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Draft Bill Reflects S. Africa's Mixed Views On Arbitration

By **Caroline Simson**

Law360, New York (May 10, 2016, 5:51 PM ET) -- A draft international arbitration bill set to replace South Africa's long-outdated commercial arbitration legislation is an encouraging sign to investors, but it is unlikely to position the country as an international arbitration hub given recent legislation criticized for curbing investor-state arbitration.

South Africa's International Arbitration Bill of 2016 incorporates the Model Law on International Commercial Arbitration as adopted by the United Nations Commission on International Trade Law and would replace a 1977 statute providing for the enforcement and recognition of foreign arbitral awards. Currently, arbitration in South Africa is governed by Arbitration Act 42 of 1965, which doesn't expressly deal with international arbitration and is not based on the UNCITRAL model law.

The government was put on notice that its international arbitration legislation was in need of a tune-up as early as 1998, when the South African Law Commission issued a report proposing that an effective legislative framework for the resolution of international trade disputes should be created. To that end, the commission recommended that South Africa incorporate the UNCITRAL model law and change the legislation pertaining to the New York Convention, otherwise known as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which it acceded to in 1976.

That report didn't result in any changes being made or serious efforts toward doing so until now, and experts say there's a good chance the bill will be adopted into law. That's a good thing, according to Kwadwo Sarkodie, a Mayer Brown LLP partner.

"The fact that there is now a draft bill, after what's been a very lengthy process in consultation, is a very positive sign. I think it's indicative of the recognition on the part of the government that it is needed for South Africa and is overdue," he said. "I think there's a good prospect of it being brought into force now that it has been set out as a full draft bill."

While investors are sure to welcome the draft legislation incorporating the model law, the bill follows a recently passed law that was a bit more worrisome to potential investors in the public sector or others who might have potential investor-state claims.

The Protection of Investment Act was signed into law by South African President Jacob Zuma late last year, though the statute's name is something of a misnomer, according to Herbert Smith Freehills partner Peter Leon and associate Ben Winks.

Under that legislation, the government "may" consent to international arbitration with an investor's home state, but investors themselves are left largely without options. In so doing, the law confirms that the state will not subject itself to investor-state arbitration, Winks said.

Moreover, the bill doesn't provide for any form of fair and equitable treatment for foreign investors, Leon noted.

"That [legislation] is actually, in my view, a regressive step," he said.

The UNCITRAL model law in the draft bill, by contrast, provides a framework within which international commercial arbitrations can be conducted with minimal court interference and a significant degree of party autonomy. Its aim is to promote the uniformity of national laws pertaining to international arbitration procedures.

Incorporating the model law into South African law will be a big step in promoting private commercial arbitration in South Africa, according to Jeffrey Kron, the head of Norton Rose Fulbright's corporate and commercial litigation practice based in Johannesburg.

"I think that this new bill ... is part and parcel of all these measures which are being put in place to give comfort to the international investment community, that South Africa's a safe place to do business and they can expect to have their cases properly heard and properly dealt with," he said. "I do think that, once it's passed, the model law should give them that level of comfort because it is then applied theoretically the same internationally."

Despite the fact that the bill seems unlikely to face much opposition, South Africa's parliamentary calendar makes it appear as though it won't be passed until early next year, according to Leon and Winks.

The Protection of Investment Act came after South Africa decided to terminate some of its bilateral investment treaties with European countries like Austria, Germany, France, Spain and the Belgium-Luxembourg Economic Union, which appears to have been prompted, at least in part, by an arbitration that Leon worked on from 2007 until 2010.

Along with other attorneys from Webber Wentzel — Leon's firm at the time — as well as Toby T. Landau QC, Elihu Lauterpacht CBE QC and Guglielmo Verdirame, Leon represented a group of Italian granite investors who accused South Africa of improperly expropriating their mineral rights through its Mineral and Petroleum Resources Development Act, and more specifically, the Black Economic Empowerment equity divestiture requirements established within it.

That required foreign investors to sell 26 percent of their shares in relevant mining companies to "historically disadvantaged South Africans," meaning those who were adversely affected by Apartheid.

The dispute was settled, but it likely left the South African government with distaste for investor-state disputes, Sarkodie said.

"The investors challenged a key element of South Africa's economic transformational agenda," he said. "I think the prospect that something so important to the government could be the subject of a challenge might have been one of the factors which led to the government reconsidering its approach to investor-state arbitration."

Despite that new approach with respect to investor-state disputes, the government nevertheless now seems keen to promote the use of private commercial arbitration and to encourage the use of South Africa as a seat of arbitration.

In some respects, taking a proactive stance to promote such international arbitration is overdue.

Mauritius — the host of this year's International Council for Commercial Arbitration Congress — has made numerous efforts in recent years to promote itself as an arbitration hub for Africa, basing its 2008 Mauritian International Arbitration Act on the UNCITRAL model law and partnering with the London Court of International Arbitration and the Mauritius International Arbitration Centre Ltd. to establish the LCIA-MIAC Arbitration Centre in 2011.

Now, it seems as though South Africa is playing catch-up, Kron said.

"Had we done this a long time ago we could have been a central hub for arbitration in Africa," he said. "Mauritius has been much more proactive in that regard."

But whether the new bill — if it's passed — will put South Africa on equal footing with Mauritius remains to be seen.

"While it puts South Africa back in the ring on commercial arbitration ... it doesn't address the investor-state issue at all ... there's no movement on that, in fact, the very reverse," Leon said. "I think it's going to be a bit difficult. Mauritius has had a significant head start on South Africa. ... [The draft bill] is a step forward. Whether it's a sufficient step forward is another matter, but it is a step forward."

--Editing by Jeremy Barker and Emily Kokoll.
