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ARBITRATION CLAUSES IN CONTRACTS: A RE-EVALUATION

BY

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1. Introduction

Arbitration is a dispute resolution method which acts as an alternative to litigation proceedings, which in theory operates speedier, more cost-effective, more confidential and more efficiently in respect of the experience and expertise of the adjudicator.[1] It is considered the better option and the preferred method of dispute resolution amongst legal practitioners and authors alike. Arbitration has become so popular, that is has more or less become standard practice to make use of it and to shy away from court proceedings. Arbitration clauses have become a standard, almost guaranteed clause in most types of contracts and have become boiler-plate provisions.

The inclusion of arbitration clauses in all contracts that allow therefore has unfortunately not realized into the "American Dream" everybody hoped it would be. Upon research and case studies it is evident that many legal issues are encountered when they these clauses are included into contracts from which disputes arise. This dissertation takes the reader through the arbitration process and its manifestation as a boiler-plate clause; it provides various case studies that illustrate legal issues that arise when attempting to enforce the arbitration clause; and it considers the possible gaps that could exist, allowing for the flawed implementation and application of such arbitration clauses. It also considers international tendencies and recommended law reform.

It is important to note that this dissertation focuses on compulsory private arbitration proceedings as enforced through arbitration clauses in contracts, and not arbitration proceedings as utilized by forums such as the Commission for Conciliation, Mediation and Arbitration in disputes stemming from areas of practice such as labour law. Arbitration of such a nature is enforced through legislation as a matter of public policy, where arbitration enforced by way of an arbitration clause is done so based on the parties' consensus thereto. This paper should therefore not be read in the light of public-private arbitration, but solely in terms of private arbitration proceedings.

This dissertation will evaluate the arbitration process, the way in which it has been incorporated as a compulsory dispute resolution method, a study of case law regarding the enforcement thereof and a discussion as to the issues they put forward. It also takes a brief look at recommendations of law reform to solve the problems identified. In the end, I want to consider whether we should continue including

C Assheton-Smith 'Arbitration rather than litigation?' (2013) 40 *Pharmaceutical & Cosmetic Review* 18.

arbitration clauses in contracts, considering that their enforcement appears to be flawed and causes further delays in the dispute resolution process.

2. Arbitration: The foundation and the implementation

Although there are various dispute resolution mechanisms, including litigation, the most popular and utilized method, aside from litigation, is probably that of arbitration. Arbitration is not a new or innovative dispute resolution technique, but rather a method that has its roots in our common-law and that was further evolved in legislation. Arbitration dates back to the writings of well-known Roman-Dutch jurists, such as Voet and Van Leeuwen, and has found its way into legislation enacted in South Africa from 1965 to 2017.

2.1. South Africa's common-law basis for arbitration

South Africa's common law is founded on Roman-Dutch law, with some influences from English law. Voet, probably the most well-known and cited Roman-Dutch jurist, made references to arbitration in his writings, along with various other jurists. Voet however had a difference of opinion with some other jurists on the aspects of arbitration law. Voet firstly differed from Van Leeuwen on the position of whether a single adviser of a party to a dispute could arbitrate disputes between two parties when consent was so given by the other party. He differed with Groenewegen on what approach was to be followed when arbitrators are in favour of awarding a different amount of compensation and cannot agree thereon. He further differed with some other authors on whether or not two arbitrators could appoint a third arbitrator to assist in the proceedings in the event that the two initial arbitrators had a disagreement as to an award and which solution was not provided for in the arbitration agreement.[2]

Although our Roman-Dutch jurists had strong opinions about arbitration law, the application thereof has been restricted due to the fact that three of our provinces in the Union of South Africa adopted the English Arbitration Act of 1889. This had a knock-on effect and led to the acceptance and implementation of English case law by our domestic courts.[3]

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2 K Ramsden & PA Ramsden *The Law of Arbitration: South African and International Arbitration* (2009) 13.

3 Ramsden (n 2 above).

The English and Roman-Dutch common-law rules relating to arbitration differ in a number of ways. One such way is that the rigid requirement that both parties to arbitration proceedings should be present when the award is delivered in Roman-Dutch law, whereas it is not a requirement in English law and consequently not in our current arbitration law. Another important distinction is the fact that Roman-Dutch law provided for the practices of *reduction* and *reformation*, allowing parties to appeal and review decisions as one would be able to in court proceedings. Our current arbitration laws do not provide for an appeal procedure as it is not rooted in our English common-law either.[4]

3.2. South Africa's legislative basis for arbitration

South Africa's legislative basis for arbitration is not as developed as one would hope and is considered to be somewhat outdated. For the past fifty-four years, South Africa has been bound by the Arbitration Act 42 of 1965 as enacted on 14 April 1965. The Act is formulated quite simply and does not contain many provisions detailing the interpretation and application of arbitration agreements.

On various recommendations, such as the South African Law Reform Commission's recommendation in 1998, South Africa enacted legislation to provide for international and cross-border arbitration. The International Arbitration Bill 15 of 2017 was promulgated and assented to on 20 December 2017, almost thirty years after the mentioned recommendation to align our laws with the UNCITRAL Model Law on International Commercial Arbitration of 1985.[5] Before the eventual enactment, South Africa had to primarily rely on the Arbitration Act to govern both its domestic and international arbitration proceedings, as well as the Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977.

As stated however, we are bound by the Arbitration Act when enforcing arbitration agreements, which includes clauses in contracts providing for the arbitration of any disputes arising from such contracts. This is due to the wording and definition of 'arbitration agreements' in the Act, which stipulates that it is "(a) an agreement (b) in writing (c) to refer to arbitration any existing dispute or future dispute (d) relating to any matter specified in the agreement (e) regardless of whether the arbitrator is named

4 Ramsden (n 2 above) 14.

5 South African Law Reform Commission 'Discussion paper 83 - Project 94: Domestic Arbitration' 1998.

or designated or not."[6]

There are a few other important sections of the Act, which will become relevant in the discussion of this paper that should be noted. The first is section 3(2) of the Act, which stipulates that:

> "…the court may at any time on the application of any party to an arbitration agreement, on good cause shown-
> (a) set aside the arbitration agreement; or
> (b) order that any particular dispute referred to in the arbitration agreement shall not be referred to arbitration; or
> (c) order that the arbitration agreement shall cease to have effect with reference to any dispute referred."[7]

Another section that should be noted is section 6 of the Act, which empowers the courts to stay legal proceedings where an arbitration agreement is enforceable. The sections mentioned become particularly relevant throughout the paper, as they have an impact on the question of independency of proceedings and relate to legal issues encountered in case law, as discussed in Chapter 5. Our Arbitration Act is in dire need of reformation and in this regard Chapter 7 takes a closer look at some of the recommendations that have been made.

3. The choice between arbitration and litigation: Which is the better option?

There are very few academics or practitioners that would advocate for litigation proceedings above arbitration proceedings, for various reasons. When compared to litigation, there are a few key factors that differentiate arbitration proceedings from litigation proceedings and which are viewed as advantages as compared to the latter. The differences, which shall be discussed below, are in my opinion not guaranteed to be advantages and could in some circumstances be counterproductive to a particular dispute. This too is explained below.

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6 Act 42 of 1965 at s 1.
7 Note 6 above at s 3(2).

3.1. Arbitration proceedings are considered to be more expeditious

Arbitration is praised in preference to litigation due to the fact that the process is dealt with in a more expeditious manner, consuming less time than what due process in court proceedings would occupy.[8] Although the reasoning behind this opinion is generally correct, I would argue that this cannot be accepted as a rule of thumb. There are various factors that need to be considered when the length of a dispute resolution process is discussed, such as the specific forum utilized. It is an accepted disadvantage of litigation that parties are bound by dates set-down by court officials and cannot opt to resolve the proceedings as soon as practically possible according to their personal schedules. However, the possibility exists too that parties are not able to settle disputes in a timely fashion, as the parties cannot reach a consensus on a date or venue for the arbitration proceedings amongst themselves.[9] Counsel, when involved, do not have the obligation to adhere to a date and venue as they would when it is set-down by courts, but must rather determine when it is most convenient to attend to the arbitration proceedings. Further, a chosen arbitrator must also be available on the respective chosen dates and can therefore cause further delays in settling the matter. We must also consider that every court differs in its scheduling and 'back-log', which too affects this point of differentiation. For example, obtaining a court date in a High Court for an application will take longer as opposed to obtaining a date in a Magistrates' Court.

