

**Consumer arbitration in South Africa and its effect on the
consumer's right to redress and enforcement**

By

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ACKNOWLEDGEMENT

“Success is not measured by what you accomplish, but by the opposition you have encountered, and the courage with which you have maintained the struggle against overwhelming odds.”

-Orison Swett Marden

The struggle began long before the completion of a doctoral thesis and the challenges, as enormous as they may have been, never succeeded in discouraging the realization of a beautiful dream. It has always been my dream to be educated and this has now been achieved. It is therefore, time to pat myself on the back and say “you made it” by the grace of God. This achievement was not without immense support and sacrifices from other important individuals, true to the adage that no man is an island. A special thanks to my former promotor, Prof Caroline Nicholson, who provided a skilful and strategic guidance. Thank you for responding to my cry for help when I needed you most. God bless you.

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LIST OF ABBREVIATIONS

AAA	American Arbitration Association
AALCC	Asian-African Legal Consultative Committee
ADP	Acting Deputy President
ADR	Alternative Dispute Resolution
AFA	Arbitration Fairness Act
AFSA	<i>Arbitration Foundation of Southern Africa</i>
CCMA	Commission for Conciliation, Mediation and Arbitration
CPA	Consumer Protection Act
DAC	Departmental Advisory Committee
DEIC	Dutch East Indian Company
DTI	Department of Trade and Industry
DoJ&CD	Department of Justice and Constitutional Development
ECC	European Economic Community
FAA	Federal Arbitration Act
ICA	Industrial Conciliation Act
ICC	International Chamber of Commerce
LRA	Labour Relations Act
NCC	National Consumer Commission
PAJA	Promotion of Administrative Justice Act
PBA	Protection of Business Act
SA	South Africa
SALRC	South African Law Reform Commission
SCA	Supreme Court of Appeal
USA	United States of America
UK	United Kingdom
UN	United Nations

UNCITRAL United Nations Commission on International Trade Law
UNGA United Nations General Assembly

KEY CONCEPTS/ WORDS

Commercial arbitration, competence-competence, separability, right of access to court, consumers, business practices, unequal bargaining power, consumer protection, party autonomy, ad hoc arbitration, *compromissium*, New York Convention, UNCITRAL.

SUMMARY

The thesis entitled “Consumer arbitration in South Africa and its effect on the consumer’s right to redress and enforcement ” notes with concern the outdated and inadequate nature of the Arbitration law currently applied in South Africa. The fact that the Act was enacted in 1965 and has never been amended highlights the desperate need to review the prevailing arbitration law with a view to aligning it with the current needs of the business world. The thesis addresses the concern that consumers are not adequately protected by the current arbitration law and thus substantially develops the discourse on the topic of arbitration in situations of unequal bargaining power. It raises three primary research questions in this context. The first question reads thus, if private arbitration is properly conducted should it still provide the parties with the envisaged benefits? Secondly, is private arbitration constitutional, especially as it impacts upon consumers’ contracting with large corporations? Thirdly, is the private arbitration process as it is currently applied, constitutional as far as it denies parties an appeal on merits against an award that is clearly wrong? The thesis attempts to answer these questions and offer recommendations for the South African Law Reform Commission (SALRC) within the specific context of commercial arbitration. In addressing these research questions, the thesis incorporates a brief overview followed by a detailed discussion of the Arbitration law framework in South Africa and abroad. The discussion of arbitration abroad is done in order to identify best practices, which could be adapted to suit the South African environment. International Arbitration law receives attention and a few observations regarding how selected foreign jurisdictions treat arbitration. Finally, the thesis explores the possibility of establishing an independent institution that will be fully equipped to handle arbitration proceedings from inception to completion.

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CHAPTER 1: INTRODUCTION

1.1 INTRODUCTION

Arbitration refers to a process by which the parties to a dispute voluntarily and jointly ask a third party, the arbitrator, to hear both sides of their dispute and make an award that they undertake in advance will be accepted as final and binding.¹ The purpose of introducing arbitration into South African law was to make an alternative to litigation available, which would be capable of effectively resolving disputes finally, speedily, privately and cost effectively.² Private arbitration is routinely utilised in commercial environments. For this reason, not only must it keep pace with constitutional demands but it must also adapt to the changing face of business. Although this thesis touches on other forms of arbitration, its primary focus is private arbitration.

The thesis encompasses a critical evaluation of the current arbitration law framework in South Africa with a view to establishing its shortcomings with regard to private arbitration. An assessment of the shortcomings identified is used to inform suggestions for legal development that align arbitration practices with current business practices within the prevailing constitutional context. This analysis takes place against the backdrop of a brief historical overview of South African arbitration law and the comparison of that law and legal development with international arbitration law provisions and the arbitration laws applicable in selected foreign jurisdictions. This comparison is used to identify best practice internationally and in other jurisdictions that might be adapted to suit the South African context. Arbitration law in South Africa is regulated by the Arbitration Act³ that was enacted in 1965 and

¹ Havenga P & Havenga M (2007) *General principles of commercial law* (6 ed) 298 (Hereafter referred to as Havenga & Havenga).

² Butler D “South African arbitration legislation - the need for reform” (1994) vol 27, *CILSA* 118-163 121. Arbitration is one of the most common types of alternative dispute resolution (ADR) followed by a wide variety of other ADR processes such as conciliation, mediation, negotiations and the hybrids con-arb, med-arb (hereafter referred to as Butler (1994)).

³ Act 42 of 1965 (The Act). The thesis focuses on making recommendations for the updating of the Arbitration legislation in South Africa. However, the term “South African Arbitration law” incorporates the entire South African law governing arbitration including the common law, legal precedents and the Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977. For the purpose of this research references to the South African Arbitration law that require an update will be references to the 1965 Act unless otherwise stated or evident from the context.

persists unchanged despite changing business practices⁴ and the promulgation of the Constitution.⁵

The unchanged status of the 1965 Arbitration Act supports the need for current arbitration law to be reviewed and amended to align it with prevailing business needs and the Constitution.⁶ Redfern and Hunter raised concerns regarding the current state of arbitration, *inter alia*, when they indicated that arbitration has lost its initial simplicity and has become more complex, institutionalised and legalistic.⁷

This fundamental shift in the approach to arbitration has resulted in the current form of arbitration being characterised by the high costs, legalism, formality, and delays in finalisation parties were trying to avoid. This research explores the possibility of establishing an institution separate from the court system that is authorised to handle arbitration from inception to enforcement in the hope of reclaiming the previous benefits of arbitration.

The thesis substantially develops the discourse on the topic of arbitration in situations of unequal bargaining power and, to this end, incorporates, *inter alia*, a detailed analysis by Sopata⁸ of the relevant literature on *Mitsubishi Motors v Soler Chrysler-Plymouth*⁹ that advocated the need to more closely consider the position between monopolists and their customers in the case of arbitration clauses. It is argued that such customers have the potential to include consumers. Sopata in her commentary on the case, raises awareness regarding the need to protect weaker contracting parties from being forced by monopolists such as large corporations to settle their disputes through private arbitration by requiring them to enter into a contract containing a compulsory arbitration clause.¹⁰ The contract may often be in respect of items or services that cannot be sourced otherwise or elsewhere. In such

⁴ Neneh B & Van Zyl J “Achieving optimal business performance through business practices: Evidence from SMEs in selected areas in South Africa” www.unisa.ac.za/contents/faculties/service_dept/docs/sabview_16_3_chap_6.pdf 121 (accessed on 30 Oct 2013).

⁵ Constitution of the Republic of South Africa, 1996.

⁶ *Ibid.*

⁷ Redfern A & Hunter M (2004) *The law and practice of international commercial arbitration* (4ed) 5.

⁸ Sopata L “*Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*: International Arbitration and Antitrust Claims” (1985-1986) vol 7, issue 3, *Nw J. Int'l L. & Bus* 595-617 601.

⁹ *Mitsubishi Motors Corp. v Soler Chrysler Plymouth, Inc.* 473 U.S.614 (1985).

¹⁰ Sopata 597.

circumstance, consumers have no option but to sign a contract containing an arbitration clause.

This research acknowledges that consumer arbitration may well be international in instances where the supplier and the consumer concluded a transaction based in different countries. Thus, the effect of legal restrictions on consumer arbitration in the consumer's home state on the home state's obligations under international law in terms of the Convention on the Recognition and Enforcement of Foreign Arbitral awards of 1958 (the New York Convention) demands consideration.

Large corporations with extensive resources are in an advantaged position when dealing with unsophisticated consumers. This position of advantage is further enhanced when the appointment process of the arbitrator is submitted to party autonomy. The stronger party due to inequality in bargaining power is likely to impose appointment procedures, which may be disadvantageous to the weaker party.¹¹

Where a consumer agrees to submit to an arbitration process, he or she forfeits any right of access to appeal the arbitral award, no matter how unfair or prejudicial it may prove to be. This is a consequence that may be unforeseen by the consumer at the time of contracting.

The issue of unequal bargaining power was explored to some extent, and somewhat superficially, by the South African Law Reform Commission (SALRC)¹² in its investigation into South African Arbitration law. The SALRC acknowledged that the Act did not offer adequate protection to consumers. Some suggestions were made regarding consumer protection in the Domestic Arbitration Bill proposed by Project 94. These proposals are dealt with fully in chapter 3 below.

¹¹ Lew J, Mistelis A & Kroll S (2003) *Comparative international commercial arbitration* 252.

¹² SALRC (2001) Domestic arbitration project 94 discussion paper 83. The object of the SALRC is to undertake research on all branches of the law subject to the approval of the Minister of Justice and Constitutional Development. The SALRC must thereafter submit recommendations to the Government regarding any development, improvement, modernisation or reformation of any law investigated that it deems necessary. See SALRC website: <http://www.justice.gov.za/salrc/> (accessed on 02 Mar 2015).

As private arbitration often flows from contractual undertakings, the contractual freedom of parties to commit to arbitration to the exclusion of court intervention is examined. Respect for party autonomy demands that parties' choices, as reflected in the contract be respected.

Respect for party autonomy is upheld by such legal luminaries as Gauntlett.¹³ The question begs however, as to whether party autonomy should extend to the right of parties to waive their Constitutional right of access to the courts, especially within the context of contracts between parties with unequal bargaining power.

The possible waiver of the right of access to the courts by the simple expedient of signing a contract containing an arbitration clause does not imply a total exclusion of the court from any role in private arbitration. The courts are integral to the enforcement of arbitral awards, which must be made orders of the court before enforcement is possible.¹⁴ Once the award is made an order of the court it becomes enforceable in the same manner as any court judgment with the added benefit of finality. Review of arbitral awards is only provided for in very limited circumstances determined by the Act. Despite the status afforded to the award that has been made an order of court, the arbitration process lacks the formality and strict regulation that characterises litigation.

Special attention is therefore given to the constitutionality of private arbitration as far as it bars parties from benefiting from the right contained in section 34¹⁵ of the Constitution, which guarantees access to the courts. The treatment of review of private arbitration differs from that of formal arbitration. This different treatment of the two forms of arbitration in this regard demands that the constitutionality of the position as applied to private arbitration be scrutinised.¹⁶

¹³ Gauntlett J "The legal system of South Africa and its approach to arbitration" *Paper delivered at the SADC International Arbitration Workshop, Le Victoria, Mauritius*, 11 and 12 April 2007 28 (hereafter referred to as Gauntlett).

¹⁴ The role of the courts in arbitration in South Africa is examined Ch 3 below.

¹⁵ S 34 reads "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

¹⁶ The detailed discussion of the various types of arbitration is dealt with below.

Parties to a formal arbitration, also known as a statutory arbitration, are afforded a number of opportunities not available to parties to a private arbitration, to challenge the award.¹⁷ For example, sections 33 and 34 of the Constitution that are two independent remedies are available to parties involved in formal arbitration.

The question begs, why are benefits afforded parties to formal arbitration denied to parties to private arbitration? Is the disparity in the treatment of the two forms of arbitration constitutional? In answering this question, it should be borne in mind that the Constitution promotes the right to equal protection of the law and access to the courts.¹⁸ Despite these ideals, no provision is made in the Act for an appeal process in private arbitration. This absence of an appeal process, coupled with the limited grounds for review in private arbitration proceedings potentially negatively impacts upon the rights of arbitration parties to access the courts particularly those who are involved in a relationship characterised by inequality in bargaining power.

From the above it is clear that the distinction between different forms of arbitration and how they differ from each other is central to this thesis. For this reason, a clear understanding of the different forms of arbitration is essential. A brief overview of the forms of arbitration appears below.

1.2 TYPES OF ARBITRATION

Arbitration is a form of alternative dispute resolution, which has been used since time immemorial. However, the process takes different shapes and forms depending on the agreement between the parties and whether or not the arbitration is governed by legislation that formalises the arbitration process. In the event of arbitration regulated by the LRA, parties are involved in a formal arbitration.¹⁹

1.2.1 STATUTORY ARBITRATION

Parties to a statutory arbitration under the LRA do not have the freedom to elect an arbitrator of their choice; instead, the matter is dealt with by the institution and

¹⁷ Labour Relations Act 66 of 1995 ss 144, 145 & 146 hereinafter referred to as LRA.

¹⁸ LRA s 33.

¹⁹ The detailed discussion of the various types of arbitration is dealt with below.

according to the procedures established in terms of the relevant Act.²⁰ The parties involved in a dispute may inform the Commission of their preferred individual and request such to be taken into consideration to the extent reasonably possible when the commissioner is appointed.²¹

The Industrial Conciliation Act²² (ICA) introduced statutory arbitration into South Africa in 1924. This Act was subsequently amended in 1937 and again in 1956.²³ The 1956 Act was amended in 1979 and renamed the Labour Relations Act (1979 LRA).²⁴ The following appears in Borat *et al's* discussion of the history of the South African labour relations landscape:²⁵

“The adoption of the 1956 LRA resulted in a narrowly focused labour relations system, limited to a competition between management and labour. The system was not only procedurally complex but also administratively burdensome. Within the spirit of South Africa’s negotiated political settlement, the LRA of 1995 replaced the 1956 LRA. Among the intended purposes of the new LRA was the promotion of an effective and efficient labour dispute resolution system in order to overcome the lengthy delays, to save on costs and to reduce the incidence of industrial action which characterised the apartheid dispensation. This marked a new era for South Africa as the labour relations system moved ostensibly from confrontation to co-operation.”

The introduction of the 1956 LRA brought with it some of the concerns that encouraged parties to resort to private arbitration of employment disputes. Private arbitration of employment disputes was in existence as early as the 1980s and were only numerically reduced by the introduction of the Labour Relations Act of 1995 (1995 LRA) which satisfied some of the concerns resulting from the 1956 LRA.²⁶ The 1995 LRA radically changed the method by which disputes emanating from labour relationships are handled.²⁷

²⁰ S 112.

²¹ See s 136 (5)(a).

²² Act 11 of 1924.

²³ Borat H, Pauw K & Mncube L “Understanding the efficiency and effectiveness of the dispute resolution system in South Africa: An analysis of CCMA Data” (2007) working paper no 09/137 *University of Cape Town Development Policy Research Unit 2* (hereafter referred to Borat *et al*).

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ Jordaan B & Stelzner S (2002) *Labour arbitration 2* (hereafter referred to as Jordaan & Stelzner).

²⁷ *Ibid.*

The Interim Constitution imposed certain obligations on the state and individuals in the labour environment. Amongst the obligations placed upon the state by the provisions of section 27 of the Interim Constitution was the responsibility to ensure formal, statutory regulation of labour relations. The Interim Constitution²⁸ sought to ensure protection of worker's rights in the work environment. The applicable provision states:-

- (1) Every person shall have the right to fair labour practices.
- (2) Workers shall have the right to form and join trade unions, and employers shall have the right to form and join employers' organisations.
- (3) Workers and employers shall have the right to organise and bargain collectively.
- (4) Workers shall have the right to strike for the purpose of collective bargaining.
- (5) Employers' recourse to the lock-out for the purpose of collective bargaining shall not be impaired, subject to section 33 (1)."

These rights were again captured in section 23²⁹ of the Constitution, which was based on section 27 above. The 1995 LRA attempts to realise the section 27 rights by regulating the relationship between employers and employees.

The 1995 LRA established the Commission for Conciliation, Mediation and Arbitration (CCMA),³⁰ the Labour Court and the Labour Appeal Court.³¹ Parties to arbitrations in terms of the 1995 LRA are not at liberty to elect an arbitrator of their

²⁸ Act 200 of 1993.

²⁹ S 23 states that: "(1) Everyone has the right to fair labour practices.

(2) Every worker has the right -

(a) to form and join a trade union;

(b) to participate in the activities and programmes of a trade union; and

(c) to strike.

(3) Every employer has the right -

(a) to form and join an employers' organisation; and

(b) to participate in the activities and programmes of an employers' organisation.

(4) Every trade union and every employers' organisation has the right -

(a) to determine its own administration, programmes and activities;

(b) to organise; and

(c) to form and join a federation.

(5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1).

(6) National legislation may recognise union security arrangements contained in collective agreements. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1)."

³⁰ The commission's main function is to conciliate, arbitrate and mediate disputes.

³¹ LRA s 112.

own choice,³² to determine the powers of the arbitrator or the applicable terms of reference as all of these are regulated by the Act. In the event that it is required in terms of the LRA that the dispute should be resolved through arbitration it is mandatory upon the Commission to appoint a commissioner who shall arbitrate the dispute between parties.³³

An arbitration under the 1995 LRA can be dealt with by the CCMA or the relevant bargaining council.³⁴ The CCMA is an independent statutory body funded by the state.³⁵ It appoints arbitrators, who are referred to as commissioners, and determines the venue, time and date of the process.³⁶ The Commissioner is empowered to use his or her discretion regarding how the hearing should be conducted.³⁷ The Commissioner then deals with the substantive merits of the dispute in a process characterised by a minimum of legal formality. The Commissioner's award is final and binding and is self-executing if found to be in full compliance with the provisions of section 143 (3) of the 1995 LRA.³⁸

CCMA monetary awards accumulate interest from the date of the award at the same rate as the rate prescribed from time to time in respect of a judgment debt in terms of section 2 of the Prescribed Rate of Interest Act.³⁹ Failure to comply with an award that orders a performance of an act other than the payment of money may trigger contempt proceedings in the Labour Court.⁴⁰

Application for rescission or variation of CCMA awards and rulings can be made under section 144 of the 1995 LRA by the affected party or a concerned Commissioner. Such an application will succeed where the award or ruling was

³² Jordaan & Stelzner 4. The parties may state a preference for particular commissioners which the Commission should take into consideration when making the appointment. See also LRA s 136(5).

³³ LRA s 136.

³⁴ Borat *et al* 4.

³⁵ *Idem* 5.

³⁶ Jordaan & Stelzner 3.

³⁷ LRA s 138.

³⁸ This means no court intervention such as that permitted in private arbitrations is required before the award could be enforced. See *Viljoen v Nketoana Local Municipality* vol 24, issue 2 *Industrial LJ* 437-451 at 440-441.

³⁹ LRA s 143 (2). See also The Prescribed Rate of Interest Act 55 of 1975. This differs in private arbitration as the benefits of an automatic application of the Prescribed Rate of Interest Act does not exist.

⁴⁰ LRA s 143(4). This demonstrates how self-sufficient statutory arbitration is as opposed to private arbitration.

erroneously issued or sought in the absence of any party affected by the said award;⁴¹ the award is ambiguous or there is an obvious error or omission, but only to the extent of the error, ambiguity or omission;⁴² or the award was granted as a consequence of a mistake by both parties to the proceedings.⁴³

An arbitral award obtained under the 1995 LRA may be reviewed in terms of section 145. According to section 145(1) any party to a dispute who is of the view that there is a defect in any arbitration proceedings of the Commission, may apply to the Labour Court to have the award set aside.⁴⁴ Application may be made where the commissioner committed misconduct in relation to his or her duties as an arbitrator, committed a gross irregularity in the conduct of the arbitration proceedings, or acted *ultra vires*.⁴⁵

The application to set the award aside may also be brought where the award was obtained improperly.⁴⁶ An admitted attorney or advocate, a co-employee, or a member or official of the union to which the respective party belongs may only represent a party to a dispute that is handled by the CCMA at a hearing.⁴⁷ A director may represent a juristic person that is either a company or close corporation.⁴⁸ A party to a dispute is also entitled to represent him or herself in the proceedings.⁴⁹

The legal framework for private arbitration differs significantly from the above and will be discussed hereafter.

1.2.2 PRIVATE ARBITRATION

Private arbitration permits parties to elect an independent person to make a final and binding determination on their dispute.⁵⁰ The arbitrator determines the rights and

⁴¹ LRA s 144 (a).

⁴² LRA s 144 (b).

⁴³ LRA s 144 (c).

⁴⁴ LRA s 145.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

⁴⁷ Brand J, Lotter C, Mischke C & Steadman F *Labour dispute resolution* 123.

⁴⁸ *Idem* 124.

⁴⁹ *Ibid.*

⁵⁰ Havenga & Havenga 298.

obligations of the parties at law.⁵¹ The parties to such an arbitration do not use the services of a statutory institution.⁵² Private arbitration may take a number of forms and it is the constitutionality and suitability of these types of arbitrations that are the focus of this thesis.

Parties may elect to follow either an institutional or *ad hoc* method during the arbitration process.⁵³ Institutional arbitration is an arbitration conducted under the control and in accordance with the rules of an established arbitral institution.⁵⁴ In such arbitrations, the President and the Secretariat of the arbitral institution may handle certain procedural steps such as the appointment of the arbitral tribunal or the service of documents.⁵⁵

Ad hoc arbitration is an arbitration, which is born from an arbitration agreement entered into by the parties that does not specify any arbitral institution to handle the process. The parties in this instance design the manner in which the process will be handled and they may even elect to adopt and apply the arbitration rules of an institution of their choice that they regard to be most suitable.

Arbitration may be voluntary or involuntary (court-mandated). This is a critical distinction. Nimmer⁵⁶ explains the distinction as understood in private arbitration thus, utilising the example in the labour context:⁵⁷ Voluntary arbitration exists where an employee agrees to have a workplace dispute resolved through arbitration rather than litigation.⁵⁸ Mandatory arbitration exists where an employee is required, as a condition of employment, to give up all the rights of access to court and to use arbitration in place of a judicial forum for resolving statutory and contractual claims.⁵⁹

⁵¹ Butler (1994) 121.

⁵² *Ibid.*

⁵³ Savage D “Ad hoc and institutional arbitration” (2010) www.charlesrussell.co.uk 1 (accessed on 10 June 2014).

⁵⁴ International Arbitration – An overview 3 https://eguides.cmslegal.com/pdf/arbitration_volume_I/CMS%20GtA_Vol%20I_OVERVIEW.pdf 121 (accessed on 10 Jan 2014).

⁵⁵ *Ibid.*

⁵⁶ Nimmer M “*The high cost of mandatory arbitration*” (2010) vol 12, issue 1, *Cardozo Journal of Conflict Resolution* 183-216 183.

⁵⁷ *Idem* 184.

⁵⁸ *Idem* 183.

⁵⁹ *Ibid.*

This thesis recommends that the possible creation of an institution designed and empowered to handle the arbitration process from its inception until enforcement stage be considered. The institution should be formulated in such a way that it is sympathetic to the plight of consumers who are often faced with the prospects of losing their right of recourse to the court through arbitration clauses that are unscrupulously incorporated into their contracts. The potential for such an independent arbitration institution is dependent upon the exploration of the legitimacy of non-state ordering in South Africa that is conducted in this thesis. Such an institution will ease the burden on courts faced with challenges to arbitral awards. The courts are subject to the Constitution and must promote the purport and object of the Constitution in all their dealings, including circumstances in which the subject matter of cases is arbitral awards.

In establishing challenges associated with arbitral awards, a detailed understanding of the arbitration law is essential. For this reason, the thesis includes an in-depth examination of this law in South Africa as well as internationally and in selected jurisdictions.

1.3 RESEARCH QUESTIONS

The primary research questions/aims in this thesis are:

- If private arbitration is properly conducted should it still provide the parties with the envisaged benefits?;
- Is private arbitration constitutional, especially as it impacts upon consumers contracting with large corporations?; and
- Is the private arbitration process as it is currently applied, constitutional in so far as it denies parties an appeal on merits against an award that is clearly wrong?

1.4 RATIONALE / MOTIVATION

This thesis primarily focuses on private arbitration although reference is made to formal arbitration where necessary. As stated above, private arbitration is a method

of resolving disputes where parties elect an independent arbitrator who will make a final and binding determination on a dispute and determine the rights and obligations of the parties at law.⁶⁰ It does not utilise any statutory institution.⁶¹ This form of arbitration is distinct from statutory arbitration, a process determined by a statutory arbitration institution.⁶²

It should be noted from the outset that the concept of “consumer” in relation to private arbitration goes beyond the scope and application of the Consumer Protection Act⁶³ (CPA) and “consumer agreements” in terms of the Act. The thesis will attempt to set out a much broader analyses than the “consumer’s” right to redress and enforcement in terms of the CPA and in particular section 69.⁶⁴ The research will attempt to address much wider scenarios and applicable law where consumers are concerned and assumed to analyse the general inequality of bargaining powers between businesses and consumers (moreover in the case of vulnerable consumers as weaker contracting parties).⁶⁵ In particular, the effect of the wording of arbitration clauses and the private arbitration process as a result thereof will be critically discussed. Such a discussion aims to illustrate the importance of law reform and aligning arbitration clauses and the private arbitration process with both international standards and the values entrenched in our Constitution in a comprehensive manner.

The majority of renowned authors on arbitration have blindly followed the view that arbitration offers a better deal to parties in dispute than litigation.⁶⁶ The view loses sight of the potential prejudice of private arbitration to the consumers when confronted by large corporations. The effect of unequal bargaining positions of

⁶⁰ Butler (1994) 121.

⁶¹ *Ibid.*

⁶² See 1.2.1 above and the discussion of the LRA.

⁶³ Act 68 of 2008.

⁶⁴ See discussion of the CPA in Cht 3 above.

⁶⁵ See discussion of unequal bargain positions in the consumer realm: Hawthorne L “Materialisation and differentiation of Contract Law: Can solidarity maintain the thread of principle which links the classical ideal of freedom of contract with modern corrective intervention?” 2008 *THRHR* 438-453.

⁶⁶ Havenga & Havenga 298. See also Hosking R “The role of the court and experts in international arbitration” <https://international-arbitration-attorney.com/wp-content/uploads/4-The-Role-of-the-Court-and-experts.pdf> 1 (accessed on 20 Jan 2013) & Xavier G “Evolution of arbitration as a legal institution and the inherent powers of the court: *Putrajaya Holdings SDN BHD v Digital Green SDN BHD*” ASLI Working Paper 009 <https://law.nus.edu.sg/asli/pdf/WPS009.pdf> (accessed on 15 Jan 2013).

consumers, especially in the South African context, and large corporations raises questions regarding the advantages and disadvantages of arbitration to the weaker party in such relationships.

Thus, the thesis addresses whether or not the process is advantageous today taking into consideration the existence of the Constitution, section 9 of which protects the right to equality. This section emphasises that everyone is equal before the law and has the right to equal protection of the law. Furthermore, the Constitution protects the right of access to the courts.⁶⁷

Section 34 provides that all persons have the right of access to a court or another appropriate, independent and impartial tribunal. This right was considered by the court on *Mphaphuli*,⁶⁸ within the private arbitration context. The court determined that a private arbitration process did not constitute an appropriate, independent and impartial tribunal for purposes of section 34. The court reasoned that, section 34 envisages a public hearing before a court or another appropriate, independent and impartial tribunal provided by the state and the private nature of a private arbitration thus disqualifies it as a court or alternative tribunal as contemplated in the section.⁶⁹ Its finding that, in private arbitration, the possibility exists that parties may consent to an arbitrator who is not completely independent further bolstered the court's determination.⁷⁰ In short therefore, a private arbitration tribunal is not another "independent and impartial tribunal or forum" for purposes of the section.

Thus, parties who elected to resolve their disputes through private arbitration cannot claim the protection of section 34 and cannot approach the court for relief in terms of the said provision. The thesis will investigate the impact of absence of an appeal process in the private arbitration particularly, where parties of unequal bargaining power are involved.

The courts and the legislature are obliged to guarantee alignment of any law or conduct including the principles governing arbitration with the Constitution. Such a

⁶⁷ Constitution s 34.

⁶⁸ *Mphaphuli & Associates (Pty) Ltd v Andrews and Another* 2009 (4) SA 529 (CC).

⁶⁹ *Idem* para 213.

⁷⁰ *Ibid.*

duty is placed upon them by the provisions of section 2 of the Constitution.⁷¹ The thesis seeks to determine whether these institutions have put sufficient measures in place to protect consumers who are involved in arbitral proceedings with big corporations.

The thesis further intends to establish whether arbitration in its current form, defeats the initial purpose for which the arbitration process was created namely, to finalise the dispute fairly, speedily, cost effectively, privately and finally.⁷² It is essential that South African arbitration law be adapted to meet international standards and cater for the new constitutional context and changing business practices. Thus, the thesis seeks to determine how effectively South Africa is responding to the need to develop a legislation that will be governing international arbitration.

1.5 METHODOLOGY/APPROACH

The research is conducted using the combined research methods of theoretical critical analysis and comparative analysis. This will include an extensive literature review of primary and secondary sources of law on the topic including legislation, case authority, books, journal articles, and information available on the Internet. This literature has been subjected to a critical analysis. The approach is qualitative in nature in that the current discourse has been fully explored, analysed and critiqued.

A historical perspective on the subject matter is essential as the current discourse on arbitration can only be understood against a historical backdrop. This historical backdrop includes the origins of South African arbitration law and the reasons for its introduction, as well as its evolution to date. This perspective will enable recommendations to align future arbitration law development with its original purposes and objectives.

⁷¹ Constitution s 2 reads as follows: "This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled".

⁷² It is the responsibility of the arbitral tribunal to ensure through the authority provided to it by the agreement between the parties that it employs strategy that will secure the anticipated benefits. The question of whether arbitration has lost its effectiveness was addressed in Chs 3 & 6 of this thesis.

The Constitution emphasises the importance of applying international law and considering foreign law when interpreting the rights in the Bill of Rights.⁷³ Thus, although this thesis will not attempt a full and detailed comparative analysis of the South African arbitration law, the research has been enriched by a brief comparison of South African arbitration law with international arbitration law and arbitration law of selected foreign jurisdictions with amongst other bases, similar arbitration background to South Africa. This comparative analysis is helpful in developing a sense of international best practice and informing the process of developing South African arbitration law. This is especially true of English law, bearing in mind the English influence on the development of South African arbitration law.

The selection of relevant jurisdictions for legal comparative purposes was based on a shared English law heritage, similar constitutional provisions and/or the foreign jurisdiction's alignment with the Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law⁷⁴ and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.⁷⁵ The identified jurisdictions are Spain, India, the United States of America (USA) and England. Particular attention is also paid to international commercial arbitration.

1.6 OUTLINE

Chapter 1

This is an introductory chapter of the thesis. It provides the rationale behind the undertaking of this study. The chapter further elaborates on the methodology to be employed, research questions to be explored and provides a brief discussion of the various types of arbitration.

Chapter 2

The chapter focuses on a historical overview of arbitration. The history of arbitration law in South Africa is explored, as is the historical development of the English arbitration law, which has influenced the South African arbitration landscape. Further focus is on the historical perspective of arbitration law of India, the USA, Spain and

⁷³ Constitution s 39 (1)(b)(c).

⁷⁴ Herein after referred to as "UNCITRAL Model law".

⁷⁵ Herein after referred to as "the New York Convention".

international commercial arbitration provisions to which the thesis refers in the comparative analysis and search for best practices for reformation of South African arbitration law.

Chapter 3

The chapter is dedicated to a detailed discussion of the current arbitration framework in South Africa and the context in which it applies. The SALRC and Department of Justice and Constitutional Development's (DoJ&CD) proposed International Arbitration Bill and Domestic Arbitration Bill are critically evaluated together with other relevant Bills such as the Promotion and Protection of Investment Bill and the subsequent Protection of Investment Act.⁷⁶

The chapter proceeds to a thorough analysis of the constitutionality of arbitration in South Africa. Arbitration was originally conceived as a viable alternative to litigation. Consequently, arbitration has followed a less formal, legalistic procedure that produces a final and binding award. This procedure makes no provision for appeal and very limited provision for review of the process. This limited opportunity to challenge awards drastically affects fairness more particularly, where inequality in bargaining powers between parties exist.

Fairness demands that every fact-finding mission must permit an aggrieved party to vindicate their rights in an open court or any alternative tribunal or forum envisaged by section 34 where the need arises. It is argued that this opportunity is denied to parties to an arbitral award. For this reason, the thesis investigates the possibility that arbitration contravenes the Constitution, especially where parties are of unequal bargaining power.

The post-1994 democratic order brought about a significant change in the legal system. The Constitution was instrumental in introducing democratic principles and constitutional relief⁷⁷ and is the standard against which the constitutionality of all legislation and conduct is measured and with which it should be aligned.

⁷⁶ Act 22 of 2015.

⁷⁷ Interim Constitution, 1993 and Constitution 1996.

Chapter 4

This chapter explores commercial arbitration within an international context. The international legal framework applicable to arbitration is examined to establish principles that may be used to guide South African legal development. Several instruments relevant to international private arbitration are also explored to determine their suitability to be incorporated into the South African arbitration law. The discussion in this chapter further reveals the inadequacy of the current Arbitration Act to cater for international arbitration. It is thus established that there is a need to align South African arbitration law to the United Nations Commission on International Trade Law Model Law (UNCITRAL Model Law) and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).

Chapter 5

The approach to private arbitration in other jurisdictions which share South Africa's English law influence (England, India and the USA) and those jurisdictions that have an arbitration process that is subject to a constitutional provision similar to the South African provision protecting the right of access to the courts (Spain, the USA and India) are also explored in this chapter.

The purpose of examining the foreign jurisdictions is to identify best practices that may be viable, with some adaptation, in the South African context. The need to adapt private arbitration in South Africa to fit international parameters is compelling. Failure to do so will prevent South Africa from benefitting fully from the thriving global economy.

Chapter 6

Finally, chapter 6 contains conclusions and recommendations to improve the South African arbitration law framework. The focus is on how best to develop the legislation to accommodate international commercial arbitration trends while observing constitutional obligations. Due consideration is also accorded to the SALRC's project 94.

An analysis of the comparative information in previous chapters is presented together with conclusions and recommendations regarding the viability and constitutionality of arbitration in South Africa. The question of whether or not the arbitration process needs to be amended, and if so how, is answered and suggested amendments proposed.

1.7 CONCLUSION

The topic of the thesis and the research questions it addresses have been briefly introduced in this chapter. It has created an overview of the purpose and objectives of the thesis and an outline of the structure that will be followed in later chapters. In chapter 2 below, an overview of the history of arbitration in South Africa and other jurisdictions are presented. With regard to the comparative jurisdictions an in-depth discussion regarding the legal framework of each country is unnecessarily burdensome and only the most relevant and applicable legal position in terms of each country is therefore included and investigated. The law as stated in this thesis reflects the position as at 31 October 2017 (date of final submission). Though it is recognised that the IAA aims to align South African arbitration law with UNCITRAL Model Law and the New York Convention, a full analyses of its impact warrants a research thesis of its own and therefore not included here.

CHAPTER 2: HISTORICAL BACKGROUND

2.1 INTRODUCTION

“It is commonly acknowledged that an understanding of the past is fundamental to an understanding of the present.”⁷⁸ This chapter thus analyses the historical landscape of arbitration to enhance the understanding of its evolution. Sterns reiterated the vital role that history plays by highlighting that it is difficult to attain intended results without a reasonably accurate knowledge of the past.⁷⁹ The history of arbitration in South Africa is therefore examined to ensure a proper understanding of the fundamental principles of private arbitration.

The origins of arbitration are not entirely clear although they can potentially be traced back to Biblical times.⁸⁰ In South Africa, arbitration was practiced in accordance with Roman Dutch law until the English Law influence was introduced.⁸¹

The thesis compares the South African arbitration law framework with the international law framework,⁸² those international instruments that set standards for and provides a template for updating national arbitration law and the framework applicable in the four jurisdictions of England, Spain, India and the United States of America (USA). For this reason, the historical development of the arbitration law in these jurisdictions is also explored in order to put the concept of arbitration, be it domestic or international, into perspective.

Furthermore, the historical overview creates the backdrop against which the current form of arbitration in South Africa is critically assessed and aspects of the arbitration

⁷⁸ Luttmmer F “Why study history” <http://history.hanover.edu/why.php> (accessed on 08 Jan 2014).
⁷⁹ Sterns P “Why study history” <http://www.historians.org/about-aha-and-membership/aha-history-andarchive/s/archives/why-study-history-%281985%29> (accessed on 07 Jan 2014).
⁸⁰ Xavier G “Evolution of arbitration as a legal institutional and the inherent powers of the court: *Putrajaya Holdings Sdn. Bhd. v. Digital Green Sdn. Bhd.*” (2010) *Asian Law Institute* working paper series No. 009 1.
⁸¹ Butler D & Finsen E (1993) *Arbitration in South Africa law and practice* 4 (hereafter referred to as Butler & Finsen).
⁸² The investigation of international commercial arbitration is essential given that South Africa encourages international trade with a view to stimulating the economy. Many international trade agreements anticipate possible disputes arising between the contracting parties and provide that they will be resolved through an arbitration process. See Edwards L & Lawrence R “South African trade policy and the future global trading environment” occasional paper no 128 (2012) *SAIIA* 2.

process identified that requires amendment. This analysis is supplemented by the comparative evaluation of the position in the four jurisdictions discussed, from which best practice is extracted to inform suggested law reform in South Africa.

2.2 ARBITRATION IN SOUTH AFRICA PRIOR TO ENGLISH INFLUENCE

Arbitration law in South Africa draws from a mixture of civil and common law.⁸³ The South African common law is predominantly Roman-Dutch law. The Roman law practices were absorbed into Roman-Dutch law and thence into South African law. The Romans practiced arbitration and there is evidence of this in the Twelve Tables.⁸⁴ In Roman law, arbitral awards were final in nature and there was no appeal process.⁸⁵ The reason for this was to prevent arbitration from becoming a precursor to the normal litigation process instead of being an alternative to it. This view was shared by all those who believed in arbitration in a number of countries. Arbitration has a long history in Europe where it was developed as an alternative to litigation.

The Roman process of arbitration practised at the end of the Republic⁸⁶ was known as *compromissum*.⁸⁷ The Romans acknowledged the fragile relations between law and arbitration.⁸⁸ It is crucial to note that arbitration was introduced to operate independently from normal legal proceedings to avoid the disadvantages associated with litigation. However, total exclusion of the law from the process would result in arbitration being ineffective as a dispute resolution mechanism, while a close regulation by the law would result in the process becoming a replica of the legal process with all the benefits being lost to the parties.⁸⁹

⁸³ Butler & Finsen 4.

⁸⁴ Dorsey R "Manifestations of Roman Procedure" (1942) vol 9, issue 13 *The American Law School Review* 1482-1495 1484. There is a scarcity of resources dealing with the history of arbitration from Roman to Roman Dutch law.

⁸⁵ Stein P "Roman arbitration: An English perspective" (1995) vol 29, *Israel LR* 215-227 222 (hereafter referred to as Stein).

⁸⁶ Deutsch B "Ancient Roman law and modern Canon law" (1969) vol 28, issue 1 *Jurist* 274-280 274.

⁸⁷ (A term referred to by western people as "the compromise of the parties"). See Stein 217.

⁸⁸ Stein 218.

⁸⁹ *Ibid.*

The Roman law successfully developed arbitration by introducing penal stipulations or bonds to ensure strict compliance with the arbitral award.⁹⁰ Arbitration was resorted to in resolving all private matters except where the issues “raised a delict involving *infamia (delictum famosum)* or an individual's freedom (*causa liberalis*).⁹¹ The parties under Roman law were free to elect an arbitrator of their choice subject to some conditions.⁹² It was vital that an elected arbitrator be a person in a position to properly accept the reference.⁹³

Slaves, women, persons below the age of puberty, the insane, the deaf and the dumb were not eligible to be appointed as arbitrators.⁹⁴ The reason for requiring that an arbitrator be a freeman was to render any agreement to refer matters to a slave illegal.⁹⁵ Reference to a freeman included both those who were free at birth or later freed.⁹⁶ Like slaves, women were also excluded from being appointed as arbitrators. This exclusion of women and slaves was not so much based on their inability to make judgements but the fact that they were not allowed to perform public functions.⁹⁷ Any person with an interest in the matter was also excluded from appointment on the basis that he would be making an award to himself.⁹⁸

The Romans took steps to ensure that the person who accepted the reference delivered the award. These steps included the establishment of the praetorian intervention, which appears to have started in the second century BC.⁹⁹ The primary objective of these steps was to deal with arbitrators who accepted a reference and later refused to act in accordance with the agreement or those who investigated the dispute but refused to make an award.¹⁰⁰ In such cases, the *Praetor*¹⁰¹ would

⁹⁰ Ramsden P & Ramsden K (2009) *The law of arbitration South African and international arbitration* 25.

⁹¹ Stein 218.

⁹² *Idem* 220.

⁹³ *Ibid.*

⁹⁴ Deutsch 274.

⁹⁵ Stein 220.

⁹⁶ *Ibid.*

⁹⁷ Ramsden & Ramsden 220.

⁹⁸ Voet J (1891) *Commentarius ad Pandectas as translated by Victor Sampson* 112.

⁹⁹ Stein 219.

¹⁰⁰ *Ibid.*

¹⁰¹ See Gane P (1955) *The selective Voet being the commentary on the pandects vol 1* 184.

“Praetors was a name given to all magistrates, even to the military prefects. In that sense they are said in the passages cited below to be older standing than very consuls. But more

intervene and was empowered to compel the arbitrator to issue the award.¹⁰² The *Praetor's* intervention was motivated by his particular interest in ensuring that all disputes were finalised either through litigation or through arbitration.¹⁰³ It was therefore the view of the *Praetor* that those who elected to resolve their disputes through arbitration, having the benefits of the process in mind, should not be disappointed.¹⁰⁴ The *Praetor* would however be willing to terminate the reference to an arbitrator who was unable to proceed due to circumstances beyond his control and which arose after he accepted the reference.¹⁰⁵

The *Praetor* was said to have had a duty to intervene even where the parties had elected more than one arbitrator to deal with the dispute and the arbitrators had divergent views. According to Stein:¹⁰⁶

“The text that discusses this point (D.4.8.17.5) has clearly been interpolated. As it stands, it states that a reference to A and B on terms that if they disagree, they should bring in a third arbitrator is not valid, because they might differ on whom to nominate; but a reference on terms that if A and B differ, they should bring in C is valid. Later the same text says that if A and B disagree, the praetor should compel them to appoint a third arbitrator to settle the matter, which is contrary to the first sentence of the text. It seems probable that the classical jurists disagreed on the matter and that the original discussion, setting out the opposing views, has been badly abbreviated.”

To counter these apparent challenges, Stein refers to the recommendation by Ulpian that reference should be made to an unequal number of persons so that upon their disagreement the majority opinion would prevail.¹⁰⁷ In the event that three arbitrators were appointed all, three arbitrators had to be present when the award was made to ensure its validity, since the reference was to three arbitrators.¹⁰⁸ This applied irrespective of whether the two arbitrators present agreed because the third

particularly the name was given to those who presided (praeerant) over the administration of justice.”

¹⁰² Stein 219.

¹⁰³ Voet 115.

¹⁰⁴ *Ibid.*

¹⁰⁵ *Idem* 119.

¹⁰⁶ Stein 221.

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.*

arbitrator, who may have held a divergent view, could potentially have successfully convinced the other two to concur with him.¹⁰⁹

In instances where the parties failed to provide the time and place of the arbitration, the arbitrator could determine these.¹¹⁰ Once the time and place of the arbitration had been determined, the parties were obliged to comply with the summons to appear, failing which the party (ies) who failed to appear would incur a penalty,¹¹¹ save where the arbitrator had chosen a disreputable place for the purpose of handling the arbitration.¹¹² In such cases no penalty was incurred.¹¹³

The rights and obligations of the arbitrator continued from the date of his appointment until the award was made or the rights and duties of the arbitrator were revoked after the dispute ceased to exist or the parties terminated their dispute by agreement between themselves.¹¹⁴ The Romans regarded the death of one of the parties as having the effect of ending the arbitration submission agreement unless the heirs on both sides were bound by the submission agreement.¹¹⁵

The award that followed the arbitration process had to be final in terms of the Roman law.¹¹⁶ Hence, Roman jurists were careful not to allow litigation on the same matter as this would have opened the arbitrator's finding to an appeal on the merits.¹¹⁷ No appeal on an arbitral award was permitted.¹¹⁸ An aggrieved party could, however, send a protest (*attestatio*) within a period of ten days from the date of the award to the arbitrator or his opponent, rejecting the award.¹¹⁹

This protest was not a disguised appeal as the two differed materially from each other.¹²⁰ An appeal focused on a reconsideration of the entire suit by a court,

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*

¹¹² *Ibid.*

¹¹³ *Ibid.*

¹¹⁴ Deutsch 275.

¹¹⁵ Ramsden & Ramsden 34.

¹¹⁶ Stein 222.

¹¹⁷ *Ibid.*

¹¹⁸ Voet 109.

¹¹⁹ *Idem* 123.

¹²⁰ *Ibid.*

whereas protest was directed towards an alteration of the award.¹²¹ In the absence of any challenge to the award, the parties were obliged to obey it. An award could, however, be disobeyed with impunity if the arbitrator exceeded or failed to abide by the terms of his reference.¹²²

Jurists were careful to ensure that arbitrators did not deviate from their terms of reference and also that the substance of the award was not interfered with.¹²³ They would not attempt to amend the award even if it appeared to be unfair.¹²⁴ The reason that they would not intervene in such cases was that they recognised that the arbitration was undertaken at the behest of the parties who appointed the arbitrator(s) and were thus bound to abide by his/their award irrespective of whether or not the award pleased them.¹²⁵ Thus, parties could not easily question the award where the arbitrator(s) acted within the terms of reference, without any corruption and without bias towards either party.¹²⁶ However, there was a possibility that a review of the award could be brought because the term *arbiter* was not limited to arbitrators.¹²⁷ Balch in weighing on the difference between arbitrator and arbiter states that:¹²⁸

"The Civilians make a difference between Arbiter and Arbitrator; the former being obliged to proceed according to Law and Equity; whereas the latter is left wholly to his own Discretion, to act without Solemnity of Process, or Course of Judgment."

Therefore, a proper understanding of whether a person is appointed as an *arbiter* or arbitrator was necessary to avoid proceeding based on the wrong interpretation of the terms of reference.

The Roman conception of arbitration was further developed in Roman-Dutch law. Arbitration, as adopted from Roman Law, envisaged a peaceful, non-violent means

¹²¹ *Ibid.*

¹²² Deutsch 275.

¹²³ Stein 224.

¹²⁴ *Idem* 225.

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*

¹²⁷ *Ibid.*

¹²⁸ Balch T "Arbitration" as a term of international law" (Nov 1915), vol 15, issue 7 *Columbia L R*, 590-607 591.

of resolving disputes, presided over by an arbitrator whose integrity was beyond reproach.¹²⁹ Dodd's view of Roman arbitration was that:¹³⁰

“*Arbitration*,’ as a principle, is closely connected with Natural Equity. The first requisite for satisfactory arbitration is that an Arbitrator should be chosen who is possessed of competent knowledge, and who is disinterested, and just. In the Middle Ages the Church, sometimes arbitrated between contending nations. Also many private disputes were settled and law-suits prevented.”

In Roman-Dutch law, arbitrators and arbiters were referred to as elected judges.¹³¹ Elected judges entertained matters referred to them with the full consent of, and in strict compliance with, the wishes of the referring parties.¹³² According to Leeuwen, the elected judges were ‘subdivided into judges by choice or good men that are arbiters and arbitrators’.¹³³ Arbiters were expected to decide a dispute between parties and issue awards in accordance with law and custom whilst acting within the powers given to them by the parties in terms of an arbitral agreement.¹³⁴

Arbitrators, or good men who were called *kersluiden*, were friendlier than the arbiters were and they were preferred for their knowledge and expertise in the field of the subject matter in dispute.¹³⁵ They were expected to apply their knowledge and judgement without any reference to the law in resolving the dispute.¹³⁶ The arbitrator attempted to resolve disputes amicably between the parties without resorting or applying the law in the process.¹³⁷ The deed of submission had to be critically analysed in order to determine whether the adjudicator was appointed as an arbiter or arbitrator. The overriding distinction being the requirement that the arbiter apply the law and the arbitrator apply only his knowledge.¹³⁸

¹²⁹ Dodd J (1884) *History of Canon law in conjunction with other branches of jurisprudence: With chapters on the Royal Supremacy and the Report of the Commission on Ecclesiastical Courts* 141.

¹³⁰ *Ibid.*

¹³¹ Leeuwen S (1923) *Commentaries on Roman Dutch law vol 2 as translated by John Kotze* 413.

¹³² *Ibid.*

¹³³ *Ibid.*

¹³⁴ *Ibid.*

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*

¹³⁷ *Ibid.*

¹³⁸ *Ibid.*

Roman-Dutch law was imported to South Africa in 1652 with the arrival of Jan Van Riebeeck at the Cape of Good Hope.¹³⁹ Van Riebeeck's initial mandate was to establish a refreshment post for the Dutch East Indian Company (DEIC).¹⁴⁰ The Dutch quickly developed plans to colonise the Cape and the officials of the DEIC applied Roman-Dutch law.¹⁴¹

Initially, the Dutch settlers applied Roman-Dutch law only amongst themselves and made no attempt to assert any authority over the indigenous population found in the Cape.¹⁴² With colonisation, the approach to the indigenous population changed, with the Dutch asserting authority over them.¹⁴³ The Roman-Dutch law was then applied by the settlers to the whole community.¹⁴⁴ Schreiner observes the following about the history of South African common law:¹⁴⁵

“Like other allied systems that arose on the continent of Europe, our law rested on Germanic custom, substantially modified and supplemented by Roman law, as represented for the most part by the compilations of Justinian. Our system was developed during the seventeenth and eighteenth centuries through the writings of practising lawyers and teachers of law and the decisions of the courts in Holland and its associated provinces of the United Netherlands. Jurists from other parts of the Continent contributed their thoughts and from time to time the law was altered or reinforced by legislation, which later became overlaid by comment and was then treated as part of the common law. This legal system of the Netherlands or rather of Holland, the principal province, received wide recognition as a distinct and important branch of the civil law family and acquired the name of *Roomsch-Hollandsche reg*, which we translate as Roman-Dutch law. It was the system brought to South Africa by the early European settlers, the first of whom arrived in 1652. When in the course of the nineteenth century, under the influence in the first place of Napoleon, most European countries introduced general codes, the Netherlands were among the first to fall in with the trend. But in the three Dutch overseas possessions that became British as a result of the Napoleonic wars the old uncodified Roman-Dutch law persisted and remained the foundation of the local common law.”

¹³⁹ Lenel B The “history of South African law and its Roman Dutch roots” (2002) <http://www.lenel.ch/docs/history-of-sa-law-en.pdf> (accessed on 8 Sep 2014).

¹⁴⁰ Rautenbach C “South African common and customary law of intestate succession: A question of harmonisation, integration or abolition” (May 2008) vol 1, *Journal of Comparative Law* 119-132 120.

¹⁴¹ Van der Merwe G & Du Plessis J (2004) *Introduction to the law of South Africa* 9.

¹⁴² *Ibid.*

¹⁴³ *Ibid.*

¹⁴⁴ *Ibid.*

¹⁴⁵ Schreiner D (1967) *The contribution of English law to South African law; and the rule of law in South Africa* 5.

The above-mentioned history is relevant to the history of arbitration in South Africa. Arbitration law in South Africa was based on Roman-Dutch law.

In my view, the reason parties opted for arbitration was to avoid unnecessary litigation with potentially disastrous results. These basic principles of arbitration were developed in Roman-Dutch law through the writings of the Dutch jurists such as Voet and Huber.¹⁴⁶ It should, however, be noted that neither Roman nor Roman-Dutch law boasted a fully developed, complete system of arbitration law.¹⁴⁷ However, the Dutch jurists' contributions proved a valuable tool in developing the concept. Voet was amongst the most authoritative and accessible writers on the Roman-Dutch law and his interpretation of the Roman-Dutch law of arbitration have been referred to in many judgements.¹⁴⁸ Gauntlett, Butler and Finsen all recognise that Voet and Huber made significant contributions to arbitration.¹⁴⁹

The absence of a developed and complete system of arbitration complicated the contribution of the Dutch jurists as Voet's contribution differed in some respects from that of other jurists.¹⁵⁰ The challenges posed by these differences of opinion were resolved in South African law when three South African provinces enacted arbitration legislation.¹⁵¹ Although the concept of the "arbitrator" was adopted into South African law from the Roman-Dutch law, the modern South African arbitration law is based almost exclusively on English law and, for this reason; the focus of the historical overview is on development of arbitration in the English law.

2.2.1 THE INTRODUCTION OF AN ENGLISH INFLUENCE INTO SOUTH AFRICAN ARBITRATION LAW

England occupied South Africa first in 1795 and again in 1806.¹⁵² English legal influences followed on the heels of the second occupation and, between 1898 and 1904, the English Arbitration Act, 1889 and the case authority associated with it

¹⁴⁶ Butler & Finsen 4.

¹⁴⁷ Gauntlett 28.

¹⁴⁸ Ramsden & Ramsden 13. See *Bidoli v Bidoli and Another* 2011 (5) SA 247 (SCA).

¹⁴⁹ Gauntlett 29; Butler & Finsen 4.

¹⁵⁰ See Ramsden & Ramsden 13.

¹⁵¹ Cape Province Act 29 of 1898, Transvaal Ordinance 24 of 1904 and Natal Act 24 of 1898.

¹⁵² Aartsma H "Brief summary of the colonial history of South Africa" <http://www.south-africa-tours-and-travel.com/colonial-history-of-south-africa.html> (accessed on 14 March 2011).

proved to be extremely influential in South African legal development.¹⁵³ The provincial statutes and ordinances in Natal,¹⁵⁴ the Cape¹⁵⁵ and the Transvaal¹⁵⁶ were strongly influenced by the English Arbitration Act, 1889, the provisions of which were adopted in each province with some adjustments to suit their unique circumstances. The purpose of the statutory intervention was not to repeal the common law but to facilitate submission of disputes to arbitration, the conduct of those proceedings and to provide a more efficient enforcement mechanism to be applied to arbitral awards.¹⁵⁷

2.2.1.1 Arbitration in Natal

Arbitration in Natal was regulated by the Roman-Dutch law until the enactment of the Natal Arbitration Act in 1898.¹⁵⁸ The enactment of the Act ushered in a new regime which was significantly influenced by the English legislation. The Natal Arbitration Act made provision for various issues ranging, *inter alia*, from the arbitration procedure, to the award and the role of the arbitrator.

The duty of the arbitrator during an arbitration process is similar to that of any presiding officer determining a dispute. The arbitrator must thus be impartial so as to imbue the award with unimpeachable integrity. Section 12 of the Natal Arbitration Act emphasised the significance of the arbitrator's impartiality:

“Every arbitrator and umpire must be, and continue throughout the reference to be disinterested with reference to the matters referred and the parties to the reference, and any party to a reference may require any arbitrator or umpire to make a sworn declaration before beginning, or continuing his duties as such arbitrator or umpire, that he has no interest direct or indirect in the matters referred or in the parties to the reference, and knows of nothing disqualifying him from being impartial and disinterested in the discharge of such duties. Provided always, that any party may expressly waive any right to object to any arbitrator or umpire on the grounds of interest or the like.”

¹⁵³ Ramsden & Ramsden 8.

¹⁵⁴ Natal Act 24 Of 1898.

¹⁵⁵ Cape Province Act 29 of 1898.

¹⁵⁶ Transvaal Ordinance 24 of 1904.

¹⁵⁷ See *Nkuke v Kindi* 1912 CPD 529 at 531-2; see also Butler & Finsen 4.

¹⁵⁸ Natal Act 24 Of 1898.

Section 12 was included to ensure that issues were decided on the facts alone. The Act thus demonstrates an uncompromising attitude towards the protection and independence of the arbitration process.

Section 4 also aimed to promote the autonomy of arbitration by providing that once parties had agreed to submit their dispute to arbitration, they could not withdraw from the agreement at will and then litigate the matter. Withdrawal from the agreement was only possible by leave of the court¹⁵⁹ or agreement of both parties. In circumstances where a party ignored the deed of submission and commenced legal proceedings, he could be compelled by the other party, in terms of section 7 of the Act, to stay the proceedings.¹⁶⁰

The party who brought the application to stay the proceedings must have been willing to abide by the agreement to arbitrate both at the commencement of the court proceedings and at the time of making the application.¹⁶¹ The court would then satisfy itself that there was no compelling reason not to refer the matter to arbitration and make an order staying the proceedings. The matter would then proceed to arbitration in terms of the Act.

Section 13 set out the grounds upon which an arbitrator could be removed. The provision was not explicit; it simply indicated that the arbitrator could be removed if he had misconducted himself in connection with the subject matter of the reference. It was left to the courts to decide what misconduct would justify removal and what would constitute a just ground for recusal of the arbitrator.

The same ambiguous concept of 'misconduct' was again used in section 18 that dealt with the setting aside of the appointment of the arbitrator or an arbitral

¹⁵⁹ S 4 Natal Act authorised the court to decide whether or not the submission to arbitration was revocable. The fact that the section granted courts the authority to decide upon the revocability of the submission without mentioning the grounds upon which such a determination could be made, provided a wide discretion to the courts to determine the survival of the process which was a threat to the litigation process. This indicated a continued scepticism of the legislature regarding whether the arbitration process was capable of surviving independently from the court system.

¹⁶⁰ Section 7 of the Natal Arbitration Act 1898 was a reproduction of section 4 of the English Arbitration Act, 1889. See also Winship T (1925) *The law and practice of arbitration in South Africa* 6.

¹⁶¹ Natal Act s 7.

award.¹⁶² The section allowed the appointment to be set aside if the arbitrator was guilty of misconduct and the award could be set aside if it was improperly obtained. The Act did not define misconduct or how an award might be improperly obtained. These matters were left to the discretion of the court. The court in *Clark*¹⁶³ provided some guidance on acts by the arbitrator that might qualify as misconduct and which might affect the integrity of the arbitral award, thereby justifying its setting aside. According to the court:¹⁶⁴

“An arbitrator must carry out his duties in a judicial manner. He need not necessarily observe the precision and forms of a Court of Law, but he must proceed in such a way as to ensure a fair administration of justice between the parties. If, therefore, an arbitrator has misconducted himself, has been corrupt, has heard one party and refused to hear the other, the Court will interfere and set aside his award.”

The issue of a misconduct by the arbitrator which justifies the setting aside of the award was at the centre of the judgment by the court in *Dickenson*.¹⁶⁵ This was an appeal before the Appellate Division from a judgment of the Natal Provincial Division declaring an award a court order. The consideration of English principles dominated the analysis of the matter by the court, the exercise which was necessary to put certain vital aspects into perspective. The English arbitration law greatly influenced and shaped the principle of arbitration in South Africa. However, not all principles were imported into South Africa.¹⁶⁶ The court held that “[s]ince the English Act came into force the Courts have applied the principle that a mistake on the face of the award constitute misconduct”.¹⁶⁷ The court further accepted that the English decisions have extended the meaning of misconduct so as to include a mistake.¹⁶⁸

Thus the challenge to the judgement flowed from this principle as the appellant argued that the award stands to be set aside because there was indeed a mistake of law apparent upon the face of it.¹⁶⁹ The Appellate Division rejected the contention that the English judge-made rule which justifies the setting aside of the award

¹⁶² The grounds for setting aside the awards were not as clear as they are in modern arbitration legislation. See s 33 of the Arbitration Act, 42 of 1965.

¹⁶³ *Clark v. African Guarantee & Indemnity Co. Ltd.* (1915) CPD 68.

¹⁶⁴ *Ibid.*

¹⁶⁵ *Dickenson & Brown v Fisher's Executors* 1915 AD 166.

¹⁶⁶ *Idem* 180.

¹⁶⁷ *Idem* 170.

¹⁶⁸ *Idem* 171.

