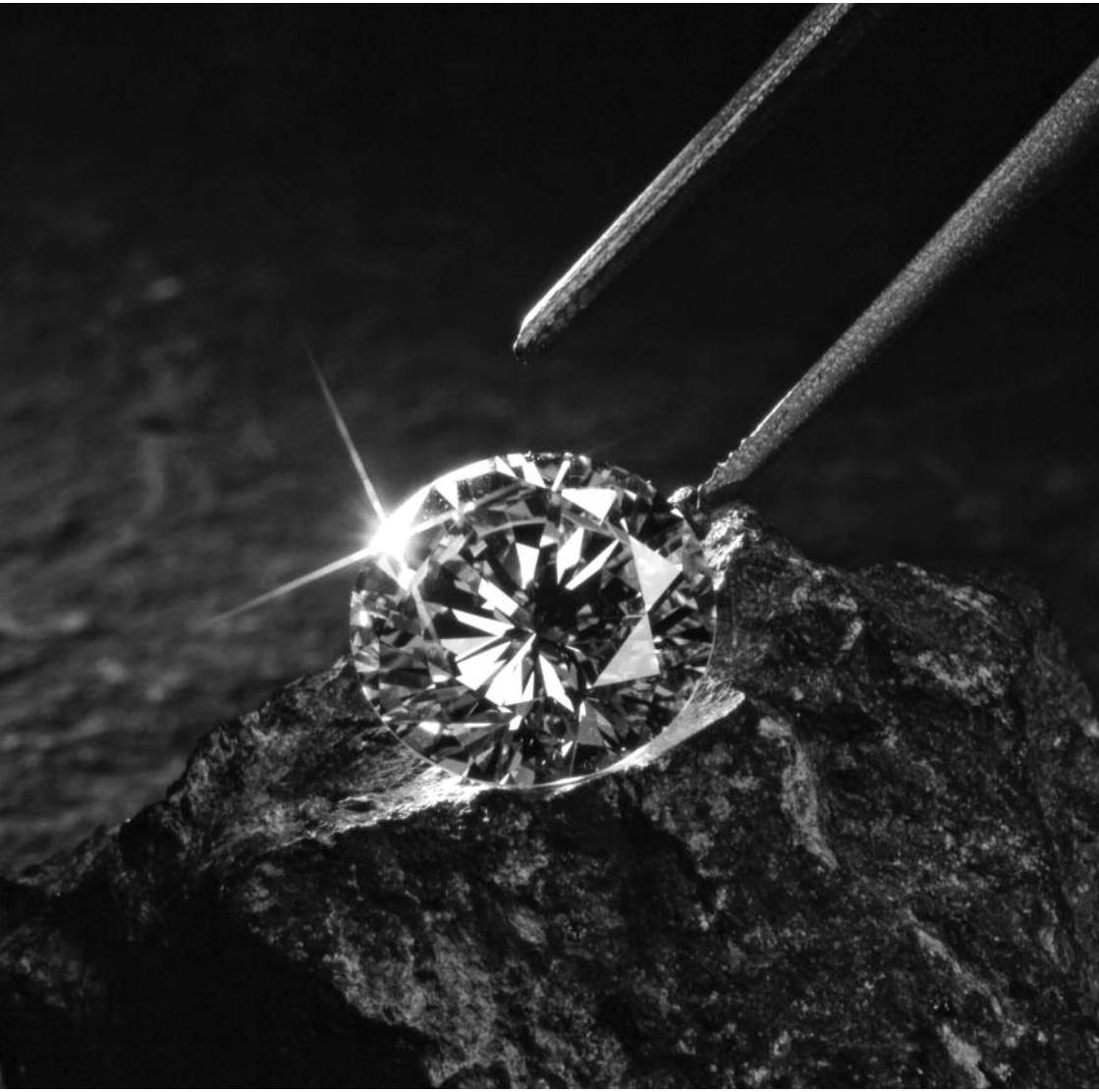
South Africa



Key points

Where a written arbitration agreement exists, arbitrations in South Africa are governed by the Arbitration Act of 1965 (the Act). The Act is not based on the UNCITRAL model law. In the absence of a written arbitration agreement, South African common law applies.

The three main arbitration bodies in South Africa are the Arbitration Foundation of South Africa (AFSA), the Association of Arbitrators (AOA), and the Commission for Conciliation, Mediation and Arbitration (CCMA).

Arbitration agreements do not exclude the jurisdiction of the courts, which retain powers of supervision, assistance and intervention.