This point can be further elaborated on to show that arbitration proceedings are thought to be more expeditious as the proceedings are concluded more rapidly and not subject to delays, as one could experience in litigation proceedings.[10] As a general assumption, here is not much room for argument here, but proceedings could also prove to take longer in a less formal environment. The arbitrator, not bound by court scheduling, could opt to allow discussions to continue for a longer period of time in order to sufficiently reach a conclusion. Therefore, there are various factors that need to be considered and it cannot be out-right stated that being bound to a court's scheduling is a disadvantage under all circumstances.

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8 Ramsden (n 2 above) 7.
9 A Gorley 'Advantages and disadvantages of the arbitration procedure' (1988) 245 *De Rebus* 339.
10 Ramsden (n 2 above) 7.

3.2. Arbitration is thought to be a more cost-effective procedure

The second point of differentiation is that arbitration proceedings are more likely to be cost-effective, as the proceedings and practice are not bound by rules of court. There are of course standards of practice which are to be adhered to and respected in arbitration proceedings as in litigation proceedings, but there are no published court rules and practice directives which parties are required to adhere to, as previously mentioned.

Parties are therefore able to settle disputes without the obligation to exchange and prepare compulsory pleadings, notices, draft orders and special pleas for example. This will most likely result in less fees charged by the legal representative, in addition to the exclusion of the court's administration costs in litigation. Consideration must however be given to the fact that arbitration proceedings involve similar costs, such as the arbitrator's fees and the fees of expert witnesses. Legal representatives are still present and, more often than not, advocates are required as well. Therefore, it can be argued that arbitration proceedings do not run as high a tab as litigation proceedings do, but both can prove to be costly proceedings. Also, litigation proceedings have the additional requirement that legal practitioners are almost always necessary to represent the parties to the dispute.

3.3. Arbitration has the advantage that there is choice in expertise and choice of adjudicator

Arbitration proceedings have the out-right advantage to allow parties to choose and select an arbitrator which best suits their needs and the subject-matter of the dispute. An arbitration agreement can either appoint an arbitrator upon conclusion thereof or provide the parties with the option to appoint a mutually approved arbitrator. Litigation proceedings do not allow parties a choice in their presiding officer and as such the parties are proverbially stuck with the cards they are dealt. The advantage in appointing an arbitrator is that parties are able to select an arbitrator based on his expertise and knowledge of the subject-matter of the dispute. A presiding officer in court proceedings, while learned in the field of law and civil procedure, may quite possibly not have widespread knowledge of the subject-matter of the dispute. For example, a magistrate may have thirty-five years' experience as such, but may not have any experience or knowledge of construction contracts. It would be to the

advantage of the parties to appoint an arbitrator who has trained in the field of construction law and arbitration of construction contracts. There is however a drawback to this advantage, seemingly the flip side of the coin. Although arbitrators may have more knowledge and expertise in the subject-matter of the dispute, they are not necessarily trained to adjudicate disputes and are not as familiar with the rule of law. This leaves room for procedural errors and could possibly result in a delay of finality of proceedings, as parties would have the option to review any proceedings where irregularities are alleged. It does however seem to remain an advantage to appoint an arbitrator of choice, as parties have the option of appointing an arbitrator with the necessary experience.

3.4. Arbitration provides for a greater sense of finality

The final point of differentiation to be highlighted is that arbitration proceedings allow for finality of proceedings, due to the fact that the arbitrator's decision, once made, is final and binding on the parties and not subject to appeal, although the arbitrator's procedural conduct is subject to review.[11] Litigation proceedings allow the parties to appeal the decision of the presiding officer, determining whether a higher court would come to a similar or opposite conclusion and decision. Although litigation allows for clarity and sufficient certainty as to the correct position in law, it also allows for inevitable delays of finality and results in a delay of the possible award and the possibility of performance.

The above highlights the differences between the two distinct dispute resolution procedures. There is much support for the idea that arbitration is to be preferred above litigation,[12] but it seems that every case would have to be evaluated in order to determine which method of proceedings would be best suited to the tailored needs of the circumstances. However, as mentioned above, much support is given to arbitration as the preferred method of dispute resolution and as a result has manifested itself as the compulsory method to utilize in most contractual settings.

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11 Note 7 above.

12 Gorley (n 9 above) 339; C Watson 'To litigate or to arbitrate? That IS the question' (2015) 15 *Without Prejudice* 38.

4. The inclusion of compulsory arbitration clauses in contracts

It is highly unlikely that you will come across a contract in 2019 which does not include an arbitration clause. These have become standard, boiler-plate clauses which are now included in contracts of all kinds.[13] They are usually drafted to compel the parties to participate in arbitration proceedings in the event that disputes, of any nature or kind, related to the contract arise. The clause will typically further stipulate whether a separate arbitration agreement is to be concluded in the event that a dispute does arise or it will, alternatively, provide the terms of such arbitration. Although these clauses are sometimes inserted as an after-thought, they can prove to create numerous problems when disputes do in fact arise. It is therefore necessary to carefully consider the way in which arbitration clauses are drafted and structured.

Initially arbitration clauses were most likely inserted as way to avoid litigation proceedings and achieve a speedier, cost-effective adjudication of your dispute. They were probably also, and could still be, inserted in certain contracts in order to alleviate the pressure and workload that falls on certain courts. Arbitration has long been utilized to resolve disputes between parties which would normally only be resolved through litigation. For example, in 2007 the Cape High Court experienced a vast load of Road Accident Fund cases, such that 30 – 40% of their case workload consisted of these claims. Due to developments and partnerships with alternative dispute resolution entities, close to three million disputes of this nature were resolved through arbitration at that point in time, with 80% of those cases being resolved in dialogue between parties themselves.[14] This is a good indication that arbitration can be a useful process that could yield satisfactory results if it is incorporated and managed in an efficient, logical way.

It is a point of concern that arbitration clauses have become so standard in contracts that we forget the original intention of this dispute resolution method. Commercial contracts and business practices now include these clauses due to standard industry practice, but quite possibly also as a strategic device which could be used to resolve a dispute in a fairly quick and cost-effective manner, or to be used as a delay tactic and thus to abuse of process. The option utilized will most often

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13 Note 12 above.

14 M Avery ‘Using arbitration to reduce court caseloads’ (2007) 7 *Without Prejudice* 11.

depend on who the wrongful party is.

Arbitration is specifically prevalent in a number of industries and specific contracts, as briefly considered below. The industries have identified the advantage of utilizing the process and as such have provided various frameworks to allow for dispute resolution in their relevant sector through arbitration. One example is the construction sector. Building contracts almost always include an arbitration clause and, in fact, it has become a standard practice in the industry to do so.[15] The Joint Building Contracts Committee Principal Building Agreement of 2014, which regulates building contracts in the sector, provides for the arbitration of disputes arising from building and construction contracts and specifies the manner in which the disputes and the arbitration must be dealt with.[16] We further have institutions such as the International Association of Athletics Federations that have an arbitration panel which primarily deals with sport and athletic related disputes.