¹⁶⁹ *Idem* 169.

because of a mistake on the face of the award formed part of South African law.¹⁷⁰ It was further found to be inconceivable that a *bona fide* mistake by the arbitrator can be characterised as misconduct.¹⁷¹ The court held that:¹⁷²

“Cases may no doubt arise where, as was said by the late CHIEF JUSTICE in the case of *Landeshut v. Koenig* (20 S.C.R., at p.34) ‘the mistake is so gross that it could not have been made without some degree of misconduct or partiality on the part of the arbitrator’ But in such cases the mistake would merely be evidence to show that there had been misconduct and if an award were set aside in such circumstances it would be really on the ground of misconduct and not of mistake.”

In the absence of any challenge in terms of section 18, the award was made an order of the court and enforced in the same manner as the judgement.¹⁷³ It is clear from the discussion of the legislation above, that the legislation was not sufficient to effectively deal with arbitration.

2.2.1.2 Cape Arbitration Act 29 of 1898

The Cape Arbitration Act was the first piece of legislation enacted in the Cape solely for the purpose of regulating arbitration. Its primary objective was to create well-structured rules and regulations to facilitate arbitration. The Act promoted arbitration and ensured that parties who agreed to submit to arbitration abided by their agreement. Section 3 declared the submission irrevocable, subject only to the consent of all the parties, or the leave of the court or judge.

The significant role that arbitration was meant to play in the area of dispute resolution was reiterated in section 6, which was designed to prevent a party to a submission from ignoring the terms of the agreement and initiating legal proceedings. The court was empowered to stay the legal proceedings provided there was an application brought by one of the parties to compel a stay of the proceedings.

Despite this, autonomy of arbitration remained a dream, as there was considerable judicial hostility towards arbitration inherited from the English law. The common English ancestry of the Natal and Cape legislation was easily identifiable in that both

¹⁷⁰ *Idem* 180.

¹⁷¹ *Idem* 176

¹⁷² *Ibid.*

¹⁷³ See Cape Arbitration Act 29 of 1898 s 19.

statutes contained similar provisions. For example, section 10 of the Cape Arbitration Act which guaranteed the impartiality of the arbitrator, was a verbatim copy of section 12 of the Natal Act and section 4 of the English Arbitration Act, 1889.

The Cape Arbitration Act was uncompromising as regards the character and qualifications of the arbitrator. It provided parties to the process with remedies where an award was improperly obtained and/or the arbitrator was not impartial or was guilty of misconduct. An arbitrator could be removed if there was misconduct or a just ground for recusal.¹⁷⁴

In the absence of any challenge to the award, it was made an order of court and was granted the status of a court judgment which could be enforced like any other court judgment.¹⁷⁵ The Cape Arbitration Act did make a provision for “stated case procedure” in section 13 (b) which could be used to motivate for judicial review of an arbitral award.¹⁷⁶

2.2.1.3 The Transvaal Arbitration Ordinance 24 of 1904

The Transvaal enacted an ordinance to regulate arbitration that, like the statutes of the Cape Province and Natal, was also based on the English Arbitration Act. Its provisions are thus similar to those of the other pieces of legislation discussed above.

Section 3 entrenched the irrevocable nature of the agreement to submit a dispute to arbitration, save where the parties agreed to terminate the agreement to submit or a court or judge granted leave to terminate the agreement.

Section 6 was included to force the parties to the arbitration agreement to abide by their agreement and not to abandon it in favour of litigation. It empowered an aggrieved party to apply for a stay of legal proceedings based on a valid, existing agreement to arbitrate future disputes. This section was designed to encourage

¹⁷⁴ Ss 11, 17 (1)(2) of Cape Arbitration Act 29 of 1898.

¹⁷⁵ S 18.

¹⁷⁶ Smedresman P “The arbitration Act, 1979” *Journal of Maritime Law and Commerce* (1979-1980), vol. 11, issue 3, 319-332 321.

parties to honour their agreement and subject themselves to the process they elected to utilise in the event that a dispute arose between them.

The ordinance sought to strengthen business confidence in the process by emphasising the element of impartiality by the arbitrator.¹⁷⁷ Section 11 permitted the removal of an arbitrator who was guilty of misconduct or where just grounds existed for his removal. Likewise, as the integrity of the award was essential, an arbitral award could be set aside where the arbitrator was found guilty of misconduct or the award was improperly obtained.¹⁷⁸

The ordinance respected the arbitral award and provided that an award that had been properly procured could be made an order of court and enforced in the same manner as any judgment.¹⁷⁹

The instruments introduced to regulate arbitration in Natal, the Cape and the Transvaal were far from perfect and thus more comprehensive arbitration law was required.

2.2.1.4 The introduction of a single Arbitration Act for South Africa

South Africa needed more comprehensive legislation to regulate arbitration. It found inspiration for this in the English Arbitration Act, 1950, which replaced the 1889 English Arbitration Act. Not only was the South African Arbitration Act, 1965; based upon its English counterpart, but the cases dealing with the English legislation were relied upon by the South African Courts when faced with a complex or confusing aspect of arbitration. It is worth noting, however, that in drafting the South African legislation, the legislature were able to present a more logical piece of legislation that was the product of a lengthy and thorough analysis of the arbitration legislation that

¹⁷⁷ This can be observed from the provisions of section 11 of the Transvaal Arbitration Ordinance 24 of 1904.

¹⁷⁸ Transvaal Arbitration Ordinance 24 of 1904 s 16.

¹⁷⁹ *Idem* s 17.

existed at the time.¹⁸⁰ Consequently, the 1965 Act was more advanced than arbitration legislation prevailing in other jurisdictions at that time.¹⁸¹

Despite the above, a need for substantial amendment to the 1965 Act to suit the current context is now apparent. To this end, the SALRC conducted an investigation into how best to develop the South African law in this area.¹⁸² Several possibilities were explored and the SALRC suggested that the South African legal development should incorporate the best features of the English Arbitration Act 1996, which conformed to the established pattern of modelling the South African arbitration law on the English law. The other alternative was that UNCITRAL Model Law should be adopted for both domestic and international arbitrations.¹⁸³ The third alternative recommended the adoption of a new legislation for domestic arbitration which shall retain the basic structure and the provisions of the 1965 Act, which worked well in practice.¹⁸⁴

2.2.2 SOUTH AFRICAN LEGISLATIVE FRAMEWORK OF ARBITRATION

Both private and formal arbitration are governed by legislation in South Africa. The Labour Relations Act (LRA)¹⁸⁵ provides for a formal arbitration process to be operated by the Commission for Conciliation, Mediation and Arbitration (CCMA). This modern manifestation of statutory arbitration was preceded by a process created in terms of the Industrial Conciliation Act¹⁸⁶, which was amended on a number of occasions before being renamed the Labour Relations Act 1979, which was subsequently replaced by the current legislation. Clearly, therefore, formal arbitration provisions in the labour field have been subject to regular amendment; however, the same cannot be said of the Arbitration Act governing private arbitration, which has remained substantially unchanged.

¹⁸⁰ South African was more advanced than arbitration legislation in other jurisdictions like Israel and New South Wales. See also Butler (1994) 118.

¹⁸¹ Ramsden & Ramsden 22.

¹⁸² SALRC (2001) Domestic Arbitration Project 94, discussion paper 83 3.

¹⁸³ *Idem* 6.

¹⁸⁴ *Idem* 7.

¹⁸⁵ Act 66 of 1995.

¹⁸⁶ Act 11 of 1924.

Concern regarding the lack of amendment to the 1965 Arbitration Act prompted the request from the Minister of Justice to the SALRC to investigate the need for amendment of the Act in light of growing business relations between South Africa and other countries and the need for arbitration mechanisms that comply with international standards. The SALRC initiated Project 94 which resulted in Discussion Paper 69 dealing with international arbitration, a draft international Act for South Africa and discussion paper 83 dealing with domestic arbitration.

The SALRC drafted two Bills for international arbitration and domestic arbitration in South Africa in 1997 and 1999 respectively. The SALRC revised the Bills in 2013 in the hope that it would be submitted to Parliament. However, only one of the two Bills, the international arbitration Bill, was approved for submission to Parliament for consideration. Currently, South Africa lacks any legislation governing international arbitration. The SALRC initiative faced another hurdle in that the Department of Trade and Industry (DTI) had tabled its own Bill regulating international arbitration involving foreigners in South Africa.¹⁸⁷

In terms of the Promotion and Protection of Investment Bill, foreign investors were restricted from resorting to international arbitration when they have a dispute regarding the action taken by the government, which affected their investment made in the country since the government is not obliged to consent to international arbitration.¹⁸⁸ This point was taken further in a clearer manner in the subsequent Protection of investment Act¹⁸⁹ which replaced the Bill. The SALRC recommended an enactment of new international arbitration legislation for South Africa with a view to promoting South Africa as a preferred site for international arbitration. The tabling of the Bill and the subsequent enactment of Protection of investment Act frustrates the SALRC objective and could possibly scare foreign investors away from the country. Clearly, delays in finalising the SALRC's suggested reform measures are undesirable and a quick implementation of the much-awaited improvements to the arbitration law is recommended.

¹⁸⁷ The Promotion and Protection of Investment Bill.

¹⁸⁸ See s 12(1).

¹⁸⁹ Act 22 of 2015 s 13(5)

The SALRC recommendations on domestic arbitration reflect continued reference to English arbitration provisions as a point of departure for the development of the South African law. This is hardly surprising given the strong English law influence on the development of the Arbitration Act of 1965.

2.3 THE ORIGINS OF ENGLISH ARBITRATION LAW

“In England, arbitration began even before the King’s courts were established.”¹⁹⁰ Furthermore, it is alleged that arbitration pre-dated the common law.¹⁹¹ Contrary to the assumption of some historians, the emergence of the common law did not end procedures like arbitration as an alternative means of dispute resolution.¹⁹² It is worth noting that arbitration was used in England to resolve commercial disputes but, in the fifteenth century, was also applied to resolving other disputes, including disputes associated with acts of violence and property disputes.¹⁹³ Within the higher echelons of English society, property arbitrations by far outnumbered those resulting from acts of violence.¹⁹⁴

The principle motivation for the early development of the arbitration process in England appears to have been the desire to provide merchants and traders with an alternative to the courts.¹⁹⁵ For this reason, English courts were hostile towards arbitration as it appeared to threaten their authority.

The attitudes of the English courts towards arbitration changed around the mid-twentieth century and the commercial courts began to support the autonomy of the arbitration process.¹⁹⁶ Despite this judicial acceptance, one basic legal principle that ensured that court jurisdiction was not entirely ousted in such matters remained.¹⁹⁷ This fundamental principle was also reflected by the court in *Czarnikow v. Roth*,

¹⁹⁰ Xavier 2.

¹⁹¹ Massey R “History of arbitration and grievance arbitration in the United States” <http://www.laborstudiesandresearch.ext.wvu.edu/r/download/32003> (accessed on 10 Jan 2012).

¹⁹² Powell E “Settlement of Disputes by Arbitration in Fifteenth-Century England” (Spring, 1984), vol. 2, no. 1 *Law and History Review* 21-43 39.

¹⁹³ *Idem* 29.

¹⁹⁴ *Ibid.*

¹⁹⁵ Xavier 2.

¹⁹⁶ Hosking 151.

¹⁹⁷ Ellenbogen G “English arbitration practice” 17 (Fall 1952) vol 17, issue 4 *Law and Contemporary Problems* 656-678 659.

Schmidt & Company where the court held that, "There must be no *Alsatia* in England where the King's writ does not run".¹⁹⁸

This led to the enactment of the Arbitration Acts of 1698, 1889, 1924, 1930, 1934, 1950, 1975 and 1979, some of which co-existed with each other, handling different aspects of arbitration. The English Arbitration Act of 1698 was the first, and the 1889 English Arbitration Act the second, formal statute enacted specifically to deal with arbitration in England. The 1889 Act significantly influenced the arbitration framework in the British colonies and played a major role in amending and consolidating previous arbitration practices.¹⁹⁹ It further enhanced the effectiveness of the arbitration agreement by giving full effect to voluntary agreements to refer existing or future disputes to arbitration, subject to certain general powers of control and supervision by the courts.²⁰⁰

The 1889 English Arbitration Act promoted the practice of arbitration. Certain provisions were introduced by the Act, which were aimed at protecting the autonomy of the arbitration process through the assistance of the court. For example, section 4 provided for the possible stay of legal proceedings initiated by a party in disregard of the agreement to submit to arbitration.²⁰¹ Such a stay could be ordered once the court had satisfied itself that the applicant was still willing to settle the matter by arbitration and there was no compelling reason why the dispute could not be finalised in terms of the agreement.²⁰²

The Arbitration Acts of 1924 and 1930 were specifically promulgated to implement international arrangements relating to arbitration and did not impact upon the general law of arbitration.²⁰³ The Arbitration Act of 1934 made some amendments to the principal Arbitration Act of 1889²⁰⁴ but the whole of arbitration law was later consolidated in the Arbitration Act of 1950.²⁰⁵ Efforts at improving the arbitration law

¹⁹⁸

Ibid.

¹⁹⁹

Noussia K (2010) *Confidentiality in international commercial arbitration: A comparative analysis of the position under English, US, German and the French law* 13.

²⁰⁰

Lorenzen G, "Commercial arbitration -- international and interstate aspects" (1934). vol. 43, issue 5 *YALE L J* 716-765 717.

²⁰¹

Ibid.

²⁰²

Idem 718.

²⁰³

Russel F (1982) *Russell on arbitration Steven & Sons Ltd London* 3.

²⁰⁴

Ellenbogen 658.

²⁰⁵

Ibid.

led to the enactment of the 1934 Arbitration Act,²⁰⁶ consolidation of the 1934 and 1889 Acts in the Arbitration Act of 1950. The arbitration process in terms of the 1950 Act was slow and expensive. The courts were always ready to intervene and the Act's inaccessibility to laypersons and foreigners made it an undesirable method of disputes resolution.²⁰⁷ It was then followed by the enactment of the 1979 English Arbitration Act.

The 1979 English Arbitration Act formed part of a continuing process of reforming arbitration, which, once begun, had to continue.²⁰⁸ Therefore, the English Arbitration Act 1996, which followed the 1979 English Arbitration Act, was another effort to enhance the English arbitration law by limiting judicial intervention, extending the powers of arbitrators, and further harmonising the English law with the laws of other jurisdictions in this respect.²⁰⁹ Shortcomings in the English Arbitration Act, 1979 greatly motivated the enactment of the English Arbitration Act, 1996, the current legislation governing English arbitration.

The English arbitration law was influential in the development of South African arbitration law as well as the arbitration law of other jurisdictions.

2.4 THE ORIGINS OF ARBITRATION LAW IN INDIA

Arbitration in India also has a long history. During ancient times, people often referred their disputes to the wise and elderly men of the community or to the Kula for a resolution, which was regarded as binding by the parties.²¹⁰ The popular form of arbitration in India was conceived in a system called the *Panchayat*.²¹¹ Although this was not the only form of alternative dispute resolution available in India, even the

²⁰⁶ Mwenda K (2003) *Principles of arbitration law* 9.

²⁰⁷ Ellenbogen 659.

²⁰⁸ Lord Hacking "The story of the Arbitration Act 1979" (2010) vol 76 *Arbitration* 1, 125-129 128.

²⁰⁹ Shackleton S "The internationalization of English arbitration law" (Spring 2000) vol 11, no 1 *ICC International Court of Arbitration Bulletin* 16-22 16.

²¹⁰ Sarma K "Development and practice of arbitration in India –Has it evolved as an effective legal institution" (2009) Working paper 103 *Center on Democracy, Development, and The Rule of Law Freeman Spogli Institute for International Studies* 2.

²¹¹ According to David Goodman Mandelbaum "Panchayat" literally means a group or council of five.

King arbitrated disputes, *Panchayat* was the system of arbitration that popularised the law of arbitration in India and made it easily accessible.²¹²

Panchayat established processes for resolving disputes, for redressing wrongdoings, and for launching group enterprises.²¹³ “The main function of this *Panchayat* was the distribution of justice and it was known for its spirit of fair play.”²¹⁴ Amongst the disputes that *Panchayats* resolved were complicated civil matters, criminal matters and family matters and because of this, disputes were seldom referred to a court of law.²¹⁵

Modern Indian law did not abandon the *Panchayats* but granted them constitutional recognition under Part IX of the Constitution of India.²¹⁶ However, the modern statutory *Panchayat* significantly differs from the traditional one. The modern statutory *Panchayat* refers to a statutory local body comprising elected members who are given legal and governmental powers.²¹⁷ In other words, statutory *Panchayats* now discharge official governmental duties not private dispute resolution processes.

The use of traditional forms of arbitration started to decline when the more formal processes were put in place as a result of the arrival of the British Raj.²¹⁸ India, being a common law country, was subject to English influences, which were facilitated by the colonisation of India by England.²¹⁹ In the process of building a sustainable judicial system, the English not only conveyed the Common law to India but also

²¹² Dutta A “Origin of alternative dispute resolution system in India” http://www.academia.edu/4371674/ORIGIN_OF_ALTERNATIVE_DISPUTE_RESOLUTION_SYSTEM_IN_INDIA 478 (accessed on 24 Jan 2014).

²¹³ Mandelbaum D (1970) *Society in India* 278.

²¹⁴ “Evolution of panchayats in India” (2010) <http://yojana.gov.in/CMS/%28S%28y4dqrc55g1m1qhnd4soqih45%29%29/pdf/Kurukshetra%5CEnglish%5C2010/October.pdf> 4 (accessed on 23 Jan 2014).

²¹⁵ Ramakrishnan K “Scope of alternate dispute resolution in India” <http://kja.gov.in/article/scopeOfADR.pdf> 2 (accessed on 24 Jan 2014).

²¹⁶ Chopra S “Supreme Court’s role *vis a vis* Indian Arbitration and Conciliation Act, 1996” http://works.bepress.com/context/dev_chopra/article/1000/type/native/viewcontent (accessed on 12 Jan 2011).

²¹⁷ Mandelbaum 278.

²¹⁸ Singh A (2011) “Changing face of arbitration in India” (2011) <http://aryme.com/docs/adr/2-2-2611/estudio-arbitraie-2011-india-ernst-young-arbitration-india.pdf> 60 (accessed on 06 June 2013).

²¹⁹ Balakrishnan K “An overview of the Indian justice delivery mechanism” (2008) Paper presented at the international conference of the Presidents of the Supreme Courts of the World, Abu Dhabi, 2008 1.

their traditions, viewpoints and methods.²²⁰ Consequently, the influence of English law on Indian arbitration law was inevitable. During the British colonial era in India, the British introduced various laws relating to arbitration which were applicable either to a part of the country or, subsequently, to the whole nation.²²¹ Arbitration in India continued its development with the first Bengal Regulations, enacted in 1772, which afforded parties an opportunity to refer their dispute to an arbitrator after a mutual agreement. The arbitral award was binding on the parties.²²²

The Bengal Regulations, which were enacted during British rule, were followed by more specific legislation, the Indian Arbitration Act, 1940. The Indian Arbitration Act, 1940 was the primary law governing arbitration in India and it was strongly influenced by the English Arbitration Act of 1934.²²³ The Indian Arbitration Act, 1940 preceded international arbitration²²⁴ although the Arbitration (Protocol and Convention) Act, 1937 and the Foreign Awards (Recognition and Enforcement) Act, 1961 facilitated the enforcement of foreign awards.²²⁵ The provisions of these two statutes were not necessarily designed to govern international arbitration; they simply laid down the conditions for “enforcement of foreign awards” in India.²²⁶

The 1940 Arbitration Act had some shortcomings, which went to the very root of arbitration as a dispute resolution mechanism. *Inter alia*, it provided for too much judicial supervision of the arbitral process²²⁷ as it facilitated court intervention in the arbitration process²²⁸ before, during and after the arbitral award.²²⁹ Furthermore, the Act required court intervention to set the arbitration in motion before it could be recognised by an arbitration tribunal.²³⁰ This state of affairs was contrary to the two essential characteristics of which arbitration is premised, viz. party autonomy and

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Ibid.

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Chopra 2.

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Singh 5.

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Sarma 3

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Idem 2.

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Ibid.

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Ibid.

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Sarkodie K “The sleeping giant” (2014) vol 9, issue 4 *Global Arbitration Review* 1.

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Balakrishnan.

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Ibid.

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Ibid.

finality.²³¹ The undermining of these two characteristics exposed arbitration to the risk of missing its objective completely, thereby losing its essence.²³²

The unfettered powers of intervention of the courts in respect of the arbitration process, allowed interminable challenges to awards. This approach defeated the purpose of opting for arbitration rather than litigation. This sad state of affairs was captured by the court in *Guru Nanak Foundation vs Rattan Singh & Sons*.²³³ The court, per Desai J, held that:²³⁴

“Interminable, time consuming, complex and expensive court procedures impelled jurists to search for an alternative forum, less formal, more effective and speedy for resolution of disputes avoiding procedural claptrap and this led them to the Arbitration Act, 1940 ('Act' for short). However, the way in which the proceedings under the Act are conducted and without an exception challenged in Courts, has made lawyers laugh and legal philosophers weep. Experience shows and law reports bear ample testimony that the proceedings under the Act have become highly technical accompanied by unending prolixity, at every stage providing a legal trap to the unwary. Informal forum chosen by the parties for expeditious disposal of their disputes has by the decisions of the Courts been clothed with 'legalese' of unforeseeable complexity. This case amply demonstrates the same.”

The *Guru Nanak* decision highlighted serious shortcomings in the Indian Arbitration Act, 1940 and highlighted the need for its urgent amendment. As a result, the Indian arbitration law was modernized by the enactment of the Arbitration and Conciliation Act, 1996. The new Act did not contain similar provisions to the previous Act, which entitled the court to intervene at will. So radical were the changes introduced by the 1996 legislation,²³⁵ that they rendered precedent regarding the Indian arbitration Act, 1940 redundant.²³⁶

Even the 1996 legislation was not flawless and the Law Commission of India was of the view that it was ripe for amendment and initiated an investigation into the progress made since the enactment of the 1996 Act and made suggestions for its

²³¹ Arya G & Sebastian T “Critical appraisal of ‘patent Illegality’ as a ground for setting aside an arbitral award in India” (2012) vol 24, issue 2 *Bond LR* 157-177 157.

²³² *Ibid.*

²³³ 1981 AIR 2075 1982 SCR (1) 842.

²³⁴ *Idem* 845.

²³⁵ Arbitration and Conciliation, 1996.

²³⁶ Khatri P “Arbitration-growth and development in India” <http://www.arbiavenuesintl.org/Arbitration-Prena.pdf> 8 (accessed on 23 Jan 2014).

amendment.²³⁷ It was on the strength of the recommendations of the Commission that the government introduced the Arbitration and Conciliation Amendment Bill, 2003.²³⁸ In the meantime, the government constituted the Saraf Commission on Arbitration to critically analyse the implications of the recommendations made by the Law Commission.²³⁹

The analysis of the Saraf Commission on Arbitration led to a recommendation that the Arbitration and Conciliation Amendment Bill, 2003 be withdrawn due to its insufficiency and controversial nature.²⁴⁰ The process of reviewing the Bill with the aim of addressing the concerns raised by the Saraf Commission on Arbitration and preparing it for its subsequent resubmission to the Rajya Sabha continued.²⁴¹ Eventually, the 1996 Indian Arbitration and Conciliation Act was amended in 2015 by the Arbitration and Conciliation (Amendment) Act, 2015.

2.5 THE ORIGINS OF ARBITRATION LAW IN THE USA

A brief overview of the history of arbitration in the USA reveals that colonial merchants acknowledged arbitration as a quicker, less formal, less expensive and more private process than litigation.²⁴² As in England,²⁴³ arbitration was also perceived to potentially protect the relationship between parties, leaving doors open for future business relations. Litigation, regarded as aggressive in nature, has a potential to, if not the inevitable effect of destroying the business relationship between the parties permanently. The reason for hostility between the parties following litigation is best illustrated by Certilman who states that:²⁴⁴

²³⁷ *Ibid.*

²³⁸ *Ibid.*

²³⁹ *Ibid.*

²⁴⁰ Narayan P & Pal "A guest post - Proposed amendments to Arbitration law: Part 1" (2014) <http://indiacorplaw.blogspot.co.za/2014/08/guest-post-proposed-amendments-to.html> (accessed on 28 Mar 2015).

²⁴¹ Rajya Sabha means the house of states and it is one of the houses of Indian Parliament with being legislative, financial, deliberative and federal functions. See Narain Y (2005) *Rajya Sabha-the upper house of Indian Parliament* 1 & 10.

²⁴² Haydock R & Henderson J "Arbitration and Judicial Civil Justice: An American Historical Review and a Proposal for a Private/Arbitral and Public/Judicial Partnership" (2002) vol. 2, *Pepperdine Dispute Resolution L J* 141-198 144 (hereafter Haydock & Henderson).

²⁴³ Certilman SA "This is a brief history of arbitration in the United States" (2010) vol. 3 no. 1, *NYSBA New York Dispute Resolution Lawyer* 10-13 10.

²⁴⁴ *Ibid.*

“While in the 20th Century it may no longer be typical for people to resort to weapons as a means of resolving their disputes, most will agree that litigation is, to a lesser degree, aggression played out in the dignified theatre of the courts with words as the weapon of choice.”

The consequences of such modern warfare are far-reaching and everlasting, especially on business relations, given the financial loss that follows. Arbitration provided much needed relief from the costly, slow and painful traditional litigation process.²⁴⁵ There has been a common appreciation amongst both practitioners and academics that the rules and procedures provided by the law tend to be somewhat rigid in litigation matters.²⁴⁶ The formalism of the law has proved, on numerous occasions, to present challenges to parties trying to resolve an existing dispute through litigation.²⁴⁷ High costs of litigation put it out of reach of most. Therefore, arbitration law in the USA offered parties a less complex alternative which focused on promoting their wishes.

The law itself demonstrated a commitment to carrying out the wishes of the parties expressed through the signing of an arbitration agreement. Maltby, correctly assessed the situation thus: “[t]he greatest strength of arbitration is that the average person can afford it”.²⁴⁸ Those interested in maintaining a fair, accessible, and affordable civil justice system were motivated by arbitrations’ promised benefits, to promote and protect arbitration as an accessible, and affordable system.²⁴⁹ Besides the benefit of affordability of arbitration, parties had the benefit of electing the arbitrator of their choice.

Parties selected an arbitrator *intuiti personae* because of the trust they had in him or their willingness to submit to his authority for various reasons.²⁵⁰ The arbitrator could be chosen because he was a squire, a relative, a mutual friend or a man of wisdom,

²⁴⁵ Haydock & Henderson 143.

²⁴⁶ Eisenberg T & Miller P "The flight from arbitration: An empirical study of ex ante arbitration clauses in the contracts of publicly held companies" (2007) vol 56, issue 2 *DePaul LR* 335-374 338, Stipanowich T Arbitration: "The new litigation" (2010) vol 2010, issue 1 *University of Illinois LR* 1-60 4.

²⁴⁷ *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (U.S. 2013).

²⁴⁸ Maltby, as quoted by Drahozal C "Arbitration costs and forum accessibility: Empirical evidence summer" (2008) vol 41, issue 4, *University of Michigan Journal of Law Reform* 813-842 813.

²⁴⁹ Haydock & Henderson 143.

²⁵⁰ Redfern A & Hunter M (2004) *Law and practice of international commercial arbitration* 3.

who was trusted to produce a satisfactory solution to the dispute.²⁵¹ Similar to the other jurisdictions discussed above, arbitration in the USA comes a long way.²⁵² The common law had contributed to the body of arbitration principles that existed before the introduction of the legislative framework of arbitration in the USA.

2.5.1 USA ARBITRATION AND THE COMMON LAW

Stoebuck defines common law as the body of governing principles, mainly substantive, developed by the common law courts of England in deciding cases before them.²⁵³ Reception of common law in North America was inevitable because the USA was an English colony. Stoebuck defines “reception” as meaning the adoption of the common law as the basis for colonial judicial decisions.²⁵⁴ The common law was received in the USA and was modified to create a unique legal system.²⁵⁵ According to Reinsch, the acceptance of the English common law in America was best explained by Justice Story in *Van Ness v Packard* when he held that:²⁵⁶

“The common law of England is not to be taken in all respects to be that of America. Our ancestors brought with them its general principles, and claimed it as their birthright; but they brought with them and adopted only that portion which was applicable to their situation.”

The USA, like South Africa and India was a British colony. Therefore its legal development was greatly influenced by English law. As Pope states:²⁵⁷

“...the greater part of the law of the states which is in fact identical with the common law of England does not consist of the common law of England which was adopted and made binding upon our courts, but it consists of rules established by the English Courts which have in fact been accepted and followed by the courts in this country, without regard to the dates of the English decisions establishing such rules, and without consideration of the

²⁵¹

Ibid.

²⁵²

Wolfe C “Faith-based arbitration: Friend or foe? An evaluation of religious arbitration systems and their interaction with secular courts” (2006) vol 75, issue 1 *Fordham LR* 427-469 432.

²⁵³

Stoebuck W “Reception of English common law in the American colonies” (1968) vol 10, issue 2 *William and Mary LR* 393-426 393.

²⁵⁴

Ibid.

²⁵⁵

Cohen M “The common law in the American legal system: The challenge of conceptual research” (1989) vol. 8, issue 1 *Law Library Journal* 13-32 13.

²⁵⁶

Reinsch P (2004) *English common law in the early American colonies* 6.

²⁵⁷

Pope H “The English common law in the United States” (Nov 1910) vol 24, no.1, *Harvard LR* 6-30 18.

question whether such decisions are a part of the adopted common law and binding upon our courts or not.”

The English law influence on USA arbitration is observed and commented upon by Gulley who states that:²⁵⁸

“The United States inherited a legacy of law grown from common law roots. England was the progenitor of American common law and from those shared roots also came arbitration. Through much of our history, we shared with England a distrust of a system that threatened to oust the courts of their jurisdiction. During this period of judicial hostility, lasting well into the twentieth century, it was not uncommon for arbitrators to ‘interact with the courts in rendering their awards.’ American judicial antipathy to arbitration, and the sharing of responsibilities between United States courts and their arbitral counterparts, changed dramatically in the twentieth century. This movement, which also shifted the American practice away from the English, has been characterized by its most important feature: ‘[A]rbitrators [are] almost entirely insulated from judicial intervention.’ The FAA codified this new understanding.”

According to Cohen, the common law has been the focus of massive commentaries and treatises throughout the legal history of England and its former colonies, including the USA and it continues to be the burning issue upon which legal literature focuses.²⁵⁹

2.5.2 ARBITRATION IN THE USA BEFORE 1925

Arbitration was practised in the USA long before legislation was passed to regulate it. It was utilised by the Native Americans before the European arrival in America.²⁶⁰ However, the newcomers did not embrace the benefits of the arbitration process until it was introduced to the settlers by early colonists who had European business experience.²⁶¹ Redfern and Hunter’s state the history thus:

“...the origins of contemporary private arbitration lie in Medieval Western Europe. A comprehensive account of second millennial arbitration, focused in a way which would enable the vigorous assertions made about the juristic basis of current mega-arbitrations to be checked against recorded facts, has yet to appear. Nevertheless, it can be said with some confidence that the dispute resolution mechanism of the post-classical mercantile world were conducted within, and drew their strengths from, communities consisting

²⁵⁸ Gulley M "The enhanced arbitration appeal amendment: A proposal to save American jurisprudence from arbitration, modeled on the English Arbitration Act of 1996," (2008) vol 36, issue 3 *Hofstra LR* 1095-1138 1098.

²⁵⁹ Cohen 13.

²⁶⁰ Certilman 10.

²⁶¹ *Ibid.*

either of participants in an individual trade or of persons enrolled in bodies established under the auspices and control of geographical trading centres. Such communities gave birth to the implicit expectations and peer-group pressures which both shaped and enforced the resolution of disputes by an impartial and often prestigious personage. Within such communities external sanctions would have been largely redundant, even if a legal framework had been available to bring them into play, which in the main it was not.²⁶²

It is trite that arbitration was constantly used in New York between 1664 and 1783.²⁶³ Colonial merchants preferred arbitration to litigation in order to avoid the expensive and endless processes that were offered by the government during that period.²⁶⁴ This new dispute resolution mechanism was not welcomed by the courts, which regarded it as a threat to their existence. The hostility of the courts towards arbitration meant that court resources were not easily accessible to enforce the award. Therefore, the merchants were forced to devise some means to ensure that the award was complied with. This they did by threatening the defaulting merchant's reciprocal agreements or his reputation.²⁶⁵

Arbitration by its nature is less confrontational than litigation and the possibility of going through dispute resolution without damaging the business relationship is preferable to litigation. This experience of arbitration as a method that reduced conflict and promoted continuation of the good business relationship was imported to the USA from Europe.²⁶⁶ The introduction of arbitration into North America prompted the creation of laws regulating the process. Massachusetts was the first colony to adopt laws, which supported arbitration.²⁶⁷ It was followed by Pennsylvania that adopted its arbitration laws in 1705.²⁶⁸ Sadly, the adoption of arbitration law by these two colonies did not inspire the use of arbitration in disputes other than those of a maritime or trade nature.²⁶⁹

Despite this, arbitration in the USA was not only utilised to resolve commercial disputes but was also sometimes used in conflict situations. A typical example of this

²⁶² Redfern A & Hunter M (2004) *Law and practice of international commercial arbitration* 4 ed 3.

²⁶³ Haydock & Henderson 144.

²⁶⁴ *Ibid.*

²⁶⁵ *Idem* 145.

²⁶⁶ Certilman 10.

²⁶⁷ *Ibid.*

²⁶⁸ *Ibid.*

²⁶⁹ *Ibid.*

practice was the attempt by John Dickinson, the leader of the moderate party to prevent the American Revolution in 1775 by resorting to arbitration to resolve the dispute.²⁷⁰ Another example was the attempt by moderate colonists to avoid further bloodshed that appeared to be leading to Revolutionary war by using the Olive Branch Petition.²⁷¹

Despite this, commercial arbitration emerged as a more prevalent form of arbitration than conflict arbitration. In 1768, the New York Chamber of Commerce established the first permanent arbitration board, and the securities industry had included an arbitration clause in its constitution by 1817.²⁷² The court's views on private arbitration at that time are reflected in the following quotation of Macneil:

“If every award must be made conformable to what would have been the judgement of this court in the case, it would render arbitrations useless and vexatious and a source of great litigation, for it very rarely happens that both parties are satisfied. The decision by arbitration is the decision of a tribunal of the parties own choice and election. It is a popular, cheap, convenient and domestic mode of trial, which the courts have always regarded with liberal indulgence; they have never exacted from these unlettered tribunals, this *rusticum* forum, the observance of technical rule and formality. They have only looked to see if the proceedings were honestly and fairly conducted, and if that appeared to be the case, they have uniformly and universally refused to interfere with the judgment of the arbitrators.”²⁷³

With the abovementioned understanding of arbitration, the New Orleans Cotton Exchange adopted arbitration for its dispute resolution mechanism in 1871.²⁷⁴ This seemingly beneficial process was also embraced by the New York Stock Exchange in 1872, for resolution of claims disputes between members and their customers.²⁷⁵ It appears that the concept of arbitration and its benefits were accepted and the practice was extended beyond matters of trade and maritime disputes. More States joined in and legislated the arbitration process in their respective jurisdictions.²⁷⁶ Maryland passed its first voluntary, binding labour dispute arbitration legislation in 1878 and it was followed by similar legislation in other States over the next ten

²⁷⁰ Certilman 10.

²⁷¹ *Ibid.*

²⁷² Wolfe 432.

²⁷³ Macneil R (1992) *American arbitration law* 19.

²⁷⁴ Certilman 10.

²⁷⁵ *Idem* 11.

²⁷⁶ *Ibid.*

years.²⁷⁷ The Arbitration Act of 1888 was the first Federal labour dispute law.²⁷⁸ Sadly, the voluntary nature of the process resulted in it being underutilised.²⁷⁹

Save for court decisions dating back to the seventeenth and eighteenth centuries and the Arbitration Act of 1888, which focused specifically on Federal labour dispute law, the legal positing, was lagging until early 1920.²⁸⁰ New York enacted the first modern arbitration law in 1920.²⁸¹ This law provided for the enforcement of agreements to refer future disputes to arbitration.²⁸² Lack of understanding of arbitration by the public motivated the establishment of the Arbitration Society of America. The Arbitration Society of America was established in 1922 by business leaders for the purpose of educating the public about the benefits of arbitration and lobbying for more extensive arbitration legislation.²⁸³

This lobbying led to promulgation of the Federal Arbitration Act, 1925.²⁸⁴ The Arbitration Foundation was established in 1924 and focused primarily on researching and promoting the commercial interests of its constituents.²⁸⁵ The primary concern of the Arbitration Society of America and the Arbitration Foundation, which threatened the fundamental principle of their existence, was judicial hostility towards arbitration.

Judicial hostility towards arbitration in the USA was inherited from the English courts,²⁸⁶ a natural consequence of English influences on the USA common law.²⁸⁷ This hostility is clearly discernible in the following judicial quotation of Wolfe:²⁸⁸

“[A]rbitrators, at the common law, possess no authority whatsoever, even to administer an oath, or to compel the attendance of witnesses. They cannot compel the production of documents, and papers and books of account, or insist upon a discovery of facts from the parties under oath. They are not ordinarily well enough acquainted with the principles of law or equity, to administer either effectually, in complicated cases; and hence it has often been said, that the judgment of arbitrators is but *rusticum judicium*.”

277

Ibid.

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Ibid.

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Ibid.

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Ibid.

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Ibid.

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Haydock & Henderson 147.

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Ibid.

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Ibid.

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Idem 148.

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Gulley 1098.

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Ibid.

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Wolfe 433.

Likewise, Benson also referred to this hostility.²⁸⁹ Benson refers to the comments of a judge reviewing a private arbitration award who indicated that the common law pertaining to arbitration in the English colonies and the newly formed USA could be traced back to the case of *Vynior's*²⁹⁰ which was decided in 1609 by Lord Edward Coke.²⁹¹ According to Coke, "though one may be bound to stand to the arbitrament yet he may countermand the arbitrator... as a man cannot by his own act make such an authority power or warrant not counter-mandable which by law and its own proper nature is counter-mandable."²⁹²

Benson interpreted the ruling as meaning that the decisions of arbitrators could be reversed by the common-law courts, because an arbitrator's purpose was, according to Coke, to find a suitable compromise, while a judge's purpose was to rule on the merits of the case.²⁹³ The precedent was binding and was followed for the next several centuries in both England and the USA.²⁹⁴ A typical example was a case of *Hobart v Drogan*²⁹⁵ decided in the USA in 1836. One of the parties argued that there was an agreement that, should the dispute arise it would be referred for resolution to the Chamber of Commerce.

The court per Mr Justice Story held that "the agreement has not been insisted on here in the argument on either side, and indeed, being to a mere amicable tribunal as arbitrators, could not in a case of this sort be now insisted upon to bar the jurisdiction of the court".²⁹⁶ The court held that common-law courts have the right to revoke whatever decision parties made to refer the dispute to arbitration, irrespective of the objection by one of the parties. The courts showed little or no respect for the will of the parties to settle their disputes outside of normal court proceedings. It retained the principle set out by Coke in *Vynior's* case.

²⁸⁹ Benson B "An Exploration of the impact of modern arbitration statutes on the development of arbitration in the United States" (Oct 1995) vol. 11, No. 2, *Journal of Law, Economics, & Organization* 479-501 483.

²⁹⁰ 4 Eng. Rep. 302 (1609).

²⁹¹ Benson 483.

²⁹² *Ibid.*

²⁹³ *Ibid.*

²⁹⁴ *Ibid.*

²⁹⁵ 35 U.S. 108 (1836).

²⁹⁶ *Idem* 119.

However, as early as 1842 the courts showed signs of moving away from the English precedent created by Coke in *Vynior's* case. The resistance to arbitration decreased when the nation became more industrialized and disputes increased.²⁹⁷ In *Hobson v McArthur*²⁹⁸ the intention of the parties was that two disinterested parties be appointed to value two pieces of land and, in the event of a disagreement on the value a third disinterested party be appointed.²⁹⁹ Indeed, a third disinterested party had to be appointed as a consequence of the disagreement of the other two. The three parties then agreed upon the value of one piece of land but only two could agree on the value of the other.³⁰⁰ The court, per Justice Thomson, held that:³⁰¹

“It has been argued that this being a delegation of power to the three for a mere private purpose all must agree, or the authority has not been pursued. This may be admitted to be the rule, where the original delegation of the power is to the three, without any other provision on the subject. But in construing this agreement, we must look at what was the obvious intention of the parties.”

In resolving the dispute, the court acknowledged that the will of the parties should receive preference because they intended to have two arbitrators decide their matter where the two agreed. The attitude of the court continued to reflect signs of moving away from the judicial hostility inherited by the USA courts from the English law. A ground-breaking decision came in 1854 when Justice Grier handed down the judgment in the case of *Burchell v. Marsh*.³⁰²

The decision in *Burchell v Marsh* reinforced the notion that the courts must respect the intention of the parties to have their disputes resolved through arbitration. This was a clear indication that the courts were now willing to embrace the arbitration process, which was asserting itself as a viable dispute resolution mechanism and was determined to emerge against all odds. There was indeed a gradual erosion of the hostility towards the process in the nineteenth Century and the USA courts moved away from the precedent set in *Vynior's* case.³⁰³

²⁹⁷ Certilman 12.
²⁹⁸ 41 U.S. 182 (1842).
²⁹⁹ *Idem* 192.
³⁰⁰ *Ibid.*
³⁰¹ *Ibid.*
³⁰² 58 U.S. 344 (1854).
³⁰³ *Idem* 349.

This change of attitude by the courts towards arbitration created the space for it to become an effective dispute resolution mechanism. The late nineteenth century and the early twentieth century saw an increasing number of arbitrations.³⁰⁴ This phenomenon resulted from the high cost of litigation and delays caused by an overburdened court roll.³⁰⁵ The fast-growing resort to arbitration and the concerns raised by the lawyers against arbitration necessitated the enactment of legislation. Legal practitioners regarded arbitration as taking work away from them.³⁰⁶

The concern above, prompted legal practitioners to motivate for legislation governing arbitration that would promote their involvement in the process.³⁰⁷ Institutions that dealt with arbitration welcomed their initiative.³⁰⁸ According to the American Arbitration Association (AAA), arbitration legislation was already a primary objective of the business community who believed that it would play a critical role in meeting their dispute resolution needs.³⁰⁹ This effort gave birth to the first modern Arbitration Act in the USA that was passed in New York in 1920.³¹⁰ The most notable characteristic of the statute was that it provided for enforcement of agreements to arbitrate both existing and future disputes.³¹¹ The 1920 Arbitration Act was followed by the birth of the Federal Arbitration Act of 1925 (FAA).

2.5.3 THE ENACTMENT OF THE FAA

The FAA established a national policy that favoured arbitration.³¹² It was designed to overcome existing judicial hostility toward arbitration³¹³ and to force courts to enforce agreements between parties to refer their disputes to arbitration. According to section 2:

“A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction,

³⁰⁴ Haydock & Henderson 146.

³⁰⁵ *Idem* 147.

³⁰⁶ *Idem* 147.

³⁰⁷ *Ibid.*

³⁰⁸ *Ibid.*

³⁰⁹ *Ibid.*

³¹⁰ *Ibid.* The New York Arbitration Law, 1920.

³¹¹ *Ibid.*

³¹² Certilman 12.

³¹³ *Ibid.*

or refusal, shall be valid, irrevocable and enforceable, save upon grounds as exist at law or in equity for the revocation of any contract.”

The legislature clearly demonstrated unconditional support for arbitration. Despite the enactment of the FAA, which was quite detailed, the courts were reluctant to apply it in practice for various reasons. Application of the FAA was also hindered by perceptions that it only governed those arbitration disputes that were referred to Federal courts.³¹⁴ This situation persisted from 1925 until 1945.³¹⁵

The perception was first challenged in the interesting decision of *Erie Railroad v Tompkins*³¹⁶ in 1938. The decision triggered consideration of whether the FAA was “substantive” or “procedural” in nature and whether the statute was premised upon Congress’ authority to regulate federal courts or on its power to regulate interstate commerce.³¹⁷ Justice Brandeis delivered the judgement for the court as follows:³¹⁸

“Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State, whether they be local in their nature or “general,” be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts.”

However, after consideration of the applicability of the FAA to state courts in *Bernardt v. Polygraphic Co. of America* it was concluded that its reach should not be extended to state courts as it is substantive rather than procedural.³¹⁹ The situation changed again in 1967 when the court in *Prima Paint Corp v Flood & Conklin Manufacturing Co*³²⁰ declared, “the FAA was unquestionably based on the power of Congress to regulate interstate commerce, and not upon an assertion of general common law or upon federal powers”.³²¹

³¹⁴ Sternlight J “Panacea or corporate tool?: Debunking the Supreme Court’s preference for binding arbitration” (1996) vol 74, issue 3 *Washington University LQ* 637-712 649.

³¹⁵ *Idem* 650.

³¹⁶ 304 U.S. 64 (1938).

³¹⁷ Sternlight (1996) 651.

³¹⁸ *Erie Railroad v Tompkins* 304 U.S. 64 (1938).

³¹⁹ Sternlight (1996) 650.

³²⁰ 388 U.S. 395 (1967) 405.

³²¹ Sternlight (1996) 656.

Prima Paint was a federal diversity claim and consequently, the court could not order that the FAA should be applied in state court.³²² However, the conclusion that the FAA was substantive law based on the Commerce Clause³²³ would facilitate the application of the FAA in state court under the Supremacy Clause.³²⁴ It was during this period that the FAA was significantly expanded with respect to international disputes, by the addition of Chapter 2 to give effect to the USA's accession to the New York Convention.³²⁵

An effort to keep private arbitration developments abreast of the evolving commercial world has continued to date. A typical example of one such effort is the proposed Arbitration Fairness Act (AFA), which will significantly amend section 2 of the FAA. By the inclusion of section 2(b), the AFA intends to prohibit the enforcement of pre-dispute arbitration agreements that require arbitration of employment, consumer, or franchise disputes or disputes arising under any statute intended to protect civil rights.³²⁶

There has been some concern expressed that this proposed Act might have unintended consequences.³²⁷ The AFA in its current form, applies both domestically and internationally and there is a fear that parties may take advantage of the loose language in the AFA which refers to "contracts or transactions between parties of unequal bargaining power" in order to resist the enforcement of arbitration clauses.³²⁸ A critical point is that if the AFA is finally made law it might re-introduce the obstacles to arbitration, which the FAA intended to address.

³²² *Idem* 657.

³²³ Reference to "the Commerce Clause" means the Congress's power granted by Article 1, Section 8, Clause 3 of the U.S. Constitution, "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." See https://www.law.cornell.edu/wex/commerce_clause (accessed on 04 June 2015).

³²⁴ *Ibid.*

³²⁵ *Ibid.* Chapter 3 was added in 1990 to give effect to the USA's accession to the Inter-American Convention on International Commercial Arbitration signed at Panama in 1975.

³²⁶ Wood J "Opening the door to justice: Amending the federal Arbitration Act to remedy the unjust use of predispute arbitration agreements" (2011) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2014428 (accessed on 03 Jan 2012).

³²⁷ Sussman E "The arbitration fairness act: unintended consequences threaten U.S. business" (2010) vol 18, issue 4 *The American Review of International Arbitration* 455-493 455; Hosking J, Lahlou Y & Leathley C "Unintended consequences of proposed amendments to FAA" <http://www.internationallawoffice.com/newsletters/detail.aspx?g=e4b5b897-d7f5-4b0f-a0c1-04c059527baa> (accessed on 20 Jan 2014).

³²⁸ *Ibid.*

2.6 THE ORIGINS OF SPANISH ARBITRATION LAW

The history of arbitration in Spain is a lengthy one.³²⁹ Its history dates back to the early epochs of the Roman Empire, and some notable references to it were discovered as early as the sixth century in the Breviario of Alarico, officially promulgated by Alarico II at the Aduris assembly.³³⁰ The Breviario Alarico was the first Spanish law book to incorporate the institution of arbitration.³³¹

As arbitration was regarded as contractual rather than judicial, arbitrators were empowered by Breviario's regulation, to make non-binding decisions only.³³² A reference to the institution of arbitration was also made by the *Liber Iudiciorum* in 654 AC, the *Fuero Real* in 1252 and finally, the *Partidas of Alfonso X 'el Santo'* in 1265.³³³ The judicial tradition of arbitration was only established by the law of the Visigoths outlined in the *Liber Juduciorum*.³³⁴ Arbitration also received recognition as a dispute resolution method in modern Spain in the Spanish Constitution of 1812 and the Civil Procedure Act of 1881.³³⁵ The highlight of arbitration in Spain was when it was entrenched as a constitutionally protected fundamental right.³³⁶

The pertinent section in the Spanish Constitution reads that: "No Spanish citizen may be deprived of the right of resolving his dispute by means of arbitration judges".³³⁷ However, the presence of this provision was unsuccessful in promoting the use of arbitration as a preferred dispute resolution mechanism in Spain. Arbitration lacked an active role in social reality notwithstanding its continued existence in Spanish law.³³⁸ Arbitration was recognised by the 1829 Commercial Code and the Procedure Act of 1830 as being an effective method for resolving disputes between

³²⁹ Volken P & Bonomi A (2009) *Year book of private international law (Arbitration agreements in international arbitration: The new Spanish regulation* 93.

³³⁰ *Ibid.* See also Cremades B & Stampa G "Commercial arbitration in Spain: History and current legislation" (1994) *The Japanese Commercial Arbitration Association Quarterly* 1.

³³¹ Cremades *idem* .

³³² Cremades 1.

³³³ Volken 93.

³³⁴ Cremades 2.

³³⁵ Volken 93.

³³⁶ Cremades 2.

³³⁷ *Ibid.*

³³⁸ Volken 94.

merchants.³³⁹ However, these codes negatively affected the institution of arbitration by referring to it as “obligatory” rather than voluntary.³⁴⁰

The manner in which arbitration was regulated during the seventeenth century was disparate.³⁴¹ The 1851 Civil code regarded the agreement to arbitrate as a contract, whereas the 1855 Civil Procedure Act established a new method of arbitration and it considered it another type of a judicial proceeding.³⁴² This disparate treatment of arbitration persisted in the 1881 Civil Procedure Act and the 1889 Civil Code.³⁴³ The 1881 Civil Procedure Act required that arbitration agreements needed to be formalized in a public deed failing which, the agreement would be void.³⁴⁴

The formal nature of this requirement was inconsistent with the requirements of the Civil Code.³⁴⁵ The situation led to a division between substantive and procedural laws,³⁴⁶ a circumstance that contributed to the insignificant value attached to arbitration in Spanish law.³⁴⁷ This factor further contributed to the paucity of relevant articles written during this period.³⁴⁸ Statistics reveal that arbitration was not as popular in Spain as it was in the USA, the UK or France.³⁴⁹ Arbitration was either under-utilised or not utilised at all and its development stagnated.³⁵⁰

People in Spain did not have a habit of referring their disputes to arbitration, a state that persisted for some time.³⁵¹ This hesitance to arbitrate could be attributed to the then prevailing culture of litigation rather than settlement.³⁵² The social isolation and economic under-development, which lasted for a century, also played a role in undermining the popularity of arbitration.³⁵³ The failure of arbitration to grow in Spain could also be attributed to political instability, government and judicial hostility

339 Cremades 3.
340 *Ibid.*
341 Cremades 3.
342 *Ibid.*
343 *Ibid.*
344 *Idem* 4.
345 *Ibid.*
346 *Ibid.*
347 *Ibid.*
348 *Ibid.*
349 *Ibid.*
350 Volken 94.
351 *Idem* 93.
352 *Idem* 94.
353 *Ibid.*

towards arbitration, which had the effect of ousting the jurisdiction of the national courts.³⁵⁴

Legislators were aware of this problem and introduced a number of statutes to promote the use of arbitration. Steps were taken to encourage recognition and use of arbitration as an effective dispute resolution mechanism through the promulgation of the 1953, 1988 and 2003 Arbitration Acts. The 1953 Arbitration Act aimed to promote a broader use of arbitration domestically and internationally.³⁵⁵ However, the 1953 Arbitration Act failed to achieve its objectives and, in fact, achieved the opposite as it emulated the values of a dictatorial regime which opposed party autonomy.³⁵⁶ According to Cremades and Casas there were three reasons provided for the legal content of the 1953 Arbitration Act:³⁵⁷

“The first of these is to defend the importance of the institution of arbitration, thereby rejecting the arguments of critics of arbitration, who tried to use the royal function of justice as an argument against the existence of the institution of arbitration. The second reason was the deficiencies in former Spanish legislation, the result of a lack of vigor in the arbitration clause. Finally, effectiveness and simplicity were the principles underlying the 1953 Act or, in other words, the solution of conflicts should be speedy and satisfactory.”

Though the 1953 Act proved inadequate to promote the use of arbitration, it represented an advance.³⁵⁸ The deficiencies in the Act appeared through practice, illustrating that the 1953 Act was ill-equipped to govern arbitration proceedings emanating from domestic and international commercial transactions.³⁵⁹ Arbitration is normally favoured for its flexibility; however, the fundamentally civil nature of the 1953 Act facilitated excessive formalism.³⁶⁰ The Act was enacted in order to resolve civil law disputes using arbitration in the strictest sense of the word.³⁶¹ The introduction of formal processes led to arbitral proceedings imitating the rigid formality of litigation proceedings. The 1953 Act further required that an arbitration

³⁵⁴

Ibid.

³⁵⁵

Ibid.

³⁵⁶

Cairns C & Stampa G “Arbitration law in Spain taking-off...at last?” (2001) vol 4 *International Arbitration L R* 84-89 84.

³⁵⁷

Cremades B & Casas G “Commercial arbitration in Spain: History and current legislation” (1994) *The Japanese Commercial Arbitration Association Quarterly* 43.

³⁵⁸

Carlos K “Spanish arbitration law” (Summer, 1989) vol 20, issue 3, *The University of Miami Inter-American Law Review* 741-763 741.

³⁵⁹

Ibid. Cremades 20.

³⁶⁰

Cremades 20.

³⁶¹

Ibid. Carlos 741.

must comply with the form requirements provided in the 1881 Civil Procedure Act by formalizing the agreement in a public deed.³⁶² The Act limited the contractual freedom of the parties by denying them recourse to institutional arbitration.³⁶³ As Ignacio states:³⁶⁴

“The 1953 Act was based on political principles radically different from those of a democratic country. At that time, lawmakers viewed arbitration unfavourably, as it was the judicial monopoly of the state to resolve conflicts. From an economic standpoint, the 1953 Act was enacted during a period of autocracy and foreign isolation, thus there was little or no activity within Spain with respect to international arbitration.”

The 1953 Act further abolished the inconsistent treatment of arbitration that flowed from the Civil Procedure Act and the Civil Code discussed above.³⁶⁵ The belief of society and lawmakers at that time was that conflict resolution was the responsibility of the State.³⁶⁶ A new comprehensive statute was necessary to address the shortcomings of the 1953 legislation.

The 1988 Arbitration Act was enacted shortly after Spain became a democratic country.³⁶⁷ Its primary objective was to promote a much broader use of arbitration both domestically and internationally.³⁶⁸ The Arbitration Act of 1988 eliminated the conceptual formalism, which characterised the 1953 Arbitration Act.³⁶⁹ The conclusion of a valid underlying contract was the only formal requirement for the existence of a valid arbitration agreement and the conclusion of an arbitration agreement was left entirely in the hands of the parties.³⁷⁰ The 1988 Arbitration Act provided a fertile ground for arbitration to grow in Spain and it did.³⁷¹ There was an increase in the incidence of arbitration agreements in contracts and a consolidation of standard practices, especially in international arbitrations.³⁷²

362 Cremades 9.

363 *Idem* 21.

364 *Ibid.*

365 *Idem* 4.

366 *Ibid.*

367 Volken 94.

368 *Ibid.*

369 Cremades 21.

370 *Ibid.*

371 Mancha J, Rodriguez J & Alfonso J (2008) *The Baker & McKenzie's international yearbook 2007 (New developments in Spanish arbitration law)* 123.

372 *Ibid.*

There was, furthermore, a notable generation of arbitration jurisprudence.³⁷³ The 1988 Act differed significantly from the 1953 Act. It abolished the requirement that an arbitration clause in a contract should be confirmed by a subsequent submission agreement.³⁷⁴ The parties were given autonomy to elect procedural rules other than those of Spain for the handling of arbitration proceedings.³⁷⁵ Likewise, parties could elect to apply substantive law different from Spanish law, provided that there was a connection between the provisions of the applicable law and the merits.³⁷⁶ The new developments were a step in the right direction. However, there was a concern that these new developments still restricted party autonomy, rendering Spain a less popular site for international arbitrations than others.³⁷⁷

The 1988 Act placed restrictions on the parties' choice of law as parties could only elect a law connected to the underlying legal transaction or with the dispute.³⁷⁸ Parties were also restricted from electing the arbitrator of their choice as section 12(2) specifically stated that, where the dispute has to be decided at law, the arbitrator must be a practising attorney.³⁷⁹ Therefore, the Act prohibited any person other than a practising attorney, whether legally qualified or not, from being an arbitrator. The 1988 Act further introduced formal requirements foreign to international arbitration, which required the award to be delivered within six months.³⁸⁰ The 1988 Act was rendered insufficient by the changing business world, technical advances and new needs of commercial practice.³⁸¹

The Spanish Arbitration Act, of 2003 was then enacted to align Spanish arbitration law with UNCITRAL Model Law of 1985, discussed in chapter 4 below,³⁸² and international standards and to accommodate the demands of those international

373

Ibid.

374 Rubino-Sammartano M (2001) *International arbitration: Law and practice* (2ed) 67.

375

Ibid.

376

Ibid.

377

Cairns & Stampa 84.

378

Spanish Arbitration Act, 1988 ss 61 & 62. See also Cairns & Stampa 84.

379

American Arbitration Association (2006) *ADR and the law* (20 ed) 219.

380

1988 Act s 30(1).

381

Ignacio J & Aguado F "Arbitration in Spain" 826 https://eguides.cmslegal.com/pdf/arbitration_volume_I/CMS%20GtA_Vol%20I_SPAIN.pdf 825 (accessed on 23 Feb 2014).

382

Ibid. A full discussion on UNCITRAL Model Law of 1985 can be found in ch 4 which focuses on the international context of arbitration.

businesses that opted to utilise arbitration as a dispute resolution mechanism.³⁸³ The 2003 Spanish Arbitration Act applies to any dispute irrespective of whether it is domestic or international, provided Spain is the seat of arbitration.³⁸⁴

There have been some subsequent amendments to the Spanish Arbitration Act of 2003 to enhance the practice of arbitration.³⁸⁵ Spain is striving to improve its international profile in the commercial world with the objective of attracting international commercial arbitration to its shores. This explains its adoption of UNCITRAL Model Law, which promotes a common language amongst the international business community, which depends on international commercial arbitration for resolution of its disputes.

The importance of the role played by international commercial arbitration in the international business sphere is undisputed. The history of international commercial arbitration will therefore be explored briefly below.

2.7 THE ORIGINS OF INTERNATIONAL ARBITRATION LAW

2.7.1 INTRODUCTION

International business relations have the potential to end in a dispute. Such disputes are complicated by parties' concerns regarding the national courts that may be tasked with resolving their disputes as more than one national legal system may be involved in these disputes.³⁸⁶ Disputes regarding the appropriate court to determine a matter may stem from concerns that one or other party may receive hostile treatment from a foreign court.³⁸⁷ It is therefore crucial for the parties to agree on their preferred forum and governing law.³⁸⁸ Arbitration presented an opportunity to the parties to opt for a forum that will allow them to elect a neutral arbitrator who will

³⁸³ Ignacio & Aguado 825.

³⁸⁴ *Idem* 826.

³⁸⁵ *Ibid.* (See also the following Acts which amended the Spanish arbitration Act, Act 13 of 2009, Act 11 of 2011 and the Organic Act 5 of 2011).

³⁸⁶ Goldberg S, Sander F & Rogers N (1992) *Dispute Resolution negotiation, mediation, and other processes* 359.

