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ARTICLE

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TO SUE OR NOT TO SUE, THAT IS THE QUESTION: ARBITRATION

There are many reasons why organisations across the globe are paying more attention to the practice of arbitration. Simply put, individuals and organisations foresee the advantages of preserving relationships -- particularly in a down-turned economy -- where disputes are more frequent and consume more management time and organisational resources than ever before. And in troubled economic times, it would appear that people are more inclined to litigate, whilst the converse may hold true that people seem more relaxed when times are good and are forgiving when contractual arrangements are not completely met. Indeed, one only needs to consider the nature of a typical Court Roll to appreciate the volume of commercial cases being presented to the courts on a daily basis to realise just how many businesses approach the courts for relief when disputes arise.

Whilst the volume of these cases also absorbs valuable court time, businesses who implement an up-front arbitration clause in their contracts invariably are able to resolve their disputes privately, and outside of the court system without going to trial. Besides the fact that business relationships have a far better chance of survival after arbitration, the costs incurred to follow an arbitration process is usually far cheaper than the costs attached to litigation, especially if such matters need to be dealt with across international borders. Of course, reputations and productivity on the whole are also largely unaffected when organisations pursue arbitration above litigation as a preferred means to resolving their disputes.

Notably, in larger South African business environments, there appears to be a greater uptake to support alternative means for resolving disputes, instead of approaching the courts as a first means of action. The reason may be largely ascribed to the fact that such an approach to resolving disputes is less hostile and generally produces better results for both parties in dispute with a quicker resolve. Whilst the Companies Act 2008 and the King Report on Governance for South Africa (King III) makes provision for organisations to use Alternative Dispute Resolution (ADR) as a first means of mediation, our Labour Relations Act of 1995 is far more specific, mandating disputing parties to *first* attempt to conciliate their disputes *prior* to resorting to arbitration or litigation.

"Arbitration is the preferred dispute resolution mechanism for international commercial and investment disputes. Having an effective dispute resolution mechanism is an important safeguard in a corporation's decision to invest or do business internationally."

Source: International Arbitration: Corporate attitudes and practices 2008
(A Pricewaterhousecoopers Report undertaken by Queen Mary University of London and the School of International Arbitration)

Expectedly, King III -- an international benchmark for business practices -- suggests in its Principle 8.6 that "the Board should ensure disputes are resolved as effectively, efficiently and expeditiously as possible." In South Africa this may be somewhat easier for businesses to achieve whilst they are on their own turf, but how would this be done with an international company say from the United States or Ethiopia operating in South Africa for example, where there are inconsistencies associated with arbitration across international borders? To address this issue, where there is agreement between multiple countries and their respective legislation vis-à-vis international arbitration cases, the United Nations Committee on International Trade and Law (UNCITRAL) introduced the Model Law in 1985, which was later amended in 2006. In essence, the Model Law can be adopted by any country in order to adapt its legislation to cater for the requirements of international arbitration and brings the desired synchronisation and enhancements to national laws throughout the globe.

To date, South Africa has not adopted the Model Law which will naturally present South African companies with additional challenges, not least the additional cost burdens and lost foreign business opportunities. In this regard,

whist South Africa is not a signatory of the Model Law, in practice this would mean that if an arbitration clause is contained in a business contract between a South African and an overseas based company, and this clause is enacted, it is most likely that the arbitration proceedings will be subject to the European jurisdiction and the case will not be adjudicated in South Africa. Making matters worse for South Africa, our own arbitration laws back date to 1965 and this also acts as a deterrent for many overseas companies to rely on our rather archaic law to handle such matters on South African soil. Of course this situation clearly explains the reasons why South African organisations are spending such huge sums of money on matters of dispute and more often than not, organisations send their legal teams to off-shore destinations to fight an arbitration regarding business done in South Africa.

Notwithstanding the fact that South Africa may have signed the New York Convention of 1958 on May 03, 1976 -- which is considered the most important international instrument on arbitration law -- South Africa is still not regarded as a serious or committed arbitration player in the world. As South Africa depends more on international trade as a major source of foreign revenue, our legal authorities will need to understand the importance of 'towing the line' with their overseas counterparts. More so, international trade depends heavily on arbitration as a means of dispute resolution -- as reported in a recent study conducted by Queen Mary University of London, including the School of International Arbitration and funded by PricewaterhouseCoopers -- and therefore the critical need for South Africa to adopt the Model Law. It is often much easier to enforce an arbitration award in a foreign country than a judgement of a court of the same country.

Finally, there is a distinct difference between the UNCITRAL's Model Law on international commercial arbitration and UNCITRAL's Arbitration Rules. According to UNCITRAL, "the Model Law provides a pattern that law-makers in national governments can adopt as part of their domestic legislation on arbitration." The UNCITRAL's Arbitration Rules however are "selected by parties either as part of their contract, or after a dispute arises, to govern the conduct of an arbitration intended to resolve a dispute or disputes between themselves. Put simply, the Model Law is directed at states, while the Arbitration Rules are directed at potential (or actual) parties to a dispute."

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