Research has been conducted into whether or not a party consents to arbitration when entering into an agreement under circumstances where the arbitration clause is a standard provision in an agreement.[17] A comprehensive investigation into the question of consent was concluded in the *Daljosaphat* case,[18] where one of the main issues before the court was whether conscious consent is present in selecting arbitration as the preferred method of dispute resolution and whether or not the arbitration agreement could survive independently from a main agreement – that is, whether the clause, when severed from the main agreement, would still embody the consent and terms of arbitration.[19]

Author Edward Torgbor discusses this notion of consent and stipulates that there are two ways in which a party to an arbitration agreement can dispute its consent: firstly by way of a bare denial of his consent to utilize arbitration as a dispute resolution method for any disputes in general, and secondly by way of disputing the arbitrable matters that fall within the scope of the arbitration agreement itself. To resolve these denials, one would have to determine what the disputing party's intention was when

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15 HS McKenzie & PA Ramsden *McKenzie's Law of Building and Engineering Contracts and Arbitration* (2014) 233.

16 McKenzie & Ramsden (n 15 above) 233.

17 E Torgbor 'Tracking down consent and dissent in arbitration law and practice [A discussion of *Daljosaphat Restorations (PTY) Ltd v Kasteelhof CC* 2006 6 SA 91 (C)]' (2009) 3 *Stellenbosch Law Review* 552.

18 *Daljosaphat Restorations (Pty) Ltd v Kasteelhof CC* 2006 (6) SA 91 (C).

19 Torgbor (n 17 above) 554.

entering into the agreement. The second denial is resolved more easily by way of determining the scope and extent of the application of the arbitration agreement itself.[20] It is however pointed out that the UNCITRAL Model Law on Commercial Arbitration, recently incorporated (basically as is) as our International Arbitration Act 15 of 2017, does not require consent to be present for the valid conclusion of a arbitration agreement.[21]

That is however not the case in our domestic arbitration law and the absence of consent will most likely lead to litigation proceedings declaring the agreement invalid for a lack of consensus. This is because South African arbitration laws, whether common-law or legislative, require a meeting of the minds for the agreement to be valid and enforceable.

Our common-law dictates that an arbitration agreement, even when concluded by way of an oral agreement, is valid and enforceable. However, the Arbitration Act will have no application to such agreements.[22] However, oral agreements in common-law are only binding if and when consensus (as a necessary element of contract) is present between the parties.

Arbitration clauses are therefore enforceable between parties in their attempt to resolve their disputes through alternative methods and avoidance of litigation. However, the concerns at present are that arbitration clauses often do not serve the purpose as intended and stipulated above, but instead tend to have the opposite and undesired effect, being litigation. Below follows a discussion and explanation of this problem.

5. Case-studies highlighting the legal issues encountered in an attempt to enforce arbitration clauses in contracts

It would seem that arbitration clauses are sometimes either incorrectly interpreted, drafted or applied. This assumption is based on the study of case law below, which shows that arbitration clauses sometimes have the opposite effect and leads parties to litigate when there is an attempt to enforce the clause. It appears that arbitration clauses are met with legal disputes surrounding the operation of the clause itself,

20 Torgbor (n 17 above) 554.
21 Torgbor (n 17 above) 555.
22 Gorley (n 9 above) 339.

which leads to an inability to arbitrate in terms thereof and in turn requires litigation. The legal issues commonly encountered are discussed below with reference to the corresponding case law.

5.1. Can an arbitration clause be severed and separately enforced when the contract is alleged to be invalid, void or voidable?

(a) Sentrale Kunsmis Korporasie (Edms) Bpk v Van Heerden and Others[23]

The case above dealt with a contract for the sale and the issue of shares in a company which included an arbitration clause to the effect that any dispute which arose between any of the parties on any matter provided for in or arising directly out of the agreement, or in regard to the interpretation or termination of the agreement, would be resolved by way of arbitration of the dispute.[24] The case went to court for litigation, as the plaintiff alleged that the contract was void *ab initio* due to false and fraudulent misrepresentations that were made by the defendant. It further argued that the matter could as a result not be arbitrated on. The court found that where a contract is voidable and has been avoided because it was induced by fraud or misrepresentation, the dispute does not fall to be dealt with in terms of the arbitration clause unless the clause specifically provided so. This is because, in the event that the contract is avoided on this type of ground, it is avoided *ab initio* and hence the clause falls away. The clause at hand was very wide but its wording did not include a dispute as to the voidability *ab initio* of the contract.[25]

The court therefore found that void contracts cannot be arbitrated on if the clause itself does not specifically make provision therefor. This would entail that the parties reasonably foresaw the contract could be void *ab initio.*

(b) North East Finance v Standard Bank[26]

This case follows the same factual setting as above, where the main agreement, which contained provisions referring any and all disputes to arbitration proceedings, was argued to be void and the validity thereof was consequently to be determined. The parties approached the court to determine whether the contract compelled the parties

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23 1972 (2) All SA 454 (W) 458.
24 Note 23 above at par 2.
25 Note 23 above at par 19.
26 2013 ZASCA 76.

to submit the question of validity to arbitration, as per the arbitration clause in the contract. The court considered a purposive interpretation of the clause and questioned what disputes the parties intended to be arbitrable, regardless of the fact that the clause stipulated "any dispute of whatsoever nature" was to be arbitrated on. The court held that the parties intended the contract itself to resolve accounting issues only, therefore indirectly intending that the arbitrator could resolve accounting disputes alone and subsequently not the validity of the agreement.

(c) *North West Provincial Government v Tswaing Consulting CC*[27]

In this case, a main agreement had been concluded between the parties. However, the appellant applied to rescind the contract as they argued it was unenforceable due to fraudulent activities that took place before the conclusion of the contract of which they were unaware. An arbitration agreement was concluded as an ancillary agreement in accordance with an arbitration clause in the main agreement and the court had to determine whether the arbitration clause in the arbitration agreement was of any force or effect, considering the fact that the appellant rescinded the main agreement. The court found that the clause could not survive the rescission and that the agreement concluded to give effect to the clause would therefore not have a legal basis and would have to be rescinded as well.

(d) *Wayland v Everite Group Ltd*[28]

In this matter the court, once again determining whether an arbitration clause was severable and enforceable separately from a void contract, held that the clause must either stand with the entire contract or fall with it when voidability is brought to the surface. This judgment is another illustration of South Africa's lack of approval of the principle of separability.[29]

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27 2006 SCA 138 (RSA) par 13.
28 1993 (3) SA 946 (W).
29 C Bredenhann 'Enforcing arbitration in South Africa' (2012) 12 *Without Prejudice* 25.

5.2. What happens to the applicability and life of the arbitration clause once the contract has been terminated?

(a) Sera v de Wet[30]

The case at hand dealt with a contract where the respondent in the matter unlawfully and wrongfully repudiated the contract, therefore terminating the agreement. The court had to consider whether the arbitration clause was enforceable despite the termination by repudiation, in order for the question of damages to then be arbitrated on. The court found that an arbitration clause could not survive the termination of the agreement and that the issue of damages would have to be decided by a court of law. Had a dispute arose when the contract was still in force, the dispute would have fallen within the ambit of the arbitration clause. However, this was not the case and thus the arbitration clause could not be enforced.[31] The court therefore concluded that the termination of an agreement effectively terminated the operation of the arbitration clause.

(b) Atteridgeville Town Council and Another v Livanos t/a Livanos Brothers Electrical[32]

An agreement entered into between the parties was terminated by the repudiation of one of the parties to the contract, similar to the case discussed immediately above. The court questioned whether the arbitration clause contained therein survived the termination by repudiation and whether the validity and enforceability of the contract was to be referred to arbitration, despite the repudiation.