³⁸⁷ *Ibid.*

³⁸⁸ *Ibid.*

listen to their case fairly and make a determination in accordance with their chosen governing law. As Rajah and Tann states.³⁸⁹

“International Arbitrations are fascinating because, unlike domestic arbitrations which take place within the envelope of a domestic legal system, they are, in a sense, like our internet, borderless. The parties may be physically sitting in one location but different legal regimes frequently impinge upon an international arbitration and frequently create tensions or pose issues for which there is no easy or ready answer or recognised legal principles to which the arbitrator can avail himself.”

It is the freedom from the restrictions of any specific national law that makes international arbitration attractive as a dispute resolution mechanism. International arbitration was used historically both to resolve commercial disputes and as a mechanism to try to prevent war between nations.³⁹⁰ It should however be noted that international commercial arbitration takes place under the arbitration law of the seat and thus suggests that the national law applying to the arbitration procedure will generally be different from the national law applicable to the substantive merits.³⁹¹

2.7.2 ARBITRATION AS A METHOD OF HARMONISATION

International arbitration pre-dates the current form of private arbitration. A dispute arose in 600 BC between Athens and Megara regarding the island of Salamis.³⁹² The conflict continued until both sides agreed to refer the dispute to five *Lacedaemonian* arbitrators.³⁹³ Another example of an arbitration institution existed in Greece. This particular institution was entrusted with compelling submission of disputes to arbitration and was known as the Amphictyonic Council.³⁹⁴ It was the States General of Greece and was allegedly empowered to arbitrate over disputes between states and to enforce its decisions.³⁹⁵ Another such institution with similar

³⁸⁹ Rajah K & Tann W “Powers of arbitrators International symposium” (2002) [http://www.weil.com/wgm/cwgm/homep.nsf/Files/p8\\$file/](http://www.weil.com/wgm/cwgm/homep.nsf/Files/p8$file/).pdf (accessed on 11 Feb 2012).

³⁹⁰ Finley R “International arbitration” (1904) vol 179, no 576, *The North American Review* 659-670 659.

³⁹¹ Blackaby & Partasides *Redfern and Hunter on International Arbitration* (61h edition, Oxford, 2015) 166; see also the Model Law articles 1(2) and 28). For example, the parties can agree that the seat of an arbitration concerning a dispute relating to a contract subject to English law will be South Africa.

³⁹² *Ibid.*

³⁹³ *Ibid.*

³⁹⁴ *Idem* 661.

³⁹⁵ *Ibid.*

powers, the *Fetiales* was discovered in Rome.³⁹⁶ Further, history reveals the existence of a permanent tribunal of arbitration to resolve disputes between Rome and other nations.³⁹⁷ This institution, which applied the principles of international law, was tasked with determining the justice or the injustice of every war before it was undertaken.³⁹⁸ However, arbitration on an international level developed from the mechanisms that were utilised to harmonise nations during wars to international commercial arbitration that featured prominently in disputes arising from international business transactions.

2.7.3 INTERNATIONAL COMMERCIAL ARBITRATION LAW

Babu defines international commercial arbitration as a 'means by which disputes arising out of international trade and commerce could be resolved pursuant to the parties' voluntary agreement, through a process other than a court of competent jurisdiction'.³⁹⁹ Arbitration has long been embraced as the commercial community's preferred method of resolving international trade disputes.⁴⁰⁰ However, the attitude of the courts towards arbitration was not positive.⁴⁰¹ There was a lack of international regulation of arbitration, facilitating extensive intervention by national courts in the process.⁴⁰² Courts were at liberty to review the substantive decision of arbitrators.⁴⁰³ Consequently, the late nineteenth and early twentieth century saw the development of modern international arbitration.⁴⁰⁴

The current form of international commercial arbitration originated in Europe in the 1920s.⁴⁰⁵ The process faced challenges. The first challenge was that in some countries an agreement to submit a dispute to arbitration could only be validly

³⁹⁶ *Idem* 662.

³⁹⁷ *Ibid.*

³⁹⁸ *Ibid.*

³⁹⁹ Babu R "International commercial arbitration and the developing countries" (2006) 385 *AALCO Quarterly Bulletin* 4.

⁴⁰⁰ Lew, Mistelis & Kroll (2003) 18.

⁴⁰¹ *Ibid.*

⁴⁰² *Ibid.*

⁴⁰³ *Ibid.*

⁴⁰⁴ *Ibid.*

⁴⁰⁵ Bergsten E "International commercial arbitration United Nations Conference on Trade and Development" http://unctad.org/en/Docs/edmmisc232add38_en.pdf (accessed on 20 Jan 2013).

entered into in respect of an existing dispute by a so-called “*compromise*”.⁴⁰⁶ There were no mechanisms in place prohibiting the court from assuming jurisdiction over the dispute even in those countries where the agreement to arbitrate a future commercial dispute could be validly entered into.⁴⁰⁷ In Gelande’s view:⁴⁰⁸

“The resolution of potential disputes is of great concern to parties involved in international business transactions. Due to the high cost of overseas litigation and the uncertainty of relying upon a foreign legal system, such disputes are often difficult to resolve.’ It is essential to the maintenance of international trade relationships that businesses feel confident in the methods by which they resolve commercial disputes.”

The international business community needed an assurance that methods that are in place to resolve international commercial disputes could be confidently relied upon. The introduction of international commercial arbitration was a breakthrough and provided the international business community with a reliable and less complex instrument to resolve commercial disputes than litigation.

Early forms of international commercial arbitration attracted criticism for constantly favouring the economic interests of the developed world.⁴⁰⁹ The current form of international commercial arbitration, with its rules and regulations, originated in the twentieth century⁴¹⁰ when lawyers promoted its internationalization.⁴¹¹ Specific reference can be made to Roots who won a Nobel Peace Prize for his contribution to the establishment of the Hague Court of International Arbitration.⁴¹² Roots and a group of like-minded individuals established the Council of Foreign Relations and played a critical role in promoting the International Chamber of Commerce (ICC).⁴¹³

406

Ibid.

407

Ibid.

408

Gelande J “Judicial review of international arbitral awards: Preserving independence in international commercial arbitrations” (1997) vol 80, issue 2 *Marq LR* 625-644 625.

409

Idem 386.

410

Idem 387.

411

Whittington KE, Kelemen RD & Caldeira GA (2010) “The Oxford handbook of law and politics” <http://books.google.co.za/books?id=fjKUols9Ep4C&pg=PT282&lpg=PT282&dq=commercial+arbitration+thrived+over+war+arbitration&source=bl&ots=upidS01E4b&sig=ZIBGcGDdMUoDwuEqxfwWJH4TVHE&hl=en&sa=X&ei=isspVMHXKsKf7gamnoGQDA&ved=0CCoQ6AEwAA#v=onepage&q=commercial%20arbitration%20thrived%20over%20war%20arbitration&f=false> (accessed on 29 Sep 2014) 354.

412

Babu 387.

413

Ibid.

The ICC was established in 1919 in Paris after the First World War by business leaders from allied countries with a view to inspiring trade and open markets.⁴¹⁴ The establishment of the ICC necessitated the establishment of an institution to handle international commercial arbitration and The ICC International Court of Arbitration was established in 1923.⁴¹⁵ The ICC International Court of Arbitration was established for the purpose of stimulating the development of commercial arbitration for application to transnational business disputes.⁴¹⁶ Instruments governing international commercial arbitration followed.

The Geneva Protocol on Arbitration Clauses (hereafter The Geneva Protocol), 1923, was an initial attempt by western parties to exclude the jurisdiction of domestic courts from international commercial arbitration cases and to further structure the legal regime of international commercial arbitration to favour themselves.⁴¹⁷ The Geneva Protocol was followed by the International Convention on the Execution of Foreign Awards, 1927 (Geneva Convention) the purpose of which was to widen the scope of The Geneva Protocol.⁴¹⁸ The widening of The Geneva Protocol made provision for the recognition and enforcement thereof within all contracting States.⁴¹⁹

The Geneva Convention required the party seeking enforcement of an award to show that the award had become final in the jurisdiction that had issued it⁴²⁰ and to obtain a declaration stating that it was enforceable there before it could be enforced elsewhere.⁴²¹ The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), 1958 provided a simpler and more effective method of obtaining recognition and enforcement of foreign arbitral awards.⁴²² The 1958 Convention also gave wider effect and validity to arbitration agreements than the Geneva Convention.⁴²³ Article 1 of the New York Convention reads as follows:

414 *Ibid.*
415 *Ibid.*
416 *Ibid.*
417 *Idem* 388.
418 *Ibid.*
419 *Ibid.*
420 Bergsten 22.
421 Babu 388.
422 *Ibid.*
423 *Ibid.*

“This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.”

Article 1 of the New York Convention made its intention to facilitate the enforcement of international commercial arbitration awards crystal clear. Institutions like the ICC played a very important part in motivating for the creation and adoption of the New York Convention that facilitated the enforcement of arbitral awards.⁴²⁴ Several cases were efficiently resolved under the umbrella of the ICC through the application of a more mediation-like rather than litigation-like process that is now associated with arbitration.⁴²⁵ More instruments governing international commercial arbitration followed the New York Convention.

In 1985, UNCITRAL adopted a Model Law on International Commercial Arbitration designed to harmonise current national laws on arbitration.⁴²⁶ To this end, UNCITRAL developed rules specifically for the arbitration of international trade disputes between parties from different legal, social and economic systems.⁴²⁷ The UN General Assembly recommended, by resolution, “that all States give due consideration to the Model Law on International Commercial Arbitration, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice”.⁴²⁸

International commercial arbitration is an evolving area of law. UNCITRAL's Working Group meets twice a year and makes recommendations on matters relating to arbitration and mediation to the commission. At its annual meeting in 2016, UNCITRAL considered and approved the revised text of the "2016 UNCITRAL Notes

⁴²⁴ Whittington 354.

⁴²⁵ Babu 388.

⁴²⁶ *Ibid.*

⁴²⁷ Franchini D, “International arbitration under the UNCITRAL arbitration rules: A contractual provision for improvement” (1994) vol 62, issue 7 *Fordham LR* 2223-2244 2223.

⁴²⁸ UNCITRAL Model Law.

on Organizing Arbitral Proceedings", the original version of which was published in 1996.⁴²⁹

2.8 CONCLUSION

This chapter gives a brief overview of the origins and development of arbitration law in a number of relevant jurisdictions, including international law. There has been significant development in arbitration law in the USA, England, India, Spain and internationally. This development was prompted by changing business practices. There was an attempt by the SALRC to revisit the arbitration law in South Africa; however, the process has failed to deliver tangible results to date. In the next chapter, the thesis addresses the application and constitutionality of private arbitration in South Africa.

⁴²⁹ UNCITRAL's Report on its 49th Session (27 June -15 July 2016) 29 (UN doc A71/17).

CHAPTER 3: SOUTH AFRICAN LAW OF ARBITRATION, INCLUDING A CONSTITUTIONAL PERSPECTIVE

3.1 INTRODUCTION

Internationally, merchants grew to prefer arbitration to litigation because litigation had become a burdensome and extremely costly process for those who needed quick delivery of justice in commercial disputes.⁴³⁰ Litigation in commercial matters involved business persons spending considerable periods of time away from the business, with adverse financial implications. Arbitration offered flexibility that enabled parties to design a dispute resolution mechanism suited to their needs.⁴³¹ It appears South Africa too, followed the international trend in the commercial sector to incorporate arbitration clauses in contracts and to regulate these. Proper regulation of arbitration was essential to ensure consistent, appropriate and efficient handling of arbitration matters.

The commercial sector was happy to endorse the less costly and speedier alternative that arbitration offered.⁴³² Butler and Finsen refer to Voet's description of the arbitration process:⁴³³

“It is a common thing for arbitrators to be approached with a view to the termination of a dispute and the avoidance of a formal trial. The reasons for resorting to arbitration are the fear of the too heavy expenses of lawsuits, the din of legal proceedings, their harassing labours and pernicious delays, and finally the burdensome and weary waiting on the uncertainty of the law.”

South African law views an arbitration clause as an agreement between contracting parties that, should a dispute arise between them regarding their business transaction, an independent, impartial individual will be appointed to adjudicate the dispute and, having gathered all relevant information, make a decision that will be

⁴³⁰ Krekora M (2008) *Contract manufacturing of medicines* 3ed 270.

⁴³¹ Likosky M (2002) *Transnational legal processes: Globalisation and power disparities* 31.

⁴³² Jones G & Pexton P (2015) *ADR and trusts: An international guide to arbitration and mediation of trust disputes* 319

⁴³³ Butler & Finsen 19.

final and binding.⁴³⁴ Arbitration agreements can be entered into when a dispute arises or in anticipation of future disputes.⁴³⁵

Arbitration in South Africa is currently regulated by the Arbitration Act,⁴³⁶ (the Act). Though technical amendments have been made,⁴³⁷ no material amendments have been made since its inception. The failure to materially update the legislation means that it has not taken proper cognisance of the impact of the Constitution. It is imperative that its legislative provisions be evaluated in light of the Constitution to ensure its compatibility.⁴³⁸ Furthermore, South African arbitration law has not responded in any way to UNCITRAL Model Law on International Commercial Arbitration.⁴³⁹ The Act is silent on the subject of international arbitration, although there is separate legislation governing the enforcement of foreign arbitral awards in South Africa.⁴⁴⁰ The stagnant landscape of South African Arbitration law will be considered hereafter.

3.1.1 ARBITRATION LAW IN SOUTH AFRICA

The sources of South African arbitration law are the common law, the Act, the Recognition and Enforcement of Foreign Arbitral Awards Act⁴⁴¹ and case law.⁴⁴² Initially, arbitration in South Africa was governed by the common law.⁴⁴³ This was later supplemented and amended by legislation,⁴⁴⁴ which was significantly influenced

⁴³⁴ *Idem* 1.

⁴³⁵ Turley I "The proposed rationalisation of South African arbitration law" (1999) vol 1999, issue 2, *TSAR*, 235-255 236.

⁴³⁶ Act 45 of 1965.

⁴³⁷ Justice Laws Rationalisation Act 18 of 1996 (see s 16(3)); General Law Amendment Act 49 of 1996 (to remove the references to the "territory", i.e. the old South West Africa); and the Prevention and Combating of Corrupt Activities Act 12 of 2004 (see s 33(2)).

⁴³⁸ The purpose of ensuring compatibility of Arbitration Act with the Constitution is to give effect to the obligations imposed by article 2 of the Constitution which states that the Constitution is the supreme law of the country and all law and conduct must be aligned to it failing which it should be declared invalid.

⁴³⁹ Butler (1994) 120.

⁴⁴⁰ *Idem* 120.

⁴⁴¹ Act 40 of 1977.

⁴⁴² Ramsden P & Ramsden K (2009) *The Law of arbitration: South African and international arbitration* 13-23.

⁴⁴³ Winship T (1925) *The law and practice of arbitration in South Africa* 2.

⁴⁴⁴ See Cape Arbitration Act, 1898, Natal Arbitration Act, 1898 & Transvaal Arbitration Ordinance, 1904.

by English arbitration law.⁴⁴⁵ The primary objective of the arbitration legislation in South Africa was to facilitate efficient reference of disputes to adjudication, to regulate the conduct of arbitration proceedings and to ensure the enforcement of awards.⁴⁴⁶ The aim of arbitration in South Africa is:⁴⁴⁷

“... to provide an alternative forum where the dispute may be adjudicated and where the parties have some control over who adjudicates the matter and the time periods in which the matter will be heard.”

The Act was enacted to achieve these stated objectives and was not without impact. In fact, in the 1970s it was regarded as more advanced than its Israeli and New South Wales counterparts and was influential in the compilation of arbitration legislation in these jurisdictions.⁴⁴⁸ Sadly, this is no longer the case. Failure to develop the law in this area has denied South Africa the opportunity to compete for the status of preferential seat of international arbitration. South Africa, being one of the most sophisticated economies in Africa,⁴⁴⁹ and given its existing infrastructure, has the potential to become an African arbitration powerhouse if it implements strategic legislative amendments.⁴⁵⁰

The dire need to revisit arbitration law in South Africa prompted the South African Law Reform Commission (SALRC) to embark upon an arbitration law revision project fifteen years ago. This project has not yet been finalised.⁴⁵¹ The SALRC revitalised its reform project in 2013 and planned to table two draft Bills regulating domestic and international arbitration respectively, before the South African Parliament in 2014. Only one Bill dealing with international arbitration has been tabled to date. A brief overview of the current arbitration law position in South Africa follows below.

⁴⁴⁵ Rudolph G & Bernstein D (2015) *Baker and McKenzie international arbitration yearbook 2014-2015* 317.

⁴⁴⁶ Butler & Finsen 4.

⁴⁴⁷ Bham F “Putting a price on it: Assessing the quantum of a claim for damages” <http://www.bowman.co.za/eZines/Custom/Litigation/JuneNewsletter/arbitration.html> (accessed on 08 Dec 2015).

⁴⁴⁸ Butler (1994) 118.

⁴⁴⁹ Sarkodie 1.

⁴⁵⁰ *Ibid.*

⁴⁵¹ SALRC Project 94. The SALRC has embarked on another project which intends to extend alternative dispute resolution mechanisms into family matters. Such a step is undertaken despite the fact that the challenges facing commercial dispute resolution mechanism have not been resolved. The SALRC published SALRC (2016) Family dispute resolution: Care of and contact with children issue 31 Project 100D for comments which will be closing on the 30th of June 2016.

3.1.2 LEGAL FRAMEWORK OF SOUTH AFRICAN ARBITRATION

The Act has been the primary source of arbitration law in South Africa for fifty years. The purpose of the Act is “[t]o provide for the settlement of disputes by arbitration tribunals in terms of written arbitration agreements and for the enforcement of the awards of such arbitration tribunals”.⁴⁵² Section 1 of the Act provides definitions of crucial terms like “arbitration agreement”, “arbitration proceedings”, “arbitration tribunal” and “arbitration award”. The application of the Act is limited in terms of section 2(a) and (b), which prohibit its application to any matrimonial cause or incidental matter, and to matters relating to the status of any person, respectively. These matters fall exclusively within the jurisdiction of the courts. There are, however, no provisions defining the scope of the Act’s application.

Sections 3 to 8, deal with the effect of arbitration agreements. Section 3 emphasises the binding effect of arbitration agreements. Section 3(1) states that the agreement cannot be terminated except by agreement between the parties. Section 3(2) empowers a court, on application of a party to an arbitration agreement, and on good cause shown, to either refer the dispute to arbitration or set the arbitration agreement aside. The court may also order that the entire arbitration agreement should cease to exist.⁴⁵³

Section 4 provides guidelines on how to handle circumstances where a party to the agreement dies or is removed from office. The section states that appointment of an arbitrator or the existence of an arbitration agreement cannot be terminated by death or removal from office,⁴⁵⁴ insolvency or winding up of any party to the agreement.⁴⁵⁵ In such circumstances, proceedings are stayed pending the appointment of a representative of the party who died or a replacement for the one who was removed.⁴⁵⁶ Section 5 provides that in the event that a party to an arbitration agreement is declared insolvent, sequestrated or there is a winding-up of a corporation that is a party in an arbitration agreement, the provisions of any law governing sequestration of insolvent estates or winding-up of the corporate body

⁴⁵² The Act (preamble).

⁴⁵³ English Arbitration Act, 1996 s 3(2)(c).

⁴⁵⁴ *Idem* s 4(1).

⁴⁵⁵ *Idem* s 5(1).

⁴⁵⁶ *Idem* s 4(2).

apply in the same manner as they would have had the matter been dealt with by way of action or civil proceedings.

The Act promotes arbitration as a viable dispute resolution process. Thus, section 6 entitles a court to order the stay of proceedings in the event that one party ignores the existence of an arbitration agreement and institutes an action. The application for a stay would be instituted by the other party to the agreement who must convince the court that there is no valid reason why the matter should not be disposed of in terms of the arbitration agreement. The Act facilitates further judicial intervention prior to the commencement of arbitral proceedings as it also permits the court to order that the dispute between parties to an arbitration agreement be resolved through interpleader.⁴⁵⁷

The cooperation of the judiciary is essential to the success of arbitration. Hence, provision is made for the court to intervene in certain circumstances, sometimes even before an award is made. For example, the court is empowered to intervene and rescue arbitration where a party failed to commence arbitration proceedings within a prescribed period, potentially leading to the barring of the claim.⁴⁵⁸ In such a situation, the court may order an extension for commencement of the proceedings if it is convinced that to do otherwise would lead to undue hardship.⁴⁵⁹

Sections 9 to 13 elaborate on the powers that the parties have to appoint or terminate the appointment of an arbitrator or an umpire. Section 9 provides that reference of a dispute should be to a single arbitrator unless the parties have expressed otherwise. The powers that the parties have to appoint an arbitrator are succinctly stated in section 10 and, section 11 elaborates on the powers of the parties to appoint an umpire. Section 12 deals with the power of the court to appoint

⁴⁵⁷ See s 7. Interpleader is defined as: "An equitable proceeding brought by a third person to have a court determine the ownership rights of rival claimants to the same money or property that is held by that third person. Interpleader is a form of equitable relief. Equitable remedies are ways for courts to enforce rights other than by issuing a judgment for money damages. Interpleader is employed when two or more parties seek ownership of money or property that is held by a third party. The property in question is called the stake, and the third party who has custody of it is called the stakeholder. The stakeholder is faced with a legal dilemma: giving the property to either one of the parties will likely lead to a lawsuit by the other party against the stakeholder and the new property owner." See Legal dictionary <http://legal-dictionary.thefreedictionary.com/Interpleader> (accessed on 09 Jan 2016).

⁴⁵⁸ The Act s 8.

⁴⁵⁹ *Ibid.*

an arbitrator or umpire where parties fail to exercise their powers properly. Section 13 sets out the procedure for the setting aside or termination of an appointment of either an arbitrator or an umpire.

Parties may agree upon the number of arbitrators or umpires to be appointed.⁴⁶⁰ Furthermore, upon unavailability of an arbitrator or umpire to continue, the parties may appoint another arbitrator or umpire to continue, despite the fact that the agreement is silent on what should happen should such an event occur.⁴⁶¹ In the event that parties fail to agree on the appointment of arbitrators in accordance with the agreement,⁴⁶² the party who gave notice of arbitration may, upon giving notice to the other party, apply to the court for the appointment of an arbitrator.

Sections 14 to 22 of the Act regulate the arbitration process. Section 14 deals with the powers that vest in the tribunal and how decisions will be made where there is more than one arbitrator. Section 15 regulates the giving of notice of proceedings, section 16 deals with the summoning of witnesses to appear before the tribunal, section 17 deals with the recording of evidence, section 18 lists the powers of the arbitrator or umpire and section 19 sets out the general powers of the court. For example, the court may deal with a “stated case” procedure where a question of law, which arose during the course of reference, is submitted to the court for its opinion or the opinion of the counsel before the final award.⁴⁶³ Section 22 establishes offences in terms of the Act.

The provisions that focus on the process regarding handling of the award are found in sections 23 to 33. Section 23 prescribes the time within which the award should be made, however, the court may extend this period on good cause. Awards should be in writing and signed by all the members of the tribunal.⁴⁶⁴ However, the validity of

⁴⁶⁰ *Idem* s 11.

⁴⁶¹ *Ibid.*

⁴⁶² In terms of s 12.

⁴⁶³ The Act s 20. See Lord Hacking “The ‘stated case’ abolished: The United Kingdom Arbitration Act of 1979” (1980) vol 14, issue 1 *International Lawyer* pp 95-102 97 where it is remarked that “stated case” procedure initially enabled judicial review beyond the exhaustive grounds for review of arbitral award. This procedure could only be initiated at the instance of the arbitrator for the opinion of the court on the award. The procedure was later extended to seeking the opinion of the court even on the question of law which arose during the proceedings and the discretion of the arbitrator in deciding on the referral was removed.

⁴⁶⁴ *Idem* s 24.

the award is not affected by the refusal of the minority of the members of the arbitral tribunal to sign.⁴⁶⁵ Subject to the arbitration agreement, valid awards are final and binding.⁴⁶⁶ A party to the proceedings may apply to a court of competent jurisdiction, to have the award made an order of court.⁴⁶⁷ Once the award has been made an order of court, it becomes enforceable in the same way as any other court order.⁴⁶⁸ The court is not obliged to make an award an order of court and may, on good cause shown, refer the award back to the tribunal for reconsideration and the issue of a fresh award.⁴⁶⁹ Parties to an arbitration may also find relief from an award in terms of section 33 (1). This section comprises of an exhaustive list of grounds upon which an award can be set aside. The section reads:

- “(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 irregularity 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.”

Sections 34 to 36 deal with the remuneration of umpires and arbitrators and other costs associated with the arbitration. The remaining sections⁴⁷⁰ deal with miscellaneous matters.

The contents of the Act that have been briefly set out above, are subject to a critical analysis below.

3.2 CRITICAL ANALYSIS OF THE SOUTH AFRICAN ARBITRATION LAW

As stated above, the current domestic arbitration law in South Africa, once advanced and influential is now outdated and inadequate to meet the challenges of the modern dynamic business world. The inadequacy can largely be attributed to the failure of the Act to adapt to modern circumstances. Furthermore, attitudes towards arbitration have been negatively impacted by perceptions such as those espoused by Western

⁴⁶⁵ *Idem* s 24 (2).

⁴⁶⁶ *Idem* s 28.

⁴⁶⁷ *Idem* s 31 (1).

⁴⁶⁸ *Idem* s 31(3).

⁴⁶⁹ *Idem* ss 32 & 33.

⁴⁷⁰ *Idem* ss 37-43.

Cape Judge President, John Hlophe, who commented that arbitration is regarded by some, particularly white practitioners, as a viable means of avoiding courts, the benches of which comprise predominantly of black judges.⁴⁷¹

The Act reflects considerable English law influence, despite some minor differences between the legislation and the English Arbitration Act, 1950. The Act is closely modelled on the 1950 English Arbitration Act with provisions, which are broadly similar.⁴⁷² The South African legislation conferred fewer powers on the courts to intervene in an arbitral award.⁴⁷³ However, it allowed more extensive court intervention during the proceedings, thus compromising the speedy finalisation of the dispute, autonomy of the arbitration and the cost effectiveness of the process.⁴⁷⁴

The Act is permeated with provisions that permit court intervention in the arbitration process. For example, section 3(2) confers a discretion on the court to set aside a valid arbitration agreement on good cause shown. Likewise, the court may set aside or terminate the appointment of an arbitrator on good cause shown.⁴⁷⁵ “Good cause” includes but is not limited to:⁴⁷⁶

“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 a case where two arbitrators are unable to agree, in giving notice of that fact to the parties or to the umpire”.

The use of poor wording is one of the shortcomings of the Act. Thus, what qualifies as good cause shown is not stipulated, potentially leaving the section open to abuse.⁴⁷⁷ Courts have a discretion to determine what constitutes good cause. The lack of certainty regarding the content of the concept of good cause leaves the door

⁴⁷¹ Sarkodie 2.

⁴⁷² Christie H “South Africa as a venue for International commercial arbitration” (1993) vol 9, issue 2, *Arbitration International* 153-166 153.

⁴⁷³ Sarkodie 2.

⁴⁷⁴ *Ibid.*

⁴⁷⁵ The Act s 13 (1)(b); see also *Umgeni Water v Hollis NO and another* 2012 (3) 475 (KZD) para 6.

⁴⁷⁶ The Act s 13 (1)(b).

⁴⁷⁷ Even though the court in *Umgeni* acknowledges that the Act does not define ‘good cause’ it held the view that there is sufficient jurisprudence developed by the courts through interpretation of ‘good cause’ in terms of rule 31 (2) (b) of the Consolidated Rules of Court which will provide courts with necessary guidelines on how to approach the concept of ‘good cause’ in terms of the Arbitration Act. See *Umgeni Water* para 7 & 10.

open to disgruntled parties to challenge arbitral awards in hopes that they will convince the court that there is good cause to set the award aside.

Section 6 (2) of the Act reveals yet another instance of poor wording that leaves the arbitration process open to abuse and that may undermine the purpose of the process. The section deals with the stay of legal proceedings where a valid arbitration agreement exists. The Act gives the court a discretion to stay the proceedings by using the word 'may' stay proceedings. This implies the court may choose not to stay the proceedings.⁴⁷⁸

The Act contains provisions that may encroach upon the principle of party autonomy. The court is empowered by section 7(1) to order parties to arbitration to determine their dispute by recourse to interpleader proceedings. This order is contrary to the expressed wishes of the parties who have agreed that disputes arising from their commercial relations must be resolved through arbitration. Courts are empowered to alter the provisions regarding commencement of proceedings that parties agreed upon⁴⁷⁹ and may condone an extension of the commencement date provided hardship would be caused if such an extension were not granted.

Furthermore, section 20, adopted from the English Arbitration Act, empowers the arbitration tribunal to refer any question of law that arises during the process to the courts for an opinion. The court in *Telcordia* described the primary objective of section 20 as follows:⁴⁸⁰

“...it can be used only if the legal question arises "in the course" of the arbitration. It is not intended to apply where the parties agree to put a particular question of law to the arbitrator. Any other interpretation of the section would defeat its purpose and "it would be futile ever to submit a question of law to an arbitrator". Its purpose, at the very least, is not to enable parties, who have agreed to refer a legal issue to an arbitrator to renege on their deal.”

The procedure in terms of section 20 is referred to as the “stated or special case” procedure and may be construed as creating another ground upon which the

⁴⁷⁸ Sarkodie 2.

⁴⁷⁹ The Act s 8.

⁴⁸⁰ *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA) para 154, *Padachie v Body Corporate of Crystal Cove* 2016 JDR 1814 (SCA) para 17.

autonomy of arbitration may arguably be undermined by possible facilitation of court interference in arbitral proceedings. The consequences of the procedure in all probabilities has the effect of undermining the arbitrator in that the opinion of the court on the question of law binds the arbitrator irrespective of the impact it has on the award. This may result in the arbitrator arriving at a different conclusion and making a different award than he or she might otherwise have made. The court in *Telcordia* confirmed that the referral of the case in terms of section 20 depends entirely on the discretion of the arbitrator.⁴⁸¹ In the event that the arbitrator declines to state a case for the opinion of the court, the aggrieved party may approach the High court in terms of section 20 for the court to determine whether the arbitrator erred in the exercise of his discretion.⁴⁸² It is important to note that the criticism of section 20 of the South African Arbitration Act does not imply that it has no benefits. The benefits are extensively described later when section 45 of the English arbitration, Act 1996 is discussed which correspond with the provisions of section 20.⁴⁸³

The “stated or special case” procedure was constantly criticised in England by both the business community and practitioners for granting wide powers to the court to intervene in arbitral proceedings. The conundrum presented by a procedure of this nature is that it has *pros* and *cons*. The advantage of this process as correctly alluded to by Kerr was “that it ensures that arbitrators apply the law of the land and not their own private notions of justice.”⁴⁸⁴

Special case procedure was consequently removed from the English law.⁴⁸⁵ The version of the special case in terms of section 20 of the South African Arbitration Act, 1965 and section 21 of the English Arbitration Act, 1950 differed significantly.⁴⁸⁶ South African Arbitration Act, 1965 only provides for a consultative case whereas the

⁴⁸¹ *Telcordia* paras 151 & 152.

⁴⁸² *Telcordia* para 153.

⁴⁸³ Cht 6 para 6.6.3.3.

⁴⁸⁴ Kerr M “The arbitration Act 1979” (1980) vol 43, issue 1, *The Modern L R* 45-58 45.

⁴⁸⁵ *Idem* 47.

⁴⁸⁶ *Telcordia* para 152.

special case in terms of the English Arbitration Act granted the courts more powers to review and in some instances correct the arbitrator's application of the law.⁴⁸⁷

The existence of the provisions of section 20 of the Act availed a tool that could be used by parties to delay the finalisation of arbitration proceedings through court actions irrespective of the outcomes. A consequence of the potential for extensive court intervention has been to undermine the original purpose and benefits arbitration offered parties. Gauntlett, (a member of the SALRC), voices this opinion eloquently:

“The Act, it reported, 'is characterised by excessive opportunities for parties to involve the court as a tactic for delaying the arbitration process, inadequate powers for the Arbitral Tribunal to conduct the arbitration in a cost-effective and expeditious manner and insufficient respect for party autonomy (ie the principle that the Arbitral Tribunal's jurisdiction is derived from the parties' agreement to resolve their dispute outside the courts by arbitration).”⁴⁸⁸

Furthermore, the South African Act does not explicitly address the two cornerstone principles of arbitration being competence-competence⁴⁸⁹ and the doctrine of separability.⁴⁹⁰ However, the courts acknowledged the significance of these principles to arbitration and developed South African common law in line with them thereby providing foundation and strengthening the argument for their incorporation into South African legislation.⁴⁹¹ A further shortcoming of the Act is its lack of provisions to deal with the power of the tribunal to grant interim orders.⁴⁹²

⁴⁸⁷ Littman M “England reconsiders “the state case” (spring 1979) vol 13 *International lawyer* 253-259 260.

⁴⁸⁸ Gauntlett 29.

⁴⁸⁹ The competence-competence principle empowers the arbitral tribunal to rule on its own jurisdiction when such an objection is raised. According to Lee in Lee, J “Separability, competence-competence and the arbitrator's jurisdiction in Singapore” (1995) vol 7, part 2, *Singapore Academy of L J* 421-437 421: “The doctrine has two aspects. Firstly, it means that arbitrators are judges of their own jurisdiction and have the right to rule on their own competence. Therefore, if the validity of the arbitration agreement *itself* and thus the competence of the arbitrator is impugned, he or she does not have to stop proceedings but can continue the arbitration and consider whether he or she has jurisdiction. Secondly, in some countries, the arbitration agreement ousts the initial jurisdiction of ordinary courts.”

⁴⁹⁰ Sarkodie 2.

⁴⁹¹ See *North East Finance (PTY) LTD v Standard Bank of South Africa LTD* 2013 (5) SA (SCA) paras 8,9 &10, *Radon Projects (PTY) LTD v Properties (PTY) LTD and another* 2013 (6) SA 345 (SCA) paras 27,28 & 29, *Zhongji Development Construction Engineering Co LTD v Kamoto Copper Co SARL* 2015 (1) SA 345 (SCA) paras 35,36 & 53.

⁴⁹² *Ibid.*

In my opinion, South African arbitration legislation failed to respond to the opportunities offered by the new constitutional dispensation of 1994, which brought about unprecedented international business growth. Furthermore, as the Act was enacted before the Constitution, it has never been fully evaluated in light of constitutional principles. The Act does not confer sufficient autonomy on arbitration parties to tailor-make the process to suit their purposes. Nor does it take cognisance of the fact that in the South African context, numerous parties to arbitration agreements are functionally illiterate and/ or commercially unsophisticated.⁴⁹³ Such parties need special protection from exploitation by large corporations due to their weaker bargaining positions. Thus, from the above it is clear that the Act labours under some considerable shortcomings in the modern context. The Act provides no guidance on how to deal with foreign arbitral awards.

An examination of the Act also reveals the absence of any provisions to accommodate the development and practice of international commercial Arbitration law.⁴⁹⁴ This may be attributed to the fact that it was enacted before the introduction of the Model Law. The Act also failed to incorporate international commercial instruments like the Convention on The Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention).

Despite the shortcomings in the Act with regard to international arbitration law, the legislature made an effort to give effect to the "New York Convention" through the promulgation of the Recognition and Enforcement of Foreign Arbitral Awards, Act⁴⁹⁵, which is discussed below. The legislature further made great strides towards remedying the shortcomings presented by the current Act with regard to International Arbitration through the enactment of International Arbitration Act 15 of 2017, which came into effect on the 20 December 2017 subsequent to the date of final submission of this thesis.

⁴⁹³ Mupangavanhu Y "Fairness a slippery concept: The common law of contract and the Consumer Protection Act 68 of 2008" (2015) vol 48, issue 1, *De Jure* 116-135 129 (hereafter Mupangavanhu).

⁴⁹⁴ Lack of accommodation of international commercial arbitration by South African Arbitration law is discussed in more detail below.

⁴⁹⁵ Act 40 of 1977.

3.2.1 RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS ACT 40 of 1977

In recognition of the significance of the New York Convention, South Africa became party to it in 1976⁴⁹⁶ and gave effect to its contents through the Recognition and Enforcement of Foreign Arbitral Awards Act.⁴⁹⁷ The New York Convention plays a critical role in facilitating international trade, harmonising arbitration practices and facilitating the recognition and enforcement of international arbitral awards. The South African legislation giving effect to the New York Convention,⁴⁹⁸ focused on three vital issues. First, it provides that a foreign arbitral award can be made an order of the court and enforced like any other court order. Second, it focuses on the procedure required to have the award made an order of court as envisaged in section 1.⁴⁹⁹ Third, it provides for the circumstances under which the court may refuse to make an arbitral award an order of the court in terms of section 4.⁵⁰⁰ The

⁴⁹⁶ Norton Rose (2011) *Arbitration in Africa* 1.

⁴⁹⁷ Act 40 of 1977.

⁴⁹⁸ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 .

⁴⁹⁹ Provisions of article 1 of the New York Convention provide guidelines on the procedure that has to be followed to have the arbitral award made an order of the court. The advantage of such a procedure is that the machinery that can be used to enforce any court judgment are placed at the disposal of the party who successfully made the application to enable her to enforce the award. The pertinent provisions reads as follows: “2 Foreign arbitral award may be made order of court and enforced as such

- (1) Any foreign arbitral award may, subject to the provisions of sections 3 and 4, be made an order of court by any court.
- (2) Where any amount payable in terms of such award is expressed in a currency other than the currency of the Republic, the award shall be made an order of court as if it were an award for such amount in the currency of the Republic as, on the basis of the rate of exchange prevailing at the date of the award, is equivalent to the amount so payable.
- (3) Any such award which has under subsection (1) been made an order of court, may be enforced in the same manner as any judgment or order to the same effect.”

⁵⁰⁰ “(1) A court may refuse to grant an application for an order of court in terms of section 3 if-

- (a) the court finds that-
 - (i) a reference to arbitration is not permissible in the Republic in respect of the subject matter of the dispute concerned; or
 - (ii) enforcement of the award concerned would be contrary to public policy in the Republic; or
- (b) the party against whom the enforcement of the award concerned is sought, proves to the satisfaction of the court that-
 - (i) the parties to the arbitration agreement concerned had, under the law applicable to them, no capacity to contract, or that the said agreement is invalid under the law to which the parties have subjected it or of the country in which the award was made; or
 - (ii) he did not receive the required notice of the appointment of the arbitrator or of the arbitration proceedings concerned or was otherwise not able to present his case; or
 - (iii) the award deals with a dispute not contemplated by or falling within the provisions of the relevant reference to arbitration, or that it contains decisions on matters beyond the scope of the reference to arbitration: Provided that if the decisions on matters referred to arbitration can be

three vital issues covered by this Act were properly structured to enhance the effectiveness of arbitral proceedings.

This Act was enacted in a calculated effort to guarantee the full benefits and protection of consensual arbitration to private parties.⁵⁰¹ However, the Act itself had shortcomings that attracted scathing criticisms from the SALRC.

Its application was restricted to the enforcement of foreign awards only.⁵⁰² Furthermore, the SALRC recorded the following further criticisms of the Act:⁵⁰³

“3.14 The 1977 Act has been subjected to four main criticisms. These relate to (a) the definition of "foreign arbitral award", (b) the failure to include an equivalent to article II of the Convention regarding the enforcement of arbitration agreements, (c) problems with the wording of s 4 regarding the grounds on which enforcement of a foreign arbitral award may be refused and (d) the enforcement of an award in a foreign currency because of the provisions of s 2(2).

3.15 A fifth criticism is the failure to make express provision for the recognition of foreign arbitral awards as opposed to their enforcement. A final criticism is that the wording of the legislation could create the impression that the grounds on which enforcement of an award may be refused in the legislation are not exhaustive and that the court therefore has a general discretion to refuse enforcement.”

Against the backdrop of the criticisms above, the SALRC recommended that the 1977 Act should be repealed and replaced by new legislation enacted specifically to deal with international arbitration.⁵⁰⁴

The international agreement between states obliges domestic courts to promote and protect this objective.⁵⁰⁵ However, the provisions on foreign arbitral awards in the

separated from those on matters not so referred, that part of the award which contains decisions on matters referred to arbitration may be made an order of court under section 2 (1); or

- (iv) the constitution of the arbitration tribunal concerned was or the arbitration proceedings concerned were not in accordance with the relevant arbitration agreement or with the law of the country in which the arbitration took place; or
 - (v) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made.
- (2) If, on an application in terms of section 3, the court is satisfied that an application for the setting aside or suspension of the award has been made to a competent authority of the country in which, or under the law of which, the award was made, the court may in its discretion postpone the hearing of the said application seeking to enforce the award, order the party against whom the enforcement is sought, to give suitable and specified security.”

⁵⁰¹ Ramsden & Ramsden 18.

⁵⁰² SALRC (1998) Arbitration: An international Arbitration Act for South Africa (Project 94) 21.

⁵⁰³ *Ibid.*

⁵⁰⁴ *Idem* 22.

Protection of Business Act⁵⁰⁶ (PBA) are a blatant violation of South Africa's obligations under the New York Convention.

The enforcement of those awards that were made outside South Africa may face a hurdle in South Africa due to the restrictions introduced by the PBA. It is provided in section 1 of the PBA that no enforcement of the foreign award should be allowed without the consent of the Minister if the award resulted from an act or transaction "connected with the mining, production, importation, exportation, refinement, possession, use or sale of or ownership to any matter or material, of whatever nature whether within, outside, into or from the Republic".

The PBA further prohibits an enforcement of foreign awards irrespective of the consent of the Minister, if the arbitral award:⁵⁰⁷

“...is connected with any liability which arises from any bodily injury of any person resulting directly or indirectly from the consumption or use of or exposure to any natural resource of the Republic, whether unprocessed or partially processed or wholly processed, or any product containing or processed from any such natural resource, unless the same liability would have arisen under the law of the Republic, as it existed at the time of the occurrence of the event which gave rise to the liability.”

The wording of the PBA is extremely wide and leaves room for potential frustration of a perfectly handled foreign award.

Consensus is at the heart of the discussion below regarding the protection of consumers when entering into arbitration agreements or commercial contracts that incorporate an arbitration clause.

3.2.2 PROTECTION OF SOUTH AFRICAN CONSUMERS

Protection of consumers in South Africa regarding unfair and unreasonable contractual terms has enjoyed the attention of the SALRC.⁵⁰⁸ The SALRC attempted

505

Ibid.

506

Act 99 of 1978

507

Idem s 1D.

508

SALRC (1998) Unreasonable stipulations in contract and rectification of contracts project 47.

to address the question of how the law should deal with unreasonable stipulations in contracts.⁵⁰⁹ They suggested that.⁵¹⁰

“.....the correct way of protecting consumers against unconscionable contracts or clauses is to provide in consumer legislation for appropriate mechanisms, e.g. a cooling-off period, a prohibition against fine print in standard form contracts, an accessible Usury Act capable of being understood by the layman or provisions outlawing or limiting certain types of clauses, e.g. consent to jurisdiction, exemption and voetstoets clauses, waiver of defences clauses, etc. If this is done, so it is argued, the courts do not need a general review power.”

This suggestion predominantly targeted the protection of consumers who were disadvantaged in contracts because of their weak bargaining position.⁵¹¹

Though consumers have always been protected in one way or another, the introduction of the Consumer Protection Act provides for a comprehensive protection framework.⁵¹² The National Consumer Commission (NCC) was established to give effect to the provisions of section 85 of CPA and acts as the guardian of consumer rights. The NCC is described on the website of the Department of Trade and Industry as:⁵¹³

“..... an organ of state within the Public administration, and as an institution outside public service with jurisdiction throughout the Republic of South Africa. The NCC is charged with the responsibility to enforce and carry out the functions assigned to it in terms of the Act, which aims to:

- Promote a fair, accessible and sustainable marketplace for consumer products and services, and for that purpose;
- Establish national norms and standards relating to consumer protection;
- Provide for improved standards of consumer information;
- Prohibit certain unfair marketing and business practices;
- Promote responsible consumer behaviour; and
- Promote a consistent legislation and enforcement framework relating to consumer transactions.”

The CPA does not explicitly deal with the effect of arbitration on vulnerable consumers. There are, however, sections of the Act designed to protect consumers from unfair, unreasonable and unjust contract terms and conditions (Part G). This fundamental right includes the right to fair, just and reasonable terms and conditions

509

Ibid.

510

Idem 8.

511

Ibid.

512

Consumer Protection Act 68 of 2008 “hereinafter referred to as CPA”.

513

The Department of Trade and Industry (DTI) agencies
<https://www.thedti.gov.za/agencies/ncc.jsp> (accessed on 12 Aug 2015).

(section 48); regulation of prohibited transactions, agreements, terms and conditions (section 51) and provides guidance to the courts to ensure fair and just conduct, terms and conditions (section 52). The fairness of arbitration clauses in consumer agreements will therefore be assessed (apart from the obvious Constitutional premise) in terms of the provisions, scope and purpose of the CPA. It should further be noted that the CPA also provides additional protection to categories of vulnerable consumers such as the young, elderly and illiterate.⁵¹⁴

The question begs, what can be done where an uninformed and vulnerable consumer signs a contract containing an arbitration clause in terms of which she⁵¹⁵ relinquishes all rights of recourse to the courts if a dispute arises. Can this be viewed as a voluntary or consensual decision to resort to arbitration? Van Eeden posits that:⁵¹⁶

“The court must promote the spirit and purpose of the Act, and make appropriate orders to give practical effect to the consumer’s right of access to redress, including, but not limited to any order expressly provided for in the Act and any innovative order that better advances, protects, promotes and assures the realisation by consumers of their rights in terms of the Act.”

The disparity in bargaining powers potentially places vulnerable consumers in the untenable position that terms like arbitration clauses, which had the effect of denying consumers the right of access to the courts, were imposed on them without their full understanding or appreciation of the consequences. Arbitration was created with a view to enabling parties with equal bargaining powers to benefit from cost reductions associated with this process.⁵¹⁷

It should be noted that section 69 of the CPA provides for particular routes of redress. Section 69(d) provides that a court (not a consumer court) may only be approached where all other avenues of redress have been exhausted. This conforms with the aim to provide consensual dispute resolution in terms of the Act (preamble and s 3). When it comes to the determination of fair contractual terms and unconscionable conduct the wording in terms of section 52 seem to indicate that

⁵¹⁴ CPA s 3(1)(b).

⁵¹⁵ Reference to the female gender refers to all other genders and should be sued interchangeably.

⁵¹⁶ Van Eeden E (2013) *Consumer protection law in South Africa* 39.

⁵¹⁷ Smith S, “Mandatory arbitration clauses in consumer contracts: Consumer protection and the circumvention of the judicial system”, (2001) vol 50, issue 1, *DePaul LR* 1191-1252 1191.

courts may be approached directly but clarity by the court and legislature is needed in this regard.⁵¹⁸ Further discussion therefore assumes that the correct process in terms of section 69 of the CPA has been followed but access to courts is inhibited by the wording of the agreement itself and has the result of being construed as unfair, unreasonable and unjust. There is an argument made that section 69 in itself also limits the consumer's right to access to the courts in terms of section 34 of the Constitution.⁵¹⁹

Often the consumer is oblivious to the existence of the clause in the agreement. In some instances, even if the clause is drawn to the attention of the weaker contracting party and explained to her, she is unable to appreciate the import and importance of the clause or, despite that appreciation, is compelled to enter the contract on the basis that the clause and its associated forfeiture of rights is an acceptable cost of doing the business.⁵²⁰ This is an indication of the manipulation of power to the benefit of the powerful. As Barnhizer states:⁵²¹

“Power. How to get it, keep it, and use it have been central questions of politics, business, military strategy, and human relationships for millennia—from the military genius of Sun Tzu to the fictional mobship of Tony Soprano. This extended study of power has yielded a wealth of nuanced and sophisticated models for assessing, maintaining or altering the balance of power in relationships. As a result, the practical, real-world approach to power is fundamentally strategic and recognizes that all actors and all relationships possess power. Power is a complex phenomenon that arises from numerous sources and may assume forms not immediately apparent to an outside observer..... Finally, power is not a static event but is subject to dynamic change throughout the course of the actors' relationship..... The contract doctrine of "inequality of bargaining power" is the legal equivalent of the socially embarrassing aunt or uncle that the family talks about but to whom no one really pays attention. Courts dealing with the legal concept of inequality of bargaining power assess relative power tactically, limiting their analysis to how the power dynamics appear to exist at a particular moment in the contracting parties' relationship.”

It appears that many suppliers have acquired this power and often utilise it to compel consumers to accept contractual terms that may be prejudicial to them. Arbitration clauses are often part of standard-form contracts and are incorporated into the contract without affording the consumer an opportunity to negotiate such a clause or

⁵¹⁸ Van Heerden C, in Naudé T & Eiselen S *Commentary on the Consumer Protection Act* (2017) 69-70; 69-16 to 69-20.

⁵¹⁹ Van Heerden C, in Naudé T & Eiselen S *Commentary on the Consumer Protection Act* (2017) 69-70 (see also in particular 69-20 to 69-25).

⁵²⁰ See section 49 of the CPA where notice to the consumer of certain terms and conditions are required.

⁵²¹ Barnhizer D, “Inequality of bargaining power”, (2005) vol 76, issue 1, *U. Colo LR* 139-242 140.

to seek legal advice on its effect. These arbitration clauses are often drafted by sophisticated attorneys, employed by major corporations.⁵²² Mupangavanhu who states that emphasized the potential prejudice suffered by the weaker party in a relationship with unequal bargaining powers:⁵²³

“A party in a weak bargaining position has little option but to contract on harsh and oppressive terms, such as time limitation clauses which are normally contained in standard-form contracts. Such contracts undermine freedom of contract between the contracting parties as they eliminate the opportunity for negotiating terms. Consumers have no bargaining power to negotiate the terms of the contract and they are imposed on a take-it-or-leave-it basis.”

Although the Act does not directly refer to arbitration clauses it does cover clauses in a contract that may potentially be regarded as unfair, unreasonable and unjust and could inter alia reduce or exclude the consumer’s right to access to the courts.⁵²⁴

The court in *Mphaphuli* explicitly stated that private arbitration by its nature, does not qualify as an alternative tribunal described by section 34 of the Constitution.⁵²⁵ Therefore, a party to private arbitration cannot enjoy the same benefits as a person who followed a normal litigation process. Furthermore, the fact that a person elected to sign a contract containing an arbitration clause means that any subsequent dispute will be resolved through an arbitration process that can only be challenged on the limited grounds provided for by the Act. Consequently, by signing a contract with an arbitration clause, the party signs away the right to judicial redress in the event that a dispute arises and the arbitrator made material errors of fact or law that threaten the administration of justice in the matter. Section 48(1)(c)(i) of the CPA prohibits a supplier from requiring a consumer to sign a contract that requires the waiver of any rights ‘on terms that are unfair, unreasonable or unjust’. Section 48(2) further provides that a consumer transaction or agreement is unfair, unreasonable or unjust if it is excessively one-sided in favour of the supplier; the terms are so adverse to the consumer that it is inequitable, the consumer relied on false representations to conclude the transaction, and the transaction does not comply with section 49 of the Act.

⁵²² Smith 1192.

⁵²³ Mupangavanhu 121.

⁵²⁴ CPA s 83. (This is apart from the limitation already built in the Act in terms of section 69 and the uncertainty of the exact application of section 52 as explained above).

⁵²⁵ *Mphaphuli & Associates (Pty) Ltd v Andrews* 2009 (4) SA (CC) para 213.

Section 52 plays an important role in this regard as it provides guidelines (together with the Constitutional dispensation and its interpretation by our courts to determine the fairness of contracts and whether or not they are against public policy and the values entrenched in the Constitution)⁵²⁶ to assess whether or not the consumer's fundamental right to fair just and reasonable terms and conditions have been infringed.⁵²⁷ The court, when considering the possible contravention of the Act in terms of section 52(1), is required to have regard to several issues including “the nature of the parties to that transaction or agreement, their relationship to each other and their relative capacity, education, experience, sophistication and bargaining position”.

It can thus be argued that arbitration clauses in consumer agreements have the potential to infringe on the consumer's fundamental right to fair just and reasonable terms and conditions in terms of the CPA where they are in themselves unfair and do not comply with the provisions of the Act. This is particularly relevant when dealing with vulnerable consumers and categories of vulnerable consumers in terms of section 3(1)(b) of the CPA.

3.3 ARBITRATION AND PUBLIC POLICY

In some instances the court may refuse to enforce an arbitral award because it is contrary to public policy.⁵²⁸ *Cool ideas* represented one of the prominent South African cases that considered the effect of public policy on the recognition and enforcement of the award.⁵²⁹ The court was approached by an unregistered building company to enforce an award against a “consumer”. The court was torn between respect for the agreement of the parties and enforcing the award, as its performance would amount to a criminal offence and thus be contrary to public policy. After

⁵²⁶ On unequal bargaining positions and public policy see eg: *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC); *Botha and Another v Rich N.O. and Others* 2014 (4) SA 124 (CC); *Uniting Reformed Church, De Doorns v President of The Republic of South Africa and Others* 2013 (5) SA 205 (WCC)

⁵²⁷ See comprehensive discussion by Naudé T, in Naudé T & Eiselen S *Commentary on the Consumer Protection Act* (2017) 48 – 52.

⁵²⁸ Butler & Finsen 263.

⁵²⁹ *Cool ideas 1186 CC v Hubbard and another* 2014 (4) SA 474 (CC).

consideration of all the facts, the court concluded that the arbitral award was indeed contrary to public policy.⁵³⁰ The court in *Cool Ideas* aptly held that:⁵³¹

“Courts are themselves subject to the fundamental principle of legality as they are bound to uphold the Constitution and, as stated, to make the arbitral award an order of court in the present instance would undermine that very principle.”

The definition of public policy can be tricky. What is contrary to public policy in one jurisdiction is not necessarily contrary to public policy in another. Furthermore, the term “public policy” is wide and includes various acts.⁵³² “It is a very unruly horse, and when you get astride it you never know where it will carry you”.⁵³³ This unpredictable feature makes it very difficult to identify acts that constitute a breach of public policy. Courts must consider each case on its merits.

In South Africa, Ngcobo J (for majority) in *Barkhuizen* clarified what constituted public policy.⁵³⁴

“Determining the content of public policy was once fraught with difficulties. That is no longer the case. Since the advent of our constitutional democracy, public policy is now deeply rooted in our Constitution and the values which underlie it. Indeed, the founding provisions of our Constitution make it plain: our constitutional democracy is founded on, among other values, the values of human dignity, the achievement of equality and the advancement of human rights and freedoms, and the rule of law.”

The fact that public policy differs from one country to another means that the public policy that must be taken into consideration in deciding on the validity or recognition and enforcement of an arbitral award is that of the country being requested to enforce the award.⁵³⁵ Furthermore, arbitration being an affair born from a contract is expected to abide by the basic principles of contract. According to Mupangavanhu.⁵³⁶

“The principles of freedom and sanctity of contract are rooted in the political and economic philosophies of *laissez-faire* liberalism and individualism. This classical model of law is based on the assumption that parties generally

⁵³⁰ *Idem* 58.

⁵³¹ *Ibid.*

⁵³² Tweeddale A “Enforcing arbitration awards contrary to public policy in England” (2000) part 1, 159-174 *The international construction LR* 159.

⁵³³ *Idem* 160.

⁵³⁴ *Barkhuizen v Napier* 2007 (5) SA 323 (CC) para 28.

⁵³⁵ *Idem* 163.

⁵³⁶ Mupangavanhu 117.

have a real freedom of choice and that parties enjoy more or less equal bargaining power. Parties are thus free to accept or reject any terms of a contract. The classical model of law is based on the assumption that there is near perfect competition in the market, and that parties actually negotiate the terms of their contract.”

The question begs, how does public policy view the signing of a contract incorporating an arbitration clause where a party has no understanding of its consequences? Surely it would be immoral to enforce an arbitration clause that was forced upon a weaker party by a stronger one. Such circumstances might potentially compromise the fairness of the process and the integrity of any resulting award. O’Regan in *Mphaphuli* held that:⁵³⁷

“.....as with other contracts, should the arbitration agreement contain a provision that is contrary to public policy in the light of the values of the Constitution, the arbitration agreement will be null and void to that extent (and whether any valid provisions remain will depend on the question of severability). In determining whether a provision is *contra bonos mores*, the spirit, purport and objects of the Bill of Rights will be of importance.”

Public policy is vitally important in arbitration as it may impact upon consumer protection where consumers unwittingly sign their right of access to the court or alternative tribunal away in a contract.

Mupangavanhu states that available jurisprudence reveals that courts have a tendency to favour the sanctity of contracts over fairness where the contract was entered into freely and voluntarily.⁵³⁸ This statement of Mupangavanhu suggests that a valid and enforceable contract cannot be a product of a relationship where one party enters into the contract simply because she lacks any other option. Such a situation directly undermines the fairness of the contract.

I submit that unfairness is manifest in contracts involving parties of unequal bargaining power where the stronger party can exert control over the contracting process to dictate terms that are potentially detrimental to the rights or interests of the weaker party. At times, the weaker party signs a contract containing an arbitration clause due to lack of understanding.⁵³⁹ As has been indicated above, this

⁵³⁷ *Mphaphuli* para 220.

⁵³⁸ Mupangavanhu 117.

⁵³⁹ Smith 1192.

may well be contrary to the principles of public policy and also unconstitutional, a possibility that will be explored further below.

3.4 CONSTITUTIONALITY OF ARBITRATION IN SOUTH AFRICAN LAW

The introduction of the Constitution transformed the face of South African law, necessitating the alignment of all laws and conduct with its contents. However, the vigorous approach taken to addressing the constitutional standing of various laws was absent in the area of contract law, especially in the area of arbitration law. As private arbitration is founded on an arbitration agreement, the impact of the Constitution on contract law is relevant to this thesis. Arbitration in general, is regarded as Constitutional and its use has been supported by numerous decisions from various Superior Courts including the Constitutional Court.⁵⁴⁰ However, there are shortcomings in the process, which, if scrutinised closely, may contravene the Constitution.

Butler, who acknowledges the shortcomings and the need to revisit arbitration law in South Africa,⁵⁴¹ highlighted the need to allow the court adequate supervisory powers to protect the constitutional imperatives of fairness and due process in arbitration.⁵⁴² The requirement that the process must be fair was reiterated by the SALRC, which described the main purpose of arbitration as to achieve the fair resolution of disputes by an independent and impartial arbitral tribunal while enjoying the benefits of time and costs saving.⁵⁴³

3.4.1 THE IMPACT OF THE CONSTITUTION ON CONTRACT LAW

Arbitration is often a product of a contract concluded by parties in the process of consummating a business transaction.⁵⁴⁴ Parties must clearly state the terms of

⁵⁴⁰ See *Patcor Quarries CC v Issroff and others* 1998 (4) SA 1069 SE p1082-1085, *Total Support Management (Pty) Ltd v Diversifield Health Systems (SA) (Pty) Ltd* 2002 4 SA 661 (SCA) para 28, *Telcordia* para 44, *Mphaphuli* para 221, *Cool Ideas 1186 CC v Hubbard* 2-14 (4) SA (CC) p135-141, *De Lange v Methodist Church* 2016 (2) 1 (CC) para 43, Butler D (2015) *The law of South Africa (arbitration)* 2 ed vol 2 para 83, Cht 3 para 3.4.3 (hereafter referred to as Butler (2015)).

⁵⁴¹ Butler & Finsen 19.

⁵⁴² *Ibid.*

⁵⁴³ SALRC (2001) Domestic arbitration, project 94, discussion paper 83 viii.

