer. This was the approach adopted by South Africa in the IAA section 11(1), which requires arbitration proceedings to which a public body is a party to be held in public, unless for compelling reasons, the arbitral tribunal directs otherwise. Certainly, a lawyer drafting a dispute resolution clause on behalf of the South African government or a state-owned public entity should bear in mind the facts of *Nigeria v P&ID Ltd* before advising the use of a seat other than South Africa for an international arbitration.

7) The judgment rightly concludes with a tribute to Judge Cranston, for his "acuity, independence and courage" shown during a two-day hearing in July 2020[12] when he granted Nigeria an extension of time to bring their application to challenge the award, and found in his

[11] [2024] EWHC 436 (Comm).

[12] For the proceedings presided over by Sir Ross Cranston, see *Federal Republic of Nigeria v Process & Industrial Development Co* [2020] EWHC 2379 (Comm).

reserved judgment that there was a strong *prima facie* case that the awards against Nigeria had been obtained by fraud.[13]

8) Apart from the provisions of section 11(1) of the IAA, referred to immediately above, regarding international arbitrations involving South African public bodies and having their juridical seat in South Africa being required to be held in public, there also two important additions to the South African version of article 34 of the Model Law on applications for setting aside an arbitration award in article 34(3) and 34(5) that have been referred to above. These additions have clearly been influenced by sections 68 and 73 of the English Act. The three additions increase South Africa's chances of avoiding the fate so nearly suffered by Nigeria.

9) Nevertheless, vigilance and integrity on the part of party legal representatives in future arbitrations involving South African public bodies will clearly be required in the years ahead.

[13] See para 595 of the October 2023 judgment, read with paras 418 and 419. At the time of the reserved judgment, the improper access of P&ID Ltd to Nigeria's internal legal documents that were subject to privilege was still unknown.

SECTION E

NOTE ON NYC

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AFSA Elective Module – International Commercial Arbitration (2025)

Note on the New York Convention of 1958 (NYC)

By David Butler[1]

Recommended sources:

ICCA's Guide to the Interpretation of the 1958 New York Convention: a Handbook for Judges (2nd edition 2024) (ICCA's Guide)

The 2nd edition is included in the module material. These notes are intended to be a companion to the ICCA Guide and not as a replacement.)

UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (2016) (The Guide is available online at newyorkconvention1958.org) (UNCITRAL Secretariat Guide). The UNCITRAL Secretariat Guide is typically cited as authority in these notes and is not prescribed.

Overview of Discussion

- Background
- Overview of Convention
- Analysis of text of the Convention (Articles I-VII)
- South Africa and the NYC - chapter 3 of IAA

Background

The Convention was intended by its drafters to supersede the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 and the Geneva Protocol on Arbitration Clauses (1923) (ICCA Guide vi; NYC Article VII(2)). Its title is misleading as to the Convention's scope, but it does illustrate that the application of the NYC to arbitration agreements occurred at a relatively late stage of the drafting process, as is demonstrated by the fact that article II of the NYC, which supersedes the Geneva Protocol, is not properly aligned with articles I and VII of the NYC (UNCITRAL Secretariat Guide 39 paras 2 and 3 – see also the ICCA Guide 153 regarding UNCITRAL's 2006 recommendation on the application of Article VII to arbitration agreements.)

The last survivor of the drafters of the NYC, Prof Pieter Sanders, in his foreword to the ICCA Guide, stated:

> "The 1958 New York Convention is the most successful multilateral instrument in the field of international trade law. It is the centrepiece in the mosaic of treaties and arbitration laws that ensure acceptance of arbitral awards and arbitration agreements. Courts around the world have been applying and interpreting the Convention for over fifty years, in an increasingly unified and harmonized fashion." (ICCA Guide v).

Sanders identifies the main improvements in the NYC regarding the recognition and enforcement of foreign arbitral awards compared to its predecessor (the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927) as being the elimination

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of the need for double *exequatur*; the limitation of the grounds on which enforcement could be refused to seven specified grounds; and in the case of the five grounds for refusal which must be raised by a party, the shifting of the onus of proving that ground to the party resisting enforcement. The cumulative effect of these changes was to give NYC a pro-enforcement bias.[2]

By April 2024, 172 states were parties to the NYC, with recent accessions including those of Ethiopia, the Seychelles, the Maldives, and Papua New Guinea. Although Zambia, the Democratic Republic of the Congo, Angola, and Malawi acceded to the NYC relatively recently, there are still two states from Southern and Central Africa that have yet to ratify or accede to the Convention, namely Namibia and Eswatini. (See UNCITRAL's website www.un.uncitral.org.)

Overview of Convention (ICCA Guide 7-9)

Judges are often required to apply the Convention against a local party. The Convention depends on the cooperation of national courts: "Its essence is reciprocal confidence."

The Convention has two objects:

- Recognition and enforcement of certain arbitration agreements.
- Recognition and enforcement of foreign arbitral awards.

An arbitration agreement has a positive and a negative effect. Article II requires courts of member states to enforce both effects.

Second object: The Convention is concerned with the recognition and enforcement of foreign arbitral awards. Recognition on its own is used as a shield to achieve the recognition of the award.

The Convention is also used as a sword to enforce a foreign award.

Analysis of the text of the Convention (articles I-VII)

The following discussion of the provisions of articles I-VII of the Convention varies in depth. Aspects of Article II are discussed in some detail, as it is the basis for Article 8 of the UNCITRAL Model Law, which must, in turn, be understood in the context of Article 16 of the Model Law. In contrast, although article V is equally important, as forming the basis for article 36 of the Model Law on the recognition and enforcement of international arbitral awards and article 34 on the setting aside of international arbitral awards by the court at the seat of the arbitration, the provisions of article V are arguably less complex and are adequately captured by Chapter 3 of the ICCA Guide.

[2] See Kaplan's Introduction to the ICCA Guide (1st edition) at xi.

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Article I *- Scope and reservations*

Article I(1) provides in part:

> "This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal."

This provision applies the Convention to the recognition and enforcement of foreign arbitral awards and defines foreign awards.

Article I(1) applies the Convention to awards, both final awards (including negative jurisdictional awards) and partial awards. Procedural orders and interim measures, strictly speaking, are not awards for purposes of the Convention. Regarding "consent awards," compare the Model Law article 30(1).) (See generally ICCA Guide 16-18.) What happens if a settlement of a dispute submitted to arbitration is achieved through mediation? The Singapore Convention (on the enforcement of international mediated settlement agreements) of 2018 is generally not applicable to a settlement achieved in the context of arbitration (see article 1(3)(b) of that Convention).

The fact that an arbitrator labels a decision as an "award" is not decisive for purposes of the document qualifying for enforcement under the NYC.

Article I(3) sets out the two permissible reservations:

> "When signing, ratifying or acceding to this Convention, … any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of *awards made only in the territory of another Contracting State*. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration." (My italics.)

These reservations are respectively known as the reciprocity and commercial reservations. The application of the reciprocity reservation to arbitration agreements under Article II is not self-evident.

Article II (See generally ICCA Guide chapter 2 and the UNCITRAL Secretariat Guide 39 paras 2-5.)

The ICCA Guide 35 commences with the following overview regarding Article II:

> "To ensure that the parties' original intention to have their disputes settled by arbitration cannot be frustrated by a unilateral submission of the dispute to courts, Article II of the Convention sets out the conditions under which courts must refer the parties to arbitration, and limits the grounds on which a party to an arbitration agreement could challenge its validity."
>
> Article II(1) states: "1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration." (My underlining.)

Arbitration agreement in writing

3

> Article II(2) states: "The term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams." (My underlining.)

Enforcement of arbitration agreements

Article II(3) states:

> "The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."

The court cannot enforce an arbitration clause under the Convention on its own initiative – an application by a party is required. (See ICCA Guide chapter 2 at 62.) Regarding "null and void, inoperative or incapable of being performed", see the ICCA Guide chapter 2 at 53-55.

Where the requirements of Article II are met, the court has no discretion and must refer the parties to arbitration. The courts will do this in one of two different ways. In civil law jurisdictions, the court will decline jurisdiction. In common-law jurisdictions, the court will stay its own proceedings, while retaining jurisdiction. For this purpose, South Africa qualifies as a common-law jurisdiction. (See the UNCITRAL Secretariat Guide 58 paras 61-63.) The Convention does not address the standard to be applied when reviewing the question of whether the arbitration agreement is null and void, inoperative, or incapable of being performed. In practice, there are two approaches: either a full review or a *prima facie* review. The UNCITRAL Secretariat Guide concludes that neither approach is contrary to the Convention. Moreover, Article II(3) of the Convention is the basis for Article 8(1) of the Model Law (see 62-63, paras 79-81, including footnote 298). The ICCA Guide 37-38 strongly favours the *prima facie* approach, while noting that the Convention does not adopt a position on this issue. The IAA 15 of 2017 contains both provisions (compare Schedule 1 article 8 and s 16(4) of the IAA). Certain common-law jurisdictions tend to favour the *prima facie* approach, subject to exceptions, but there is no uniform approach for determining what the exceptions should be. In the context of the Model Law, article 8 must be read with article 16(1), which applies the doctrines of competence-competence and severability (separability) of the arbitration clause. This favours the *prima facie* approach, so that the arbitral tribunal has the opportunity to determine its own jurisdiction, subject to court control under articles 16(3) or 34.

Certain Canadian, Australian, and English case law that illustrates the *prima facie* approach is now briefly discussed:

Canadian position

Canada is a federal jurisdiction. Both the federal parliament and most provinces have adopted the UNCITRAL Model Law for international arbitration. In *Dell Computer Corp v Union des consommateurs*,[3] the Supreme Court of Canada has held that generally, in a case involving the enforcement of an arbitration clause, a challenge to the arbitral tribunal's jurisdiction should first be resolved by the tribunal. The court should only refrain from referring the matter to the tribunal if the challenge is based solely on a

[3] 2007 SCC 34 para 84.

question of law. The majority in *Dell* also found that where questions of mixed law and fact are concerned, the court must refer the case to arbitration unless the questions of fact require only superficial consideration of the documentary evidence in the record.[4] The general approach in Dell reflects the *prima facie* approach.

The *Dell* principles were again before the Supreme Court of Canada in *Uber Technologies Inc v Heller*[5] in 2019. Heller, from Ontario, had a contract with Uber to use their software for the purpose of delivering food from restaurants to customers. The contract contained a dispute resolution clause that first subjected the contract to Dutch law. Second, if a dispute could not be resolved by mediation, it was to be referred to arbitration under the ICC Arbitration Rules in the Netherlands. To gain access to ICC arbitration, an upfront administrative fee of US $14,500 was payable, representing a substantial portion of Heller's annual income as an Uber driver. Heller attempted to institute a class action, but Uber applied for a stay of court proceedings so that the matter could be referred to arbitration.[6]

The majority refused a stay on the basis that the separable arbitration clause was unconscionable and therefore invalid.[7] Brown J, in a separate supporting judgment, rejected the extension and application of the unconscionability doctrine of the Anglo-Saxon common law. Instead, he favoured a narrow extension to the *Dell* principles, namely that if the question arises as to whether the arbitration agreement bars a disputing party from access to that very arbitrator, this matter should be determined by the court, and not by the arbitrator. He therefore refused a stay, as the arbitration clause in that instance was invalid or at least unenforceable as being contrary to public policy.[8] This approach is easier than that of the majority to align with the South African version of the Model Law in the IAA.[9]

Australian position

The Canadian approach can arguably be seen as somewhat rigid. This problem has been perceived by the Federal Court of Appeal (Full Court) in Australia in *Hancock Prospecting Pty Ltd v Rinehart*.[10] (Australia is also a federal jurisdiction. The UNCITRAL Model Law applies to international commercial arbitration under federal law.[11] Each state has adopted a uniform arbitration statute, closely based on the UNCITRAL Model Law for domestic arbitration.[12] The Australian Full Court stated at para 145:

> "We think that any rigid taxonomy of approach is unhelpful, as are the labels '*prima facie*' and 'merits' approach. How a judge deals with an application under [article 8(1)

[4] 2007 SCC 34 paras 84-87.
[5] 2020 SCC 16.
[6] Meshel T "International commercial arbitration in Canada after *Uber Technologies Inc v Heller*" (2021) 37 *Arb Int'l* 361 362.
[7] See 2020 SCC 16 paras 95-100.
[8] 2020 SCC 16 at paras 101-106, 110, 113,115 and 122-126.
[9] See Schedule 1 articles 34(2)(b)(ii) and 36(1)(b)(ii), and s 18(1)(a)(ii) regarding foreign awards.
[10] 2017 FCAFC 170. The matter subsequently went on appeal to the High Court of Australia as *Rinehart v Hancock Prospecting (Pty) Ltd* [2019 HCA 13 paras 6 and 13. While this Court generally agreed with the outcome ordered by the Full Court, it nevertheless restricted its decision to the construction of the arbitration clauses and did not find it necessary to consider the interaction between articles 8(1) and 16 of the Model Law. See also Tseng "*Fiona Trust* in context: interpreting arbitration clauses after Rinehart v Hancock" (2020) 36 *Arb Int'l* 109-121.
[11] See the (Australian) International Arbitration Act 136 of 1974, as amended.
[12] See e.g. the Commercial Arbitration Act 61 of 2010, as amended (New South Wales).

of the UNCITRAL Model Law] will depend significantly upon the issues and the context."