The arbitration tribunal's decision is final and not subject to appeal, unless the parties have agreed otherwise.

The parties to an arbitration agreement are free to agree on the apportionment of costs. In the absence of agreement, the award of costs is at the discretion of the tribunal.

South Africa is a party to the New York Convention and has enacted legislation to give effect to its ratification.

Matters relating to status may not be resolved by arbitration. In particular, this applies to liquidation proceedings, which result in a change of status of the liquidated party.

Confidentiality

There is no statutory basis in South African law for the privacy of arbitration hearings and the confidentiality of the proceedings.

The parties may provide for the confidentiality of the proceedings in their arbitration agreement. However, in certain circumstances there may be exceptions to this confidentiality: for example, disclosure may be agreed by both parties, ordered by a court, or necessary in order for a party to protect its rights against a third party.

Model arbitration clauses

Any dispute arising from or in connection with this contract shall be finally resolved in accordance with the Rules of the Arbitration Foundation of South Africa by an arbitrator appointed by the Foundation.

Arbitration Foundation of South Africa

Any dispute of whatsoever nature arising out of this contract concerning any of the rights and/or obligations of any party thereto, either during the currency of the contract or after completion thereof, including any dispute as to the validity of the contract, is hereby referred to arbitration and final decision of a single arbitrator and the parties agree to accept his award as final and binding upon them.

The arbitrator shall be:

- selected by agreement between the parties, or failing such agreement
- appointed at the request of either party by the Chairman for the time being of the Association of Arbitrators.

The cancellation of this contract by either party shall not affect the validity of this clause.

Association of Arbitrators

See the Arbitration section for best practice in drafting arbitration clauses.

Weblinks

www.arbitration.co.za
Arbitration Foundation of South Africa

www.arbitrators.co.za
Association of Arbitrators

www.ccma.org.za
Commission for Conciliation, Mediation and Arbitration

1 What arbitration bodies are there within the jurisdiction?

The parties in dispute may choose between institutional (or "administered") arbitration and ad hoc arbitration. Institutional arbitration is administered by specialist arbitral institutions according to their own sets of rules. Ad hoc arbitration is conducted under rules of procedure which are adopted for the purposes of the arbitration: for example, the Rules of the High Court of South Africa.

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Arbitration Foundation of South Africa

AFSA was founded in 1996 and is a joint venture between business organisations and the legal and accounting professions. It provides a one-stop service, with facilities for arbitrations and mediations, a fully administered dispute resolution service (including panels of experts) and a choice of rules depending on the size and complexity of the matter.

The Alternative Dispute Resolution Association of South Africa (ADRASA) is a wholly owned subsidiary of AFSA.

Association of Arbitrators

AOA was formed in 1979 with the following aims: to promote arbitration as a means of resolving disputes; to provide a body of competent and experienced arbitrators and alternative dispute resolution specialists; to help arbitrators and alternative dispute resolution specialists work more efficiently; and to make arbitration and alternative dispute resolution more effective.

Commission for Conciliation, Mediation and Arbitration

The CCMA is a dispute resolution body established under the Labour Relations Act (66 of 1995). It is independent: it does not belong to, nor is it controlled by, any political party, trade union or business. The CCMA has compulsory jurisdiction to arbitrate certain disputes, and may also arbitrate disputes which are between parties who have consented to arbitration by the CCMA, and which fall within the jurisdiction of the Labour Court.

2 Is there an Arbitration Act governing arbitration proceedings, and is it based on the UNCITRAL model law?

Arbitration in South Africa is governed by the Arbitration Act (42 of 1965) (the Act). This provides for the settlement of disputes by arbitral tribunals through written arbitration agreements, and for the enforcement of the awards of such tribunals. The Act is applicable to all domestic and international arbitration proceedings in South Africa. South Africa also has a body of common law, which governs oral submissions to arbitration.

The Act is not based on the UNCITRAL model law. Two bills based on the UNCITRAL model law – one of which deals with domestic arbitration, the other with international arbitration – have been proposed to Parliament. However, there is no indication of when these bills may be enacted.

3 What are the available rules?

Each of the arbitral institutions has its own set of rules. These are published on their websites. Arbitrators must observe due process at all times.

The Act contains provisions dealing with issues such as the powers of the arbitrators, summoning of witnesses, production of documents and oral evidence, and recording of evidence.

In ad hoc arbitrations, rules of procedure are adopted specifically for the purposes of the arbitration. Parties often choose to apply the Rules of the High Court of South Africa.

