

**A CRITICAL ANALYSIS OF THE SOUTH AFRICAN LAW OF  
ARBITRATION, SPECIFICALLY PERTAINING TO  
ARBITRATION CLAUSES IN FIDIC AND GCC**

By

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**(27102018)**

Submitted in fulfilment of the requirements for the degree

LLM (Private Law)

In the Faculty of Law,

University of Pretoria

Date of Resubmission: 21 April 2016

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## **CHAPTER 1:**

### **Introduction**

#### **1.1 Background**

The critical analysis of arbitration in South African law, with reference to arbitration clauses in FIDIC and GCC, and the differences between the processes followed to resolve a dispute in a contract are the main focus of this dissertation. This topic will be discussed in the context of the modules of the LLM (Law of Contract) namely the general principles of contract law, the interpretation of contracts and finally the drafting of contracts. These three themes are all embodied in this dissertation with specific focus on the main topic. In view of this, the interpretation and drafting of alternative dispute resolution (hereinafter 'ADR') clauses, specifically arbitration clauses is examined in detail.

GCC is a national standard form contract and will be discussed as such. As FIDIC is a standard form contract, drafted in a foreign jurisdiction yet used nationally, certain changes must be made to the contract to ensure that it can be used in South Africa. These changes will also be discussed. Ways in which the current South African arbitration clauses that apply to contracts in general (not only to construction contracts) may be changed in accordance with FIDIC and GCC practices to ensure a better resolution of disputes will be recommended.

#### **1.2 Research Question / Problem Statement**

To evaluate the efficiency of the South African law of arbitration, and the procedures introduced by the arbitration clauses in FIDIC and GCC.

The main focus of the study will be a comparative study of the different arbitration processes of South Africa, and the contracts known in industry as FIDIC (International Federation of Consulting Engineers) and GCC (General

Conditions of Contract for Construction Works). Also included in this study is a comparison of the interpretation of contracts, and changes that need to be made to standardised contracts in order for them to be utilised more optimally in South Africa. This comparison will show where provisions of the South African Arbitration Act<sup>1</sup> (hereinafter referred to as 'the Act') are found wanting, and to recommend possible solutions for said deficiencies.

### **1.3 Methodology**

This study will follow a comparative research methodology by completing an analysis of arbitration rules locally and internationally.

This comparison will show where the Act, FIDIC, and GCC rules are different; furthermore, solutions and recommendations will be made where deficiencies need to be addressed. The clauses will also be critically analysed with specific reference to rules and principles pertaining to the drafting of contracts.

Sources will include statutes, case law, and opinions of academic writers. The following will be used to critically analyse the South African arbitration law: the Constitution; the Arbitration Act; rules of interpretation and assumptions that apply to contracts in general; rules pertaining to the drafting contracts; GCC and FIDIC arbitration rules and standard clauses.

### **1.4 Proposed Structure**

In Chapter 2 the study shall address the Constitution of the Republic of South Africa<sup>2</sup> (hereinafter referred to as 'the Constitution'). The importance of the Constitution when interpreting contracts will be evaluated. Specific reference shall be made to Section 34 of the Constitution which grants every person the right to access a court. Further in this chapter the relationship between national - and international law will be discussed. Throughout the various discussions and evaluations in this chapter, reference shall be made to applicable case law and the rules of interpretation of contracts.

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<sup>1</sup> Arbitration Act 42 of 1965.

<sup>2</sup> The Constitution of the Republic of South Africa 1996.

Chapter 3 shall consist of an in depth discussion and analysis of arbitration in South Africa. When discussing arbitration different aspects need to be considered as the Act is not a comprehensive codification of the law of arbitration. Reference shall be made to the common law. Furthermore, case law shall also be considered when discussing the application of the Act.

In the next chapter the development of the General Conditions of Contract for Construction Work shall be discussed. The ADR clauses, specifically the arbitration clause, contained in the GCC shall be evaluated and the arbitration process shall be discussed.

In Chapter 5 the ADR clauses, specifically the arbitration clause, contained in the FIDIC contracts shall be evaluated and analysed critically. Included in this chapter shall be a specific discussion regarding the process which is followed when a dispute is referred to arbitration. Some focus will also fall on the different FIDIC contracts in the FIDIC suite of contracts, as well as the differences between the various FIDIC contracts' ADR clauses, specifically the arbitration clauses. These FIDIC contracts include the following:

- FIDIC Red Book: being a contract form where the design is made by the Employer and the Contractor is paid on measurement basis.
- FIDIC Yellow Book: being a contract form where the design is made by the Contractor and the Contractor is paid on a lump sum basis.
- FIDIC Silver Book: being a contract where under the Contractor does the design and construction. In consideration of the works the Employer promises to pay the Contract price.
- FIDIC Gold book: being a contract where the design is made by the Contractor. Additionally, the contractor assumes the responsibility for the construction and the operation of the works.

Chapter 6 shall contain the comparison between the rules and procedures used in the arbitration of a dispute between the standardised ADR clauses contained in the chosen FIDIC contract as well as GCC 2010. Furthermore, the possible changes to be made to the South African arbitration law will also be discussed.



The last chapter of this dissertation consists of a conclusion and various recommendations.

## **1.5 Delimitations or Delineations**

This study will not include a detailed discussion of the *pro forma* NEC (New Engineering Contract), the JBCC (Joint Building Contract Committee Contracts) or related legislation.

GCC 2010 has been used as reference throughout the dissertation in light of the fact that the dissertation has already been finalised when GCC 2015 came into effect on the 18<sup>th</sup> of September 2015 and thus GCC 2015 is not included in the detailed discussion in Chapter 4.

## **CHAPTER 2:**

### **Constitution of South Africa and Interpretation of Contracts**

#### **2.1 Introduction**

In this chapter the Constitution of the Republic of South Africa<sup>3</sup> (hereinafter referred to as ‘the Constitution’) is discussed. The importance of the Constitution when interpreting contracts will be evaluated. Specific reference is made to sections 34, 39(1) (b), 231, 232, and 233 of the Constitution. Furthermore, in this chapter the relationship between national and international law is discussed. Throughout the various discussions and evaluations in this chapter, reference is made to applicable case law and the rules pertaining to the interpretation of contracts.

#### **2.2 South African Court Structure**

The Constitution is the supreme law of South Africa. This is governed by section 2 of the Constitution which reads as follows:

“The Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and obligations imposed by it must be fulfilled.”

In South Africa, the doctrine of *stare decisis* is followed. This doctrine entails that a decision by a judge in the High court shall be binding on the lower courts which falls within the jurisdiction of the high court. The Constitutional court has the highest jurisdiction in South African law.

As it is supreme law, it is necessary to discuss the Constitution of the Republic of South Africa as well as the application of statutes by the national courts.<sup>4</sup>

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<sup>3</sup> The Constitution of the Republic of South Africa, 1996.

<sup>4</sup> The Superior Courts Act 10 of 2013.

## 2.3 The Constitutional right of access to the courts

The Constitutional Court approved the final Constitution on the 4<sup>th</sup> of December 1996, which came into effect on the 7<sup>th</sup> of February 1997.<sup>5</sup> As the national supreme law all laws and statutes must aim to be in accordance with the Constitution.

### 2.3.1 Section 34 of the Constitution: The fundamental right of access to the courts

Section 34 of the Constitution reads:

“Everyone has the right to have any dispute that can be resolved by application of law decided in a fair public hearing before a court, or where appropriate, another independent and impartial tribunal or forum”.

In the case of *President of the RSA v Modderklip Boerdery (Pty) Ltd*<sup>6</sup> the court interpreted the section by a confirmation that it constitutes a fundamental principle of legality. Furthermore, the court indicated that this section also imposes a positive obligation on the State and not just a negative implication.<sup>7</sup> This obligation, as referred to above, is an obligation where the State needs to ensure that everybody has access to the courts.

The second case to raise three Constitutional issues regarding section 34 of the Constitution is the case of *Lufuno Mphaphuli and Associates (Pty) Ltd v Andrews*.<sup>8</sup> The court indicated that the first issue raised in this matter is the interpretation of section 34 of the Constitution and its application to arbitrators held in terms of the Arbitration Act. Another issue is what the correct approach is to the grounds of review set out in section 33(1) of the Arbitration Act when properly interpreted in accordance with the right to a fair and impartial hearing. A final question

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<sup>5</sup> [www.sahistory.org.za/Constitution-history](http://www.sahistory.org.za/Constitution-history) (last accessed 01/02/2016).

<sup>6</sup> 2005 (8) BCLR (CC).

<sup>7</sup> Cheadle H, Davis D and Haysom N, *South African Constitutional Law: The Bill of Rights*, Second Edition, (updated May 2015) LexisNexis.

<sup>8</sup> 2009 (6) BCLR (CC).

that arises is whether, and to what extent the parties entering into an arbitration agreement waive their fundamental right to a fair and impartial hearing.<sup>9</sup>

The court relied on the principle set out in the case of *Telcordia Technologies Inc v Telkom SA Ltd*.<sup>10</sup> This principle entails that before a court orders the arbitration award to be enforceable, the court needs to be certain that the award was obtained in a manner which was procedurally fair in accordance with Section 34 of the Constitution.<sup>11</sup>

The court indicates that in answering the Constitutional issues raised in this matter, the nature of private arbitration needs to be set out first.<sup>12</sup> It was concluded by the court that section 34 of the Constitution does not apply directly to private arbitration.<sup>13</sup>

In concluding the role of the Constitution the court held that the decision to refer the dispute to arbitration is a choice, and as long as this choice is exercised voluntarily, the courts are to respect the decision.<sup>14</sup> The court then also indicated that as with other contracts, if the arbitration agreement contains a provision that is contrary to public policy with regards to the values of the Constitution, the arbitration agreement will be null and void.<sup>15</sup>

### **2.3.2 Bill of Rights and application of International Law in South African law with specific reference to the Constitution Sections 39(1) (b), 231, 232 and 233.**

Section 39<sup>16</sup> of the Constitution regulates the interpretation of the Bill of Rights that where the courts have to decide whether a law or legal

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<sup>9</sup> *Lufuno Mphuphuli* case, Page 13.

<sup>10</sup> 2007 (3) SA 266 (SCA).

<sup>11</sup> *Lufuno Mphuphuli* Case, Page 15.

<sup>12</sup> *Lufuno Mphuphuli* Case, Page 90.

<sup>13</sup> *Lufuno Mphuphuli* Case, Page 101.

<sup>14</sup> *Lufuno Mphuphuli* Case, Page 103.

<sup>15</sup> *Lufuno Mphuphuli* Case, Page 103.

<sup>16</sup> Section 39 of the Constitution reads as follows:

“39(1) When interpreting the Bill of Rights, a court, tribunal or forum –

principle is compatible with the Constitution, a court, tribunal or forum must promote the values that promote an open and democratic society which is based on human dignity, freedom and equality. The courts must also take into account international law as well as the way in which courts in other countries might have decided similar cases. In view of this one has to consider international law when interpreting clauses, including arbitration clauses.

It is important to understand the role of the Constitution with regard to arbitration. In the words of Kroon AJ (the minority) in the case of *Lufuno Mphaphuli and Associates (Pty) Ltd v Andrews*,<sup>17</sup>

“Despite the choice not to proceed before a court or statutory tribunal, the arbitration proceedings will still be regulated by law and, as I shall discuss in a moment, by the Constitution. Those proceedings, however, will differ from proceedings before the court, statutory tribunal or forum.”<sup>18</sup>

However in the majority judgment of by O’Regan ADC J it is said that:

"I have had the opportunity of reading the judgment prepared in this matter by my colleague, Kroon AJ. Unfortunately I cannot concur in it. In my view, although leave to appeal should be granted, the appeal should be dismissed. As will appear from the reasons that follow, there are two differences between my approach and that of Kroon AJ. First, in my view, section 34 of the Constitution does not apply to private arbitration although I do hold that it is an implied term of every arbitration agreement that it be procedurally fair. Secondly, it is my view that the arbitration agreement at issue in this case, properly construed, required the arbitrator to adopt an informal, investigative method of proceeding and not a formal, adversarial one."