The Full Court went on to analyse the interaction between the proviso at the end of article 8(1) of the Model Law, namely "unless [the Court] finds that the agreement is null and void, inoperative or incapable of being performed" and article 16 of the Model Law. It concluded in paragraph 378 of its judgment that the interaction between article 8(1) and article 16 could be summarised in three propositions. Firstly, the Court is not required to decide the matters in the proviso to article 8(1), quoted above, but can and should usually leave this to the arbitral tribunal in the first instance. It does so by staying the court proceedings so that the matter can be referred to arbitration. Secondly, the competence principle in article 16(1) is wide enough to permit the arbitral tribunal to decide *any* question of jurisdiction, including whether the arbitration agreement came into existence. This interpretation is supported by the clear wording of article 16(1). Thirdly, the decision by the arbitral tribunal on its own jurisdiction is not final, as the Court has the final say on the question.[13]

English position

England is of course not a Model Law jurisdiction, but the English Arbitration Act of 1996 adopts most of the principles of the Model Law. In the context of discussing the interaction between articles 8 and 16 of the Model Law, the principles contained in article 8 of the Model Law appear in the English Act as section 9, which is likewise intended to give effect to article II of the New York Convention. The principles of separability and the competence of the arbitral tribunal to rule on its own jurisdiction in the first instance, contained in article 16(1) of the Model Law, are set out in sections 7 and 30 of the English Act.

The principles or doctrines of separability and *kompetenz kompetenz* been considered on several occasions by the senior courts in England. The power of the arbitral tribunal to consider the validity of the main contract where there was a separable and valid arbitration clause was identified by both the court of first instance and the Court of Appeal in *Harbour Assurance Co (UK) Ltd v Kansa General International Assurance Co Ltd*, a case which concerned "initial illegality" as the cause of invalidity of the main contract.[14] The existence of both doctrines was then confirmed by the English legislature, as mentioned above, in the English Arbitration Act of 1996.[15]

Subsequently, both the Court of Appeal and the House of Lords gave judgments in *Fiona Trust & Holding Corp v Yuri Privalov*. In that case, the charterers had allegedly rescinded the main contracts because of the bribery of their officials. The House of Lords accepted that the appeal raised two issues:

[13] See the detailed analysis in paras 337-394 of the judgment. The Court, depending on the circumstances may be required to give its final decision under article 16(3) or article 34(2)(a)(i) or even article 36(1)(a)(i).

[14] See [1992] 1 Lloyd's Rep 81 for the judgment of Steyn J in the court of first instance and [1993] QB 701 for the Court of Appeal; see also *Fiona Trust & Holding Corporation v Privalov* [2007] 4 All ER 951, [2007] UKHL 40 para 9, per Lord Hoffmann.

[15] *DHL Project & Chartering Ltd v Gemini Ocean Shipping Co Ltd (Re "Newcastle Express")* [2022] EWCA Civ 1555 para 56, where Males LJ states clearly that with s 7 the legislature did not intend to go further than the Court of Appeal in Harbour Assurance and that the doctrine of separability can only be applied where there is a valid arbitration clause/agreement.

"first, whether, as a matter of construction, the arbitration clause is apt to cover the question of whether the contract was procured by bribery, and secondly, whether it is possible for a party to be bound by submission to arbitration when he alleges that, but for the bribery, he would never have entered into the contract containing the arbitration clause."[16]

The House of Lords, in essence, agreed with the judgment of the Court of Appeal and answered both questions in the affirmative. Nevertheless, for purposes of answering the question as to whether, for purposes of Article II(3) of the NYC[17] the court should fully enquire into the validity of the arbitration clause, or, after a more superficial investigation, leave this issue to the arbitral tribunal. The clearest exposition is arguably that by Longmore LJ in the Court of Appeal, who stated that:[18]

> "If arbitrators can decide whether a contract is void for initial illegality, there is no reason why they should not decide whether a contract has been procured by bribery, just as much as they can decide whether a contract has been procured by misrepresentation or non-disclosure ... It is not enough to say that the bribery impeaches the whole contract unless there is some special reason for saying that the bribery impeaches the arbitration clause in particular."

All the judges in the two appellate courts supported a wide interpretation of the arbitration clause, as the presumed intention of a member of the business community would be in favour of one-stop arbitration, in the absence of a clear expression of a contrary intention.[19] Longmore LJ also stated "that it is contemplated by the Act that it will, in general, be right for the arbitrators to be the first tribunal to consider whether they have jurisdiction to determine the dispute.[20] He also correctly used the doctrine of separability to find that there was presumed to be a valid arbitration agreement in the absence of a direct attack on or the impeachment of the arbitration agreement itself.

A lucid explanation of the English case law on the development of separability from 1942 onwards appears from a more recent judgment of the Court of Appeal in *DHL Project & Chartering Ltd v Gemini Ocean Shipping Co Ltd (Re "Newcastle Express")*.[21] The court, after referring in passing to *Heyman v Darwins* (1942) in para 2, discusses the *Harbour Assurance* case at paras 44-54, the enactment of the separability principle in English law by section 7 of the Arbitration Act of 1996 (paras 55-57), and the *Fiona Trust* case (at paras 58-63).

Of particular importance is Males LJ's distinction at paras 46 and 47 in the context of the doctrine of separability between the issues of contract formation and contract validity. He points out that when the issue is one of contract formation, the arbitration clause will usually be impeached as there is generally no valid arbitration agreement. The question will usually have to be decided by the court, and the question of referring the issue of jurisdiction to the arbitral tribunal will usually not arise. In the case of contract validity, it will be necessary to determine on a case-by-case basis if the attack on validity is such as to impeach the arbitration clause. Males LJ classified both the *Harbour Assurance* case

[16] See [2007] UKHL 40 para 2, per Lord Hoffmann.
[17] Or article 8(1) of the Model Law or s 9(4) of the English Arbitration Act. See also s 16(4) of the IAA.
[18] [2007] EWCA Civ 20 para 29.
[19] See Longmore LJ paras 19-20; Lord Hoffmann paras 12-13 and Lord Hope para 27.
[20] Longmore LJ para 34, having regard to ss 7, 30-32 and "the prescriptive s 9(4)".
[21] [2022] EWCA Civ 1555.

and the *Fiona Trust* case as being cases involving contract validity. However, the *DHL* case concerned contract formation. In paras 66-72, Males LJ discusses the Singapore case of *BCY v BCZ*.[22] At para 72, Males LJ states that he regarded the treatment "of the application (or rather non-application) of the separability principle to issues of contract formation" in that case as the fullest and clearest exposition on separability in the context of contract formation that was cited to the Court of Appeal in the *DHL* case.

Summary

From a South African perspective, Article 8 of the Model Law should be interpreted and understood in the context of Article 16 and competence-competence. This generally favours the *prima facie* approach unless the circumstances require the court to subject the arbitration agreement to a merits approach upfront. This will be the case where the validity of the arbitration agreement is directly impeached or where the issue is one of contract formation.

However, under both the standard version of the Model Law and the South African version, the court should not be approached directly with an application for declaratory relief regarding an objection to the arbitral tribunal's jurisdiction, including a challenge based on the validity of the arbitration clause. An application for declaratory relief should be dismissed on this basis alone.[23] It is submitted that the use of applications for declaratory relief to determine the validity and scope of an arbitration clause under the International Arbitration Act should be firmly discouraged by the South African courts.[24] In view of a South African modification to article 16(3), an application for declaratory relief also has no application where an arbitral tribunal *incorrectly* decides that it lacks jurisdiction to deal with an issue that is actually within its jurisdiction by virtue of a valid arbitration agreement. This is because the second sentence of the South African version of article 16(3) commences: "If the arbitral tribunal rules on such plea as a preliminary question, any party may request ... ." The unamended UNCITRAL text for the sentence commences: "If the arbitral tribunal rules as a preliminary question *that it has jurisdiction*, any party may request ... ." (My italics)

This submission depends on the application of Article 5, which prohibits court intervention in matters governed by the Model Law except where so provided by the Model Law. Thus, declaratory relief would be appropriate in the event of the hopefully rather unlikely event of a challenge to the constitutionality of a provision of Chapter 2 of the IAA or the Model Law as contained in Schedule 1, as this is not a matter governed by the Model Law.

It is suggested that at this point, candidates should page through chapter II of ICCA Guide, to get a feel for the scope of the discussion, particularly the meaning of the phrase in article II(3) "unless [the court] finds that the [arbitration] agreement is null and void,

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[22] [2016] SGHC 249.

[23] *El Nino Ventures Inc v GCP Group Ltd* [2010] BCSC 1859. *Dens Tech-Dens kg v Netdent-Technologies Inc*, Court of Appeal of Quebec, Canada, (2008) CLOUT case No 1016, adopts the same approach. Compare however *Jean Estate v Wires Jolley LLP* [2009] ONCA 339, where the restricted availability of article 8, as advocated in the text, was overlooked.

[24] Even before the advent of the International Arbitration Act, this statement finds support in both judgments in *Zhongji Development Construction Engineering Co Ltd v Kamoto Copper Co SARL* 2015 1 SA 345 (SCA).

inoperative or incapable of being performed". This aspect of Article II, while important, is not discussed in these notes, as it is adequately discussed in the ICCA Guide.

Article III

"Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards."

On a somewhat cursory glance at the contents of the ICCA Guide, it appears that Article III is not specifically discussed. It is, however, briefly discussed in the Introduction to Chapter 3 of the Guide (67). For a useful outline of the intentions of the drafters underlying Article III and possible complexities in its application, the reader is referred to the UNCITRAL Secretariat Guide 77-93. See also the IAA s 16.

Article IV

"1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

(a) the duly authenticated original award or a duly certified copy thereof;
(b) the original agreement referred to in article II or a duly certified copy thereof."

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent."

See the ICCA Guide (69-75) and the IAA's 17.

Article V

"1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) the parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it, or, failing any indication thereon, under the law of the country where the award was made; or

(b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings, or was otherwise unable to present his case; or

(c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decision on matters submitted to arbitration may be recognized and enforced; or

(d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
(e) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
(a) the subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
(b) the recognition or enforcement of the award would be contrary to the public policy of that country."

See the ICCA Guide chapter 3 paras C-E) and the IAA's 18.

