A similar version of this article first appeared in *Global Arbitration Review*, 17 June

THE SLEEPING GIANT

By Kwadwo Sarkodie

The prospect of a new arbitration act to comprehensively overhaul and update international arbitration law in South Africa is undoubtedly significant. A modern framework for arbitration could do much to encourage and facilitate trade and investment. Further, South Africa could realise its latent potential as a seat and venue for arbitrations for the Southern African Development Community (SADC) and the wider African continent.

With Africa's best-developed infrastructure and most sophisticated (and second largest) economy, South Africa could become an African arbitration powerhouse. The coming years could see the country's commercial centres join, and even supersede, the established and emerging arbitration centres of the continent such as Cairo, Lagos, Nairobi, Kigali and Mauritius. Much depends on the outcome of the current reform process, influenced as it is by South Africa's unique history.

The current legislation

The law currently governing arbitration in South Africa is set out in the Arbitration Act 1965 and the Recognition and Enforcement of Foreign Arbitral Awards Act 1977. The 1965 act is based on the English Arbitration Acts of 1889 and 1950, pre-dating the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) and the 1985 UNCITRAL Model Law on International Commercial Arbitration.

While the 1977 act post-dates South Africa's ratification of the New York Convention in 1976, it is nonetheless considered incomplete and inconsistent in its application of the convention's terms.

The 1965 act similarly fails to accord with modern international standards. It allows the court a broad discretion with regard to upholding an arbitration agreement or enforcing an arbitral award. For example, section 6(2) of the act says the court "may" stay court proceedings where there is a valid arbitration agreement. This contrasts with the usual stipulation that the court "shall" stay proceedings in such circumstances (reflecting article II(3) of the New York Convention).

Section 3(2) of the 1965 act grants the court discretion to set aside an otherwise valid arbitration agreement if it considers there to be "good cause". Further, the 1965 act fails to address explicitly key issues such as the ruling of a tribunal on its own jurisdiction, the separability of the arbitral agreement or the power of the tribunal to grant interim measures.

Of course, it is always possible that such shortcomings may be mitigated by a pro-arbitration approach on the part of the courts. This indeed proved to be the case in the key judgments issued by the Supreme Court and the Constitutional Court of South Africa, respectively, in the 2006 case of *Telcordia Technologies Inc v Telkom SA Ltd* and the 2009 case of *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another.*

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These decisions robustly supported the right of parties to arbitrate and thereby to achieve a final, binding and enforceable decision.

However, a positive approach from the courts is not, on its own, sufficient. Clear and firm provision by way of legislation is necessary if certainty and confidence in South Africa as an arbitral seat is to be cemented. In this regard, it is worth noting that another recent judgment of the South African Supreme Court was less supportive of arbitration, and as such has attracted criticism. In its 2006 judgment in *NorthWest Provincial Government and Another v Tswaing Consulting CC and Others*, the court declined to apply the principle of separability to uphold an arbitration clause contained in a contract induced by fraud. This contrasted with the approach taken, at around the same time, by the English House of Lords in the 2007 judgment in *Fiona Trust Holding Corp & Ors v Privalov & Ors*.

Reform proposals

The reform of South African arbitration law has been under discussion for some time. The South African Law Commission produced a report in July 1998 highlighting the shortcomings of the regime under the 1965 and 1977 acts, and concluding with the recommendation of a statute based on the Model Law. These recommendations were reflected in a draft bill, although not ultimately implemented.

This lack of legislative action may have reflected a dimming of enthusiasm for arbitration, founded on concerns such as those expressed in a 2005 report by Judge John Hlophe, president of the Western Cape Division of the High Court of South Africa. He suggested that arbitration is perceived by some as a means by which parties can circumvent a judiciary increasingly staffed by black judges, thereby undermining the judicial transformation of South Africa.

More recently, however, interest in reform has revived, with a new commission being convened. The draft legislation has been reviewed, amended and developed.

Interestingly, in addition to the Model Law, the commission considered the Organisation for the Harmonisation of Business Law in Africa (OHADA) Uniform Act on Arbitration – currently applicable in the 17 African countries comprising OHADA – as a possible model, though it was not ultimately selected. What has emerged is a revised text for a proposed international arbitration act with the Model Law as a basis. This provides for compatibility with a number of South Africa's neighbours and trading partners which have arbitration laws either based on, or influenced by, the Model Law.

Investor-state arbitration

All of this is against a background of significant changes in relation to investor-state arbitration. South Africa, which is not a signatory to the ICSID Convention, has recently terminated its bilateral investment treaties with a number of EU states. It is also consulting on a new Investment Promotion and Protection Bill, which would serve to limit recourse to investor-state arbitration, instead conferring the central role in investment protection upon the laws, courts and tribunals of South Africa itself.

Such measures have caused some consternation on the part of foreign investors and may again reflect the government's desire to protect its transformational agenda. In particular, elements within government have expressed concerns that efforts to empower previously-disadvantaged groups could be hindered by decisions taken in investor-state arbitration by international tribunals.

The way forward

It seems that a number of sometimes conflicting considerations are forming a backdrop to the proposed reforms. On the one hand, it is recognised that the effectiveness and credibility of modern arbitration depends on a sound legislative framework, upholding the arbitral agreement and the powers of the tribunal. On the other, the South African government is naturally concerned to protect the constitutionally enshrined commitment to economic reform and transformation.

Such considerations are being brought to a head with the consultation on the draft Investment Promotion and Protection Bill, and the imminent issue for comment of draft bills governing domestic and international arbitration.

Accordingly, while the availability of investor-state arbitration in relation to South African investments is being curtailed, international commercial arbitration is expected to receive significant support. With the drafting of an act specifically governing international commercial arbitration (and with domestic arbitration dealt with separately), the legislation is being framed to minimise the risk that international arbitration provisions become entangled with controversies over domestic judicial transformation.

Despite a long gestation, and the need to reckon with, and often reconcile, a wide range of issues and considerations, it would appear that a new international arbitration act is likely to be in force by the end of the year. Being based on the Model Law, it is expected to manifest the standards necessary to allow disputes concerning the most complex of cross-border transactions to be dealt with efficiently, cost-effectively and finally. International commercial arbitration in South Africa is set to join the 21st century.

Cases referenced

Telcordia Technologies Inc v Telkom SA Ltd (26/05) [2006] ZASCA 112

Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another (CCT 97/07) [2009] ZACC 6.

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