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- (a) Must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
  - (b) Must consider international law;
  - (c) May consider foreign law;
- 39(2) When interpreting any legislation and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights;
- 39(3) Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to extent that they are consistent with the Bill of Rights;"

<sup>17</sup> 2009(6) BCLR (CC).

<sup>18</sup> *Lufuno Mphaphuli Case*, Page 103.

Therefore, considering the above quote by the minority, the Constitution clearly plays a role in arbitration of disputes as an alternative to litigation for purposes of dispute resolution. According to the majority judgment Section 34 does not apply to private arbitration, however the majority still holds that it is an implied term that every arbitration must be conducted in a procedurally fair manner.

In accordance with section 39(1) (b)<sup>19</sup> a court, tribunal or forum is required to consider international law and are permitted to consider foreign law. The FIDIC suite of contracts are internationally recognised standardised *pro forma* contracts. They are used in South Africa, specifically in the mining industry; therefore it is important to discuss the role that international law plays in South African law as currently contracts written in international jurisdictions are widely used within South Africa.

Chapter 14 of the Constitution, specifically section 231, regulates the manner in which international law becomes part of South African law.

Section 231 of the Constitution reads:

- “(1) the negotiation and signing of all the international agreements is the responsibility of the National Assembly;
- (2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection 3;
- (3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession entered into by the national executive, binds the Republic without approval by the National Assembly and the Council within a reasonable time;
- (4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by the Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament;
- (5) The Republic is bound by international agreements which were binding on the Republic when the Constitution took effect.”

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<sup>19</sup> *Supra* fn 14.

Further to the above, it should be considered that section 232<sup>20</sup> of the Constitution regulates that customary international law shall be law in the Republic unless it is inconsistent with the Constitution or an Act of parliament.

Section 233 also provides for the following:

“When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.”

The following confirmation is made by Zondo JP in the case of *NEHAWU v University of Cape Town*.<sup>21</sup>

“It seems to me that through section 233 our Constitution seeks to ensure that our behaviour and practices are aimed at meeting international standard.”

This indicates that international law plays an undeniable role in the structuring and the development of South African law. Section 233 of the Constitution developed the original common law position into a rule which is more favourable to the application of international law, creating the opportunity for international law to play a more prominent role in South African law.

According to the directive to consider international law in the interpretation of the Bill of Rights section 39(1) (b) of the Constitution clearly indicates a need for a genuine inquiry into the application of international law, although the section does not provide any guidance on how the inquiry should be conducted, nor does it provide guidance on how international legal norms should be balanced into the interpretative equitation of South African law.

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<sup>20</sup> S 232 provides that “Customary international law is law in the Republic, unless it is inconsistent with the Constitution or an Act of Parliament”.

<sup>21</sup> 2002 (4) BLLR 311 (LAC).

There are two different views when operating within the international framework and when working within the national framework. The point of view of a judge within the international framework is that the international law is the supreme law and that the state may not rely on the provisions of its own law as an excuse for failing to comply with its international obligations. This is found in article 27<sup>22</sup> of the Vienna Convention.<sup>23</sup> From the perspective of the judge in the national framework, the national law will be the supreme law, unless the law itself provides that the provisions of the international law shall be supreme. South Africa is not a party to the convention but is still bound by the provisions of the treaty.<sup>24</sup>

Considering all of the above a clear conclusion is drawn that courts, tribunals or forums should rather consider an interpretation which is consistent with international, rather than one that is contradictory to international law.

## **2.4. Interpretation of contracts**

### **2.4.1 Legal Nature and the relationship between rules on interpretation for contracts, statutes and wills**

When the legal nature of a document is analysed it is important to keep in mind that there are different types of legal instruments, i.e. contracts, statutes, wills etc. This raises the important question on whether the interpretation will differ from one kind of legal instrument to the other. Fortunately, there are several cases from which the answer can be inferred, some of which will be mentioned throughout the following paragraphs.

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<sup>22</sup> Article 27 reads: "A party may not invoke the provisions of its international law as justification for its failure to perform a treaty. This rule is without prejudice to article 46".

<sup>23</sup> Vienna convention on the law of Treaties 1969, done at Vienna 23 May 1969. This convention was entered into force on 27 January 1980.

<sup>24</sup> [www.dfa.gov.za/chiefstatelawadviser/general.html](http://www.dfa.gov.za/chiefstatelawadviser/general.html) (Last accessed on 23 August 2015).



In the case of *KPMG Chartered Accountants v Securefin*<sup>25</sup> the Court was of the opinion that interpretation is a matter of law and not of fact, and accordingly, interpretation is a matter for the court and not for witnesses. The Court also indicated that rules about admissibility of evidence in this regard do not depend on the nature of the documents, whether statute, contract or for example a patent.<sup>26</sup>

When it comes to the interpretation of contracts, wills and statutes, it is generally accepted that the same rules are applied to the various legal documents. It should be noted that although there are various important distinctions between the legal documents (one being that contract and wills are governed by private law whilst statutes have to comply with public law) there are also similarities. The most important similarity is that all legal documents are trying to convey a legal message, and this message has to be deciphered by the medium known as language. Therefore, the conclusion can be drawn that all of the legal documents are subject to the same consequences pertaining to potential deficiencies of language.<sup>27</sup>

The above is confirmed by AJ Wessels in the case of *Van Rensburg v Taute en Andere*<sup>28</sup> where the learned appeal judge stated that:

“Wat die partye tot die waterooreenkoms wou bepaal het moes in die eerste plek gesoek word in die woorde wat hulle gebesig het, en daardie woorde moet volgens hulle gewone grammatikale betekenis verstaan word”.<sup>29</sup>

The conclusion which can be drawn from the above is that the purpose of legal interpretation will remain the same, irrespective of the legal nature of the document that needs to be interpreted.<sup>30</sup>

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<sup>25</sup> 2009 (4) SA 399 (SCA).

<sup>26</sup> *KPMG Chartered Accountants* Case, Para 39.

<sup>27</sup> Cornelius S.J, *Principles of Interpretation of Contracts in South Africa*; 2<sup>nd</sup> edition; LexisNexis; Durban, (2007) Page 70.

<sup>28</sup> 1975 (1) All SA 452 (A).

<sup>29</sup> *Van Rensburg* case, Page 440.

<sup>30</sup> S J Cornelius (2007), Page 72.

Furthermore, in accordance with this discussion, although there is a substantial degree of similarities between the rules, there are also rules that are unique to a specific legal document. Therefore, using the rules that apply to different legal documents, some uniformity will be created and thus a lesser risk of diverse subjective interpretations.<sup>31</sup>

## 2.4.2 Theories of Interpretation<sup>32</sup>

There are different theories on interpretation due to different ways of thinking by individuals. The theories will be discussed in the following paragraphs.

### 2.4.2.1 Subjective Theory<sup>33</sup>

As the name indicates this theory entails that the party's intention must be ascertained by considering the contract as a whole together with all the surrounding circumstances. The subjective theory has been accepted, approved and applied in the courts of South Africa, as well as in England and most other countries with a common law tradition. This theory only considers and concerns itself with the inner workings of the minds of the parties involved, i.e. it only considers the thoughts and ideas behind the use of language, rather than the strict literal, dictionary meaning of the words. This theory is not without its shortcomings. When only considering the intention of the parties, there is no room for the possibility of undue influence or duress playing a role in the signing of the contract. The effect of the shortcomings is that where the subjective theory is applied, and should one of the parties sign the contract under duress, or under undue influence, the injured party will not be able to declare the contract void. Considering the subjective theory's shortcomings inference can

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<sup>31</sup> S J Cornelius (2007), Page 72.

<sup>32</sup> S J Cornelius (2007), Chapter 3.

<sup>33</sup> S J Cornelius (2007), Page 29.

be made that the subjective theory in its purest form is not compatible with the general principles of the law of contract.

#### 2.4.2.2 Subjective Cum Literal Theory<sup>34</sup>

According to the subjective cum literal theory (literal theory), the golden rule of interpretation of contracts is that the intention of the parties must be ascertained from the words. These words are the primary and main source of information, and the interpreter is bound thereby. The interpreter may not dwell beyond the text when determining the meaning of the words. This theory excludes other elements and only places emphasis on the semantic elements of interpretation. This theory also excludes simulated contracts, rectification, implied terms, mistakes, duress or undue influence, which leads to the conclusion that the exclusions should be seen as exceptions to the golden rule. This literal theory must be rejected as it does not conform to the subjective will theory of contractual liability, which is applied when determining whether a contract exists.

#### 2.4.2.3 Traditionalist -, Literalist -, Purposive - and Judicial Theory<sup>35</sup>

- a.) The traditionalist theory entails the same principles as the literalist theory together but ascertains the intention of the parties.
- b.) The purposive theory consists of determining the purpose of the legal instrument to determine the meaning of the words used in the instrument.
- c.) The judicial theory is exactly as the name indicates; the judge is the one to determine the meaning of the words. This theory does not consider that a judge still remains a person. Granted that they have experience in the field of law, their subjective preferences to meanings on certain

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<sup>34</sup> S J Cornelius (2007) Page 30.

<sup>35</sup> S J Cornelius (2007), Page 33.

words will still influence their interpretation of words used in contracts, which can lead to incorrect interpretations.

#### 2.5.2.4 Objective Theory and Contextualism Interpretation<sup>36</sup>

The objective theory stipulates that the meaning of the words are discovered only through the text, whilst the theory of contextualism regulates that the meaning of the words are determined by the context in which words are used and text is interpreted. Thus it considers the entire legal instrument, and not just the dictionary meaning of the words.

#### 2.4.2.5 Holistic Interpretation<sup>37</sup>

This is an approach which incorporates different theories. The reasoning behind this approach is based on the problem that the traditional theories are failing because they isolate the text from reality and thus different meanings are assigned to the words. In the holistic view, different theories are combined into one, combining the benefits of each.

This is the approach which Prof. S J Cornelius suggests should be applied in South African courts.

Further to the recommended approach he describes it as follows:<sup>38</sup>

“It is an accepted principle of interpretation that a term of contract must be read in its context and not in isolation. Therefore, the term must be interpreted in the light of all the other terms of the contract, so that the meaning of each word is influenced by the text as a whole.”

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<sup>36</sup> S J Cornelius (2007), Page 34.

<sup>37</sup> S J Cornelius (2007), Page 35.

<sup>38</sup> Cornelius S J, “The Unexpressed Terms of a Contract”, International Journal for the Private Law,(2012) Page 293.

Further to the above, the same author indicated in the article known as “Tacit Terms and the Common Unexpressed Intention of the Parties to a contract”,<sup>39</sup> that

“Although it is often said that the purpose of interpretation is to ascertain the intention of parties, it is trite that it is the objective meaning of the contract rather than the subjective intention, which is being determined.”

At this point in South African law there is no prescribed method or theory to be used when interpreting words in a contract. A holistic approach to interpretation of contracts needs to be followed as this will reduce the inconsistencies in application of the theories, eliminate subjective thinking and create legal certainty.

## **2.5 The role of the Constitution and interpretation theories when interpreting contracts by the courts.**

### **2.5.1 North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd<sup>40</sup>**

In the case of *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* the appellant’s business was financing the acquisition of goods by concluding rental agreements with applicable / interested end users. A cession agreement was concluded in 2001 and in 2008 disputes arose which were settled amicably by way of a settlement agreement in September 2008. The settlement agreement contained an arbitration clause which read that any dispute between the parties has to be referred to arbitration. After the settlement agreement was signed by both parties it came to the bank’s attention that it was induced by fraudulent misrepresentation and non-disclosure on the part of the appellant. The respondent argued that the contract was void *ab initio* and maintained that the arbitration clause fell within the contract and is therefore not enforceable. The appellant, on the other hand, indicated

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<sup>39</sup> Cornelius S. J, 2013 De Jure 1088.