The court considered whether a party's secondary rights and obligations in terms of an agreement, for example to pay damages in the event of repudiation, would cease after they no longer had any obligation to perform their primary duties.[33] Simply stated, could the arbitration clause still bind and compel the parties to arbitrate on the question of damages after they had repudiated the contract to perform their primary obligations in terms of the agreement? The court came to the conclusion that in such an event it would be reasonable to infer that all the parties intended the arbitration provisions to operate, even after the parties' primary obligations to perform in terms of the contract had come to an end. Therefore, the arbitration clause survived the repudiation of the

30 1974 (2) SA 645 (T).
31 1974 (2) All SA 295 (T) 298.
32 1992 (1) SA 296 (A).
33 Note 29 above at 17.

agreement and was not terminated with the repudiation.[34]

(c) *Gerolemou/Thamane Joint Venture v AJ Construction CC and others*[35]

In this case, the contract between the parties contained an arbitration clause which was bound to a suspensive condition. The clause stipulated that disputes were to be referred to arbitration, however only when all the work in terms of the contract had been fully completed, either by the obligated party or by another.[36] Therefore, disputes could not be referred to arbitration if the work to be done in terms of the contract had not yet been completed by someone – not necessarily the party obligated to complete the work. The court had to consider whether an arbitration clause could be subject to a suspensive pre-condition. The court referred to the fact that an arbitrator is only empowered to act and adjudicate a dispute through the main contract between the parties. Therefore, if the arbitration clause was not yet operational due to the fact that certain conditions had not been met, the arbitrator was not yet empowered to adjudicate the matter.[37]

5.3. When will the courts allow applications in terms of section 6(1) of the Arbitration Act to stay court proceedings?

***(a) Nick's Fishmonger Holdings (Pty) Ltd v De Sousa*[38]**

The above case dealt with a party to a contract who wished to invoke an arbitration clause and the question whether such a party could secure a stay of proceedings in terms of the Arbitration Act or in terms of the common law. The court determined that such a party could in fact request a stay of proceedings by way of either bringing an application in terms of the Arbitration Act, or alternatively by filing a special plea requesting a stay in terms of the common law. Furthermore, the right to make such a request under the Arbitration Act does not deprive a party of the ability to make such a request under the common law as well.[39]

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34 Note 29 above at 24.
35 1999 (3) All SA 74 (T).
36 1999 JOL 4869 (T) 7.
37 1999 JOL 4869 (T) 9.
38 2003 (2) SA 278 (SE).
39 McKenzie & Ramsden (n 14 above) 241.

(b) Kmatt Properties (Pty) Ltd v Sandton Square Portion 8 (Pty) Ltd & Another[40]

The court dealt with a contract between parties where an application for the interpretation of contractual clauses was brought by the applicant, with a counter-application brought by the respondent for the confirmation of the cancellation of the contract due to the applicant's alleged repudiation of the agreement. The contract contained an arbitration clause allowing for the arbitration of disputes relating to the termination of the contract.

The applicant requested a stay of proceedings, as the issue of termination was to be determined through arbitration, in accordance with the arbitration clause. The court further held that the issue of repudiation and the subsequent cancellation was something separate from the interpretation of the agreement between the parties. It found that the arbitration clause did preclude it from adjudicating the counter-application and a stay of proceedings was granted.[41]

(c) *Freightmarine Shipping Ltd v S Wainstein & Co (Pty) Ltd and Others*[42]

This case involves a case wherein three different parties were cited as defendants, with two of the defendants being carriers of cargo that belonged to the applicant and that was subsequently damaged. The third defendant was the agent of the carriers. The contract between the applicants and the defendants as carriers, in the form of a bill of lading, contained an arbitration clause wherein liability in respect of the damages were to be determined. The agent, as defendant, requested the court to grant a stay of proceedings in order to allow arbitration proceedings to adjudicate the dispute regarding liability. The court rejected the application and held that only a party to the agreement wherein the arbitration clause is contained, in this case the bill of lading, was able to bring such an application to enforce the arbitration proceedings. The agent was not a party to the agreement wherein the arbitration clause was contained and could therefore not launch such an application.

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40 2007 (5) SA 475 (W).
41 2006 ZAGPHC 105 par 48.
42 1984 (2) SA 425 (D).

(d) MV Iran Dastghayb, Islamic Republic of Iran Shipping Lines v Terra-Marine[43]

The case discussed immediately above set a precedent that a party who was not a contracting party to an arbitration agreement is precluded from bringing an application for the staying of proceedings to enforce arbitration proceedings in terms of that agreement. The case at hand overruled that decision and stated that a stay of proceedings may be granted in one of two circumstances. Firstly, it could be granted where the parties have agreed that the matter in dispute should be referred to arbitration, or secondly, where the court finds that any other sufficient reason exists or where the court is of the opinion that the proceedings should be stayed.

The Supreme Court of Appeal held that a party who was not a contracting party to the arbitration agreement could in fact have grounds to bring such an application, overruling the *Freightmarine* case. Therefore, a party who was not a contracting party may bring such an application, provided that the court is satisfied that sufficient reason exists to grant the order.

(e) Aveng (Africa) Ltd (formerly Grinaker-LTA Ltd) t/a Grinaker-LTA Building East v Midros Investments (Pty) Ltd[44]

The applicant in this case commenced litigation proceedings to recover the balance of moneys due to it under their contract for work. The delay in obtaining a court date resulted in the applicant bringing an application for the staying of court proceedings in order to pursue the claim through arbitration proceedings as provided for in an arbitration clause in the contract. The court, on deciding whether the matter was arbitrable in terms of the clause, held that:

> "an arbitration clause is inserted in a contract at the time of its conclusion because the parties contemplate as a matter of commercial convenience that it is desirable to adopt this as a mechanism for resolving the disputes that may arise in the course of their business relationship. Its construction should therefore be influenced by a consideration of the underlying commercial purpose of including such a clause in the agreement."[45] The court found that the dispute between the parties fell within the ambit of the arbitration clause.

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43 2011 (1) All SA 468 (SCA).
44 2011 (3) SA 631 (KZD).
45 Note 43 above at par 14.

The court also considered whether the applicant was entitled to change its strategy in opting for the 'other' method of dispute resolution available to it, after it had already chosen the alternative. The court found that a party's selection of one dispute resolution method did not preclude it from making use of the other. The court did however frown upon the applicant's breach of the arbitration clause by reverting to litigation proceedings before arbitration proceedings, whereafter he attempted to enforce the clause he had breached. The applicant's application was therefore dismissed.

The court's choice of wording here, particularly that the applicant *breached* the arbitration clause by choosing to enforce his claim through litigation proceedings despite an arbitration clause being present, suggests that the court is of the opinion it is a wrongful action to allow a party to opt for litigation proceedings in such circumstances. However, even though it is considered to be wrong, the courts still allow litigation proceedings to continue despite it being a *breach* of the agreement. This is due to the fact that the courts have expressed their opinion that it is incumbent upon a defendant seeking to invoke such a clause to file a special plea,[46] or to raise it as a defense on affidavit.[47]

5.4. When are disputes not arbitrable and when is such determination made by a court of law?

(a) JC Dunbar & Sons (Pty) Ltd v Ellgood Properties (Pty) Ltd[48]

In this case, the court had to decide whether the dispute involved an arbitrable matter falling within the scope of an arbitration clause's operation in a construction contract, where an engineer withholds a certificate of payment to which a contractor claims he is entitled. The court found that, even though a precondition exists where all work must be completed before arbitration proceedings could be enforced, a question regarding the certificate would constitute immediate grounds for arbitration. The court therefore used its discretion to allow an exception to an arbitration precondition in specific contracts of construction.[49]

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46 *Yorigami Maritime Construction Co Ltd v Nissho-Iwai Co Ltd* 1977 (4) SA 682 (C) 692H.
47 *Conress (Pty) Ltd and Another v Gallic Construction* 1981 (3) SA 73 (W).
48 1975 (4) SA 455 (W).
49 McKenzie & Ramsden (n 14 above) 233.