⁵⁴⁴ Van Huyssteen L, Van der Merwe J & Maxwell C (2010) *Contract law in South Africa* 139.

reference of disputes that are submitted to arbitration and the parties will only be bound to arbitrate those disputes that they agreed to submit under the terms agreed upon.⁵⁴⁵ As with other contracts, a person who enters into an arbitration agreement must have the requisite legal capacity and must consent to the agreement.⁵⁴⁶ Arbitration agreements are thus contracts.⁵⁴⁷ In assessing the constitutionality of arbitration in South Africa, it is therefore important to assess whether or not the South African common law of contract ensures the realisation of the constitutional values of fairness and due process in contractual relations?⁵⁴⁸

The influence of the Constitution on contract law was considered by the court in *Barkhuizen*.⁵⁴⁹ The court in this matter was required to consider the constitutionality of a time limitation clause in short-term insurance. An insured claimant was required in terms of this clause, to serve summons on the insurance company within a period of 90 days, failing which the insured claimant would be prevented from instituting legal action against the company. The argument by the applicant was that a time limitation clause contravenes the right of access to the court stipulated in section 34 of the Constitution. The court considered the appropriateness of testing a contractual provision directly against a specific provision in the Bill of Rights.⁵⁵⁰ In other words, it explored the direct application of the Bill of Rights to the private person.⁵⁵¹

Courts have been reluctant to interfere with private contractual arrangements of parties and do so only very rarely.⁵⁵² They adhere to the principle of autonomy of contract, a principle that appears to have taken precedence over the need to

⁵⁴⁵ Meyerson B “But I didn’t sign an arbitration agreement!” [http://brucemeyerson.com/articles/documents/ ArbitrationandNonsignatories.pdf](http://brucemeyerson.com/articles/documents/ArbitrationandNonsignatories.pdf) (accessed on 15 Feb 2016) 1.

⁵⁴⁶ Redfern A & Hunter M (2004) *Law and practice of international commercial arbitration* 145 & 148.

⁵⁴⁷ Kaufmann-Kohler G & Rigozzi A (2015) *International arbitration: Law and practice in Switzerland* 1ed 86.

⁵⁴⁸ Bauling A & Nagtegaal A, “A bread as dignity: The Constitution and the Consumer Protection Act 68 of 2008”, (2015) vol 48, issue 1, *De Jure* 149-171 149., Louw A “Yet another call for a greater role for good faith in the South African law of contract: Can we banish the law of the jungle, while avoiding the elephant in the room?” (2013) vol 16, issue 5, *Potchefstroom Electronic LJ* 43-120.

⁵⁴⁹ *Barkhuizen* para 28.

⁵⁵⁰ *Idem* para 23.

⁵⁵¹ *Ibid.*

⁵⁵² *Burger v Central South African Railways* 1903 TS 571, *Tjollo Ateljees (Eins) Bpk v Small* 1949 1 SA 856 (A) 871, *Wells v South African Alumenite Co* 1927 AD 69, 73, *Barkhuizen v Napier* 2007 5 SA 323 (CC) 57.

introduce constitutional principles into contract law.⁵⁵³ The reason may be as Mupangavanhu indicates:⁵⁵⁴

“Much of the jurisprudence shows that sanctity of contract prevails over fairness as courts seek to promote legal and commercial certainty by enforcing contracts that are freely and properly entered into by the parties, even if they are sometimes unfair.”

On this, Mupangavanhu states that:⁵⁵⁵

“The Constitution is founded on the values of human dignity, equality and freedom. The question that arises is: To what extent has the common law of contract embraced constitutional values? Inequalities in bargaining power in South Africa are underscored by deeply entrenched social and economic inequalities, occasioned by apartheid and patriarchy. Bhana argues that the value of equality requires evidence of unequal bargaining power to be taken into account, so as to ensure that there is autonomy in substance as opposed to mere form. The move towards the concept of substantive consensus, that takes better cognisance of the inequalities prevalent in South Africa, is a dream which has to be realised in contract law. There is a need for an incremental development of contract doctrines to achieve a balance between the values of freedom and equality. Bhana and Pieterse opine that courts should be willing to infuse contract doctrines with values underlying the Constitution. Courts must not shy away from developing common law to ensure that the law responds to the general needs of the people.”

Despite the duty placed on the courts by the Constitution to revitalise the common law with the spirit and purport of the Bill of Rights,⁵⁵⁶ the analysis of a number of critical cases demonstrates continued reluctance on the part of the courts to tamper with private arrangements.⁵⁵⁷ Closer scrutiny of these cases demonstrates how slow courts have been in responding to the need to adapt the common law of contract to incorporate the spirit of the Constitution.⁵⁵⁸ The principle of *pacta sunt servanda*, which was rigorously upheld prior to the Constitution, still holds sway in South African jurisprudence. *Pacta sunt servanda* is a common law principle and one of the cornerstones of Contract law.⁵⁵⁹ The principle requires that contractual

⁵⁵³ Mupangavanhu 117.

⁵⁵⁴ *Ibid.*

⁵⁵⁵ *Ibid.*

⁵⁵⁶ Constitution of the Republic of South Africa, 1996, ch 2.

⁵⁵⁷ *Brisley v Drotsky* 2002 (4) SA 1 (SCA), *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman* NO 1997 (4) SA 302 (SCA), *SA Sentrale Ko-op Graanmaatskappy Bpk. v Shifren en Andere* 1964 (4) SA 760 A, *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA).

⁵⁵⁸ Meiring J A, “Revolution deferred: The impact of the South African Constitution on the law of contract” (2011) paper 17 *University of Cambridge Legal Studies Research Paper Series* 18.

⁵⁵⁹ Reid C & Visser D (2013) *Private law and human rights: Bringing rights home in Scotland and South Africa* 447.

obligations which appear to have been created freely and consensually should be enforced.⁵⁶⁰ This principle upholds the constitutional values of freedom and dignity as well as autonomy. According to Calitz:⁵⁶¹

“Courts in the pre-constitutional era held *pacta sunt servanda* in high regard as a profoundly moral principle and regarded sanctity of contract as more important than freedom to trade. This may be seen as a *laissez faire* approach according to which the most powerful party to the contract will get the best deal, as opposed to social intervention in terms of which the weaker party will be protected.”

Current jurisprudence emerging from the Supreme Court of Appeal (SCA) continues to support the principle of *pacta sunt servanda*,⁵⁶² a principle that strongly discourages judicial intervention in contracts and, by extension, arbitration agreements.

The need to protect and promote the principle of *pacta sunt servanda* was addressed in the Botswana case of *Maqbool*.⁵⁶³ The applicant in this matter issued summons against the defendant for breach of a contract which they entered into during a business transaction. Litigation was initiated despite the existence of an arbitration clause in the contract. This prompted an application by the defendant for the stay of the proceedings and the referral of the matter to arbitration. The court obliged and honoured the principle of *pacta sunt servanda*, thereby giving effect to the parties’ agreement to refer any dispute between them to arbitration.⁵⁶⁴

Unlike the SCA, the Constitutional Court has demonstrated its willingness to entertain constitutional challenges to contractual arrangements. Ngcobo J on behalf of the majority in *Barkhuizen*, held that:⁵⁶⁵

“In my view the proper approach to the constitutional challenges to contractual terms is to determine whether the term challenged is contrary to public policy as evidenced by the constitutional values, in particular, those found in the Bill of Rights. This approach leaves space for the doctrine of *pacta sunt servanda* to operate, but at the same time allows courts to

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Ibid.

⁵⁶¹

Calitz K “Restraint of trade agreements in employment contracts: Time for *pacta sunt servanda* to bow out?” (2011) vol 1, *Stell LR* 50-70 62.

⁵⁶²

Idem.

⁵⁶³

Maqbool and Another v Mphoyakgosi and Another 2012 2 BLR 369 HC at 369.

⁵⁶⁴

Ibid.

⁵⁶⁵

Barkhuizen para 29.

decline to enforce contractual terms that are in conflict with the constitutional values even though the parties may have consented to them.”

This approach was significant in that it indicated that a term of a contract may be legally challenged, irrespective of whether or not it was entered into voluntarily. The court did not treat the principle of *pacta sunt servanda* as unassailable.⁵⁶⁶ This is a significant departure from the SCA’s past, rigid approach to the principle of *pacta sunt servanda*. The latest developments, heralded by *Barkhuizen*, burden the courts with an obligation to render unenforceable, contractual terms that disregard constitutional values and which are thus contrary to public policy.⁵⁶⁷

3.4.2 THE RELATIONSHIP BETWEEN PARTY AUTONOMY AND THE CONSTITUTION

The principle of party autonomy has played a critical role in arbitration processes in South Africa “since the early part of the 19th Century”.⁵⁶⁸ Party autonomy supports the parties’ rights to direct the arbitration process and to determine who will arbitrate.⁵⁶⁹ The court in *City of Johannesburg Metropolitan Municipality*,⁵⁷⁰ confirmed that “party autonomy is fundamental in modern arbitration law”.⁵⁷¹ This view accords with worldwide recognition of the principle of party autonomy in the arbitration context.⁵⁷² Arbitration is founded upon a contractual agreement between the parties and depends upon the courts for the enforcement of any arbitral award.⁵⁷³

The court in *Barkhuizen*, stated that ‘[s]elf autonomy, or the ability to regulate one’s own affairs, even to one’s detriment, is the very essence of freedom and a vital part of dignity’.⁵⁷⁴ However, party autonomy cannot prevail in total disregard of

⁵⁶⁶ *Idem* para 15.

⁵⁶⁷ *Idem* para 44.

⁵⁶⁸ *Telcordia* para 4.

⁵⁶⁹ Bělohávek A & Rozehnalova N (2012) *Czech and Central European Yearbook of Arbitration - 2012: Party autonomy* 134.

⁵⁷⁰ *City of Johannesburg Metropolitan Municipality v International Parking Management (PTY) LTD* case no: 10548/2010 (17 February 2011).

⁵⁷¹ *Idem* para 67.

⁵⁷² *Telcordia* para 4.

⁵⁷³ Butler (1994) 121.

⁵⁷⁴ *Barkhuizen* para 57. Arbitration which is normally premised on the parties’ exercise of their choice to use alternative dispute resolution mechanism rather than litigation process is a non-state justice. Non-state justice’ is often mistakenly assumed to be synonymous with dispute resolution mechanisms utilised by civilians to the complete exclusion of the state. This assumption contradicts research findings that not all those institutions operate completely

constitutional values. It has been argued that the principle of autonomy is itself, an underlying constitutional value.⁵⁷⁵ The principle promotes freedom of contract and dignity, both values that are protected by the Constitution. The court in *Telcordia* referred to *Brisley v Drotsky*, which held that:⁵⁷⁶

“the Constitution requires us to employ its values to achieve a balance that strikes down the unacceptable excesses of “freedom of contract”, while seeking to permit individuals the dignity and autonomy of regulating their own lives. This is not to envisage an implausible contractual nirvana. It is to respect the complexity of the value system the Constitution creates. It is also to recognise that intruding on apparently voluntarily concluded arrangements is a step that judges should countenance with care, particularly when it requires them to impose their individual conceptions of fairness and justice on parties’ individual arrangements.”

The principle of party autonomy in arbitration has been consistently upheld by the courts, irrespective of the relative bargaining power of the contracting parties.⁵⁷⁷ In my opinion, this adherence to the principle in contexts where unsophisticated consumers contract with large corporations, may compromise the fairness of the process and infringe upon the constitutional rights of the consumer. The impact of the Constitution on arbitration in general, has never been fully explored. The Constitutional Court in *Mphaphuli* addressed the constitutionality of arbitration between parties of relatively equal bargaining powers. However, the constitutionality of private arbitration where parties of unequal bargaining power are involved still demands proper exploration. Such an exploration is essential to establish the constitutionality or otherwise of the practice.⁵⁷⁸ To enforce party autonomy in the presence of potential prejudice due to the unequal bargaining powers of parties would be to perpetuate an assault on the rights of consumers that has persisted for a considerable period. Sein opines that:⁵⁷⁹

“The jurisdiction and arbitration clauses contained in consumer contracts can significantly limit the constitutional right of consumers to have recourse to the courts for protecting their rights. This particularly applies if such a

independent from the state, in the contrary much ‘non-state justice’ is undertaken by state functionaries. However, the primary focus of this research is not on the discussion of non-state justice.

⁵⁷⁵ *AB and Another v Minister of Social Development as Amicus Curiae: Centre for Child Law* (40658/13) [2015] ZAGPPHC 580 (12 August 2015) para 65.

⁵⁷⁶ *Telcordia* para 47.

⁵⁷⁷ *Barkhuizen; Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA); *Brisley*.

⁵⁷⁸ Sein K “Protection of consumers against unfair jurisdiction and arbitration clauses in jurisprudence of the European Court of Justice” (2011) vol 18, *Juridica International* 54-62 54.

⁵⁷⁹ *Ibid.*

clause is contained in the standard terms of the contract prepared by the other party, as a result of which the consumer cannot influence the substance of the contract. In such cases, the consumer has in fact been forced to agree that the disputes arising from the contract will be settled in the arbitral tribunal or court chosen by the seller or supplier if the consumer wishes to acquire the desired goods or service.”

A valid contract is a product of free choice.⁵⁸⁰ By concluding a contract containing an arbitration clause without receiving a proper explanation or understanding of the implications thereof, consumers may sign away their day in court without even realising they have done so. Even if parties are aware of the existence of the clause, they are sometimes provided with no option but to accept the clause. This lack of options may compromise the voluntary nature of the party’s participation in the agreement to arbitrate, affecting the fairness of any arbitration process that might ensue. Furthermore, fairness is also necessary in arbitration proceedings. Unfairness may bring the arbitration law into conflict with the Constitution. O’Regan J in *Mphaphuli*, affirmed that “[f]airness is one of the core values of our constitutional order...”⁵⁸¹

Standard-form contracts often violate the rights of consumers.⁵⁸² Important clauses, like arbitration clauses, are often buried in the fine print of these contracts. Sachs J, for the minority in *Barkhuizen*, pertinently stated that:⁵⁸³

“Standard – form contracts are contracts that are drafted in advance by the supplier of goods or services and presented to the consumer on a take – it – or- leave- it basis, thus eliminating opportunity for arm’s length negotiations. They contain a common stock of contract terms that tend to be weighted heavily in favour of the supplier and to operate to limit or exclude the consumer’s normal contractual rights and the supplier’s normal contractual obligations and liabilities. Not only is the consumer frequently unable to resist the terms in a standard-form contract, but he or she is often unaware of their existence or unable to appreciate their import. Onerous terms are often couched in obscure legalese and incorporated as part of the ‘fine print’ of the contract.

As it is impracticable for ordinary people in their daily commercial activities to enlist the advice of a lawyer, most consumers simply sign or accept the contract without knowing the full implications of their act. The task of endlessly shopping around and wading through endless small print in endless standard forms would be beyond the expectations that could be

⁵⁸⁰ Kanamugire J “The future of standard form contracts in South Africa with particular reference to recent developments in the law” (2013) vol 4, issue 13, *Mediterranean Journal of Social Sciences* 335-352 336.

⁵⁸¹ *Mphaphuli* para 221.

⁵⁸² Kanamugire 335.

⁵⁸³ *Barkhuizen* paras 135-136.

held of any ordinary person who simply wished to get his or her vehicle insured.”

This judgment of Sachs J, sums up the injustice that consumers are subjected to by large corporations through arbitration processes emanating from clauses that are buried in the fine print of the contract. The general principle that agreements must be honoured cannot apply to immoral agreements that violate public policy. In *Barkhuizen*, Ngcobo J acknowledged that many people in South Africa find themselves concluding contracts without a proper understanding of what they are agreeing to.⁵⁸⁴ He further highlighted that this is a pertinent issue to consider when determining fairness.⁵⁸⁵ The view that consumers often sign contracts containing an arbitration clause with no knowledge of its existence or understanding of its implications supports the argument that consumers are deprived of their right to judicial redress without any true consensus being reached. A true consensus is vital for a valid contract to exist.⁵⁸⁶ Enforcing a contract characterised by inequality of bargaining power based on party autonomy would be contrary to public policy and undermine constitutional values.

Friedland states that arbitration is a viable solution to the deadlock that can arise between parties of somewhat equal bargaining powers regarding the jurisdiction that should entertain disputes between them.⁵⁸⁷ Constitutional values are not only open to potential abuse in situations of contracts between parties of unequal bargaining power. As will appear below, they may also be undermined where parties have equal bargaining power. Equal bargaining power however, facilitates the fairness of the process and reduces the possibility of the results being frowned upon by the courts and the commercial community. There is a common understanding amongst both practitioners and academics that, when parties elect to forego a litigation process in favour of arbitration, they accept that their disputes will be resolved fairly, through a

⁵⁸⁴ *Barkhuizen* para 65.

⁵⁸⁵ *Ibid.*

⁵⁸⁶ Kanamugire 336.

⁵⁸⁷ Friedland P (2007) *Arbitration clauses for international contracts* (2ed) 10.

less formal process than litigation and according to the principles governing arbitration.⁵⁸⁸ According to O'Regan J in *Mphaphuli*.⁵⁸⁹

“At Roman-Dutch law, it was always accepted that a submission to arbitration was subject to an implied condition that the arbitrator should proceed fairly or, as it is sometimes described, according to law and justice. The recognition of such an implied condition fits snugly with modern constitutional values. In interpreting an arbitration agreement, it should ordinarily be accepted that when parties submit to arbitration, they submit to a process they intend should be fair. Fairness is one of the core values of our constitutional order...”

Thus, the process as described by O'Regan J is resorted to in pursuit of justice and fairness, two important constitutional principles. The term “justice” means “[t]he attainment of what is just, especially that which is fair, moral, right, merited, or in accordance with law...”.⁵⁹⁰ The word “merited” means “[a] quality deserving praise or approval...”.⁵⁹¹ When parties submit their dispute to arbitration they expect nothing less than justice as described above. Anything less would be unconstitutional. A party to an arbitration process has the right to challenge the award on the narrow grounds stipulated in section 33 (1) of the Act.⁵⁹² An arbitral award may only be reviewed and set aside if there was a gross irregularity or misconduct by a member of the tribunal or where the award was improperly obtained.⁵⁹³ Therefore, the Act made no provision for setting aside an award based on material error of fact or law by an arbitrator, which influences the outcome of the arbitration. Furthermore, no appeal process is provided for in the Act. The court in *Leadtrain Assessment* even extended this narrow approach stipulated in section 33 (1) of the Act to the review of the costs order by the consensual arbitrator.⁵⁹⁴ The decision altered the previous approach that allowed costs award to be set aside by reason of an error in law.

O'Regan J, indicated that in Roman-Dutch law, parties to arbitration could expect a fair and just outcome.⁵⁹⁵ Surely Justice demands that the determination be merited. In my view, justice is not done where the determination is premised upon a fatal error

⁵⁸⁸ *Mphaphuli; Telcordia*; See also Clough H et al (2015) *Construction contracting: A practical guide to company management* 330.

⁵⁸⁹ *Mphaphuli* 221.

⁵⁹⁰ The free dictionary <http://www.thefreedictionary.com/justice> (accessed on 23 Aug 2015).

⁵⁹¹ *Ibid.*

⁵⁹² The Act.

⁵⁹³ *Idem* s 33(1).

⁵⁹⁴ *Leadtrain Assessments (Pty) Ltd v Leadtrain (Pty) Ltd* 2013 (5) SA 84 (SCA) para 11 & 12.

⁵⁹⁵ *Mphaphuli* para 221.

of fact or law. In such instances, to deny parties any court challenge to the award denies them justice. This view is unfortunately not supported by the courts. According to Harms J in *Telcordia*:⁵⁹⁶

“.....an arbitrator in a ‘normal’ local arbitration has to apply South African law but if he errs in his understanding or application of local law the parties have to live with it. If such an error amounted to a transgression of his powers it would mean that all errors of law are reviewable, which is absurd.”

The abovementioned view of Harms J was also shared by O’Regan J in *Mphaphuli*.⁵⁹⁷ Parties generally elect an arbitrator for his ability to interpret the law and analyse the facts properly.⁵⁹⁸ They trust the arbitrator’s ability to deliver justice. For the court to say that parties must live with the arbitrator’s misinterpretation of the law or error on the facts, is the same as stating that a consumer must accept a defective product, despite its condition, because he elected to buy it. This view was rejected by the Departmental Advisory Committee (DAC) in English law.⁵⁹⁹ The DAC stated that parties who elected a certain system of law are entitled to expect the arbitrator of their choice to grant them a proper application of the law.⁶⁰⁰ An error in interpreting the law correctly would do a disservice to the parties and fail to attain the outcomes contemplated in the arbitration agreement.⁶⁰¹ This will certainly compromise fairness of the process. In *Mphaphuli*, O’Regan held that:⁶⁰²

“.....what constitutes fairness in any proceedings will depend firmly on context. Lawyers, in particular, have a habit of equating fairness with the proceedings provided for in the Uniform Rules of Court. Were this approach to be adopted, the value of arbitration as a speedy and cost effective process would be undermined.”

To permit enforcement of awards that are based upon an incorrect interpretation of the law and facts to the benefit of an undeserving party, cannot be said to be in conformity with the Constitution.

⁵⁹⁶ *Telcordia* para 15 & 86.

⁵⁹⁷ *Mphaphuli* paras 235-236.

⁵⁹⁸ McKelvey T (1976) “New challenges to arbitration. In *Industrial relations: Now and in 1984*” *Papers presented at the founders seminar* (26-35). Ithaca, NY: Cornell University, New York State School of Industrial and Labor Relations 26.

⁵⁹⁹ Dedezade T “Are you in? Or are you out? An analysis of section 69 of the English Arbitration Act 1996: Appeals on a question of law” (2006) issue 2, *Int.Arb LR* 56-67 58.

⁶⁰⁰ *Ibid.*

⁶⁰¹ *Ibid.*

⁶⁰² *Mphaphuli* para 223.

3.4.3 ARBITRATION POTENTIALLY CURTAILS THE RIGHT OF ACCESS TO THE COURTS

In my view, the right of access to the courts is fundamental to a sound democracy. This right plays a critical role in preventing individuals from resorting to self-help.⁶⁰³ Failure by the state to properly protect this right might be regarded as justification for employing self-help.⁶⁰⁴ The efficiency of the courts in preventing self-help can be enhanced by increasing access to the courts.⁶⁰⁵

The impact of arbitration clauses, especially those contained in standard-form contracts, on parties' rights of access to the courts will now be explored. Furthermore, it will be argued that, where arbitration results from a contract entered into by parties with unequal bargaining powers, it is possible that proper consent of the weaker party may be absent and that the arbitration that follows may consequently be unconstitutional. According to Sachs J in *Barkhuizen*:⁶⁰⁶

“Prolix standard-form contracts undermine rather than support the integrity of what was actually concluded between the parties. They unilaterally introduce elements that were never in reality bargained for, and that had nothing to do with the actual bargain. It may be said that far from promoting autonomy, they induce automatism. The consumer's will does not enter the picture at all. Indeed, it could be contended that the question has moved from being one of whether Judges should impose their own subjective and undefined preferences in this field, to one of whether their own vision has become so clouded by anachronistic doctrine as to prevent them from seeing objective reality.

A distinction needs to be drawn, then, between those aspects of the contract where the minds concerned actually met, and a range of surrounding provisions that were never discussed at all, but that, like Mount Everest, were just there. Little wonder that such characteristics appear in small print. Their objective is not to record negotiated terms but to be as un-prominent as possible so as to provide the least possible distraction from finalising the contract, while securing the greatest obligatory reach for the consumer and the most-reduced prospect of liability for the provider. Thus, while business people can get their lawyers to scrutinise the small print with professional lenses and advise accordingly, ordinary consumers cannot be expected to do the same. The result is that much of the contract is in reality not a record of what was agreed upon but a superimposed construction favouring one side. In my view, to treat mass-produced script as sanctified legal Scripture is to perpetuate something hollow and to dishonour the moral and philosophical foundation of contract law. It certainly does not promote the spirit of openness central to our new constitutional order.”

⁶⁰³ *S v Makwanyane* 1995 (3) SA 391 CC 168.

⁶⁰⁴ *Ibid.*

⁶⁰⁵ Currie I & De Waal J (2013) *The Bill of Rights handbook* 717.

⁶⁰⁶ *Barkhuizen* para 155.

The analysis by Sachs aptly described the hardships experienced by the consumers in their dealings with big corporations. It thus underscores the significance of taking proactive measures to protect the potential injustice that may occur when there is a disparity in bargaining powers between the parties.

Court intervention may be necessary to protect aggrieved parties from possible unfair and unscrupulous decisions that cannot withstand scrutiny. The right of access to the courts is further necessary to facilitate judicial intervention to guard against the abuse of power by arbitrators and those who select them.⁶⁰⁷ Arbitration is hailed for its remarkable benefits of curtailing costs and delays and delivering a final determination.⁶⁰⁸ These possible benefits have been preserved by severely limiting the grounds for judicial review and denying any appeal of an award to a court.⁶⁰⁹ This limitation does not appear to have been a cause for concern in the past; however, with the advent of democracy and human rights, more particularly the right of access to the courts, concern has been raised amongst jurists globally.⁶¹⁰ The question thus begs, what is the impact of the right of access to justice on arbitration? Mokgoro J had the following to say regarding this crucial right:⁶¹¹

“The right of access to court is indeed foundational to the stability of an orderly society. It ensures the peaceful, regulated and institutionalised mechanisms to resolve disputes, without resorting to self help. The right of access to court is a bulwark against vigilantism, and the chaos and anarchy which it causes. Construed in this context of the rule of law and the principle against self help in particular, access to court is indeed of cardinal importance. As a result, very powerful considerations would be required for its limitation to be reasonable and justifiable.”

The argument stems from the provisions of section 34 of the Constitution, which reads thus:

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

⁶⁰⁷ Park W, “Why courts review arbitral awards” (2001), *Festschrift für Karl-Heinz Böckstiegel* 595-606 595.

⁶⁰⁸ Helm K, “The expanding scope of judicial review of arbitration awards: Where does the buck stop?” (Nov. 2006-Jan. 2007), vol 61, issue 4, *Dispute Resolution Journal* 16-26 17.

⁶⁰⁹ *Ibid.*

⁶¹⁰ Hamilton J “Pre-dispute consumer arbitration clauses: Denying access to justice?” (2006) vol 51, issue 4, *Mcgill L J / Revue de Droit de Mcgill* 693-734 695, Kurkela M & Turunen S (2010) *Due process in international commercial arbitration* 2, Chukwuemerie A “Arbitration and human rights in Africa” (2007) vol 7, issue 1, *African Human Rights L J* 103-141 104.

⁶¹¹ *Lesapo v North West Agricultural Bank and Another* (CCT23/99) [1999] ZACC 16; 2000 (1) SA 409; 1999 (12) BCLR 1420 para 22.

This right enshrines the principles of natural justice with regard to courts and other appropriate tribunals.⁶¹² It is thus imperative to explore whether or not arbitration as it currently exists in South Africa, limits the abovementioned right of access to the courts. As will appear below, this issue has been subjected to judicial scrutiny on several occasions.

Whether or not section 34 applies to arbitration was left open in the *Total Support* case.⁶¹³ However, the subject received more attention in *Telcordia*.⁶¹⁴ The court in *Telcordia*⁶¹⁵ directly considered the relationship between arbitration and section 34 of the Constitution. The court concluded that arbitration by its nature, constitutes “another independent and impartial tribunal or forum” as envisaged by the provisions of section 34 of the Constitution. This conclusion was contrary to that taken in *Mphaphuli*⁶¹⁶ that held that private arbitration does not fit into the framework of section 34 of the Constitution.⁶¹⁷ The minority judgment in that case, however, shared the view expressed in *Telcordia*.⁶¹⁸

The court in *Mphaphuli*, excluded private arbitration from the scope of section 34 on the basis that private arbitration lacks the characteristics of a tribunal described by the section.⁶¹⁹ O’Regan J held in *Mphaphuli* that:⁶²⁰

“In considering whether private arbitration fits into the framework of section 34, we have to acknowledge that private arbitration, as conventionally understood, is ordinarily not held in public. It is, as its name implies, a private process. Nor can it ordinarily be said that arbitrators have to be independent in the full sense that courts and tribunals must be. As the *Suovaniemi* case suggests, parties can knowingly consent to an arbitrator who may not be entirely independent. Accordingly, it is not clear that arbitrators can accurately be described as “independent . . . tribunals”. As private arbitration proceedings do not, and, if international practice is to be accepted, should not require public hearings, and similarly if private arbitrators need not, as long as parties knowingly accept this, always be “independent”, then the language of section 34 does not seem to fit our conception of private arbitration.”

⁶¹² Cheadle M, Davis M & Haysom N (2014) *South African Constitutional Law: The Bill of Rights* 28.

⁶¹³ *Total Support* para 23.

⁶¹⁴ *Telcordia* para 47.

⁶¹⁵ *Ibid.*

⁶¹⁶ *Mphaphuli*.

⁶¹⁷ *Idem* para 213.

⁶¹⁸ *Idem* para 71.

⁶¹⁹ *Idem* para 211.

⁶²⁰ *Mphaphuli* para 213.

Arbitration proceedings do not constitute a suitable alternative tribunal for purposes of section 34 of the Constitution.⁶²¹ Therefore, parties are obliged to accept that their decision to resort to arbitration for resolution of their dispute severely restricts their right of access to the courts. The description of “another independent and impartial tribunal or forum” fits snugly with the tribunals established in terms of the Labour Relations Act (LRA).⁶²² The parties in a tribunal established in terms of the LRA are entitled to demand all the benefits stated by the provisions of section 34, namely: a public hearing, the independence of the tribunal or the impartiality of the presiding officer. It is my observation that the parties in an arbitration in terms of the LRA are provided with a number of opportunities to challenge the decision of the tribunal. They are further entitled to invoke the provisions of section 33 of the Constitution, which provides for judicial review of administrative action.

LRA tribunals and the process they apply, are subject to strict rules, which demand fair procedures.⁶²³ There are mechanisms to correct deviations from the required standard.⁶²⁴ The parties are entitled to judicial review even beyond the narrow grounds of review stipulated in section 145(2)(a) of the LRA, more particularly because a CCMA awards, unlike private arbitration, involves the exercising of public power and constitutes administrative action. This is to ensure that the process is fair and a fair hearing lies at the heart of the rule of law.⁶²⁵ The standard of measures that are put in place to ensure procedural fairness in private arbitration are lower than those under LRA. This approach to private arbitration was condemned by Kroon JA in *Mphaphuli* where he stated that:⁶²⁶

“....private arbitrations are, as a starting point, not to be subjected to a lower standard of procedural fairness – once an arbitration award is made an order of court the legal effect thereof is identical to that of an arbitration award under the LRA.”

I am of the view that any denial of the relief provided for in section 34 of the Constitution also affects upon the right to equal protection of the law. More so, when

⁶²¹ As concluded in *Mphaphuli* *ibid*.

⁶²² *Idem* para 201, *Total Support* para 26.

⁶²³ Labour Relations Act 66 of 1996 (hereinafter referred to as the LRA) ss 1, 9 & 10.

⁶²⁴ *Idem* s 145.

⁶²⁵ *Mphaphuli* para 77.

⁶²⁶ *Idem* para 78.

the denial prevents an aggrieved party from benefiting from the rights provided by the Constitution for all to enjoy.

Any discussion of the impact of the Constitution on arbitration would be incomplete without also examining whether or not 33 of the Constitution, which deals with judicial review of administrative action, applies to private arbitration. The section states that:

- “33. (1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
(3) National legislation must be enacted to give effect to these rights, and must—
(a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
(b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
(c) promote an efficient administration.”

The court in *Total Support*⁶²⁷ concluded that section 33 is not applicable to private arbitration because it is not an administrative action.⁶²⁸

“Arbitration does not fall within the purview of "administrative action". It arises through the exercise of private rather than public powers. This follows from arbitration's distinctive attributes, with particular emphasis on the following. First, arbitration proceeds from an agreement between parties who consent to a process by which a decision is taken by the arbitrator that is binding on the parties. Second, the arbitration agreement provides for a process by which the substantive rights of the parties to the arbitration are determined. Third, the arbitrator is chosen, either by the parties, or by a method to which they have consented. Fourth, arbitration is a process by which the rights of the parties are determined in an impartial manner in respect of a dispute between parties which is formulated at the time that the arbitrator is appointed.”

Administrative action was described as “conduct of an administrative nature performed by a functionary in the exercise of a public power or the performance of a public function”.⁶²⁹

It is a fact that, private arbitration lacks an appeal process and that the benefits provided to parties to a statutory arbitration are not made available to the parties to a private arbitration process. This raises the question whether the disparity in the

⁶²⁷ *Total Support* para 23.

⁶²⁸ *Idem* para 24.

⁶²⁹ *Idem* para 23.

treatment of these two forms of arbitration, established for the same purpose, is constitutional.

3.4.4 CHOICE OF ARBITRATION IS NOT NECESSARILY A WAIVER OF A CONSTITUTIONAL RIGHT

There are opposing views regarding whether an election to arbitrate amounts to waiver of the constitutional right of access to court or simply to a decision not to exercise that right.⁶³⁰ It is therefore necessary to interrogate the legal implications of waiving a right and electing not to exercise it. The understanding of the distinction between a waiver of a right and election not to exercise it will be helpful in identifying the exact effect of signing a contract containing an arbitration clause. The point of departure for this discussion will be an evaluation of the consideration of how a right may be waived. Du Bois states that:⁶³¹

“The test to determine the intention to waive is now said to be determined objectively rather than subjectively; but if his conduct appears to manifest an intention to waive yet falls short of manifesting an unequivocal intention, the innocent party will not be held to have lost his right.... if he provides a reasonable explanation for his conduct.”

Thus, waiver of rights is possible and recognised by the law but must be made "voluntarily, knowingly, and intelligently" in the most explicit manner possible.⁶³² Kroon AJ in *Mphaphuli* stated the following regarding 'waiver':⁶³³

“Waiver is first and foremost a matter of intention; the test to determine intention to waive is objective, the alleged intention being judged by its outward manifestations adjudicated from the perspective of the other party, as a reasonable person. Our courts take cognisance of the fact that persons do not as a rule lightly abandon their rights. Waiver is not presumed; it must be alleged and proved; not only must the acts allegedly constituting the waiver be shown to have occurred, but it must also appear clearly and unequivocally from those facts or otherwise that there was an intention to waive. The onus is strictly on the party asserting waiver; it must be shown that the other party with full knowledge of the right decided to abandon it, whether expressly or by conduct plainly inconsistent with the intention to enforce it. Waiver is a question of fact and is difficult to establish.”

⁶³⁰ See Noyes H “If you (re)build it, they will come: Contracts to remake the rules of litigation in arbitration’s image” (2012) vol 30, issue 2, *Harvard Journal of Law & Public Policy* 579-648, Kamal S “Mandatory Consumer Arbitration” 2 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2050418 (accessed 05 September 2015), *Telcordia* para 48. *Mphaphuli* para 216.

⁶³¹ Du Bois F (2007) *Wille's principles of South African law* (9ed) 881.

⁶³² Spitzer G “Fifth amendment-validity of waiver: A suspect need not know the subjects of interrogation 1988” vol 78, issue 4, *Journal of Criminal Law and Criminology* 828-852 829.

⁶³³ *Mphaphuli* para 81.

The above approach to waiver was emphasised in the case of *Suovaniemi and Others v Finland*⁶³⁴ where the court held that the waiver of a right must be established unequivocally. The court observed:⁶³⁵

“There is no doubt that a voluntary waiver of court proceedings in favour of arbitration is in principle acceptable from the point of view of Article 6 (cf. No. 8588/79 and 8589/79 *Bramelid and Malmström v. Sweden*, Dec. 12 December 1983, D.R. 38, p. 38). Even so, such a waiver should not necessarily be considered to amount to a waiver of all the rights under Article 6. As indicated by the cases cited in the previous paragraph, an unequivocal waiver of Convention rights is valid only insofar as such waiver is “permissible”. Waiver may be permissible with regard to certain rights but not with regard to certain others. A distinction may have to be made even between different rights guaranteed by Article 6. Thus, in the light of the case-law it is clear that the right to a public hearing can be validly waived even in court proceedings (see, Eur.Court H.R., *Håkansson and Stureson v. Sweden* judgment of 21 February 1990, Series A no. 171, pp. 20-21, §§ 66-67). The same applies, *a fortiori*, to arbitration proceedings, one of the very purposes of which is often to avoid publicity. On the other hand, the question whether the fundamental right to an impartial judge can be waived at all, was left open in the *Pfeifer and Plankl v. Austria* case, as in any case in the circumstances of that case there was no unequivocal waiver.”

The description of ‘waiver’ by the abovementioned cases of *Mphaphuli* and *Suovaniemi* is sound and fully supported by this research. The question begs whether, by electing to arbitrate, a party waives the constitutional right to approach the court for relief when necessary. Woolman points out that there is a paucity of material regarding the issue of waiver of constitutional rights in South Africa as the Constitution contains no provisions that deal with waiver.⁶³⁶

Underdevelopment of this legal topic may also be attributed to the insignificant number of cases in which there is any meaningful discussion of the notion of “waiver”.⁶³⁷ Woolman asserts that contractual waiver certainly exists but denies the existence of a constitutional waiver.⁶³⁸ Be that as it may, the question that arises in this thesis is whether or not there is waiver of a right in the case of private arbitration. Ramsden and Ramsden supported the view that election of private arbitration as dispute resolution mechanism is a manifestation of the parties’ intention to waive

⁶³⁴ ECHR Case No 31737/96 (23 February 1999).

⁶³⁵ *Ibid.*

⁶³⁶ Woolman S “Category mistakes and the waiver of constitutional rights: A response to Deeksha Bhana on *Barkhuizen*” (2008) vol 125, issue 1, *The South African L J* 10-24 12.

⁶³⁷ *Ibid.*

⁶³⁸ *Ibid.*

their constitutional rights afforded by sections 34 and 35 of the Constitution.⁶³⁹ They further highlight that.⁶⁴⁰

“....., in order to be effective such a waiver of their constitutional right (such as the right of access to a public court) must be made without undue compulsion, must be made in an unequivocal manner and must also not run counter to any important public interest.”

The decision of *Suovaniemi* mentioned above, stated unequivocally that it is possible to waive court proceedings in favour of arbitration. Hylton held the same view as Ramsden and Ramsden that by choosing arbitration, parties actually waive their right of access to court.⁶⁴¹ Hylton asserts that.⁶⁴²

“An arbitration agreement, after all, is simply a form of waiver, in which the plaintiff waives the right to sue in court rather than the right to sue altogether.”

Based on the views expressed above, it can be concluded that the choice to resort to arbitration constitutes a waiver of the right to judicial redress. This right that is allegedly waived is protected by the provisions of section 34 of the Constitution and the waiver has the effect that the party to the arbitration loses the rights contained in section 34 of the Constitution.

According to O'Regan J in *Mphaphuli*, the issue of waiver finds no application in private arbitration, since the process does not fit the framework of section 34 of the Constitution.⁶⁴³ The finding of the court in this regard was that parties that resort to private arbitration choose not to exercise their section 34 rights.⁶⁴⁴ The conclusion of O'Regan J was inspired by an analysis of the difference between waiver and choice not to exercise a constitutional right as discussed in *Mohamed and Another v President of the RSA and Another*.⁶⁴⁵ What differentiate the two possible interpretations of the effect of resort to arbitration from each other is the legal

⁶³⁹ Ramsden & Ramsden 17.

⁶⁴⁰ *Ibid.*

⁶⁴¹ Hylton K “Agreements to waive or to arbitrate legal claims: An economic analysis” (2000) vol 8, *Supreme Court Economic Review* 209-264 223.

⁶⁴² *Idem* 223.

⁶⁴³ *Mphaphuli* para 216.

⁶⁴⁴ *Ibid.*

⁶⁴⁵ *Mohamed and Another v President of the RSA and Another (Society for the Abolition of the Death Penalty in South Africa and Another Intervening)* [2001] ZACC 18; 2001 (3) SA 893 (CC); 2001 (7) BCLR 685 (CC) para 61.

implication of each choice. The court in *S v Shaba*⁶⁴⁶ elaborated on the legal implications of electing not to exercise a constitutional right. It was held in *Shaba* that a person may elect not to exercise a constitutionally protected right, however, the choice has no legal implications since such an individual is at liberty to change her mind without penalty.⁶⁴⁷ However, the legal implications of waiving a right are that the party cannot later exercise the said right.

In the case of arbitration, parties who elected to sign a contract containing an arbitration clause are indeed regarded as having waived their constitutional right of access to the court as provided for in section 34 of the Constitution.⁶⁴⁸ The decision to resort to arbitration thus has the legal effect that the parties are prohibited from later attempting to access the court for relief as their resort to arbitration is regarded as a waiver of the constitutional right of access to the courts. Should one party attempt to approach the courts, the other party will be entitled to rely on the waiver and may even approach the court to enforce this reliance.⁶⁴⁹

The decision of the minority in *Mphaphuli* supported the notion that electing to enter into a contract which contains an arbitration agreement does not amount to the waiver of the section 34 right of access to the courts. In my opinion, electing arbitration does not amount to waiver. To conclude otherwise could potentially be controversial, particularly where contracting parties have unequal bargaining powers. To determine whether or not the arbitration clause amounts to a waiver, the circumstances and processes through which the decision was arrived at need to be critically analysed to determine whether or not the requirements for waiver have been met. Intention, knowledge and an element of voluntariness are critical for valid waiver. Ramsden and Ramsden went even further, requiring that the decision to waive a right must be unequivocal and without undue compulsion.

⁶⁴⁶ *S v Shaba and Another* 1998 (2) BCLR 220 (T) at 221H – I.

⁶⁴⁷ *Ibid.*

⁶⁴⁸ Sovern J, Greenberg E, Kirgis P & Liu Y “Whimsy little contracts with unexpected consequences: An empirical analysis of consumer understanding of arbitration agreements” (2015) *vol 75*, issue 1, *Maryland LR* 1-134 3.

⁶⁴⁹ Van der Merwe S (2012) *Contract: General principles* 455. “The effect of signing a waiver is that you give up your legal rights in relation to one or more specified matters..... Therefore, by signing the waiver, you are agreeing to give up legal rights which may otherwise have been open to you.” See http://www.impact.ie/wp-content/uploads/2014/09/explanation_of_waiver_28_october_2014_2.pdf (accessed on 07 Sept 2015).

Parties often elect to arbitrate simply because arbitration is regarded as a cheap alternative to litigation.⁶⁵⁰ They are oblivious to the fact that this choice will significantly restrict their right of access to the courts.⁶⁵¹ The effect of the choice is seldom discussed by the parties or thoroughly explained to and understood by consumers, except where attorneys are involved.⁶⁵² It has been accepted globally, by authors and practitioners, that consumers are the biggest victims of arbitration clauses that form part of a standard-form contract.⁶⁵³ Often the clause is buried in the fine print and never explained, or, if it was explained, the consumer did not comprehend the implications of the clause. Parties may also feel compelled to accept the clause as a necessary cost of doing business.

Consideration of the above discussion leads me to the conclusion that arbitration parties do not waive their right to judicial redress. Consumers are certainly not knowledgeable enough to agree to a waiver. It has further been established that consumers do not necessarily enter into the arbitration agreement voluntarily but because they feel, compelled to do so. It can therefore not be concluded that by electing arbitration, parties have waived their right of access to court. Critical analysis of the circumstances under which consumers sign their right to judicial redress away fall short of satisfying the requirements of a valid waiver.

In my opinion, Kroon AJ's eloquent, clear and detailed analysis of waiver should be supported.⁶⁵⁴ This analysis by Kroon AJ supports my view that the courts' protection of arbitration in its current form depends upon theories that are without legal basis and are contrary to the Constitution, especially where consumers are involved. The analysis of waiver by Kroon accords with O'Regan J's statement in *Mphaphuli* that an arbitration clause is only a decision not to exercise a fundamental right. Such a decision is without legal implications and the party who elected not to exercise the fundamental right may change her mind and avail herself of the relevant right(s). Rights which may be contravened by the arbitration process include but are not

⁶⁵⁰ McDermott P & Berkeley E (1996) *Alternative dispute resolution in the workplace: Concepts and techniques for human resource executives and their counsel* 38.

⁶⁵¹ Sovern *et al* 4.

⁶⁵² Scarpino J "Mandatory arbitration of consumer disputes: A proposal to ease the financial burden on low-income consumers" (2002) vol 10, issue 3, *Journal of Gender, Social Policy & the Law* 679-710 682.

⁶⁵³ See Scarpino *idem* 680, *Barkhuizen*; Sopata (1985-1986) 601, Mupangavanhu 121.

⁶⁵⁴ *Mphaphuli* para 85.

limited to, the right of access to the courts and the right to equal protection of the law.

3.4.5 THE IMPACT OF ARBITRATION ON THE RIGHT TO EQUAL PROTECTION OF THE LAW

The section 9 equality clause of the Constitution, seeks, *inter alia*, to eradicate the imbalances of the past and make the protection of the law accessible to everyone.

As Gutto states:

“[t]he equality concept in the South African Bill of Rights is influenced and informed by modern progressive understanding and developments in human rights law and practice.”⁶⁵⁵

The equality clause reads: “everyone is equal before the law and has the right to equal protection and benefit of the law”. In my opinion, the parties to arbitration are denied the same protection of law as that afforded parties to litigation, more particularly, where an inequality of bargaining powers exists between contracting parties. This conclusion is based upon the fact that once parties have elected to go the arbitration route, they can no longer approach a court if they are unhappy with the outcome. Thus, by electing arbitration as dispute resolution mechanism, parties are effectively restricted from asking for judicial redress in the event a dispute arises regarding the award. The restriction clearly limits parties’ rights to access the courts.

The right of access to the court in terms of section 34 of the Constitution may arguably be restricted by parties who elect to forego the litigation process in favour of arbitration if the choice is exercised voluntarily and with a clear understanding of the implications of the decision. However, this restriction on arbitration parties’ rights of access to the courts may lack integrity where such parties did not enter into the arbitration agreement voluntarily and without undue influence. The right of access to the courts is central to the proper administration of justice and caution should be taken when curtailing it. As Davis states:⁶⁵⁶

⁶⁵⁵ Gutto S (2001) *Equality and non-discrimination in South Africa: The political economy of law and law making* 127.

⁶⁵⁶ Davis D, Cheadle H & Haysom N (1997) *Fundamental rights in the Constitution* 143.

“The right of access to courts is generally guaranteed through a right safeguarding equal protection of the law or a provision which ensures that no person will be deprived of a right without due process of law....”

3.4.6 THE PROTECTION OF CONSUMERS AGAINST PRE-DISPUTE ARBITRATION AGREEMENTS

Private arbitration in South Africa is typically a voluntary process and no party can thus be compelled to arbitrate.⁶⁵⁷ Consensus between the parties is therefore essential for arbitration.⁶⁵⁸ Furthermore, validity of the agreement to arbitrate depends upon it being entered into voluntarily.⁶⁵⁹ Where these two pre-requisites are met, the agreement demands the respect of the courts.⁶⁶⁰ As Yekiso J stated in *Phoenix Shipping Corporation*.⁶⁶¹

“An arbitration agreement is based on consensus between the parties. Consensus is a fundamental element of a contract. Consensus is an element of such fundamental importance in the law of contracts which no nation in the civilised world can derogate from. Any contract which does not contain consensus as an element would offend those norms and values which characterise a civilised society. Absent the element of consensus in any alleged or purported contract, the purported agreement or contract is invalid.”

Relations between consumers and large corporations are often based on contracts. These contracts often contain arbitration clauses.

A closer analysis of the relationship between large corporations and consumers reveals that a disparity in bargaining power has the potential to prejudice the weaker party in the relationship. It is acknowledged by jurists that consumers may be arbitrarily deprived of their right to approach the courts by big companies who oblige them to sign a contract, which contains an arbitration clause. Consumers are often denied an opportunity to negotiate this term of the contract. The clause is incorporated in a standard-form contract, which the consumer may feel bound to sign due to lack of other options. Often, this critical clause with such important

⁶⁵⁷ *Mphaphuli* 217.

⁶⁵⁸ Redfern A & Hunter M (1999) *Redfern and Hunter on international arbitration* (4ed) 6.

⁶⁵⁹ Noyes 581.

⁶⁶⁰ *Mphaphuli* 19.

⁶⁶¹ *Phoenix Shipping Corporation v DHL Global Forwarding SA (Pty) Ltd and Another* 2012 (3) SA 381 (WCC) para 63.

consequences is placed in the fine print of the contract that consumers rarely check and it is often omitted during the discussion of the contract.⁶⁶²

The analysis of the impact of the arbitration clause on consumers, more particularly on their right to seek judicial intervention, demonstrates a dire need to revisit the current legislative framework of arbitration. The common appreciation amongst jurists is that consumers are either directly or indirectly forced to enter into contracts, which contain arbitration clauses.⁶⁶³ The effect thereof is that the consumer is restricted from approaching the court for relief in the event of a dispute arising from the contract.

According to Brynes and Pollman, “[c]onsent has long been the foundation of arbitration, giving the process legitimacy and informing decisions about its nature and structure”.⁶⁶⁴ The fact that the legitimacy of private arbitration depends on the presence of consent by the parties is a vital element of a valid arbitration agreement and thus indispensable.⁶⁶⁵ Smallberger ADP pertinently described arbitration, with particular focus on the fundamental element of “consent”, in *Total Support*:⁶⁶⁶

“The hallmark of arbitration is that it is an adjudication, flowing from the consent of the parties to the arbitration agreement, who define the powers of adjudication, and are equally free to modify or withdraw that power at any time by way of further agreement.”

The critical role played by consent in contract was emphasised by Leonhard who states that:⁶⁶⁷

“The consent concept has enjoyed a dominant position in contract law. Scholars have described it as “the master concept that defines the law of contracts...” That makes intuitive sense. Contracts are private agreements—a set of terms and conditions to which the parties have consented. Some *have* pointed out that the consent doctrine helps promote individual autonomy and freedom of contract, core values protected by contract law.”

⁶⁶² Smith 1192.

⁶⁶³ Scarpino 682.

⁶⁶³ *Idem* 680, *Barkhuizen* ; Sopata 601, Mupangavanhu 121.

⁶⁶⁴ Brynes D & Pollman E “Arbitration, consent and contractual theory: The implications of *Eeoc v Waffle house*” vol 8 *Harv. Negot. L R* 289-312 289.

⁶⁶⁵ Synkova S (2013) *Courts' inquiry into arbitral jurisdiction at the pre-award stage: A comparative analysis of the English, German and Swiss Legal order* 293.

⁶⁶⁶ [2002] ZASCA 14; 2002 (4) SA 661 (SCA).

⁶⁶⁷ Leonhard C “The unbearable lightness of consent in contract law” (2012) vol 63, issue 1, *Western Reserve LR* 57-90 58.

The acknowledgement of the necessity of consent in the context of an arbitration agreement by the court in *Mphaphuli*, marked an important milestone in accepting the potential unconstitutionality of the arbitration process in a relationship between parties of unequal bargaining power. Leonhard also highlights the influence that powerful commercial forces may have in driving the end results to their benefit.⁶⁶⁸

“With the advent of the “age of persuasion,” defining consent and ascertaining its existence have become even more difficult, if not impossible. Behavioral studies during the last few decades have provided a more in-depth understanding of human decision-making processes, including predictable biases. Relying on those insights, powerful commercial forces have deliberately manipulated people’s decisions..... Because of the ease with which “consent” can be manipulated, contract law’s consent focus will inevitably lead the courts to use the coercive power of the state to favor the more powerful party in an economic relationship. The party with more bargaining power, resources, and better access to information is in a better position to manipulate.”

True consent is the basis of party autonomy that is, in turn, a fundamental principle of arbitration law.⁶⁶⁹

As reflected in its report on domestic arbitration,⁶⁷⁰ the SALRC was alive to the possibility that arbitration might negatively influence consumers. So too are jurists such as Butler who states that:⁶⁷¹

“The objection to an arbitration clause in the small print of a consumer contract is that it excludes the consumer's right to take the dispute to court. The average consumer is unlikely to read the clause. If he does read it he will probably not understand its implications and if he does object to its inclusion he is unlikely to be able to buy the goods or acquire the service without accepting the clause. If the consumer is dissatisfied with the supplier's performance he may be without an effective remedy because the costs of the arbitration would be out of proportion to the amount in dispute. However, the problem of arbitration clauses imposing onerous costs is not the only objection. 'Consumers may want to go to the courts to publicise the complaint, to test an issue of principle, or simply because they have more confidence in the court system than in the arbitration scheme. The consumer's choice should be respected.' The confidentiality of arbitration and the fact that an arbitrator's award does not constitute a binding precedent are therefore other potential disadvantages of arbitration for the consumer.”

668 *Idem* 60-63.
669 SALRC (2001) 2.
670 *Ibid.*
671 *Idem* 92.

For this reason, it is argued in this thesis, that there is a need to properly interrogate arbitration before making a blanket decision that arbitration is constitutional. By adhering to the narrow grounds provided for review of an arbitral award, a consumer/victim may be denied her constitutional right of access to the courts. Arbitration law is subject to the Constitution and cannot be allowed to trump it at the expense of Constitutional values.

In light of the above discussion, it is apparent that consumers may potentially suffer prejudice at the hands of large corporations who demand arbitration clauses and there is thus a need to devise a means of protecting consumers from exploitation. Compelling or misleading consumers into signing an arbitration clause and thus signing away their day in court, cannot survive constitutional muster. Denying consumers the right to access the courts for protection contravenes the Constitution. The process lacks fairness and justice. This absence of fairness may negatively affect the constitutionality of arbitration, as it constitutes a fundamental constitutional value.⁶⁷² Furthermore, evolution has not been kind to arbitration that now appears to have significantly shifted from its original purpose.

3.5 THE EROSION OF THE BENEFITS OF ARBITRATION IN SOUTH AFRICA

Arbitration is embraced by the business community as an alternative to litigation, which is perceived to be fraught with delay, excessive cost and formality.⁶⁷³ Besides its efficiency and reduced costs, arbitration is valued for its finality.⁶⁷⁴ What distinguishes arbitral tribunals from courts is that they have no inherent jurisdiction other than the authority that emanates from the contract signed by the parties. Arbitral tribunals are duty bound to conduct the proceedings in such a way that it provides the parties with the anticipated benefits stated above. There is however, considerable consensus that arbitration as it is practiced today lost its initial benefits⁶⁷⁵ For example; Schmitz comments “[a]rbitration is losing its significance”.⁶⁷⁶

⁶⁷² *Mphaphuli* para 221.

⁶⁷³ Durosaro W, “The role of arbitration in international commercial disputes” (2014) vol 1, issue 3, *International Journal of Humanities Social Sciences and Education* 1-8 1.

⁶⁷⁴ Bray D & Bray H (2013) *Post-hearing issues in international arbitration* 165.

⁶⁷⁵ Schmitz A “Ending a mud bowl: Defining arbitration’s finality through functional analysis” (2002) vol 37, issue 1, *Georgia LR* 123-204 123.

⁶⁷⁶ *Ibid.*

This shift was exacerbated by the introduction of lawyers into the process.⁶⁷⁷ This involvement contributed to arbitration becoming more and more akin to litigation as it evolved.⁶⁷⁸

In my view, the litigation style imported into arbitration is also attributable to the introduction of the Constitution, which introduced certain constitutional rights that demand observation by any dispute resolution mechanism. These rights include, but are not limited to the right to equal protection and benefit of the law and access to the courts.⁶⁷⁹ The Constitution also introduced provisions which may be invoked successfully or not to challenge the award in court.⁶⁸⁰ In the past, parties complied with the arbitral award without much resistance and this ensured the benefits contemplated in arbitration process.⁶⁸¹ With time, merchants started resisting compliance with awards and laws intended to support the process was enacted.⁶⁸² Such legislation created grounds upon which an award could be challenged, grounds which parties took advantage of.⁶⁸³ Such challenges prolonged the finalisation of the dispute, thereby undermining the purpose of resorting to arbitration in the first place.

Court intervention prolonged the process, thus compromising its efficiency and increasing the costs involved. Welser ascribes this loss of efficiency to the behaviour of the parties involved in the process.⁶⁸⁴ The prevailing view amongst jurists is that arbitration today, has adopted a litigation model, which could be attributed to the increased involvement of lawyers, trained in litigation.⁶⁸⁵ Although there is strong support for the view that arbitration should not simply become another form of litigation by formalising the process and introducing legalities, there are some who

⁶⁷⁷ Betancourt J & Crook J (2014) *ADR, arbitration and mediation: A collection of essays* 450.

⁶⁷⁸ *Ibid.*

⁶⁷⁹ 1996 Constitution s 34.

⁶⁸⁰ *Idem* art 39 & 34.

⁶⁸¹ *Ibid.*

⁶⁸² Williams D “Defining the role of the court in modern international commercial arbitration” *Herbert Smith Freehills - SMU Asian Arbitration Lecture, Singapore – 2012* 1.

⁶⁸³ The Act s 33.

⁶⁸⁴ Welser I “Efficiency – Today’s challenge in arbitration proceedings” http://www.chsh.com/fileadmin/docs/publications/Welser/Welser_AYIA_2014.pdf 166 (accessed on 24 Sept 2015) 152.

⁶⁸⁵ Phillips G (2010) *AAA handbook on arbitration practice* 41.

regard this “creeping legalism” as enhancing the process rather than jeopardising it.⁶⁸⁶

The introduction of the court into the process brought the matter into the public domain, depriving it of the private character it had previously enjoyed. A judge presented with the award would be empowered to intervene in the process despite the parties having chosen their own adjudicator to deal with their dispute. Thus, court involvement compromised everything that arbitration stood for. Kramer explicitly sums up the loss of the anticipated benefits of arbitration thus:⁶⁸⁷

“.....there appears to be a growing consensus that the benefits of arbitration have been squandered and that the arbitration of today does not provide the benefits of speed, efficiency and cost control. The agitation against the costliness and delays of litigation is now directed at arbitration.

The charges include long delays reaching a conclusion, discovery abuses that mirror those in civil court litigation.....”

In my opinion, arbitration in its current form, offers participants no benefit. This phenomenon is not peculiar to South Africa.

3.5.1 EFFICIENCY AND CONFIDENTIALITY IN ARBITRATION A THING OF THE PAST

As stated above, the past willingness of merchants to respect the outcome of arbitration made it an ideal process to ensure swift and final adjudication of the issue with complete privacy.⁶⁸⁸ The word ‘privacy’ permeates the arbitration discussion as it differentiates private arbitration, which is held privately from litigation which takes place in the public domain.⁶⁸⁹ This does not, however mean that confidentiality is guaranteed in arbitration. Such an assertion would be “misleading and is certainly overbroad”.⁶⁹⁰

⁶⁸⁶ *Idem* 44.

⁶⁸⁷ Kramer K (2010) “JAMS’ Expedited Rules: Returning Arbitration to Its Roots” http://www.jamsadr.com/files/Uploads/Documents/Articles/Krame_CPR_Alternatives_11-10.pdf (accessed on 28 Sept 2015).

⁶⁸⁸ Gemmell A & Talbott A “The Lex mercatoria- Redux 3” http://works.bepress.com/art_gemmell/1/ (accessed on 09 Jun 2016).

⁶⁸⁹ Kaster L “NYSBA” (2012) vol 5, issue 1, 23-27 *New York Dispute Resolution Lawyer* 23.

⁶⁹⁰ *Ibid.*

There are various means by which what was supposed to be a private affair may end up in the public domain. The manner in which the parties handle the outcome of the arbitral process may contribute to the publicizing of information they may prefer to have kept private. For example, public agencies often publicize awards and parties themselves are not restricted from making an award public unless they signed a confidentiality agreement.⁶⁹¹ There is also a trend amongst arbitration parties to challenge the award in court, thereby exposing what transpired behind closed doors, in an undisclosed venue, before an arbitrator of the parties' choice to public scrutiny. Similarly, judicial review may also negatively affect the privacy of arbitration. This process too, shifts the arbitration proceeding into the public domain and can be used by parties in a last-bid attempt to litigate a dispute that has been finalised through arbitration.

However, the blame for failure of arbitration to live up to expectations cannot be attributed to only one party but to all role players.⁶⁹²

3.5.2 EVOLUTION OF ARBITRATION AND THE LOSS OF THE BENEFITS OF COST EFFECTIVENESS AND INFORMALITY

O'Regan J in *Mphaphuli*, described a properly interpreted arbitration agreement as requiring the arbitrator to adopt an informal investigative process not a formal adversarial one.⁶⁹³ It may be argued that this statement is an inaccurate generalisation as the approach that the parties prefer the tribunal to adopt will depend on the terms of the specific arbitration agreement. The purpose of introducing an informal flavour into arbitration was to avoid the rigid processes followed in litigation, which often attract exorbitant costs. As Wallis JA held in *Dexgroup*.⁶⁹⁴

“The advantages of arbitration over litigation, particularly in regard to the expeditious and inexpensive resolution of disputes, are reflected in its growing popularity worldwide. Those advantages are diminished or destroyed entirely if arbitrators are confined in a straitjacket of legal formalism that the parties to the arbitration have sought to escape.”

⁶⁹¹ *Idem* 129.

