

REPUBLIC OF SOUTH AFRICA

INTERNATIONAL ARBITRATION BILL

*(The English text is the official text of the Bill)
As approved by the Minister*

(MINISTER OF JUSTICE AND CORRECTIONAL SERVICES)

BILL

To provide for the incorporation of the Model Law on International Commercial Arbitration, as adopted by the United Nations Commission on International Trade Law, into South African law; to provide anew for the recognition and enforcement of foreign arbitral awards; to repeal the Recognition and Enforcement of Foreign Arbitral Awards Act, 1977; to amend the Protection of Businesses Act, 1978, so as to delete an expression; and to provide for matters connected therewith.

PARLIAMENT of the Republic of South Africa enacts as follows:—

ARRANGEMENT OF SECTIONS**CHAPTER 1****GENERAL PROVISIONS**

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2. Interpretation
3. Objects of Act
4. Exclusion of Act 42 of 1965
5. Act binds public bodies

CHAPTER 2**INTERNATIONAL COMMERCIAL ARBITRATION**

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CHAPTER 1

GENERAL PROVISIONS

Definitions

1. In this Act, unless the context otherwise indicates—

"arbitration agreement" means an arbitration agreement referred to in Article 7 of the Model Law and includes:

- (a) an arbitration clause contained in or incorporated by reference in a bill of lading; and
- (b) an agreement between the parties otherwise than in writing which refers to terms that are in writing;

"conciliation" includes mediation;

"Constitution" means the Constitution of the Republic of South Africa, 1996;

"Model Law" means the UNCITRAL Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on 21 June 1985, as adapted and contained in Schedule 1;

"public body" includes –

- (a) any department of state or administration in the national or provincial sphere of government or any municipality in the local sphere of government; or
- (b) any other functionary or institution when –
 - (i) exercising a power or performing a duty in terms of the Constitution or a provincial constitution; or
 - (ii) exercising a public power or performing a public function in terms of any

legislation.

"Republic" means the Republic of South Africa; and

"UNCITRAL" means the United Nations Commission on International Trade Law.

Interpretation

2. A word or expression used in Chapter 2 of this Act bears the same meaning as it has in the Model Law, unless inconsistent with the context and the Constitution.

Objects of Act

3. The objects of the Act are to—
- (a) facilitate the use of arbitration as a method of resolving international commercial disputes;
 - (b) adopt the Model Law for use in international commercial disputes;
 - (c) facilitate the recognition and enforcement of certain arbitration agreements and arbitral awards; and
 - (d) give effect to the obligations of the Republic under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), the text of which is set out in Schedule 4 to this Act, subject to the provisions of the Constitution.

Exclusion of Act 42 of 1965

4. (1) Subject to subsection (2), the Arbitration Act, 1965 (Act No. 42 of

1965), is not applicable to an arbitration agreement, arbitral award or reference to arbitration covered by this Act.

(2) Section 2 of the Arbitration Act, 1965, applies for purposes of Chapter 3 of this Act.

Act binds public bodies

5. (1) This Act, subject to the provisions of section 12 of Promotion and Protection of Investment Act, 2015, binds public bodies and applies to any arbitration in terms of an arbitration agreement to which a public body is a party.

(2) For the purposes of subsection (1), “public body” includes –

- (a) any department of state or administration in the national or provincial sphere of government or any municipality in the local sphere of government;
- (b) any other functionary or institution when –
 - (i) exercising a power or performing a duty in terms of the Constitution or a provincial constitution; or
 - (ii) exercising a public power or performing a public function in terms of any legislation.

CHAPTER 2

INTERNATIONAL COMMERCIAL ARBITRATION

Model Law to have force of law

6. (1) The Model Law applies in the Republic subject to the provisions

of this Act.

(2) The Cabinet member responsible for the administration of justice may, from time to time by notice in the *Gazette*, amend Schedule 1 to reflect any changes made to the Model Law if those changes are necessary for the effective application of this Act.

Matters subject to international commercial arbitration

7. (1) For the purposes of this Chapter, any international commercial dispute which the parties have agreed to submit to arbitration under an arbitration agreement and which relates to a matter which the parties are entitled to dispose of by agreement may be determined by arbitration, unless—

- (a) such a dispute is not capable of determination by arbitration under any law of the Republic; or
- (b) the arbitration agreement is contrary to the public policy of the Republic.

(2) Arbitration may not be excluded solely on the ground that an enactment confers jurisdiction on a court or other tribunal to determine a matter falling within the terms of an arbitration agreement.