(b) Intercontinental Finance and Leasing Corporation (Pty) Ltd v Stands 56 and 57 Industrial Ltd[50]

The court in this matter, in determining whether interdictory relief should be granted to prevent compulsory arbitration proceedings from taking place, held that such an order may be granted despite an arbitration agreement stating the contrary. This was due to the fact that a party, who foresees that the proceedings will be invalid, should not be inconvenienced by going through arbitration proceedings and having a decision granted against him, against which he could not appeal.[51] A court can therefore interfere with arbitration proceedings before such proceedings have even commenced in order to protect a party from the finality of arbitration proceedings where invalidity or irregularities can be envisaged.

(c) Telecall (Pty) Ltd v Logan[52]

The court in this case had to determine whether a dispute, of such a nature that it would merely amount to an expression of dissatisfaction, would constitute an arbitrable dispute in terms of the arbitration agreement and the Arbitration Act, and would therefore subsequently result in arbitration proceedings. The court stated that a dispute, for the purposes of the Act, would be one in relation to which opposing contentions would exist. The court therefore held that a dispute which could not be founded upon competing contentions, could not be defined as a dispute for purposes of an arbitration agreement and consequently no arbitration could be entered into.[53]

(d) PCL Consulting (Pty) Ltd t/a Phillips Consulting SA v Tresso Trading 119 (Pty) Ltd[54]

The parties to the contract were a lessor and a lessee. The contract (the lease agreement) contained an arbitration clause in terms of which disputes in terms of the agreement would be referred for arbitration. The lessee had failed to pay the rental amount due and thus the lessor was entitled to arrear rentals, whereafter it applied for summary judgement.

The lessee, in its affidavit in response to the application for summary judgement,

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50 1979 (3) SA 740(W).
51 Ramsden (n 2 above) 110.
52 2000 (2) SA 782 (SCA).
53 Note 49 above at 13.
54 2009 (4) SA 68 (SCA).

stated that it would bring an application requesting the court to stay the proceedings, as the lease agreement contained an arbitration clause. The court held that there was no dispute of liability as to payment of the arrear rentals and as such the application would not succeed. A mere failure to comply with the terms of a contract does not amount to an arbitrable dispute.[55] The court further highlighted that the lessee merely pointed out the existence of the arbitration clause and did not prove a valid dispute.

(e) Grobbelaar en 'n Ander v De Villiers NO en 'n Ander[56]

In this case, the court determined that section 2 of the Arbitration Act, interpreted along with the common law, provided that the actions of a juristic person which are *ultra vires* its articles of association, cannot be submitted to arbitration proceedings regardless of the fact that the articles of association may include an arbitration clause.[57] Therefore, such *ultra vires* actions of a juristic person are not arbitrable, regardless of any arbitration agreement to the contrary.

(f) BDE Construction v Basfour 3581 (Pty) Ltd[58]

The applicant in this matter brought an application for the stay of the legal proceedings, despite the fact that it had breached the arbitration agreement by launching the litigation proceedings in the first place. The court *a quo* held that where a party to an arbitration agreement had commenced litigation and in doing so breached the arbitration agreement, such a party who instituted the proceedings shall be precluded from seeking a stay of those proceedings and must abandon them, before being able to refer the dispute to arbitration in accordance with the arbitration agreement, however only in the event that the other party has elected to not seek a stay of such proceedings.[59] The Court held that the court *a quo* arrived at the wrong conclusion and that such an applicant is ultimately entitled to seek a stay of the present proceedings and would in such a case not be obliged to withdraw it, before referring the parties' dispute to arbitration.[60] The initial breach of the arbitration agreement would therefore not preclude the instituting party from staying proceedings as well.

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55 Note 51 above at par 7.
56 1984 (2) SA 649 (C).
57 Ramsden (n 2 above) 24-25.
58 2013 (5) SA 160 (KZP).
59 Note 55 above at par 12.
60 Note 55 above at par 13.

(g) Zhongji Development Construction Engineering Company Ltd v Kamoto Copper Company SARL[61]

The applicant and respondent had entered into a main agreement, as well as an interim agreement which was supplementary to the main agreement. The main agreement contained an arbitration clause, but the interim agreement made no provision for arbitration at all. Various disputes arose and the respondent contended that it would submit to arbitration proceedings in respect of all disputes arising from the main agreement, but it refused to arbitrate on matters arising from the interim agreement due to the absence of an arbitration clause in the interim agreement. The applicant approached the court for an order declaring the interim issues to be arbitrable, but the court rejected the application and stated that the arbitrator, once appointed in terms of the main agreement, could decide which disputes could be brought before it. The court emphasized the need to respect the arbitration process and to allow the arbitrator to determine its own jurisdiction, as is internationally recommended.[62]

(h) Rawstorne and Another v Hodgen and Another[63]

The parties in this case entered into an agreement for the sale of the members' interest of a close corporation, along with various movables. One of the parties alleged that the movables were not delivered to him as required, along with allegations of fraud, and proceeded to refer the matter for arbitration in terms of an arbitration clause. The applicant in the case argued that the matter was not arbitrable in terms of the agreement and that the appointed arbitrator did not have the jurisdiction to adjudicate the matter. The court held that the applicant was accused of fraud, a grave allegation, and that it was deemed fair to adjudicate such a matter in an open court of law.

The case demonstrates that a court can determine whether disputes are arbitrable based on the gravity of the dispute and the right to have grave allegations tried in an open court of law.

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61 2015 (1) SA 345 (SCA).
62 J Nielsen 'International arbitration in South Africa' (2014) 14 *Without Prejudice* 42.
63 2002 (3) SA 433 (W).

5.5. Are parties barred from instituting legal proceedings when a valid and enforceable arbitration agreement exists?

Conress (Pty) Ltd and Another v Gallic Construction (Pty) Ltd[64]

The applicant in this case brought an application requesting urgent relief, regardless of the fact that the agreement between the parties contained an arbitration clause. The respondent argued that by virtue of that clause alone, the court was not in a position to grant the relief sought to the applicant, and argued that the application should be dismissed on that ground alone.[65] Therefore, the respondent contended that an arbitration clause in a contract bars a party from approaching the court to resolve dispute.

The court however did not agree with this interpretation and held that an arbitration agreement does not create an automatic bar to legal proceedings with regard to disputes that fall within the ambit and scope of the arbitration agreement. The court did however note that when a party to an arbitration agreement commences with legal proceedings in a court of law against the other party to the arbitration agreement, such a party may, before he delivers any pleadings or takes any further procedural steps, apply to the court to have the legal proceedings stayed to enforce the arbitration. This will be true even after the party has delivered an appearance to defend the litigation.[66]

Parties are therefore able to make use of court proceedings to adjudicate their dispute regardless of the fact that they concluded an arbitration agreement consenting to arbitration of the dispute. This illustrates how the Arbitration Act has loopholes through which parties are still able to reach the court, despite an agreement to the contrary.

5.6. Do courts have the discretion to overrule an arbitration agreement with its own adjudication?

Hasewinkel v Simoes[67]

In this case, an arbitration clause contained in a contract between the parties was overruled by the court, as the court was of the opinion that the referral of the dispute

64 1981 (3) SA 73 (W).
65 1981 (3) All SA 337 (W) 339.
66 Note 62 above.
67 1966 (2) SA 81 (W).

would lead to an injustice to the appellant, due to the respondent's inability to fully cooperate in good faith. The court disregarded the arbitration clause and ruled on the matter itself.

This case further illustrates the court's ability and willingness to interfere when requested to do so by a pleading litigant. The circumstances of every case must always be considered, but there is an argument to be made that it cannot be considered more important than the contract concluded between two parties.

5.7. What will be considered a 'dispute' that qualifies as an arbitrable dispute, in the opinion of our courts?

***Altech Data (Pty) Ltd v M B Technologies (Pty) Ltd*[68]**

In this case, an application was brought for an order of judgment against a party who had failed to pay the purchase price in terms of an agreement. The defendant's only defence was that the agreement contained an arbitration clause and that the plaintiff could consequently not bring the application it did. The court stated that a matter can only be arbitrable if there is in fact an ongoing dispute, as arbitration proceedings was a method for resolving disputes, and cannot be utilized if no dispute exists. The court held that the defendant did not dispute the fact that he owed the plaintiff the money claimed and therefore no dispute existed which could be arbitrated.

