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THE PORTFOLIO COMMITTEE ON JUSTICE
AND CORRECTIONAL SERVICES
PARLIAMENT OF THE REPUBLIC OF SOUTH AFRICA
CAPE TOWN

Per-email: vrammano@parliament.gov.za

Dear Mr Rammano,

RE: INTERNATIONAL ARBITRATION BILL [B10-2017]: COMMENTS

INTRODUCTION

1. This document constitutes comments on the International Arbitration Bill [B10-2017] ("the Bill") as was called for by the Portfolio Committee on Justice and Correctional Services ("the PC") on 3 July 2017.

2. The group that are signatories to these comments would, in addition, like to make a verbal presentation during the public hearing.

COMMENTS

3. Section 1 (Definitions)

"arbitration agreement"

3.1. The reference to Article 7 fails to identify whether South Africa intends to adopt the definition set out in option 1 or option 2 of the Article.

3.2. The distinction between the two options has significant implications for the Bill as the two options reflect different approaches on the question of definition and form of arbitration agreement.

3.3. If the intention is to adopt the shorter definition of arbitration agreement contained in Article 7 option 2, the additional aspects of the definition as set out in Article 7 option 1 must then be addressed or incorporated elsewhere in the Bill. This includes aspects such as the nature of the written agreement and whether electronic communication acceptable and will satisfy the requirement for a written agreement between the parties.

3.4. Having regard to the domestic legal context in which the Model Law will operate, including the South African law of contract and the Electronic Communications Act 2007, it is proposed that the definition of "arbitration agreement" in section 1 of the Bill, state clearly that the definition in Article 7 option 1 is adopted and that the definition is reproduced in the Bill.

"international"

3.5. The Bill does not provide a definition of this word. When regard is had to the important of this definition and the number of disputes that involve an in limine issue of whether the dispute is properly regarded as international, it is recommended that this word is specifically defined in the Bill.

3.6. To do so will avoid any dispute on whether the guidance provided in Article 1(3) of the Model Law is to be deemed to be the understanding of "international" for purposes of the Bill.

4. **Section 2**

The meaning of the phrase *"the context"* is unclear. Should the words mean in the context of the Bill, then this should be stated to remove ambiguity.

5. **Section 4(2)**

Reproduce/incorporate section 2 of the Arbitration Act, 42 of 1965 herein.

6. **Section 7(1)(a)**

6.1. Is section 7(1)(a) intended to refer to a dispute that is excluded by a specific law from being subject to arbitration, or that the subject matter/dispute is inherently not capable of resolution by arbitration?

7. **Section 7(1)(b)**

7.1. A definition of "public policy of the Republic" is necessary.

7.2. It appears that the two paragraphs seek to exclude certain transactions from the ambit of "international commercial dispute". It is suggested that these exclusions be spelt out, even by example and on an open-list basis. It may be useful to use the guidance contained in the Model Law on the ambit of "commercial" in Article 1, footnote 2.

7.3. Some public bodies enter into contracts with parties that seek to make a profit or with a commercial objective, whereas the public body does not have such an objective. Should different rules apply in these instances?

8. **Section 10(2)**

Redraft as follows: S10(2)

(a) The arbitral tribunal may, on application by one or more of the parties to an arbitration or arbitrations, order that more than one arbitration proceedings be consolidated or that concurrent hearings be conducted.

(b) Factors that may be taken into account by the tribunal upon application in terms of paragraph (a) of subsection (2) will be the following:

(i) substantially the same question of law or fact would arise in such arbitrations;

(ii) consent by the parties to consolidation of proceedings or that concurrent hearings be conducted; and

(iii) prejudice to one or more of the parties

9. **Section 15**

Redraft as follows: s15

(a) Subject to Articles 20(2) and 31(3) of the Model Law, the juridical seat of arbitration shall be in South Africa; or

(b) Upon application by any of the parties the juridical seat of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case.

10. **Section 16(1)**

The replacement of the word "must" for the word "shall".

11. **Award**

An award made in terms of Article 31 of the Model Law shall be subject to section 15.

12. **Selection of Arbitral Tribunal**

12.1. The inclusion of a new section 15A:

Subject to Article 11 of the Model Law:

(a) where only one arbitrator is appointed it shall be a South African arbitrator; and

(b) where more than one arbitrator is appointed one of them shall be a South African.

12.2. This selection criteria is necessary in order to ensure that parties do not eschew South Africans in favour of counterparts in Europe or other parts of the world.

CONCLUSION

13. These comments are preliminary and may be modified at the public hearings.

14. The signatories herein are not members of a formal arbitration institute. The group is still discussing the desirability to establish an international arbitration centre in South Africa.

15. We thank you in anticipation for considering our submissions.

Yours faithfully,

SIGNATORIES

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