<sup>40</sup> (2013) 3 All SA 291 (SCA)

that the dispute is arbitrable in terms of the arbitration clause in the agreement.<sup>41</sup>

The High Court found that there was sufficient proof that the allegations of fraud by the respondent were not unfounded and therefore the bank was not compelled to submit the dispute for arbitration. The appellant contended that the arbitration clause conferred jurisdiction to an arbitrator, despite the allegations of fraud inducing the settlement agreement.<sup>42</sup>

The issue before the SCA was whether the arbitration clause to be interpreted to compel the bank to submit for arbitration even if the contract was induced by fraud. The SCA confirmed the judgement of the High Court and dismissed the appeal.<sup>43</sup>

The SCA considered and applied the following legal principles:

- i. If a contract is void from the outset then all of its clauses, including exemption and reference to arbitration clauses fall with it.<sup>44</sup>
- ii. The effect of fraud that induces a contract is, in general, that the contract is regarded as voidable.<sup>45</sup>
- iii. In interpreting a contract, a court must ascertain what the parties intended their contract to mean. That requires a consideration of the words used by them and the contract as a whole and whether or not there is any possible ambiguity in the meaning, the court must consider the context in which the contract was concluded.<sup>46</sup>
- iv. A contract must also be interpreted so as to give it a commercially sensible meaning. The interpretation of the arbitration clause in this case was aimed at establishing the

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<sup>41</sup> *North East Finance Case*, Page 2 to 4.

<sup>42</sup> *North East Finance Case*, Para 8.

<sup>43</sup> *North East Finance Case*, Para 34 and 35.

<sup>44</sup> *North East Finance Case*, Para 12.

<sup>45</sup> *North East Finance Case*, Para 14.

<sup>46</sup> *North East Finance Case*, Para 26.

meaning of the phrase “including any question as to the enforceability of this contract” in respect of disputes which were to be referred to arbitration.<sup>47</sup>

### 2.5.2 *Bothma – Batho Transport (Edms) Bpk v S Botha & Seun Transport (Edms) Bpk*<sup>48</sup>

The second case worth mentioning is the case of *Bothma – Batho Transport (Edms) Bpk v S Botha & Seun Transport (Edms) Bpk*. Two brothers divided the family business handed down to them by their father, with the effect that they had to deal with a tank farm which the respondent was hiring from Omnia. In accordance with the lease agreement signed in 2005, it was regulated that the respondent would have the use of 3 tanks, and the appellant would have the use of 6 tanks. Both of the parties let the tanks to third parties. Disputes arose based on an agreement between the parties.<sup>49</sup>

The High Court rejected the submission of the appellant that, according to the appellant, upon proper interpretation of the relevant clause, it was entitled to receive the entire benefit from an increase in the rental paid by FFS refiners (to whom it let the tanks). The respondent, on the other hand, argued that on its interpretation of the relevant clause that it was entitled to a *pro rata* portion of the rental asked and not just a fixed amount.<sup>50</sup>

The Supreme Court held that interpretation is the process of attributing meaning to the words used in a document, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Consideration must be given to the language used in the light of ordinary rules of grammar and syntax; the context in

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<sup>47</sup> *North East Finance Case*, Para 16.

<sup>48</sup> 2014 (1) All SA 517 (SCA).

<sup>49</sup> *Bothma – Batho Transport Case*, Para 1 to 3.

<sup>50</sup> *Bothma – Batho Transport Case*, Para 9.

which the provisions appear; the apparent purpose to which it is directed and the material known to those responsible for its production. Therefore, the starting point is the words of the document, which are considered in the light of all relevant admissible contexts, including the circumstances in which the document came into being.<sup>51</sup>

The Supreme Court of Appeal held further that when it applies the above to this specific case, it found that the interpretation contended for by the appellant that on a proper interpretation of the relevant clause, it was entitled to payment of the increase in the amount of the invoices rendered to the client of the Respondent, was not correct, and therefore the appeal was dismissed.<sup>52</sup>

## 2.6 Conclusion

The Constitution of South Africa is the supreme law. Any act, law or regulation contrary to the Constitution can be, in the absence of justification, regarded as null and void and thus unenforceable. The Constitution also recognises that international law plays a significant role in the interpretation and development of South African law. In accordance with the Constitutional sections 231, 232 and 233 international law needs to be considered when interpreting our law. An interpretation consistent with international law is preferable over an interpretation inconsistent with international law.

Furthermore, the Constitutional case<sup>53</sup> held that section 34 of the Constitution does not directly apply to an arbitration agreement, but that the Constitution still regulates the arbitration agreement indirectly. In the event that the arbitration agreement is not for example obtained by way of a fair procedure as regulated, the arbitration agreement shall be null and void.

When it comes to interpreting a contract it should be kept in mind that some rules may be applied to different legal documents. In applying the same rules

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<sup>51</sup> *Bothma – Batho Transport Case*, Para 12.

<sup>52</sup> *Bothma – Batho Transport Case*, Para 26.

<sup>53</sup> *Supra* Para 2.3.1.



uniformity can be created. When considering case law, the courts indicated that when interpreting a contract, the context in which the document was drafted should be considered, and thus the words are not to be isolated from the context. The courts indicated, as per the *North East Finance*<sup>54</sup> case, that the intention of the parties needs to be considered as well as the context in which the contract was concluded. Furthermore, when interpreting the words or meaning of the words, a commercially sensible meaning needs to be given to the word. In the *Bothma - Batho*<sup>55</sup> case the court also confirmed that when interpreting the words used in a contract the context needs to be considered by reading the particular provision. The language used should be considered in light of ordinary rules of grammar and syntax.

In conclusion, all arbitration agreements entered into, voluntarily between the parties, must be in accordance with the Constitution. When interpreting the arbitration agreement, the context in which the agreement was concluded should be considered by the courts and also the intention of the parties at the time of concluding the agreement. International law may be considered when interpreting the arbitration agreement as provision is made for international law in the Constitution.

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<sup>54</sup> Supra fn 35.

<sup>55</sup> Supra fn 36.

## **CHAPTER 3:**

### **The Arbitration Act of South Africa**

#### **3.1 Introduction**

This chapter consist of an in depth discussion of arbitration as one of the dispute resolution methods in South Africa. When discussing arbitration different aspects need to be considered as the Act is not a comprehensive codification of the law of arbitration. Reference is made to the common law and case law.

#### **3.2 Alternative Dispute Resolution**

General Alternative Dispute Resolution (ADR) describes different means to settle disputes other than resorting to litigation. There are various ADR methods which include, but are not limited to, amicable settlement, mediation, adjudication and arbitration:

##### **3.2.1 Amicable Settlement**

Amicable settlement is a discussion between the parties to resolve the dispute in an amicable manner.

##### **3.2.2 Mediation**

Mediation is described as:

“In the construction industry in South Africa generally denotes a procedure in which a neutral third party seeks to resolve a dispute by conducting an enquiry, similar to but less formal than an arbitration hearing.”<sup>56</sup>

##### **3.2.3 Adjudication**

Is described as:

“In adjudication, a dispute between the employer and contractor is first referred to a adjudicator. The adjudicator usually bases his decision on documentation and on his own knowledge and expertise. An adjudicator is not an arbitrator and is not obliged to give the parties a hearing. The adjudicator must adjudicate the dispute within the agreed time period. The adjudication is final and binding unless the dissatisfied

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<sup>56</sup> McKenzie, Page 246.

party gives notice to the other party within a further agreed period of its intention to commence arbitration proceedings.”<sup>57</sup>

This decision shall be binding unless the court refuses leave to enforce decision or it is substituted by a final arbitral award of court judgment. It should also be mentioned that as yet the Arbitration Act<sup>58</sup> (herein after referred to as ‘the Act’) does not govern adjudication and there is no other statutory provision which governs adjudication.<sup>59</sup>

### **3.2.4 Arbitration**

Arbitration is the submission of disputes by consensual agreement to a third party for a binding decision. In South Africa, arbitration is governed by the Act.

It is also worth mentioning that the Act does not distinguish between domestic arbitration and international arbitration, and although the South African Law Commission proposed various reforms, it was not accepted.<sup>60</sup> In essence, arbitration is a method or a manner in which disputes may be resolved.<sup>61</sup>

## **3.3 Different types of ADR clauses**

As there are various types of ADRs, there are various clauses which regulate each type of ADR.

### **3.3.1 Gin and Tonic Clause**

There is a clause, known in the industry as the ‘gin and tonic’ clause. This ADR clause regulates that the top management of the parties meet casually to discuss the dispute. This usually entails a friendly discussion over a couple of drinks, hence where the name originated from.

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<sup>57</sup> Ramsden P, *The law of Arbitration: South African and International Arbitration*, (2009), Page 4.

<sup>58</sup> Act 42 of 1965.

<sup>59</sup> McKenzie, Page 246.

<sup>60</sup> [www.nortonrosefulbright.com/files/South Africa-25761.pdf](http://www.nortonrosefulbright.com/files/South%20Africa-25761.pdf) (Last accessed 30 January 2016).

<sup>61</sup> Butler, D, *South African Arbitration Legislation – The Need to Reform*, Sabinet, 2009, page 121.

When drafting a so called ‘gin and tonic’ clause, the drafter must time periods. The time periods must be reasonable as it would be pointless to incorporate a gin and tonic clause into a contract if neither of the parties is able to comply with the time periods. Furthermore, the representatives of the parties must have the necessary authority to be able to bind the entity or company to a decision made during the meeting. Usually a gin and tonic clause will be beneficial in corporate contracts between entities.

### **3.3.2 Multitier Clauses**

Another well-known clause worth mentioning is a clause known as the multitier clause. This is the type of clause in which the parties agree to take interim steps in the process of resolving disputes. These steps include amicable settlement, mediation and adjudication. In the event that these interim steps are unsuccessful, the clause usually regulates that the parties may refer the dispute to arbitration. It is imperative to know that if the parties do not comply with the interim steps, neither of the parties may refer the matter to arbitration nor compel arbitration proceedings.<sup>62</sup>

Well-known examples of such multitier clauses have been drafted into GCC as well as all the FIDIC contracts. These clauses will be discussed in detail and analysed in chapter 4 and chapter 5 respectively.

### **3.3.3 Expert Determination Clauses**

The expert determination clause is known to be drafted in such a way that the decision is made by an expert, where the expert is not an arbitrator. This clause, addition to the average ADR clause will be necessary in the event that the contract deals with specific, complex

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<sup>62</sup> Ramsden P, *The law of Arbitration: South African and International Arbitration*, (2009), Page 55.

matters where a dispute cannot adequately be resolved by a lay person.

### 3.4 Arbitration in South Africa

#### 3.4.1 Definition of Arbitration

According to Ramsden arbitration is:

“the process by which parties to a dispute are, with the approval and encouragement of the law, enabled to arrange for taking and abiding by judgment of a selected person or persons instead of carrying the dispute, in ordinary course, to the established courts of justice.”<sup>63</sup>

#### 3.4.2 Origins of Arbitration in South Africa

The South African common law is based on Roman Dutch law thus making the views of different jurists, such as Johannes Voet, Van Leeuwen and Groenewegen part of the South African common law.<sup>64</sup>

At first the application of the common law on arbitration matter was restricted to three of the provinces, Cape - <sup>65</sup>, Transvaal -<sup>66</sup> and Natal Province<sup>67</sup> who adopted the English Arbitration Act of 1889. Although the English Arbitration Act was adopted with some variation, English case law was recognised and applied by the courts of South Africa.<sup>68</sup>

The ordinances which governed the arbitration in South Africa in accordance with the English Arbitration Act were repealed by the Arbitration Act 42 of 1965, thus allowing South Africa to operate under one unified arbitration statute.<sup>69</sup>

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<sup>63</sup> Ramsden, P, *McKenzie's Law of Building and Engineering Contracts and Arbitration*, 7th Edition, Page 231.