6. The various legal issues that are and have been encountered in the use and enforcement of an arbitration agreement

Various legal problems are encountered in the enforcement and interpretation of arbitration clauses, as is evident from the case law discussion above. Arbitration clauses, while intended to simplify the adjudication of disputes, often prove to be problematic as the interpretation and application of the clauses give rise to various legal problems which need to be adjudicated upon in order to determine whether the arbitration clause would be operational at all. This therefore proves to have the opposite intention and effect for which the arbitration clause was included in the contract, which as previously mentioned is to avoid litigation proceedings and the

68 1998 (3) SA 748 (W).

necessity to approach the court in the first place. Parties in such situations approach the court, incurring costs and delaying the finality of the matter, in order to determine whether a different forum has the ability to adjudicate the matter. We need to question whether arbitration clauses are practically and theoretically sensible if they result in the above-mentioned conundrums. It is clear that there are issues of contention in our arbitration law that either allow for the legal problems to occur, or in the alternative that our law does not provide suitable protection to prevent the legal problems from occurring. Below follows a discussion of the possible 'gaps' in our law which result in the flawed application and implementation of arbitration clauses in contracts.

6.1 The error of 'copy and paste': The use of standard drafting and boiler-plate provisions

As mentioned in chapter 4 above, arbitration clauses in contracts have become standard provisions which are inserted into many contracts. Unfortunately it has become such a standard provision, that they are continuously overlooked when the other specific details of a contract are considered, ultimately resulting in the inappropriate and unsuitable application of the clauses in contracts to which they are not tailored.[69] Legal practitioners have fallen into the habit of coping and pasting arbitration clauses into every contract they draft. Without considering the specific adjudication needs and the elements of the contract which require expertise, legal practitioners make the mistake of assuming that every contract would benefit from the arbitration route. Although there are advantages to arbitration proceedings instead of litigation proceedings, it may not always be the most suitable method of dispute resolution. It has been suggested therefore that legal practitioners, when drafting, should sufficiently consider the types of disputes that could be anticipated in the life of the contract.[70] In doing so, drafters would be able to address the shortcomings in the Arbitration Act, discussed in more detail below, by detailing and defining the provisions of the arbitration clauses to avoid problems that have been encountered.[71] It is safe to say that not all of the problems that are encountered can be resolved by means of careful and meticulous drafting, but it is an attempt at a solution emanating from the legal practitioners themselves. As discussed below, the other gaps cannot be as easily

69 C Watson 'To litigate or to arbitrate? That IS the question' (2015) 15 *Without Prejudice* 38.
70 Note 65 above.
71 Assheton-Smith (n 1 above) 18.

resolved and would ultimately require the intervention of the legislature.

6.2 A continuous failure to reform our law despite numerous recommendations to do so

Chapter 2 above pointed to the shortcomings and gaps in our current arbitration legislation specifically that it has become outdated and does not conform to international guidelines and industry standards. This issue has been brought about the failure of the South African legislature to reform our domestic law to adhere to international guidelines. Suggested law reform has been proposed not once, but on multiple occasions. July 1998 saw the South African Law Commission's proposal that we should distinguish between domestic and international arbitration proceedings and the recommendation that we should enact a separate statute regulating international arbitration proceedings, more specifically that we should make use of the 1985 UNCITRAL Model Law on Commercial Arbitration as a guideline for doing so.[72] Fortunately, the legislature enacted the International Arbitration Act 15 of 2017 on 20 December 2017. South Africa managed to adopt most of the UNCITRAL Model Law on Commercial Arbitration as recommended, with a few minor changes. It however did not bring about any change to the laws applicable to domestic arbitrations.

In May of 2001, the South African Law Reform Commission once again proposed that the domestic legislation be amended to reflect modern laws and tendencies.[73]Reform of South Africa's domestic laws will allow them to address the inevitable legal issues that have been encountered in case law, by formulating their legislation to better determine matters such as arbitrable disputes, the effect of contract termination on the clause itself, the voidability of contracts and whether the agreement's contentis arbitrable. The reform of domestic arbitration legislation is considered in more detail in Chapter 7 below.

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72 F du Plessis 'Foot dragging and dizzying pirouettes – but no reform' (2007) 7 *Without Prejudice* 39.

73 Assheton-Smith (n 1 above) 18.

6.3 The lack of independency awarded to arbitration proceedings in contrast to the vast discretion awarded to courts

It is arguable that a signification portion of the legal issues encountered in case law pertaining to arbitration clauses in contracts is as a result of the inability of our courts to restrain themselves and avoid interfering in arbitration proceedings. The courts alone are not at fault, as the legislature's failure to amend our Arbitration Act permits the court to intervene, in addition to granting them ample discretion to act. For example, by allowing parties the ability to approach a court to make an arbitration award an order of court, the legislature paves the way of the court's steps.[74] This is not to say that the provision is wholly flawed, but if one considers that the fact that the Act determines an arbitration award to be of the same force and effect as that of a Magistrates' Court order, the question of necessity must once again be brought up.[75] The award has a judicial status equal to that ordered by a Magistrates Court, but the courts are still approached to make it an order of court. Once again, this is not to say that it is an unnecessary provision that serves no purpose, but it illustrates the need for reform of our Arbitration Act. If the legislature makes sufficient provision for the enforcement of the awards without the necessity to approach the courts, we would be a step closer to independency.

A further example of this is section 6(1) of the Arbitration Act, which allows a party to an arbitration agreement to request legal proceedings to be stayed in order to enforce arbitration as per the arbitration agreement. On the face of it, this might seem like a provision which advocates for the exclusion of the courts in order to enforce an arbitration agreement to its full extent. The concern, however, is that courts are afforded the option to grant the application or, in their discretion, reject it. This is despite the fact that an arbitration agreement, a binding contract, has been concluded between the parties. There would naturally be instances where the validity of an arbitration agreement or clause is questioned, specifically due to the fact that the Arbitration Act only regulates arbitration agreements that comply with the requirements. However, the legal question would then be of a contractual nature and whether legislative requirements have been met.

Another example would be the application of section 3(2) of the Act, which gives

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74 Note 7 above.
75 Note 7 above.

the court the ability to determine that a dispute should not be heard in arbitration proceedings, that the arbitration agreement should be set aside or that the arbitration agreement should cease to have any effect on a particular dispute. Essentially, the courts have the discretion to decide whether disputes are arbitrable or not. However, if it is indeed a binding contract, the courts arguably should not have the discretion to place disputes outside the scope and application of the agreement, but should rather follow the approach adopted in *Brisley v Drotsky*.[76] In this case the court emphasized the fact that courts must and are required to respect any contracting party's contractual autonomy, seeing as it embodies the constitutional values of dignity and equality.[77] The *Stieler Properties* case also touches on this aspect and states that the onus lies on a party to sufficiently show why the arbitration proceedings should not go ahead.[78] The court should only exercise its discretion to place a dispute outside the scope of the arbitration agreement when a very strong case has been made out by the party seeking the application.[79] As is evident from the case studies in Chapter 5 above, the courts do not follow this approach, but rather tend to invoke their discretion at their own convenience.

The concerns highlighted above could be addressed by a reformulation of the Act and thus reforming our domestic arbitration laws to international standards.

7. International considerations and law reform in South Africa

By now it is relatively clear that the South African laws regarding domestic arbitration are flawed and in dire need of reform, which shall be addressed in more detail below. When considering reform, it is necessary that international standards of arbitration should be considered so that South Africa can incorporate such standards in the reform of our law.

