

South Africa construction law update: Important procedural developments

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There are three important developments that are taking place in the field of dispute resolution. These developments will be of substantial interest to all involved in the construction industry in South Africa.

These developments are :

- 1 The introduction into law in 2016 of mandatory Adjudication and Prompt Payment Regulations, for all construction works contracts
- 2 The submission to Parliament in 2016, of an International Arbitration Bill
- 3 The establishment of the China/Africa Joint Arbitration Centre (CAJAC) in Johannesburg and Shanghai

Adjudication Procedure and Prompt Payment Provisions

The Minister of Public Works has proposed an amendment to the Construction Industry Development Regulations.

The draft amendments to the regulations have been published for public comment and are expected to come into law during 2016.

The amended regulations will apply to all construction works contracts or construction works related contracts, whether written or oral and in both the private and public sectors (excluding home building contracts). The definition of such contracts is very broad. The main import of the regulations will be the following :

- A prompt payment provision which will provide the following:
 - That a contract may not contain any provision which makes payment to a contractor, service provider or supplier conditional upon the payer receiving payment from a third party. This will be of particular importance to sub-contractors who are entitled to payment from the principal contractor.
 - That a party to a contract may not withhold payment or part payment unless that party has given notice of intention to withhold payment and has given reasonable grounds, in terms of the contract, for doing so. Where a party is not satisfied with those reasons they may declare a dispute and refer the dispute to adjudication in terms of the regulations.

- A provision for mandatory Adjudication, which will provide that:
 - every construction works contract or construction works related contract must provide for an adjudication procedure for the determination of any dispute;
 - where a party is not satisfied with the adjudicator's decision, that party may refer that dispute to arbitration in terms of the Arbitration Act or take the decision on review in terms of the Promotion of Administrative Justice Act;
 - the decision of the adjudicator is binding and the parties must give effect to that decision, within ten days from delivery of the adjudicator's decision, even though a party may intend to refer that dispute to arbitration or to take that decision on review; and
 - any party to a dispute, may be assisted by or represented at the adjudication by a representative or advisors, including the legal representation.

Parties to a construction works contract or construction works related contract will not be able to contract out of these regulations. The purpose of the regulations is to introduce mandatory adjudication as a fast track mechanism for resolving disputes and increasing cash flow in the construction industry. The regulations are set to have a profound effect on the industry and industry participants need to get to grips with the regulations themselves and the impact that they will have.

The regulations in their existing draft form have been severely criticized and are likely to be subject to a number of amendments and further publication for public comment before they are signed into law.

International Arbitration

A draft International Arbitration bill is presently with the Department of Justice, for review, having been approved by the Law Development Commission. The bill, it is understood, is based on the UNCITRAL Model Law for International Arbitrations (that having been the Law Commission's proposal in 1997). The bill will be submitted to Parliament for approval next year.

It is a matter of speculation as to what extent the Model Law will be adjusted or tampered with – what is known is that the Law Commission had, in putting its proposal to the Department of Justice (as long ago as 1997), stressed the need to promote two main threads, these being:

- the liberalisation of International Arbitration by limiting the role of domestic courts; and
- the emphasizing of party autonomy by allowing parties the freedom to choose how disputes should be determined

Our existing Arbitration Act of 1965 allows parties recourse to our courts in the course of arbitration proceedings on a large number of procedural matters. This of course detracts from the essence of arbitration proceedings and so the new bill is eagerly awaited.

In addition to the fact that the Department of Justice is currently reviewing the draft bill, there have in the last four or five years been a number of decisions of our courts which reveal an appreciation of the role of arbitration in modern society. These decisions have supported the sanctity of arbitration agreements and proceedings, and have limited in those respective matters, intervention by the court in arbitration proceedings, as also the review of arbitral awards. Our courts have gone so far as to say :



“ The South African courts not only have a legal, but a socio-economic and political duty to encourage the selection of South Africa as a venue for international arbitrations. International arbitrations in South Africa will not only foster our comity among the nations of the world, as well as international trade but will also bring about the influx of foreign spending to our country (*Zhongji Development Construction Engineering Company Limited vs Kamoto Copper Company SARL (2014) 4 ALL SA 614(SCA)*)”

These developments should be of interest to all involved in cross border disputes, from the points of view of predictability in the resolution of disputes, ease of enforcement of arbitral awards, and curtailment of judicial review of arbitral awards.

The China/Africa Joint Arbitration Centre (CAJAC)

CAJAC Johannesburg and Shanghai were launched last week as arbitration centres. The intention is to establish a number of further centres in China and Africa.

The Centre will provide dispute resolution services to facilitate and strengthen business, trade and investment between China and Africa.

Parties will subject the administration and arbitration of their dispute to CAJAC, by the signing of a model clause.

The publication of the applicable procedural rules is imminent. There will be two sets of rules, one of application in South Africa, and the other in China. Johannesburg and Shanghai will have access to a shared panel of arbitrators.

This development is of course unproven but it is understood that a number of disputes have already been referred to the Centre.

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