<sup>64</sup> Ramsden, P, *The Law of Arbitration in South Africa and International Arbitration* (2009), Page 13.

<sup>65</sup> Act 29 of 1898.

<sup>66</sup> Ordinance 24 of 1904.

<sup>67</sup> Act 24 of 1898.

<sup>68</sup> Ramsden, Page 13.

<sup>69</sup> Ramsden, Page 14.

### 3.4.3 Date of commencement of the Act

Section 42(3) of the Act reads as follows:

“(3) Any arbitration, enquiry or trial commenced prior to the commencement of the Act in terms of any law repealed by subsection (1) shall be proceeded with in all respects as if such repeal had not been effected.”

This means that any arbitration proceedings which commences after 14 April 1965 shall be subject to the Act regardless of the date on which the agreement was concluded.<sup>70</sup>

### 3.4.4 Application of the Act

Section 39 of the Act reads

“This Act shall apply to any arbitration in terms of an agreement to which the State is a party, other than an arbitration agreement between the State and the Government of a foreign country or any undertaking which is wholly owned and controlled by such a Government.”

This section indicated that this Act will apply to the State, unless the parties involved is the State and another Government.<sup>71</sup>

Section 40 of the Act regulates as follows:

“This Act shall apply to every arbitration under any law passed before or after the commencement of this Act, as if the arbitration were pursuant to an arbitration agreement and as if that other law were an arbitration agreement: Provided that if that other law is an Act of Parliament, this Act shall not apply to any such arbitration in so far as this Act is excluded by or is inconsistent with that other law or is inconsistent with the regulations of procedure authorized or recognised by that other law.”

This mandates the Act to regulate any arbitration, whether it is regulated by other legislation or not.<sup>72</sup>

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<sup>70</sup> Ramsden, Page 14.

<sup>71</sup> Ramsden, Page 15.

<sup>72</sup> Ramsden, Page 15.

When applying the Act and conflict arises with the common law, the Act shall change the common law, but the changes shall not be more than necessary.<sup>73</sup>

Furthermore, it appears as though any person who has contractual capacity to sue, or to be sued has the capacity to refer a matter to arbitration. It should, however, be noted that in the event that there is a dispute regarding the contractual capacity of a person, the arbitrator has no authority to assess the contractual capacity of the person as that prerogative still remains with the courts.<sup>74</sup>

### 3.4.5 Structure of the Act

In this discussion of the structure of the Act reference will only be made to the sections which are relevant for purposes of this dissertation.

The first section that needs to be considered when referring a matter to arbitration is Section 2 of the Act. This section specifically excludes specific matters which are not subject to arbitration.

#### 3.4.5.1 Exclusions from the Act

Section 2 of the Act reads:

- “2. Reference to arbitration shall not be permissible in respect of –
- a. any matrimonial cause or any matter incidental to any such cause; or
  - b. any matter relating to status.”

It is important to know that not all matters may be referred to arbitration. It would thus be redundant and rather useless to

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<sup>73</sup> Ramsden, Page 14.

<sup>74</sup> Ramsden, Page 27.

incorporate an arbitration clause into a contract which could affect the status of another person.

### 3.4.5.2 Role of the Court in arbitration proceedings in South Africa

Section 3 of the Act regulates the following:

- (1) Unless the agreement otherwise provides, an arbitration agreement shall not be capable of being terminated except by consent of all the parties thereto
- (2) The court may at any time on 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.”

Thus, considering the above, the only way in which a court may interfere with an arbitration agreement will be when a review application is brought by one of the parties and when good cause is shown on why the court should interfere.

### 3.4.5.3 Recusal of the Arbitrator

Another section worth considering is Section 13 of the Act. In terms of Section 13 of the Act<sup>75</sup> it is obvious that the Act does not make provision for the arbitrator to recuse him or herself. Thus if the arbitration agreement does not make provision for the recusal of the arbitrator, and the parties do not consent thereto, the

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<sup>75</sup> Section 13: Termination or setting aside of appointment of arbitrator or umpire

“(1) Subject to the provisions of subsection (2), the appointment of an arbitrator or umpire, unless a contrary intention is expressed in the arbitration agreement shall not be capable of being terminated except by consent of all parties to the reference.

(2)(a) The court may at any time on the application of any party to the reference, on good cause shown, set aside the appointment of an arbitrator or umpire or remove him from office.

(b) For the purposes of this subsection, the expression ‘good cause’ includes failure on the part of the arbitrator or umpire to use all reasonable dispatch in entering on and proceeding with the reference and making an award or, in the case where two arbitrators are unable to agree, in giving notice of the fact to the parties or to the umpire.

(3) Where the appointment of the arbitrator or umpire is so set aside, or where an arbitrator or umpire is so removed from the office, the court may apart from any order of costs which may be awarded against such arbitrator or umpire personally, order that such arbitrator or umpire shall not be entitled to any remuneration for his services.”



arbitrator is still obliged to discharge the duties assumed by him or her upon the accepted appointment.<sup>76</sup>

#### 3.4.5.4 Finality of an award

Section 28 of the Act reads as follows:

“Unless the arbitration agreement provides otherwise, an award shall, subject to the provisions of the Act, be final and not subject to appeal and each party to the reference shall abide by and comply with the award in accordance with its terms.”

This section regulates the finality of the arbitration award. In accordance with this section, the arbitration award shall be final and the parties are bound thereby. The arbitration award can also be made an order of court. Section 31 of the Act regulates when an award may be made an order of court.

Section 31 of the Act reads:

“31: An award may be made an order of Court

31(1): An award may, on application to a court of competent jurisdiction by any party to the reference after due notice to the other party or parties, be made an order of court.

31(2): The court to which application is so made, may, before making the award an order of court, correct in the award any clerical mistake or any patent error arising from any accidental slip or omission.

31(3): An award which has been made an order of court may be enforced in the same manner as any judgment or order to the same effect.”

Section 33 of the Act reads as the following:

“33(1) Where –

- (a) Any member of an arbitration tribunal has misconducted himself in relation to his duties as arbitrator or umpire; or
  - (b) An arbitration tribunal has committed any gross irregularities in the conduct of the arbitration proceedings or has exceeded its powers; or
  - (c) An award has been improperly obtained;
- The court may, on the application of any party to the reference after due notice to the other party or parties, make an order setting the award aside.

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<sup>76</sup> McKenzie, Page 251.

- 33(2) An application pursuant to this section shall be made after the publication of the award to the parties: Provided that when setting aside of the award is requested on the grounds of corruption, such application shall be made within six weeks after discovery of the corruption and in any case no later than three years after the date on which the award was so published.
- 33(3) The court may, if it considers that the circumstances so require, stay enforcement of the award pending its decision.
- 33(4) If the award is set aside the dispute shall, at the request of either party, be submitted to a new arbitration tribunal constituted in the manner directed by the court.”

Section 33 of the Act is one of the most important sections as it regulates when an arbitration award may be set aside by the courts. This section thus regulates the power of the court and when the court is allowed to interfere with an arbitration award.

## 3.5 Draft Bills for South Africa

### 3.5.1 UNCITRAL draft Bill

UNCITRAL is an abbreviation for United Nations Commission on International Trade Law. UNCITRAL is a subsidiary body of the United Nations General Assembly.<sup>77</sup> This model aims to promote uniformity in international arbitration and to limit the role that national courts play in arbitration.<sup>78</sup> It should be noted that currently South Africa’s arbitration processes are not in accordance with the international standard as the proposition to draft a bill in accordance with the UNCITRAL model was not accepted. The latitude currently given to the courts may lead to uncertainty and this might lead to a possible resistance to arbitration.<sup>79</sup> If this model were to be incorporated into the South African arbitration law, South Africa might be in a position to become an international

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<sup>77</sup> Ramsden, Page 19.

<sup>78</sup> [www.fulbright.com/files/2014/002-overhauling-arbitration-in-South Africa-121541.pdf](http://www.fulbright.com/files/2014/002-overhauling-arbitration-in-South-Africa-121541.pdf) (Last accessed 12 January 2016).

<sup>79</sup> [www.fulbright.com/files/2014/002-overhauling-arbitration-in-South Africa-121541.pdf](http://www.fulbright.com/files/2014/002-overhauling-arbitration-in-South-Africa-121541.pdf) (Last accessed 12 January 2016).

arbitration centre for the wider Africa.<sup>80</sup> According to Prof. D. Butler<sup>81</sup>, it is necessary to have clarity on the powers of the court, more specifically to which extent the court may interfere with arbitration, whether it be international or domestic.

### **3.5.2 Project 94 of SALRC**

#### **3.5.2.1 Domestic Arbitration**

When arbitration was brought into South African law with objectives such as the fair resolution of disputes by an independent and impartial party or tribunal getting rid of unnecessary costs and expenses which is present with litigation. Another objective that the legislator had in mind was party autonomy as well as adequate powers for the tribunal to be in a position to conduct an arbitration of a dispute effectively. At this moment, according to the South African Law Commission (herein after referred to as the Commission), the current Act does not adequately meet the objectives.<sup>82</sup>

To address the shortfalls of the current Act the Commission suggested that a new statute must be drafted in which the best features of the Model Law and English Arbitration Act of 1996 must be combined with certain provisions of the current Act which works in practice in South Africa.

It was also recommended by the Commission that the UNICTRAL model law, as discussed above, should not be implemented / adopted for domestic arbitration as the needs for

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<sup>80</sup> [www.fulbright.com/files/2014/002-overhauling-arbitration-in-South Africa-121541.pdf](http://www.fulbright.com/files/2014/002-overhauling-arbitration-in-South-Africa-121541.pdf) (Last accessed 12 January 2016).

<sup>81</sup> Butler, D, *South African Arbitration Legislation – The Need to Reform*, Sabinet, 2009, page 135;

<sup>82</sup> South African Law Commission: Project 94, Domestic Arbitration Report, dated May 2001, Page viii.

international arbitration differ from the needs for domestic arbitration.<sup>83</sup>

### 3.5.2.2 Arbitration: an International Arbitration Act for South Africa

South Africa is frequently a party to international business transactions and therefore it is imperative to have a proper method for dispute resolution which must be in line with international norms.<sup>84</sup>

Currently South African law does not make provision for international commercial arbitration. The Commission has resolved to adopt a holistic approach to international arbitration legislation and recommends that there should be compulsory application of the Model Law of international commercial arbitration.<sup>85</sup>

In terms of Chapter 1 of the report<sup>86</sup> there are several objectives for the proposed bill. The proposed bill is based on three core proposals. These are to introduce the UNICTRAL Model Law on International Commercial Arbitration of 1985 into our law, to implement changes on the New York Convention and proposed accession by South Africa to the Convention on the Settlement of Investment of the Investment Disputes between the States and Nationals of Other States.<sup>87</sup>

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<sup>83</sup> South African Law Commission: Project 94, Domestic Arbitration Report, dated May 2001, Page ix.

<sup>84</sup> South African Law Commission: Project 94, Arbitration: An International Arbitration for South Africa Report, dated 1998, Page 20.

<sup>85</sup> South African Law Commission: Project 94, Arbitration: An International Arbitration for South Africa Report, dated 1998, Page 21.

<sup>86</sup> South African Law Commission: Project 94, Arbitration: An International Arbitration for South Africa Report, dated 1998, Page 23.