Article V contains an exhaustive list of grounds on which a court may refuse to enforce a foreign arbitral award. The onus of proving the existence of the award is on the party resisting enforcement. Although a court may still enforce an award even if a ground for refusing enforcement is proved, this will be a rare event and dependent on the particular facts of the case. It needs to be emphasising that Article V is concerned with defences against applications for the enforcement of foreign awards. The court at the seat of the arbitration has exclusive jurisdiction to set aside the award. If the seat is a Model Law jurisdiction, article 34 of the Model Law will apply, subject to any local adaptations.[25] If the award is set aside at the seat, this will usually render the award unenforceable in any other jurisdiction. [26]

One particular ground deserves particular attention; namely, where a party contests the validity of the award against it on the basis that it was not a party to the arbitration agreement. It is accepted that the enforcement court may conduct a fresh inquiry into this issue and is neither bound by the arbitrator's decision nor the consideration of whether there has been an attempt to set the award at the seat.[27]

Recent case law in the form of a decision by the UK Privy Council in *Gol Linhas Aereas SA v MatlinPatterson Global Opportunities Partners (Cayman)*[28] confirms earlier case law to the effect that the grounds in Article V should be construed narrowly to give effect to the pro-enforcement bias of the NYC. The dispute concerned a purchase and sale agreement relating to shares. The contract was in Portuguese and subject to Brazilian law. The contract contained an arbitration agreement, which stipulated Brazil as the seat of the arbitration. The appellants contesting enforcement in the Cayman Islands challenged the validity of the arbitration agreement, which is a ground for refusing

[25] See e.g. the separate notes on *Nigeria v P&ID* 10 para 8, where the cumulative effect of South African adaptations to the Model Law in this context are discussed.
[26] Obviously, the enforcement court will tend to defer to the court at the seat on whether or not the arbitration meets due process standards. However, where the court gives a seemingly blatant home-town decision by setting aside an award on a basis not generally recognised internationally, the enforcement court may well be prepared to still enforce the award.
[27] *Phoenix Shipping Corporation v DHL Global Forwarding SA (Pty) Ltd and Bateman Projects Ltd* [2012] ZAWCHC 11; 2012 3 SA 381 (WCC). Paras 55-58 refer to *Dallah Real Estate v Government of Pakistan* [2010] UKSC 46 as supporting authority.
[28] [2022] UKPC 21 (on appeal from the Court of Appeal in the Cayman Islands) paras 23 and 112. Following the convention the Privy Council is referred to in the discussion below as "the Board".

enforcement under Article V(1)(a). The respondent argued that this ground should be rejected because of issue estoppel, which supports finality of awards, in that the issues had already been determined under Brazilian law by the Brazilian courts. The Board was satisfied that the annulment action against the award before the Brazilian courts did involve an independent or fresh determination of the question whether the MP Funds (the objector to enforcement) were party to a valid arbitration agreement, which had then been subject to a full appeal process. It therefore gave rise to an issue of estoppel on that question.[29]

The second ground raised against enforcement relied on article V(1)(b) in that the party resisting enforcement had been unable to present its case, because the tribunal had decided the case against it on a point of law, without first giving it the opportunity to respond. The Board held that "in interpreting and applying article V(1)(b) of the New York Convention, as transposed into English or Cayman law, the court should regard the domestic statutory provision as imposing a standard of due process capable of application to any international arbitration whatever the procedural law applicable and the nationality of the participants".[30] The Board noted that to decide a matter against a party on a significant factual issue based on evidence of which it had not been informed would indeed be unfair (para 85). The Board found the "due process" issue difficult to decide and stated that it would have been prudent for the tribunal to have notified the respondent in the arbitration of the point of law on which it intended to decide the case. However, they were not persuaded that the tribunal's failure to ask for comment was so serious a denial of procedural fairness that would justify refusal of enforcement under article V(1)(b).[31]

The objector to enforcement also raised the issue of public policy in article V(2)(b). The invocation of public policy failed for two reasons. First, as the objector properly conceded, it had been unable to convince the court to refuse enforcement for lack of due process. Second, the Brazilian courts, following a full appeal process, had declined to set aside the award. The Board concluded that "It would be a very strong thing for an English or Cayman court to find it contrary to the public policy of the forum to enforce an award which has been upheld *by the courts with primary responsibility for ensuring the integrity of the arbitral process*. There is no sufficient basis on which to reach such a conclusion in this case." (My italics.)

Article VI

"If an application for the setting aside or suspension of the award has been made to a competent authority referred to in Article V paragraph (1)*(e)*, the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

See the ICCA Guide chapter 3 para F (at 112-115) and the IAA s 18(3).

[29] Para 60.
[30] Para 76.
[31] See paras 100-101 and also paras 102-106 regarding the factors to which the PC attached particular weight.

Article VII

"The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon."

See the ICCA Guide (chapter 1 para E) and the IAA's 19.

South Africa and the NYC - chapter 3 of IAA

Since the commencement of the IAA, some judges have found it unnecessary to decide whether that statute or the Arbitration Act 42 of 1965 applies to the arbitration in which the court has been asked to intervene or to support.[32] This is clearly contrary to s 4(1) of the IAA, and in any event, the statutes are very different. The circumstances in which the IAA will apply are now clearly set out in *Industrial Development Corporation of South Africa Ltd v Kalagadi Manganese (Pty) Ltd.*[33]

Chapter 3 of the IAA, pursuant to South Africa's accession to the NYC in 1976, is intended to make the substantive provisions of the NYC part of South Africa's domestic law.[34] This appears from s 3(d) of the IAA regarding the objects of the Act. The text of the Convention is contained in Schedule 3 to the IAA. S 16(1) and (4) ensure the incorporation of Article II of the NYC into South Africa's domestic law.

The issue that this part of the Notes is intended to address concerns the interaction between the provisions in Chapter 3 of the IAA that give effect to the provisions of the NYC on the recognition and enforcement of foreign arbitral awards and articles 35 and 36 of the Model Law in Schedule 1 of the IAA which provide for the recognition and enforcement of international commercial arbitration awards.[35]

Article 35(1) of the Model Law deals with the recognition and enforcement of an arbitral award, irrespective of the country in which the award was made. However, the Model Law in terms of article 1(1) applies only to <u>international commercial</u> arbitration, although

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[32] See e.g. *Delta Beverages (Private) Ltd v Blakey Investments (Pty) Ltd* [2020] ZAKZDHC 36 paras 4 and 17. As the dispute concerned companies from Zimbabwe and South Africa the IAA should have applied, irrespective of where the contract was concluded. See also *Industrial Development Corporation of South Africa Ltd v Kalagadi Manganese (Pty) Ltd* [2025] ZASCA 70 para 14 regarding the judgment of the High Court in Johannesburg in this matter.

[33] [2025] ZASCA 70 paras 14-18.

[34] The IAA repealed the Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977. Perhaps the most serious fault in the 1977 legislation was its failure to incorporate article II of the NYC into South Africa's domestic law. As the 1977 makes no express reference to the NYC, contrary to the comparable statutes of the United Kingdom and Botswana, which were introduced in 1975, it is fair to conclude that the omission was deliberate in order to preserve the discretion of the courts under s 6(2) of the 1965 Act not to stay court proceedings so that the parties could proceed to arbitration. After the introduction of the current South African Constitution of 1996, the courts could rightly have refused to exercise this discretion by virtue of s 233 of the Constitution.

[35] Although articles 35 and 36 are referred to as a unit in the discussion below, they of course actually have different functions. Article 35 concerns the requirements imposed on a successful party in an arbitration to have the award recognised and enforced. (An award cannot be enforced by a court unless it is recognised. Recognition without enforcement may be needed by a successful defendant, if the claimant ignores an award in favour of the defendant by bringing court proceedings, possibly in another country, claiming relief that has previously been dismissed in an arbitral award.) Article 36 contains the exhaustive list of grounds on which a court can refuse to enforce the award. Irrespective of whether the ground must be raised by the party opposing enforcement or may be raised by the court on its own initiative, the onus of proving the ground will be on the party opposing enforcement.

article 1(2) includes articles 35 and 36 on the brief list of provisions of the Model Law that apply even if the seat of the arbitration was in a country other than South Africa. In contrast, chapter 3 of the IAA applies to "foreign arbitral awards", defined in s 14(d) as awards made in the territory of a state other than the Republic.

In short, Chapter 3's provisions on the recognition of foreign arbitral awards can overlap with the provisions of articles 35 and 36 of the Model Law, but they also have separate functions. Articles 35 and 36 apply only to awards made in an international commercial arbitration, irrespective of whether the juridical seat of the arbitration is in South Africa or elsewhere. An arbitral award to qualify for recognition and enforcement under Chapter 3 must be a foreign award. Also, as South Africa did not make the commercial reservation when acceding to the NYC, a qualifying award for purposes of Chapter 3 need not be made in a commercial matter. If an award concerning a residential property in South Africa is made in a foreign country to settle a dispute between two co-owners, it will be enforceable under Chapter 3 of the IAA as a foreign award. It will not be enforceable under articles 35 and 36 of the Model Law as it was made in a non-commercial matter.[36] It is for this reason that s 4(2) of the IAA applies s 2 of the Arbitration Act regarding matters that are not arbitrable, in preference to s 7 of the IAA, which determines matters that are not arbitrable in (international) commercial disputes. In contrast, a foreign award relating to an international commercial dispute can be enforced both under articles 35 and 36 and under chapter 3 of the IAA.

[36] Compare *Bidoli v Bidoli* [2011] ZASCA 82, which concerned the enforcement of a consent award in what was apparently a commercial dispute.

SECTION F

QUIZ

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AFSA
The Arbitration Foundation of Southern Africa
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AFSA Elective Module – International Commercial Arbitration (2025)

Quiz on lectures and material presented by Prof David Butler

Answer the question as set. Each correct answer counts one (1) mark. You may only choose one answer for each question. Where the question contains combination answers (e.g., (a) and (b)), a student may still select a single answer, e.g., (a). Where this answer is partially correct, the student will receive ½ mark. Where the student selects two or more choices for a question (e.g., (c) and (d), the student will receive zero (0).

Question 1

Choose the most correct answer, which may be a combination (e.g., (a) and (b)).

(a) The New York Convention of 1958 may be regarded as both a shield and a sword for the recognition and of foreign arbitration awards.

(b) The court at the seat of the arbitration is typically responsible for enforcing arbitral awards under the New York Convention.

(c) Article V of the New York Convention permits the court approached to recognise and enforce the award to raise the public policy defence on its own initiative.

(d) (a) and (b).

(e) (a) and (c).

Question 2

Choose the most correct answer, which may be a combination (e.g., (a) and (b)).

(a) When South Africa acceded to the New York Convention in 1976, Article II of the Convention became part of South Africa's domestic law following the commencement of the Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977.

(b) Article II of the Convention only applies to the enforcement of foreign arbitral agreements.

(c) When a country joins the New York Convention of 1958, after it has already joined the Geneva Protocol on Arbitration Clauses of 1923, it will cease to be bound by the Geneva Protocol, to the extent that the Convention of 1958 applies.

(d) (a) and (b).

(e) (a) and (c).

Question 3

Choose the most correct answer, which may be a combination (e.g., (a) and (b)).

(a) Under the AFSA International Arbitration Rules of 2021, arbitrations can only be consolidated if all claims in the arbitration are made under the same arbitration agreement, or if all the parties involved in the consolidated arbitration have agreed to the consolidation.

(b) Under the International Arbitration Act 15 of 2017, consolidated arbitrations or concurrent hearings require the consent of the parties involved.

(c) Joinder of another party in an arbitration under the UNCITRAL Arbitration Rules of 2010 is freely permissible as long as the arbitral tribunal consents.

(d) (a) and (b).

(e) (b) and (c).

Question 4

Choose the most correct answer.

(a) An arbitral tribunal may not decide on the subject matter of a dispute under the International Arbitration Act of 2017 when the arbitration has its seat in South Africa, if the arbitration agreement is contrary to South Africa's public policy.

(b) Only the party resisting the enforcement of an arbitral award under the International Arbitration Act of 2017 may raise the issue that the dispute is not arbitrable.

(c) A private arbitrator in an international arbitration seated in South Africa may decide a dispute concerning the criminal liability of the respondent.

(d) A private arbitrator in an international arbitration seated in South Africa may not decide a dispute under South African law where a statute confers jurisdiction on a court to determine a matter falling within the scope of the arbitration agreement.

(e) As the International Arbitration Act of 2017 does not expressly exclude an issue of status from the jurisdiction of an arbitrator, private arbitrators may freely decide such issues under that Act.

Question 5

Choose the most correct answer, which may be a combination (e.g., (a) and (b)).

(a) Under article 16(1) of Schedule 1 of the International Arbitration Act, the arbitral jurisdiction may finally rule on its own jurisdiction.

(b) Article 16(1) of Schedule 1 of the International Arbitration Act only refers to the doctrine of severability in the context of disputes regarding the jurisdiction of the arbitrator.

(c) A party is not precluded from challenging the jurisdiction of an arbitrator under article 16(1) of Schedule 1 of the International Arbitration Act by reason of the fact that such party participated in the appointment of the arbitrator.

(d) (b) and (c).

(e) (a) and (c).

Question 6

Choose the most correct answer, which may be a combination (e.g., (a) and (b)).

