

Africa's newest credible international arbitration centre: South Africa

Few businesses in Africa appear to be taking advantage of the fact that, for arbitrations that involve African parties, there is no longer a good reason not to consider running those cases from arbitration centres on the African continent. South Africa, for instance, has updated its legislation to be fully internationally compliant with the infrastructure and has the professional skill and know-how to ensure effective resolution of international commercial disputes.



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Legislation introduced in South Africa in recent years ensures that an effective legal framework is in place to regulate international arbitrations as well as the enforceability of any arbitration awards arising.

“In fairness to international companies, until fairly recently, their concerns around having their disputes heard and determined in South Africa were legitimate,” says Siphokazi Kayana, a director at Commercial Law at the law firm CMS South Africa.

Kayana, who is Head of Dispute Resolution at the firm, elaborates further: “South Africa’s Arbitration Act 42 of 1965 failed to regulate procedural rules for international arbitrations seated in South Africa. As a result, there was a risk of arbitration awards being set aside by foreign courts.”

South Africa's replacement legislation, the International Arbitration Act 15 of 2017, came into effect in December 2017 and aligns South Africa with the United Nations Commission on International Trade Laws (UNCITRAL) Model Law, yet this isn't widely known.

Says Zaakir Mohamed, a co-director at CMS South Africa and head of Corporate Investigations and Forensics: "This relieves any uncertainty about how international arbitration proceedings would be regulated if seated in South Africa."

What the new legislation enables

The Act aims to facilitate arbitration as a method of resolving international commercial disputes. It adopts the UNCITRAL Model Law for use in international commercial disputes and facilitates the recognition and enforcement of certain arbitration agreements and arbitral awards. As a result, it gives effect to South Africa's obligations under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958).

Of concern, notes Kayana, is that the new developments do not seem to have had the desired result yet: "We are still seeing disputes being run out of forums outside of the African continent that could easily now be heard and determined here."

This in spite of the biennial [Arbitration in Africa Survey Report 30.06.2020.pdf](#) [2020 Arbitration in Africa Survey Report](#) having identified the major cities on the African continent that host arbitration cases, whether ad hoc or institutional. Among the top five ranked in the report, three are in South Africa – namely Johannesburg, Cape Town and Durban – with the other two being Lagos and Cairo.

The advantages of having arbitration seated in South Africa

"By aligning itself with modern arbitration legislation," says Mohamed, "South Africa has given foreign parties the appropriate assurance that this country's international arbitration laws meet recognised international standards and benchmarks."

Adds Kayana: "A key element of establishing a safe seat for arbitration is an independent legal profession with expertise in international arbitration, and an independent judiciary that respects a party's choice to use arbitration rather than other legal avenues. South Africa satisfies all these requirements."

A bonus is that, against the backdrop of Covid-19, South African dispute resolution forums have adopted virtual platforms which make the dispute resolution processes accessible, efficient and physically safe.

"Video conference facilities now make access to arbitration easier and curtail the costs, which for South African arbitrations are already very competitive," notes Kayana.

Without any compromise on the quality of either legal proceedings or professionals, it appears South Africa is, finally, a competitive alternative for international commercial arbitration, and it's a realisation soon to be grasped and embraced in full by multinationals seeking the process.

The benefits of using local investigation teams in arbitration

The advantages of local arbitrations involving African parties on the African continent are many and include independence, the benefit of location and access to diverse languages, access to experienced panels, the implementation of modern rules and technology, a knowledge of the African socio-cultural context, and reduced costs.

In particular, in South Africa, there are also significant cost-effective and efficient benefits of using local investigation teams to provide support to the legal teams running the arbitration. These include:

- Investigations conducted by professionals with local knowledge of the relevant legislative and regulatory prescripts will ensure all avenues are pursued effectively and that all evidence, information, interviews, documentation and connections are thoroughly gathered to aid the legal team;
- Assisting with the collecting of evidence through appropriate background checks against local databases, conducting witness interviews and computer forensics, and locating individuals relevant to the case;
- Local asset ownership searches (such as property and vehicle ownership searches) can assist with identifying possible prospects of recovery in the case of civil recovery disputes;
- Local forensic accounting and financial investigations, conducted by professionals who understand local tax and commercial laws, and who can assist with quantifying losses and/or possible recovery if there have been fraudulent activities;
- Computer/data analysis can be conducted by parties on the ground, who can identify relevant information and evidence that meets local evidentiary requirements. Local knowledge also assist claimants to identify weaknesses in a case;
- Based on information and evidence gathered during the course of the local investigation, clients can take a more informed view on the potential success of the relevant case or gain further insights necessary to decide on an appropriate legal strategy.

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