⁶⁹² Welser 152.

⁶⁹³ *Mphaphuli* para 188.

⁶⁹⁴ *Dexgroup (PTY) LTD v Trustco Group International (PTY) LTD* 2013 (6) SA (SCA) para 20.

The introduction of lawyers to the arbitration process posed a challenge, which ultimately contributed to the rising costs of arbitration and its formalisation.⁶⁹⁵ The formal training of lawyers fitted them for litigation, not arbitration as alternative dispute resolution mechanism. They brought this training to bear on arbitration, fundamentally altering the process to align it more closely with the litigation process with which they were more familiar.⁶⁹⁶

These lawyers sought a victory for their clients rather than exploring the agreement underlying the dispute and the rights and obligations of the parties in respect thereof.⁶⁹⁷ The behaviour of trial lawyers involved in arbitrations was typified by the characteristics that define such lawyers.⁶⁹⁸ Those characteristics altered the face of modern arbitration, depriving it of its former simplicity, institutionalising it and complicating it with legalities.⁶⁹⁹

3.5.3 THE FINALITY OF ARBITRATION

Finality has been one of the strongest and positive attribute of arbitration. Butler aptly described the principle of finality of the awards as being firmly established both as a cardinal principle of arbitration proceedings under the common law and by statute.⁷⁰⁰ According to Schmitz:⁷⁰¹

“Finality has been the functional cornerstone of arbitration, in that it has allowed arbitration to develop as a private, flexible, and self-contained process regarded as more efficient than litigation both in terms and expense.”

This view was supported by Cowling who identified chief advantages of arbitration as being speediness and finality.⁷⁰² History has not been kind to this significant element of arbitration due to the threat it posed to the courts’ assertion of power which in return refused to order parties to abide by the agreement to arbitrate their dispute.⁷⁰³

⁶⁹⁵ Betancourt 450.

⁶⁹⁶ *Ibid.*

⁶⁹⁷ *Ibid.*

⁶⁹⁸ *Idem* 215.

⁶⁹⁹ Redfern & Hunter 5.

⁷⁰⁰ Butler (1994) 134.

⁷⁰¹ Schmitz 133.

⁷⁰² Cowling M “Finality in arbitration” (1994) vol 111, issue 2 *SALJ* 306-315 306.

⁷⁰³ *Ibid.*

The practice of arbitration persisted until such time that courts were gradually changing their attitudes and supporting arbitration and its course.⁷⁰⁴ However, the current regulatory framework of arbitration undermines the finality of the award by providing some grounds for challenging awards.⁷⁰⁵ The primary cause of this fundamental shift in arbitration was the manner in which it evolved. In the past, a mere threat to the merchant's reciprocal arrangement or his reputation was sufficient to secure compliance with an arbitral award.⁷⁰⁶ Arbitration was a self-regulatory process, which needed no support from the courts.⁷⁰⁷ This limited court intervention curbed costs, kept the matter private and facilitated the swift finalisation of the matter without becoming embroiled in the technicalities and formalities of a court process. The current challenges to arbitral awards in courts demonstrate a changed attitude amongst the business community towards arbitration and a diminished respect for the outcome thereof.⁷⁰⁸

Current arbitration legislation in South Africa recognised the need to protect the finality of the arbitral award and incorporated section 28 that provides that:

“Unless the arbitration agreement provides otherwise, an award shall, subject to the provisions of this 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.”

From the content of the section, it appears the award is final and no appeal process is specifically provided for. The court in *Patcor Quarries* interpreted the section to mean that the prohibition on an appeal is not absolute, parties may agree on a form of an appeal to another arbitral tribunal.⁷⁰⁹ This did not, however, prevent the inclusion of section 33, which provides grounds upon which the award may be attacked and set aside.⁷¹⁰ Section 33 contradicts the very purpose of resorting to

⁷⁰⁴ *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925 (10th Cir. 2001); *UHC Mgmt. Co. v. Computer Scis. Corp.*, 148 F.3d 992 (8th Cir. 1998). See also Schmitz 157.

⁷⁰⁵ The Act s33.

⁷⁰⁶ Haydock & Henderson 145.

⁷⁰⁷ Redfern & Hunter 3.

⁷⁰⁸ *Mphaphuli*; *Total Support*; *Telcordia*; *Sarkodie* 1.

⁷⁰⁹ *Patcor Quarries CC v Issrof and Others* 1998 (4) 1069 (SE) p1084, *Gutsche Family Investments (Pty) Ltd v Mettle Equity group (Pty) Ltd* 2012 JDR 0358 (SCA) para 12.

⁷¹⁰ *The party against whom* the award has been made may submit an application before the court for the setting aside of such an award. The setting aside can only be brought on limited grounds set out in s33 of the Act which states that:

“(1) Where-

arbitration, undermining the finality of the award. The provisions of section 33 permit judicial review of arbitral awards. It is argued that the grounds for judicial review under section 33(1) are rather vague and indeterminate, thus depends entirely on how the courts construe them.⁷¹¹ Helm states that: “[a]lthough arbitration awards are meant to be final, some judicial review remains a vital part of the arbitration process”.⁷¹² This statement by Helm acknowledges that the potential for judicial review affects the finality of the award. This opens the door for unscrupulous losers to explore these avenues in hopes of achieving a more favourable outcome.

The presence of section 33 (1) may provide the losing party with avenues to circumvent the finality of arbitration. The finality of an award was tested in *Cool Ideas*.⁷¹³ The application was brought in terms of section 31 to declare the arbitral award an order of the court. However, the court was not willing to grant the order based on public policy. The court was concerned by the fact that *Cool ideas* did not approach the court with clean hands as it had contravened section 10 of Housing Consumers Protection Measures Act.⁷¹⁴ Thus, the court refused to make the award an order of the court as it was persuaded that by doing so it will be contravening a “clear statutory criminal prohibition enacted for a particularly laudable and important purpose: the protection of housing consumers.”⁷¹⁵ The finality status of the award in this instance did not prevent the award from being rejected by the court.

-
- (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 irregularity 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.
- (2) An application pursuant to this section shall be made within six weeks after the publication of the award to the parties: Provided that when the setting aside of the award is requested on the grounds of corruption, such application shall be made within six weeks after the discovery of the corruption and in any case not later than three years after the date on which the award was so published.
- (3) The court may, if it considers that the circumstances so require, stay enforcement of the award pending its decision.
- (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.”

⁷¹¹ Cowling 315. For a contrary view, see Brand FDJ “Judicial review of arbitration awards”(2014) 25 Stell LR 247 at 262-263.

⁷¹² Helm 1.

⁷¹³ *Cool ideas 1186 v Hubbard and another* 2014 (4) SA 474 (CC).

⁷¹⁴ 95 of 1998.

⁷¹⁵ *Cool ideas* 60.

Roodt holds the view that current developments in arbitration in South Africa attach no significance to the aspect of finality in arbitration.⁷¹⁶ Brand on the other hand analysed the strict manner at which the courts approached the review of arbitral awards in terms of section 33 (1).⁷¹⁷ He firmly believed that the manner in which courts construed the grounds for review and setting aside of the award reaffirmed the finality of the award, produced satisfactory results and certainly progressed in line with the constitutional expectations.⁷¹⁸ There exists a tension between finality and fairness that threatens finality in this context.⁷¹⁹ This tension often manifests after the publication of the award when the party in whose favour the award was made supports its finality and the other party seeks judicial review.⁷²⁰ O'Regan J in *Mphaphuli* hastened to warn against fairness in private arbitration being equated with the process of conducting court proceedings established in terms of the Uniform Rules of Court.⁷²¹ The approach was confirmed by the court in *Dexgroup* when it held that unless the agreement states otherwise the arbitrator is not obliged in presiding over the matter, to follow strict rules of evidence provided the procedure employed guarantees fairness to both parties and “conforms to the requirements of natural justice”.⁷²² It should be remembered that arbitration was resorted to by business community due to its ability to grant certain benefits. Amongst the recognised benefits of arbitration was its potential to bring finality to the dispute.⁷²³ As Cisar and Halla state:⁷²⁴

“.....the arbitral award should be final determination of the rights and obligations of the disputants. But the arbitral procedure evolved through the last one and half century from the absolute finality of the award to the slightly limited version where the disputants can introduce measures of reopening the case.”

The description of finality in current arbitral awards as being slightly limited version of finality may sound controversial but it clearly captures the essence of what arbitral awards represents in this modern era. The question begs, what should be

⁷¹⁶ Roodt C “Reflections on finality in arbitration” (2012) vol 45, issue 3, *De Jure* 485-510 488.

⁷¹⁷ Brand F “Judicial review of arbitration awards” (2014) vol 25, issue 2 *Stel LR* 247-264

⁷¹⁸ *Idem* 263.

⁷¹⁹ Park (2001) 596.

⁷²⁰ *Ibid.*

⁷²¹ *Mphaphuli* para 236.

⁷²² *Dexgroup* paras 17 & 18.

⁷²³ Cisar I & Halla S “The finality of arbitral awards in the public international law” <http://www.grantjournal.com/issue/0101/PDF/0101cisar.pdf> (accessed on 13 August 2017).

⁷²⁴ *Ibid.*

guaranteeing the finality of the awards, is it the consent of the parties knowing that its decision is final? Consent does play a critical role in initiating arbitration.⁷²⁵ It may well be that to a certain extent it forms the basis of the finality and validity of the arbitral award.⁷²⁶ As the court clearly pronounced in the *dictum* in *Clark*:⁷²⁷

“The Court will always be most reluctant to interfere with the award of an arbitrator. The parties have chosen to go to arbitration instead of resorting to the Courts of the land, they have specially selected the personnel of their tribunal, and they have agreed that the award of that tribunal shall be final and binding.”

However, the rule relating to finality can best be associated with the status and integrity of the arbitral process.⁷²⁸ The law in South Africa permits only the review of arbitral proceedings rather than the appeal on merits.⁷²⁹ Thus, the interpretation of finality appears to be approached contextually rather than textually. The presence of the grounds for review does not necessarily imply that the arbitral award is no longer final and binding. According to Carbonneau the restrictions placed on judicial scrutiny by arbitration “...reinforces arbitral autonomy and fosters the finality of arbitrator determinations.”⁷³⁰ The pertinent support for this interpretation can be found on the Scots decision of *Holmes Oil Co* where the court held that:⁷³¹

“One of the advantages which people are supposed to get by a reference to arbitration is the finality of the proceedings when the arbitrator has once stated his determination. They sacrifice something for that advantage – they sacrifice the power to appeal. If, in their judgment, the particular judge whom they have selected has gone wrong in point of law or in point of fact, they have no longer the same wide power to appeal which an ordinary citizen prosecuting his remedy in the courts of law possesses, but they sacrifice that advantage in order to obtain a final decision between the parties. It is well-settled law, therefore, that when they have agreed to refer their difficulties to arbitration as they have here, you cannot set aside the award simply because you think it wrong. The parties have agreed that it shall not be subject to the ordinary modes of appeal and that it shall be final; and that is, in nine cases out of ten, the very object which they mean to attain by submitting their difficulties to arbitration.”

⁷²⁵ Khan R (1990) *The Iran-United States claims tribunal: Controversies, cases, and contribution* 61.

⁷²⁶ *Idem* 62

⁷²⁷ *Clark v African Guarantee and Indemnity Co Ltd* 1915 CPD 68 at 77.

⁷²⁸ *Ibid.*

⁷²⁹ The Act s 33(1)

⁷³⁰ Carbonneau T (2014) *Toward a new Federal law on arbitration* 106.

⁷³¹ *Holmes Oil Co. v Pumpherston Oil Co.* (Court of Sess., R.18, p. 53).

Thus, allowing limited form of judicial intervention strengthens the integrity of the award and proclaims the finality of the awards. The efficiency of arbitration is dependent on balancing finality and fairness and,⁷³² fairness demands some minimal form of judicial scrutiny of the award.⁷³³ Section 33 (1) provides an exhaustive list of grounds upon which the application for judicial review of the arbitral award can be brought in South Africa. The debate regarding the effect of section 33 (1) on the finality status of the arbitral award deserves consideration. O'Regan J in *Mphaphuli* took the liberty to unpack this controversial but legally interesting aspect of the law.

The court in its approach to the interpretation of this section gave due consideration to domestic legal precedents, SALRC reports, international instruments and foreign case law.⁷³⁴ The SALRC acknowledged that:⁷³⁵

“It is accepted that court support for the arbitral process, particularly as regards the enforcement of arbitration agreements and arbitral awards, is essential. It is also accepted that courts are entitled to certain supervisory powers as the price for their powers of assistance.”

However, the supervisory powers of the courts are subject to the provisions of section 33(1), which stipulates the limited grounds upon which the award may be set aside. The constitutionality of this section received some attention from *Mphaphuli* where the court held that:⁷³⁶

“... it seems to me that the values of our Constitution will not necessarily best be served by interpreting section 33(1) in a manner that enhances the power of courts to set aside private arbitration awards. Indeed, the contrary seems to be the case. ... In my view, and in the light of the reasoning in the previous paragraphs, the Constitution would require a court to construe these grounds reasonably strictly in relation to private arbitration.”

Judicial challenges to the arbitral awards in South Africa revealed that the courts observe high degree of deference to arbitral decisions. However, there setting aside of the awards may succeed where it is demonstrated that the arbitrator exceeded

⁷³² Park (2001) 596.

⁷³³ *Ibid.*

⁷³⁴ SALRC (2001) paras 2.25-2.35.

⁷³⁵ *Idem* 2.16.

⁷³⁶ *Mphaphuli* para 235 & Butler (2015) 140.

powers granted to her by the agreement.⁷³⁷ The setting aside would also likely to succeed where it can be demonstrated that there was an element of misconduct by any of the members of the arbitration tribunal in relation to his/her duties as an arbitrator.⁷³⁸ Setting aside of the award is likely to succeed where evidence exists to prove that there was gross irregularity committed by an arbitration tribunal in the conduct of the arbitration proceedings.⁷³⁹ The court would also be at liberty to interfere with the award where it is sufficiently proven that the award was improperly obtained.⁷⁴⁰ The Constitutional Court encouraged courts to exercise restraint when it comes to interfering with the arbitral awards on the grounds that the procedure followed was so faulty that it was unfair or constituted irregularity in terms of section 33 (1).⁷⁴¹

Even a gross mistake of law or fact does not invoke the sympathy of the court provided the mistake was not malicious.⁷⁴² The court in *Total Support* reiterated this point by contending that it will be absurd to conclude that the arbitrator who gave fair consideration of the facts has misconducted himself as stipulated in section 33 (1) where he made *bona fide* mistake of facts or law.⁷⁴³ The courts often refused to set arbitral awards aside if the grounds for judicial review under section 33(1) were not satisfied.⁷⁴⁴ In principle, the finality of the decision of the arbitrator would be affirmed by the court's refusal to tamper with it. This confirms that the presence of the grounds for review stipulated under section 33(1) provides a little protection if any to the rights of consumers. Consumers often find themselves having signed the contract containing an arbitration clause without being aware of its existence or fully comprehending the consequences thereof.

⁷³⁷ Brand 255.

⁷³⁸ The Act s33(1)(a)

⁷³⁹ *Idem* s33(1)(b)

⁷⁴⁰ Brand 256.

⁷⁴¹ *Mphaphuli* para 236.

⁷⁴² *Donner v Ehrlich* 1928 WLD 159 at 161.

⁷⁴³ *Total support* para 1.

⁷⁴⁴ Arbitration Act 1965.

3.6 THE INVESTIGATION OF ARBITRATION BY THE SALRC

The new democratic South Africa, born in 1994, brought with it a Constitution⁷⁴⁵ that is supreme.⁷⁴⁶ The Arbitration Act, 1965, like all South African legislation, must withstand Constitutional muster. This Act is both outdated and inadequate to satisfy the needs of either international or domestic arbitration.⁷⁴⁷ In the last few decades, the business community and jurists in South Africa have persistently called for legislative reform of arbitration law in South Africa.⁷⁴⁸ The robust support for, and use of, arbitration globally as a dispute resolution mechanism has necessitated an adjustment of arbitration practice in South Africa to align it with international norms and standards. It was hoped that the cries for reform would cause the SALRC to intensify its efforts to incorporate international best practice into the South African law, an element that is currently sadly lacking.⁷⁴⁹

The SALRC's investigations confirmed the inadequacy of prevailing arbitration legislation in South Africa to cater for the demands of modern private arbitration. To address the obvious shortcomings of the South African arbitration law two reports were produced.⁷⁵⁰ The focus of the first of these two reports was the need for legislation to regulate international arbitration in South Africa in the wake of the country emerging from an extended period of isolation in 1994 into an environment for which existing international trade and investment laws were both outdated and inadequate.⁷⁵¹

The Arbitration Act, 1965 was an example of legislation in the commercial sector, which had completely failed to keep pace with the changing needs of the business world. The SALRC recognised that the Act was designed for domestic application and that it lacked any provisions dealing expressly with international arbitration.⁷⁵² The SALRC also recognised the importance of arbitration as a successful international dispute resolution mechanism in resolving international trade

⁷⁴⁵ 1996 Constitution.

⁷⁴⁶ *Idem* art 2.

⁷⁴⁷ SALRC (2001) 1.

⁷⁴⁸ Sarkodie 1; Butler (1994) 118; Gauntlett 58.

⁷⁴⁹ Sarkodie 1.

⁷⁵⁰ SALRC (2001), SALRC (1998) Arbitration: An international arbitration Act for South Africa project 94, discussion paper 84.

⁷⁵¹ *Idem* SALRC (1998) 23.

⁷⁵² *Ibid.*

disputes.⁷⁵³ It ascribed this success to the New York Convention, which facilitates enforcement of foreign arbitral awards in States parties in a more effective manner than the manner in which foreign judgements are enforced.⁷⁵⁴

The SALRC also directed attention towards domestic private arbitration which was the subject of the second report issued. This second report was completed in 2001 and followed an intensive investigation into the status of domestic arbitration law in South Africa. Unsurprisingly, the SALRC found the current Arbitration Act, 1965 to be inadequate, ineffective and inefficient.⁷⁵⁵ The SALRC acknowledged the English law roots of the Arbitration Act, 1965⁷⁵⁶ and noted with dismay that despite amendment and updating of the English law, the South African legislation had failed to keep pace with that development.⁷⁵⁷

The SALRC identified three alternative options for reform of the current South African Arbitration Act in this regard: The first was that the existing legislation should be modified without affecting the fundamental provisions of the Act;⁷⁵⁸ Secondly, South Africa could follow the example of some other states and adopt UNCITRAL Model Law for both domestic and international arbitration.⁷⁵⁹ However, the SALRC suggested that a third option should be adopted, namely a new statute should be drafted "... combining the best features of the Model Law and the English Arbitration Act of 1996, while retaining certain provisions of the Act which have worked well in practice".⁷⁶⁰ This last suggestion was recommended by the SALRC as the most favourable option. The SALRC acknowledged that arbitration no longer provides the benefits, which were traditionally associated with it.⁷⁶¹

The entire chapter 8 of the report focused on consumer arbitration agreements. In its report on the SALRC draft Bill for domestic arbitration, it acknowledged that the Act did not offer adequate protection to consumers. The concern raised by the report

753

Ibid.

754

Ibid. The proper implementation of the New York Convention is another critical issue that requires a consideration in South Africa.

755

SALRC (2001) 6.

756

Ibid.

757

Ibid.

758

Idem viii.

759

Ibid.

760

Ibid.

761

Ibid.

regarding lack of express provisions aimed at protecting consumer is valid and deserves support. Regrettably, the report dilutes the seriousness of this aspect by pointing at section 3(2) and 6 of the Act as providing a protection to consumers. The framework of the current Arbitration Act is not consumer friendly and it is important to appreciate the need to develop the Act to be sensitive to the rights of the consumers. The report identifies true consent as the foundation of party autonomy, which is the fundamental principle of arbitration law.⁷⁶² The primary reasons underlying measures to protect consumers are summed up as follows by the SALRC:

"The objection to an arbitration clause in the small print of a consumer contract is that it excludes the consumer's right to take the dispute to court. The average consumer is unlikely to read the clause. If he does read it he will probably not understand its implications and if he does object to its inclusion he is unlikely to be able to buy the goods or acquire the service without accepting the clause. If the consumer is dissatisfied with the supplier's performance he may be without an effective remedy because the costs of the arbitration would be out of proportion to the amount in dispute. However, the problem of arbitration clauses imposing onerous costs is not the only objection. 'Consumers may want to go to the courts to publicise the complaint, to test an issue of principle, or simply because they have more confidence in the court system than in the arbitration scheme. The consumer's choice should be respected.' The confidentiality of arbitration and the fact that an arbitrator's award does not constitute a binding precedent are therefore other potential disadvantages of arbitration for the consumer."

The SALRC identified the facts in the summary as being the motivation for the necessary amendment of the Act to offer protection to the consumers. It has been consistently argued in this research that the manner in which the current Arbitration Act is formulated and proceedings conducted is highly prejudicial to consumers. The research advanced the argument further by expressing the discomfort with the manner in which consent to arbitration is obtained from consumers. The big corporations effectively bully consumers into giving consent to something they neither understand nor necessarily agree with. From the constitutional perspective, can it be confidently accepted that treatment of consumers in this manner is constitutionally correct? Ironically, the abovementioned quote from the report gives credence to argument by this research that an arbitration clause might be denying consumers their right to access courts for relief. It further strengthens the argument pursued by this research that the consumers hardly if ever grant true consent to

⁷⁶² Report on Domestic Arbitration 91 3.278.

arbitration clauses that inevitably raises a constitutional issue. A draft bill was crafted to address the shortcomings in the current Arbitration Act.

The report again refers to various sections that consumers can invoke for protection although they are not tailor-made for parties in a fragile position like consumers. The position of consumers demands extra attention to mitigate prejudice they are subjected to by those in privileged position. The draft Bill on domestic arbitration contains some provisions aimed at providing such protection.⁷⁶³ These provisions included section 58, 55(7) and 39 (6) of the Draft Bill.

The SALRC provided a comprehensive report on the aspect of consumer arbitration evincing its appreciation of the controversy surrounding this subject. The Commission undertook a comparative analysis to discover best practices.⁷⁶⁴ The analysis was followed by the listing of principles that deserve consideration when statutory provisions on consumer arbitration are drafted. Those principles were outlined as follows:⁷⁶⁵

“3.289 First, the provisions must contain balanced protection for the interests of consumers, with due regard to the legitimate concerns of traders and arbitration service providers.

3.290 Secondly, the provisions must promote legal certainty. There must therefore be a reasonable degree of clarity as to who are consumers and what contracts are consumer contracts. The consequences of non-compliance with the consumer protection provisions should also be clear from both the supplier's and the consumer's perspective.

3.291 Thirdly, the consumer protection provisions must take into account current and future commercial requirements, for example in relation to growth of electronic commerce and consumer contracts entered into on the Internet.

3.292 Fourthly, the imposition of greater formalities for consumer arbitration agreements is not objectionable in principle, as contended by one respondent. The requirement of writing for the statutory recognition and enforcement of arbitration agreements is already more onerous than the formalities for most commercial contracts, where writing is not required. Moreover, in modern arbitration law, the arbitration clause is treated as a separate agreement, severable from the contract in which it is contained.

3.293 Finally, special provisions for consumer arbitration agreements merely emphasise the right of the consumer to take disputes to court and the need to protect consumers against being coerced into an arbitration agreement where the consumer is in a clearly unequal bargaining position.

⁷⁶³ *Idem* p 92 para 3.280.

⁷⁶⁴ SALRC (2001) 93 3.284

⁷⁶⁵ *Idem* 97.

Such provisions are therefore not a vote of no-confidence in arbitration. The protection should therefore underpin party autonomy by ensuring that there is genuine and informed consent on the part of the consumer.”

The principles provide a vital ground upon which provisions which are well balanced and fair to the consumer may be developed. The meticulous manner in which the Commission dealt with this sensitive subject of consumer arbitration prompted a recommendation of further four additional methods that could be considered to provide consumer protection in arbitration legislation.⁷⁶⁶ The Commission considered the viability of imposing additional formalities like requiring a separate written agreement signed by the consumer as a guarantee that she was made aware of the existence of the arbitration clause in the contract.⁷⁶⁷ However, this method was found to be providing no protection to the consumers because they could sign the clause without a full understanding of what the clause entails. The Commission further appreciated the fact that the consumer could sign solely because she desperately requires the goods and cannot obtain them without appending the signature to the contract and accepting unintended consequences of sacrificing the right to judicial redress.

The next consideration was whether providing the consumer with the sole powers to decide whether arbitration is applicable would provide necessary protection. The challenge presented by this method was whether it could be adapted to provide adequate protection to the “legitimate interests of the supplier and arbitration service providers.”⁷⁶⁸ This method had the effect of leaving the supplier in the dark as to which forum the dispute will be resolved when it arises. The uncertainty would discourage those sectors that traditionally never used arbitration from considering it as an effective and more convenient mechanism for resolving disputes.⁷⁶⁹

The Commission considered the protection that could be afforded to the consumer in the event that the arbitration agreement is enforceable against the consumer unless the court directs otherwise. However, it quickly realised that this option is already covered by the current Act. This option would have enabled the consumer to argue

⁷⁶⁶ *Idem* 96.

⁷⁶⁷ *Ibid.*

⁷⁶⁸ *Idem* 97.

⁷⁶⁹ *Ibid.*

against the stay of court proceedings in favour of arbitration where the arbitration clause could be regarded as an unfair term. The high litigation costs emerged as a major restriction against the access of this benefit by the consumer. This option like the previous two was not regarded as providing adequate protection from exploitation to the consumer.

The Commission went on to consider the protection that can be afforded to the consumer through the application of statutory “cooling off” period. The statutory “cooling off” period received favour and was endorsed as a viable option that can be adopted to protect consumers in consumer arbitration. The statutory “cooling off period” is expressed as follows in the Draft Bill:⁷⁷⁰

- (1) Where a consumer enters into an arbitration agreement to refer future disputes arising from or in relation to a consumer contract to arbitration, the consumer may cancel that arbitration agreement by giving written notice to the other party within ten days of entering into it.
 - (2) The other party is not entitled to impose any penalty as a result of the consumer cancelling the arbitration agreement.
 - (3) For purposes of subsection (1) a consumer is a natural person who enters into a contract while acting for purposes outside his or her trade, business or profession with another party acting for purposes relating to his or her trade, business or profession, if the total consideration payable by the consumer does not exceed the amount of R50 000 or such other amount as may from time to time be prescribed by regulation.
-
- (5) Where the arbitration agreement referred to in subsection (1) is a clause in a consumer contract or is contained in a document referred to in the contract, the other party must furnish the consumer with a copy of the document containing the arbitration”
 - (6) The other party must inform the consumer of his or her right under subsection (1) at the time when the arbitration agreement is concluded or when furnishing the copy of the document referred to in subsection (5).
 - (7) The ten-day period referred to in subsection (1) only commences once the other party has complied with the provisions of subsections (5) and (6).
 - (8) Subsection (1) applies to every arbitration agreement entered into by a consumer in South Africa after the commencement of this Act notwithstanding a provision in the arbitration agreement to the effect that it is governed by a law other than South African law.
 - (9) For purposes of subsection (8), an arbitration agreement is entered into by a consumer in South Africa if the consumer is in South Africa at the time when the agreement is entered into.”

⁷⁷⁰ Domestic Arbitration draft Bill s 58.

The effort of the Commission was to ensure that the consumer grant his consent to arbitration. To this end, the provision succeeded to guarantee that consent to arbitration is obtained. Nevertheless, the consent guaranteed by the above provision completely fails to reach the standard of consent that the Commission believes is necessary to validate the enforcement of the arbitration clause. According to the SALRC:

“Party autonomy, as a fundamental principle of arbitration law, is based on true consent. In the case of a consumer transaction, the danger however exists that true consent can be undermined by the fact that the parties are in an unequal bargaining position and the weaker party is prejudiced by the use of standard-form contracts imposed by the stronger party.”

True consent is not achieved by the measures recommended by the SALRC. The abovementioned provision of the Draft Bill does not address concerns regarding the fact that the average consumer may not fully comprehend the consequences of granting consent to arbitration.⁷⁷¹ The definition of consent in Sterilisation Act⁷⁷² caught my attention. Consent is defined by the Act as follows:⁷⁷³

“For the purposes of this act, “consent” means consent given freely and voluntarily without any inducement and may only be given if the person giving it has –
(a) been given a clear explanation and adequate description of the –
(i) proposed plan of the procedure; and
(ii) consequences, risks and the reversible or irreversible nature of the sterilisation procedure;....”

This definition though focusing on consent in sterilisation procedure consists of characters that true consent should possess. Consent should be made freely and voluntarily and it should not be based on any form of inducement. It must be obtained from the person who was provided with a clear explanation and adequate description of what the process entails and the consequences thereof. The provision in the draft Bill that intends to protect consumers places the obligation on the other party to provide the consumer with a copy of a document that contains the arbitration clause and further inform her of his right to cancel it within a period of 10 days. However, it places no duty on the supplier to adequately explain to the consumer what arbitration clause is and its implications. The cooling-off period does not address this concern in any way, nor does it improve the consumer’s capacity to

⁷⁷¹ *Idem* s 92.
⁷⁷² 44 of 1998.
⁷⁷³ *Idem* s 4.

negotiate the term or address concerns regarding inequality of bargaining positions. The provision represents an advance but it has shortcomings, which make it fall short of the standard of protection that the consumer deserves.

Ensuring that the consumer is made aware of the existence of the arbitration clause and what consent to such a clause implies for the parties, was not given sufficient consideration. If this concern is not adequately addressed, the concerns raised above regarding the infringement of the consumer's right of access to the courts, especially in situations of unequal bargaining power, become real.

The SALRC did not confine itself to dealing with the domestic arbitration framework but also investigated the need to introduce new legislation to govern international arbitrations. Such legislation would have the potential to support economic growth in South Africa. This potential has existed in South Africa since 1994 when doors were opened for South Africa to participate in international business.

The SALRC recommended the promulgation of legislation to specifically deal with international arbitration. As part of the investigation into the drafting of such legislation, the SALRC considered whether or not the new legislation should adopt UNCITRAL Model Law. The SALRC prepared a draft Bill regulating international arbitration. This draft Bill is tangible proof that progress is being made towards achieving the ambitions of jurists and businessmen in South Africa, of creating a viable international arbitration framework for South Africa. Sadly, however, the draft legislation has not yet been enacted save to say it has been approved for submission to Parliament.

The introduction of the Promotion and Protection of Investment Bill, 2013 presented another challenge to the practice of international commercial arbitration in South Africa. The purpose of the proposed Act⁷⁷⁴ is to:

- “(a) promote and protect investment in a manner that is consistent with public interest and a balance between the rights and obligations of investors; and
- (b) ensure the equal treatment between foreign investors and citizens of the Republic, subject to applicable legislation.”

⁷⁷⁴ Promotion and Protection of Investment Bill s 3.

The Bill, though focusing on investments, has a direct impact on the application of international arbitration as it places some restrictions on the resort to arbitration. The 2013 version of the Draft Bill, clause 11(5) stated:

“An investor may refer an investment dispute to arbitration in accordance with the arbitration Act, 1965 Act No. 42 of 1965”

The Bill discourages resort to international arbitration by providing in section 12(5) that all domestic remedies must be exhausted before parties may resort to international arbitration to resolve an international investment dispute. Furthermore, the consent of the State must be obtained prior to initiation of international arbitration proceedings in any matter governed by The Act. However, section 12 of Bill 18 of 2015 and section 13 of Act 22 of 2015 also provided for mediation, and in addition to its restriction of the investor to the local courts. Section 15 (5) of the Act provides:

“The government may consent to international arbitration in respect of investments covered by this Act, subject to the exhaustion of domestic remedies... Such arbitration will be conducted between the Republic and the home state of the applicable investor.”

While the investor is restricted to the local courts, after these remedies have been exhausted, South Africa may consider referring the matter to arbitration with the investor’s home state. Both states would have to consent to the arbitration and the investor is not directly involved.

Global concern has been expressed that South Africa has denied itself an opportunity to become the arbitration powerhouse of Africa by not aligning its arbitration law with the international standard.⁷⁷⁵

3.7 CONCLUSION

Conflict exists in all spheres.⁷⁷⁶ Where such conflict arose from business transactions, merchants sought a less destructive resolution mechanism than litigation. To preserve the underlying relationship and to avoid exorbitant costs, they opted to resolve disputes using alternative dispute resolution. Arbitration became the

⁷⁷⁵ Sarkodie 1, Butler (1994) 120.

⁷⁷⁶ Stitt A (1998) *Alternative dispute resolution for organisation* 3.

most commonly used form of dispute resolution in the commercial context. Initially this process was complete and required no court intervention.

Evolution changed the shape of arbitration fundamentally. As Redfern and Hunter state:⁷⁷⁷

“In its early days, arbitration would have been a simple and relatively informal process. Two merchants, in dispute over the price or quality of goods delivered, would turn to a third whom they knew and trusted, and they would agree to abide by his decision-and they would do this not because of any legal sanction, but because this was what was expected of them in the community within which they carried on their business.

In theory, such a localised system of private justice might have continued without any supervision or intervention by the courts of law-in much the same way as the law does not generally concern itself with supervising the conduct of a private members’ club or intervening in its rules unless public policy requires it to do so.

However, no modern state can afford to stand back and allow a system of private justice-depending essentially on the integrity of the arbitrators and the goodwill of the participants-to be the only method of regulating commercial activities. Arbitration may well have been a system of justice born of merchants but just as war is too important to be left to the generals, so is arbitration too important to be left to private provision.”

Legal development such as the promulgation of the Constitution played a critical role in promoting the legitimacy of arbitration in South Africa as it recognises and supports the use of arbitration as a dispute resolution mechanism.⁷⁷⁸ The common understanding amongst academics and courts in South Africa is that private arbitration has withstood Constitutional scrutiny and is thus constitutional.⁷⁷⁹ However, it is my opinion that closer scrutiny will reveal that private arbitration may, in some instances, violate the fundamental principles of the Constitution. Processes that lack fairness cannot be regarded as constitutional. The supremacy of the Constitution subordinates all law and conduct to it. Arbitration is no exception to the requirement that all laws and conduct should be aligned to the Constitution, failing which they will be declared invalid.

The Constitution provides support to processes that are fair and dispense justice. The arbitral award is often favoured for its final and binding status and this is also safeguarded by limitation of any form of appeal from the arbitral award. The award can only be reviewed under narrow circumstances. The grounds are so narrow that

⁷⁷⁷ Redfern A & Hunter M (2015) *International arbitration* (6ed) 4.

⁷⁷⁸ *Mphaphuli* para 235.

⁷⁷⁹ Ramsden & Ramsden 16.

even a misinterpretation of the law or facts which drastically alters the outcome cannot justify setting aside of the award. Thus, instead of dispensing justice, the process potentially prejudices the innocent party.

The element of fairness in arbitration is not new. In Roman-Dutch Law, it was an implied term of the referral to arbitration that the process should be fair, just and proceed in terms of the law.⁷⁸⁰ In *Mphaphuli*, the court held that the Roman-Dutch law, by recognising this implied requirement, was squarely aligned with the values reflected in the South African Constitution.⁷⁸¹ The fact that parties elected arbitration over litigation does not mean they consented to an unfair process. As Ramsden and Ramsden said:⁷⁸²

“In interpreting an arbitration agreement, it should ordinarily be accepted that when parties submit to a process they intend should be fair. Fairness is one of the core values of our constitutional order.....”

In the event that fairness is compromised during arbitration proceedings, parties should be allowed to exercise their right of access to the courts to seek justice. To deny this right where there has been blatant unfairness in the process offends the Constitution. The prejudice to the party who was denied justice on the basis of a misinterpretation of either the law or the facts may be more far-reaching than a simple requirement to abide by the award. This party may also be required to pay the costs of the arbitration process at the discretion of the arbitrator.⁷⁸³ O’Reilly states that:⁷⁸⁴

“.....the liability for the costs of a reference is in the discretion of the arbitrator. An arbitrator exercising this discretion must do so judicially, having primary regard to the principle that the successful party is prima facie entitled to have his reasonable costs paid by the unsuccessful party. The unsuccessful party will also be prima facie liable for the arbitrator’s fees and expenses.”

The only manner in which such injustice can be addressed is to make court intervention a possibility in appropriate circumstances.

⁷⁸⁰ *Mphaphuli* para 221.

⁷⁸¹ *Ibid.*

⁷⁸² Ramsden & Ramsden 17.

⁷⁸³ O’Reilly M (1997) *Costs in arbitration proceedings* (2ed) 1.

⁷⁸⁴ *Ibid.*

Voluntary referral to arbitration is regarded as fair and parties who resort to arbitration are regarded as having either waived their right of access to the courts or have elected to not avail themselves of that right. The effectiveness of such a decision not to exercise the constitutional right of access to courts depends entirely on it having been made without undue compulsion and in accordance with public policy.⁷⁸⁵

How large corporations treat consumers was addressed at length earlier in this chapter.⁷⁸⁶ It became clear that consumers rarely have any opportunity to negotiate the arbitration clause, which is often buried in the fine print of the contract. The clause is often only referred to when a dispute arises and consumers are often not alerted to the presence of the clause or the implications thereof at the time of contracting. Even in circumstance where the consumer is made aware of the clause and its implications, the consumer often feels compelled to accept the clause as a necessary cost of doing the business. This offends the very principles of a contract. As Mupangavanhu states:⁷⁸⁷

“Ideally, the creation of a contract should be the result of a free choice, without external interference, and that in the process of contracting, the parties are sovereign. Once a court is satisfied that the contract was freely entered into with the intention to create binding obligations, it should uphold and enforce the contract based on the principle of *pacta sunt servanda*. Accordingly, there should be minimal state intervention in the area of contract law as a result of freedom of contract and party autonomy. Autonomy entails that the decision-maker must accept the responsibility of binding himself to a contract.”

Submission can never constitute consent in law.⁷⁸⁸ There is indeed an element of undue influence where parties are forced to sign away their day in court in order to secure the transaction. This is unfair and thus unconstitutional. This leads to the inevitable conclusion that arbitration in such circumstances is unconstitutional.

Overcrowded court rolls, the delay in finalising cases through litigation, exorbitant fees that are paid during litigation and a lack of privacy-fostered resort to arbitration. The arbitration process was a private dispute resolution mechanism, which was utilised by merchants to resolve business disputes. It operated free of legalities.

⁷⁸⁵ Ramsden & Ramsden 16.

⁷⁸⁶ *Idem* 21.

⁷⁸⁷ Mupangavanhu 122.

⁷⁸⁸ Herring J (2014) *Criminal law: Text, cases, and materials* 439.

These benefits were eroded over time and arbitration today mimics litigation. Parties spend substantial sums for arbitration. This departure from the initial purpose of arbitration in South Africa creates an urgent need to revisit arbitration and align it with the Constitution. By aligning arbitration with the Constitution and attempting to resurrect the initial benefits of arbitration, it may be possible to unleash the full potential of the process in South Africa.

This objective can however, only be achieved if the courts are willing to accept that contract law is subordinate to the Constitution and must also conform to it. My instinctive sense that the courts were unwilling to concede this was recently confirmed by Wallis J when he stated that:⁷⁸⁹

“There is a view abroad, among both academics and legal practitioners, that certain decisions by the Constitutional Court impacting on the commercial life of the country have introduced uncertainty into our commercial law.”

The majority judgment in the case of *Mphaphuli* was written by O’Regan J who had considerable experience in the field of arbitration. The Judge was well aware of the impact that declaring arbitration unconstitutional might have or the uncertainty that such a decision might create in the commercial world. O’Regan J, in analysing the constitutionality of arbitration, did so appreciating the catastrophic results of declaring arbitration unconstitutional. Her decision was certainly influenced by her background and her understanding of the principles of arbitration developed through her vast experience in this field. Her decision favoured arbitration and concluded that the process does not contravene the Constitution. The court made this finding conscious of the fact that a factually and legally incorrect decision cannot be a ground for setting aside the award. The court, by supporting arbitration with its aforementioned shortcomings, may support the argument that arbitration does not unfairly limit the rights of parties in an arbitration to access the court in terms of section 34 of the Constitution. As Chukwuemerie states:⁷⁹⁰

“The right is so fundamental for any society that it is recognised as a constitutional right, even in jurisdictions with unwritten constitutions, unless it is expressly excluded by law. It is one of the bedrocks of a proper administration of justice that to deny a citizen access to the courts is an

⁷⁸⁹ Wallis M “Commercial certainty and constitutionalism: Are they compatible?” A paper delivered at an inaugural lecture at the University of the Free State on the 17th of September 2015 3.

⁷⁹⁰ Chukwuemerie 114.

outright denial of justice and the rule of law and indeed a breach of his right.”

The Constitutional Court also addressed section 34 of the Constitution in the case of *Barkhuizen*. The challenge in this matter was based on a clause in an insurance policy, which had the effect of barring a claimant from instituting a legal action through summons after 90 days. Wallis J poses an interesting question:⁷⁹¹

“Did the clause in question afford the insured an adequate and fair opportunity to seek judicial redress if the insurer repudiated the claim? If it did not, then it would not be enforced, as being against public policy. This was consistent with the long established principle that contractual provisions barring access to courts are contrary to public policy and unenforceable, a principle now strengthened by the protection the Constitution accords to the right of access to courts.”

Arbitration does restrict parties from accessing courts, a right that has been protected by the law since time immemorial.

In my opinion, compliance of arbitration with the Constitution has never been properly interrogated. The fact that arbitration places the right of access to the courts, as provided for by section 34 of the Constitution, beyond reach of the parties involved is undeniable. Wallis, after outlining the principle in the quotation above, emphasised the fact that:⁷⁹²

“If the terms of an agreement are such as to deprive a party of his legal rights generally, or to prevent him from seeking redress at any time in the Courts of Justice for any future injury or wrong committed against him, there would be good ground for holding that such an undertaking is against the public law of the land. Per Kotze JA in *Schierhout v Minister of Justice* 1925 AD 417. ‘This is the principle that underlay the historic reluctance of courts to recognise arbitration agreements’.”

The current arbitration process in South Africa violates the Constitution, especially in cases where it involves parties with unequal bargaining power. Unfortunately, it also disclosed some shortcomings when it comes to accommodating international arbitration that is discussed in the following chapter. Great strides have been made through a separate legislation to improve the shortcomings in as far as international arbitration is concerned.

⁷⁹¹ Wallis 7.
⁷⁹² *Ibid.*

CHAPTER 4 INTERNATIONAL ARBITRATION

4.1 INTRODUCTION

In this chapter, the practice of commercial arbitration within an international context will be examined. This examination will inform the recommendations for the development of South African arbitration law that appear in chapter 6 below. UNCITRAL Model Law describes private arbitration as international if:⁷⁹³

- “(a) the parties to an arbitration agreement have, at the time of conclusion of that agreement, their places of business in different states; or
- (b) one of the following is situated outside the State in which the parties have their place of business:
 - (i) the place of arbitration, if determined in, or pursuant to, the arbitration agreement;
 - (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject matter of the dispute is most closely connected; or
- (c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.”

Arbitration is necessary for commerce and facilitates national and international trade.⁷⁹⁴ This is because commercial relations give rise to disputes from time to time. Such disputes can be amicably settled through an arbitration process that is less antagonistic in nature than litigation. Thus, it is hardly surprising that arbitration is a popular dispute resolution mechanism within the commercial sphere. Babu defines international commercial arbitration earlier.⁷⁹⁵ Defining the word ‘commercial’ presented a challenge; however, Cordero Moss defines a transaction as being ‘commercial’ if it’s concluded by parties in the course of their business activities, thus excluding consumer contracts.⁷⁹⁶

There does not appear to be any compelling reason why international commercial arbitration rules should differ from State to State.⁷⁹⁷ Thus, the introduction of international instruments like UNCITRAL Model Law seeks to unify international arbitration. Efforts at unifying and harmonising arbitration internationally are

⁷⁹³ UNCITRAL Model Law art 3 .

⁷⁹⁴ Nariman F (2012) *Arbitration in Asia* 337.

⁷⁹⁵ See Cht 2 para 2.7.3. The terms international commercial arbitration and international arbitration will be used interchangeably in this chapter.

⁷⁹⁶ Cordero Moss G (2014) *International commercial contracts: Applicable sources and enforceability* 2.

⁷⁹⁷ *Ibid.*

dependent on legal comparison for their success and that makes legal comparison in the arbitration field particularly valuable.

In the South African context, legal comparison is required by section 39 of the Constitution that emphasises that international law must be taken into account and foreign law may be considered in the interpretation of the Bill of Rights. The court held in *S v Makwanyane* that:⁷⁹⁸

“International agreements and customary international law provide a framework within which...the Bill of Rights can be evaluated and understood, and for that purpose decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, and the European Court of Human Rights, and in appropriate cases, reports of specialised agencies such as the International Labour Organisation may provide guidance as to the correct interpretation of particular provisions.”

The court in *Makwanyane* confirmed that South Africa is part of an international community and therefore, cannot live in isolation. It must embrace international instruments that facilitate cooperation between different independent sovereign states. The world of commerce is no different and, in recognition of this fact, various instruments have been designed to govern international private arbitration.⁷⁹⁹ This thesis focuses on two such instruments, UNCITRAL Model Law and the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). Other instruments are referred to where necessary.

⁷⁹⁸ 1995 (3) SA 391 (CC) para 36-37.

⁷⁹⁹ Various legal instruments have been developed to govern international commercial arbitration. The following were amongst instruments which were adopted: 1923 Geneva Protocol on Arbitration Clauses; 1927 Geneva Convention on the Execution of Foreign Arbitral Awards (In English and French); 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention); 2006 Recommendation regarding interpretation of article II (2) and article VII (1) of the New York Convention; 1961 European Convention on International Commercial Arbitration (Geneva Convention); 1962 Agreement Relating to Application of the European Convention on International Commercial Arbitration (Paris Agreement); 1965 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (Washington or ICSID Convention); 1966 Convention Providing a Uniform Law on Arbitration (Strasbourg Convention); 1972 Convention on the Settlement by Arbitration of Civil Law Disputes Resulting from Relations of Economic and Scientific-Technical Cooperation (Moscow Convention); 1975 Inter-American Convention on International Commercial Arbitration (Panama Convention); 1979 Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards (Montevideo Convention); 1985 UNCITRAL Model Law on International Commercial Arbitration; 1987 Arab Convention on Commercial Arbitration; and the 1993 OHADA Treaty on the Harmonization of Business Law in Africa (Port-Louis, Senegal).

This thesis explores whether or not South African arbitration law should be aligned to UNCITRAL Model Law, which was adopted by UNCITRAL in an attempt to harmonise national laws pertaining to international private arbitration procedures. It has been adopted by a number of countries but not by South Africa.

As South Africa chose not to adopt UNCITRAL Model Law, it fell to the South African Law Reform Commission (SALRC) through project 94,⁸⁰⁰ to investigate not only the necessity to reform South African arbitration law, but also to establish the best possible way to introduce international commercial arbitration into South Africa. The Commission recommended legislation dealing with international arbitration. In its summary it indicates that:⁸⁰¹

“The ending of the economic isolation of South Africa is leading to increased regional trade and economic links with other countries. As parties to international business transactions favour arbitration as a speedy method for dispute resolution, it is important that the country’s arbitration law should be in line with international norms.

It is however widely argued that South African law does not currently promote international commercial arbitration. The Arbitration Act 42 of 1965 contains no provisions which expressly deal with international arbitration, while the Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977 is limited to the enforcement of foreign awards only. It is also generally considered that the court’s statutory powers of supervision during the arbitral process are inappropriate, given in particular, the inherently expeditious requirements of that process.

The Commission proposes that an effective legislative framework for the resolution of international trade disputes should be created. The Commission has resolved to adopt a holistic approach to international arbitration legislation. In this process, with a single statute on international arbitration in mind, consideration is given to three matters: South Africa’s response to the UNCITRAL Model Law; possible changes to the legislation on the New York Convention (currently set out in Act 40 of 1977); and the proposed accession by South Africa to the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID).”

Once implemented, the recommendations of the SALRC will improve South Africa’s position within the global business community, thereby benefitting the economy of the country. The development of business arbitration is crucial to international

⁸⁰⁰ Discussion paper 83, Project 94 Domestic Arbitration.(Project 94) The object of the SALRC is to undertake research on all branches of the law subject to the approval of the Minister of Justice and Constitutional Development. The SALRC must thereafter submit recommendations to the Government regarding any development, improvement, modernisation or reformation of any law investigated that it deems necessary. See SALRC website: <http://www.justice.gov.za/salrc/> (accessed on 02 Mar 2015).

⁸⁰¹ *Idem* 20.

economic cooperation.⁸⁰² It is essential to have mechanisms to resolve cross-border disputes.⁸⁰³ Failure to have such measures in place will be detrimental to wealth-creating transactions which will remain either incomplete, or will be concluded at higher costs to compensate for lack of adequate mechanisms to protect the rights of those who are involved in such transactions.⁸⁰⁴

Arbitration of international commercial disputes benefits both national welfare and the shared interests of the global commercial community.⁸⁰⁵ It is thus of utmost importance for South Africa to adopt UNCITRAL Model Law to optimise its involvement in the international commercial environment.

Another instrument that promotes commercial interaction at an international level by offering an appropriate dispute resolution mechanism is the New York Convention. This instrument was a consequence of the desire of the international business community to boost the efficiency of international private arbitration as a dispute resolution mechanism. The primary purpose of the New York Convention was to facilitate the recognition of international private arbitration agreements and the enforcement of awards resulting from such agreements. The abovementioned instruments are applicable only to international commercial arbitration thus necessitating that a clear distinction be drawn between domestic and international commercial arbitration.

4.2 THE DISTINCTION BETWEEN DOMESTIC AND INTERNATIONAL PRIVATE ARBITRATION

Private arbitration, both internationally and domestically, is premised on the same principles and shares the same purpose. There are however, a few special characteristics that differentiate international from domestic private arbitration.

⁸⁰² Park W (2006) *Arbitration of international business disputes* 4.

⁸⁰³ *Ibid.*

⁸⁰⁴ *Ibid.*

⁸⁰⁵ *Ibid.*

Paulsson has the following to say regarding the distinction between international and domestic private arbitration:⁸⁰⁶

“The fundamental problem that distinguishes international from domestic cases is the multiplicity of potentially competent jurisdictions. Since there is no obligatory ‘World Court of International Commerce’ parties must voluntarily accept a neutral forum created by means of a contractual stipulation. If such contractual stipulations are not respected from country to country, there would be chaos. Everyone would sue his adversary in his own favourite court. There would be inconsistent judgments, and those judgments would be difficult to enforce anywhere but in the country where they were rendered. The system would degenerate. Settlement of disputes under international contracts would no longer be secure. International commerce would suffer because serious companies would consider international contracts to be a matter of high risk, to be avoided or to be priced at a premium to compensate for the risk.”

International private arbitration is a self-governing process, independent of national laws.⁸⁰⁷ Its hybrid nature, as illustrated by Redfern and Hunter, should be borne in mind:⁸⁰⁸

“International commercial arbitration is a hybrid. It begins as a private agreement between the parties. It continues by way of private proceedings, in which the wishes of the parties are of great importance. Yet it ends with an award which has binding legal force and effect and which, on appropriate conditions, the courts of most countries of the world will recognise and enforce. The private process has a public effect, implemented with the support of the public authorities of each state and expressed through its national law.”

There are other unique circumstances that set international arbitration apart from either domestic arbitration or litigation. Likewise, the practices, procedures and the resources used distinguish international arbitration from litigation or domestic arbitration.⁸⁰⁹ The differences result from the unique mixture of civil and common law traditions reflected in international commercial arbitrations, which require practitioners to be more cautious.⁸¹⁰

Caution must be exercised to avoid copying procedures followed in domestic courts or arbitrations, which might result in the practitioner losing an opportunity to secure a

⁸⁰⁶ Paulsson J Accepting international arbitration in fact--and not only in words in Cotran and Amissah (eds) (1996) *Arbitration in Africa* 31-45 33.

⁸⁰⁷ Lew J “Does national court involvement undermine the international arbitration processes” (2009) vol 24, issue 3, *American University LR* 489-537 490.

⁸⁰⁸ Redfern A & Hunter M (2004) *The law and practice of international commercial arbitration* (4ed) 11.

⁸⁰⁹ Strong S (2009) *Research and practice in international commercial arbitration* 3.

⁸¹⁰ *Ibid.*

favourable decision for the client.⁸¹¹ Furthermore, international commercial arbitration is a private dispute resolution mechanism that lacks official precedents or rigid rules, unlike litigation that is formal and has clear rules and procedures.⁸¹²

The complexity of legal processes in international commercial arbitrations forces business people to engage the services of lawyers to protect their interests and explains the presence of lawyers from different jurisdictions with different legal backgrounds.⁸¹³ These lawyers are presented with the challenge of navigating through the “intricate network of jurisdictional options and potentially applicable provisions of law”, while guarding against issues that can arise when advocates and arbitrators come from different legal backgrounds.⁸¹⁴ Despite the different legal backgrounds of the advocates and arbitrators involved in an international arbitration, international arbitration awards all require the intervention of the relevant domestic court for validation and enforcement.

According to UNCITRAL Model Law and the New York Convention, courts may intervene in the international commercial arbitration process at four possible points: a) Prior to the establishment of a tribunal where one party challenges the validity of the arbitration agreement;⁸¹⁵ at the same stage if a party to the dispute requires urgent protection which cannot be delayed until the establishment of a tribunal;⁸¹⁶ (b) at commencement of the arbitration if there is a challenge to the appointment of the arbitrators. In such cases, the court may assist by appointing arbitrators;⁸¹⁷ (c) during the arbitration when interlocutory orders, which arbitrators are not empowered to make, are needed;⁸¹⁸ and (d) during the enforcement stage.⁸¹⁹ The purpose of the court’s intervention at this stage is to legitimise the award thereby justifying the use of state resources to enforce compliance with the award. The court seeks to give the arbitral award some teeth.

811

Ibid.

812

Idem 4.

813

Ibid.

814

Ibid. See Trakman L “Legal traditions and international commercial arbitration” (2006) vol 17, *American review of international commercial arbitration* 1-35 1.

815

Lew 496.

816

Ibid.

817

Idem 497.

818

Ibid.

819

Idem 498.

International arbitration policies are premised on two basic interests, namely, preservation of the finality of arbitral awards and maintaining a just system.⁸²⁰ This can be achieved by keeping the intervention of the court in arbitration processes to a minimal and available instruments must be constantly updated to avoid being rendered redundant due to evolution of international commerce.

4.3 THE EVOLUTION OF INTERNATIONAL COMMERCIAL ARBITRATION

Arbitration as a dispute resolution mechanism has a long history, which some authors trace back to the period of King Solomon and Alexander the Great's father.⁸²¹ Nevertheless, modern international arbitration has only recently become the preferred means of settling international commercial disputes.⁸²² According to Graving:⁸²³

"For many years it was fashionable to say that international commercial arbitration had come of age. That is no longer an appropriate observation. By now it has entered a mature and sophisticated middle age.' Both the crises and the illusions of youth are past, and in the eyes of businessmen (although not necessarily their lawyers) the creature has developed an identity and ability to solve problems that match the needs of the critical role it plays in the world of commerce today."

The existence and success of international commercial arbitration creates a fertile ground for increasing international business transactions. The critical role played by the evolution of arbitration in the economic health of international business transactions is clearly captured by Park.⁸²⁴ Park's view in this regard is that:⁸²⁵

"The evolution of business arbitration remains of critical importance to international economic cooperation. Without reliable ways to resolve cross-border disputes, many wealth-creating transactions either will remain unconsummated, or will be concluded at higher costs to reflect the absence of adequate mechanisms to vindicate contract rights. Arbitration of business disputes thus provides net benefits from the perspective of both national welfare and the shared interests of the global commercial community."

⁸²⁰ Gelandner J "Judicial review of international arbitral awards: Preserving independence in international commercial arbitrations" (1997) vol 80, issue 2, *Marquette LR* 625-644 626.

⁸²¹ Wasco M "When less is more: The international split over expanded judicial review in arbitration" (2010) vol 62, issue 2, *Rutgers LR* 599-626 600.

⁸²² *Ibid.*

⁸²³ Graving R "The International commercial arbitration institutions: How good a job are they doing?" (1989) vol 4, issue 2, *American University International LR* 319-376 319.

⁸²⁴ Park 4.

⁸²⁵ *Idem* 4.

The success of international arbitration as a preferred dispute resolution mechanism internationally was predicted by Finlay many years ago.⁸²⁶

“The theoretical interest of the subject of international arbitration is great, its literature enormous; it has been intimately associated in the past with ambitious schemes of international control, and with speculations, some of which seems to us nowadays very fantastic. Its history reaches back to the earliest times of classical antiquity and runs through the Middle Ages; and in our own time the subject has assumed proportions little dreamt of half a century ago. It has a great practical interest; for, with some necessary limitations, there is no doubt that arbitration is destined to play an increasing part in the history of nations.”

The process of international arbitration flourished mostly in resolving disputes arising from commercial transactions rather than conflict disputes.⁸²⁷ Arbitration has evolved from the time arbitrators were valued not for their legal analysis but for their sense of fairness and industry knowledge.⁸²⁸ Today, businesses use international arbitration because of its ability to deliver a neutral, adjudicative dispute resolution process where arbitrators independently apply the law to facts.⁸²⁹ This faith in the process promotes the legitimacy of international arbitration.⁸³⁰ Furthermore, arbitration produces final and binding awards that can be enforced by the national courts.⁸³¹ Finally, arbitration is flexible compared to litigation but, how it is applied internationally is an issue that must be properly handled to avoid incorrect practices.⁸³²

4.4 INTERNATIONAL APPLICATION OF COMMERCIAL ARBITRATION

International commercial arbitration emerged as a dispute resolution method preferred by the business community because of its ability to resolve matters speedily, informally and cost effectively. Furthermore, the matter is determined by someone possessed of expertise in the field. An added benefit of arbitration is that the private nature of the process protects the confidential business transaction between the parties.

⁸²⁶ Finlay R “International arbitration” (Nov 1904) vol 179, no 576 *The North American review* 659-670.

⁸²⁷ Born G (2001) *International commercial arbitration: Cases and materials* (2ed) 1.

⁸²⁸ Franck S “The role of international arbitrators” <https://www.international-arbitration-attorney.com/wpcontent/uploads/Microsoft-Word-ILW-ILSA-Article.docsfranck2.pdf> 6 (accessed on 20 Jan 2015).

⁸²⁹ *Ibid.*

⁸³⁰ *Ibid.*

⁸³¹ *Ibid.*

⁸³² *Ibid.*

The international commercial community has expressed particular concern regarding the ability to enforce foreign judgments. The existence of international commercial arbitration presented a solution to the challenge of enforcing a foreign judgment as a number of instruments facilitating recognition and enforcement of international commercial awards were put in place. Buhning-Uhle, one of the leading authors in the field of international commercial arbitration states that: “[t]he process of international commercial arbitration has a ‘distinct’ flavour to it that sets it apart from the procedure in any national court”.⁸³³ Buhning-Uhle makes further reference to the leading practitioner on international commercial arbitration, Paulsson, who was of the view that:⁸³⁴

“International arbitration is at once serious business and great fun, but it isn’t everyone’s cup of tea. You may have to structure your arguments under a substantive law you have never considered before, appear in a hearing in a remote country before arbitrators trained in three different legal systems who have worked out some weird, fish-and-fowl rules of procedure, which are revealed to you as you go along. If you are truly lucky, your case will depend on your skill in cross-examining a brilliant rogue who insists he can express himself only in Greek or Danish or Thai, and who lengthily answers the question he thinks you ought to have asked, through a befuddled interpreter, all while the jet-lagged chairman’s concentration seems exclusively focused upon his watch. Many litigators who perform superbly in their home courts are unable to function in this kind of environment. Coping with such a three-ring circus requires flexibility, tolerance, and a fair dose of humility. You must be ready to play to win while accepting someone else’s rules, and to put a diplomatic veneer on the relentlessness with which you are in fact pursuing your objective.”

International commercial arbitration is a more convenient and predictable mechanism to employ in an international commercial dispute than litigation for the sake of the smooth running and success of international business. International trade is flourishing and is accompanied by a demand for an efficient and effective dispute resolution mechanism. Arbitration offers such a mechanism. The business community is brutalised by fear of the prospect of having to litigate in a foreign court with associated high costs. This fear is exacerbated by the concern of having to enforce a foreign judgement in another State.