(a) Under the wording of article (8)(1) in Schedule 1 of the International Arbitration Act, a court may order the parties to take their dispute to arbitration, in which case the court will cease to have jurisdiction.

(b) In terms of the express wording of article (8)(1) in Schedule 1 of the International Arbitration Act, the court may determine the validity of the arbitration agreement on a *prima facie* basis.

(c) Where the court has been approached under article (8)(1) in Schedule 1 of the International Arbitration Act, an arbitration may be commenced and an award made, while the issue is pending before the court.

(d) (a) and (b).

(e) (b) and (c).

Question 7

Choose the most correct answer, which may be a combination (e.g., (a) and (b)).

(a) Under article 12 of the AFSA International Rules of 2021, an arbitral tribunal may only dismiss a claim that is manifestly without legal merit on the application of a party and not on its own motion.

(b) If the tribunal grants the application, it must give reasons for its decision that may be in summary form.
(c) If an application is granted under Article 12, it is unlikely to result in a more expeditious and cost-effective process.
(d) (a) and (b).
(e) (b) and (c).

Question 8
Choose the most correct answer, which may be a combination (e.g., (a) and (b)).
(a) The parties are usually free to determine the law applicable to their arbitration agreement, under the principle of party autonomy.
(b) Where no such choice is made, logic dictates that the court should normally apply the law applicable to the contract, which will include the arbitration clause.
(c) Where the parties fail to make an express choice as to the law applying to the arbitration clause, the English legislature favours the application of the law of the seat.
(d) (a) and (b).
(e) (a) and (c).

Question 9
Choose the most correct answer, which may be a combination (e.g., (a) and (b)).
(a) Under the UNCITRAL Model Law, in the absence of a choice by the parties, the arbitral tribunal must apply the law determined by the conflict of laws rules that it considers appropriate.
(b) Under the AFSA International Arbitration Rules (2021), if the parties fail to agree, the arbitral tribunal must apply the law that it determines to be appropriate
(c) Under the AFSA International Arbitration Rules (2021), if the parties fail to agree, the arbitral tribunal must apply the rules of law that it determines to be appropriate.
(d) (a) and (c).
(e) (b) and (c).

Question 10
Choose the most correct answer, which may be a combination (e.g., (a) and (b)).
(a) The chances of an award being made that is tainted by fraud, as occurred in England in *Nigeria v PI&D,* are less likely to happen under the South African version of the UNCITRAL Model Law than under the standard version.
(b) The chances of an award being made that is tainted by fraud, as occurred in England in *Nigeria v PI&D,* are less likely to happen under the standard version of the UNCITRAL Model Law than under the South African version in Schedule 1 of the International Arbitration Act of 2017.
(c) The information that enabled the English court to set aside the final award in *Nigeria v PI&D* only became available to the English court after the final award was made.
(d) (b) and (c).
(e) (a) and (c).

SECTION G

FURTHER READING

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IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO. D2834/2020

In the matter between:

DELTA BEVERAGES (PRIVATE) LIMITED	**First Applicant**
SCHWEPPES ZIMBABWE LIMITED	**Second Applicant**

and

BLAKEY INVESTMENTS (PTY) LTD	**First Respondent**
PAMMENTER C.J, N.O.	**Second Respondent**
HOLLIS N.D, N.O.	**Third Respondent**
ASSOCIATION OF ARBITRATORS (SOUTHERN AFRICA) NPC	**Fourth Respondent**

ORDER

The application is dismissed with costs of two counsel, such costs to be paid by the applicants jointly and severally, the one paying the other to be absolved.

JUDGMENT

CHETTY J :

[1] This is an application for the stay of arbitration proceedings instituted by the first respondent ('Blakey') against the first ('Delta') and second applicants ('SZL').

The latter two companies are part of the global AB InBev group of companies, with their registered offices in Harare, Zimbabwe. Blakey has its registered offices in Durban. The second and third respondents are the arbitrators seized with the pending arbitrations, with the matter concerning SZL scheduled to commence on 1 September 2020. The temporary stay of the arbitral proceedings is sought pending the finalisation of legal proceedings in the High Court of Zimbabwe that the supply agreement entered into with Blakey be declared void, alternatively voidable or unenforceable. It is these agreements, which contain a referral to arbitration, which Delta and SZL seek to set aside as void and unenforceable. At the time when these proceedings were instituted, the applicants contemplated instituting the Zimbabwean proceedings within a month after obtaining the order sought in this application. That approach would have rightly brought criticism against the applicants. The applicants, since the launching of this application, have in fact instituted the Zimbabwean proceedings in May 2020, in two separate actions against Blakey. No relief is sought against the remaining respondents in those actions or in this application.

[2] I point out at the outset that the applicants issued their application papers on 8 May 2020. I am advised that during April 2020 unsigned sets of the application papers were sent to the respondents. These papers could not be issued at the time because of the COVID-19 lockdown. After issuing of the papers, Blakey delivered its answering affidavit on 9 June 2020 and the applicants delivered their replying affidavit on 26 June 2020. During this period, the applicants also managed to institute their Zimbabwean proceedings after succeeding to persuade the High Court in Zimbabwe to grant them leave to serve their papers via edictal citation. The arbitration against SZL is set to proceed from 1 to 4 September 2020 before the third respondent, while the Delta arbitration is set to follow sometime in October 2020 before the third respondent.

[3] The applicant approached the Judge President for the granting of a preferential date for hearing in light of the looming arbitrations. The matter was assigned to me as the parties were desirous of conducting a virtual hearing. The earliest, mutually convenient date was 21 August 2020. This judgment is therefore delivered under strict time constraints and deals crisply with the kernel issue – whether the applicants have made out a case for a stay of the arbitration

proceedings pending the finalisation of the Zimbabwean litigation. The applicant bears the onus of satisfying the traditional test for the granting of interim relief, being a *prima facie* right, a reasonable apprehension of harm, the balance of convenience and the absence of an alternative remedy (*Setlogelo v Setlogelo* 1914 AD 221 at 227), although Blakey contends that the applicants must establish a clear right as the relief that it sought is final in effect. Both Mr Chohan SC, who appeared with Ms Thobela-Mkhulusi and Ms Milovanovic-Bitter for the applicants, and Mr Pillay SC, who appeared with Ms Lushaba for Blakey, were in agreement that the relief sought was discretionary and that I would have to be persuaded that it would be in the interests of justice to pause both scheduled arbitrations.

[4] Counsel raised several interesting, but peripheral arguments pertaining to the applicability of the International Arbitration Act 15 of 2017 (the IAA) and the UNCITRAL Model Law on International Commercial Arbitration (1985) (amended in 2006) to the present dispute. For reasons which are apparent from what is set out below, these arguments were not determinative of the issue before me.

[5] The facts of the matter are largely common cause. The CEO of Blakey, Mr Panday, first started doing business with the applicants in 2002 at the time when he was employed as a marketing manager with a plastic manufacturing company. He eventually went out on his own and established Blakey. He has been doing business with the applicants for almost 15 years, although they contend it was for a lesser period. Nothing turns on that. Essentially the applicants contracted with Blakey to supply flexible packaging materials made from plastic based on an *ad hoc* arrangement, for which there was no need to subject such an agreement to the Zimbabwean foreign exchange control regulations. Over the course of time and due to a national shortage of raw materials in South Africa, Blakey entered into discussions with the applicants, who were represented by Ms Cynthia Malaba, for the purposes of concluding an agreement that committed the applicants to purchase minimum bulk quantities of materials, agreeing on fixed pricing of the product and for the applicants to provide ‘forecasting’ to Blakey of the minimum quantity that it would be require to supply. According to Blakey, it was oblivious of any need for such an agreement to comply with exchange control regulations, particularly as the parties had had a fairly long business relationship. Eventually in May 2018, SZL concluded

an agreement with Blakey for the supply of raw materials and the supply of flexible wrapping.

[6] Following an internal audit in 2019 at Delta, they discovered the existence of the supply agreement between themselves and Blakey, which the aforementioned Ms Malaba had apparently concluded without the approval and oversight by various other departments within Delta, including the legal department and the company secretary, particularly where the company was significantly exposed. According to Delta, prior to this audit, they were under the impression that Blakey was an *ad hoc* supplier of goods. Ms Malaba was to be subjected to a disciplinary enquiry by Delta, but left employment before this could commence. Delta now contends that the agreement signed with Blakey is unenforceable against it as it contained terms that are 'unusually oppressive' in nature, for example allowing Blakey to amend the standard price for the supply of goods for any reason. It was submitted by Delta that even if the goods were of a defective quality, it would be precluded from not paying for these based on the terms of the agreement. The agreement also bound Delta to make 'forecasts' of minimum quantities of material that they intended to order, which were binding on it. The agreement furthermore made Blakey the exclusive supplier of materials to Delta, which exclusivity triggers the application of Zimbabwean foreign exchange control regulations as Delta was contracting with a foreign entity.

[7] As a result of what it describes as a 'commercially oppressive contract', Delta refused to accept further deliveries of goods from Blakey and contested the basis on which the supply agreement was concluded.

[8] The contract between Delta and Blakey provided in clause 21 of the supply agreement for a referral of all disputes emanating from the contract to arbitration. The position adopted by Delta is that if the supply agreement is susceptible to being set aside as being void *ab initio*, then it must follow that any arbitration provided for in the contract, cannot proceed on the basis of the tainted main agreement. The legal position is that if an agreement is void *ab initio* then all the consequential clauses thereto fail with it. In *North West Provincial Government & another v Tswaing Consulting CC & others* 2007 (4) SA 452 (SCA) para 13, Cameron JA held that an arbitration clause which is 'embedded in a fraud-tainted agreement' cannot

stand, and 'the agreement purporting to give effect to it is stillborn'. Blakey refused to accept the contention by Delta and proceeded to refer the matter to arbitration under the auspices of the fourth respondent.

[9] It is not in dispute that Delta was not in agreement with the appointment of the arbitrator but once appointed, it participated in the pre-arbitration conference, and unequivocally set out its position that it was participating in the process in order to protect its interests, that it did not acquiesce to the process, and that it would seek the right to challenge the validity of the agreement in court. A perusal of the minutes of the pre-arbitration conference confirms Delta's position. Delta proceeded to deliver a statement of defence, in which it raised three special pleas contending that the agreement fails to comply with Zimbabwean Exchange Control Regulations of 1996 and that the agreement is unenforceable as it is *contra boni mores*. In so far as the latter contention, Delta relies on the onerous terms which Ms Malaba imposed on the company, including a term which made Blakey the exclusive supplier of packaging products to Delta. They contend that no reasonable business person, acting in the interests of Delta, would have agreed to such terms.

[10] Delta contends that on a proper interpretation of clause 21, it is not severable from the remainder of the agreement and does not survive the illegality which taints the main agreement. This, as appears below, is disputed by Blakey.

[11] With regard to the SZL agreement, it is contended that this too fails to comply with the Zimbabwean exchange control regulations and that Blakey had allegedly failed a supply assessment conducted by Coca-Cola South Africa ('CCSA'). As the CCSA is part of the AB InBev global group of companies, Blakey would have been precluded from doing business with SZL. It is further contended that Blakey misrepresented to SZL that the rates at which it would be supplied materials was similar to that provided to Delta when in reality Blakey charged SZL at a significantly higher rate. As in the Delta arbitration, SZL has also challenged the validity of the arbitration but nonetheless participated in the pre-arbitration conference in order to ensure the protection of its interests.