Arbitrators may have regard to public policy in reaching certain decisions. Where there is a conflict between a procedure ordered by the arbitrators and a provision of the Act, a party may apply to court to have the issue resolved.

A summons to compel a person to attend an arbitral tribunal to give evidence, or to produce documents, may be procured in the same way (and subject to the same conditions) as in a civil action pending in the court having jurisdiction. Cross-examination of witnesses is also possible.

4 What supervision is there of arbitrators and their awards?

Arbitration agreements do not exclude the jurisdiction of the courts. The courts retain certain powers – of assistance, supervision and intervention – in relation to the dispute and the arbitration, before, during and after the proceedings.

The parties may, within six weeks from the publication of the award, refer (in writing) any matter – which had previously been referred to arbitration – back to the arbitral tribunal, for reconsideration and for the making of a further award or a fresh award, or for any other purpose (section 32 of the Act).

The court may also refer any such matter to the tribunal, on application of any party (after due notice to the other parties, and made within six weeks after the publication of the award). Any such referral requires "good cause" to be shown.

Where an arbitration follows the rules of an arbitral institution, this institution retains supervisory powers over the arbitral proceedings and the award.

5 How quickly can a tribunal be set up?

The time taken to set up a tribunal depends on the mechanism agreed by the parties in their arbitration agreement. The parties can choose the number of arbitrators and the procedure for their appointment. Often the parties will agree to adopt the rules of an arbitral institution.

The Act decrees that, unless otherwise agreed, a dispute should be referred to a single arbitrator. However, the arbitration agreement may provide for a greater number of arbitrators. If it provides for an even number of arbitrators, then (unless otherwise stated) those arbitrators may at any time appoint an umpire.

There are certain circumstances in which a party may serve a written notice on another party, or arbitrator, requiring them to appoint (or agree on the appointment of) an arbitrator or an umpire. These circumstances are as follows:

- where an arbitration agreement or the Act provides for a single arbitrator and, after a dispute has arisen, not all the parties agree to the appointment of the arbitrator

- where an arbitration agreement provides for two or more arbitrators, one to be appointed by each party, and any party fails to appoint an arbitrator

- where an arbitration agreement provides for an even number of arbitrators, and the parties or the arbitrators fail to appoint an umpire when such an appointment is necessary

- where an arbitration provides for three arbitrators, one of whom is to be appointed (possibly as an umpire) by the parties or by the other two arbitrators, and that arbitrator or umpire has not been appointed

- where an appointed arbitrator or umpire refuses to act, is incapable of acting or dies, or is removed from office or has their appointment terminated or set aside, and the parties or arbitrators responsible for making the appointment fail to appoint someone else to fill the vacancy

- where more than one arbitrator has to be appointed, and the parties do not agree on the appointment of arbitrators (in so far as the arbitration agreement requires such agreement).

If the appointment is not made within seven days after serving notice, the party who gave notice may, upon notice to the other parties or arbitrators, apply to court to make the necessary appointment.

6 What happens if one party refuses to participate in the process?

An arbitration agreement cannot be terminated except with the consent of all parties. A party seeking to avoid having an arbitrable dispute determined by arbitration may apply to court for an order that the dispute should not be referred to arbitration. South African courts are, however, loath to interfere in the contractual arrangements between parties and will only do so, as required in the Act, where "good cause" has been shown.

Where the plaintiff is the party seeking to avoid arbitration, it may institute proceedings in court. The defendant may then apply to court to have these proceedings stayed on the grounds that the dispute should be referred to arbitration. The courts will grant the defendant's application if it is satisfied that there is "no sufficient reason why the dispute should not be referred to arbitration" (section 6(2) of the Act).

The situation where one of the parties fails to participate in the appointment of the arbitrator is covered under Question 5 above.

7 What interim measures are available?

The arbitral tribunal does not have the power to order interim measures of protection in relation to the subject matter of the dispute. Accordingly, unless the arbitration agreement provides otherwise, the tribunal cannot make orders for security for costs or compelling witnesses. The agreement may confer some of these powers on the tribunal, but where this is not the case, a party requiring interim measures will have to approach the court.

Under the Act, the court can make orders in relation to an arbitration just as it can in relation to any other matter. This covers the following:

- security for costs
- discovery of documents and interrogatories
- examination of any witness before a commissioner in the Republic or abroad, and the issue of a commission or a request for such examination

- giving of evidence by affidavit (sworn written statement)
- the inspection, interim custody, preservation, or sale, of goods or property
- an interim interdict or similar relief
- securing the amount in dispute
- substituted service if notice is required
- appointment of a receiver.

