Additional Submission on Clause 7 of the International Arbitration Bill

We refer to our submission dated 3 August 2017. We herewith expand on our submission contained at item 3 of the table under the heading "**Matters subject to international commercial arbitration**" to provide the Portfolio Committee with further guidance and clarity on the proposition.

For clarification we point out that the suggestion is not that public policy is not an overriding factor when it comes to the arbitrability of a dispute in South Africa – but remains paramount. What we allude is that the current wording of clause 7, the clause be amended to align with international law principles on the issues of arbitrability of international commercial disputes. In that regard we propose the following amendments: -

> For purpose of this Chapter **Matters subject to international commercial arbitration**
>
> **7.** (1) For the purposes of this Chapter, any international commercial dispute which the parties have agreed to submit to arbitration under an arbitration agreement may be determined by arbitration unless it is contrary to public policy to do so.[1]
>
> ~~and which relates to a matter which the parties are entitled to dispose of by agreement, may be determined by arbitration, unless—~~
>
> ~~*(a)* such a dispute is not capable of determination by arbitration under any law of the Republic; or~~
>
> ~~*(b)* the arbitration agreement is contrary to the public policy of the Republic.~~
>
> (2) Arbitration may not be excluded solely on the ground that an enactment confers jurisdiction on a court or other tribunal to determine a matter falling within the terms of an arbitration agreement.

For any arbitration proceedings where South Africa is merely the juridical seat for such international commercial arbitration, the South Africa courts will subject to such grounds contemplated by the Model Law, be entitled to set aside an arbitral award based on public policy considerations. However, in doing so, regard must be had to the nature of international arbitration (subject matter of the dispute), as the setting aside of an arbitral award by a South African court does not imply that such award is not capable of being enforced in another state.

We submit that the proposition to make clause 7 of the International Arbitration Bill broader and thus less restrictive is premised on the nature of international commercial disputes where the subject-matter of the dispute is unrelated to the juridical seat. The setting aside of an arbitral award that has no links with the juridical seat on grounds of substantive public policy may well be considered arbitrary and the exercise of an exorbitant jurisdiction by the courts of the seat.[2]

In that regard, we refer the Portfolio Committee to Chapter 3: "Arbitrators' Freedom in Arbitral Decision-Making in Dolores Bentolilia, Arbitrators as Lawmakers[3] that records the following:-

> *312. The application of public policy and overriding mandatory rules by arbitrators is one of the most debated issues on applicable law in*

[1] Singapore *International Arbitration Act*:
Public policy and arbitrability
11. —
(1) Any dispute which the parties have agreed to submit to arbitration under an arbitration agreement may be determined by arbitration unless it is contrary to public policy to do so. *[38/2001]*
(2) The fact that any written law confers jurisdiction in respect of any matter on any court of law but does not refer to the determination of that matter by arbitration shall not, of itself, indicate that a dispute about that matter is not capable of determination by arbitration.

[2] 'Chapter 3: Arbitrators' Freedom in Arbitral Decision- Making', in Dolores Bentolilia, Arbitrators as Lawmakers, International Arbitration Law Library, Volume 43 (© Kluwer Law International; Kluwer Law International 2017) para 313

[3] *Idem* pp. 83 - 144

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international arbitration. Arbitration is based on party autonomy, and most arbitration laws and rules do not refer to overriding mandatory rules in their applicable law provisions. Conversely, arbitral awards may be set aside or their enforcement refused if they conflict with the public policy of the forum called to annul or enforce the arbitral award. Arbitrators should thus respect the public policy of the forum that may potentially be called to set aside or enforce the arbitral award.

313. As discussed in §1.01, ***under most arbitration laws and arbitration rules the arbitral tribunal is no longer under an obligation to apply the conflict of laws rules of the seat****. The detachment of the law applicable to the merits of the arbitration from the private international law of the seat also encompasses the overall legal system of the seat, including its mandatory rules (lois de police) and domestic policies.* ***Arbitrators are not under the duty to enforce and protect the public laws of the seat, unless the seat's laws are applicable. In most international arbitration cases, the seat is unrelated to the dispute and an arbitral award that conflicts with the substantive public policy of the seat may still be enforced in other countries unless such public policy has widespread recognition. Indeed, the setting aside of an arbitral award that has no links with the seat on grounds of substantive public policy may be considered arbitrary and the exercise of an exorbitant jurisdiction by the courts of the seat****.*

314. It has also been argued that arbitrators should comply with the public policy of the countries where the arbitral award can be enforced. The problem with this approach is that arbitral awards can be enforced anywhere in the world; wherever the award debtor has assets. Thus, a choice needs to be made where different enforcement jurisdictions have conflicting values. It could be argued that arbitrators should take into account the public policy of the country in which the award creditor will most likely bring an enforcement action. But it may be difficult to know in advance the place of enforcement. The place of enforcement may also change according to the party who loses the case – a matter that may depend on whether the public policy of a particular place is given effect or not.

315. Arbitrators may therefore give priority to one country's public policy over another.

316. ***In practice, arbitral awards have taken into account the public policy of the seat, the public policy of the country or countries where the award may be enforced, the public policy of the countries connected with the dispute or the parties, or a combination of the public policy of all of these states****. In the Dow Chemical case the arbitral tribunal referred to the public policy of France, which was the seat of the arbitration. In ICC Case No. 3281, the arbitral tribunal took into account the public policy of the country where the award could be enforced. Arbitrators have also referred to the public policy of other countries, such as those connected with the dispute or the parties, or a combination of the public polices of such countries.*

317. In most of the cases where arbitrators took into account the public policy of a particular state, it was to express the conformity of the lex contractus or contract to public policy, not to bar the application of the lex contractus. Conversely, when arbitrators disregard the lex contractus because it conflicts with public policy, they make reference to a public policy that is common to a majority of states or, to borrow Pierre Lalive's terms, a 'truly international or transnational public policy'.

> *318.* ***Transnational public policy is often referred to as a response to the internationalization of economic relationships and the need for universal standards of morality****.* ***The idea of a transnational public policy has been endorsed by the 1989 Resolution of the Institute of International Law, which states that '[i]n no case shall an arbitrator violate principles of international public policy as to which a broad consensus has emerged in the international community'****. Transnational public policy primarily exercises a positive function. It requires the application of imperative rules that are fundamental to the international community (of states and business-people). Examples of these rules include those which endorse slavery, corruption, drug/arms/human organ/cultural goods trafficking, and embargos imposed by the international community to promote peace and security.*

Our proposition that the arbitrability clause be made broader and thus less restrictive is to ensure courts tasked with deciding whether a certain international commercial arbitral awards rendered in South Africa should be set aside for violation of South African public policy has regard to broader public policy consideration. The intention therewith is to mitigate against the potential risk of courts setting aside arbitral awards rendered in South Africa that have no links with South Africa as a juridical seat on grounds of substantive public policy.

We trust this provide further insight to our proposition at item 3 of our submissions.

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