[12] Both applicants contended that the stay of the arbitral proceedings should be granted on the basis that the High Court of Zimbabwe is the *forum conveniens* on the basis that both agreements require performance in Zimbabwe, clothing the Zimbabwean courts with jurisdiction. They further contend that a number of witnesses are Zimbabwean nationals who can only be subpoenaed in Zimbabwe, particularly Ms Malaba who is a Zimbabwean citizen. The applicants further submit that it is proper that the Zimbabwean courts pronounce on the validity of the supply agreements in as much as they would require an application of Zimbabwean law, specifically in respect of the interpretation of exchange control regulations and of Zimbabwean competition law, and whether Zimbabwean courts would compel the applicants to be bound by an agreement which is *contra boni mores*. The applicants rely on *Multi-Links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd* 2014 (3) SA 265 (GP) para 18 where Fabricius J quoted the following from Forsyth *Private International Law* 5ed (2012) at 188 regarding *forum conveniens* :

'"The basic principle is that a stay will only be granted on the ground of *forum non conveniens* where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, ie in which the case may be tried more suitably, for the interests of all the parties and the ends of justice. . . . if the court is satisfied that there is another available forum which is prima facie the appropriate forum for the trial of the action, the burden will then shift to the plaintiff to show that there are special circumstances by reason of which justice requires that the trial should nevertheless take place in this country. . . . Since the question is whether there exists some other forum which is clearly more appropriate for the trial of the action, the court will look first to see what factors there are which point in the direction of another forum. . . . and these will include not only factors affecting convenience or expense (such as availability of witnesses), but also other factors such as the law governing the relevant transaction . . . and the places where the parties respectively reside or carry on the business. If the court concludes at that stage that there is no other available forum which is clearly more appropriate for the trial of the action, it will ordinarily refuse a stay. . . . If however the court concludes at that stage that there is some other available forum which prima facie is clearly more appropriate for the trial of the action it will ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should nevertheless not be granted. . . ."'

[13] In light of the above factual situation, the applicants contend that they have satisfied the requirements for a clear right, alternatively a *prima facie* right to be allowed to approach the Zimbabwean courts to determine the validity of the supply agreements in light of the contraventions referred to. In so far as the apprehension of harm is concerned, the applicants contend that they run the risk of dual arbitration proceedings, only for the Zimbabwean courts to declare at a later stage that the agreements are void and unenforceable. Should the arbitrations proceed without a pronouncement by the Zimbabwean courts on its validity, and should Blakey succeed thereat, Blakey could then seek to enforce the award in Zimbabwe on the basis of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), which requires courts to give effect to arbitration awards made in contracting countries. If that were the case, Blakey would be entitled to enforce the award in Zimbabwe, without the Zimbabwean courts being able to exercise the discretion as to the enforcement thereof.

[14] I am not persuaded by this line of argument. Where a court is faced with an application to make an arbitration award an order of court, it must apply its mind to the issue of the lawfulness of the award. This precise issue was considered by the Constitutional Court in *Cool Ideas 1186 CC v Hubbard & another* [2014] ZACC 16; 2014 (4) SA 474 (CC) where Majiedt AJ, writing for the majority at para 59, considered whether 'making an arbitration award an order of court is permissible in circumstances where to do so would be to sanction a clear statutory prohibition'. Far from abandoning any form of enquiry, the court in *Cool Ideas* recognised that a court could refuse to make an award an order of court on grounds of public policy, including that the enforcement of such an award would be in violation of a statutory prohibition. As a matter of interest, the court in *Cool Ideas* para 61 was also asked to consider the provisions of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards referred to above, as well as the provisions of the Model Law on International Commercial Arbitration. I have no doubt that even if an arbitration award were to be made in favour of Blakey, if it sought to enforce those awards in Zimbabwe, the Zimbabwean courts would not simply rubberstamp the decision of the arbitrators, particularly if to do so would condone a contravention of that country's laws. That however is a risk that Blakey must take by insisting that the

arbitrations proceed, regardless of Delta's and SZL's contentions that the Zimbabwean courts should first pronounce on the validity of the agreements.

[15] In so far as the contention that the applicants have no other available remedy but to seek a stay of the two arbitral proceedings, the applicants submit that the arbitrators do not have the power to determine their own jurisdiction. They further contend that despite this issue being squarely before the arbitrators as part of a special plea, an interdict should nonetheless be granted. The applicants rely on *Inter-Continental Finance and Leasing Corporation (Pty) Ltd v Stands 56 and 57 Industria Ltd & another* 1979 (3) SA 740 (W) at 754B-C, where the court was faced with an application to interdict arbitration proceedings, and held as follows :

'. . .it appears to me, with respect, that it is unrealistic and inconvenient to expect a party who contends that impending arbitration proceedings will be invalid, to take part in such proceedings under protest, or otherwise to await the conclusion and then, if the result is against him, to oppose the award being made an order of Court. Every consideration of convenience and justice, it seems to me, points to the desirability of allowing such a party to seek an order preventing the allegedly futile proceedings before they are commenced. Moreover, as a matter of law, the probability of harm or injury seems to me to be present in the form of wasted and, to some extent at least, irrecoverable, costs incurred in relation to the abortive proceedings if they are ultimately established to have been such. In my view, therefore, the applicant is entitled to an order in terms of its main prayer.'

[16] Before dealing with Blakey's response to the application, it is necessary to record that despite the applicants contending that the supply agreements should be declared invalid and unenforceable, both parties have acted pursuant to the agreements, in fact with the applicants receiving goods over a number of years, without any demur on their part or the expression of any concern that the agreements contravened their exchange control regulations. As Blakey says in its heads of argument 'everything was hunky dory until the debts fell due'. It is common cause that the supply agreements specifically make provision in clause 20 for the appointment of an arbitrator in the event of a dispute arising between the parties. The agreement further provides that the arbitration will be conducted in 'accordance with the rules of the Association of Arbitrators (Southern Africa) or its successor current at the date of the dispute arising'. Closer scrutiny of the agreements reflects

that the parties agreed in clause 21 that the agreement 'is governed by and must be interpreted and construed in accordance with the laws of the Republic of South Africa'. This is contrary to the assertion by the applicants that the agreement must be determined with reference to Zimbabwean law. The point emphasised by Blakey is that once the parties have agreed to be bound by a contract, our courts have shown deference to respecting the choices parties made as to the mechanisms chosen for the resolution of disputes, even in international commercial transactions. See *Zhongji Development Construction Engineering Co Ltd v Kamoto Copper Company SARL* [2014] ZASCA 160; 2015 (1) SA 345 (SCA) para 29 where the SCA noted that:

'[29] The majority judgment in the Constitutional Court, delivered by O'Regan ADCJ in *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and another* makes it plain that our law of arbitration is not only consistent with, but also in full harmony with, prevailing international best practice in the field.' (Footnotes omitted.)

The court in *Zhongji* para 32 made reference to *Fiona Trust Holding Corp & others v Privalov & others* [2007] EWCA Civ 20; [2007] Bus LR where Longmore LJ, delivering the court's unanimous judgment, said the following:

'As it seems to us any jurisdiction or arbitration clause in an international commercial contract should be liberally construed. The words "arising out of" should cover "every dispute except a dispute as to whether there was ever a contract at all".'

[17] This statement is pertinent, as the point emphasised by Mr Pillay is that the applicants do not contend that there was *no agreement* to refer disputes to arbitration. On that score, it must be accepted, that an agreement existed, but as Mr Chohan stressed throughout, the applicants do not dispute that the parties agreed to refer matters to arbitration. They simply take issue with the legality of the agreement. In that context, what is said in *Fiona Trust* paras 19 and 38 in my view, assumes a greater significance in determining the issue before me. The court said the following in para 19:

'[19] One of the reasons given in the cases for a liberal construction of an arbitration clause is the presumption in favour of one-stop arbitration. It is not to be expected that any commercial man would knowingly create a system which required that the court should first decide whether the contract should be rectified or avoided or rescinded (as the case might be) and then, if the contract is held to be valid, required the arbitrator to resolve the issues that have arisen. . . .'

And further at para 38:

‘. . . If there is a contest about whether an arbitration agreement had come into existence at all, the court would have a discretion as to whether to determine that issue itself but that will not be the case where there is an overall contract which is said for some reason to be invalid eg for illegality, misrepresentation or bribery and the arbitration agreement is merely part of that overall contract. In these circumstances it is not necessary to explore further the various options canvassed by Judge Humphrey Lloyd since we do not consider that the judge had the discretion which he thought he had.’

Mr Pillay emphasised that the decision in *Inter-Continental Finance (supra)* is distinguishable from the present matter, as in that case the court found that there was *no agreement* which bound the parties to have their dispute resolved by arbitration. In the present matter, there *is* an agreement to submit to arbitration. The point of departure is the contention of the applicants that the referral to arbitration is tainted by the alleged unlawfulness of the main agreement. Mr Pillay submitted that *North West Provincial Government (supra)* is distinguishable because the applicants do not allege fraud against Blakey anywhere in their papers, which he conceded would be sufficient to invalidate the agreements. See *Namasthethu Electrical (Pty) Ltd v City of Cape Town & another* [2020] ZASCA 74. In any event, it was submitted that article 16 the International Arbitration Act provides for separability, which as I understood the concept means that the invalidity of the main agreement does not necessarily entail the invalidity of the arbitration agreement; and that the arbitration agreement must be treated as a distinct agreement**.** In other words, even if the main agreement is tainted as alleged, this does not prevent the arbitration from proceeding. Mr Chohan was obliged to file heads to deal with this issue as it only emerged in Blakey’s heads. However, in light of the conclusion I reach, it is not necessary for me to make any finding as to whether the IAA rather than the Arbitration Act 42 of 1965 applies.

[18] During the course of the hearing, I enquired from Mr Chohan why the applicants had waited until mid-2020 to institute an action in the Zimbabwean courts, despite them being aware as early as October 2019 that Blakey was not amenable to a stay of the arbitration proceedings. Their attorneys held instructions as at October 2019 to bring a stay application. Mr Chohan submitted that it would have made no difference whether the Zimbabwean action was launched earlier. To that

extent, Mr Chohan, in fairness, submitted that he could provide no explanation why the applicants had waited for the conclusion of their investigations before deciding to embark on a plan of action. The founding papers suggest that the applicants adopted a 'cautious approach' and that they did not act rashly. Their failure to act promptly has resulted, to some extent, in this matter being heard on a similar footing to an urgent application. I mention this to the extent that Blakey submits that the application for a stay is nothing more than a delaying tactic to avoid an order being made against the applicants for payment of considerable amounts. Blakey filed its statements of claim on 20 and 31 January 2020 respectively. The claim against Delta is for approximately R150 million and the claim against SZL for approximately R250 million. Despite the significant amounts involved, the applicants only instituted their action in Zimbabwe during June 2020. In my view, the applicants appear to have dragged their heels in launching the Zimbabwean proceedings, but seek to rely on this pending action as the main ground for their stay application.

[19] To the extent that the applicants complain that Ms Malaba compromised the interests of the applicants when she concluded a 'suspicious' agreement with Blakey, the latter is entitled to raise the issue of estoppel on the grounds that Ms Malaba represented to Blakey that she had the necessary authority to enter into the supply agreements. In this regard, Blakey relies on section 20(7) of the Companies Act 71 of 2008, and the common law position as set out in *Royal British Bank v Turquand* (1856) 6 E&B 327; 119 ER 886 at 888, which position was stated as follows by Lord Hatherley in *Mahony v East Holyford Mining Co Ltd* (1875) LR 7 HL 869 at 894:

'. . .when there are persons conducting the affairs of the company in a manner which appears to be perfectly consonant with the articles of association, then those so dealing with them, externally, are not to be affected by any irregularities which may take place in the internal management of the company.'

[20] Although Mr Chohan stressed that this court is not being asked to make a determination as to whether Ms Malaba acted with the requisite authority, it is one of the factors that this court must take into account in determining whether the applicants have a reasonable prospect of success in persuading the Zimbabwean courts of the agreement being *contra boni mores*. They rely on the conduct of Ms

Malaba in order to make this argument. The applicants must make out a case that they are entitled to final relief in the main case in Zimbabwe in order to establish a *prima facie* right entitling them to an interim interdict in this court. This presupposes that I am entitled to do a preliminary assessment of the merits of the applicants' main case. This is also linked to the balance of convenience. As Holmes J in *Olympic Passenger Service (Pty) Ltd v Ramlagan* 1957 (2) SA 382 (D) at 383C–F held:

'It thus appears that where the applicant's right is clear, and the other requisites are present, no difficulty presents itself about granting an interdict. At the other end of the scale, where his prospects of ultimate success are nil, obviously the Court will refuse an interdict. Between those two extremes fall the intermediate cases in which, on the papers as a whole, the applicants' prospects of ultimate success may range all the way from strong to weak. The expression '*prima facie* established though open to some doubt' seems to me a brilliantly apt classification of these cases. In such cases, upon proof of a well grounded apprehension of irreparable harm, and there being no adequate ordinary remedy, the Court may grant an interdict - it has a discretion, to be exercised judicially upon a consideration of all the facts. Usually this will resolve itself into a nice consideration of the prospects of success and the balance of convenience - the stronger the prospects of success, the less need for such balance to favour the applicant: the weaker the prospects of success, the greater the need for the balance of convenience to favour him. I need hardly add that by balance of convenience is meant the prejudice to the applicant if the interdict be refused, weighed against the prejudice to the respondent if it be granted.'

