

21 July 2017

Portfolio Committee on Justice and Correctional Services  
Parliament of the Republic of South Africa  
CAPE TOWN  
Attention: Mr V Ramaano  
vramaano@parliament.gov.za

*Lectori salute*

## INTERNATIONAL ARBITRATION BILL

- 1 Paragraph 6 below contains a proposal to amend clause 8 of the International Arbitration Bill with a reference to the Hague Principles on Choice of Law in International Commercial Contracts.
- 2 The Hague Principles on Choice of Law in International Commercial Contracts (2015) (attached) were adopted by the more than 80 member countries of the Hague Conference on Private International Law, including South Africa. They are also endorsed by UNCITRAL and the International Chamber of Commerce. The instrument constitutes a code of current best practice with respect to choice of law in international commercial contracts, with certain innovative provisions where appropriate (see Neels "The nature, objective and purposes of the Hague Principles on Choice of Law in International Contracts" 2013/2014 *Yearbook of Private International Law* 45). The Principles may be used to interpret, supplement and develop rules of private international law by arbitral tribunals and courts (the preamble to the Principles).
- 3 The Model Law makes provision for party autonomy in Article 28(1): "The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute." Article 28(4) adds: "In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction."
- 4 However, no detailed rules on choice of law are provided (for instance on partial choice of law, modification of a choice of law, tacit choice of law and the formal validity of a choice of law clause). Many legal systems in emerging countries likewise do not have detailed rules on choice of law in international commercial contracts. This also applies in respect of South Africa (see C F Forsyth *Private International Law* (2012) 315-349). Such conflict-of-law systems would therefore similarly not be capable to solve more sophisticated issues of choice of law, as indicated.

- 5 An arbitral tribunal or court in South Africa may therefore greatly be assisted in this regard by guidance from an international instrument with significant persuasive authority.
- 6 It is therefore submitted that the following sentence be added to clause 8 of the Bill:
- “In the interpretation of Article 28(1) and (4) of the Model Law, the arbitral tribunal or court may be guided by the Hague Principles on Choice of Law in International Commercial Contracts.”**
- 7 Finally, it is suggested that the title of the Bill be changed to the **International Commercial Arbitration Bill**, to reflect the title of the Model Law.

Thanking you in advance for your kind consideration.

Yours sincerely



**PROF JAN L NEELS**

Professor of Private International Law

Member of the Governing Council of UNIDROIT

Director of the Research Centre for Private International Law in Emerging Countries

[jlneels@uj.ac.za](mailto:jlneels@uj.ac.za)

Attachment: Text of the Hague Principles on Choice of Law in International Commercial Contracts