International commercial arbitration provides the business community with a neutral platform for resolving disputes arising from their transactions, thereby levelling the

⁸³³ Buhning-Uhle C, Kirchhoff L & Scherer G (2006) *Arbitration and mediation in international business* (2ed) 69.

⁸³⁴ *Ibid.*

playing field for all parties. It presents parties with benefits that litigation cannot offer, for example, party control of the process,⁸³⁵ lower costs, flexibility, privacy, speedy resolution of the dispute and a fair and final award made by an arbitrator who was selected by the parties based on her preferred expertise and characteristics.⁸³⁶

Arbitrators are not government employed judges but private persons elected by the parties.⁸³⁷ Their role is to implement the will of the parties without unnecessary interference from the courts. It is advisable that the court should avoid treating arbitration like litigation and limit its interference in a private agreement to avoid offending the fundamental goals and principles of international commercial arbitration.⁸³⁸ Arbitration is more relaxed and less formal than litigation in some domestic courts.⁸³⁹ A further benefit of international commercial arbitral awards is that they are more likely to be enforced in a foreign State than foreign court judgments.⁸⁴⁰

International instruments like The Geneva Protocol and International Convention on the Execution of Foreign Awards, 1927 (Geneva Convention) were put in place to govern the international commercial arbitration and liberate it from the clutches of national courts.⁸⁴¹ However, the abovementioned instruments were not without shortcomings that fundamentally undermined the existence of arbitration itself.⁸⁴²

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) provided much needed relief from the restrictions presented by the Geneva Convention. The New York Convention⁸⁴³ and UNCITRAL Model Law are the two main instruments that currently regulate arbitration in the international arena.

⁸³⁵ Sussman E & Wilkinson J “Benefits of arbitration for commercial disputes” http://www.americanbar.org/content/dam/aba/publications/dispute_resolution_magazine/Marc_h_2012_Sussman_Wilkinson_March_5.authcheckdam.pdf (accessed on 30 Jun 2015).

⁸³⁶ *Ibid.*

⁸³⁷ Born 1.

⁸³⁸ Gelernder 625.

⁸³⁹ Born 8.

⁸⁴⁰ *Ibid.*

⁸⁴¹ Babu 388, See Cht 2 of this thesis.

⁸⁴² See Cht 2 of this thesis.

⁸⁴³ The Convention on the Recognition and Enforcement of Foreign Arbitral Awards which is famously known as The New York Convention was born in 1958 from the United Nations Conference on International Commercial Arbitration that was held in New York.

4.4.1 THE NEW YORK CONVENTION, 1958

The New York Convention was one of the instruments introduced to enhance the effectiveness of international commercial arbitration. It was necessitated by the huge economic growth and flourishing global commerce and trade between private parties that followed World War II.⁸⁴⁴ The establishment of the International Bank for Reconstruction and Development, International Monetary Fund in 1944 and the General Agreement on Tariffs and Trade in 1947 further stimulated global commerce.⁸⁴⁵

These developments, coupled with lobbying by the business and legal communities from the early twentieth century, played a vital role in the enactment of what is termed the “most important milestone in the entire history of international commercial arbitration”, the New York Convention.⁸⁴⁶ The New York Convention, which is alleged to have a pro-enforcement bias, was established to facilitate the recognition and enforcement of foreign arbitral awards and agreements.⁸⁴⁷

The justification for such a pro-enforcement bias can be found in both the purpose of the New York Convention which is to encourage and facilitate recognition and enforcement of awards by restricting intervention by national courts,⁸⁴⁸ and in the principle of comity alluded to by Justice Prakash in the Singapore High Court decision of *Hainan Machinery Import & Export Corporation v Donald & McArthy Pte Ltd* as follows:⁸⁴⁹

“The principle of comity of nations requires that the awards of foreign arbitration tribunals be given due deference and be enforced unless exceptional circumstances exist. As a nation which itself aspires to be an international arbitration centre, Singapore must recognise foreign awards if it expects its own award to be recognised abroad.”

The provisions of article VII (1) which underlies the Convention’s pro enforcement policy provides the party seeking recognition and enforcement with the liberty to rely

⁸⁴⁴ Greenberg S, Kee C & Weeramantry R (2011) *International commercial arbitration: An Asia-Pacific perspective* 9.

⁸⁴⁵ *Idem* 10.

⁸⁴⁶ *Ibid.*

⁸⁴⁷ *Ibid.*

⁸⁴⁸ *Ibid.*

⁸⁴⁹ *Hainan Machinery Import & Export Corporation v Donald & McArthy Pte Ltd*. [1995] SGHC 232 para 45.

on the more favourable domestic law or treaty without fearing being in breach of the Convention.⁸⁵⁰ The Convention was thus provided with the necessary tools to safeguard its sustainability and foster the development of international arbitration.⁸⁵¹

The New York Convention was implemented to allay fears of parties to international transactions that any arbitral award might face enforcement challenges. The primary objective of the New York Convention can be identified from the scope of its application set out in article 1:⁸⁵²

“This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.”

Mr Justice Stewart delivered the opinion of the court in *Scherk v. Alberto-Culver Co* and had the following to say regarding the aim of the Convention:⁸⁵³

“The goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries.”

Parties are permitted by article 1(3) to impose some restrictions to the scope of application of the Convention when signing, ratifying or acceding to it by making two allowed reservations of reciprocity and commercial. Reciprocity reservation enables the Contracting state to restrict the application of the Convention to only awards issued in the territory of another Contracting State. It further permits a restriction to be imposed under what is referred to as ‘commercial reservation’ “only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration”. The Convention goes further in article 2, to outline the obligations placed upon contracting states towards international commercial arbitration agreements.

⁸⁵⁰ Gaillard E & Bermann G (2017) *Guide on the Convention on the Recognition and Enforcement of Foreign arbitral awards* 6.

⁸⁵¹ *Idem* 7.

⁸⁵² The New York Convention.

⁸⁵³ (1974) 417 U.S. 506 at 521.

Although from its title, the Convention creates the impression that it only focuses on the recognition and enforcement of foreign arbitral awards, the provisions of article 2 introduces a different angle, which deals with the duty of the court to enforce arbitration agreements. Article 2 provides:

“Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

.....

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.”

It may indeed come as a surprise that an international treaty with its primary focus as the recognition and enforcement of arbitral awards should begin with a provision on the arbitration agreement.⁸⁵⁴ However, further consideration of this issue reveals a sensible reason for incorporation of such a clause. The Convention incorporated the provision that deals with the arbitration agreement specifically for ensuring a uniform understanding of the legal foundation of arbitration and attaching the necessary legal effects to it.⁸⁵⁵ Thus, the incorporation was intended to make arbitral proceedings and the subsequent awards possible.⁸⁵⁶ The prerequisites for a valid arbitration agreement are the arbitrability of the disputes and the written form of it.⁸⁵⁷ What constitutes written agreements according to the Convention is a clause in a contract or a separate written agreement provided the said documents are signed by each party.⁸⁵⁸ The provisions of article 2 were directed to the contracting states and their courts not arbitral tribunals.⁸⁵⁹

The New York Convention is extensively utilised in international commercial dispute resolution. It outlines the procedure to be followed to achieve recognition and

⁸⁵⁴ Kronke H (2010) *Recognition and enforcement of foreign arbitral awards: A global commentary* 38.

⁸⁵⁵ *Idem* 39.

⁸⁵⁶ *Ibid.*

⁸⁵⁷ Alfons C (2010) *Recognition and enforcement of annulled foreign arbitral awards: an analysis of the legal framework and its interpretation in case law and literature* 28

⁸⁵⁸ *Ibid.*

⁸⁵⁹ Kronke 39.

enforcement of foreign arbitral awards.⁸⁶⁰ The recognition and enforcement of foreign arbitral awards depends upon the intervention of the domestic courts for its effectiveness. However, the introduction of the court system at the recognition and enforcement stage does not constitute permission for the court to scrutinize the decision of the arbitrator on either the facts or application of the law.⁸⁶¹

The exhaustive list of grounds upon which recognition and enforcement of the award can be refused, contained in article 5 of the New York Convention, are testament to the extent to which courts are restricted from interfering with awards.⁸⁶² The New York Convention specifies limited grounds upon which recognition and enforcement of arbitration awards may be refused by signatory States.⁸⁶³ The grounds listed correspond with the grounds listed in UNCITRAL Model law.⁸⁶⁴

⁸⁶⁰ Redfern & Hunter 11. Art 4 of the New York Convention governs the process that has to be adhered to in order to obtain the recognition and enforcement of the awards. The article reads thus:-

“1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

(a) The duly authenticated original award or a duly certified copy thereof;

(b) The original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon. The party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.”

⁸⁶¹ Cordero-Moss G (2013) *International commercial arbitration: Different forms and their features* 33.

⁸⁶² *Ibid.*

⁸⁶³ *Ibid.* Art 5 of the New York Convention stipulates the grounds which may be invoked by the party who seek to oppose the recognition and enforcement of the award. The provisions thereof reads as follows:-

“1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceeding or was otherwise unable to present his case or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

The Convention was introduced by the United Nations to assist in the development of international commercial arbitration.⁸⁶⁵ The Convention simplifies the process for registering the award and shifts the burden of proving that the award was not obtained properly to the person who so alleges.⁸⁶⁶ It further provides the parties with the liberty to utilise either the Convention or other favourable provisions besides the 1923 Protocol and the 1927 Convention on the execution of foreign arbitral awards, to enforce the award.⁸⁶⁷

The attempt to simplify the recognition and enforcement process regarding arbitration awards is evident from the fact that the focus of the scope of operation of the Convention is on the initiation and conclusion of the arbitration process.⁸⁶⁸ The most pertinent contribution of the Convention is found in article 3, which states that:

“Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.”

The reception of the Convention was not the same around the world. Some States were quick to embrace it whilst others were reluctant. The first countries to ratify it were the socialist countries of Europe and Sweden, followed by non-European States.⁸⁶⁹ The New York Convention was established to replace the Geneva

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- (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
 - (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority, of the country in which, or under the law of which, that award was made.
2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
- (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country. or
 - (b) The recognition or enforcement of the award would be contrary to the public policy of that country.”

⁸⁶⁴ Cordero-Moss 26.

⁸⁶⁵ *Ibid.*

⁸⁶⁶ Rubino-Sammartano M (2014) *International Arbitration law and practice* (3ed) 80.

⁸⁶⁷ *Ibid.*

⁸⁶⁸ Garnett R “International Arbitration law: Progress towards harmonisation” (2002) vol 3, issue 2, *Melbourne Journal of Arbitration Law* 400-413 405.

⁸⁶⁹ Rubino-Sammartano 80.

Protocol on Arbitration Clauses of 1923 (the Geneva Protocol) and the Geneva Convention of 1927.⁸⁷⁰

4.4.1.1 The New York Convention and the Geneva Protocol

The Geneva protocol existed to advance two objectives.⁸⁷¹ Its primary aim was to ensure international enforcement of arbitration clauses, so that parties who concluded arbitration agreement shall be obliged to resolve their disputes through arbitration rather than the courts.⁸⁷² It further aimed at securing the enforcement of the arbitral awards made because of the arbitration agreement in the territory of the state in which they were made.⁸⁷³ The Geneva Protocol had shortcomings, which certainly compromised the success of the course it aimed to advance. It found application in arbitration agreements concluded “between parties subject respectively to the jurisdiction of different contracting states”.⁸⁷⁴ It shared the same purpose with the New York Convention. In fact article 1 and 4 of the Geneva Protocol precede article 2 of the New York Convention with two notable differences.⁸⁷⁵ The Geneva Protocol contrary to the wide scope of application of the New York Convention narrowed down its application to the parties who are subject to the jurisdiction of the Contracting State.⁸⁷⁶ Furthermore, the Geneva Protocol had no substantive provision that requires that the arbitral agreement must be in writing.⁸⁷⁷

4.4.1.2 The New York Convention and the Geneva Convention

The Geneva Convention of 1927 represented an advance to the Geneva Protocol. The Convention was aimed at widening the scope of the Geneva Protocol by making a provision for the recognition and enforcement of Protocol awards within the territory of contracting states.⁸⁷⁸ This certainly represented an advance since the Protocol only provided for the recognition and enforcement of the award within the territory of the state in which the award was made. The Geneva Convention

⁸⁷⁰ Kronke 39.
⁸⁷¹ Redfern & Hunter 67.
⁸⁷² *Ibid.*
⁸⁷³ *Ibid.*
⁸⁷⁴ *Idem* 68.
⁸⁷⁵ Kronke 39.
⁸⁷⁶ *Ibid.*
⁸⁷⁷ *Ibid.*
⁸⁷⁸ Redfern & Hunter 68.

experienced operational challenges due to the duty that was placed on the party that was applying for an enforcement of the award to prove the conditions necessary for enforcement.⁸⁷⁹ The party applying for enforcement was under an obligation to demonstrate that the award has become final in its country of origin by obtaining a declaration from that country to the effect that the award was enforceable in that country before such enforcement can be sanctioned by the enforcing court.⁸⁸⁰

The New York Convention succeeded the Geneva Convention. It acknowledged the shortcomings of the Geneva treaties and sought to remedy them through introduction of liberal provisions. The provisions of article 1 of the NYC broadened its scope even further than the 1927 Geneva Convention.⁸⁸¹ In terms of this article limitation of the application which existed on the Geneva treaties were removed completely. Article 1 (1) states that the NYC finds application to awards made in any foreign State regardless of whether the State is a Contracting party or not. The New York Convention further discarded those requirements of the application of the Geneva Convention, which were found to be “vague and ambiguous”.⁸⁸² Specific reference can be made to the requirement that the Geneva Convention found application only to those arbitral award resulting from the proceedings involving parties who are subject to the jurisdiction of one of the High Contracting Parties.⁸⁸³

The ultimate aim of drafting the New York Convention was to present an instrument that has progressed further than the Geneva Convention. Article 1 of the NYC achieved that by making the reciprocal requirement optional and getting rid of the nationality or residence requirement.⁸⁸⁴ Article 1(2) extended the application of the provisions of the Convention to permanent arbitral bodies an aspect on which the Geneva Convention was silent.⁸⁸⁵ The New York Convention was not the only instrument to enhance the practice of international commercial arbitration. As indicated earlier, UNCITRAL Model Law was another major contribution to the drive to market international commercial arbitration as a preferred dispute resolution method.

⁸⁷⁹

Ibid.

⁸⁸⁰

Ibid.

⁸⁸¹

Gaillard & Bermann 12.

⁸⁸²

Ibid.

⁸⁸³

Ibid.

⁸⁸⁴

Gaillard & Bermann 13.

⁸⁸⁵

Kronke 20.

4.4.1.3 International consumer arbitration and the New York Convention

International arbitration is aptly described by Rogers as an idealized archetype of alternative dispute resolution born from mutual agreement between two sophisticated parties with equal bargaining powers.⁸⁸⁶ At least this was the position in not so distant past. The rapid growth of electronic purchases has introduced consumers to the international sphere with the real possibility that the deal between the consumer and the company might go awry. Consumers are more than happy to secure goods at a click of a finger without thinking or even realizing that the company providing services is based in another country. Various jurisdictions have put measures in place to ensure protection of consumers who are involved in a relationship characterized by inequality in bargaining powers.⁸⁸⁷ The question begs, what will be the impact of restrictions on consumer arbitration to the home state's obligations to the New York Convention? The New York Convention has pro-arbitration bias, which is designed to promote uniformity and guarantee enforcement of arbitral awards and agreements.⁸⁸⁸ Contracting States to the New York Convention can enforce the protection of consumers without violating the obligations the State has to the New York Convention.

The New York Convention provides the Contracting States with three ways in which the awards or claims involving consumers can be insulated from the ambit of the New York Convention.⁸⁸⁹ The first exception to the New York Convention is 'commercial reservation' that enables the Contracting states to refuse the enforcements of awards or claims which are not classified as commercial.⁸⁹⁰ At the moment many signatories do not treat consumer arbitration as being commercial, thus restrictions to consumer arbitration in domestic sphere will not violate the New York Convention.⁸⁹¹ The New York Convention empowers Contracting States to declare certain international claims as non-arbitrable that various states have done with consumer arbitration amongst others.⁸⁹² The final category of arbitral awards

⁸⁸⁶ Rogers C "The arrival of the 'have-nots' in international arbitration" vol 8 Nevada LJ 341-384 at 341.

⁸⁸⁷ Tang Z (2014) *Jurisdiction and arbitration agreements in international commercial law* 107.

⁸⁸⁸ Rogers 364.

⁸⁸⁹ *Ibid.*

⁸⁹⁰ See NYC art I (3) & Rogers 364.

⁸⁹¹ Rogers 364.

⁸⁹² See NYC arts 11(1) & V (2)(a) & Rogers 364.

that the Contracting States are permitted to refuse their enforcement are those that violate public policy.⁸⁹³ The international arbitral awards or agreement that concerns parties of unequal bargaining powers or consumers can be effectively dealt with under the exceptions provided by the New York Convention by the contracting states without violating their responsibility to the Convention itself. Contracting States are under obligations to put legislative measures in place that are responsive to the demands of the parties in unequal bargaining powers.

4.4.2 THE INTRODUCTION OF UNCITRAL MODEL LAW

UNCITRAL was established by the United Nations General Assembly (UNGA) in 1966 for the specific purpose of promoting unity and harmony in international trade law.⁸⁹⁴ UNCITRAL was initially comprised of a restricted number of States, 36 in all, which were elected to represent all regions of the world.⁸⁹⁵ The number of States was expanded to 60 by the UNGA in 2002 to reflect the growing participation and contribution of non-member States. The number of States has remained constant until 2016.⁸⁹⁶ The projects of UNCITRAL are undertaken by a working group comprised of experts who work intensively to see projects to their conclusion.⁸⁹⁷ Completed projects are reviewed by UNCITRAL who, after approval, refer these to the UNGA for adoption.⁸⁹⁸

The first significant contribution to the area of international commercial arbitration by UNCITRAL was the adoption of arbitration rules in 1976.⁸⁹⁹ These rules reflected modern commercial arbitration features and influences from a variety of national legal and economic systems.⁹⁰⁰ The rules were warmly received by various arbitral institutions globally, were adopted in a number of ways by various arbitration institutions and were further referred to in a number of arbitration agreements.⁹⁰¹ The

⁸⁹³ See NYC art V (2)(b) & Rogers 366.

⁸⁹⁴ Weigand F (2009) *Practitioner's handbook on international commercial arbitration* (2ed) 954.

⁸⁹⁵ *Ibid.*

⁸⁹⁶ The UNCITRAL Guide (2007) *Basic facts about the United Nations Commission on international trade law* 3.

⁸⁹⁷ *Ibid.*

⁸⁹⁸ *Ibid.*

⁸⁹⁹ Herrmann G "UNCITRAL's work towards a Model Law on International Commercial Arbitration" (1984) vol 4, issue 3, *Pace LR* 537-580 537.

⁹⁰⁰ *Ibid.*

⁹⁰¹ *Idem* 538.

scope of application of these rules is expressed thus in article 1(1) of UNCITRAL arbitrations rules:

“Where the parties to a contract have agreed in writing that disputes in relation to that contract shall be referred to arbitration under the UNCITRAL Arbitration Rules, then such disputes shall be settled in accordance with these Rules subject to such modifications as the parties may agree in writing.”

Despite their value, the rules were not sufficient to meet the demands of business for international arbitration. It is worth noting that, as the New York Convention stands, it does not “deal with either the substantive or the procedural law of arbitration”.⁹⁰² Therefore, the need arose to adopt yet another instrument to augment the New York Convention and UNCITRAL Arbitration rules. This signalled the birth of UNCITRAL Model Law. UNCITRAL Model Law was adopted in response to the shortcomings of the New York Convention such as the lack of substantive and procedural law of arbitration mentioned above.⁹⁰³ Therefore, UNCITRAL Model Law aimed at complimenting rather than competing with the New York Convention by closely modelling the rules of recognition and enforcement in the former on those provided in the latter.⁹⁰⁴ The influence of the New York Convention on UNCITRAL Model Law was inevitable considering that the New York Convention was pivotal to the decision that a need for new arbitration legislation existed and the shape such legislation should take. The Model Law constituted the new legislation so envisaged.⁹⁰⁵

The entire process of investigating the need for another instrument to govern international commercial arbitration was initiated by a recommendation made by the Asian-African Legal Consultative Committee (AALCC).⁹⁰⁶ The AALCC recommended review and possible amendment of the New York Convention.⁹⁰⁷ UNCITRAL adopted a rather different approach, in its reliance on the study and interpretation of the practice of the New York Convention, it resolved to seek clarification of some

⁹⁰² Renaud S “The influence of the New York Convention on the UNCITRAL Model Law on international commercial arbitration” (May 2008) vol 2, issue 1 *Dispute Resolution International* 27-42 28.

⁹⁰³ *Ibid.*

⁹⁰⁴ UNCITRAL (2008) UNCITRAL Model Law on International Commercial Arbitration 1985: With amendments as adopted in 2006 36.

⁹⁰⁵ Renaud 29.

⁹⁰⁶ Herrmann 537.

⁹⁰⁷ *Ibid.*

issues and to respond to some challenges experienced by uniform rules of arbitral procedure.⁹⁰⁸

Subsequent to the report on the feasibility of the Model Law on international commercial arbitration by the United Nations secretariat, UNCITRAL assigned the responsibility of preparing a draft Model Law to its Working Group on International Contract.⁹⁰⁹ The task had to be completed with due consideration of the New York Convention and UNCITRAL Arbitration rules.⁹¹⁰ The working group completed its task, giving birth to the Model Law, which, after the adoption process discussed above,⁹¹¹ was adopted in 1985.

UNCITRAL Model Law⁹¹² was one of the most important and influential treaties that contributed to shaping international commercial arbitration into its current form. It took a critical step beyond the New York Convention in arriving at an international legal framework for commercial arbitration.⁹¹³ UNCITRAL Model Law was groundbreaking in the field of international commercial arbitration.⁹¹⁴

The Model Law provides for the pre-arbitration process, the arbitration process and the post-arbitration process.⁹¹⁵ It outlines the recognition and enforcement procedure of the Model Law and⁹¹⁶ identifies the circumstances under which the recognition and enforcement of an arbitral award may be opposed.⁹¹⁷

⁹⁰⁸ *Idem* 539.

⁹⁰⁹ *Idem* 540.

⁹¹⁰ *Ibid.*

⁹¹¹ Cht 4 para 4.2.2.

⁹¹² UNCITRAL Model Law came about after extensive preparation and deliberations by the working group after sessions and consultations with arbitral institutions and individual arbitration experts. The consultation process was followed by some reviewing of the text and a subsequent adoption by the Commission in 1985. See Sarcevic P (1989) *Essays in international commercial arbitration* 1.

⁹¹³ Born 30.

⁹¹⁴ Sarcevic P (1989) *Essays in international commercial arbitration* 1.

⁹¹⁵ Model Law art 1-17 (pre-arbitration), 18-33 (arbitration process), 34-36 (post arbitration).

⁹¹⁶ UNCITRAL Model Law art 35 : “ (1) An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36.

(2) The party relying on an award or applying for its enforcement shall supply the original award or a copy thereof. If the award is not made in an official language of this State, the court may request the party to supply a translation thereof into such language.”

⁹¹⁷ Art 36 of the Model Law provides that the recognition and enforcement of the arbitral awards may be refused under narrow circumstances outlined hereafter as follows:

The Model Law was an attempt by UNCITRAL to harmonise the application of international commercial arbitration in various jurisdictions with the intention of moving towards uniformity in international arbitration practices. Evolving global business practices prompted amendments to the highly regarded Model Law which were adopted in 2006. The amendments were necessary to ensure that the Model Law developed to meet the needs of increasingly complex commercial disputes.

A principle that is fundamental to the arbitration process and that is promoted by UNCITRAL through the Model Law is the principle of party autonomy. This principle and its importance to the arbitration process is discussed fully below.⁹¹⁸

4.4.3 PARTY AUTONOMY IN INTERNATIONAL COMMERCIAL ARBITRATION

Party autonomy is a fundamental principle of international commercial arbitration, which is supported by both national and international arbitral institutions and organisations.⁹¹⁹ The party autonomy principle assures parties that they own the arbitration process and that it will be conducted according to their plans, subject to existing limitations such as public policy and other legal restrictions.⁹²⁰ The principle permits parties to determine how the process should be handled. Furthermore, the

“(1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:

- (a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that:
 - (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
 - (ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
 - (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
 - (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
 - (v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or
- (b) if the court finds that:
 - (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or
 - (ii) the recognition or enforcement of the award would be contrary to the public policy of this State”.

⁹¹⁸ See art 5, 13 (1), 17H, 19(1), 20(1), 21, 22, 23 (1) (2), 24(1), 25, 26(1)(2).

⁹¹⁹ Redfern & Hunter 315.

⁹²⁰ Chatterjee C “The reality of party autonomy rule in international arbitration” (2003) vol 20, issue 6, *Journal of international arbitration* 539-560 540.

principle of party autonomy goes so far as to allow parties to abandon an arbitration process due to a compromise.⁹²¹

Parties to international arbitration often opt for arbitration to avoid the strict formalities applied by national courts.⁹²² Party autonomy and the freedom it grants parties to determine how arbitration should be conducted is thus central to arbitration. Redfern and Hunter express this as follows:⁹²³

“Party autonomy is the guiding principle in determining the procedure to be followed in an international commercial arbitration. It is a principle that has been endorsed not only in national laws, but by international arbitral institutions and organisations. The legislative history of the Model Law shows that the principle was adopted without opposition...”

The principle was succinctly but explicitly articulated in article 19(1) of UNCITRAL Model Law. The article states that parties are at liberty to agree on the procedure to be followed by the arbitral tribunal depending on the observation of the provisions of the Model Law. Further evidence of the Model Law’s adherence to the principle of party autonomy is to be found in article 3 where, a provision is made subject to the *proviso* that the parties have not otherwise agreed.⁹²⁴

The parties’ contractual decision to refer a matter for arbitration implies their intention to exclude the courts from the resolution of any dispute that may arise from the contract. This choice of the parties is honoured by article 5 of UNCITRAL Model Law which states that: “In matters governed by this Law, no court shall intervene except where so provided in this Law”. The flexibility party autonomy introduces into the dispute resolution process is also demonstrated by article 9 of UNCITRAL Model Law which grants the parties the right to approach the court for interim measures, if they deem it necessary.

Amongst the most important benefits of party autonomy is the parties’ ability to select the arbitrator(s) of their choice, the competencies the arbitrator(s) must possess and the law which will be applied. These and other decisions of the parties are outlined

⁹²¹ *Ibid.*

⁹²² Dursun A “A critical examination: The role of party autonomy in international arbitration” (2012) vol 1, *Yalova Üniversitesi Hukuk Fakültesi Dergisi* 161-188 170.

⁹²³ Redfern & Hunter 265.

⁹²⁴ Chatterjee 550.

by the parties in an agreement which may, inter alia, also provide for an institutional⁹²⁵ or *ad hoc* arbitration.⁹²⁶ Commercial arbitration is therefore a contractual creation and the tribunal derives its powers from the agreement.

Though the arbitration agreement may be a clause entrenched in a business contract between the parties, it has a life of its own, independent of the main contract. This situation is best described as the doctrine of separability. The doctrine of separability provides that an arbitration clause is "separable" from the contract containing it and it may not be affected by a successful challenge to the legitimacy of the contract.⁹²⁷ A defect in the main contract will only have an effect on the arbitration if it relates specifically to the arbitration agreement.⁹²⁸

The doctrine of separability is one of the two cornerstones of arbitration. The doctrine of competence-competence is the other.

The competence-competence doctrine grants arbitrators the authority to decide challenges to the arbitration agreement upon which their own jurisdiction is based.⁹²⁹ "These two doctrines have appropriately been called the conceptual cornerstones of international arbitration as an autonomous and effective form of international dispute resolution."⁹³⁰

The doctrines are there to protect the parties' desire to arbitrate any disputes that may arise out of their international contractual relationship.⁹³¹ They ensure that this objective is accomplished without unnecessary court interference, despite a

⁹²⁵ Institutional arbitration refers to arbitrations conducted according to the rules and procedures of a specific arbitration institution. See Born G (2010) *International Arbitration and Forum Selection Agreements: Drafting and Enforcing* (3ed) 44.

⁹²⁶ *Ad hoc* arbitration is where parties reach an agreement regarding the form of arbitration they wish to follow without referring the dispute to any arbitral institution. *Ibid* Born (2010).

⁹²⁷ Smit R "Separability and competence-competence in international arbitration: Ex nihilo nihil fit? Or can something indeed come from nothing?" (2002) vol 13 *The American Review of International Arbitration* 19-42 19.

⁹²⁸ Graves J & Davydan Y (2011) *Competence-competence and separability- American style* 157.

⁹²⁹ Smit 19.

⁹³⁰ *Ibid.*

⁹³¹ *Ibid.*

challenge to the validity of the contract.⁹³² The view is also expressed by Rubino-Sammartino as follows:⁹³³

“The arbitration agreement is an agreement on procedural issues, independent and separate from the main agreement. It must then be treated independently from the existence or the validity of the main contract as it results from the intention of the parties.”

The parties’ intention remains the primary source of international commercial arbitration law and an essential part of arbitration.⁹³⁴ Party autonomy guarantees that the arbitration process reflects the wishes of the parties.

Other international instruments like the New York Convention, also demonstrate support for party autonomy. The New York Convention provides that a failure of the arbitral authority or the arbitral procedure to reflect the wishes of the parties may be a ground to refuse recognition and enforcement of the award.⁹³⁵ It should however, be borne in mind that party autonomy does not confer unlimited freedom on the parties.

There are some principles that take preference over party autonomy thereby potentially restricting it. Public policy is one such principle. A violation of public policy might render the award unrecognisable and unenforceable.⁹³⁶ Parties may include a condition in their contract, which might potentially be in conflict with the public policy of a particular, relevant state. What constitutes public policy may differ from one place to another. However, the courts interpret public policy narrowly to avoid discouraging the principle of party autonomy.⁹³⁷ Public policy is a sociological concept because it is made and enforced by members of a society; it encompasses

932

Ibid.

933

Rubino-Sammartano 209.

934

Idem 83.

935

See art v 1 (a) (d).

936

Egbedi T “An analysis of the effect of public policy on party autonomy in international arbitration”

http://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB4QFjAA&url=http%3A%2F%2Fwww.dundee.ac.uk%2Fcepmlp%2Fgateway%2Ffiles.php%3Ffile%3DCAR11_6_508934278.pdf&ei=xazbVPSQGMr3UPL7gJgK&usg=AFQjCNGKv5dwQ9h1AulIzLKV535IS3zmiQ&bvm=bv.85761416,d.d24 (accessed on 12 Dec 2014).

937

Idem 8.

different types of cultures' social and moral values.⁹³⁸ Furthermore, public policy is dynamic and changes with time and place.⁹³⁹

The law of the place of arbitration, the *lex arbitri*⁹⁴⁰ may also limit party autonomy as the arbitration tribunal must observe the norms and public policy of the place of arbitration. Public policy and the *lex arbitri* may not be the only limitations to party autonomy. The parties' autonomy to determine the procedure to be followed during the arbitration is also restricted where they elected to make use of an institutional arbitration which is bound by a predetermined procedural framework.

The party autonomy rule is not applicable as far as the competence of an arbitral tribunal to rule on its jurisdiction is concerned. The power to rule on this issue of jurisdiction rests with the tribunal and can be exercised without any direction or guidance from the parties.⁹⁴¹ Another restriction on party autonomy arises when the tribunal makes use of article 27 of the Model Law which provides that:⁹⁴²

“The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence.”

The moment the court assumes the process of taking evidence, parties are not entitled to dictate how the court should execute the task. Party autonomy does not apply to the substance or form of awards, these falls within the sole discretion of the arbitrator.⁹⁴³ Likewise, the will of the parties is irrelevant to issues relating to termination of proceedings.⁹⁴⁴

It is thus clear that party autonomy is limited where mandatory public policy or statutory limitations to arbitration exist in the place of arbitration.⁹⁴⁵ Parties do not have an option to select an alternative procedural law to apply.⁹⁴⁶ It falls to the

⁹³⁸

Ibid.

⁹³⁹

Ibid.

⁹⁴⁰

Lex arbitri means the law of the place of arbitration.

⁹⁴¹

Chatterjee 552.

⁹⁴²

Ibid.

⁹⁴³

Idem 553.

⁹⁴⁴

Ibid.

⁹⁴⁵

Shackelford E “Party autonomy and regional harmonization of rules in international commercial arbitration” (2006) vol 67, issue 4, *University of Pittsburgh LR* 897-912 902.

⁹⁴⁶

Ibid.

national courts of the jurisdiction within which the parties intend to apply for recognition and enforcement of the award to ensure that there are no limitations to the application for such recognition and enforcement.⁹⁴⁷ The support of the national courts is essential in international commercial arbitration as the award has to be recognised and enforced by the relevant national court.

4.4.4 THE ROLE OF NATIONAL COURTS IN INTERNATIONAL ARBITRATION

Arbitration is a private affair which should preferably be kept out of the court as per the express wishes of the parties who opted for alternative dispute resolution in place of litigation. Consequently, there are laws in place in various jurisdictions globally that are designed to minimise court interference in private affairs. However, the effectiveness and success of the private arbitration system depends on the co-operation of the courts.⁹⁴⁸

One author, Paulsson, explains this strange relationship between international commercial arbitration and the national courts thus: “the great paradox of arbitration is that it seeks the co-operation of the very public authorities from which it wants to free itself”.⁹⁴⁹ According to Redfern and Hunter, “[t]he relationship between national courts and arbitral tribunals swings between forced cohabitation and true partnership”.⁹⁵⁰

Despite the global business community’s emphatic declaration of support for party autonomy in international commercial arbitration and the call to protect it from court interference, arbitration depends entirely on the support of the courts where, for example, the court has the authority to rescue the process when one party tries to sabotage it.⁹⁵¹ There seems to be a consensus amongst authors that the involvement of national courts in international arbitration is necessary.⁹⁵²

⁹⁴⁷

Ibid.

⁹⁴⁸

Williams D “Defining the role of the court in modern international commercial arbitration” (2012) Herbert Smith Freehills - SMU Asian arbitration lecture, Singapore 1.

⁹⁴⁹

Paulsson, as discussed by Williams *ibid.*

⁹⁵⁰

Redfern & Hunter 328.

⁹⁵¹

Ibid.

⁹⁵²

See Tang 2.

In addition to Williams and Paulsson mentioned above, there are other authors who acknowledge the vital role played by national courts in international arbitration. Lew's view is that the involvement of national courts in "international arbitration is a fact of life as prevalent as the weather".⁹⁵³ Lew further states that:⁹⁵⁴

"...despite the autonomous nature of arbitration, it must be recognized that just as no man or woman is an island, so no system of dispute resolution can exist in a vacuum. Without prejudice to autonomy, international arbitration does regularly interact with national jurisdictions for its existence to be legitimate and for support, help, and effectiveness. This assistance of the national courts takes on different forms at different stages of the arbitration process because: (1) national laws are required to recognize and enforce the agreement to arbitrate and enforce any award; (2) national laws are required to support the arbitration process during the arbitration; and (3) international arbitration has established certain fundamental standards that require policing at the national level. These standards are recognized by the international community and reflected in international instruments, international public policy and due process."

There are international instruments which provide guidelines on the role of courts in arbitration, the extent to which they might intervene and at what stage(s) in the process. One such international instrument is the Model Law.

4.4.4.1 The influence of UNCITRAL Model Law on court participation

Article 5 of the Model Law clearly states that courts may only intervene in matters governed by the Model Law where permitted by a statutory provision. This provision affirms the Model Law's antipathy towards undue court interference.

In understanding UNCITRAL Model Law's provisions, Williams refers to the *UNCITRAL Analytical Commentary on the Draft Model Law*, a document that was preparatory to the Model Law. This revealed that:⁹⁵⁵

"Although the provision, due to its categorical wording, may create the impression that court intervention is something negative and to be limited to the utmost, it does not itself take a stand on what is the proper role of the courts. It merely requires that any instance of court involvement be listed in the model law. Its effect would, thus, be to exclude any general or residual powers given to the courts in a domestic system which are not listed in the model law. The resulting certainty of the parties and the arbitrators about

⁹⁵³ Lew 490.

⁹⁵⁴ *Idem* 492.

⁹⁵⁵ Williams 5.

the instances in which court supervision is to be expected seems beneficial to international commercial arbitration.”

Article 6 identifies specific articles of the Model Law that create obligations for member States that can only be performed by making court resources or other competent authorities available to arbitrating parties.⁹⁵⁶

The provisions of article 8(1) prohibit the court from entertaining a matter brought before it by a party where it becomes apparent that she is party to an arbitration agreement. In such a case, the court is required, upon the request of one of the parties, to refer the matter for arbitration, provided the arbitration agreement is not found to be null and void, inoperative or incapable of being performed. Article 9 of the Model Law provides the court with the authority to intervene before or during arbitral proceedings and to grant an interim order of protection where a party to the agreement so requests. The court is also permitted to intervene in the appointment of arbitrators in accordance with the provisions of article 11.

Article 11 deals with the right of parties to appoint arbitrators. The Court may intervene where parties are unable to agree on the procedure to be used in appointing arbitrators;⁹⁵⁷ where a party fails to appoint an arbitrator within the prescribed time or two arbitrators are required to appoint a third but fail to do so. In such cases, the court or another authority specified in article 6, may appoint an arbitrator upon the request of a party. Likewise, the court or an authority specified in article 6, may appoint an arbitrator upon the request of a party if the parties cannot reach consensus regarding the arbitrator to be appointed.

The 2006 amendments to the Model Law introduced significant changes regarding the role of the courts in the arbitral process. Article 17 was replaced by a newly worded article 17 and according to Sevtá:⁹⁵⁸

“UNCITRAL’s recognition of the inadequacies of the previous Model Law on interim measures of protection led to the development of what promised to be an essential text in arbitration. However, despite predictions of widespread acceptance, the majority of states have not integrated the new

⁹⁵⁶ See art (s) (11(3), 11(4), 13(3), 14, 16(3) and 34(2).

⁹⁵⁷ Art 2.

⁹⁵⁸ Sevtá P “UNCITRAL Model Law Amendment 2006: An overview” (2013) <http://lex-warrier.in/2013/09/unictral-model-law-amendment/> (accessed on 13 Dec 2014).

version of article 17. This, however, should not detract from the important purpose the amendment will serve. There are a number of compelling reasons why states should incorporate the amendments to article 17. In particular, states should consider that the efficacy of arbitration proceedings depends on the use of and enforcement of interim measures. Furthermore, arbitration is a practical and efficient forum for ordering interim relief, and adoption of the Model Law amendment will harmonize national arbitration laws. This will inspire the confidence necessary for the survival of international commercial arbitration as a prominent dispute resolution mechanism.”

Article 17B empowers arbitrators to grant a preliminary order at the behest of one of the parties. However, the recognition and enforcement of such orders depends upon the cooperation of the national courts. Article 17H of the Model Law outlines the procedure to be followed by a party who is seeking recognition and enforcement of an interim measure issued.⁹⁵⁹ This procedure is the same as that reflected in the New York Convention.⁹⁶⁰ The article clarifies the powers of the court at the stage when the application for recognition and enforcement of the award is being made.⁹⁶¹ Article 17I sets out the grounds upon which the court may refuse to recognise and enforce an interim measure.⁹⁶² Article 17J empowers the court to issue interim orders in relation to arbitration proceedings.

⁹⁵⁹ The procedure to be followed in enforcing the interim measure issued is explicitly outlined by article 17H as follows: “(1) An interim measure issued by an arbitral tribunal shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court, irrespective of the country in which it was issued, subject to the provisions of article 17I.

(2) The party who is seeking or has obtained recognition or enforcement of an interim measure shall promptly inform the court of any termination, suspension or modification of that interim measure.”

⁹⁶⁰ See art 5 of the New York Convention.

⁹⁶¹ “(3) The court of the State where recognition or enforcement is sought may, if it considers it proper, order the requesting party to provide appropriate security if the arbitral tribunal has not already made a determination with respect to security or where such a decision is necessary to protect the rights of third parties.”

⁹⁶² The circumstances under which the enforcement of the interim measures may be refused are stipulated as follows: “(1) Recognition or enforcement of an interim measure may be refused

only:

(a) At the request of the party against whom it is invoked if the court is satisfied that:

- (i) Such refusal is warranted on the grounds set forth in article 36(1)(a)(i), (ii), (iii) or (iv); or
- (ii) The arbitral tribunal’s decision with respect to the provision of security in connection with the interim measure issued by the arbitral tribunal has not been complied with; or
- (iii) The interim measure has been terminated or suspended by the arbitral tribunal or, where so empowered, by the court of the State in which the arbitration takes place or under the law of which that interim measure was granted; or

(b) If the court finds that:

- (i) The interim measure is incompatible with the powers conferred upon the court unless the court decides to reformulate the interim measure to the extent necessary to adapt it to its own powers and procedures for the purposes of enforcing that interim measure and without modifying its substance; or

In issuing interim orders, the court must be conscious of the distinctive nature of arbitration from any other domestic proceeding.⁹⁶³ The court may be requested either by the arbitral tribunal or, with permission of the arbitral tribunal, by a party to the arbitration, to assist in taking evidence.⁹⁶⁴ The evidence will be taken by the court according to its rules.⁹⁶⁵ The contribution of national courts is thus essential for the continued success of arbitration.

The fundamental role of the court in international commercial arbitration is confirmed by the inclusion of articles 34, 35 and 36 in the Model Law. Articles 34 and 36 outline the circumstances under which the implementation of the arbitral award may be opposed. Article 34(2)(3) entitles either of the parties to apply to the court for an order setting the arbitral award aside. The onus of proving the existence of the recognised grounds for setting aside the arbitral award lies with the person who brings the application.⁹⁶⁶ In terms of article 34(2) the party making an application must provide proof that she was not capable of entering into a valid agreement due to some form of incapacity.⁹⁶⁷ It may also be proven that the agreement is not valid under the law chosen by the parties to apply to the arbitration or the law of the enforcing State. The grounds for setting the arbitral award aside in terms of article 34 and the grounds for refusing recognition and enforcement in terms of article 36 are nearly identical and will not be discussed separately.

An arbitral award may be set aside where a party to the arbitration can show that proper notice of the appointment of arbitrators or the arbitral, proceeding was not given or that she was unable to present his or her case.⁹⁶⁸ So too, an award may be set aside where a party furnishes proof that the arbitrators acted *ultra vires* or decided matters which were not referred to arbitration in terms of the agreement.

(ii) Any of the grounds set forth in article 36(1)(b)(i) or (ii), apply to the recognition and enforcement of the interim measure.

(2) Any determination made by the court on any ground in paragraph (1) of this article shall be effective only for the purposes of the application to recognize and enforce the interim measure. The court where recognition or enforcement is sought shall not, in making that determination, undertake a review of the substance of the interim measure.”

⁹⁶³ Morrissey J & Graves J (2008) *International sales law and arbitration: Problems, cases and commentary* 438.

⁹⁶⁴ See art 27 of the New York Convention.

⁹⁶⁵ *Ibid.*

⁹⁶⁶ *Idem* art 34 (2) (a).

⁹⁶⁷ *Ibid.*

⁹⁶⁸ *Idem* art 34 (2) (ii).

Where a decision on matters not submitted to arbitration can be separated from a decision on matters submitted, only the decision on matters not referred may be set aside.⁹⁶⁹ A party may also successfully seek to have an award set aside on the basis that the composition of the arbitral tribunal or the arbitral procedure applied, deviated from that agreed to in terms of the agreement.⁹⁷⁰

The court may set an award aside where it is convinced that the matter referred cannot be settled by arbitration or the award is in conflict with the public policy of the enforcing State. However, the court has the discretion to suspend the setting aside where it is requested to do so by a party to the arbitration proceedings.⁹⁷¹ The purpose of such a suspension is to allow the arbitral tribunal either to resume the arbitral proceedings or cure the cause of the application for setting aside.

Article 35 seeks to facilitate the recognition and enforcement of the arbitral awards. The courts are obliged to recognise and accordingly enforce an arbitral award made in terms of the Model Law, notwithstanding the country in which the award was made.⁹⁷² The party requesting recognition and enforcement of an award must supply the court with the original award or a copy thereof.⁹⁷³ The court may request the parties to supply a translation of the award in the official language of the State where the application for recognition and enforcement is made in the event that the award is in another language.⁹⁷⁴

It is argued that the Model Law is premised on four principles being “party autonomy, reduced judicial involvement, increased powers of the arbitral tribunal and equality of treatment”.⁹⁷⁵ The Model Law, which was developed as a supplement to the New York Convention, made significant progress in building international commercial arbitration as an effective mechanism to resolve disputes.

⁹⁶⁹ *Idem* art 34 (2) (iii).

⁹⁷⁰ *Idem* art 34 (2) (iv)

⁹⁷¹ *Idem* art 34 (4).

⁹⁷² See art 35 (1).

⁹⁷³ See art 35 (2).

⁹⁷⁴ *Ibid.*

⁹⁷⁵ Williams 6.

4.4.4.2 The court's participation in terms of the New York Convention

The main objective of the New York Convention is to ensure that international arbitral awards are recognised and enforced by contracting States and to introduce uniform standards to be applied during the enforcement stage of the international commercial arbitration process.⁹⁷⁶ The New York Convention's aim to promote international commercial arbitration as a mechanism to resolve international commercial disputes is discernible from its structural framework. The New York Convention was adopted by the United Nations to ensure the effectiveness of international commercial arbitration by guaranteeing the recognition and enforcement of the international commercial arbitral award. The courts have a role to play in international commercial arbitration and, as McLaughlin and Genevro state:⁹⁷⁷

“.....Current international commercial arbitration cannot function without the assistance of the national courts. The New York Convention is built upon this principle. It can even be said that the Convention effectively derives its authority from the national courts. The manner in which they interpret and apply the Convention is the main source of its effectiveness.”

In most countries, courts are the most powerful, if not the only institutions that have the power and resources to enforce arbitral awards. Although the New York Convention introduces the court into the arbitration process it is kept on a tight leash to avoid unnecessary and potentially destructive judicial interference in the process. This is clearly demonstrated by the exhaustive list of the grounds upon which recognition and enforcement can be refused by the courts in terms of article 5.⁹⁷⁸

The restrictive nature of article 5 prevents courts from exercising unrestricted powers regarding the validity of awards. It also prevents the courts from reviewing the facts or questions of law decided during the arbitral proceedings.

⁹⁷⁶ Lu M “The New York Convention on the recognition and enforcement of foreign arbitral awards: Analysis of the seven defenses to oppose enforcement in the United States and England” (2006) vol 23, issue 3, *Arizona Journal of International & Comparative Law* 747-786 748.

⁹⁷⁷ McLaughlin J & Genevro L “Enforcement of arbitral awards under the New York Convention - Practice in U.S. courts, 3” (1986) vol 3, issue 2, *Int'l Tax & Bus. Law*. 249-272 249.

⁹⁷⁸ New York Convention art 5.

As arbitrators are generally elected for discipline specific expertise and qualifications⁹⁷⁹, to allow the courts unrestricted powers to review their legal understanding or analysis and their application of the law to the facts might expose the award to unnecessary court interference, undermining the purpose for which the parties agreed to resolve their dispute through arbitration in the first place. To guard against this kind of interference, the New York Convention introduced measures to limit the role of the court, or institution with similar legally recognised authority (competent authority),⁹⁸⁰ in the arbitration process to those circumstances mentioned in article 5.

On application being made by a party to arbitration, a competent authority may defer the decision and may, on application by a party claiming enforcement, order the other party to give suitable security.⁹⁸¹ The requirements for refusal of recognition and enforcement set out in article 5 are similar to the requirements in article 36 of the Model Law mentioned above. Likewise, there is accord between articles 34 of the Model Law and 4 of the New York Convention, which introduce the participation of the courts or competent authority. Without the intervention of the court, the award cannot be recognised and enforced. It is, however, only upon the limited grounds mentioned in article 34 of the Model Law and 4 of the New York Convention that the court may participate in the arbitration process.

4.5 CONCLUSION

The aim of this chapter was to explore the practice and legal framework of international commercial arbitration. The international instruments introduced to facilitate arbitration as an effective international dispute resolution mechanism were considered. A survey of the current literature on the topic revealed a number of

⁹⁷⁹ Bantekas I (2015) *An introduction to international arbitration* 116.

⁹⁸⁰ The New York Convention failed to define what constitutes a competent authority in terms of article 5. This prompted the need to consult other sources to determine the meaning. See para 21 http://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=10&menu=625&opac_view=-1 (accessed on 30 Nov 2015): "While article V(1)(e) does not define the terms 'competent authority', there is little doubt that these terms refer to the court or courts having jurisdiction to suspend and/or set aside awards in each country. A court from the Cayman Islands also envisaged that in a certain country, this power could be entrusted to a special tribunal or a 'special executive arm of government'".

⁹⁸¹ New York Convention art 6.

interesting features that make international commercial arbitration preferable to litigation. Adoptions of instruments like UNCITRAL Model Law and the New York Convention illustrate a commitment to promote the use of international commercial arbitration. These instruments attempt to establish a common framework against which States can develop their approach to arbitration with a view to harmonising this aspect of international trade law.

The New York Convention seeks to promote the recognition and enforcement of international arbitral awards and to reduce the challenges to such recognition and enforcement. UNCITRAL Model Law, in turn, focuses specifically on establishing principles, which seek to harmonise the global practice of international commercial arbitration. It is apparent that international commercial arbitration is a necessary and effective tool for resolution of disputes that arise from business transactions. It appears further that some States viewed their adoption of these instruments or the modelling of their arbitration approach on them, as enhancing their position as active participants in and beneficiaries of, the global economy. The approach of some of these States will be discussed in chapter 5 below, that deals with arbitration in other jurisdictions.

CHAPTER 5: ARBITRATION IN FOREIGN JURISDICTIONS

5.1 INTRODUCTION

This chapter seeks to explore the concept of arbitration as practiced in selected foreign jurisdictions.⁹⁸² As arbitration is a global phenomenon, a study of arbitration in other jurisdictions may reveal best practice that may meaningfully be applied in South Africa. The value of comparison between various jurisdictions in matters of mutual concern has been stressed, *inter alia*, in *Bernstein v Bernstein*⁹⁸³ where the court stated that:

“Comparative study is always useful, particularly where courts in exemplary jurisdictions have grappled with universal issues confronting us. Likewise, where a provision in our Constitution is manifestly modelled on a particular provision in another country’s constitution, it would be folly not to ascertain how the jurists of that country have interpreted their precedential provision. The prescripts of section 35(1) of the Constitution are also clear: where applicable, public international law in the field of human rights must be considered, and regard may be had to comparable foreign case law.”

Therefore, comparative study is a necessary tool, which may yield solutions to common problems. The selection of jurisdictions to be examined for comparative purposes was made with due regard to the comparability of the systems. Selection was based upon such considerations as the presence of similar constitutional provisions regarding access to courts, an English law heritage and/or the foreign jurisdiction’s adoption of international arbitration law instruments.

5.2 ARBITRATION IN ENGLISH LAW

Arbitration as a form of dispute resolution mechanism in England has existed for as long as the Common law but has only emerged relatively recently as a distinct branch of jurisprudence.⁹⁸⁴ It is particularly popular amongst the business community.⁹⁸⁵ The popularity of arbitration as a dispute resolution mechanism has been variously attributed to its flexibility, cost effectiveness, confidentiality and time saving.⁹⁸⁶ Its initial development was greatly influenced by a dictum of Lord Coke in

⁹⁸² England, India, Spain and the USA.

⁹⁸³ *Bernstein v Bester NNO* 1996 (2) SA 751 (CC) per Kriegler J para 133.

⁹⁸⁴ Tweeddale A & Tweeddale K (1999) *A practical approach to arbitration law* 1.

⁹⁸⁵ Mistelis L “Corporate choices in international arbitration industry perspectives” (2013), *International Arbitration Survey* 1-29 4.

⁹⁸⁶ Mazirow A The advantages and disadvantages of arbitration as compared to litigation: A paper presented to the Counselors of Real Estate April 13, 2008 Chicago, Illinois 1.

*Vynior's*⁹⁸⁷ case. This influence also permeated various jurisdictions that were colonised by the English. Colonisation meant that English law significantly contributed to the establishment of the arbitration process in numerous other jurisdictions, including amongst others, India, the United States of America (USA) and South Africa (SA).

English law went through a series of arbitration legislation over the years which served various purposes.⁹⁸⁸ Arbitration in England is currently governed by English Arbitration Act, 1996.

5.2.1 THE ENACTMENT OF THE ENGLISH ARBITRATION ACT, 1996

English Arbitration Act, 1996 consolidated and reformed the legal principles that preceded it.⁹⁸⁹ This legislation accords extensively with the provisions of UNCITRAL Model Law, despite the fact that it is not premised upon it.⁹⁹⁰ The Act has been applauded as a model of simplicity in legal draftsmanship and innovation in attending to old and difficult problems.⁹⁹¹ It was further heralded a success by jurists from various jurisdictions who regarded it as a model for reform of arbitration in their own jurisdictions.⁹⁹² It was praised by both the House of Lords and the House of Commons who welcomed the new, clear and workable arbitration regime it introduced.⁹⁹³ The Act was further commended for promoting party autonomy and for upholding the arbitrator rather than the court as the crucial role-player.⁹⁹⁴ According

⁹⁸⁷ 8 Co. Rep. 81 b. et seq. (1609) at 82 a. As discussed in Cht 2.

⁹⁸⁸ As discussed in Cht 2 of this thesis.

⁹⁸⁹ Noussia K (2010) *Confidentiality in international commercial arbitration: A comparative analysis of the position under English, US, German and the French law* 16.

⁹⁹⁰ Amissah N (1997) Judicial aspects of the arbitral process, paper presented at the WIPO Biennial IFCAI Conference held in Geneva, Switzerland, on 24 Oct, 1997 92.

⁹⁹¹ *Ibid.*

⁹⁹² See Gulley 1097, Yu H "Five years on: A review of the English Arbitration Act of 1996" (2002), vol 19, issue 3 *Journal of international Arbitration* 209-225 209. The Americans highlighted the necessity to revisit the Federal Arbitration Act with a suggestion that such development should be achieved through the tools found within the American experience. However, Gulley, on the one hand, holds the view that the exemplary model to utilise is the English law and acknowledged its long history of arbitration. Yu on the other hand, states that the 1996 Act is praised for being comprehensive and for its coherent statement of the principles and practice of arbitration in England.

⁹⁹³ Schaefer J "New solutions for interim measures of protection in international commercial arbitration: English, German and Hong Kong Law Compared" http://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=4&ved=0CC4QFjAD&url=http%3A%2F%2Fwww.ejcl.org%2F22%2Fart22-2.doc&ei=yWqVNjZA4OtUYn1gJgL&usq=AFQjCNHGQrS5JrHGviE4xKb_4uW0qymI6Q (accessed on 05 Jan 2015).

⁹⁹⁴ Heilbron H (2013) *A practical guide to international arbitration in London* 5.

to Hosking, the primary objective of the 1996 Arbitration Act was to improve upon and clarify major elements of English Arbitration law and to facilitate the speedy and economic resolution of commercial disputes.⁹⁹⁵ The primary objective of the Act is discernible from the long title.⁹⁹⁶

The provisions of the Act are divided into two categories: mandatory and non-mandatory.⁹⁹⁷ Mandatory provisions which are listed in schedule 1 of the Act, somewhat curtail party autonomy since parties, even where there is a mutual agreement, cannot exclude these provisions from application to their agreement. Parties can however, elect to include or exclude non-mandatory provisions. Although the Act permits parties to make their own arrangements, provision is made for instances where such arrangements are not made.⁹⁹⁸

The Act is subdivided into four parts. Part 1 is the most substantial part of the Act, comprising 84 of the 110 sections of the Act. Parts 2, 3 and 4 comprise of the remaining 26 sections and each part deals with a specific aspect of arbitration. The four parts will be dealt with individually below.

5.2.1.1 Analysis of Part 1 of the Act

Part 1 focuses on arbitration processes consequent to an arbitration agreement. It comprises of the general principles of arbitration and incorporates definitions. Section 2 states that the Act applies to arbitral matters in which the seat of arbitration is England, Wales or Northern Ireland. The Act applies the same arbitration regime to both domestic and international arbitrations, which have their seat in England, Wales or Northern Ireland.⁹⁹⁹ What constitutes the seat of arbitration is set out in section 3. Parties may determine the seat of arbitration in their agreement.¹⁰⁰⁰

⁹⁹⁵ Hosking 151.

⁹⁹⁶ See, English Arbitration Act, 1996 which states that “An Act to restate and improve the law relating to arbitration pursuant to an arbitration agreement; to make other provision relating to arbitration and arbitration awards; and for connected purposes”.

⁹⁹⁷ *Idem* s4.

⁹⁹⁸ *Idem* s4 (2).

⁹⁹⁹ Lee J “Separability, competence-competence and the arbitrator’s jurisdiction in Singapore” (1995) vol 7, part 2 *Singapore Academy of L J* 421-437 421. Also see also Heilbron 4.

¹⁰⁰⁰ English Act s 5.

Section 1 enumerates the principles upon which Part 1 of the Act is premised. These principles are recognition of alternative dispute resolution, party autonomy and judicial non-intervention. The section also captures the fundamental principles of arbitration embodied in the Act.¹⁰⁰¹ The section thus demonstrates the legislature's intention to reaffirm the initial purpose of arbitration: The fair resolution of disputes by an impartial tribunal without unnecessary delay or expense.

Part 1 of the Act also includes important definitions of identified concepts. "Seat of arbitration" is defined as the juridical seat of arbitration selected by the parties, arbitral institution, a person authorised thereto by the parties or determined in any other manner in the absence of a selection by the parties.¹⁰⁰² Another definition included in part 1 of the Act is that of "arbitration agreement", contained in section 6, which is an agreement to refer prospective or existing disputes to arbitration for resolution.

Section 1(b) reaffirms party autonomy by stating that parties should be free to determine the manner in which their dispute should be resolved. Party autonomy is further expressed in section 1(c) which limits the court's intervention in arbitration matters. Section 7 supports party autonomy in arbitration by applying the principle of separability to arbitration agreements contained within a broader contract.¹⁰⁰³

Section 7 states that:

"Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement."

In terms of this principle, the validity of the arbitration clause is not dependent on the validity of the underlying contract. The arbitration agreement is dealt with as a separate agreement which can only be declared invalid on grounds that directly

¹⁰⁰¹ Yu 209.

¹⁰⁰² English Act s 3.

¹⁰⁰³ The doctrine of separability guarantees the survival of the arbitration agreement in circumstances where the validity of the underlying agreement is successfully challenged. The doctrine allows the arbitration to be considered as a separate contract from the main contract. See Lee 421.

relate to it.¹⁰⁰⁴ A properly drafted arbitration agreement can effectively confer jurisdiction on the arbitrator to entertain disputes surrounding the initial validity of the underlying contract and not only those arising after the contract's termination.¹⁰⁰⁵ Therefore, the arbitrator is empowered to evaluate the grounds upon which the main contract was declared invalid and, if necessary, order that the contract must persist. This principle was reluctantly accepted by the courts in England prior to the enactment of the 1996 Arbitration Act.¹⁰⁰⁶ This reluctance was attributable to the fact that the principle was found to be illogical.¹⁰⁰⁷

The Act further affirms party autonomy in arbitration by permitting parties the freedom to determine the commencement of the proceedings,¹⁰⁰⁸ the constitution of the arbitral tribunal¹⁰⁰⁹ and the manner of appointment of the arbitrators.¹⁰¹⁰ The parties may also determine the required qualifications of the arbitrator.¹⁰¹¹ Parties are further empowered to revoke the authority of the arbitrator subject to the provisions of section 23.

Where the substantive jurisdiction of an arbitral tribunal that has already been constituted is challenged, section 30 entitles the tribunal to rule on its own jurisdiction. This principle, which is referred to as competence-competence, is regarded, together with separability, as a cornerstone of international commercial arbitration.¹⁰¹² These cornerstones are applied in a considerable number of jurisdictions.¹⁰¹³ As Lee states:¹⁰¹⁴

“Competence-competence picks up where separability ends. The doctrine has two aspects. Firstly, it means that arbitrators are judges of their own jurisdiction and have the right to rule on their own competence. Therefore, if

¹⁰⁰⁴ Hill J & Chong J (2014) *International commercial disputes: Commercial conflict of laws in English Courts* 765.