[21] As to the issue of prejudice which the applicants will suffer if the stay of the arbitral proceedings is not granted, the applicants reiterate the same argument that they would be obliged to participate in two arbitration proceedings, which are based on agreements which may yet be found to be unlawful and invalid or unenforceable by a Zimbabwean court. Moreover, the costs that would be incurred in the arbitrations, should the Zimbabwean courts find in their favour, cannot be recovered. Inasmuch as Blakey's claim is a monetary claim, it is submitted that no prejudice would be occasioned as interest would in any event attach to any award made in favour of Blakey. I am not persuaded by this argument in as much as it may be used to avoid any monetary claim which is contested. Blakey has a right to have its dispute expeditiously resolved. It is for that reason, as counsel submitted, that they expressly agreed to have all disputes resolved through arbitration as opposed to the courts. This is an important consideration when parties have agreed to a speedy

dispute resolution mechanism, which is now sought to be derailed by one party. In any event, I am not persuaded by the submission that the applicants would be 'forced' to participate in the arbitration agreement. They, after all, entered into an agreement, in respect of which there was performance, and they receive goods pursuant thereto. Now that a dispute has arisen, they take issue with the validity of the agreement.

[22] In so far as the contention that the applicants have no other alternative remedy, it bears noting that all of the arguments raised in respect of the invalidity of the supply agreements are squarely before the arbitrators. The applicants have no reason to believe that those special pleas have been pre-judged. It may well transpire that the special plea raised on behalf of the applicants could be upheld. That could spell the end of Blakey's case. I am therefore not persuaded that the applicants have no other alternative remedy. In any event, the proceedings in the Zimbabwean court are not intended to offer a 'one-stop shop' similar to arbitration. As I understood Mr Chohan's submissions, should the Zimbabwean courts dismiss the action and uphold the validity of the main agreement, the matter would have to return to arbitration, after a significant delay to Blakey. On the other hand, the arbitration scheduled for 1 September 2020 will consider the special pleas, including the issue of jurisdiction, and if those preliminary objections are dismissed, the arbitration will then enquire into the merits of the dispute. In *Vedanta Resources Holdings Ltd v ZCCM Investments Holdings PLC & another* [2019] JOL 45353 (GJ) para 54 the court held that:

'[54] If a party to an arbitration agreement seeks to litigate a dispute to which the agreement relates in a court outside the country of the seat of arbitration, namely Johannesburg, his opposing party may seek an injunction to restrain him from bringing or continuing that suit. This principle emerges from the UK Supreme Court's decision in *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC*, [2013] UKSC 35 (12 June 20130, [2014] 1 All ER 335, in which the court observed that an agreement to arbitrate disputes has 'positive and negative aspects'. Not only do parties to such an agreement undertake to seek relief in arbitration in whatever *forum* the agreement prescribes, the negative (often silent) aspect of the agreement means that the parties undertake the <u>concomitant (negative) obligation not to seek relief in any other forum</u>.' (My underlining.)

[23] In the final analysis, I am not satisfied that the applicants have made out a case for interdictory relief to stay the pending arbitrations. There is no impediment to the applicants participating in the arbitrations. In any event, much of the arguments which they have placed before me will be advanced before the arbitrator on 1 September 2020 for a determination of the special pleas. I can hardly think that the applicants will not be prepared to proceed. The importance of forging ahead with the arbitrations is underscored by the observation by Ponnan JA in *MV Iran Dastghayb Islamic Republic of Iran Shipping Lines v Terra-Marine SA* 2010 (6) SA 493 (SCA) para 35:

'[35] Courts should generally be slow to encroach upon a decision to refer a dispute to private arbitration, for to do so would be to disregard the principle of party autonomy. That ought to apply with greater force in a situation such as this, for as Wallis points out:

> "However, there seems to be no escape from the conclusion, however unsatisfactory, that by bringing an action *in rem* against an associated ship a claimant can defeat the provisions of both an arbitration clause and an exclusive jurisdiction clause in the contract underlying the claim."

Were that to be so, as indeed it must be on that analysis, a cynical litigant could with impunity circumvent the terms of a bargain that the other party to it may have thought had been earnestly struck. . . .' (Footnotes omitted.)

[24] As to costs, both sides were represented by senior and junior counsel. The issues were fairly complex. I am satisfied that costs should follow the result.

[25] I make the following order:

The application is dismissed with costs of two counsel, such costs to be paid by the applicants jointly and severally, the one paying the other to be absolved.

M R CHETTY

Appearances

For the applicant:	M A CHOHAN SC (J THOBELA-MKHULISI and A MILOVANOVIC-BITTER)
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For the Respondent:	I PILLAY SC (S B R LUSHABA)
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Email:	pbarnard@coxyeats.co.za and cpretorius@coxyeats.co.za
Date reserved:	21 August 2020
Date of Judgment:	31 August 2020

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 661/2024

In the matter between:

INDUSTRIAL DEVELOPMENT CORPORATION OF SOUTH AFRICA LIMITED	**FIRST APPLICANT**
AFRICAN DEVELOPMENT BANK	**SECOND APPLICANT**
and	
KALAGADI MANGANESE (PTY) LTD	**FIRST RESPONDENT**
KALAHARI RESOURCES (PTY) LTD	**SECOND RESPONDENT**
KGALAGADI ALLOYS (PTY) LTD	**THIRD RESPONDENT**

Neutral citation: *Industrial Development Corporation of South Africa Limited and Another v Kalagadi Manganese (Pty) Ltd* (661/2024) [2025] ZASCA 70 (30 May 2025)

Coram: MEYER, MATOJANE, KATHREE-SETILOANE and UNTERHALTER JJA and VALLY AJA

Heard: 3 March 2025

Delivered: 30 May 2025

Summary: Law of Contract – international arbitration agreement – disputes arising out of or in connection with the agreement – must be resolved through arbitration in the United Kingdom - International Arbitration Act 15 of 2017 applies – high court – no jurisdiction to determine disputes.

Diplomatic Privileges and Immunities Act 37 of 2001 – African Development Bank – immune from court's jurisdiction – immunity recognised and enforced through the Diplomatic Privileges and Immunities Act 37 of 2001.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Spilg J, sitting as a court of first instance):

1 The application for leave to appeal is granted with costs including those of two counsel where so employed.
2 The appeal is upheld with costs including those of two counsel where so employed.
3 The order of the high court is set aside and replaced with the following order:
'1. The application is stayed as against Kalagadi Manganese (Pty) Ltd (Kalagadi Manganese), pending the final determination of the arbitration proceedings in terms of clause 40.2.1 of the Common Terms Agreement.
2. Kalagadi Manganese is ordered to pay the costs of the application including those of two counsel.'

JUDGMENT

Kathree-Setiloane JA (Meyer, Matojane and Unterhalter JJA and Vally AJA concurring):

[1] This is an application for leave to appeal in terms of s 17(2)*(b)* of the Superior Courts Act 10 of 2013 (the Superior Courts Act) against paragraph 3 of the order of the Gauteng Division of the High Court, Johannesburg, Spilg J sitting as the court of first instance (the high court), dated 6 September 2023. The application was referred for oral argument in terms of s 17(2)*(d)* of the Superior Courts Act.

[2] On 29 April 2020, the first applicant, the Industrial Development Corporation (the IDC) brought an application to place the first respondent, Kalagadi Manganese (Pty) Ltd (Kalagadi) under business rescue in terms of s 131(1) of the Companies Act 71 of 2008, under case number 10228/2020 (the business rescue application). In response, Kalagadi, together with the second and third respondents respectively, Kalahari Resources (Pty) Ltd (Kalahari Resources) and Kalagadi Alloys (Pty) Ltd (Kalagadi Alloys),[1] brought an application in the high court to, *inter alia*, compel the IDC and the second applicant, the African Development Bank (the AfDB),[2] to accept a restructuring arrangement of the debt between Kalagadi and the applicants (the Kalagadi application). The relationship between Kalagadi and the applicants is governed by various contracts; the principal one being the Common Terms Agreement which was concluded on 4 September 2017.

[3] In their answering affidavit, in the Kalagadi application, the applicants raised the following preliminary objections:

'(a) The court is required to stay the exercise of its jurisdiction to determine the merits of the Kalagadi application. Clause 40.2.1 of the Common Terms Agreement provides that any disputes arising out of or in connection with the agreement must be resolved through arbitration in London, United Kingdom, under the International Chamber of Commerce rules [(the ICC Rules)]. The substantive law of the Common Terms Agreement is also English law. Kalagadi's attempt to bypass this arbitration clause and bring the matter before a domestic court contravenes the agreed-upon dispute resolution process.

(b) Kalagadi has failed to follow further formal dispute resolution processes prescribed in the Common Terms Agreement. Clause 15 of the Common Terms Agreement requires that disputes regarding revisions to the Financial Model or Technical and Economic Assumptions must first be negotiated in good faith and, if unresolved, referred to an expert for determination in terms of

[1] Kalagadi, Kalahari Resources and Kalagadi Alloys are collectively referred to as 'the respondents' in the judgment.
[2] IDC and AfDB are collectively referred as 'the applicants' in the judgment.

clause 38 of the Common Terms Agreement. Kalagadi's failure to engage in this expert determination process, opting instead to initiate court proceedings, is a direct violation of the contractually prescribed mechanisms for resolving such disputes.

(c) AfDB, a respondent (and a necessary party) in the Kalagadi application, is immune from the Court's jurisdiction. Under article 52(1) of the AfDB Parent Agreement (given effect to, and recognised, *inter alia*, by article 4 of the AfDB Host Country Agreement), the AfDB is immune from every form of legal process except in cases arising out of its borrowing powers. This immunity has been recognised and enforced through South African law, specifically the Diplomatic Privileges and Immunities Act 37 of 2001 [(the Immunities Act)], pursuant to the Host Country Agreement concluded with the Minister of International Relations and Cooperation of the Government of the Republic of South Africa [(the Minister)].

(d) Since the AfDB is a necessary party to the application and cannot be subject to the jurisdiction of the South African courts, the Court is divested of jurisdiction and the entire application is rendered defective as relief cannot be granted against the AfDB and it cannot otherwise be joined to the proceedings.'

The preliminary objections will be referred to as the arbitral, expert determination and immunity challenges, respectively.

[4] Kalagadi operates a manganese mine in the Northern Cape. It obtained various loan facilities from the applicants for its operation. These facilities were made available to Kalagadi pursuant to the Common Terms Agreement. The total amount owing by Kalagadi is currently in excess of R6 billion.

[5] The IDC is not only a major creditor of Kalagadi, but is also a minority shareholder in Kalagadi, with a 20% shareholding. The major shareholders of Kalagadi are Kalahari Resources and Kgalagadi Alloys. They are not parties to the Common Terms Agreement, but are parties to two separate Guarantee, Pledge and Cession Agreements which were concluded on 14 September 2017 with, *inter alia*, IDC and AfDB, respectively. Pursuant to these agreements, Kalahari Resources and

Kgalagadi Alloys provided security to the applicants, which they could call up in the event of Kalagadi breaching its debt repayment obligations to them, under clause 5 of the Common Terms Agreement. Clause 5[3] regulates Kalagadi's repayment obligations to the applicants.

[6] Kalagadi did not satisfy its obligations under clause 5 of the Common Terms Agreement. The applicants, acting in terms of their powers under clause 24.30,[4] issued separate notices of default to Kalagadi accelerating the entirety of the debt. Kalagadi was obliged to repay the whole debt immediately.