<sup>87</sup> South African Law Commission: Project 94, Arbitration: An International Arbitration for South Africa Report, dated 1998, Page 24.

### 3.5.2.3 Current position of Project 94

Since both the reports titled, Arbitration: An International Arbitration Act for South Africa as well as Domestic Arbitration, was submitted, it has not been acted upon. In the case of *Bidoli v Bidoli*<sup>88</sup> it is recorded by V N Ponnann JA that:

"Many developed and developing countries have adopted the UNCITRAL Model Law for domestic and international arbitrations. It is thus lamentable that a decade later the Law Commission's recommendations are yet to be acted upon."

On the 25<sup>th</sup> of July 2013 the South African Law Reform Commission drafted another report which is titled Summary of Amendments to the Commission's Draft International Arbitration Bill of July 1998. In this report the Draft International Arbitration Bill is brought in line with the amendments made to the Model Law on International Commercial Arbitration which was made in 2006.<sup>89</sup>

Currently it is hoped that a new domestic and international arbitration act shall be implemented as to place South Africa in a position to develop its arbitration procedures and be placed in a position to take centre stage in the African continent in relation to arbitration disputes.

### 3.5.3 International Draft Bill

The Department of Justice and Constitutional Development is currently drafting an International Draft Bill (hereinafter referred to as the Draft Bill) of which the main objective is to incorporate the UNICTRAL model, which will form the cornerstone of the international arbitration regime.<sup>90</sup>

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<sup>88</sup> 2011 ZASCA 82, Para 9.

<sup>89</sup> Summary of Amendments to the Commission's Draft International Bill of July 1998, drafted by South African Law Reform Commission, dated 25 July 2013, Para 1.02.

<sup>90</sup> [www.justice.gov.za/m.\\_speeches/2015/20150817\\_ChinaAfrica.html](http://www.justice.gov.za/m._speeches/2015/20150817_ChinaAfrica.html) (Last accessed 05 April 2016);

This Draft Bill was aimed to be submitted to parliament during the 2015 Parliament sitting, but according to the latest article, South African Construction Law update: Important procedural developments<sup>91</sup>, the Draft Bill shall be submitted to the Parliament next year.

### 3.6 Application of the Act in South African Courts

The discussion below focuses on case law, and the views of the courts on how the sections mentioned above should be applied in South African law.

#### 3.6.1 *Stocks and Stocks v Gordon and Others NNO*<sup>92</sup>

In the *Stocks and Stocks* case various disputes arose based on a contract between the parties. The disputes were referred to mediation in accordance with clause 26 of the contract. An application was brought for an order that effect must be given to the opinion of the mediators and that payment must be effected in terms of the opinion. This application was brought based on the wording of the following clause:

“The opinion of the mediator shall be binding upon the parties and shall be given effect to bind them until the said opinion is overruled in any subsequent arbitration or litigation.”<sup>93</sup>

An important question arose before court, which needed to be addressed. The question was:

“Whether the opinion of the mediator can be enforced when it is disputed by a party to the contract pending resolution of such dispute by arbitration or litigation where the opinion consists of a monetary value.”<sup>94</sup>

The court concluded that in principle there is no objection in giving effect to an agreement in terms of which interim payments are to be made which may later be followed by an adjustment of accounts and a claim

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<sup>91</sup> <http://www.engineernews.co.za/article/South-Africa-construction-law-update-important-procedural-developments-2016-02-09> (Last accessed 08 April 2016);

<sup>92</sup> 1993(1) ALL SA 39 (T).

<sup>93</sup> *Stocks and Stocks Case*, Page 41.

<sup>94</sup> *Stocks and Stocks Case*, Page 42.

for repayment of what has been paid. Therefore, the court decided that the mediators' opinion must be given effect too.<sup>95</sup>

### **3.6.2 *Leadtrain Assessments (Pty) Ltd and Others v Leadtrain (Pty) Ltd and Others*<sup>96</sup>**

In the case of *Leadtrain Assessments (Pty) Ltd and others v Leadtrain (Pty) Ltd and Others* there were various disputes which were referred to arbitration by agreement. The Arbitrator ordered the first respondent to pay 80% of the costs of the arbitration as well as 80% of the certain costs incurred in the High Court.<sup>97</sup> The Appellant applied to court for the award to be made an order of court in terms of Section 31<sup>98</sup> of the Act, which prompted a counter application by the Respondent to set aside paragraph 4 and 5 of the award and in the alternative remitting the above mentioned portions of the award to the arbitrator under Section 32(2) of the act for reconsideration. The question before the SCA is if misdirection occurred in the exercise of the Arbitrator's discretion, whether the Respondent is entitled to have the affected part of the award set aside and the matter remitted for reconsideration by the arbitrator. The SCA indicated that in terms of Section 28<sup>99</sup> of the Act, an arbitrator's award is ordinarily final.<sup>100</sup>

In light if the above, the SCA, also considered that Section 33(1)<sup>101</sup> of the Act permits a court to interfere with an award in the event that the arbitrator has misconducted itself, or committed a gross irregularity, or exceeds its powers or the award itself has been improperly obtained.<sup>102</sup>

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<sup>95</sup> *Stocks and Stocks Case*, Page 43.

<sup>96</sup> 2013 ZASCA 33 (date of judgment: 28 March 2013).

<sup>97</sup> *Leadtrain Assessments Case*, Para 1 to 2.

<sup>98</sup> *Supra*, Para 3.5.4.4.

<sup>99</sup> *Supra* Para 3.5.4.4.

<sup>100</sup> *Leadtrain Assessments Case*, Para 8.

<sup>101</sup> *Supra* Para 3.3.4.

<sup>102</sup> *Leadtrain Assessments Case*, Para 9.

The Respondent, however, did not bring an application based on Section 33 of the Act<sup>103</sup>; instead it brought an application based on Section 32(2) of the Act.

Thus it was the submission of the Respondent that misdirection on the part of the arbitrator provided 'good cause' for the matter to be remitted under Section 32(2).

Therefore, the case made out by the Respondent is an alleged error on the part of the arbitrator. The SCA then referred to the case of *Kolber v Sourcecom Solutions (Pty) Ltd*<sup>104105</sup> where it was observed that a party to arbitration proceedings should not be allowed to take the arbitrator on appeal under the guise of a remittal in terms of Section 32(2).<sup>106</sup> Based on the *Kolber* case the SCA held that the counter application ought to have failed and that it should have been ordered that paragraphs 4 and 5 of the award be made an order of court.<sup>107</sup>

### 3.6.3 *Cool Ideas 1186 CC v Hubbard and Another*<sup>108</sup>

In the case of *Cool Ideas 1186 CC v Hubbard and Another* the Constitutional Court was divided on the question whether or not the arbitration award should be enforced. A building contract was concluded between the parties of which Cool Ideas was the builder and Hubbard was the home owner. Cool Ideas contracted the services of a sub-contractor to build the dwelling. A dispute arose regarding the quality of the work and payment of the remainder of the contract price. Hubbard invoked the arbitration clause and claimed damages, which prompted Cool Ideas institute a counter claim for the remainder of the contract price

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<sup>103</sup> S33 of Act 42 of 1965.

<sup>104</sup> 2001 (2) SA 1097 (C)

<sup>105</sup> The Court stated further that where an arbitrator has given fair consideration to a matter it would be impossible to find that he had been guilty of misconduct because he had a *bona fide* mistake of either law or fact. The aggrieved party has to go further and prove *mala fides* on the part of the arbitrator before a court would be prepared to upset his award.

<sup>106</sup> S32 of Act 42 of 1965.

<sup>107</sup> *Leadtrain Assessments Case*, Para 16.

<sup>108</sup> 2014 ZACC 16.



to be paid. Arbitrator found in favour of Cool Ideas, and when Hubbard still refused to abide, Cool Ideas brought an application in terms of Section 31<sup>109</sup> of the Act to make the arbitration award an order of court.<sup>110</sup> Hubbard contended that the award may not be made an order of court as it would be in contravention of Section 10(1) of the Housing Consumers Protection Act 95 of 1998.<sup>111</sup>

The issue before the Supreme Court of Appeal was whether it would be legally tenable to make the arbitration award an order of court where to do so would amount to sanctioning the breach of a clear statutory provision.<sup>112</sup>

Cool Ideas argued that the refusal by the SCA to make the order an order of court was an infringement upon its Constitutional right of Section 34<sup>113</sup> of the Constitution. The Constitutional Court found that Cool Ideas was afforded a full and proper opportunity to have all its issues ventilated before the High Court and the SCA, and that therefore its rights in terms of Section 34 of the Constitution had not been infringed upon. The Constitutional Court held further that to enforce the arbitration award would be contrary to public policy, since it would undermine the principle of legality and sanction a criminal offence. The Constitutional Court dismissed the application and refused to make the arbitration award an order of court.<sup>114</sup>

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<sup>109</sup> Supra fn 12

<sup>110</sup> *Cool Ideas* Case, Para 1 to 2.

<sup>111</sup> Section 10

(1) no person shall –

(a) carry on business of a home builder; or

(b) Receive any consideration in terms of any agreement with a housing consumer in respect of the sale construction of a home, unless that person is a registered home builder.

<sup>112</sup> *Cool Ideas* Case, Para 23.

<sup>113</sup> Supra, Chapter 2, Para 2.2.3.

<sup>114</sup> *Cool Ideas* Case, Para 134 to 169.

### 3.6.5 *North East Finance (Pty) Ltd V Standard Bank of South Africa*<sup>115</sup>

A case which illustrates the above is the Supreme Court of Appeal case of *North East Finance (Pty) LTD v Standard Bank of South Africa*. In this case the Respondent and the Appellant entered into a settlement agreement after disputes arose. This settlement agreement contained an arbitration clause which read: “... (including any question as to the enforceability of this contract...)...”.<sup>116</sup> The Respondent discovered that the settlement agreement was fraud induced and decided to resile from the agreement and to regard it as void *ab initio*. The High Court held that the arbitration clause fell within the scope/ambit of the contract and that it had no separate existence, as it was not drafted to be severable from the rest of the contract. The Supreme Court made reference to the general principle that if a contract is void from the outset then all of its clauses, including exemption and arbitration clauses, fall within it. The Supreme Court referred to the principle set out by the House of Lords in *Fiona Trust*<sup>117</sup> and indicated that it is in line within the South African approach of interpretation of contracts in general. The principle set out by the House of Lords comes down to that if the parties can foresee that there is a possible dispute regarding the validity of the contracts, it is within their power to agree to provide that it be referred to an arbitrator for resolution. Accordingly, if the parties anticipate that there might be a dispute arising, that the contract itself might be invalid for lack of consensus or another reason, and the parties may agree that it is arbitrable.<sup>118</sup>

Taking the principle above into account together with the argument made by the respondent that it was not foreseen that there might have been

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<sup>115</sup> Case number: 492/2012 (2013) ZASCA 76 (judgment date 20 May 2013).

<sup>116</sup> *North East Finance Case*, Para 13.

<sup>117</sup> “Arbitration is consensual. It depends on the intention of the parties as expressed in their agreement. Only the agreement can tell you what kind of disputes they intended to submit to arbitration. But the meaning which parties intended to express by the words which they used will be affected by the commercial background and the reader understands purpose for which the agreement was made. Businessmen in particular are assumed to have entered into agreements to achieve some rational commercial purpose and an understanding of this purpose will influence the way in which one interprets their language.”