7.1 Conforming to international laws and recommendations

As mentioned above, in 2017 South African finally enacted international arbitration legislation by adopting most of the UNICTRAL Model Law on Arbitration as is into our

76 2002 (4) SA 1 (SCA).
77 T Druckman 'Referral of arbitration to court adjudication' (2018) 18 *Without Prejudice* 18.
78 *Stieler Properties CC v Shaik Prop Holdings (Pty) Ltd* [2015] 1 All SA (GJ) at par 52.
79 Druckman (n 77 above) 18.

law. The problem is, however, that this initiative did not affect our domestic laws and hence we are still hand-cuffed to the Arbitration Act as enacted in 1965. Authors have noted that South Africa remains lagging behind the rest of the world, as we have failed to establish ourselves as an international arbitration centre by failing to reform our domestic laws. Before reforming our domestic arbitration laws, we need to consider the outcome that we wish to achieve with such a reform. The South African Law Reform Commission has considered this matter and has published its recommendations in 1998. Although these recommendations were welcomed by the legal professionals and academics, our legislature has failed to take any action to implement such recommendations. In what follows, the Commission's recommendations are considered.

7.1.1. Suggestions and recommendations made by the South Africa Law Reform Commission in 1998 in relation to the domestic arbitration law

Firstly, our legislature followed recommendations made by the Commission to distinguish between our international and domestic laws, as our Arbitration Act was not well suited for a dualistic approach. As mentioned, the UNICITRAL Model Law on International Commercial Arbitration of 1985 was adapted and incorporated as our International Arbitration Act 15 of 2017. This does, however, not mean that the same law should be incorporated into our domestic laws. The Commission briefly considered the possibility, though thoroughly explained why they were against the idea.[80]

7.1.2. The Commission's decision to not incorporate the UNCITRAL Model Law into our reformed domestic legislation

The Commission considered the fact that two developed countries and three developing countries had implemented the Model Law into the domestic legislation. Based on this fact and various other factors, they put forward the following reasons for their dismissal of the idea.

(a) We should not completely replace our Arbitration Act of 1965

The Commission considered the fact that the countries who incorporated the Model Law had completely replaced any existing domestic laws already in place in their

[80] Note 5 above.

jurisdictions. The Commission was of the opinion that this would not work well in our jurisdiction, as our Arbitration Act had in fact made some positive contributions to the current arbitration system.[81] The other countries had arbitration laws which proved to be obsolete and they could therefore only benefit from replacing the system with an improved one. This would not be the case in South Africa.

(b) The Law Commission's recommendation to copy and paste the Model Law for our law regarding international arbitration

The Commission suggested that the Model Law should be incorporated as closely as possible, when drafting our laws regarding international arbitration. The official English text was to be adhered to as closely as possible, which is how it was adopted in the end. The problem with domestic legislation is that the official text will not work in its original form, as it did for the legislation pertaining to international arbitration. The Commission was of the opinion that it would not be well received by our legal practitioners when it needed to be applied, as its interpretation would become a problem.[82] The Commission therefore found that it would be far less practical for the Model Law to be involved in our domestic legislation, as opposed to the manner in which it was in our international legislation.

The Commission recommended that the Model Law should be incorporated with as little adaptations and additions as possible, as it was near perfect in an international sphere. However, the Model Law has various gaps when considered in a domestic setting when it is compared to our considerably detailed and sophisticated Arbitration Act. The Model Law would therefore have to be adapted and amended to account for these gaps, in order to allow it to operate effectively. An example of such a gap would be that, whereas our existing Act provides for a list of powers that are awarded to arbitrators, the Model Law does not. In the event that the arbitration agreement would be silent in this regard, the Model Law states that the arbitration tribunal may exercise any powers they deem necessary and fit.[83] This could cause foreseeable problems in the regulation and procedural fairness of each arbitration.

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81 Note 5 above at 8.
82 Note 5 above at 9.
83 Note 78 above.

(c) There is a need for specific provisions that only apply in our domestic setting

The Commission found that there is an urgent need to incorporate remedial measures in relation to the type of procedures that are often used when it comes to complex arbitrations. The construction industry is such an example where proceedings often take much longer and turn out to be more expensive than litigation proceedings would have been.[84] Domestic law would therefore have to cater to industry specific related issues and not only to a broad spectrum of concerns, as experienced on an international level.

The Commission put forward the above in their explanation as to why the Model Law would not be an appropriate solution to our domestic requirements. I tend to agree with the Commission and am of the opinion that our domestic legislation should be more refined and detailed to our system's needs.

7.2 The objectives identified by the Law Commission for our domestic arbitration legislation

The Commission, in contemplation of how we should reform our Arbitration Act, named a few objectives that are to be borne in mind when drafting our new domestic legislation. These objectives are briefly set out below.

(a) To allow for the objective of arbitration itself

The Commission points out that the objective of arbitration as a dispute resolution method is:

> "to obtain the fair resolution of disputes by an impartial arbitral tribunal without unnecessary delay or expense."[85]

The first and primary objective of our legislation should therefore be to promote and give effect to this object,[86] in order to provide an arbitration system that operates to the best of its abilities.

(b) To promote party autonomy

Parties have the ability to select arbitration as a dispute resolution method, as they have more control over the proceedings compared to litigation proceedings. Arbitration

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84 Note 5 above at 10.
85 Note 5 above at 4.
86 Note 5 above at 8.

proceedings have the advantage that they are more flexible, as parties have the option of choosing their arbitrator. The Commission therefore holds that one of the most important aspects of modern arbitration is party autonomy.[87] Our arbitration legislation should therefore be drafted in such a manner as to provide for party autonomy.

(c) A balance in powers awarded to courts

The courts, although not a direct role player, serve an important purpose in arbitration proceedings, as they ensure that the rule of law is upheld and that due process is followed in the proceedings.[88] However, as is evident from the case studies in Chapter 5 above, the courts have a tendency to over-use (or even abuse) the powers and discretion awarded to them when attempting to ensure fairness and procedural fairness. The Commission agreed with this when it stated that:

> "experience in several jurisdictions, including South Africa, has shown that it is necessary to guard against the court's powers being abused by a party to an arbitration as a delaying tactic."[89]

We should therefore draft new arbitration legislation with provisions that safeguard against the abuse of the ability to involve the courts in arbitration proceedings, as well as including provisions which limit the courts discretion under certain circumstances.

With the above objectives in mind, the Commission proceeded to consider the options available to reform our current Arbitration Act.

7.3 The Law Commission's recommendations on the ways in which the Arbitration Act of 1965 could be reformed

In their discussions of reform, the Commission considered the question as to what to do with our current Act. They considered the following options, as briefly discussed below.

87 Note 5 above at 5.
88 Note 5 above at 10.
89 Note 5 above at 10.

(a) Retain the current Act and amend certain provisions that have proven to be problematic

The Commission stated that there are two main difficulties in following this approach. Firstly, our current Act does not sufficiently measure up to the Model Law and does not take proper account thereof. This would result in a rather fragmented system of arbitration law, as we would have two completely different statutes for our domestic and international setting.[90] It is well known that our insolvency legislation has been burdened with this exact problem for the past 20 years.[91] The insolvency system provides for different statutes when it comes to domestic insolvency and cross-border insolvency. There have been many debates and discussions as to how the fragmentation problem could be resolved, in order to allow a more harmonized and dualistic approach. There has unfortunately been no progress in solving the problem.

The Commission is however of the opinion that that it could possibly lead to harmonization of our laws, in that there is a commonality between them.[92] Whether it would lead to harmonization or fragmentation is not clear. I am however of the opinion that there is a real concern that different statutes could result in the same situation as in the case of insolvency law.

The second difficulty in this approach can be explained by referring to the drafters of the English Arbitration Act of 1996 and their method to drafting it. They had drafted their legislation to account for certain difficulties experienced in their arbitration system, although still keeping the Model Law in mind.[93] This is arguably exactly what South Africa needs to do. We need to draft new provisions that address the difficulties we experience, as well as provisions that align our legislation with international standards and guidelines.