[7] On 29 April 2020, the IDC instituted the business rescue application. At the time, Kalagadi was indebted to the IDC in an aggregate amount of R3,010,341,967.01. This application was struck from the roll on 29 May 2020, for want of urgency. The respondents subsequently brought the Kalagadi application. In addition to an order directing the applicants to restructure their loans to Kalagadi, the respondents also sought an order directing the applicants to consent to the termination of a mining contract concluded with Murray & Roberts Cementation

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[3] Clause 5 of the Common Terms Agreement reads:
'[Kalagadi] shall repay all Utilisations made to it under a Facility Agreement in full, in the amounts and on the dates specified in that Facility Agreement, in accordance with the Priority of Payments and otherwise in accordance with the terms of the Facility Agreement, this Agreement and the Account Bank Agreement.'
[4] Clause 24.30.1 provides (in relevant part) that the Lenders are entitled to take the following action as a result of an event of default:
'. . . .
(*c*) demand repayment of all or part of its share of the Total Outstandings regardless of whether or not the individual amounts of the Total Outstandings are due, all of which amounts shall immediately become due and payable upon such claim; and/or
(*d*) declare that all or part of any Loans is repayable, and any other amounts accrued or outstanding under the Finance Documents are immediately due and payable, whereupon they shall become immediately due and payable; and/or
. . . .
(*g*) take any steps to exercise enforce any rights, remedies, powers or discretions of the Finance Parties under the Security Documents, subject to the Intercreditor Deed; and/or
(*h*) instruct the Borrower to, or enforce, all or any of the Borrower's rights under the Project Documents for which purpose the Borrower irrevocably appoints the Facility Agent as its agents to perform all acts and to sign all documents and all Project Authorisations on its behalf necessary to enforce such rights.'

(Pty) Ltd, which Kalagadi blamed for the business rescue application. They also sought to interdict the applicants from exercising their security rights in terms of clause 1.1.248 of the Common Terms Agreement, consequent upon their default.

[8] On 30 October 2020, Kalagadi launched a further application in which it, *inter alia,* sought a joint hearing of the business rescue and the Kalagadi applications. The high court heard that application on 30 January 2021. On 22 July 2021, it ordered a joint hearing of the two applications on the basis that 'the substantive adjudication of the one [application] involves a consideration of the factors raised in the other, and it may be more convenient not to require their regurgitation simply for the sake of form'. The high court did not order a consolidation of the two applications.

[9] However, on 3 December 2021, the high court heard only the preliminary objections raised in the Kalagadi application and the business rescue application.[5] It did not deal with the merits of these applications. On 6 September 2023, it dismissed the preliminary objections in the Kalagadi application in paragraph 3 of its order. The applicants applied to the high court for leave to appeal this order. It was refused. They subsequently applied to this Court for leave to appeal. The respondents oppose the application.

The Arbitral Challenge

[10] The applicants contend that the high court erred in dismissing this preliminary objection, as the peremptory dispute resolution mechanism in clause 40.2.1 of the Common Terms Agreement is peremptory. Clause 40.2.1 reads:

'Subject to Clause 40.2.10, any dispute arising out of or in connection with [the Common Terms Agreement], including any question regarding its existence, validity or termination, shall be

[5] The business rescue application has been postponed *sine die* (without a date).

referred to and finally resolved by arbitration under the Rules of Arbitration of the International Chamber of Commerce (the ICC) in force at that time (the ICC Rules), which ICC Rules are deemed by reference into this clause 40.2 . . .'

[11] The test for interpreting documents is well established. It is a unitary exercise that involves considering the text, context and purpose of the provision in question.[6] Clause 40.2.1 is unambiguous. It expressly provides that 'any dispute arising out of or in connection with [the Common Terms Agreement]' shall be referred to arbitration and finally resolved by arbitration. The use of the word 'shall' signifies that clause 40.2.1 is peremptory. It provides no scope for the exercise of a discretion. It also imposes no internal substantive limitation on the class of disputes that must be referred to arbitration. This is consistent with the purpose of the clause which is to establish a neutral, efficient, and enforceable dispute resolution mechanism for the resolution of disputes arising from the agreement. Thus, any disputes arising out of or in connection with the Common Terms Agreement must be referred to arbitration for resolution.

[12] The only exception to this rule is in clause 40.2.10 of the Common Terms Agreement.[7] This term of the agreement gives the finance parties (in this case the IDC and AfDB) an election, regardless of whether the borrower has commenced arbitration, to elect by notice in writing to the borrower (Kalagadi) that the dispute shall be resolved by litigation rather than arbitration. Neither of the applicants has made this election. The Kalagadi application concerns alleged breaches, by the

[6] *University of Johannesburg v Auckland Park Theological Seminary and Another* [2021] ZACC 13; 2021 (6) SA 1 (CC).
[7] Clause 40.2.10 of the Common Terms Agreement reads:
'The Borrower agrees for the benefit of the Finance Parties that, at the sole option of the Finance Parties and regardless of whether the Borrower has commenced arbitration proceedings under Clause 40.2.1, the Finance Parties may elect by notice in writing to the Borrower . . . that the Dispute shall be resolved by litigation rather than arbitration. . .'

applicants, of the Common Terms Agreement. These are, manifestly, 'disputes arising out of or in connection with the [Common Terms Agreement]'. Courts of law, therefore, have no jurisdiction to determine these disputes.

[13] In spite of the peremptory dispute mechanism in clause 40.2.1 of the Common Terms Agreement, the high court found that:

(a) the Kalagadi application is responsive to the business rescue application, and, given that the dispute resolution clause is not applicable to the business rescue application, the court has sole jurisdiction in both applications;

(b) the AfDB actively supported the business rescue application and thus cannot now cavil at the respondents raising defences to the business rescue (in the form of the Kalagadi application), even if such issues would otherwise fall to be arbitrated in terms of the Common Terms Agreement;

(c) the respondent parties have a right of access to court under the Constitution, which right may only be limited where it is reasonable to do so; and

(d) the issues, which are the subject matter of the court proceedings, overlap with what may be referred to arbitration and thus the former subsumes the latter, and it does not make sense to refer the issues to arbitration.

[14] The high court erred in arriving at this conclusion, as it failed to consider the parties' clear intention to include an extensive dispute resolution mechanism in the Common Terms Agreement. It, furthermore, simply overlooked that the agreement is an 'international arbitration agreement' which is governed by the International Arbitration Act 15 of 2017 (the IAA). Prior to 20 December 2017, all arbitrations and arbitration agreements, whether domestic or international in character, were governed by the Arbitration Act 42 of 1965 (the Arbitration Act). Since that date, however, international arbitrations are governed by the IAA. Article 1(3) of Schedule

1 to the IAA, states that an arbitration is international if, *inter alia*, the parties to an arbitration agreement have at the time of the conclusion of that agreement, their places of business in different States; or the place of arbitration is different to the State where the parties have their places of business.

[15] The Common Terms Agreement is an international arbitration agreement as the AfDB has its offices in Abidjan and Côte d'Ivoire, whereas Kalagadi, ABSA[8] and the IDC have their places of business in South Africa. Additionally, the agreed place of arbitration in the agreement is London. The IAA clearly applies in this matter. Counsel for the respondents conceded as much during oral argument in this Court.

[16] In terms of article 8(1) of Schedule 1 to the IAA, '[a] court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his or her first statement on the substance of the dispute, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed'. The IAA heightens the stringent standard that a party wishing to escape an arbitration agreement must meet, before a court would entertain the matter. This is in step with the modern approach to arbitration clauses which is 'to respect the parties' autonomy in concluding the arbitration agreement, and to minimise the extent of judicial interference in the process'.[9]

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[8] ABSA is a lender under the Common Terms Agreement but is not cited as a respondent in the Kalagadi application.
[9] *Aveng (Africa) Ltd (formerly Grinaker-LTA Ltd) t/a Grinaker-LTA Building East v Midros Investments (Pty) Ltd*, 2011 (3) SA 631 (KZD); [2011] 3 All SA 204 (KZD) para 13 citing *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews* [2009] ZACC 6; 2009 (4) SA 529 (CC); 2009 (6) BCLR 527 (CC) (*Mphaphuli*) para 219.

[17] The high court, however, failed to apply the test prescribed in the IAA. Mistakenly, it referenced the Arbitration Act in its judgment and applied an 'interests of justice' test to conclude that it has a wide discretion in this matter. Yet even under that Act, the test is stringent.[10]

[18] There was some debate on whether the applicants relied on article 8(1) of Schedule 1 to the IAA in argument before the high court. The respondents were adamant that the applicants had not, hence we should not assail the high court for failing to apply this provision. This submission is misplaced. The high court was confronted with a preliminary objection to its jurisdiction to determine the dispute between the parties. In terms of clause 40.2.1 of the Common Terms Agreement, the high court was required to determine whether the arbitration clause was of appreciation. The applicants' omission to deal with the IAA pertinently, during argument in the high court, did not absolve the court from doing so. A court has a duty to determine its own jurisdiction, quite apart from the parties' submissions to the Court.

[19] The high court erred for the further reason that it considered the Kalagadi and the business rescue applications as having overlapping issues. The Kalagadi application is distinct from the business rescue application. It is brought under a separate case number from the business rescue application and is not a counter application to the latter. This is, perhaps, why the high court did not make an order consolidating the two applications. Besides the relief sought in the Kalagadi

[10] In terms of s 3 of the Arbitration Act, a Court could overlook an arbitration agreement on 'good cause' being established. This open-ended standard was interpreted restrictively in *De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the time being and Another* [2015] ZACC 35; 2016 (1) BCLR 1 (CC); 2016 (2) SA 1 (CC) paras 36-7, where the Constitutional Court held that 'the onus to demonstrate good cause is not easily met. A court's discretion to set aside an existing arbitration agreement must be exercised only where a persuasive case has been made out . . . [a]bsent infringement of constitutional norms, courts will hesitate to set aside an arbitration agreement untainted by misconduct or irregularity unless a truly compelling reason exists'.

application is not dependent on the outcome of the business rescue application. The relief sought, and issues raised, in the Kalagadi application are founded on purported breaches of the Common Terms Agreement.

[20] Even if there are overlaps between the two applications, this does not render the dispute resolution mechanisms in the Common Terms Agreement inapplicable to disputes arising therefrom. The relief sought in the business rescue application and the Kalagadi application are dissimilar. Each of these proceedings may take its own course without requiring the high court to assume jurisdiction over the arbitration proceedings. The business rescue proceedings are clearly not a basis for disregarding or bypassing the arbitration agreement.

[21] The business rescue application would bring about an entirely different statutory regime in respect of Kalagadi. Importantly, in this regard, it will place Kalagadi under independent oversight and temporarily halt certain enforcement action against it, without absolving it from any breach. By comparison, the relief which Kalagadi seeks in the Kalagadi application is effectively an injunction against the exercise of the applicants' contractual rights. This relief must be sought in the correct forum - the contractually agreed arbitration process.

[22] The high court also erred in placing emphasis on Kalagadi's lack of legal remedies. It has remedies in terms of the contractually agreed dispute resolution clause in the Common Terms Agreement. Kalagadi expressly agreed, in that agreement, not to exercise its right to access to court in terms of s 34 of the Constitution. As held by the Constitutional Court in *Mphaphuli*[11] 'the decision to

[11] Ibid at paras 216-217.

refer a dispute to arbitration, as long as it is voluntarily made, should be respected by the courts.[12]

[23] The high court found that AfDB supported the business rescue application and is therefore precluded through its conduct from invoking its immunity or the arbitration agreement under the Common Terms Agreement. The high court erred in this respect, as there is no factual basis for this finding on the papers. Equally, it erred in concluding that the IDC cannot simultaneously invoke the business rescue application and raise the preliminary objections. Nothing stopped the IDC from doing so. It raised the preliminary objections as a defence in the Kalagadi application, whereas it seeks a different remedy in the business rescue application.

[24] The Kalagadi parties seek to escape the peremptory dispute resolution clause by contending that the Guarantee, Pledge and Cession Agreements are implicated in this matter. They argue that these agreements would expose Kalahari Resources and Kalagadi Alloys (the Kalagadi majority shareholders) to liability, should the applicants not be interdicted from enforcing their security rights in the high court. As mentioned, these shareholders are not party to the Common Terms Agreement but rather to two different Guarantee, Pledge and Cession Agreements. Although they do not allege that the applicants have breached these agreements, they, nonetheless, believed, rightly or wrongly, that as Kalagadi was not in a position to pay the debt to the applicants, they would likely call up their guarantees.

[25] In my view, Kalahari Resources and Kgalagadi Alloys were not required to wait for the applicants to call up the guarantees before seeking interdictory relief,

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[12] Ibid at para 219.

which they could only seek from the high court, under the Guarantee, Pledge and Cession Agreements. A referral to arbitration of the interdictory relief they seek in the Kalagadi application will, therefore, deny them the right to seek relief, in the high court, to interdict the applicants from enforcing their security rights in terms of those agreements. It must be emphasised, however, that the security arrangement under these agreements have no bearing on the enforceability of the peremptory arbitration clause as between Kalagadi and the applicants.