<sup>118</sup> *North East Finance Case*, Para 21.

fraudulent conduct on the part of the appellant and thus there was no intention that the arbitrator would be expected to resolve the issues relating to fraud. According to the Respondent it had envisaged that the arbitrator's role would be to resolve disputes around financial / accounting issues.<sup>119</sup>

The Supreme Court held that in light of the purpose of the settlement agreement, together with the intentions of the parties at the time of concluding the agreement, it was not intended that the validity or the enforceability of the contract, which was induced by fraudulent misrepresentations and various non-disclosures, would be attributable. The Supreme Court upheld the High Court's judgement and dismissed the appeal.<sup>120</sup>

### 3.7 Conclusion

There are various ways in which disputes can be resolved. But when a party wishes to enter into an arbitration agreement, the agreement needs to be in writing and both parties need to enter into the agreement willingly. As was also confirmed in the body of this chapter, South Africa is currently regulated by one act, the Arbitration Act 42 of 1965, which repealed all the ordinances which regulated arbitration in South Africa before 14 April 1965.

There are only some instances in which the court may interfere with an arbitration award, as listed in section 33 of the Act. The court also has the authority to make the arbitration award an order of court in terms of section 31 of the Act, provided that it is not contrary to public policy. An example where the award was not made an order of court is found in the *Cool Ideas* case<sup>121</sup> where the court indicated that if it were to make the award an order of court it

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<sup>119</sup> *North East Finance* Case Para 31 to 32.

<sup>120</sup> *North East Finance* Case, Para 33.

<sup>121</sup> *Supra*, Para 3.4.4.

would be contradictory to public policy since it will be undermining the principle of legality and sanction a criminal offence.

It was further confirmed in the *North East Finance* case<sup>122</sup> that an arbitration clause may be drafted in such a manner that it is severable from the rest of the contract to be separated from the rest of the contract and thus enforceable in the event that the contract is void or voidable.

In view of the discussion above and problems relating to disputes which arise from contracts, it is common practice to include extensive ADR clauses into contracts that regulate alternative dispute resolution procedures such as mediation and arbitration. These clauses are drafted in accordance with the intention of the parties to the contract and can sometimes deviate or add to the laws of arbitration which are already in place. The chapter that follows examines such clauses found in GCC 2010 (General Conditions of Contract for Construction Work).

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<sup>122</sup> *Supra*, Para 3.4.5.

## **CHAPTER 4:**

### **ADR and arbitration in the General Conditions of Contract for Construction Work (GCC) 2010 standard form contract**

#### **4.1 Introduction**

In this chapter the development of the General Conditions of Contract for Construction Work is discussed in this chapter. The ADR clause, specifically the arbitration clause, contained in the GCC is evaluated and the arbitration process is discussed throughout this chapter.

#### **4.2 Construction Contracts**

General Conditions of Contract for Construction Works 2010 is a construction contract. This raises the question on what exactly is a construction contract, and what is included in such a contract. A construction contract is:

"A formal agreement for construction, alteration, or repair of buildings or structures (bridges, dams, facilities, roads, tanks, etc.). A construction contract is distinct from a contract to assemble, fabricate, or manufacture."<sup>123</sup>

General Conditions of Contract for Construction Works 2010 can also be classified as a standard form contract. A need for these types of contracts came to light as there was space for written contracts that are economically executable without the need for extensive legal intervention. There is a need for standardisation of certain relationships and practices.<sup>124</sup> Although it is possible, and well within the rights of the parties to amend the standard form contract, the amendments should be kept to a minimum. The more amendments to the standard form contract the more the effectiveness decreases as the parties now has to read and understand the amendments

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<sup>123</sup> <http://www.businessdictionary.com/definition/construction-contract.html> (Last accessed 01 March 2016).

<sup>124</sup> The South African Council for the Quantity surveying profession, *Understanding the basic principles of construction law in the built environment*, (2014), Page 26.

which might result in misinterpretation and thus potential for subsequent disputes.<sup>125</sup>

### 4.3 General Conditions of Contract in Construction Work

The acronym used in the construction industry for this contract is 'GCC', the latest edition being known as 'GCC 2010' which replaced the previous 'GCC 2004' version. Throughout this chapter reference shall be made to either GCC 2010 or GCC 2004 respectively.

#### 4.3.1 Development of GCC 2004, GCC 2010 and GCC 2015

In the foreword of GCC 2004, also on the South African Institute for Engineers (herein after known as SAICE) website<sup>126</sup> it is stated that SAICE published six editions of General Conditions of Contract for Civil Engineering Works. When GCC 2004 was drafted, it replaced both the GCC 1990 version as well as the COLTO 1998 documents and the GCC 2004 was the first edition to satisfy the requirements of the Construction of Industry Development Board (herein after referred to as CIDB<sup>127</sup>) for standard contracts. After six years of application the GCC 2004 was revised and currently the GCC 2010, second edition, together with a management guide which was published not as a legal document, nor to form part of the contract, but purely as a tool to facilitate understanding of the GCC 2010. The latest available edition is GCC 2015 which was implemented on the 18<sup>th</sup> of September 2015.

#### 4.3.2 Objective of the GCC 2010

The main objective of the GCC 2010 is to provide administrative procedures which are fair, equitable, efficient, economic and transparent. It also provides for the allocation of risk. GCC 2010 also

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<sup>125</sup> Supra fn 105.

<sup>126</sup> [www.SAICE.org.za](http://www.SAICE.org.za) (Last accessed 5 September 2015).

<sup>127</sup> The CIDB is there to set up regulations and legislation in the construction industry as well as developing standards and best practice guidelines. The CIDB was established and currently regulated by the Construction Industry and Development Board Act 38 of 2000.

fully complies with all the regulations and requirements set out by CIDB.<sup>128</sup>

#### 4.4 Clause 10: Claims and Disputes

Before the changes to the current ADR clause of the GCC 2010 are discussed it would be beneficial to look at the ADR clause as a whole and to have a look at what the clauses entail. Following this paragraph there are two illustrations of the ADR clauses, the first being an overview of the different ADR clauses contained in the GCC 2010. The second illustrating is a more detailed schematic illustration of the manner in which each ADR clauses are regulated.

The first schematic illustration is an overview of the different ADRs contained in the GCC 2010. This illustration is only to indicate the different types of ADRs that the drafters of the GCC 2010 chose to regulate the solving of disputes.

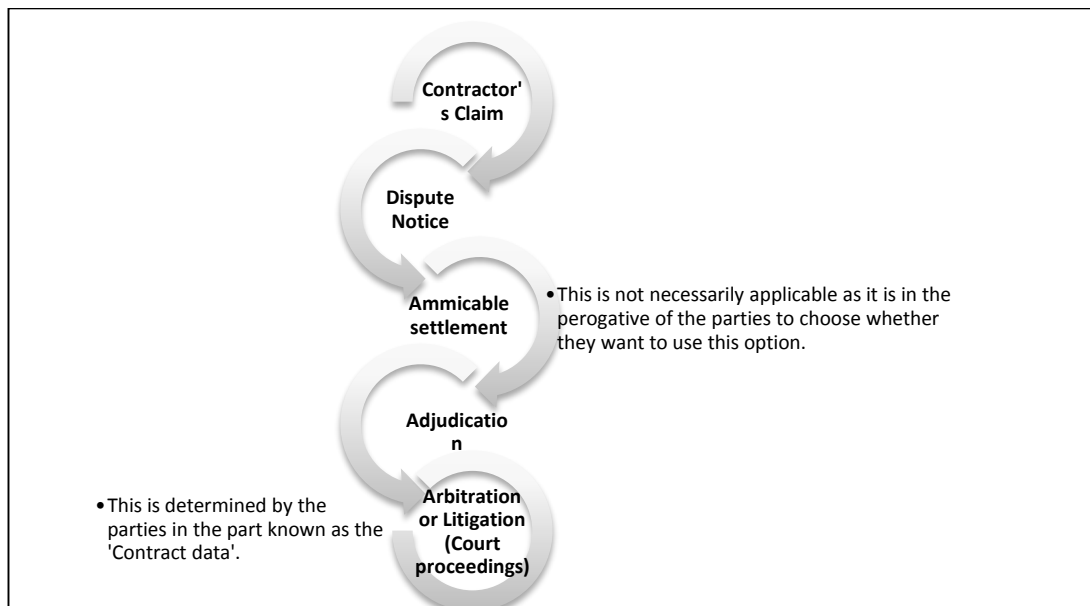


Figure 4.4.1: Overview of the possible ADRs to be used in GCC 2010<sup>129</sup>.

<sup>128</sup> The South African Council for the Quantity surveying profession, *Understanding the basic principles of construction law in the built environment*, (2014), Page 27.

<sup>129</sup> Author's own version

The second schematic illustration explains each clause and thus comprises of more detail regarding how the clauses regulate each different ADR.