Interpretation of Model Law

8. The material to which an arbitral tribunal or a court may refer in interpreting this Chapter and the Model Law includes the documents referred to in Schedule 2 to this Act.

Immunity of arbitrators and arbitral institutions

9. (1) An arbitrator is not liable for any act or omission in the discharge or purported discharge of that arbitrator's functions as arbitrator unless the act or omission is shown to have been done in bad faith.

(2) An arbitral or other institution, authority or person specified in article 6(2) or (3) of the Model Law, or designated or requested by the parties, or another arbitral institution to appoint an arbitrator, is not liable for any act or omission in the discharge of that function or any other function in relation to an arbitration unless the act or omission is shown to have been done in bad faith.

(3) An institution, authority or person referred to in subsection (2) by whom an arbitrator is appointed or nominated is not liable, by reason of having appointed or nominated such arbitrator, for any act or omission of such arbitrator in the discharge or purported discharge of the functions of the arbitrator.

(4) The provisions of this section also apply, with the changes required by the context, to—

- (a) the employees of an arbitrator; or
- (b) the officers and employees of an arbitral or other institution, authority or person referred to in subsection (2).

Consolidation of arbitral proceedings and concurrent hearings

10. (1) The parties to an arbitration agreement may agree that—
- (a) the arbitral proceedings be consolidated with other arbitral proceedings; or
 - (b) concurrent hearings be held, on such terms as may be agreed.

(2) The arbitral tribunal may not order consolidation of arbitral proceedings or concurrent hearings unless the parties agree.

Confidentiality of arbitral proceedings

11. (1) Arbitration proceedings to which a public body is a party are held in public, unless for compelling reasons, the arbitrator directs otherwise.

(2) Where the arbitration is held in private, the award and all documents created for the arbitration which are not otherwise in the public domain must be kept confidential by the parties and tribunal, except to the extent that the disclosure of such documents may be required by reason of a legal duty or to protect or enforce a legal right.

Right to conciliation process

12. Parties to an arbitration agreement may refer a dispute covered by the arbitration agreement to conciliation, before or after referring the dispute to arbitration, subject to the terms of the agreement.

Application of UNCITRAL Conciliation Rules

13. The parties to an arbitration agreement who intend to settle their dispute by conciliation may, subject to this Act, agree to use the UNCITRAL Conciliation Rules set out in Schedule 3 to this Act.

CHAPTER 3
RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

Definitions

- 14.** In this Chapter, unless the context otherwise indicates—
- (a) **"certified copy"** means a copy authenticated in a manner in which foreign documents must be authenticated to enable them to be produced in any court;
 - (b) **"Convention"** means the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, the text of which is set out in Schedule 4;
 - (c) **"court"** means any Division of the High Court referred to in section 6(1) of the Superior Courts Act, 2013 (Act No. 10 of 2013), or any local seat thereof having jurisdiction; and
 - (d) **"foreign arbitral award"** means an arbitral award made in the territory of a state other than the Republic.

Determination of place of arbitration

- 15.** For the purposes of this Chapter an award is deemed to be made at the place of arbitration determined in accordance with the provisions of articles 20(1) and 31(3) of the Model Law.

Recognition and enforcement of foreign arbitral awards

16. (1) A foreign arbitral award may be recognised in the Republic as required by the Convention, subject to this Chapter.

(2) A foreign arbitral award is binding between the parties to that foreign arbitral award, and may be relied upon by those parties by way of defence, set-off or otherwise in any legal proceedings.

(3) A foreign arbitral award must, on application, be made an order of court and may then be enforced in the same manner as any judgment or order of court, subject to the provisions of this section and sections 17 and 18.

(4) Article 8 of the Model Law applies, with the necessary changes, to arbitration agreements referred to in subsection (1).

Evidence to be produced by party seeking recognition or enforcement

17. A party seeking the recognition or enforcement of a foreign arbitral award must produce—

- (a) (i) the original award and the original arbitration agreement in terms of which an award was made, authenticated in a manner in which foreign documents must be authenticated to enable them to be produced in any court; and
- (ii) a certified copy of that award and of that agreement; and
- (b) a sworn translation of the arbitration agreement or arbitral award

authenticated in a manner in which foreign documents must be authenticated for production in court, if the agreement or award is in a language other than one of the official languages of the Republic: Provided that the court may accept other documentary evidence regarding the existence of the foreign arbitral award and arbitration agreement as sufficient proof where the court considers it appropriate to do so.