[26] Kalagadi contends that the IDC's constitutional and statutory obligations preclude it from entering into an arbitration agreement. This contention is unsustainable. The IDC's primary mission is to promote economic growth and industrial development in South Africa. Lending money is a key tool for achieving this objective.[13] There are no legal barriers that preclude the IDC from agreeing to the arbitration process to resolve disputes, when concluding loan agreements. Public bodies, routinely, enter into such agreements and participate in arbitrations in South Africa. Section 5 of the IAA expressly recognises the binding nature of arbitration agreements on public bodies, such as the IDC, in international commercial arbitrations.[14]

The Immunity Challenge

[27] In relation to this ground of appeal, the applicants contend that AfDB enjoys immunity from legal process and the high court erred in concluding that it has

[13] Sections 4(*b*) and (*c*) of the Industrial Development Corporation Act 22 of 1940 specifically give the IDC the authority to lend money to companies and acquire shares in those companies.
[14] Section 5 of the IAA provides: '[the IAA] binds public bodies and applies to any international commercial arbitration in terms of an arbitration agreement to which a public body is a party'. A 'public body' is defined in the IAA to include provincial and national departments, municipalities and 'any other functionary or institution when exercising a public power or performing a public function in terms of . . . any legislation'.

jurisdiction over it.[15] The applicants found this challenge on the AfDB Parent Agreement and the AfDB Host Country Agreement. The AfDB was established in terms of the AfDB Parent Agreement that was signed in Khartoum on 4 August 1963. South Africa became a member of the AfDB on 13 December 1995.

[28] In terms of article 52(1) of the AfDB Parent Agreement, the AfDB is immune 'from every form of legal process except in cases arising out of the exercise of its borrowing powers'. The AfDB Host Country Agreement was agreed to by the Republic of South Africa and published in Government Notice 916, *Government Gazette* 32579 of 18 September 2009. It conferred the relevant immunities on the AfDB.[16] Article 4 of the Host Country Agreement provides that 'the [AfDB] shall be immune from every form of legal process and may only be sued in accordance with paragraph 1 of article 52 of [the AfDB Parent Agreement]'.

[29] The AfDB's privileges and immunities are recognised by the Minister under s 5(3) and 7(1) of the Immunities Act. The high court held, to the contrary, that the AfDB was not immune in the Kalagadi application, as such immunity had not been incorporated into South African law as required under s 231(2) of the Constitution. This section provides that '[a]n international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National

[15] Should the applicants succeed in this challenge, AfDB's immunity would not only preclude it from being party to the Kalagadi application. Since it is a necessary party to the proceedings, not only can no relief be granted against it, but the entire application would be stillborn. In *Absa Bank Limited v Naude NO and Others*[15], this Court held that 'if an order or judgment cannot be sustained without necessarily prejudicing the interests of third parties that had not been joined, then those third parties have a legal interest in the matter and must be joined before the court can proceed to adjudicate the dispute'. If the court has no jurisdiction over a necessary party, then it cannot adjudicate the matter.
[16] This was recognised by the republication of the Host Country Agreement (with a protocol) by the Minister in the Government Gazette on 10 November 2017 (GN 1233; GG 41237). The official Department of International Relations and Co-operation's treaty register confirms the amended Host Country Agreement, which amended and reincorporated the original Host Country Agreement of 2009, subject to amendments that are not relevant to this matter. It came into force in South Africa on 18 August 2017.

Council of Provinces, unless it is an agreement referred to in section 3'. This section is not applicable, as immunity from legal process is sourced not from s 231 of the Constitution, but rather in the Immunities Act, and its consequent recognition by the Minister. Sections 5(3) and 7(1) of the Immunities Act provide:

'5(3) any organisation recognised by the Minister for the purposes of this section and any official of such organisation enjoy such privileges and immunities as may be provided for in any agreement entered into with such organisation or as may be conferred on them by virtue of section 7(2).

. . . .

7(1) Any agreement whereby immunities and privileges are conferred to any person or organisation in terms of this Act must be published by notice in the *Gazette*.'

[30] These provisions give the Minister the power to recognise organisations for the purposes of conferring immunities. The Minister may then enter into an agreement with the recognised organisations which confer those immunities or, in the absence of agreement, simply confer them unilaterally in terms of s 7(2) of the Immunities Act.[17] Parliament has specifically assigned these powers and duties to the Minister.

[31] Since the immunities and privileges are incorporated into domestic law through the Immunities Act, there is no need for additional ratification by Parliament. In addition, the Immunities Act has been invoked on several occasions and remains on our statute books. Its constitutionality has not been successfully challenged. Nor has the Minister's power to confer immunity in terms of s 7(2) of

[17] Section 7(2) of the Immunities Act provides:
'The Minister may in any particular case if it is not expedient to enter into an agreement as contemplated in subsection (1) and if the conferment of immunities and privileges is in the interest of the Republic, confer such immunities and privileges on a person or organisation as may be specified by notice in the *Gazette*.'

the Immunities Act. The Immunities Act is, therefore, enforceable in its terms.[18] Consequently, s 231(2) of the Constitution is inapplicable.

[32] As indicated above, in terms of article 52 of the AfDB Parent Agreement, the AfDB is immune from every form of legal process, except in cases arising out of the exercise of its borrowing powers. Since, this case involves the exercise AfDB's lending powers and not its borrowing powers, legal immunity applies to AfDB. The applicants, however, argue that under the Common Terms Agreement, the AfDB only consented to being sued by way of the arbitral procedure in clause 40.2.1 or the expert procedure in clause 38. These clauses, so they contend, are significant because although the AfDB has immunity, they still provide Kalagadi with legal recourse should they breach the Common Terms Agreement.

[33] However, as correctly pointed out by the respondents, what the applicants fail to address is clause 40.2.9 of the Common Terms Agreement which nullifies clauses 40.2.1 and clause 38, to the extent that they apply to the AfDB. Clause 40.2.9 precludes the respondents from ever proceeding against AfDB. It reads:

'The parties hereby acknowledge and agree that nothing contained in this Agreement, or any other Finance Document shall be construed *as a waiver, renunciation or other modification of any privileges, immunities and exemptions accorded to AfDB under the AfDB Charter, international law or any other law applicable or applicable international treaties or customs, including without limitation . . . the immunity of AfDB from all forms of legal processes . . . .'* (My emphasis.)

[34] Although this issue was raised by the respondents in their answering affidavit, the applicants failed to deal with it in reply or in their heads of argument. However,

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[18] *Qwelane v South African Human Rights Commission and Another* [2021] ZACC 22; 2021 (6) SA 579 (CC); 2022 (2) BCLR 129 (CC); *Mahlangu and Another v Minister of Labour and Others* [2020] ZACC 24.

at the hearing in this Court, counsel for the applicants waived reliance on clause 40.2.9 in so far as it applies to its immunity in the arbitral process in terms of clause 40.2.1 of the Common Terms Agreement. The effect of this waiver is that Kalagadi may proceed against AfDB in arbitration proceedings envisaged in clause 40.2.1 of the agreement but may not do so in a court of law. In other words, AfDB will not raise immunity in the arbitration proceedings. Consequently, the issue of non-joinder will not arise.[19]

[35] In the circumstances, there is no obstacle to staying the Kalagadi application for purposes of referral of the dispute to arbitration in terms of clause 40.2.1 of the Common Terms Agreement. The stay of the Kalagadi application will not non-suit Kalahari Resources and Kgalagadi Alloys. They have their remedies in terms of the Guarantee, Pledge and Cession Agreements which they may enforce in the high court. In view of the conclusion that I have arrived at; I will not consider the remaining preliminary objection concerning clause 38 of the Common Terms Agreement.

[36] For all these reasons, the high court has no jurisdiction to determine the Kalagadi application. In the circumstances, the application for leave to appeal must be granted and the appeal upheld.

[37] In the result, it is ordered that:

1 The application for leave to appeal is granted with costs, including those of two counsel where so employed.

2 The appeal is upheld with costs including those of two counsel where so employed.

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[19] See fn 17.

3 The order of the high court is set aside and replaced with the following order:

'1. The application is stayed as against Kalagadi Manganese (Pty) Ltd (Kalagadi Manganese), pending the final determination of the arbitration proceedings in terms of clause 40.2.1 of the Common Terms Agreement.

2. Kalagadi Manganese is ordered to pay the costs of the application, including those of two counsel.'

F KATHREE-SETILOANE

JUDGE OF APPEAL

Appearances

For the appellants:	A E Franklin SC and M Mbikiwa
Instructed by:	Webber Wentzel, Johannesburg
	Honey Attorneys, Bloemfontein
For the respondents:	A Gautschi SC, N Luthuli, O Motlhasedi and M Salukazana
Instructed by:	Harris Nupen Molebatsi Inc, Johannesburg
	Mayet & Associates, Bloemfontein.

THE WINE ARBITRATION:

In Vino Veritas

Edelrot is German for *noble rot* and it signifies grapes which have been deliberately exposed to the Botrytis fungus. The fungus punctures the grape skins causing the water in the grape to evaporate and thereby concentrating the sugars and the acids and the flavours in the grapes. When wine is made from those grapes it has a medley exceptionally well. Beeren Auslese and Trockenbeeren Auslese are famous examples of such wines.

A German wine company specializing in Edelrot wine enters into a contract with a South African company. Its name is the Rhinebeeren Vineyard and it produces 1 200 cases of its wine each year and each case is priced at $7,000.00. The terms of the contract requires the Rhinebeeren Vineyard to deliver 500 cases of its wine each year to the South African company which is called Rhinebeeren Vineyard South Africa. It is the obligation of Rhinebeeren Vineyard South Africa to pay in full for the wine on delivery and then to market it in Southern Africa with a 30% mark up. Rhinebeeren Vineyard undertakes to create a viable market for the wine by way of a marketing campaign including TV exposure and by high quality service in dealing with client requirements.

The two parties have a written agreement in which they provide that any dispute between them is to be resolved by arbitration and they choose Ghana as the venue for any such arbitration.

In the third year of the contract Rhinebeeren Vineyard delivers only 100 cases of wine and Rhinebeeren Vineyard South Africa accuses it of diverting the balance to the UK and Japan which are more lucrative markets than South Africa.

The ability of the two companies to arrange their affairs in this way depends upon the existence of an international arbitration framework. That framework has been created by the United Nations through the United Nations Commission of International Trade Law (UNCITRAL) which was established in 1966 to harmonise international trade laws and to provide stability in international commercial transactions. Subsequently a Model Law framework has been developed and adopted or adapted by over 80 countries worldwide.

The consequence is that the Courts of Ghana and of the United Kingdom and of Germany and of Japan will all recognize and enforce the arbitral awards emanating from the arbitration, subject to such reservations as each country may have published and to issues of public policy.

The parties may choose to conduct their arbitration *ad hoc* or by an administering international arbitration institution such as the ICC or L.C.I.A. or the AFSA International Court.

The advantages of administered arbitration include neutral administrative oversight, a comprehensive set of rules and appropriate deadlock breaking mechanisms. This international arbitration module will track every aspect of the New York Convention of *ad hoc* and administered arbitrations and the predictable issues which arise in the course of arbitration. Special emphasis will be placed on the Rules of the AFSA International Court.

Similar frameworks are to be found in support of foreign investors to protect them from arbitrary conduct by the Governments of the country in which they choose to invest. They are to be treated fairly and equitably and their investment cannot be expropriated without prompt, adequate and effective compensation. These promises of protection are to be found in bilateral treaties for the promotion and protection of investments (bilateral investment treaties or BITs).

The framework for investment protection, again developed by UNCITRAL, is the Washington Convention of 1965. This Convention is commonly referred to as ICSID and is aimed at settling investment disputes between contracting states and the nationals of other states. ICSID provides a neutral forum for resolving investment disputes under the aegis of the World bank Group and its procedures create a binding decision independent of any national legal system as if they were final judgments of the local Court. Over 150 states have ratified the ICSID Convention. South Africa signed the ICSID Convention in 1994 but has never ratified it because it is concerned that it would allow foreign investors to challenge South African laws or interfere with its land reform goals and BEE objectives. Instead South Africa passed the Protection of Investment Act of 2015.