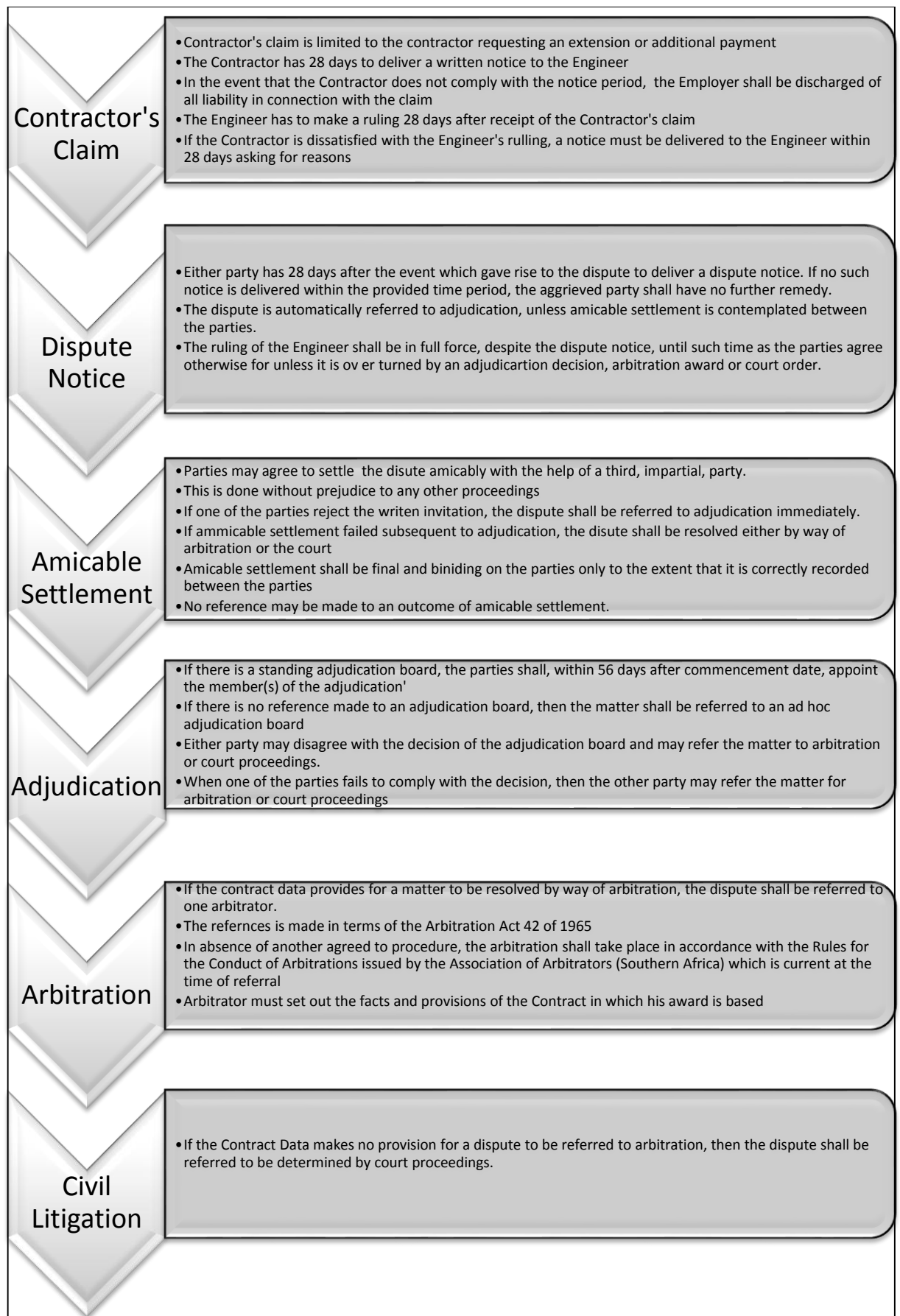


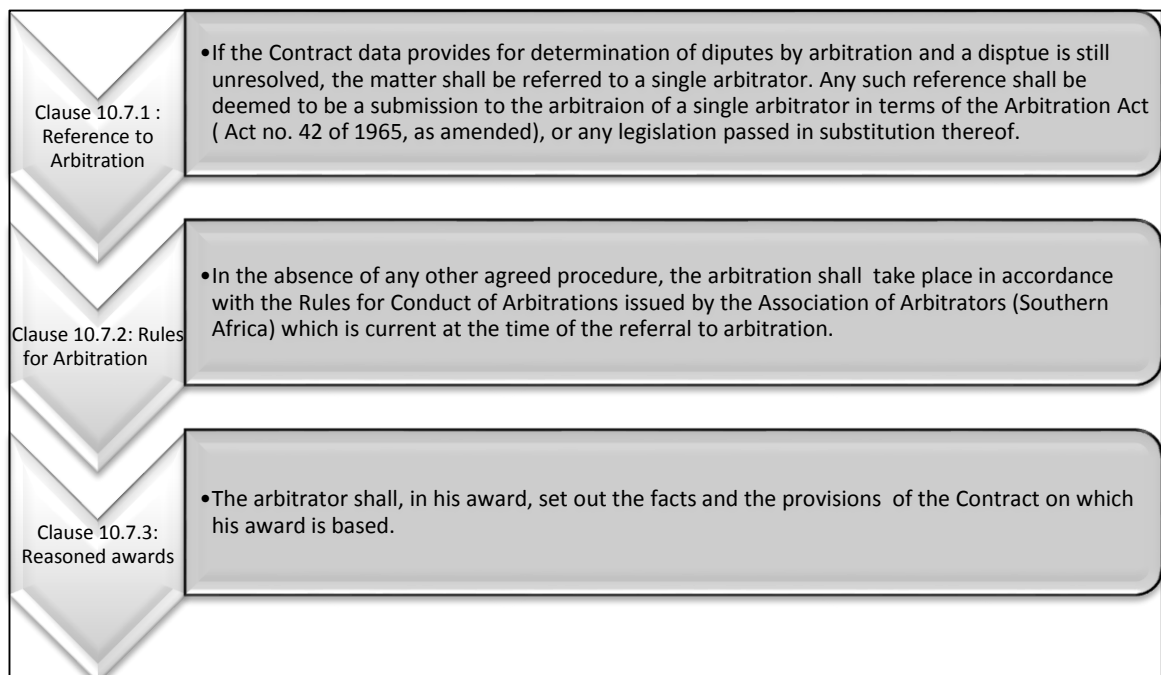
Figure 4.4.2: Detailed description of each ADR clause

#### 4.5 Clause 10.7: Arbitration

It should be noted, that after a dispute notice has been delivered, in compliance with clause 10.3.1, the matter shall be referred to adjudication, unless the parties are contemplating amicable settlement.

Adjudication is a pre-requisite for arbitration or litigation proceedings. Amicable settlement on the other hand is a prerogative of both the parties and can only be used as an ADR when both parties agree thereto. If the parties agree thereto clause 10.4 shall be applicable. Amicable settlement may be referred to at any stage during the dispute resolution procedure. However, amicable settlement fails subsequent to adjudication; the dispute shall be referred to arbitration or litigation proceedings.

In GCC 2010, the arbitration proceedings are regulated by clause 10.7. This clause is illustrated below as a direct quote from the GCC 2010 contract:



Therefore, the arbitration proceedings shall be regulated by the Arbitration Act, and thus the role the court plays is subject to the provisions as discussed in Chapter 3.

Any changes that the parties have in mind must be given effect to by incorporating express provisions of the changes to be made into the contract.

The drafter of the contract shall consider the intention of the parties and the current regulations of the Act and Rules of Conduct of Arbitrations as issued by the Association of Arbitrators and draft the necessary changes into the contract. All changes still have to comply with the Arbitration Act as well as the Constitution as it plays a role in the arbitration proceedings.

#### **4.6 Conclusion**

The GCC 2010 was drafted in South Africa and it incorporates the common law of arbitration and the Act which regulates the arbitration proceedings. The GCC 2010 furthermore requires that arbitration must take place in accordance with the Rules of Conduct of Arbitrations issued by the Association of Arbitrators. The provisions of the Act should be followed unless this is expressly excluded or modified in the agreement. The characteristic that is most noticeable of arbitration is that it is the only dispute resolution that offers a true alternative to litigation due to the fact that the arbitration award is final, binding and summarily enforceable, whereas this is not necessarily the case with adjudication.

## **CHAPTER 5:**

### **ADR and arbitration in the FIDIC standard construction contract**

#### **5.1 Introduction**

In this chapter the development of the standard form FIDIC contract is discussed. The ADR clauses, specifically pertaining to the arbitration clause, contained in the FIDIC contracts is evaluated and analysed critically. This chapter includes a specific discussion regarding the process which must be followed when a dispute is referred to arbitration. Some focus will also be placed on the different FIDIC contracts as well as the differences between their ADR clauses, specifically the arbitration clauses.

#### **5.2 FIDIC**

##### **5.2.1 Development of FIDIC**<sup>130</sup>

In 1913 consulting engineers met to discuss the possibility of forming a global federation, and on the 22<sup>nd</sup> of July 1913 FIDIC was established. FIDIC is an abbreviation for International Federation of Consulting Engineers. The founding principles for FIDIC which was adopted is quality, integrity and sustainability. FIDIC's standard form contracts in engineering has been used for many years between the Employers and Contractors on international construction projects. FIDIC's standard form contracts first consisted of three contracts, namely:

- i. Conditions of Contract for works of Civil Engineering Construction; Red Book (1987)
- ii. Conditions of Contract for Electrical and Mechanical Works including Erection in Site; Yellow Book (1987)

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<sup>130</sup> [http://fidic.org/about-fidic/federation/fidic history](http://fidic.org/about-fidic/federation/fidic%20history). (Last accessed 7 September 2015).

- iii. Conditions of Contract for Design – Building and Turnkey; Orange Book (1987).

### 5.2.2 Different forms of FIDIC<sup>131</sup>

Due to the past work in updating FIDIC red and yellow books, it came to the attention of FIDIC that there are some projects that does not fall within the scope of the existing books. Therefore, in September 1999, FIDIC not only updated the existing books but also extended the range to be suitable for the majority of construction works as well as plant installation projects.

The different FIDIC contracts all marked as “First Edition 1999” includes the following:

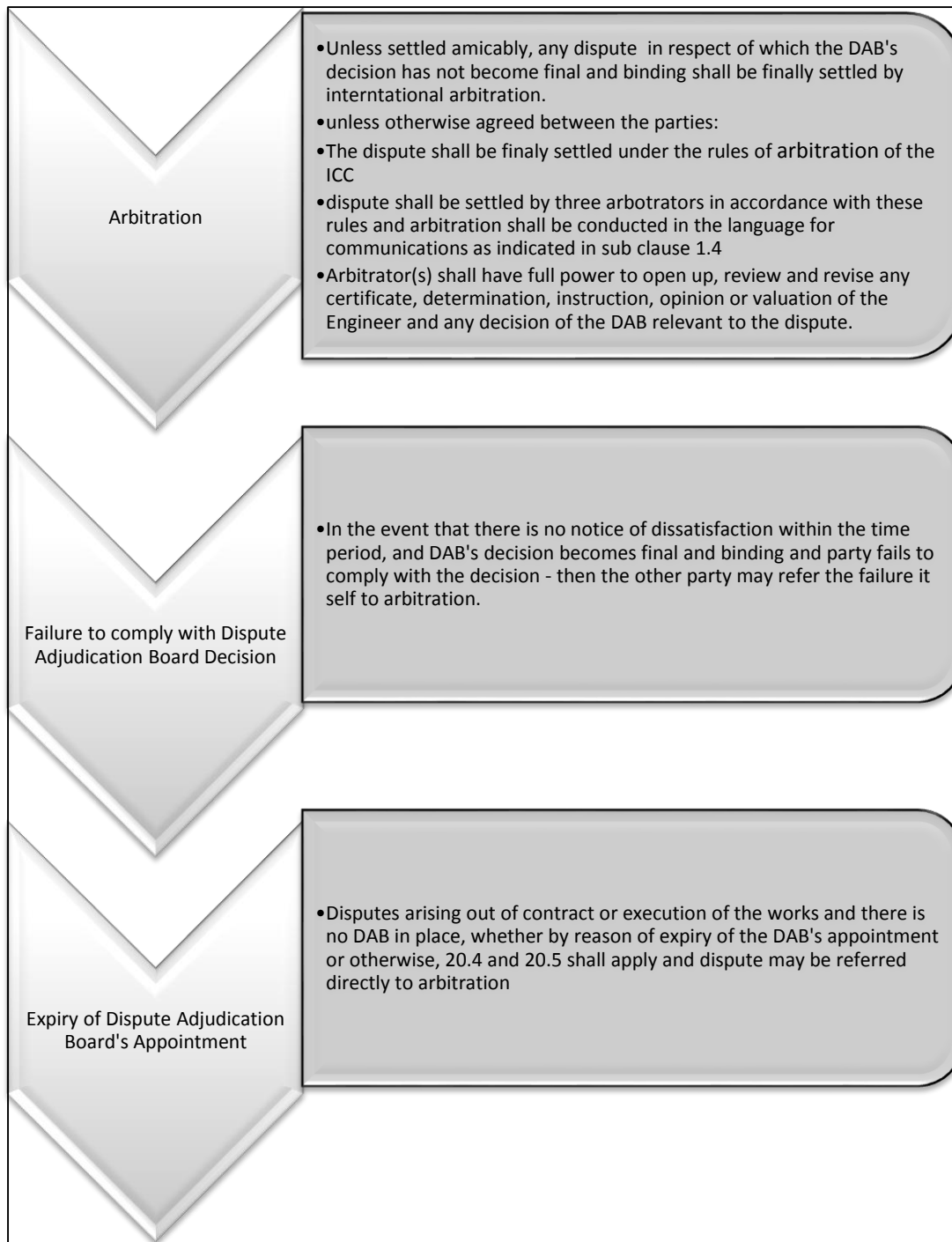
- i. Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer: The Construction Contract;
- ii. Conditions of Contract for Construction for Building and Engineering Works designed by Employer (MDB Harmonised Edition) – for bank finances projects only: The MDB Construction Contract;
- iii. Conditions of Contract for Plant and Design- Build for electrical and Mechanical Plant and for Building and Engineering Works Designed by the Contractor: The Plant and Design-Build Contract;
- iv. Conditions of Contract for EPC/Turnkey Projects: The EPC/Turnkey Contract;
- v. Short Form of Contract: The Short Form;
- vi. Dredgers Contract (based on the Short Form Contract): Dredgers Contract;

## 5.3 **Clause 20: Dispute Resolution**

A figure illustrating an overview of the Clause 20, known as the Dispute Resolution clause of the standard form FIDIC contract is found below.

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<sup>131</sup> Supra fn 123.



As this topic specifically pertains to the arbitration clause contained within the chosen FIDIC contract, a detailed discussion of the clause follows.

## 5.4 Arbitration in FIDIC

The arbitration process in the chosen FIDIC contract is regulated by clause 20.6.