¹⁰⁰⁵ *Idem* 766.

¹⁰⁰⁶ Fazilatfar H “Characterizing international arbitration agreements as truly separable clauses” 6 <http://pegasus.rutgers.edu/~rcrlj/articlespdf/Fazilatfar.pdf> (accessed 05 Jan 2016).

¹⁰⁰⁷ *Ibid.*

¹⁰⁰⁸ English Act s 14.

¹⁰⁰⁹ *Idem* s 15.

¹⁰¹⁰ *Idem* ss 16, 17 & 18.

¹⁰¹¹ *Idem* s 19.

¹⁰¹² Kroll S & Mistelis L (2011) *International arbitration and international commercial law: Synergy, convergence and evolution chapter 8 – competence- competence and separability-American* 157.

¹⁰¹³ Lee 421.

¹⁰¹⁴ *Ibid.*

the validity of the arbitration agreement *itself* and thus the competence of the arbitrator is impugned, he or she does not have to stop proceedings but can continue the arbitration and consider whether he or she has jurisdiction. Secondly, in some countries, the arbitration agreement ousts the initial jurisdiction of ordinary courts.”

The competence-competence principle grants arbitration the independence it requires from the courts and thus saves time.

The participation of the court is drastically restricted by the parties’ decision to prefer arbitration to litigation. However, the court is not completely excluded from the process as it is afforded a supporting role. The limited role that the court plays in arbitration can be observed from the provisions of section 1(c), which clearly state that, the court should not intervene in matters governed by part 1 of the Act except where authorised by the Act.

5.2.1.1.1 Court Intervention

The arbitration agreement in England is not terminated by the death of one of the parties.¹⁰¹⁵ Parties are bound by the agreement even after death as their representatives will be required to take responsibility for the agreement. The court may enforce the agreement to arbitrate against the representative of the deceased party in the same manner it could have against the deceased. In terms of section 9, the agreement to arbitrate may be enforced against a party who ignores the agreement in favour of litigation. In such cases the aggrieved party may apply to the court for the stay of the proceedings.¹⁰¹⁶

¹⁰¹⁵ English Act s 8.

¹⁰¹⁶ *Idem* s 9 provides the parties with the powers to seek legal stay of the proceedings in the event where one of them despite the existence of a valid arbitral agreement elected to approach the court for resolution of the dispute between them. The provision reads thus: “Stay of legal proceedings”.

1. A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.
2. An application may be made notwithstanding that the matter is to be referred to arbitration only after the exhaustion of other dispute resolution procedures.

The court is also empowered by the Act to grant relief in the form of an interpleader¹⁰¹⁷ and to further order that a matter which is subject to an arbitration agreement must be finalised in terms of the agreement.¹⁰¹⁸ The court may order the retention of security in a case where admiralty proceedings are stayed due to the existence of an arbitration agreement.¹⁰¹⁹ In addition to its other powers, the court may, upon application by a party, extend the time for commencement of arbitral proceedings.¹⁰²⁰

It thus appears that the courts and arbitrators complement each other rather than competing for power and authority. They each have a significant role to play in promoting the practice of arbitration.

5.2.1.1.2 *The Role of Arbitrators in Arbitration*

The Act effectively enhanced the powers of arbitrators, thereby facilitating their authority over arbitral proceedings. In fact, the role of the courts was, to some degree, subjected to the authority of the arbitrator as courts can only entertain preliminary points of law submitted to them during the arbitral proceedings, subject to the consent of the arbitral tribunal.¹⁰²¹ Arbitrators are obliged to adopt procedures,

3. An application may not be made by a person before taking the appropriate procedural step (if any) to acknowledge the legal proceedings against him or after he has taken any step in those proceedings to answer the substantive claim.

4. On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed.

5. If the court refuses to stay the legal proceedings, any provision that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings.”

¹⁰¹⁷ “A Bill of interpleader is where two or more claiming the same thing by different or separate interests, pray the judgement of the court to which of them it belongs. But that which is commonly called a bill of interpleader, is that which is exhibited by a third person, who not knowing to whom he ought of right to render a debt or duty, or pay his rent fears he may be hurt by some of the claimants; and therefor prays that they interplead, so that the court may judge to whom the thing belongs, and he be rendered safe on the payment; and this he may do whether any suits be actually commenced against him in law or equity, or is only in danger of being molested: as where different persons claim the same thing in distinct and separate interests.” See Harrison J (1807) *The practice of the court of chancery, volume 1* 96. The interpleader that is referred to is a normal civil interpleader and there is no Arbitration Act that offers a definition of interpleader because it is not a term directly associated with arbitration.

¹⁰¹⁸ English Act s 10.

¹⁰¹⁹ *Idem* s 11.

¹⁰²⁰ *Idem* s 12.

¹⁰²¹ *Ibid.* See also Arbitration Act, 1996 s 45.

which are best suited to the particular case, thereby avoiding unnecessary delays or expenses and providing a fair means for the resolution of disputes.¹⁰²² It is the responsibility of the tribunal to decide all evidential and procedural matters in cooperation with the parties.¹⁰²³ Arbitrators may now appoint attorneys to assist them in meeting these obligations.

An arbitration tribunal may not, however, order a consolidation and concurrent hearing of arbitral proceedings unless the parties so elect and authorise the tribunal to do so.¹⁰²⁴ Parties are obliged to expeditiously comply with all the requirements set by the tribunal to expedite proceedings.¹⁰²⁵ The tribunal has a general duty to strive for fairness by observing the *audi alteram partem* rule.¹⁰²⁶ The tribunal must ensure that it adopts flexible procedures that will be cost effective and efficient.¹⁰²⁷

On finalisation of the proceedings, the arbitrator must issue an award in the prescribed manner.¹⁰²⁸ The award will, in the absence of any statutorily recognised challenge, be final and binding.¹⁰²⁹ Such an award may, with the leave of the court, be enforced in the same way as a judgment.¹⁰³⁰ The award may be challenged on the basis of a challenge to the substantive jurisdiction of the tribunal¹⁰³¹ or on the basis of a serious irregularity.¹⁰³²

¹⁰²² *Ibid.* See also Arbitration Act, 1996 s 33. S 37 deals with the power of the arbitrator to appoint legal experts to assist.

¹⁰²³ English Act s 34.

¹⁰²⁴ *Idem* s 35.

¹⁰²⁵ *Idem* s 40.

¹⁰²⁶ S 33(1)(a) requires each party to be provided with a reasonable opportunity to state their case and to deal with that of the opponent.

¹⁰²⁷ English Act s 33 (1) (c).

¹⁰²⁸ *Idem* s 52.

¹⁰²⁹ *Idem* s 58 (1) (2).

¹⁰³⁰ *Idem* s 66.

¹⁰³¹ *Idem* s 67 The legal foundation for the arbitrator's authority to resolve the disputes is a valid and enforceable arbitral agreement. The agreement normally grants the arbitrator the authority/jurisdiction to determine the disputes until the award is issued. Section 67 stipulates the grounds upon which the jurisdiction of the arbitrator may be challenged as follows: "Challenging the award: substantive jurisdiction.

1. A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court-

(a) challenging any award of the arbitral tribunal as to its substantive jurisdiction; or

(b) for an order declaring an award made by the tribunal on the merits to be of no effect, in whole or in part, because the tribunal did not have substantive jurisdiction.

A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).

The courts did not challenge the limitations imposed on their powers of intervention as they were already moving away from their previous hostile attitude towards arbitration.¹⁰³³ The Act limits unfettered judicial interference with the arbitral award while guaranteeing fairness by providing the aggrieved party with an opportunity to challenge the award in terms of an exhaustive list of grounds contained in sections 67 and 68.

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2. The arbitral tribunal may continue the arbitral proceedings and make a further award while an application to the court under this section is pending in relation to an award as to jurisdiction.
 3. On an application under this section challenging an award of the arbitral tribunal as to its substantive jurisdiction, the court may by order—
 - (a) confirm the award,
 - (b) vary the award, or
 - (c) set aside the award in whole or in part.
 4. The leave of the court is required for any appeal from a decision of the court under this section.”

¹⁰³² *Idem* s 68 provides for the grounds upon which the award can be challenged based on irregularity. “Challenging the award: serious irregularity

1. A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award.

A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).

2. Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant—
 - (a) failure by the tribunal to comply with section 33 (general duty of tribunal);
 - (b) the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction: see section 67);
 - (c) failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties;
 - (d) failure by the tribunal to deal with all the issues that were put to it;
 - (e) any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeding its powers;
 - (f) uncertainty or ambiguity as to the effect of the award;
 - (g) the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy;
 - (h) failure to comply with the requirements as to the form of the award; or
 - (i) any irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award.
3. If there is shown to be serious irregularity affecting the tribunal, the proceedings or the award, the court may—
 - (a) remit the award to the tribunal, in whole or in part, for reconsideration,
 - (b) set the award aside in whole or in part, or
 - (c) declare the award to be of no effect, in whole or in part.

The court shall not exercise its power to set aside or to declare an award to be of no effect, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration.

4. The leave of the court is required for any appeal from a decision of the court under this section.”

¹⁰³³ Gough K *Judicial supervision and support for arbitration and ADR*: A paper presented to the delegates of the IBC Construction Law Summer School at Cambridge University on the 12th of September 2006 14.

Section 69 also permits court intervention in case of an appeal against the award on a point of law. Although this section appears to increase the grounds for judicial interference, the provision is non-mandatory and parties can elect to exclude its application in terms of their arbitration agreement. Where parties do not exclude the provision from application, an appeal may only be brought by agreement between the parties or by leave of the court.¹⁰³⁴ The inclusion of the right to appeal embodied in section 69 is an anomaly in England, which adopted UNCITRAL Model Law. The business community resisted its inclusion and arguments have been advanced for its removal on the following grounds:¹⁰³⁵

- “(1) If parties agree on arbitration as a means to resolve their dispute they should be able to rely on the decision of their chosen arbitrator as opposed to the decision of a court, whether or not their arbitrator has misinterpreted the law or not. If the parties wished for the courts to determine their dispute they would not have agreed to have the dispute referred to arbitration.
- (2) The UNCITRAL Model Law does not contain a provision to allow appeals on a point of law.
- (3) Many other countries have adopted the UNCITRAL Model Law.”

The Departmental Advisory Committee (DAC),¹⁰³⁶ whilst acknowledging the arguments raised, upheld the right of the parties to arbitration to expect a proper interpretation of the laws of the legal system they had elected to rely upon.¹⁰³⁷ In their view, failure to interpret the law properly will do the parties a disservice and will not achieve the outcome contemplated in the agreement.¹⁰³⁸ The parties will not be getting value for money since they are responsible for the costs of the process. The Act provides adequate guidelines on how the costs of arbitration must be handled after conclusion of the proceedings.¹⁰³⁹

¹⁰³⁴ English Act s 70.

¹⁰³⁵ Dedezade T “Are you in? Or are you out? An analysis of section 69 of the English Arbitration Act 1996: Appeals on a question of law” (2006) issue 2 *Int.Arb LR* 56-67 58.

¹⁰³⁶ The Departmental Advisory Committee is a committee of the Department of Trade and Industry under the chairmanship of Lord Mustill which was tasked with the responsibility of investigating whether the necessity exists to adopt the UNCITRAL Model Law. See Dedezade 57.

¹⁰³⁷ *Ibid.*

¹⁰³⁸ *Ibid.*

¹⁰³⁹ English Act ss 59-65.

5.2.1.2 Part 2 of Arbitration Act

Part 2 of the Act focuses on domestic arbitration, consumer arbitration and statutory arbitrations and it further domesticates some of the provisions applicable to international commercial arbitration contained in part 1. Another critical focus of this part of the Act is the rights of consumers. These rights are covered by the provisions of section 89 which clearly states that an arbitration agreement is a term of a contract; therefore, the Unfair Terms in Consumer Contracts Regulations 1994 are applicable to it.¹⁰⁴⁰

5.2.1.3 Part 3 of the Act

The New York Convention was adopted in England, as in other jurisdictions, to overcome difficulties associated with the recognition and enforcement of international commercial arbitral awards. Part 3 deals specifically with the enforcement of foreign arbitral awards made in terms of this Convention.¹⁰⁴¹ According to section 101:

- “(1) A New York Convention award shall be recognised as binding on the persons as between whom it was made, and may accordingly be relied on by those persons by way of defence, set-off or otherwise in any legal proceedings in England and Wales or Northern Ireland.
- (2) A New York Convention award may, by leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect.
.....
- (3) Where leave is so given, judgment may be entered in terms of the award.”

Section 103 of the 1996 Act contains an exhaustive list of the circumstances under which recognition and enforcement of awards made in terms of the New York Convention may be refused. The grounds for refusal of recognition listed in this section are identical to those contained in the Convention itself. The emergence of an international arbitration jurisprudence that has followed upon the accession of numerous jurisdictions to the international Convention, has led to English courts being admonished to avoid interpreting the Convention in an “Anglo-centric”

¹⁰⁴⁰ *Idem* s 89.

¹⁰⁴¹ Sparka F (2009) *Jurisdiction and arbitration clauses in maritime transport documents: A comparative analysis* 35.

manner.¹⁰⁴² English courts are thus required to interpret the grounds restrictively and rarely if ever, review the merits of the award.¹⁰⁴³ Neither English law nor the Convention make provision for a general defence to enforcement and recognition founded on the tribunal lacking jurisdiction.¹⁰⁴⁴ However, the grounds outlined in article IV of the Convention and repeated in section 103 (2) of the 1996 Act, could be regarded as providing jurisdictional defences.¹⁰⁴⁵

5.2.1.4 Part 4 of the Act

The fourth and final part of the Act comprises of general provisions. Part 4 clarifies that part 1 finds application even where Her Majesty is a party to the proceedings.¹⁰⁴⁶ Furthermore, part 4 also captures all repeals of, and amendments to, existing laws brought about by the Act.¹⁰⁴⁷

5.2.2 THE IMPACT OF THE 1996 ARBITRATION ACT

The Act effected a radical change to arbitration as it was known and practiced in England. The following quotation of Lord Mustil and Stewart Boyd is apposite:¹⁰⁴⁸

“The Act has however, given English arbitration law an entirely new face, a new policy, and new foundations. The English judicial authorities ... have been replaced by the statute as the principal source of law. The influence of foreign and international methods and concepts is apparent in the text and structure of the Act, and has been openly acknowledged as such. Finally, the Act embodies a new balancing of the relationship between parties, advocates, arbitrators and courts which is not only designed to achieve a policy proclaimed within Parliament and outside, but may also have changed their juristic nature.”

The fact that the 1996 Act introduced a new perspective meant that cases decided prior to the enactment of the legislation became less relevant to current legislative interpretation.¹⁰⁴⁹

¹⁰⁴² Merkin R & Flannery L (2014) *Arbitration Act 1996* 394.

¹⁰⁴³ *Ibid.*

¹⁰⁴⁴ *Idem* 395.

¹⁰⁴⁵ *Ibid.*

¹⁰⁴⁶ English Act s 196(1).

¹⁰⁴⁷ Merkin 395.

¹⁰⁴⁸ Ramsden P & Ramsden K (2009) *The law of arbitration: South African and international arbitration* 23.

¹⁰⁴⁹ *Ibid.*

5.2.3 THE IMPACT OF AN ARBITRATION CLAUSE ON CONSUMERS

It is trite that standard-form contracts between consumers and suppliers or sellers often contain arbitration clauses. These contracts are frequently entered into by parties with unequal bargaining power. The weaker party may lack knowledge regarding the effect of such a clause or have no option other than to conclude the contract containing the clause. This may be to her detriment and to the benefit of the stronger contracting party. The benefits that come with power are enormous; those who possess power are able to get things done. They are able to control the results to their advantage. Thus, in situations of unequal bargaining power, it is possible that the more powerful party might unilaterally design an arbitral procedure that favours her to the detriment of the weaker party.

In some instances, consumers have little opportunity to read through the contract and, even if they do, the language is often too complicated for consumers to understand.¹⁰⁵⁰ For this reason, it is necessary to protect consumers in such situations. Lord Denning in *Lloyds Bank* held that:¹⁰⁵¹

“..... the English law gives relief to one who, without independent advice, enters into a contract on terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other. When I use the word 'undue' I do not mean to suggest that the principle depends on proof of any wrongdoing. The one who stipulates for an unfair advantage may be moved solely by his own self-interest, unconscious of the distress he is bringing to the other. I have also avoided any reference to the will of the one being 'dominated' or 'overcome' by the other. One who is in extreme need may knowingly consent to a most improvident bargain, solely to relieve the straits in which he finds himself. Again, I do not mean to suggest that every transaction is saved by independent advice. But the absence of it may be fatal....”

Therefore, English law requires that an arbitration clause in a contract must be brought to the attention of the consumer and fully discussed to avoid it being termed

¹⁰⁵⁰ Mason L “Protecting consumers from unfair terms in standard form contracts: The UK approach” (2015) vol 26, issue 2 *European Business LR* 335-346 335.

¹⁰⁵¹ *Lloyds Bank Ltd v Bundy* [1974] 3 All E.R. 757 at 765.

unfair.¹⁰⁵² An arbitration clause can constitute an unfair term of the contract in circumstances, which might deprive a consumer of his or her day in court.¹⁰⁵³

English courts have on occasion, upheld arbitration clauses signed by consumers who have sought and received legal advice and struck down those where such advice was not received.¹⁰⁵⁴ The English law restricts the use of pre-dispute arbitration clauses because of its adherence to the belief that consumers must be protected from arbitration and permitted to resort to the courts should they so wish.¹⁰⁵⁵

The United Kingdom (UK), being a member of the European Union, gave effect to the European Union's Council Directive 93/13/EEC¹⁰⁵⁶ aimed at protecting the interests of consumers. The directive applies to unfair terms in a contract concluded between a consumer and a supplier.¹⁰⁵⁷ It outlined the circumstances under which a term in a contract would be regarded as unfair¹⁰⁵⁸ and the effect thereof on the validity of the contract.¹⁰⁵⁹ According to article 3 of EEC directive 93/13:

"1. A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.

2. A term shall always be regarded as not individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract.

The fact that certain aspects of a term or one specific term have been individually negotiated shall not exclude the application of this Article to the rest of a contract if an overall assessment of the contract indicates that it is nevertheless a pre-formulated standard contract."

Furthermore, article 6 of ECC directive 93/13 reads:

¹⁰⁵² Hörnle J (2009) *Cross-border Internet dispute resolution* 178.

¹⁰⁵³ *Idem* 179.

¹⁰⁵⁴ *Ibid.*

¹⁰⁵⁵ *Ibid.*

¹⁰⁵⁶ The English Unfair Terms in Consumer Contracts Regulations 1999 was introduced as a way of adopting the European Union's Council Directive 93/13/EEC. This regulation was an improvement on the Unfair Terms in Consumer Contracts Regulations, 1994.

¹⁰⁵⁷ Unfair Terms in Consumer Contracts Regulations 1999 art 4(1).

¹⁰⁵⁸ *Idem* art 5.

¹⁰⁵⁹ *Idem* art 8.

“1. Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms.

2. Member States shall take the necessary measures to ensure that the consumer does not lose the protection granted by this Directive by virtue of the choice of the law of a non-Member country as the law applicable to the contract if the latter has a close connection with the territory of the Member States.”

Article 7 of ECC directive 93/13 states that:

“1. Member States shall ensure that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers.

2. The means referred to in paragraph 1 shall include provisions whereby persons or organizations, having a legitimate interest under national law in protecting consumers, may take action according to the national law concerned before the courts or before competent administrative bodies for a decision as to whether contractual terms drawn up for general use are unfair, so that they can apply appropriate and effective means to prevent the continued use of such terms.”

The English Arbitration Act, 1996 acknowledged the prejudice that may be suffered by consumers at the hands of large corporations and extended the provisions of the Unfair Terms in Consumer Contracts Regulation 1994 to arbitration clauses.¹⁰⁶⁰ The effect of the extension was that a term, which is found to be unfair, would not be binding on the consumer.¹⁰⁶¹

5.2.4 THE RELATIONSHIP BETWEEN ARBITRATION AND THE CONSTITUTION IN ENGLAND

Unlike the Constitutions of the other jurisdictions discussed in this thesis, the UK Constitution is unwritten.¹⁰⁶² Despite this, the UK has, through the years, acquired a Constitution, which fosters a liberal democratic system of government.¹⁰⁶³ The Constitution does not however, directly provide for access to the courts. However, a party who elects to utilise arbitration as a dispute resolution mechanism to resolve

¹⁰⁶⁰ English Act s 89.

¹⁰⁶¹ Regulations 1999 art 8.

¹⁰⁶² UK Constitution context and history
<http://www.hartpub.co.uk/pdf/samples/9781849461603sample.pdf> 2 (accessed on 25 Jul 2015).

¹⁰⁶³ *Idem* 3.

present or future disputes is "treated as having waived a right to an independent and impartial tribunal, to the safeguards of public court procedure and to a public hearing...".¹⁰⁶⁴ The parties are therefore regarded as having no right to an oral appeal from the award unless provided for in the Act and, probably, agreed to by the parties.¹⁰⁶⁵ Be that as it may, arbitration remains popular because of the perceived benefits discussed briefly below.

5.2.5 A MYTH REGARDING THE BENEFITS OF ARBITRATION

The common belief amongst supporters of private arbitration is that it is cheaper and faster than litigation. A closer analysis reveals that there are, however, certain challenges that render the aforementioned benefits elusive. As arbitration is a global concept, most of the challenges facing the process are not unique to English law. Certainly, arbitration has the potential to be even more expensive and prolonged than litigation.¹⁰⁶⁶ This may be as a result of:¹⁰⁶⁷

- the requirement to pay the arbitrators' fees, any institutional administrative fees and to pay to hire the hearing venue
- poorly drafted contracts with arbitration agreements which fail to provide an adequate and practical framework for the conduct of the arbitration proceedings
- tribunals being unwilling to control the timetable and the parties' conduct for fear of challenges to the subsequent award on the grounds of unfairness..."

Ogubuike¹⁰⁶⁸ indicated that arbitration has long been hailed for its cost reduction potential when compared to litigation.¹⁰⁶⁹ Despite this, he stressed that even though litigation is expensive, there is considerable doubt that arbitration is cheaper¹⁰⁷⁰ as

¹⁰⁶⁴ Hoffman D (2011) *The impact of the UK Human Rights Act on Private law* 305.

¹⁰⁶⁵ *Ibid.*

¹⁰⁶⁶ Mayer Brown International LLP "The pros and cons of arbitration" www.mayerbrown.com/files/News/04165fd5-5165-41ea-bb6f-19d9235c171d/Presentation/NewsAttachment/7e531e5e-4040-4251-b1a8-1d4b6168c99b/Practice%20Note_Duncan_Pro-Con-Arbitration_oct12.pdf (accessed on 25 Jul 2015).

¹⁰⁶⁷ *Ibid.*

¹⁰⁶⁸ Ogubuike A "Arbitration: Is it truly a "cheap" alternative to litigation?" [http://www.dundee.ac.uk/cepmlp/gate way/files.php?file=cepmlp_car13_6_734047148.pdf](http://www.dundee.ac.uk/cepmlp/gate%20way/files.php?file=cepmlp_car13_6_734047148.pdf) 4 (accessed on 02 Feb 2014).

¹⁰⁶⁹ *Ibid.*

¹⁰⁷⁰ *Ibid.*

parties are responsible to pay arbitrators whilst judges' salaries are paid by the government.¹⁰⁷¹

Furthermore, Leon and Siwec state that, it is a myth that arbitration has the benefit of confidentiality.¹⁰⁷² According to these practitioners the benefits of arbitration, like confidentiality, efficiency and cost effectiveness are possible but not assured.¹⁰⁷³ This loss of benefits of arbitration might be attributed to the manner in which the whole process is handled by those involved. Despite the fact that, as mentioned above, arbitration may not truly offer the benefits first envisaged, it remains popular in commercial environments. The reason for this continued popularity may be the fact that the process continues to offer the potential for these benefits provided the parties respect the rules and adopt a suitable approach to the arbitration.

5.3 ARBITRATION LAW IN INDIA

Alternative dispute resolution methods have an ancient history in India;¹⁰⁷⁴ however, the form such methods take has changed drastically due to the ever-changing pattern of society, growth of human knowledge and civilization.¹⁰⁷⁵ Indian business communities expressed support and a wish for settlement of disputes through tribunals of their own choice.¹⁰⁷⁶ The selection of an arbitrator acceptable to both parties was essential and the potential for a speedy and final solution was a major attraction.¹⁰⁷⁷ Nariman, as discussed by Arya and Sebastian, described arbitration as “a never ending war between two irreconcilable principles: the high one that demands justice even if the heavens fall and the lower one which demands an end

¹⁰⁷¹

Ibid.

¹⁰⁷²

Leon B & Siwec J “Debunking some common arbitration myths: Benefits over court proceedings include cost, flexibility” (2013) http://www.perlaw.ca/media/Lawyer_Articles_PDF/Myths_About_Arbitration_-_BLeon_JSiwec.pdf (accessed on 16 Jan 2016).

¹⁰⁷³

Ibid.

¹⁰⁷⁴

Umamaheswari D “The alternative dispute redressal methods” (2012) http://shodhganga.inflibnet.ac.in/bitstream/10603/5423/1/11_chapter%204.pdf 83 (accessed on 10 June 2014).

¹⁰⁷⁵

Subhan J “Arbitration conciliation and mediation - conflict between formal and informal setups” (2010) <http://papers.ssrn.com/sol3/papers.cfm?abstractid=2145187> 1 (accessed on 21 Jan 2015).

¹⁰⁷⁶

Umamaheswari 83.

¹⁰⁷⁷

Gandhi M (1948) *Autobiography: The story of my experiments with truth* 117.

to litigation”.¹⁰⁷⁸ India considers arbitration to be an efficient method of commercial dispute resolution.¹⁰⁷⁹

Dutta states, “[o]f all mankind’s adventures in search of peace and justice, arbitration is amongst the earliest”.¹⁰⁸⁰ According to Dutta “Long before law was established or courts were organised, or judges had formulated principles of law, man had resorted to arbitration for resolving disputes”.¹⁰⁸¹ Arbitration in India was resorted to with a view to providing the business community with a less formalistic, more economical and more efficient process of resolving commercial disagreements. The two significant statutes in the Indian arbitration context are the Indian Arbitration Act, 1940 and the Indian Arbitration Act, 1996. The Indian Arbitration Act, 1940 had fundamental shortcomings which completely undermined the very existence of arbitration as an alternative dispute resolution.¹⁰⁸² The 1996 Act was enacted to address the shortcomings in the 1940 Act. The 1996 Act itself was also amended by the Arbitration and Conciliation (Amendment) Act, 2015. The discussion of the 1996 Act below, incorporates the 2015 amendments.

5.3.1 INDIAN ARBITRATION AND CONCILIATION ACT, 1996

The 1996 Act emerged in the wake of widespread disgruntlement with the excessive supervisory powers the courts had over arbitration.¹⁰⁸³ The enactment of the 1996 Act was inspired by the desire to keep pace with global developments.¹⁰⁸⁴ Rani and Kishore observe that the 1996 Act was founded on four core principles:¹⁰⁸⁵

- “(i) To minimize the supervisory role of the courts;
- (ii) To narrow the basis on which awards could be challenged;
- (iii) To ensure the finality of arbitral awards; and

¹⁰⁷⁸ Arya & Sebastian 159.

¹⁰⁷⁹ Shah N & Gandhi N Arbitration: One size does not fit all: Necessity of developing institutional arbitration in developing countries (2011) vol. 6, issue 4 *Journal of International Commercial Law and Technology* 232-242 232.

¹⁰⁸⁰ Dutta A “Origin of alternative dispute resolution in India” http://www.academia.edu/4371674/ORIGIN_OF_ALTERNATIVE_DISPUTE_RESOLUTION_SYSTEM_IN_INDIA (accessed on 10 Jun 2014) 1.

¹⁰⁸¹ *Ibid.*

¹⁰⁸² See the discussion of the shortcomings of Indian Arbitration Act, 1940 in Cht 2.

¹⁰⁸³ Arya & Sebastian 161.

¹⁰⁸⁴ *Ibid.*

¹⁰⁸⁵ Rani M & Kishore K “Strengthening arbitration through judiciary” (2013) vol 4, issue 1 *American International Journal of Research in Humanities, Arts and Social Sciences* 34-40 35.

(iv) To expedite the arbitration process.”

The 1996 Act effected such significant amendments to the 1940 Act that it rendered any precedents based upon the 1940 Arbitration Act redundant. The 1996 Act consolidated and amended domestic arbitration, international commercial arbitration and provisions for enforcement of foreign arbitral awards. It also defined the law relating to conciliation and matters connected or incidental to conciliation in India to achieve its goal of positioning India as a preferred site for international commercial arbitration.

The 1996 Act was modelled on UNCITRAL Model Law, guaranteeing an expedient and effective dispute resolution mechanism, which instilled confidence in the international community regarding the dispute resolution mechanisms of India.¹⁰⁸⁶ The 1996 Act consists of four parts. Part 1 consists of general provisions, part 2 deals with enforcement of foreign awards, part 3 deals with conciliation and part 4 comprises of miscellaneous provisions.

5.3.2 PART 1 OF THE INDIAN ARBITRATION AND CONCILIATION ACT, 1996

The primary focus of part 1 of the 1996 Act is those arbitration proceedings, whether domestic or international, that are conducted in India.¹⁰⁸⁷ This is the most comprehensive part of the Act and it consists of provisions, which are based on UNCITRAL Model Law.¹⁰⁸⁸ This part of the Act finds application where the place of arbitration is India.¹⁰⁸⁹ It further contains definitions of relevant terms. For example, “arbitration” is defined in section 2(1)(a) as any form of arbitration regardless of whether it is administered by a permanent arbitral institution or not. “Arbitral award” is defined as any award, irrespective of whether it is final or interim.¹⁰⁹⁰ Section 2(1)(f) defines “international commercial arbitration” as:

“... an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is-

¹⁰⁸⁶

Idem 34.

¹⁰⁸⁷

Kachwaha S & Rautray D, “Arbitration in India: An overview” <https://ipba.org/media/fck/files/Arbitration%20in%20India.pdf> (accessed on 17 Mar 2016) 2.

¹⁰⁸⁸

Ibid.

¹⁰⁸⁹

Indian Arbitration Act, 1996 s2 (1) (a).

¹⁰⁹⁰

Idem s2 (1) (c).

- (i) An individual who is a national of, or habitually resident in, any country other than India; or
- (ii) A body corporate which is incorporated in any country other than India; or
- (iii) A company or an association or a body of individuals whose central management and control is exercised in any country other than India; or
- (iv). The Government of a foreign country;”

“Arbitration agreement” is defined in section 7(1) as an agreement between parties with a contractual legal relationship or not, to submit any current or future disputes, either in whole or in part, to arbitration. The agreement must be in writing, either as a clause in a contract or as a separate agreement.¹⁰⁹¹ The parties to the agreement may apply to the judicial authority before which an action is brought to refer the matter to arbitration if the dispute is the subject of an arbitration agreement.¹⁰⁹² Such an application must be accompanied by the original arbitration agreement or a certified copy thereof.¹⁰⁹³

Sections 10 to 15 of the 1996 Act focus on the composition of the arbitral tribunal. Parties are free to agree on the number of arbitrators to be appointed, provided the final number is an odd number.¹⁰⁹⁴ Section 11(1) states that a person of any nationality can be appointed as an arbitrator and parties may agree on the appointment procedure.¹⁰⁹⁵ The appointment of an arbitrator may be challenged if it transpires that circumstances exist which cast reasonable doubt on her independence or impartiality.¹⁰⁹⁶ Such an appointment may also be challenged if the arbitrator does not possess the qualifications required by the parties.¹⁰⁹⁷ Where an arbitrator fails to complete his or her functions without undue delay or it becomes impossible for her to perform her function, her mandate will be terminated and a substitute appointed.¹⁰⁹⁸ The mandate may also be terminated if the arbitrator withdraws from the office or the parties agree to terminate her mandate.¹⁰⁹⁹

¹⁰⁹¹ *Idem* s 7 (2) (3).

¹⁰⁹² *Idem* s 8 (1).

¹⁰⁹³ *Idem* s 8 (2).

¹⁰⁹⁴ *Idem* s 10 (1).

¹⁰⁹⁵ *Idem* s 11 (2).

¹⁰⁹⁶ *Idem* s 12 (3) (a).

¹⁰⁹⁷ *Idem* s 12 (3) (b).

¹⁰⁹⁸ *Idem* s 14 (1) (a).

¹⁰⁹⁹ *Idem* s 14 (1) (b).

Sections 16 and 17 deal with the jurisdiction of the arbitral tribunal. Section 16 contains two critical principles of arbitration, namely competence-competence and separability. In terms of the competence-competence principle, a tribunal is empowered to rule on its own jurisdiction and may also rule on any objections regarding the existence or validity of the arbitration agreement.¹¹⁰⁰ Separability is contained in section 16(1)(a)-(b) which provides that:

“(a) An arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and
(b) A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.”

The guidelines regarding the handling of arbitral proceedings are contained in sections 18 to 27. Section 18 sets the ground rules for the treatment of parties throughout the proceedings. According to section 18, parties deserve equal treatment and opportunities to present their cases before the tribunal. The procedure to be followed will be determined by the parties in terms of section 19. Arbitration may be held at a place of the parties' choice¹¹⁰¹ on the commencement date they agreed upon.¹¹⁰² The court may, upon application by the arbitral tribunal, assist in taking the evidence of a witness and will execute this duty in terms of its rules and procedures.¹¹⁰³

Sections 28 to 33 focus on making the award and termination of the proceedings. Where the place of arbitration is India, the arbitral tribunal will determine the matter in accordance with the existing substantive law in India, save where the arbitration is an international commercial arbitration.¹¹⁰⁴ Section 28(1)(b) provides that international commercial arbitrations must be determined in accordance with the law designated by the parties. Where no applicable law has been designated, section 28(1)(b)(iii) empowers the tribunal to employ the rules of law it considers appropriate.

In the event that there is more than one arbitrator involved, decisions of the tribunal must be made by a majority of its members.¹¹⁰⁵ The arbitration should be completed

¹¹⁰⁰ *Idem* s 16 (1).

¹¹⁰¹ *Idem* s 20 (1).

¹¹⁰² *Idem* s 21.

¹¹⁰³ *Idem* s 27 (1) & (3).

¹¹⁰⁴ *Idem* s 28 (1) (a).

¹¹⁰⁵ *Idem* s 29.

within a period of twelve months from the constitution of the tribunal.¹¹⁰⁶ The arbitral tribunal is entitled to encourage settlement of disputes between the parties and, where parties do not object, to record the same as an arbitral award.¹¹⁰⁷ Such an arbitral award must be in writing and signed by all members of the tribunal.¹¹⁰⁸ The party who is aggrieved by the award may have recourse to the court on those narrow grounds provided for by the Act. The grounds upon which such application can be brought are stipulated in section 34. The said provision reads as follows:

- “(1) Recourse to a court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and subsection (3).
- (2) An arbitral award may be set aside by the court only if-
- (a) The party making the application furnishes proof that-
 - (i) A party was under some incapacity, or
 - (ii) The arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or
 - (iii) The party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
 - (iv) The arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

- (v) The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or
- (b) The court finds that-
- (i) The subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or
 - (ii) The arbitral award is in conflict with the public policy of India.

Explanation. -Without prejudice to the generality of sub-clause (ii), it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81.

- (3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal: Provided that if the court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

¹¹⁰⁶ *Idem* s 29A

¹¹⁰⁷ *Idem* s 30 (1)(2).

¹¹⁰⁸ *Idem* s 31 (1).

- (4) On receipt of an application under sub-section (1), the court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.”

Finality and enforcement of the award are dealt with in sections 35 and 36. Section 35 reiterates the final and binding status of the award. Section 36 determines the period within which the application for setting aside of the award may be made. Section 36(1) states further, that upon expiry of the said period and subject to the provisions of sub-section 2, the award will be enforced under the Code of Civil Procedure Act,¹¹⁰⁹ in the same manner as if it were a judgment of the court.

Section 37 of the Act deals with appealable orders¹¹¹⁰ and sections 38 to 43 are miscellaneous provisions. An arbitration agreement is not terminated by the death of a party to the agreement.¹¹¹¹ The mandate of the arbitrator is also not terminated by the death of the party who appointed her.¹¹¹²

5.3.3 PART 2 OF THE INDIAN ARBITRATION AND CONCILIATION ACT, 1996

Part 2 of the 1996 Act focuses on the requirements that have to be complied with prior to the enforcement of foreign arbitral awards made in terms of the New York Convention and the Geneva Convention. Sections 44 to 52 of the Act provide guidelines regarding the enforcement of foreign awards and challenges to awards made in terms of the New York Convention. Section 47 sets out the requirements that must be complied with in order for an application for enforcement of a foreign

¹¹⁰⁹ Act 5 of 1908.

¹¹¹⁰ *Idem*. The provisions of section 37 grant parties interlocutory relieves by enabling them to appeal certain orders specified in this section that they are dissatisfied with. According to the provisions of section 37 Appealable orders –

(1) An appeal shall lie from the following orders (and from no others) to the court authorised by law to hear appeals from original decrees of the court passing the order, namely: -

(a) Granting or refusing to grant any measure under section 9;
(b) Setting aside or refusing to set aside an arbitral award under section 34.

(2) An appeal shall also lie to a court from an order of the arbitral tribunal--

(a) Accepting the plea referred to in sub-section (2) or sub-section (3) of section 16; or

(b) Granting or refusing to grant an interim measure under section 17.

(3) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court.”

¹¹¹¹ *Idem* s 40 (1).

¹¹¹² *Idem* s 40 (2).

award made in terms of the New York Convention to succeed. A party opposing the recognition and enforcement of such an award must act in accordance with section 48. In the event that the court is satisfied that the foreign award is enforceable, section 49 states that the award shall be treated as a decree of the court and enforced as such.

Sections 53 to 60 regulate the enforcement of awards made in terms of the Geneva Convention. The person applying for enforcement of the foreign award must produce certain information before the court.¹¹¹³ She must produce a duly authenticated original award according to the law of the country in which it was made; evidence proving the finality of the award; and evidence necessary to prove that the conditions mentioned in section 57(1)(a) and (c) are duly satisfied.¹¹¹⁴ Section 57 sets out the conditions that must be satisfied before the foreign award may be enforced in India.¹¹¹⁵ Upon the court satisfying itself that the award is enforceable, the award will be treated as a judgment of the court.¹¹¹⁶

5.3.4 PARTS 3 AND 4 OF THE INDIAN ARBITRATION AND CONCILIATION ACT, 1996

Part 3, containing sections 61 to 81 of the 1996 Act, focuses on conciliation. As this topic falls outside the scope of this thesis it will not be discussed. Likewise, Part 4, which comprises of various miscellaneous provisions contained in sections 82 to 86, will not be discussed.

¹¹¹³ *Ibid* s 56 (1).

¹¹¹⁴ *Ibid* s 56 (a) (b) (c).

¹¹¹⁵ The benefit of the arbitral award is that once completed it becomes final and binding. The court's contribution to the effectiveness of arbitral award through making the award a court order is subject to the party moving the application and satisfying the provisions of section 57. The said provisions reads as follows "(1) In order that a foreign award may be enforceable under this Chapter, it

shall be necessary that-

- (a) The award has been made in pursuance of a submission to arbitration, which is valid under the law applicable thereto;
- (b) The subject-matter of the award is capable of settlement by arbitration under the law of India;
- (c) The award has been made by the arbitral tribunal provided for in the submission to arbitration or constituted in the manner agreed upon by the parties and in conformity with the law governing the arbitration procedure;
- (d) The award has become final in the country in which it has been made, in the sense that it will not be considered as such if it is open to, opposition or appeal or if it is proved that any proceedings for the purpose of contesting the validity of the award are pending;
- (e) The enforcement of the award is not contrary to the public policy or the law of India."

¹¹¹⁶ *Ibid* s 58.

5.3.5 THE SHORTCOMINGS OF THE INDIAN ARBITRATION AND CONCILIATION ACT, 1996

The 1996 Act dramatically enhanced the powers of a duly constituted arbitration tribunal to facilitate an effective handling of arbitration proceedings.¹¹¹⁷ There has been some concern however, that since implementation of the 1996 Act, inefficiency, judicial intervention, delays and unpredictability hinder the enforcement of foreign arbitral awards in India.¹¹¹⁸ Contrary to the approach taken regarding domestic arbitration, it is a prerequisite that foreign awards must go through an enforcement procedure prior to their execution in India.¹¹¹⁹ It was during this process that Indian courts sometimes refused to enforce awards on grounds not provided for in the Convention.¹¹²⁰ However, the attitude of the courts appears to be changing towards favouring enforcement.¹¹²¹

Despite this change of heart by the courts, a strong view developed that law reform was long overdue to address inadequacies in the application of arbitration in India.¹¹²² This prompted the Indian Law Commission to undertake a project that investigated possible amendments to the 1996 Act.¹¹²³ These efforts produced the Arbitration and Conciliation (Amendment) Ordinance 9 of 2015 which acted as an interim measure¹¹²⁴ until Parliament approved a Bill to make the proposed changes permanent.¹¹²⁵ The Bill became law in December 2015 in the form of the Arbitration and Conciliation (Amendment) Act, 2015.¹¹²⁶ The Act is virtually identical to the

¹¹¹⁷ Gupta P & Mittal S “Commercial arbitration in India” (2010) vol 2 *International Conference on Economics, Business and Management* 186-191 186.

¹¹¹⁸ Chernick R, Kolkey D & Neal B (2012) *Practitioner's handbook on international arbitration and mediation* (3ed) 354.

¹¹¹⁹ *Ibid.*

¹¹²⁰ *Ibid.*

¹¹²¹ *Idem* 355.

¹¹²² Sebastian T Critical appraisal of 'patent illegality' as a ground for setting aside an arbitral award in India (2012) vol 24, issue 2 *Bond L R* 157-177 164.

¹¹²³ Law Commission of India Report No. 246 Amendments to the Arbitration and Conciliation Act 1996.

¹¹²⁴ Giaretta B & Kishore A (2016) “The Indian Arbitration and Conciliation (Amendment) Act” https://www.ashurst.com/doc.aspx?id_Content=12757 (accessed on 15 July 2016).

¹¹²⁵ *Ibid.*

¹¹²⁶ *Ibid.*

Ordinance and is deemed to have come into effect on the 23 October 2015, the date of commencement of the Ordinance.¹¹²⁷

It should be noted that the 1996 Act, even as amended, does not attempt to incorporate provisions that are aimed at protecting the rights of consumers in arbitration.

5.3.6 THE RIGHTS OF INDIAN CONSUMERS IN ARBITRATION

Consumers are arguably the most neglected and exploited part of Indian society.¹¹²⁸ This is attributed to the lack of strong, adequately equipped consumer movements to protect consumers' interests.¹¹²⁹ This position persists despite the presence of policies and statutes, which are supposed to offer such protection.¹¹³⁰ Such policies and statutes are ineffective due to lack of supervisory control or relevant institutions to monitor compliance.¹¹³¹ Lack of enthusiasm to protect the interests of consumers exposes them to prejudice when they enter into contracts containing an arbitration clause with big corporations.

The main concern regarding these contracts is that consumers are often not sufficiently informed about the presence of the arbitration clause and what it entails to enable them to make an informed decision. As Kaptan say "[t]he right to be informed is a fundamental economic interest of the consumer".¹¹³² At times, even consumers who are adequately informed of what arbitration means, find themselves in a weaker position than the large corporation, which leaves them with no room to negotiate for better terms. This situation pressurises a consumer to agree to clauses in circumstances that are not necessarily voluntary. As Niedermaier state:¹¹³³

1127

Ibid.

1128

Kaptan S (2003) *Consumer movement in India: Issues and problems* 47.

1129

Ibid.

1130

Ibid.

1131

Ibid.

1132

Idem 51.

1133

Niedermaier T "Arbitration agreements between parties of unequal bargaining power – Balancing exercises on either side of the Atlantic" (2014) 13 http://dajv.de/law-journal.html?file=tl_files/DAJV/Z_Englische%20Webseite/Newsletter/1_2014/Tilman%20Niedermaier%2C%20Arbitration%20Agreements%20between%20Parties%20of%20Unequal%20Bargaining%20Power-

“...where the parties’ respective bargaining powers strongly differ, the contractual mechanism fails. In this case, the stronger party is in a position to unilaterally impose legal provisions on the weaker party to the stronger party’s own benefit. Party autonomy and the freedom to create private legal provisions can turn into the opposite for the weaker party. In case of arbitration agreements, this is particularly problematic because these agreements have a direct impact on the parties’ right to access to justice.”

The right of access to justice will be explored further below, where the Constitutionality of arbitration in India is explored. However, to conclude, there is an indication that consumers in India are not offered adequate protection by the government and this exposes them to abuse by large corporations which introduce arbitration clauses to the consumer’s detriment. It is accepted in India that the issue of whether a clause in a contract is reasonable or fair “could be examined in cases where the bargaining power of the parties is unequal to the extent that the liberty given to one of the parties is liberty of a ‘Lamb before the Lion’.”¹¹³⁴ Kumar J in *National Construction* held that:¹¹³⁵

“It is, therefore, the settled law that if a contract or a clause in a contract is found unreasonable or unfair or irrational, one must look to the relative bargaining power of the contracting parties. In dotted line contracts there would be no occasion for a weaker party to bargain or to assume to have equal bargaining power. He has either to accept or leave the services or goods in terms of the dotted line contract. His option would be either to accept the unreasonable or unfair terms or forego the service forever. With a view to have the services of the goods, the party enters into a contract with unreasonable or unfair terms contained therein and he would be left with no option but to sign the contract.”

The court acknowledged that there are situations, which, due to unfairness, will require the intervention of the court to protect the interests of those parties who are prejudiced.¹¹³⁶ The courts in India have demonstrated a willingness to set aside a contract or a clause in a contract between parties who are not equal in bargaining power if it appears to be unfair and unreasonable.¹¹³⁷ The court in *Central Inland*

Balancing%20Exercises%20on%20Either%20Side%20of%20the%20Atlantic.pdf (accessed on 15 July 2015).

¹¹³⁴ *National Building Construction vs State Of Haryana And Anr* on 9 January, 2007 AIR 2007 P H 111, (2007) 146 PLR 708 para 7.

¹¹³⁵ *Ibid.*

¹¹³⁶ *Ibid.*

¹¹³⁷ *Central Inland Water Transport Corporation v. Brojonath Ganguly* 1986 SCR (2) at 289.

*Water*¹¹³⁸ outlined circumstances that may justify the striking down of a contract or a clause between parties of unequal bargaining power. Madon J held that:¹¹³⁹

“The above principle will apply where the inequality of bargaining power is the result of the great disparity in the economic strength of the contracting parties. It will apply where the inequality is the result of circumstances, whether of the creating of the parties or not. It will apply to situations in which the weaker party is in a position in which he can obtain goods or services or means of livelihood only upon the terms imposed by the stronger party or go without them. It will also apply where a man has no choice, or rather no meaningful choice, but to give his assent to a contract or to sign on the dotted line in a prescribed or standard form or to accept a set of rules as part of the contract, however, unfair unreasonable or unconsonable a clause in that contract or form or rules may be.”

I am of the view that this principle can also be utilised to strike down the agreement to arbitrate entered into between parties of unequal bargaining power where it appears that the stronger party relied on its power to secure a signature.

5.3.7 HOW THE CONSTITUTION AFFECTS ARBITRATION IN INDIA

Access to justice generally denotes the individuals’ right of access to the courts.¹¹⁴⁰ This right is protected by article 39A of the Indian Constitution, a living document that is the basic law of the country. Article 39A reads:¹¹⁴¹

“The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.”

This article was intended to protect the equal right to justice and provide for free legal aid to everyone in need thereof. Parties to a dispute select the process to resolve their disagreement that they believe will afford them justice. Hence, access

1138

Ibid.

1139

Ibid.

1140

Kalifula M Rule of law and access to justice paper presented at NJA South zone regional judicial conference on “Role of courts in upholding Rule of Law” at Tamil Nadu State Judicial Academy (31 January 2014).

1141

The Constitution of India.

to justice is regarded as representing fairness and an underlying recognition of the principle of equality.¹¹⁴² Bhat states that:¹¹⁴³

“The notion of justice evokes the cognition of the rule of law, of the resolution of conflicts, of institutions that make law and of those who enforce it. The dispute resolution mechanism chosen by a society reflects the concept of justice in that society. Access to justice, in its widest sense of the effective resolution of disputes whether through court-based litigation or alternative dispute resolution processes, is an essential aspect of ensuring the realisation of the fundamental rights recognised and given protection by the Constitution. With the emergence of the welfare state, the right to access to justice has become an effective right wherein not only the right to litigate or defend a claim, but also the right to access such forums and have parity of power with the other litigants.”

Arbitration falls under alternative dispute resolution mechanisms and it is therefore expected to dispense justice in terms of the Constitution and to promote fairness. Disparities of power between two parties who are engaged in an arbitration process have the potential to contravene the Constitution and compromise fairness and justice. The State is obligated by article 14 of the Constitution to ensure that no person is denied equality before the law and the equal protection of the law.¹¹⁴⁴

5.3.8 HOW THE BENEFITS OF ARBITRATION WERE LOST IN INDIA

Arbitration was conceived in India as an alternative to litigation that was plagued by inefficiency, high costs, complex enforcement processes and lack of privacy.¹¹⁴⁵ However, in reality, the alleged benefits of arbitration are not necessarily realisable.¹¹⁴⁶ The framework of arbitration contributes immensely to the failure of the arbitration process to achieve its intended goal. The process that precedes arbitration proceedings which entails appointment of the arbitral tribunal, the process during arbitration, when lawyers may drag the case out, and the process after the award is made, which allows the award to be challenged before a court, have not been helpful in preserving the benefits of arbitration.¹¹⁴⁷ There are certainly cost

¹¹⁴² Bhat I “Access to justice: A critical analysis of alternative dispute resolution mechanisms in India” (2013) vol 2 issue 5, *International Journal of Humanities and Social Science Invention* 46-53 46.

¹¹⁴³ *Ibid.*

¹¹⁴⁴ *Idem* 47.

¹¹⁴⁵ Sondhi A “Arbitration in India – some myths dispelled” (2007) vol 19, issue 2 *Student Bar Review* 48-54 50.

¹¹⁴⁶ *Ibid.*

¹¹⁴⁷ *Ibid.*

implications associated with a prolonged process that negatively affect arbitration's promise of cost reduction. Finally, the fact that the award can be challenged in a court potentially robs arbitration of its privacy status.

5.4 USA ARBITRATION LAW: THE PRACTICAL SIDE

According to Stipanowich, "American arbitration has come of age".¹¹⁴⁸ A closer look at the seven decades of the dawn of the "modern era" of arbitration will reveal that its supporters procured "institutional acceptance of the process from business, bench and bar".¹¹⁴⁹ The emerging trend in the USA Supreme Court displays a favourable attitude towards arbitration as evidenced by a series of decisions that significantly limited judicial and legislative restrictions on the right to arbitrate under the federal law.¹¹⁵⁰ The decisions which support the use of arbitration, demonstrate overwhelming evidence of the faith that the business community and the courts have in arbitration as a viable replacement for litigation.¹¹⁵¹ The courts in the USA have thrown their support behind both domestic and international private arbitration.¹¹⁵²

Arbitration law in the USA does not differentiate between domestic and international arbitration.¹¹⁵³ The forum for hearing arbitration disputes involving foreign elements can be either the State or Federal courts.¹¹⁵⁴ Furthermore, arbitration is regulated at both Federal and State levels with both Federal and State laws that are equipped to deal with, and applicable to, both domestic and international arbitrations.¹¹⁵⁵ The

¹¹⁴⁸ Stipanowich T "Rethinking American arbitration" (1987-1988) vol 63, No. 3, *Indiana LJ* 425-487 425.

¹¹⁴⁹ *Idem* 426. According to Stipanowich the modern era of American arbitration began in the 1920's with the passage of a New York state statute making agreements to arbitrate future contract disputes enforceable.

¹¹⁵⁰ *Ibid.* *Moses H Cone Memorial Hosp v Mercury Constr Corp*, 460 U.S. 1 (1983), *Southland Corp v Keating*, 465 U.S. 1 (1984), *Dean Witter R Shearson/American Express, Inc. v. McMahon*, 107 S. Ct. 2332 (1987). *Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985), *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.*, 473 U.S. 614 (1985).

¹¹⁵¹ Stipanowich (1987-1988) 427.

¹¹⁵² Born G (2001) *International commercial arbitration: Commentary and materials* (2ed) 355.

¹¹⁵³ Zhou J "Judicial intervention in international arbitration: A comparative study of the scope of The New York Convention in U.S. and Chinese courts" (June 2006) vol. 15 no. 2, 403-455 *Pacific Rim Law & Policy Journal* 414.

¹¹⁵⁴ *Ibid.*

¹¹⁵⁵ *Ibid.*

current legislation governing arbitration in the USA is the Federal Arbitration Act (FAA).¹¹⁵⁶

5.4.1 THE FEDERAL ARBITRATION ACT

The FAA is the most important piece of legislation to be enacted in the USA in the field of arbitration. The FAA created the legislative framework for the enforcement of arbitration agreements and arbitral awards in the USA.¹¹⁵⁷ This was observed in *Shearson/American Express v. McMahon*,¹¹⁵⁸ where the court contended that:

“The Arbitration Act establishes a federal policy favoring arbitration, requiring that the courts rigorously enforce arbitration agreements. This duty is not diminished when a party bound by an agreement raises a claim founded on statutory rights. The Act's mandate may be overridden by a contrary congressional command, but the burden is on the party opposing arbitration to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue. Such intent may be discernible from the statute's text, history, or purposes.”

Although there have been no significant changes made to the FAA since its inception in 1925, its application has been dramatically expanded.¹¹⁵⁹ The FAA grew from a mere remedy applied to arbitration cases to a definitively established substantive federal law, which is pre-emptive and binding on the States. It expresses a federal policy extending to issues, which go beyond its literal terms.¹¹⁶⁰ The FAA consists of three chapters: Chapter 1, sections 1 to 16, comprises of general provisions; chapter 2, sections 201 to 208, focuses on the implementation of the New York Convention; and Chapter 3, sections 301 to 307, deals with the enforcement of foreign awards under the Inter-American Convention on International Commercial Arbitration.¹¹⁶¹

The Act was passed in 1925 and it remains applicable, with some minor amendments, today. The Act was neglected when it was first promulgated, despite the legislation being delivered fully equipped to effectively deal with matters referred to arbitration. This may be attributed to the initial view that it only applied to matters

¹¹⁵⁶ Act 9 of 1925.

¹¹⁵⁷ Salomon C & De Villiers S (2014) *The United States Federal Arbitration Act: A powerful tool for enforcing arbitration agreements and arbitral awards* 1.

¹¹⁵⁸ 482 U.S. 220 (1987) 482.

¹¹⁵⁹ Haydock & Henderson 149.

¹¹⁶⁰ *Ibid.*

¹¹⁶¹ The Panama Convention.

heard by federal courts.¹¹⁶² However, subsequent interpretation of the FAA by the courts found that the FAA can also be applied to matters before state courts.¹¹⁶³ The particular aim of the FAA was to ensure that arbitral agreements in maritime and commercial transactions were “valid, irrevocable, and enforceable, subject to such grounds as exist at law or in equity for the revocation of any contract”.¹¹⁶⁴ The FAA empowers the courts to issue a stay of litigation where parties had a written agreement to arbitrate a dispute.¹¹⁶⁵

Section 4 of the FAA authorizes the courts to compel a party who refuses to submit a dispute to arbitration, despite the written agreement to do so, to honour the agreement and pursue arbitration. Appointment of an arbitrator is done in terms of the agreement between the parties.¹¹⁶⁶ If there is no such agreement, or parties fail to comply with the agreement, a party to the agreement may apply to the court to make the appointment.¹¹⁶⁷ The arbitral tribunal is empowered to subpoena any person whom it thinks may be of assistance to the proceedings to appear before it and to bring with him/ her any article which could be helpful to the tribunal in reaching a decision.¹¹⁶⁸ Any person who fails to comply with a summons may either be compelled in terms of section 7 or subject to penalties for contempt in the same manner as a witness who fails to comply with a subpoena to appear before a court.

Section 9 states that, by agreement between the parties, one of the parties may apply to the court for confirmation of the arbitral award. The section sets out the procedure to be followed. The effect of such confirmation is that the award will be treated as a court order and may be enforced in the same manner as a court judgement. Section 9 in the FAA entrenched the need for cooperation between the arbitration process and the court for the arbitration process to succeed.

¹¹⁶² *Erie Railroad v Tompkins* 304 U.S. 64 (1938).

¹¹⁶³ *Prima Paint Corp v Flood & Conklin Manufacturing Co* 388 U.S. 395 (1967).

¹¹⁶⁴ Salomon 1. Federal Arbitration Act, 1925 s 2 hereinafter referred to as (FAA).

¹¹⁶⁵ FAA s 3.

¹¹⁶⁶ *Idem* s 5.

¹¹⁶⁷ *Ibid.*

¹¹⁶⁸ *Idem* s 7.

The Act also made provisions for vacation of the arbitral award where necessary¹¹⁶⁹ and for modification or correction of an award upon application of a party to the arbitration¹¹⁷⁰. Section 16 outlines the circumstances under which an appeal may be lodged against an order made in terms of the FAA.

By including Chapter 2 in the FAA, the USA reaffirmed its commitment to supporting arbitration both domestically and internationally. This chapter deals with the implementation of the New York Convention. Section 201 of the FAA declared that: "The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter". Section 202 states that an arbitration agreement or award arising from any legal relationship, whether contractual or not, which is regarded as commercial, including those that fall under section 2, fall under the Convention. However, the section excludes those awards or arbitral agreements arising from such relationships where they are entirely between USA citizens. Be that as it may, the support of the legislature for arbitration is clear in that it may order that a dispute must be referred

¹¹⁶⁹ Arbitral awards are said to be final and binding, however the FAA does make a provision for a dissatisfied party to seek to have a court set aside the said award. The party who seek to apply for a vacation of an award needs to satisfy the provisions of section stated hereafter. The relevant section of the FAA reads as follows: "Section 10. Same; vacation; grounds; rehearing

- (a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration--
 - (1) where the award was procured by corruption, fraud, or undue means;
 - (2) where there was evident partiality or corruption in the arbitrators, or either of them;
 - (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
 - (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.
- (b) If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.
- (c) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5."

¹¹⁷⁰ Section 11:" (a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

- (b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.
- (c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties."

to arbitration in accordance with an agreement between the parties, at a place agreed upon by them irrespective of whether or not that place is within the USA.¹¹⁷¹

The court may also appoint arbitrators in terms of the agreement between the parties.¹¹⁷² A party who obtained an award in his /her favour under the Convention may apply to a court with jurisdiction to confirm the award against the other party.¹¹⁷³ The court will confirm the award unless there are grounds for refusal of recognition and enforcement of the award in terms of section 207.

Chapter 3 adopted the Inter-American Convention on International Commercial Arbitration and section 301 makes the Convention enforceable in the USA. Section 302 states that the provisions of sections 202, 203, 204, 205, and 207 of Chapter 2 are also relevant for Chapter 3.

The court having jurisdiction to decide a dispute may, in terms of section 303, order that the dispute be referred to arbitration in accordance with the agreement between the parties and at a place agreed upon by them, irrespective of whether or not it is within the USA. The court may also appoint arbitrators in accordance with the parties' agreement.¹¹⁷⁴ Recognition and enforcement of a foreign award made in a foreign state that acceded to the Inter-American Convention will be recognised and enforced based on reciprocity.¹¹⁷⁵

5.4.2 THE INFLUENCE OF THE FAA ON THE ARBITRATION LAW OF THE UNITED STATES

Prior to promulgation of the FAA, statutes in most states in the USA did not reflect a tendency to either promote arbitration or enforce arbitration awards.¹¹⁷⁶ In some States, courts were actively involved in the process leading up to and following on the arbitration process. For example, appointment of arbitrators was the responsibility of the courts in Maine and New Hampshire and the arbitrator's report

¹¹⁷¹ *Idem* s 206.