(b) Adopt the UNCITRAL Model Law as is for our domestic system as well

The disadvantages of adopting the Model Law for our domestic laws has already been explained above. It is therefore not necessary to repeat why the Model Law is not well suited as a blueprint for domestic legislation.

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90 Note 5 above at 3-4.

91 DA Burdette 'The application of the law of insolvency to the winding-up of insolvent companies and close corporations' (2003) 66 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 597.

92 Note 5 above at 10.

93 Note 5 above at 10.

(c) Adopt a new arbitration statute for the domestic arbitration setting

This approach would allow South Africa to completely rethink the Arbitration Act and to tailor it to our needs. The Commission suggests that we retain the basic structure of the 1965 Act, along with the provisions that have operated effectively with no problems. We would then use the Model Law, as well as other foreign laws, to incorporate essential features currently missing from our Act.[94]

I agree with the Commission that this would in all probability be the best option to reform our law in accordance with our needs. The Commission drafted a Draft Bill in accordance with the recommendations that were made, in addition to publishing a dissection thereof. Below follows a brief discussion of their recommendations of section 3(2) of the Act, as it is one of the major problems in our current Act and visible throughout this paper.

7.4 Reforming section 3(2) of the Arbitration Act of 1965: The Law Commission's recommendations to solve its current failures

The Commission carefully considered the current provision of section 3(2) and came to the conclusion that much had to be amended in order to give effect to the objectives, as mentioned above. They stated that the need for its amendment is due to the fact that courts, as well as parties to arbitration proceedings, abuse the provision and are often too eager to resolve the dispute themselves.[95]

The Commission proposed that the section should be reformulated, granting a more restricted discretion to courts. Their reasoning behind this is firstly that the same standard would then be applied to both domestic and international arbitrations, where the courts have minimal discretion to set the proceedings aside. It would further align such discretion with internationally recognized standards. Secondly, it would bring the courts' discretion and attitude towards arbitration proceedings into the modern era, as the current section was drafted during a time when the courts were not as exposed and therefore supportive of arbitration proceedings. Lastly, the Commission felt strongly about the need to protect consumers from arbitration clauses in standard consumer agreements, where they end up in a less than equal bargaining positions.[96]

Their suggested reform of the section would amount to the provision forcing the

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94 Note 5 above at 10.
95 Note 5 above at page 26.
96 Note 5 above at 26.

courts to decline a stay of proceedings and prohibiting them from ignoring the spirit of the arbitration agreement, unless

> "the court is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed."[97]

This suggestion would align this particular portion of our domestic arbitration law with that of the The New York Arbitration Convention of 1958, the Model Law and the English Act. The Commission further stated that South Africa will have the benefit of referring to foreign decisions, when interpreting the section and cases, which would compel them to exercise their discretion in line with international standards.[98]

This recommendation would be a great improvement on the current section, as the section has proven to allow courts to dismiss the existence of arbitration agreements or to ignore the spirit and intention with which they were concluded.

It is unfortunate that the South African legislature has chosen to ignore the recommendations of the Commission in relation to our domestic arbitration legislation. A Draft Bill was published, but the goal of reforming our law has remained unfulfilled.

8. Conclusion

This dissertation has provided an overview of arbitration proceedings in South Africa, as well as insight into the way arbitration proceedings are enforced and the role that the courts play therein.

Arbitration was introduced into our jurisdiction through common law, particularly Roman-Dutch and English common law. Although South Africa's legal system is predominantly based on Roman-Dutch law and its influences, our arbitration system was mostly influenced by English law, as explained in Chapter 2. This led to the enactment of our Arbitration Act of 1965, through the adaptation of the English Arbitration Act and their precedents. South Africa has now, however, reached a point where we cannot continue to make use of outdated legislation that no longer reflects our interests or needs. Arbitration as a dispute resolution mechanism has grown into a popular and widely used technique, often preferred above litigation. The initial Act and the subsequent failures to amend it have proven that our legislature may not yet appreciate the importance thereof in our legal system. This may be due to the fact that

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97 Note 5 above at 27.
98 Note 5 above at 27.

arbitration could still be considered inferior to litigation proceedings.

The dissertation has attempted to explain the elements that differentiate arbitration and litigation proceedings from one another, by highlighting those elements and considering whether there might be an advantage to making use of arbitration proceedings as opposed to litigation proceedings. It has been made clear that arbitration proceedings are not always the best option and that the circumstances of every case would have to be evaluated to determine which dispute resolution method to utilize. Although arbitration proceedings may prove an advantage over litigation, the advantage will be nullified if the arbitration agreement is not tailored to the parties' circumstances. As shown, an inefficient arbitration clause might cause more delays and become more expensive than initial litigation would have been. It is therefore important to carefully consider when arbitration proceedings will be used and to then sufficiently prepare for it. Boiler-plate provisions have the opposite effect of this and have consequently resulted in costly delays for the parties.

Arbitration proceedings are popular and are widely used to resolve multiple types of disputes. There are many international organizations that exist purely to resolve disputes through arbitration. Many industries and sectors have also chosen to make it standard practice to resolve disputes through arbitration in order to ensure fairness and similarity in the resolution of proceedings. However, due to its acclaimed fame, arbitration agreements have been reduced to standard provisions that are found in most contracts. Lay persons do not always understand that they are consenting to arbitration and by implication excluding litigation from the dispute resolution options. By including arbitration as a standard provision, where the details and specific provisions thereof are not given enough consideration, the claimed advantages are inhibited. The concern with arbitration clauses is therefore not only that our legislation is outdated and does not sufficiently provide for effective arbitration provisions, but that the clauses are not always drafter carefully enough to ensure that the arbitration proceedings flowing from that clause will be without cause for delay. Although legislation allows the courts to interfere, poorly drafted contract clauses give the parties sufficient reason to approach the courts.

Chapter 5 discussed various cases. The discussion considered how the courts deal with arbitration proceedings. It is clear that the courts have a tendency to interfere in arbitration proceedings by using their discretion. As mentioned above, the problem lies not only in the legislation allowing them to do so, but in the drafting of the arbitration

agreements. If the agreements are drafted with more precision and clarity, there would be no need for the courts to, for example, decide whether or not a dispute is arbitrable. Our case law shows that, in the last ten years, the judiciary's influence on arbitration has been great. This is not to say that the judiciary's decisions are without merit or importance, as they can be utilized to reform our law and close identified gaps where necessary. Our reform must however ensure that the courts' powers are balanced in arbitration proceedings, as their discretion to find arbitration agreements ineffective or to rule that they shall cease to have effect, is a disappointing response to party autonomy. The sanctity of the contract should be upheld and there is no reason why this should not apply to arbitration agreements. The issues causing constant interference have also been identified in this dissertation.

Three issues were identified as main causes of concern throughout the dissertation and were specifically identified in Chapter 6. "Copy and paste" clauses, failure to reform our law and a lack of independency in arbitration proceedings are some of the more pertinent issues that have been identified through case studies and research. There is unfortunately no quick fix to resolve and remedy the issues, and therefore we are dependent on the legislature to improve the system. Legal practitioners however have the ability to reduce the negative effects in practice, by being more cautious when drafting arbitration clauses or agreements.

Our legislature has at least differentiated between our domestic and international arbitration laws. There have been multiple recommendations as to how we can reform our domestic laws as well, as discussed in Chapter 7. We have not yet implemented such recommendations and we therefore have not brought about change to the arbitration system we envision.

In conclusion, it is clear that arbitration proceedings are an effective and viable method of dispute resolution. It is unfortunate and disappointing that not as much attention is paid to the administration thereof and that it is possibly considered a less than effective method when compared to litigation proceedings. Arbitration clauses in contracts are well placed and I do not think that their inclusion in contracts are unnecessary. However, careful consideration must be given when they are drafted, in addition to legislative amendments, in order for them to operate to their full extent.

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