Refusal of recognition or enforcement

18. (1) A court may only refuse to recognise or enforce a foreign arbitral award if—

- (a) the court finds that—
 - (i) a reference to arbitration of the subject-matter of the dispute is not permissible under the law of the Republic; or
 - (ii) the enforcement of the award is contrary to the public policy or was made in bad faith; or
- (b) the party against whom the award is invoked, proves to the satisfaction of the court that—
 - (i) a party to the arbitration agreement had no capacity to contract under the law applicable to that agreement;
 - (ii) the arbitration agreement is invalid under the law to which the parties have subjected it, or where the parties have not subjected it to any law, the arbitration agreement is invalid under the law of the country in which the award was made;
 - (iii) that he or she did not receive the required notice regarding the

appointment of the arbitrator or of the arbitration proceedings or was otherwise not able to present his or her case;

- (iv) the award deals with a dispute not contemplated, by or not falling within the terms of the reference to arbitration, or contains decisions on matters beyond the scope of the reference to arbitration, subject to the provisions of subsection (2);
- (v) the constitution of the arbitration tribunal or the arbitration procedure was not in accordance with the relevant arbitration agreement or, if the agreement does not provide for such matters, with the law of the country in which the arbitration took place; or
- (vi) the award is not yet 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, the award was made.

(2) An award which contains decisions on matters not submitted to arbitration may be recognised or enforced to the extent that it contains decisions on matters submitted to arbitration which can be separated from those on matters not so submitted.

(3) If an application for the setting aside or suspension of an award has been made to a competent authority referred to in subsection (1)(b)(vi), the court where recognition or enforcement is sought may, if it considers it appropriate—

- (a) adjourn its decision; and
- (b) on the application of the party claiming recognition or enforcement of the award, order the other party to provide suitable security.

Savings

19. The provisions of this Chapter do not affect any other right to rely upon or to enforce a foreign arbitral award, including the right conferred by article 35 of the Model Law.

CHAPTER 4 TRANSITIONAL AND OTHER PROVISIONS

Transitional provisions

20. (1) Chapter 2 of this Act applies to international commercial arbitration agreements whether they entered into force before or after the commencement of Chapter 2 of this Act and to every arbitration under such an agreement but this section does not apply to arbitral proceedings which commenced before Chapter 2 of this Act came into force.

(2) For purposes of this section, the date of commencement of the arbitration proceedings is the date upon which the parties agree as the date on which the arbitral proceedings commenced or failing such agreement, on the date of receipt by the respondent of a request for the dispute to be referred to arbitration.

(3) Chapters 2 and 3 of this Act apply to every arbitral award whether it was made before or after the date of commencement of such Chapters, but—

(a) proceedings for the enforcement of an arbitral award under the Recognition

and Enforcement of Foreign Arbitral Awards Act, 1977 (Act No. 40 of 1977); or
(b) proceedings for the enforcement, setting aside or remittal of an award
under the Arbitration Act, 1965 (Act No. 42 of 1965),
which commenced before Chapters 2 and 3 of this Act came into force,
continue until they are concluded as if Chapters 2 and 3 of this Act had not
commenced.

Repeal or amendment of laws

21. The laws referred to in Schedule 5 are repealed or amended to the extent set out in the third column thereof.

Short title and commencement

22. This Act is called the International Arbitration Act, 2016, and comes into operation on a date fixed by the President by proclamation in the *Gazette*.

Schedule 1**UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW****UNCITRAL Model Law on
International Commercial
Arbitration
1985****With amendments
as adopted in 2006**

The United Nations Commission on International Trade Law (UNCITRAL) is a subsidiary body of the General Assembly. It plays an important role in improving the legal framework for international trade by preparing international legislative texts for use by States in modernizing the law of international trade and non-legislative texts for use by commercial parties in negotiating transactions. UNCITRAL legislative texts address international sale of goods; international commercial dispute resolution, including both arbitration and conciliation; electronic commerce; insolvency, including cross-border insolvency; international transport of goods; international payments; procurement and infrastructure development; and security interests. Non-legislative texts include rules for conduct of arbitration and conciliation proceedings; notes on organizing and conducting arbitral proceedings; and legal guides on industrial construction contracts and countertrade.

Further information may be obtained from

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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

UNCITRAL Model Law on

International Commercial

Arbitration

1985

With amendments as adopted in 2006

UNITED NATIONS

Vienna, 2008