“Unless settled amicably, any dispute in respect of which the DAB’s decision (if any) has not become final and binding shall be finally settled by international arbitration. Unless otherwise agreed by both parties:

- a.) The dispute shall be finally settled under the Rules of Arbitration of the International Chambers of Commerce,
- b.) The dispute shall be settled by three arbitrators appointed in accordance with these rules; and
- c.) The arbitration shall be conducted in the language for communications defined in sub clause 1.4 [law and language].

The arbitrator(s) shall have full power to open up, review and revise any certificate, determination, instruction, opinion or valuation of the Engineer, and any decision of the DAB, relevant to the dispute. Nothing shall disqualify the Engineer from being called as a witness and giving evidence before the arbitrator(s) on any matter whatsoever relevant to the dispute.

Neither party shall be limited in the proceedings before the arbitrator(s) to the evidence or arguments previously put before the DAB to obtain its decision, or to reasons for dissatisfaction given in its notice of dissatisfaction. Any decision of the DAB shall be admissible in evidence in the arbitration.

Arbitration may commence prior to or after completion of the Works. The obligations of the Parties, the Engineer and the DAB shall not be altered by reason of any arbitration being conducted during the progress of the Works.”

It should however be noted that amicable settlement must be attempted before commencement of the arbitration, although, if the parties do not agree otherwise, arbitration shall commence 56 days after the notice of dissatisfaction has been given, even though no attempt has been made for amicable settlement. Therefore, amicable settlement is not a fixed pre-requisite for arbitration proceedings.

As is regulated in Clause 20.6,<sup>132</sup> the rules which will be applied to arbitration are the ICC<sup>133</sup> Rules of Arbitration. Before discussing the procedure as contained in ICC Rules of Arbitration (herein after referred to as the Rules), it

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<sup>132</sup> Clause 20.6 of FIDIC Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer

<sup>133</sup> International Chamber of Commerce.

is important to know that the rules currently used has been in force since 1 January 2012.

In terms of Article 4 of the Rules, a request for arbitration must be submitted to the Secretariat. The Secretariat shall notify the parties that the request for arbitration was received and the date on which it was received shall serve as the commencement date for arbitration. Article 6(2) provides that where the parties agree to use the Rules for arbitration proceedings, the parties automatically accept that the arbitration shall be administered by the court. In other words, the parties agree that the court plays an active role in the arbitration proceedings.

- a.) Article 11 contains general provisions regarding the appointment of arbitrators. In terms of Article 11(1) an arbitrator must remain independent and impartial throughout the proceedings. As regulated by sub article 2, the arbitrator must sign a statement of acceptance, availability, impartiality and independence. This statement must be provided to the Secretariat which in turn forwarded it to the parties and then the parties must comment thereon within a time period as fixed by the Secretariat. Sub article 4 regulates that the decision of the court regarding the appointment, confirmation, challenge or replacement shall be final. When the arbitrator accepts the appointment, he or she must carry out the responsibilities in accordance with the rules.
- b.) Article 27 provides that a draft award must be submitted to the court for approval pursuant to Article 33. Article 31 indicates that if there is more than one arbitrator, the award shall be made in accordance with the majority, and in the event that there is no majority, the president of the tribunal shall make the award alone. An interesting article is Article 32 which regulates that if the parties were to settle the matter, the settlement agreement may be recorded in the form of an award. This article shall only be enforceable if the parties request that it be recorded in the form of an award and if the arbitral tribunal agrees thereto.
- c.) Article 33 requires that an award must be submitted to court as a draft award. The court shall then have the opportunity to lay down modifications as to the form of the award and, without affecting the arbitral tribunal's liberty of decision, may draw its attention to points of substance. It is also important



to mention that no award shall be rendered unless it is approved by the court.

d.) Article 34 regulates that every award shall be binding on the parties. It goes further to indicate that if the parties submit the dispute to arbitration under these Rules, the parties undertake to carry out any award without delay and shall be deemed to have waived their right to any form of recourse as such waiver can validly be made.

## **5.5 Conclusion**

FIDIC has been around for several years. During this time the necessary changes has been made to the standard form contracts to make provision for different situations, and the clauses have been revised to eliminate possible ambiguous meanings. Although changes are always possible to give effect to the intentions of the parties, it can be said that the FIDIC standard form contracts mostly appear to require few to no changes.

In terms of the chosen FIDIC contract, the arbitration process, in the event of a dispute, shall be regulated by the ICC rules of Arbitration. In accordance with these rules, the international court plays a rather significant role in the arbitration award. The said role shall be discussed in more detail in Chapter 6.

## CHAPTER 6:

### **Comparison between GCC 2010 and FIDIC arbitration procedures**

#### **6.1 Introduction**

This chapter contains the comparison between the rules and process used in the arbitration of a dispute between the standardised ADR clauses contained in the chosen FIDIC contract as well as the GCC 2010. Furthermore, possible changes to the South African arbitration law are recommended.

#### **6.2 Differences between GCC 2010 and FIDIC arbitration procedures**

As discussed above, the GCC 2010 follows mainly the Arbitration Act, whilst the FIDIC arbitration clause requires the Rules of Arbitration of the International Chamber of Commerce to be followed.

In the column below a comparison is made between the Arbitration Act and the Rules of Arbitration of ICC.

<b>Arbitration Act</b>	<b>Rules of Arbitration of ICC</b>
Section 13 provides that the parties may consent to the termination of the appointed arbitrator. The court may also be approached by way of application, and the court may, if good cause is shown, then remove the arbitrator	Article 11 of ICC rules of arbitration provides that the arbitrator(s) must at all times be independent and impartial and that the court has the final decision on whether the arbitrator is appointed or not and does not have to provide a reason to the parties regarding the final decision.
Section 28 indicates that the award is final and binding and that the parties	Article 34 indicates that the decision shall be final and binding

<p>must abide thereby and complies with the award. But Section 33 provides exceptions to the above.</p>	<p>and any other form of recourse is waived by the parties when they agree to arbitration under the ICC rules of arbitration.</p>
<p>Section 31 indicates that an award may be made an order of court on application by one of the parties and the court will then have the power to correct any clerical mistakes or errors arising from accidental slip or omissions. When the court makes the award an order of court the award may be enforced as any other judgment.</p>	<p>Articles 27, 32 and 33 regulates that a draft award must be submitted to the court before it can be made a final order. The court shall have the opportunity to lay down modifications with regards to the form of the award. The Court shall also have the opportunity to draw the tribunal's attention to points of substance.</p>
<p>Section 33 regulates when an award may be set aside. This is also done on application to court to set aside the order, but the circumstances under which the court will consider setting aside the order is limited to the following:</p> <ul style="list-style-type: none"> <li>• Misconduct on the part of the arbitrator;</li> <li>• Gross irregularities in the conduct of the arbitrator during the arbitration procedure; or</li> <li>• In the event that the award has been improperly obtained;</li> </ul> <p>The section also regulates that the application must be made within 6 weeks after discovering the corruption and the application must be brought within 3 years after the award was made.</p>	<p>It is also regulated that no award shall be final and given to the parties unless it has been approved by the court.</p> <p>The parties also have the option, if the tribunal agrees thereto, to record any settlement agreement reached in the form of an award.</p>

Considering the above, there are a few differences between the manner in which arbitration proceedings are regulated in terms of the Arbitration Act and the ICC Rules of Arbitration. The most obvious difference can be found in the role that the International Court plays when the arbitration falls under the ICC Rules of Arbitration. According to the Arbitration Act the South African courts can only interfere with an award in the event that an application is brought in terms of Section 33. This application must also be brought within 6 weeks after discovering that there was corruption and also within 3 years from date of award. The ICC Rules of Arbitration, on the other hand, regulates that no award shall be made final if it has not been approved by the court.

The second difference is found in the appointment of the arbitrators. In South African law the contract regulates that the parties shall be in a position to determine who shall be the arbitrator. In the event that the parties are not able to agree on an arbitrator, it is usually drafted into the contract that an independent third party shall appoint an arbitrator. It is then regulated by Section 13 of the Arbitration Act when an arbitrator may be replaced. This clause however does not make provision for the recusal of the arbitrator.

In terms of Article 11 of the ICC Rules of Arbitration the arbitrator must disclose to the Secretariat, in writing, any facts that might affect his/her independence or impartiality. The prospective arbitrator must also sign a statement of acceptance, availability, impartiality and independence. The International Court then has the decision to appoint the arbitrator, and that decision shall be final and binding on the parties.

### **6.3 Lacuna(s) in South African law**

There will always be lacunas in law as it is not possible to cover all aspects or possible problems at first draft. In my view, and considering the above, the following lacunas are found within the South African arbitration law:

- 1.) The first lacuna in the South African law of arbitration can be found in the inability of the arbitrator to recuse him - / herself. Currently it is not possible for an arbitrator to recuse himself from being an arbitrator. The parties can agree that the arbitrator is unsuitable and another can then be chosen, but the arbitrator cannot recuse himself.

The international (ICC) rules also do not make provision for recusal, but the rules provide for the arbitrator to complete a statement which must be signed to ensure availability, impartiality and independence. In this said statement the arbitrator also accepts the role as arbitrator.

- 2.) Another lacuna that can be drawn from the discussion above is the role that the court plays in the arbitration process. In South Africa the court plays a passive role and is only permitted to interfere with the appointment of an arbitrator or an award under certain circumstances.

However, in terms of ICC the international arbitration court plays a more active role. It has the final say in the appointment of the arbitrator(s) and a draft award needs to be submitted to the court before it may be made a final award. It is also not necessary for any of the parties to bring an application before the international court to ensure that the arbitration award is enforceable.

- 3.) Another Lacuna currently in the Act is that it does not make provision for international arbitration. The Act does not distinguish between domestic arbitration and international arbitration which makes South Africa an unequal competitor in hosting arbitration proceedings.

## **FINAL CONCLUSION AND RECOMMENDATIONS**

The Constitution of Republic of South Africa is the supreme law of South Africa and therefore influences arbitration proceedings. Section 34 of the Constitution does not apply to private arbitration directly, but the arbitration proceedings still have to comply with the values and fundamental principles as set out in the Constitution.

The Constitution also regulates that international law must be considered when interpreting contracts. This creates the opportunity for contracts, written in a different jurisdiction, to be used and interpreted correctly in South African law. The Constitution also regulates that an interpretation consistent with international law is preferred over an interpretation inconsistent with international law.

As regulated by the Arbitration Act, there are only certain circumstances under which the courts may interfere with the award made by the arbitrator. These circumstances are limited to the circumstances listed in the Act. The parties also need to bring an application to court before the court will be able to play a part in the arbitration process and the courts power / role is also limited to the provisions recorded in the Act.

In arbitration rules of ICC, the court plays an active role and has the power to make a final decision in appointing or choosing an arbitrator. The international court also has to be consulted before an arbitration award may be made a final award by the arbitrator.

This study recommends that the current Arbitration Act should be changed to incorporate some of the more beneficial regulations of the Rules for Arbitration of ICC.

### **Recommendation**

Considering the above it is recommended to draft the following into the arbitration act:

- a.) that a prospective arbitrator shall have the opportunity to recuse him or herself before a certain event in the arbitration process, alternatively he or she must formally accept the role as arbitrator, and may also reject based on valid reasons, such as conflict of interest.

- b.) It is also recommended that the courts should play a more active role in the arbitration process in South Africa. The view that if the courts did play a more active role, the award made in the *Cool Ideas* case would never have been made an award as the award was never enforceable in law can be supported. In my view costs were wasted in an attempt to make the award an order of court.
- c.) The International Arbitration Bill as drafted by the South African Law Reform Commission has merit and it would benefit South African Arbitration to distinguish between domestic arbitration and international arbitration.

**WORDS: 16 607**

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