Injunctive relief is available to the parties at any time, unless it is excluded by the arbitration agreement. There is no requirement to notify arbitrators of an interlocutory application to court, although it is common practice and courteous to do so.

8 What right is there to challenge the appointment of an arbitrator?

Unless the arbitration agreement provides otherwise, the appointment of an arbitrator cannot be terminated except with the consent of all parties. Any party may, however, apply to the court at any time to have the appointment of an arbitrator set aside or to remove that individual from office. The party must show the court that there is good cause for such a move. "Good cause" is not explicitly defined in the Act. It may exist in instances where the arbitrator has been unreasonably slow in commencing with and proceeding with the arbitration or making an award; or where two arbitrators cannot agree, and fail to inform the parties of this. In any case, it is up to the applicant to show that good cause exists.

9 Can a party appeal the arbitrator's decision and, if so, are there any time limits to be aware of or unusual provisions?

The finality of arbitration awards is entrenched in South African law as a principle of common law and by statute. Section 28 of the Act provides that, subject to its provisions and unless the arbitration agreement provides otherwise, the award is final and not subject to appeal.

The parties to an arbitration agreement can, however, agree to the right to appeal the award. The agreement may limit the appeal to a specific type, and it may also set out time limits and a procedure for the appeal.

Some institutional arbitration rules allow an option for the parties to carry the matter to an appeal hearing. The parties can choose to have the right to appeal the arbitrator's decision and an appeal panel may be provided by the institution.

AFSA Rules

Where the parties have agreed to a right of appeal, notice of any appeal must be delivered within seven calendar days of publication of the (interim or final) award (article 22.2 of the AFSA Rules). This applies unless otherwise agreed by the parties in writing. Notice of any cross-appeal must be delivered within seven calendar days of delivery of the notice of appeal.

AOA Rules

Parties may, by a written and signed agreement, provide that the award shall be subject to appeal (rule 39 of the AOA Rules). Either party may then, within ten days of the publication of the award, give written notice – to the other party, to the arbitrator and to the Chair of the Association – of its intention to refer the award to an appeal tribunal.

CCMA Rules

The CCMA Rules allow parties to apply to change or rescind arbitrators' awards or rulings. Any such application must be made within 14 days of the date on which the applicant became aware of the arbitral award or ruling or of a mistake common to the parties.

10 Is South Africa a party to the New York Convention?

Yes. South Africa acceded to the Convention without reservation in 1976, and enacted legislation to give effect to this ratification in 1977.

11 Will an arbitration award be enforceable in South Africa and, if so, what is the procedure?

A party seeking to enforce a foreign arbitral award may apply to a provincial or local division of the High Court of South Africa to have the award made an order of court. A "foreign arbitral award" is defined as any arbitral award made outside the Republic and can therefore include both New York Convention awards and non-Convention awards. The application must be accompanied by the original, or a certified copy, of both the foreign arbitral award and the arbitration agreement in terms of which the award was made, duly authenticated.

Enforcement proceedings must be instituted on notice to the other party.

If the award or agreement is not in one of the official languages of South Africa, then the application must be accompanied by a sworn translation into one of the official languages, and duly authenticated. The official languages of South Africa are English, Afrikaans, Ndebele, Pedi, Sotho, Swazi, Tsonga, Tswana, Venda, Xhosa and Zulu.

Having the foreign award made an order of court may take between one and three months. The enforcement of the award may take longer, depending on the cooperation of the other party to the award.

South African courts also, of course, have the power to enforce domestic arbitral awards. Parties can apply to court to have an award made an order of court.

12 What are the likely costs of arbitration?

Formal arbitrations are often more costly than High Court trials, because parties have to remunerate the tribunal at normal professional rates, and often also have to pay for a venue and transcriber's fees. Some arbitral institutions also charge an administration fee.

The parties usually agree, in their arbitration agreement, to share the costs of the tribunal, venue and transcriber, and for each party to pay the costs of its own legal representatives, subject to any recovery it might make from the other party.

The Act provides that the award of costs is at the discretion of the tribunal, unless the agreement provides otherwise. Where an award is silent with regard to costs, or to the scale on which those costs must be taxed, any party may apply to the tribunal for an appropriate order. This order must be made within 14 days of the publication of the award. The parties may agree that the tribunal has the power to award interest. ■