¹¹⁷² *Ibid.*

¹¹⁷³ *Idem* s 207.

¹¹⁷⁴ *Idem* 206.

¹¹⁷⁵ *Idem* s 304.

¹¹⁷⁶ Berger J & Sun C "The evolution of judicial review under the Federal Arbitration Act" (2009) vol. 5 *NYU Journal of law & Business* 745-792 757.

had to be filed with the court for acceptance, rejection or re-committal.¹¹⁷⁷ Connecticut, Maryland and Vermont restricted the matters that could be arbitrated.¹¹⁷⁸ Illinois provided a party aggrieved by an award, a right to appeal to the courts on matters of law.¹¹⁷⁹ This undermined the principle of party autonomy which demanded the courts' deference to the parties' decision to arbitrate their disputes. Some States, like North Carolina, Oklahoma, Rhode Island, South Carolina, and South Dakota did not even attempt to legislate arbitration.¹¹⁸⁰

States are obliged to ensure that arbitration agreements are treated in the same manner as other contracts.¹¹⁸¹ The FAA renders any State policy that places arbitration agreements on an unequal footing with other contracts, unlawful. Such unequal treatment would directly contradict the intention of Congress as articulated in the language of the FAA.¹¹⁸² Congress also made clear its intention that the FAA would pre-empt State law in certain areas.¹¹⁸³ This becomes clear when certain aspects of the New York State Arbitration Statute and the FAA are compared. In terms of the New York Statute, the courts play a greater role as gatekeeper than under the FAA.¹¹⁸⁴ The FAA expects that once the courts have established that an agreement to arbitrate exists and the matter is indeed suitable for arbitration, the parties must be referred to arbitration.¹¹⁸⁵ In terms of the FAA, initial issues, like allegations of waiver, delay, or defence[s] to the suitability for arbitration are believed to be matters to be disposed of by the arbitrators.¹¹⁸⁶ Conversely, the New York State Arbitration Statute reserves decisions of that nature for the courts.¹¹⁸⁷

In as far as New York State arbitration is concerned, State provisions that are in conflict with the FAA and its strong policy in favour of arbitration, will likely be pre-empted by the FAA.¹¹⁸⁸ The USA Supreme Court has highlighted the absence of

1177

Ibid.

1178

Ibid.

1179

Ibid.

1180

Ibid.

1181

Zhou 416.

1182

Ibid.

1183

Idem 415.

1184

Carter J & Fellas J (2010) *International commercial arbitration in New York* 12.

1185

Ibid.

1186

Idem 13.

1187

Ibid.

1188

Ibid.

express pre-emptive provisions or reflections of a congressional intent to apply the FAA to the entire field of arbitration in the USA.¹¹⁸⁹ However, the supremacy clause of the USA Constitution states that Federal law supersedes conflicting State law; as a result, neither Federal nor State courts may apply State statutes in conflict with the FAA.¹¹⁹⁰ Thus, the FAA does not automatically pre-empt all State arbitration laws. The USA Supreme Court has, however, applied the FAA to pre-empt only those State laws that undermine the FAA's objective of ensuring that arbitration agreements are enforced.¹¹⁹¹

Subsequent to the enactments of the FAA, a number of States revised their arbitration legislation and reformed it to reflect Federal policy.¹¹⁹² These States elected to adopt the whole or substantial portions of the Uniform Arbitration Act¹¹⁹³ with the effect that currently all State arbitration statutes reflect a modern policy in favour of the enforcement of arbitration agreements and awards.¹¹⁹⁴ The USA's progressive stance on private arbitration has set a global example and thus, their approach to adoption of UNCITRAL Model Law is also of some interest.

5.4.3 UNCITRAL MODEL LAW AND THE USA

UNCITRAL Model Law was drafted in 1985 by UNCITRAL and was amended in 2006.¹¹⁹⁵ The purpose of the Model Law was to harmonise the application of international commercial arbitration internationally. The USA has not, to date, adopted the Model Law at a federal level.¹¹⁹⁶ The fact that the USA has not adopted the Model Law does not prevent their courts from addressing disputes governed by foreign law that is based on the Model Law.¹¹⁹⁷ According to Strong:¹¹⁹⁸

¹¹⁸⁹ *Idem* 2.

¹¹⁹⁰ Zhou 415.

¹¹⁹¹ Carter 3.

¹¹⁹² Berger 757, Uniform Arbitration Act, 1955.

¹¹⁹³ *Ibid.*

¹¹⁹⁴ *Ibid.*

¹¹⁹⁵ United Nations Commission on International Trade Law, United Nations (2008) UNCITRAL Model Law on International Commercial Arbitration 1985: With amendments as adopted in 2006 23.

¹¹⁹⁶ Strong I (2012) *International commercial arbitration: A guide for U.S. Judges Federal Judicial Centre international litigation guide* 16.

¹¹⁹⁷ *Ibid.*

¹¹⁹⁸ *Ibid.* Strong uses the abbreviation MAL (Model Arbitration Law) to refer to UNCITRAL Model Law

“In such cases, judges should not be surprised to see parties introducing comparative legal research to show how a particular provision of the MAL has been interpreted in other jurisdictions, including the nation whose law governs the issue. UNCITRAL has specifically stated that the MAL was intended to be applied consistently across national borders, which means that parties may refer to international consensus on some matters.”

The Model Law has been adopted, either partially or in full, by sixty-five countries and seven USA States.¹¹⁹⁹ UNCITRAL Model Law is one of the most important instruments in the field of international commercial arbitration. Therefore, it is important that it should be adopted by more States as this will greatly assist in harmonising their arbitration practices.

5.4.4 THE NEW YORK CONVENTION AND THE USA

The New York Convention was intended to bring about international certainty regarding the recognition and enforcement of foreign arbitral awards by member States.¹²⁰⁰ The Federal courts furthered the objective of the Convention by interpreting its provisions liberally.¹²⁰¹ However, there is considerable confusion caused by the failure of the Federal courts to determine whether or not the defences contained in the FAA, available to challenge domestic arbitral awards, are also available to parties in relation to awards made under the Convention.¹²⁰² The confusion has the potential to undermine the efficiency of the Convention.¹²⁰³

The New York Convention plays a critical role in the success of international commercial arbitration in today’s global economy.¹²⁰⁴ The USA only acceded to the New York Convention in 1970 despite having had representation during the United Nations conference that produced the Convention in 1958.¹²⁰⁵ The delay in the USA acceding to the New York Convention was the result of the recommendation of its delegation to the 1958 proceedings. The delegation cited conflict between the implementation of the Convention and State anti-arbitration laws as one of the

1199

Ibid.

1200

Matlin R, “The Federal Courts and the enforcement of foreign arbitral awards”, (1984) vol 5, issue 1 *Pace LR* 151-184 151.

1201

Ibid.

1202

Ibid.

1203

Ibid.

1204

Wang T (2010) “Interpreting the New York Convention: A US perspective” in *AAA Handbook on International Arbitration Practice*, Chapter 27 323.

1205

Zhou 419.

reasons for its recommendation that the USA not accede to the New York Convention.¹²⁰⁶ The delegation also referred to the USA's lack of a sufficient domestic legal basis for accepting the Convention as a further reason.¹²⁰⁷

Eventually, the New York Convention was adopted in 1970¹²⁰⁸ and Chapter 2 of the FAA was established to facilitate the process of incorporating and implementing the New York Convention in the USA. The motivation for the USA's accession to the New York Convention was its determination to encourage the recognition and enforcement of commercial arbitration agreements in international contracts.¹²⁰⁹ Section 201¹²¹⁰ of the FAA formally applied the New York Convention to the USA. Section 202¹²¹¹ defines the type of arbitral awards to which the Convention applies. The abovementioned provision was introduced to address the shortcomings of Chapter 1 of the FAA in so far as its application to international agreements and awards is concerned.¹²¹²

Despite USA recognition of the essential role of international trade in the economy of the country, manifest by its promotion of policies favourable to private arbitration both domestically and internationally, there is a developing trend in the USA to permit recognition and enforcement under the New York Convention only where the

¹²⁰⁶ *Ibid.* The US delegation was of the view that there was a need for Congress to expand the FAA prior to the ratification of the New York Convention. Furthermore, the delegation deemed it necessary for more states to adopt their own arbitration laws and courts or legislatures to put measures in place to promote the enforceability of foreign arbitral awards. It was concluded that the abovementioned steps must be taken before a successful adoption of the New York Convention by the US could take place. See Drahozal C, "New York Convention and the American Federal System, The Symposium", (2012) vol 2012, *Journal of Dispute Resolution* 101-117 102.

¹²⁰⁷ *Ibid.*

¹²⁰⁸ Bray D & Bray H (2013) *Post-hearing issues in international arbitration* 309.

¹²⁰⁹ *Bergesen v. Joseph Muller Corp.*, 710 F.2d 928 at 932 (2d Cir. 1983). McLaughlin J & Genevro L "Enforcement of arbitral awards under the New York Convention - Practice in U.S. courts" (1986) vol 3, issue 2 *Int'l Tax & Bus. Law.* 249-272 251.

¹²¹⁰ The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, will be enforced in USA courts in accordance with this chapter.

¹²¹¹ "An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract or agreement described in section 2 of this title, falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States."

¹²¹² Drahozal (2012) 104.

court has personal jurisdiction over the award debtor or his or her property is located within the jurisdiction of the forum.¹²¹³ This approach was confirmed thus in *Frontera Resources* by Judge Walker:¹²¹⁴

“Generally, personal jurisdiction has both statutory and constitutional components. A court must have a statutory basis for asserting jurisdiction over a defendant, see *Grand River Enters. Six Nations, Ltd. v. Pryor*, 425 F.3d 158, 165 (2d Cir. 2005), and the Due Process Clause typically also demands that the defendant, if “not present within the territory of the forum,. . . have certain minimum contacts with it such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’”

The approach attracted substantial criticism from international arbitration specialists who argued that the requirement unnecessarily restricted the enforcement of valid arbitral awards in the USA in contradiction to the New York Convention.¹²¹⁵ A closer analysis of the challenge suggests that the enforcement difficulty could be the result of a three-year statute of limitations on actions to recognize and enforce New York Convention awards imposed by the FAA.¹²¹⁶ Furthermore, the due process clause of the Constitution is regarded by critics as contravening Article V of the New York Convention, which limits the grounds for non-recognition and enforcement to the narrow ones provided by the Convention.¹²¹⁷ However, the provisions of Article III of the New York Convention provide that contracting States should recognize and enforce arbitral awards subject to the procedural rules applicable in their jurisdiction. The view of the court in *Frontera* was that the grounds outlined in Article V of the New York Convention restrict the challenges that can be brought against the confirmation of an arbitral award but change “the fundamental requirement of jurisdiction over the party against whom enforcement is being sought”.¹²¹⁸

¹²¹³ Santans A “Difficulties enforcing New York Convention awards in the U.S. against non-U.S. defendants: Is the culprit jurisprudence on jurisdiction, the three-year time bar in the Federal Arbitration Act, or both?” (2009) <http://kluwerarbitrationblog.com/blog/2009/12/23/difficulties-enforcing-new-york-convention-awards-in-the-us-against-non-us-defendants-is-the-culprit-jurisprudence-on-jurisdiction-the-three-year-time-bar-in-the-federal-arbitration-act-or-bot/> (accessed on 04 Dec 2014) para 1.

¹²¹⁴ *Frontera Resources Azerbaijan Corporation v. State Oil Company of the Azerbaijan Republic*, 2009 WL 3067888 (2d Cir. 2009).

¹²¹⁵ Santans para 3.

¹²¹⁶ *Ibid.*

¹²¹⁷ *Ibid.*

¹²¹⁸ *Frontera* 9.

5.4.5 THE DIFFERENCE BETWEEN APPEAL AND REVIEW IN USA ARBITRATION

The difference between a review and an appeal in the USA arbitration law is a complex subject. Scrutiny of the language used by USA authors in the field of arbitration discloses a lack of a clear distinction between a review and an appeal. Other jurisdictions like South Africa, clearly differentiate between review and appeal. An appeal focuses on alleged errors of law or fact while judicial review focuses on alleged procedural irregularities during the decision making process.¹²¹⁹

The American Arbitration Association (AAA) introduced new, optional, arbitration appeal rules. These rules “provide for an appeal to an appellate arbitral panel that would apply a standard of review greater than that allowed by existing federal and state statutes”.¹²²⁰ The use of the words “appeal” and “review” in the same sentence illustrates that the words are used interchangeably, obliterating the distinction between these two legal terms. Furthermore, Reisberg also states on the topic of review, that:

“Traditionally, one of the advantages of arbitration has been finality. However, the benefits of finality may be outweighed in certain large, complex cases by the loss of the right to appellate review of an award on the merits.”

Reisberg’s discussion of the advantages and disadvantages of arbitration is concluded with his lament that it lacks any review of the award on the merits. This lament also reflects the confusion between review and appeal as review focuses on procedural irregularities and not the merits of the matter, these are the subject matter of an appeal process.

The confusion continues when the contribution to the discourse regarding the introduction of the AAA Optional Appellate Arbitration Rules by Rapp and Reich is discussed:¹²²¹

¹²¹⁹ Armstrong G Administrative justice and tribunals in South Africa: A Commonwealth comparison *Masters thesis Stellenbosch University* 32.

¹²²⁰ Rapp R & Reich A (2013) “AAA shakes up ADR with new rules to permit appeals of arbitration awards” <http://www.lexology.com/library/detail.aspx?g=1d466bd0-aeff-43e5-96b9-def338ff7baf> (accessed on 17 Dec 2014).

¹²²¹ *Ibid.*

“The AAA *Optional Appellate Arbitration Rules*, effective November 1, 2013, allow parties to include, as part of their contractual arbitration provisions, a further provision that the decision of arbitrators may be appealed to a newly established AAA Appeal Tribunal which, specifically, may review those decisions based upon alleged errors of law that are material and prejudicial to a party, and determinations of fact that are “clearly erroneous.”

The abovementioned discussion regarding the indiscriminate use of the words “review” and “appeal” of the arbitral award in the USA was undertaken to caution readers that the interchangeable use of these words might cause confusion as to exactly what the arbitral law in the USA provides. It is therefore, prudent to ascertain the context in which the word is used.

5.4.6 APPEAL IN TERMS OF THE AMERICAN ARBITRATION ASSOCIATION (AAA) RULES

Parties to a dispute often select the AAA¹²²² as the forum to hear and determine their disputes in accordance with its rules. Although a fundamental principle of arbitration has always been that the award is final and binding, subject to narrow grounds for judicial review, AAA rules permit an optional arbitration appeal process on just grounds.¹²²³ This optional appeal process may be welcomed by parties involved in transactions involving large amounts of money to guard against errors of fact or law on the part of the arbitrator.

The appeal rules permit an appeal to the newly established AAA Appeal Tribunal which will review the decision on questions of law or fact which appear to be material and either prejudicial to the parties or clearly erroneous.¹²²⁴ The rules provide comprehensive guidance on issues concerning the appointment of the tribunal. The appeal process is only available by specific agreement between the parties. This implies that a contractual agreement to arbitrate, without a specific inclusion of the

¹²²² “The American Arbitration Association (AAA), is a not-for-profit organization with offices throughout the US. AAA has a long history and experience in the field of alternative dispute resolution, providing services to individuals and organizations who wish to resolve conflicts out of court.” See https://www.adr.org/aaa/faces/s/about?_afLoop=490590144546616&_afWindowMode=0&_afWindowId=h5txng382_1#%40%3F_afWindowId%3Dh5txng3821%26_afLoop%3D490590144546616%26_afWindowMode%3D0%26_adf.ctrl-state%3Dh5txng382_55 (accessed on 26 Jul 2015).

¹²²³ Rapp & Reich para 3.

¹²²⁴ *Ibid.* See rule A-10 which reads: A party may appeal on the grounds that the Underlying Award is based upon:
(1) an error of law that is material and prejudicial; or
(2) determinations of fact that are clearly erroneous.

appeal process will not suffice to permit such an appeal. The option of an appeal facilitated by the AAA is not to be confused with the process employed by the courts in dealing with challenges to arbitral awards. The courts are expected to respect the decision of the tribunal irrespective of whether the award emanates from the initial award or is the outcome of an appeal process in terms of the AAA optional process. This particular option of an appeal to the appeal tribunal may be a solution to the argument that the lack of an appeal process in arbitration amounts to a denial of access to justice.

5.4.7 PROTECTION OF THE RIGHTS OF THE CONSUMERS WHERE ARBITRATION IS RESORTED TO

The Americans have been critical of arbitration because of its potential to limit peoples' rights to judicial redress.¹²²⁵ Critics of arbitration hold the view that:¹²²⁶

“[t]he reality that the average consumer frequently loses his/her constitutional rights and right of access to the court when he/she buys a car, household appliance, insurance policy, receives medical attention or gets a job rises as a putrid odor which is overwhelming to the body politic.”

Opposition to arbitration involving consumers in the USA has become an everyday struggle, particularly because arbitration is regarded as denying consumers their day in court.¹²²⁷ The need to protect parties in an unequal bargaining position has been of concern to courts for some time. Feinberg J in *American Safety* held that:¹²²⁸

“....commercial arbitrators are frequently men drawn for their business expertise, it hardly seems proper for them to determine these issues of great public interest. As Judge Clark said concerning the analogous situation in *Wilko v. Swan*, 201 F. 2d at 445 (dissenting opinion): Adjudication by such arbitrators may, indeed, provide a business solution of the problem if that is the real desire; but it is surely not a way of assuring the customer that objective and sympathetic consideration of his claim....”

¹²²⁵ Boyd R & Rubenfield A “Pre-dispute mandatory arbitration agreements and employment contracts: Examining the implications for statutory discrimination claims” (2011) vol. XXI *Southern LJ* 151-176 154.

¹²²⁶ Brunet E, Speidel R, Sternlight J & Ware S (1999) *Arbitration law in America: A critical assessment in re Knepp*, 229 B.R. 821 (Bankr. N.D. Ala. 1999).

¹²²⁷ Marrow P “Determining if mandatory arbitration is “fair”: Asymmetrically held information and the role of mandatory arbitration in modulating uninsurable contract risks” (2009) vol 54 *New York Law School LR* 187-239 188.

¹²²⁸ *American Safety Equipment Corp v. J. P. Macguire & CO., Inc., a Delaware Corporation*, 391 F.2d 821 (1968) 827.

Ongoing criticism directed towards arbitration involving consumers drew the attention of policymakers in the USA to the need to protect consumers against exploitation by big companies, which are taking advantage of privatising the dispute resolution process through arbitration.¹²²⁹ This led to efforts to enact the Arbitration Fairness Act which will serve to protect consumers.¹²³⁰ This effort serves to confirm that the potential unfairness of the process towards consumers has been acknowledged and that efforts to minimise such prejudice are being made. It should be noted though, that disapproval of arbitration where consumers are involved is not universal. The benefits of arbitration where consumers are involved are, *inter alia*, reduced prices of goods for consumers and increased access to justice for commendable claims.¹²³¹ However, the challenge of arbitration where consumers are involved as a party to the agreement is that it has the potential to limit the right of the consumer to judicial redress. As Beasley *et al* explain, the Constitutional guarantee of a trial by jury is a right that Americans value and no party should be compelled to enter into an arbitration agreement as a result of a power imbalance between the parties.¹²³²

Despite the observation by Beasley *et al* above, the American Court, in *Am. Express Co. v. Italian Colors Rest*¹²³³ remained unconvinced by the argument that an arbitral agreement between merchants and the *American Express* company, which excluded class actions against the company, effectively denied parties their right to pursue a statutory remedy. The respondents raised the fact that it would be more cost effective to pursue an action for violation of anti-trust law collectively than to do so individually in their application to have the waiver of class action declared unenforceable.¹²³⁴ The respondents drew the attention of the court to the reality that allowing waiver of class action entails prohibitive costs for litigants which will effectively deny them the right to sue.¹²³⁵ The court held that the fact that the only

¹²²⁹ Bates D “Consumer’s dream or pandora’s box: Is arbitration a viable option for cross-border consumer disputes?” 2003 vol 27, issue 2 *Fordham International LJ* 823-898 827.

¹²³⁰ National Association of Consumer Arbitration “The Arbitration Fairness Act of 2013: Protect consumers & employees from forced <https://www.nclc.org/images/pdf/arbitration/ib-arbitration-fairness-act-nov-2013.pdf> (accessed on 29 June 2016).

¹²³¹ Ware S “Arbitration under assault trial lawyers lead the charge” *Policy Analysis* no 433 April 18, 2002 2.

¹²³² Beasley J, Crow A, Portis M & Miles P “The evils of binding arbitration in consumer contracts” (2000) *Arkansas Trial Lawyers Association* 1-12 8 (hereafter Beasley *et al*).

¹²³³ *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (U.S. 2013).

¹²³⁴ *Idem* 2.

¹²³⁵ *Ibid.*

means available to prove a statutory right is excessively costly does not eliminate the right to make use of that remedy.¹²³⁶

5.4.8 THE IMPACT OF THE CONSTITUTION ON ARBITRATION IN THE USA

According to Strong “....the intersection between arbitration and constitutional law is an important topic deserving of serious scholarly attention”.¹²³⁷ Strong thus confirms the relationship between arbitration and the Constitution. It is my view that the peaceful co-existence of the Constitution and arbitration depends on the necessary alignment of arbitration with constitutional imperatives. One of the primary objectives of this thesis is to establish whether resort to alternative dispute resolution mechanisms like arbitration, potentially contravene the constitutional right of parties to access the courts.

The critical nature of the right of access to the court was underscored by Boyd and Rubenfield who refers to Amendment VII of the Bill of Rights of the USA Constitution, which states that:¹²³⁸

"[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

This right was highly regarded in the USA and the seriousness with which it was taken can be observed from contention by Boyd and Rubenfield that:¹²³⁹

“These few words, although simple in purpose, were articulated with the most fervent and impassioned of ideals. They voiced a concern and a requirement of the founding fathers that justice through a jury trial system become and remain a mainstay of the American judicial system. Furthermore, it could be implied and prudently reasoned that the founders intended that a jury trial system be the most ardent tribunal for the resolution of legal disputes. However, it appears that the jury trial system may have been replaced with an alternative dispute resolution process, and that this other process appears to be strongly entrenched in today’s current business legal fabric.”

¹²³⁶

Idem 7.

¹²³⁷

Strong S “Constitutional conundrums” (2013) vol 15, issue 41, *Cardozo Journal of Conflict Resolution* 1-50 42.

¹²³⁸

Boyd and Rubenfield 151

¹²³⁹

Idem 154.

The right to a jury trial that was elevated to the status of a constitutional right in the USA,¹²⁴⁰ played a vital role in ensuring due process. This right was regarded as the cornerstone of the American legal system.¹²⁴¹ The right to jury trial was considered to be a significant element of American democracy.¹²⁴² Trial by jury was favoured to mitigate the danger of providing power to one individual being the Judge. The significant role it plays emphasises can be reflected on the following statement by the National Judicial College, which states that:¹²⁴³

“2. The jury trial is a vital part of America’s system of checks and balances. Checks and balances” means that the judicial branch of government is equal to the other two branches (executive and legislative) and the courts can overturn laws or acts of government that violate constitutional rights. Our system of checks and balances requires a strong judicial branch. A strong judicial branch requires a healthy jury trial option. Jury service is your chance to have a voice in the judicial branch of government.

3. The founding fathers included jury trials in the constitution because jury trials prevent tyranny.

The definition of tyranny is oppressive power exerted by the government. Tyranny also exists when absolute power is vested in a single ruler. Jury trials are the opposite of tyranny because the citizens on the jury are given the absolute power to make the final decision.”

The introduction of alternative dispute resolution methods directly influenced what the jury trial intended to achieve, namely, due process. Rutledge refers to the fourteenth amendment to the USA Constitution which professes due process.¹²⁴⁴ Due process is defined as “[t]he principle that an individual cannot be deprived of life, liberty, or property without appropriate legal procedures and safeguards”.¹²⁴⁵ The court in *Perpetual Securities*¹²⁴⁶ considered whether private arbitration infringes the party’s right to due process of the law. The argument was raised by *Perpetual*

¹²⁴⁰ US Constitution, Amendment VII of the Bill of Rights.

¹²⁴¹ Liegner C “A Modern look at the right to a civil jury trial under the Maine Constitution” *Maine L R* (2017) vol 66, issue 1, 169-198 172.

¹²⁴² *Ibid.*

¹²⁴³ The National judicial college why jury trials are important to a democratic society <http://www.judges.org/uploads/jury/Why-Jury-Trials-are-Important-to-a-Democratic-Society.pdf> (accessed on 23 Jul 2016).

¹²⁴⁴ Rutledge P (2013) *Arbitration and the Constitution* 127. Article XIV of the US Constitution reads thus: “Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws”.

¹²⁴⁵ See Dictionary.com <http://www.dictionary.com/browse/due-process-of-law> (accessed on 23 Jul 2016).

¹²⁴⁶ *Perpetual Securities, Inc v Tang* 290 F.3d 132, 138 (2d Cir. 2002).

Securities as a ground for requesting the Federal court to reconsider and set aside the award for violation of due process. The court held that: “In order for this argument to be colorable, Perpetual must show that NASD’s conduct constituted state action; otherwise, there is no constitutional violation”.¹²⁴⁷

In the process of rejecting the argument that arbitration infringes the parties’ right to due process of the law, the court in *Perpetual Securities*, lost sight of the impact arbitration has on the parties. The party who loses during arbitral proceedings stands to lose her belongings either in the form of money or, where she is unable to fulfil the award, by the attachment of property where the award was made an order of the court.

5.4.9 DEPARTURE FROM THE INITIAL BENEFITS OF ARBITRATION IN THE USA

Arbitration was favoured in the USA for speed, cost effectiveness and privacy.¹²⁴⁸ The process was also hailed for its finality and the binding status of the award.¹²⁴⁹ However, there is a concern that the process no longer offers those benefits.¹²⁵⁰ This growing concern was highlighted by Drahozal and Wittrock who states:¹²⁵¹

“Ten to [twenty] years ago,” one commentator writes, “arbitration was the proverbial fair-haired kid. It was touted as being cheaper, faster, and less confrontational than litigation.” Today, the child seems to have grown into a troubled teenager. Reports of dissatisfaction with arbitration—not only by consumers and employees (and their advocates), but also by businesses and their attorneys—appear with increasing frequency. One recent article in the legal trade press asserts that “arbitration may be losing some of its luster.”

Drahozal and Wittrock quoted Rupert Barkoff, a franchising lawyer, who highlighted the growing scepticism of the business community regarding arbitration.¹²⁵² Barkoff emphasised that privacy can probably still be achieved through arbitration; the same cannot be said about finality, speed or cost reduction. The use of arbitration in the

¹²⁴⁷ *Idem* para 1B.

¹²⁴⁸ Sussman & Wilkinson 1.

¹²⁴⁹ *Idem* 4.

¹²⁵⁰ Park W “Arbitrators and accuracy” (2010), vol 1, no. 1 *Journal of International Dispute Settlement* 25–53 27.

¹²⁵¹ Drahozal C & Wittrock Q “Is there a flight from arbitration” (2008) vol 37, *Hofstra L R* 71-116 71.

¹²⁵² *Idem* 72. Samra expressed the view that arbitration has lost some of its benefits along the way in Samra H “Is arbitration all it’s cracked up to be?” *ABA section of litigation 2012 Section Annual Conference April 18-20, 2012*.

USA has increased tremendously in recent years.¹²⁵³ Its scope has also expanded.¹²⁵⁴ As a result, the process has become increasingly similar to litigation, with prolonged hearings occasioned by the need to achieve procedural justice.¹²⁵⁵ The lengthier nature of such proceedings undermines the initial purpose of arbitration and has financial implications for the parties. It can thus be concluded that arbitration in the USA no longer offers its earlier benefits.

5.5 ARBITRATION AS A DISPUTE RESOLUTION MECHANISM IN SPAIN

As in India, the concept of arbitration has long been known in Spain.¹²⁵⁶ Arbitrators in Spain may decide a dispute according to law or equity.¹²⁵⁷ According to Cremades:¹²⁵⁸

“In arbitration at law, the arbitrators must be practicing attorneys, proceedings are in accordance with the procedure set forth in the Private Arbitration Act, and the arbitrators’ decision must be based on substantive law. In arbitration in equity, the arbitrators need not be attorneys, the proceedings are not subject to any particular procedural rules, and the decision need only be based on the knowledge and understanding of the arbitrator.”

Spain arbitration law went through a reform on various occasions which was facilitated by the introduction of the 1953 and the 1988 Spanish arbitration Acts respectively. These statutes even though they had certain contribution to the development of arbitration in Spain, had fundamental shortcomings which demanded some legislative intervention.¹²⁵⁹ The 2003 Arbitration Act which followed, sought to position Spain as a centre of choice for international commercial arbitration.

5.5.1 SPANISH ARBITRATION ACT 60 OF 2003

The current legislation governing arbitration in Spain is the Arbitration Act 60 of 2003. The 2003 Arbitration Act is formulated in such a way that it will promote the

¹²⁵³ Stipanowich (2010) 5.

¹²⁵⁴ *Idem* 6.

¹²⁵⁵ *Ibid.*

¹²⁵⁶ Mota E “Recognition and enforcement of foreign arbitration awards in Spain and public policy https://www.academia.edu/12503807/Recognition_and_Enforcement_of_Foreign_Arbitration_Awards_in_Spain_and_Public_Policy” (accessed on 25 Jul 2016) 1.

¹²⁵⁷ Campbell D & Meek S, (2001) *Comparative law Yearbook of international business* 2001 67.

¹²⁵⁸ Cremades B & Cabiedes E (1989) *Litigating in Spain* 491.

¹²⁵⁹ See Ch 2 of this thesis.

use of both domestic and international arbitration.¹²⁶⁰ The 2003 Arbitration Act was passed under a completely different social and economic dispensation than the 1953 and 1988 Acts,¹²⁶¹ although it was built on a firm foundation created by the 1988 Act.

Arbitration in Spain experienced significant development in 1988 and the country is now actively involved in international trade and investment,¹²⁶² requiring that parties to commercial disputes be afforded a mechanism to resolve their disputes expeditiously through a just and equitable arbitration process.¹²⁶³ Cremades and Cairns highlighted that the 2003 Act is strongly rooted in the 1985 text of UNCITRAL Model Law on International Commercial Arbitration, although with some notable differences.¹²⁶⁴ It appears that Spain, in its quest to achieve its goal of positioning itself as the seat of choice in International Arbitration, firmly aligned the Arbitration Act 2003 with UNCITRAL Model Law to such an extent that the wording of the Act is almost identical to the original wording of UNCITRAL Model Law.¹²⁶⁵ The Act was praised for its accessibility and ease of application¹²⁶⁶ and its enactment was welcomed by practitioners, academics and other interested parties who formed the Spanish Arbitration Club in response to its enactment.¹²⁶⁷ The primary aim of the club was to work together in promoting the legislative ambition to position Spain as a

¹²⁶⁰ Volken P, Bonomi A & Sarcevic P (2009) *A Yearbook of private international law* 95.

¹²⁶¹ *Idem* 94.

¹²⁶² *Idem* 95. Cremades & Casas 123.

¹²⁶³ Uria & Menendez (2012) *Spain company laws and regulations handbook* 254.

¹²⁶⁴ Cremades B & Cairns D "Spain's consolidated arbitration legislation" (2012) Suppl 69, *Binder V International handbook on commercial arbitration* 1. The differences are as follows:

"(1) the express provision in the Spanish Law for testamentary and corporate arbitration (Art. 10 and 11bis and 11ter Law);

(2) in default of agreement of the parties the tribunal shall consist of a sole arbitrator (Art. 12 Law);

(3) the requirement that a sole arbitrator, or at least one arbitrator in a tribunal of three or more members, be a "jurist" (Art. 15(1) Law);

(4) the appointment of arbitrators in a multi-party arbitration (Art. 15(2)(b) Law);

(5) the deferral of a judicial determination of the validity of a challenge to an arbitrator to after the issue of the award (Art. 18(3) Law); (6) the professional responsibility of arbitrators and institutions and the mandatory requirement of insurance (Art. 21 Law);

(7) express recognition of the confidentiality of arbitration (Art. 24 Law);

(8) the language of the arbitration (Art. 28 Law, as amended in 2011);

(9) the time limit for the issue of an arbitral award (Art. 37(2) Law);

(10) the express provision for the destruction of documentation on the termination of the arbitration (Art. 38(3) Law);

(11) the distinction between foreign and domestic arbitral awards for enforcement purposes, with special provision for the recognition of foreign awards (Art. 46 Law)."

¹²⁶⁵ Volken & Bonomi 95.

¹²⁶⁶ Hamilton C & Torres G "Spanish code of arbitration practice now in accord with international doctrine" (2009) vol 23, no 2, *The Centre for Transnational Arbitration* 3-5 3.

¹²⁶⁷ *Ibid.*

preferred seat of international arbitration.¹²⁶⁸ The first paragraph of the preamble to the Spanish Arbitration Act¹²⁶⁹ reaffirms that:

“Spain has always been sensitive to the calls for harmonising legal provisions on arbitration, in particular in connection with international trade, to further the use of this tool and the consistency of criteria in its application. That attitude is informed by the conviction that greater uniformity in the laws governing arbitration will enhance its effectiveness as a means of settling disputes.”

The preamble further captured the intention of the Spanish to adopt the Model Law and highlights the critical role played by the Model Law in commercial arbitrations involving international trade relations to which Spanish citizens may be party. It concedes that:

“The Model Law strikes a subtle compromise between continental European and Anglo-Saxon legal tradition, the outcome of an exhaustive exercise in comparative law. Consequently, its terms are not wholly in keeping with the traditional canons of Spanish law, but they do facilitate application of the law by actors working out of economic areas where Spain maintains active and growing commercial relations. The greater certainty about the content of the legal provisions on arbitration in Spain acquired by economic agents in those areas will favour and even encourage the conclusion of arbitration agreements that define this country as the place of arbitration. The Model Law is more readily comprehensible for international traders, accustomed to flexible rules that are readily adaptable to the particularities of specific cases arising in a wide diversity of scenarios.”

The legislation departed fundamentally from traditional Spanish arbitration legislation and demonstrated the legislator’s willingness to make sacrifices to position Spain as a centre for international arbitration.¹²⁷⁰ The Act eliminated restrictions on party autonomy introduced by the 1988 Act, which adversely affected the success of the Act and contributed to Spain’s lack of popularity as a seat for International Arbitration.¹²⁷¹

Parties to a domestic commercial dispute in Spain may only refer the matter for arbitration if there is prior written agreement which clearly states their intention to submit their dispute to arbitration.¹²⁷² The written agreement may apply to future or existing disputes and it may form part of a contract or be an independent

¹²⁶⁸

Ibid.

¹²⁶⁹

Act 60 Of 2003.

¹²⁷⁰

Mancha 124.

¹²⁷¹

American Arbitration Association (2006) *ADR and the law* (20 ed) 214.

¹²⁷²

2003 Act s 9 (1)(2), IBP Inc (2016) *Spain investment and business guide volume 1 strategic and practical information* 36.

agreement.¹²⁷³ The validity of the arbitration agreement may be confirmed even without a written agreement if it is alleged by one party and not denied by the other.¹²⁷⁴

The scope of application of the 2003 Act is set out in section 1. The section states that the Act is applicable to both domestic and international arbitration conducted in Spain. Section 1(1) states further, that the Act will be applied subject to the provisions of other treaties to which Spain may be a party or to laws with special provisions on arbitration. In every law of general application there are exceptions and section 1(2) provides exceptions to section 1(1) of the 2003 Act. According to section 2(1), arbitration may be invoked to resolve all disputes that may be freely disposed of at law. It is further stated in section 2(2), that in an international arbitration that involves a State or a state-owned company as a party, such party shall not raise the prerogatives of its own law in a bid to circumvent compliance with the award.

Section 3 offers a definition of international Commercial Arbitration that was significantly influenced by the definition in section 1(3) of the Model Law. Section 4 provides guidance on where to find mandatory and non-mandatory provisions of the Act. Section 5 states that the agreement to arbitrate must be in writing. It is stipulated in section 6 that, in the event that a party becomes aware of non-compliance with any provision of the arbitration law or any requirement of the arbitration agreement, and fails to raise an objection within a prescribed period, such party will be deemed to have waived their right to legally challenge the non-compliance.

Section 7 of the 2003 Act also accords with the provisions of the Model Law in that no court may intervene in matters governed by the Act, save where the Act authorises such intervention. Section 8 contains a guideline on which courts have jurisdiction to supervise or assist in arbitration matters and section 9 provides for arbitration agreements and their effects.

Section 9(1) regulates the forms, which arbitration agreements may take. These can either be contained in a clause in a contract or in a separate agreement. Section 9(2) states that the validity of those agreements included as a clause in a standard-form

¹²⁷³

Ibid.

¹²⁷⁴

2003 Act s 9 (5).

contract will be governed by the rules applicable to such contracts. The agreement must be in writing and signed by both parties.¹²⁷⁵ Section 9(6) stipulates that where the envisaged arbitration is international, the matter's suitability for arbitration may be determined either according to Spanish law or the law of any State to which the parties have submitted.¹²⁷⁶ Section 9(10) makes provision for the inclusion of an arbitration clause in a will as a dispute resolution mechanism to determine any dispute that may arise between beneficiaries during the administration of the estate.

Section 11 declares the binding status of an arbitration agreement and further provides guidance on how the court should deal with matters involving an arbitration agreement where one of the parties ignored the agreement in favour of litigation. Parties may agree on the number of arbitrators to be appointed¹²⁷⁷ and section 13 empowers the parties to stipulate the required qualifications that arbitrators to their dispute must possess. Section 14 confers a discretion on parties to choose to entrust the determination of the arbitration process and appointment of arbitrators to an arbitral institution. Parties may appoint arbitrators, subject to certain requirements established in the governing legislation. Section 15 requires that at least one of the arbitrators chosen by the parties must be an attorney. If there is a single arbitrator and arbitration is not to be decided in equity, the sole arbitrator must be an attorney. A person nominated as arbitrator must be notified of his/ her nomination and has a period of fifteen days from such notification within which to indicate her willingness or otherwise to act in that capacity.¹²⁷⁸

An arbitrator must remain independent and impartial throughout the arbitration.¹²⁷⁹ She must disclose any potential conflict of interests.¹²⁸⁰ She may be challenged at any stage of the proceedings¹²⁸¹ where, after appointment, parties become aware of circumstances that raise doubts as to his/ her independence and impartiality.¹²⁸²

¹²⁷⁵ *Idem* s 9 (3).

¹²⁷⁶ Mancha 128.

¹²⁷⁷ 2003 Act s 12.

¹²⁷⁸ *Idem* s 16.

¹²⁷⁹ *Idem* s 17 (1).

¹²⁸⁰ *Ibid.*

¹²⁸¹ *Idem* s 18.

¹²⁸² *Ibid.*

The arbitrator also has a duty to protect the integrity of the award in all possible ways by abiding by the terms of the contract.¹²⁸³

Section 22 entrenches the doctrine of separability to the extent necessary to give effect to competence-competence. The former doctrine provides that, where the arbitration agreement is contained in another contract, it remains entirely separate from the underlying contract.¹²⁸⁴ In effect, this means that if the underlying contract is declared null and void, this will by itself not affect the validity of the arbitration agreement.

Unless otherwise agreed by the parties, the arbitrator is empowered by the provisions of section 23 to order interim measures on request by one of the parties. Section 24 promotes the natural law principle of *audi alteram partem*. This section requires that parties to the arbitration be provided with a full opportunity to present their case and that they receive fair and equal treatment.

The award will be issued subject to the provisions of section 37 that outlines the manner and period in which the award should be delivered. The grounds for setting aside the award under section 41 of the 2003 Act are as follows:

- “1. An arbitral award may be set aside only if the party making the application alleges and proves:
 - (a) That the arbitration agreement does not exist or is not valid.
 - (b) That he was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case.
 - (c) That the arbitrators have decided questions not submitted to their decision.
 - (d) That the appointment of the arbitrators or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law.
 - (e) That the arbitrators have decided questions not capable of settlement by arbitration.
 - (f) That the award is in conflict with public policy.”

¹²⁸³ 2003 Act s 34 (3).

¹²⁸⁴ Tripathi S & Verma P “The effect of invalidity of underlying contract on the arbitration clause: A critique on the doctrine of separability in Arbitration” (2011) *The Practical Lawyer* October S-22.

The grounds for setting aside of the award in terms of section 41 stipulated above corresponds with the provisions of article 34 of the Model Law. However, the only distinction between them is that the grounds under the Spanish law can only be raised on the application of the party, whereas under the Model Law the court can raise them *mero motu*.

Finally, section 44 states that during the enforcement stage, the provisions of the Civil Procedure Law and title VIII of the 2003 Arbitration Act should be observed.

5.5.2 CONSUMER PROTECTION AND ARBITRATION IN SPAIN

Spain recognises the need to protect consumers from exploitation by large corporations. Consumer rights were taken seriously, to the extent that they were elevated to a constitutional right by inserting a provision which protects them. The Spanish Constitution¹²⁸⁵ provides for consumer rights in the following terms:¹²⁸⁶

- “1. The public authorities shall guarantee the protection of consumers and users and shall, by means of effective measures, safeguard their safety, health and legitimate economic interests.
2. The public authorities shall promote the information and education of consumers and users, foster their organizations, and hear them on those matters affecting their members, under the terms established by law.
3. Within the framework of the provisions of the foregoing paragraphs, the law shall regulate domestic trade and the system of licensing commercial products.”

The Spanish enacted General Law 26/1984 to give effect to the provisions of the abovementioned article of the Constitution. Article 10a(1) of General Law 26/1994 provides that:¹²⁸⁷

“[a]ll those terms not individually negotiated which, contrary to the requirement of good faith, cause a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer, shall be regarded as unfair terms.”¹²⁸⁸

¹²⁸⁵ Spanish Constitution, 1978.

¹²⁸⁶ *Idem* 51.

¹²⁸⁷ Art 10a(1) of General Law 26/1994 was added by Law 7/98.

¹²⁸⁸ Reifner U *et al* (2012) *Usury laws: A legal and economic evaluation of interest rate restrictions in the European Union* 47.

A similar provision to article 10a(1) was also included in EU Council Directive 93/13 which Spain adapted into an integral part of its Consumer Law 7/98. The Directive was converted into national law by the Spanish.¹²⁸⁹ Spain, which joined the European Economic Community (ECC) in 1988,¹²⁹⁰ aligned itself with the ECC Council Directive 93/13, which regulates unfair terms in consumer contracts.¹²⁹¹ On the strength of its alignment with directive 93/13, Spain referred the matter of *Elisa María Mostaza Claro*¹²⁹² to the European Court of Justice. The issue to be determined was whether an arbitral award which arose from an arbitration clause that formed part of a standard-form contract, can be annulled based on inequality of bargaining power between the consumer and a large corporation. The court held that:¹²⁹³

“The system of protection introduced by the Directive is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge. This leads to the consumer agreeing to terms drawn up in advance by the seller or supplier without being able to influence the content of those terms...”

The court concluded that a national court faced with an application for annulment of such an award is empowered to determine whether the arbitral agreement is void and to annul the award where there is evidence that the term of the agreement was unfair. The court has a discretion to make this finding irrespective of whether or not the consumer asserted this in the pleadings.¹²⁹⁴

Opposition to arbitration on the basis that it is potentially unconstitutional and particularly prejudicial to consumers has been growing rapidly globally.¹²⁹⁵ This opposition has gained ground in numerous jurisdictions, including Spain. Those who have been outspoken about their opposition expressed concern that arbitration could

¹²⁸⁹ Kidner F *et al*, (2014) *Making Europe: The story of the West* (2ed) 918.

¹²⁹⁰ *Ibid*.

¹²⁹¹ *Ibid*. Relevant sections of the directive were discussed earlier under para 5.3.

¹²⁹² *Elisa María Mostaza Claro v Centro Móvil Milenium SL*, JUDGMENT OF 26. 10. 2006 — CASE C-168/05.

¹²⁹³ *Idem* para 25.

¹²⁹⁴ *Idem* para 40.

¹²⁹⁵ Noyes 579; Jean R. Sternlight, “Rethinking the Constitutionality of the Supreme Court’s preference for binding arbitration: A fresh assessment of jury trial, separation of powers, and due process concerns”, (1997) vol 72 no 1, *Tulane L R* 1-100; Brunet *et al* 140, Cortes P (2016) *The new regulatory framework for consumer dispute resolution* 256, Bělohávek A & Rozehnalova N (2011) *Czech and Central European Yearbook of Arbitration 2011: The Relationship between Constitutional values, Human rights and arbitration* 188.

potentially involve a significant limitation on a consumer's constitutional right to approach the courts for relief.¹²⁹⁶ This is particularly concerning where the arbitration clause forms part of a standard-form contract prepared by one contracting party who was in a stronger position than the consumer who was, in turn, unable to influence the contract.¹²⁹⁷ This inequality in the bargaining position of the contracting parties may support the view that the consumer may not have entered into the agreement to arbitrate on an entirely voluntary basis and that he/ she may simply have viewed the agreement as a necessary cost of doing the transaction.¹²⁹⁸

5.5.3 CONSTITUTIONALITY OF ARBITRATION IN SPAIN

The Spanish Constitution is one of very few constitutions that contain a specific article aimed at protecting consumer rights.¹²⁹⁹ Furthermore, article 24 of the Constitution also entrenches the right of any person to approach the court when necessary to protect her interests. Article 24 states that:

“1. All persons have the right to obtain effective protection from the judges and the courts in the exercise of their rights and legitimate interests, and in no case may there be a lack of defense.

2. Likewise, all have the right to the ordinary judge predetermined by law, to the defence and assistance of a lawyer; to be informed of the charges brought against them; to a public trial without undue delays and with full guarantees; to the use of evidence appropriate to their defence; to not make self-incriminating statements; to not declare themselves guilty; and to be presumed innocent.”

Where consumers are unfairly deprived of their right of access to the courts as a consequence of the incorporation of an arbitration clause in a standard-form contract, the contents of which were never properly explained to them, they are effectively prejudiced.¹³⁰⁰ Such denial of their rights may well be found to be unconstitutional.

1296

Ibid.

1297

Sein 54.

1298

Ibid.

1299

Spanish Constitution s 51.

1300

Barkhuizen v Napier 2007 (5) SA 323 (CC) paras 135-136.

5.5.4 DEPARTURE FROM THE INITIAL BENEFITS OF ARBITRATION IN SPAIN

Business' choice of arbitration as a mode of dispute resolution was motivated by the potential benefits it offered to the parties.¹³⁰¹ These benefits included reduced costs, efficiency, privacy, flexibility and the informality of the process.¹³⁰² As discussed above in the context of other jurisdictions, there is growing concern that these benefits are no longer achievable given the manner in which arbitration is currently practiced. Spain is not exempt from this concern. Electing civil or commercial courts to resolve a dispute in Spain is a financially wiser decision than submitting a dispute to arbitrators and arbitral institutions that charge exorbitant fees.¹³⁰³ This issue was raised, inter alia, by Hernandez-Mora and Segovia who pointed out that one of the reasons why arbitration is not growing in Spain, despite the 2003 Spanish Arbitration Act, is the high costs associated with it.¹³⁰⁴ Some still argue, however, that arbitration remains preferable to litigation in commercial cases in particular, if the goal is to finalise the matter speedily and at a reasonable cost, whilst enjoying less formality.¹³⁰⁵ Jurisprudence on this issue is scarce.

5.6 CONCLUSION

In this chapter, a brief overview of foreign arbitration law in selected jurisdictions was given. A concerted effort to advance arbitration and its regulation was evident in all these jurisdictions.¹³⁰⁶ Best practice from these jurisdictions will be identified with a view to informing arbitration law reform in South Africa.

¹³⁰¹ Tay C (1998) *Resolving disputes by arbitration: What you need to know* 18.

¹³⁰² *Ibid.*

¹³⁰³ Linklater F (2012) "Arbitration in Spain: State of affairs" <http://kluwerarbitrationblog.com/blog/2012/05/29/arbitration-in-spain-state-of-affairs/> (accessed on 21 Jul 2015).

¹³⁰⁴ Hernandez-Mora H & Segovia H (2008) "Overcoming the barrier to the expansion of arbitration in Spain" (Iberian Lawyer) 29 http://www.cuatrecasas.com/web/es-ESN/PDF/antonio_hierro_overcoming.pdf (accessed on 21 Jul 2015).

¹³⁰⁵ Gerstein F (2011) "Arbitration in Spain" <http://scornik.com/download/pdf/FSG-Arbitration-in-Spain-July-11.pdf> (accessed on 21 Jul 2015).

¹³⁰⁶ India, Spain and England.

CHAPTER 6 CONCLUSION AND RECOMMENDATIONS

6.1 INTRODUCTION

In this chapter, an attempt will be made to provide solutions to some of the challenges that confront arbitration law in South Africa today. This thesis was inspired by the divide between what arbitration seeks to achieve and what it actually achieves currently. Clearly South African arbitration law is inadequate and has received insufficient attention despite its popularity in the commercial and private sector. Arbitration in South Africa is governed by legislation that is 51 years old. The dynamics of the changing business world should have prompted regular updates of the applicable legislation. This did not, however, occur. The need for legislative reform in this context was exacerbated by the advent of the Constitution and the growing rights of consumers.

Arbitration has thus failed to realise its early promise. The weak position of unsophisticated and vulnerable South African consumers in concluding contracts containing arbitration clauses with large corporations, exposes them to potentially unconstitutional treatment and an unfair denial of their right of access to the courts.¹³⁰⁷

Furthermore, prevailing South African arbitration law makes no provisions for international arbitration, potentially hampering economic growth and the ability of the country to be marketed as a preferred seat of international commercial and also private arbitration in Africa.

This thesis briefly explored international arbitration law frameworks and arbitration law in various jurisdictions.¹³⁰⁸ The purpose of this overview was to identify best practices that could be used to inform law reform in South Africa.

The need to reform South African arbitration law (including its processes) were also the subject of a South African Law Reform Commission (SALRC) project.¹³⁰⁹ The SALRC proposed two statutes to govern domestic and international arbitration respectively. The proposals of the SALRC to amend the arbitration law, both domestic and international, do not offer a complete solution to the issues highlighted

¹³⁰⁷ Cht 3 para 3.2.2.

¹³⁰⁸ Cht 4 & 5.

¹³⁰⁹ South African Law Reform Commission (SALRC) project 94.

in this thesis and the suggestions made below will also address the shortcomings in the SALRC's proposals.¹³¹⁰

6.2 BRIEF OVERVIEW OF THE RESEARCH

The bases for the research and the research questions were set out clearly in chapter 1 of the thesis.¹³¹¹ The question begs: "If private arbitration is properly conducted should it still provide the parties with the envisaged benefits?; is private arbitration constitutional, especially as it impacts upon consumers contracting with large corporations?; and is the private arbitration process as it is currently applied, constitutional in so far as it denies parties an appeal on merits against an award that is clearly wrong?

As indicated in the introductory chapter the concept of "consumer" in relation to private arbitration goes beyond the scope and application of the CPA and "consumer agreements" in terms of the Act. The research as set out above indicated a much broader analyses than the "consumer's" right to redress and enforcement in terms of the CPA and in particular section 69.¹³¹² The research attempted to address much wider scenarios and applicable law where consumers are concerned and assumed to analyse the general inequality of bargaining powers between businesses and consumers (moreover in the case of vulnerable consumers as weaker contracting parties).¹³¹³ In particular, the effect of the wording of arbitration clauses and the private arbitration process as a result thereof were discussed. This was done to illustrate the importance of law reform and aligning arbitration clauses and the private arbitration process with both international standards and the values entrenched in our Constitution in a comprehensive manner.

In chapter 2, a brief historical overview was supplied to create the backdrop for the analysis that followed. In chapter 3, the thesis considered the development of arbitration law in South Africa and the shortcomings of the current legal position. This

¹³¹⁰ Cht 3 para 3.2.

¹³¹¹ Cht 1.

¹³¹² See discussion of the CPA in Cht 3 above.

¹³¹³ See discussion of unequal bargain positions in the consumer realm: Hawthorne L "Materialisation and differentiation of Contract Law: Can solidarity maintain the thread of principle which links the classical ideal of freedom of contract with modern corrective intervention?" 2008 *THRHR* 438-453.

examination focused on the failure of private arbitration to deliver on its early promise and its potential to infringe upon the constitutional rights of South Africans. Furthermore, in chapter 4, the international arbitration landscape was explored in order to make recommendations to advance South African arbitration within a global environment. Chapter 5 offered a brief overview of the approach to arbitration in a selection of foreign jurisdictions with a view to making recommendations informed by best practice as identified in such jurisdictions. This final chapter comprises of recommendations and suggestions for possible solutions to the challenges facing arbitration in South Africa based on the best practices from the selected foreign jurisdictions discussed in chapter 5 above.

6.3 LESSONS LEARNED FROM IDENTIFIED JURISDICTIONS

As indicated above, a review of approaches to arbitration in foreign jurisdictions was undertaken as best practice in foreign systems may potentially be of value in informing South African law reform.¹³¹⁴ To this end, a brief summary of the best practices identified in the jurisdictions examined appears below.

6.3.1 ENGLISH ARBITRATION LAW

The view that, given the English law influence on the development of arbitration law in South Africa, current English arbitration law practices may be of value in informing further legal development in the field in South Africa was shared by the SALRC in making its recommendations for law reform.¹³¹⁵

Current English arbitration legislation promotes recognition of alternative dispute resolution, party autonomy and judicial non-intervention.¹³¹⁶ It also attempts to align applicable law with international standards.¹³¹⁷ The current legislation is thus applicable to both domestic and international arbitration.¹³¹⁸ The legislation, though not premised on UNCITRAL Model Law, contains provisions that are closely aligned to the said Model Law. The Act pertinently retains the two critical principles of

¹³¹⁴ Cht 5.

¹³¹⁵ SALRC (2001) Domestic arbitration, project 94 6.

¹³¹⁶ English Arbitration Act, 1996 part 1 s1.

¹³¹⁷ *Idem* part 2.

¹³¹⁸ *Idem* part 1 & 2.

separability¹³¹⁹ and competence-competence.¹³²⁰ These two principles are the cornerstone of arbitration and play a significant role in protecting party autonomy. The English Arbitration Act further focused on enhancing the powers of arbitrators in directing the proceedings. The arbitration tribunal is obligated by section 33(1)(b) to take charge of arbitration proceedings and avoid unnecessary delays, thus ensuring that costs are minimised.

English law provides for various ways to challenge arbitral awards. Sections 67 permits a challenge to the validity of the award based because the tribunal lacked authority to hear either the particular type of case that was referred or a dispute relating to that specific subject matter. Serious irregularity affecting the tribunal, the proceedings or the award is considered a valid ground to challenge the award.¹³²¹ Section 69 of the Act, which permits a challenge to the award on a point of law, was unique to the jurisdiction that aligned itself with UNCITRAL Model Law, a Model Law that prevents a challenge of the award based on the question of law. However, an appeal on a point of law can only be made against an award in the English courts with the agreement of all parties or with the leave of the court.¹³²² The provisions of section 69 may offer a potential solution to the concern raised by this thesis regarding the absence of an appeal procedure even where the award was based upon a material error regarding the interpretation of the applicable law.

Contrary to the above recommendation, modern international arbitration rules effectively contract out of provisions like section 69, stating that section 69 is not regarded as a reason for choosing London as the preferred seat for an international arbitration.¹³²³

The English law has a single legal regime that governs both domestic and international arbitration. The convenience of having a single document that communicates with both domestic and international lends credence to the argument

1319

Idem s7.

1320

Idem s30.

1321

Idem s68.

1322

Idem s69 (1)(2)(a)(b).

1323

ICC Arbitration Rules of 2017 art 35.6 & London Court of International Arbitration Rules 2014 art 26.8.

presented by this thesis that there is no logical reason why both separate legislation cannot be combined in one statute.

6.3.2 USA ARBITRATION LAW

The USA also has a single legal regime that governs both domestic and international arbitration and it applies the same rules to both.¹³²⁴ As in other jurisdictions,¹³²⁵ the benefits offered by arbitration made it preferable to litigation.¹³²⁶ Arbitration in the USA is currently governed by the Federal Arbitration Act (FAA) which was enacted in 1925 and had two significant amendments since its inception. These amendments incorporated, inter alia, the New York Convention and the Inter-American Convention on International Commercial Arbitration, 1975 (the Panama Convention) into the FAA.

The USA adopted the New York Convention twelve years after its enactment in 1970.¹³²⁷ The adoption of the Panama Convention occurred in 1990.¹³²⁸ These amendments served to expand the FAA to deal with international arbitrations in the USA which were not in issue when the Act was enacted in 1925.

This brief discussion of the USA highlights several critical points. It demonstrates the essential need to regularly amend legislation governing arbitration to keep pace with the fast changing world of business. It further illustrates the significance of enacting legislation to cater for international arbitration. The structural framework of arbitration legislation in the USA also demonstrates the convenience of having a single statute to govern both domestic and international arbitration.

6.3.3 INDIAN ARBITRATION LAW

Indian arbitration law is currently regulated by the Arbitration Act of 1996. This Act is based on UNCITRAL Model Law. Like the USA and England, India incorporates both its domestic and international arbitration law frameworks in a single piece of

¹³²⁴ Zhou 414.

¹³²⁵ India, England and Spain.

¹³²⁶ Haydock & Henderson 143.

¹³²⁷ Bishop D & Martin E “Enforcement of foreign arbitral awards” 8 <http://www.kslaw.com/library/pdf/bishop6.pdf> 8 (accessed on 07 May 2016).

¹³²⁸ *Idem* 3.

legislation.¹³²⁹ The Act is divided into part 1 and part 2. Part 1 regulates domestic arbitration, whereas part 2 governs the enforcement of foreign awards. As with the English legislation, the Indian legislation also pertinently relies upon the critical principles of separability and competence-competence. The Indian legislation distinguishes itself from legislation in other jurisdictions however, in that it also makes provision for conciliation.¹³³⁰

The Act was amended in 2015 and the requirement that all arbitrations must be completed within one year of the constitution of the arbitration tribunal was introduced through the provisions of section 29A. A fast-tracking procedure was introduced by section 29B and enabled parties to a dispute to opt for a speedy process.

The Indian Act is unique insofar as it encourages the arbitration tribunal to persuade parties to settle their dispute.¹³³¹ It further empowers the tribunal to record such agreed settlements as arbitral awards.¹³³² The flexibility granted to the tribunal in this instance creates the potential to shorten the proceedings and maximise the benefits to the parties. An arbitration award may be challenged by the parties within a period of three months.¹³³³ A further month may be added to the time allowed to lodge the challenge where the party challenging the award can satisfy the court that there was sufficient cause for the delay. These restrictions are necessary to ensure certainty regarding the finality of the award.

A further unique feature of the Indian arbitration law is the absence of a requirement that the court recognise the arbitral award before it may be enforced. Enforcement may not, however, take place prior to the finalisation of any challenge to the award or the elapse of the time during which such a challenge may be lodged.¹³³⁴

Indian legislation also acknowledged the importance of International arbitration to the economic growth of the country by incorporating provisions necessary to promote

¹³²⁹ Indian Arbitration & Conciliation Act, 1996 s 1 (2).

¹³³⁰ *Idem* preamble.

¹³³¹ *Idem* s 30 (1)(2).

¹³³² *Idem* s 30 (1)(2).

¹³³³ As stated by the explanation on section 34 (3).

¹³³⁴ Indian Act.

international commercial arbitration in India. India adopted both the Geneva Convention and the New York Convention.¹³³⁵ Provision is made in part 2 of the Act, for the enforcement of awards made in terms of these conventions. The Indian legislation went to great lengths to ensure that arbitration law is equipped to effectively deal with disputes both domestically and internationally. However, no provisions were included for the protection of consumer rights.

6.3.4 SPANISH ARBITRATION LAW

Arbitration in Spain is currently governed by the Spanish Arbitration Act, 2003. This Act is a notable improvement on previous provisions in that it acknowledges the importance of promoting party autonomy in arbitration cases by protecting arbitration from excessive judicial intervention. Examples of this are sections 11(1) and (7), both of which restrict court intervention in arbitration matters.

Sections 9(11) and 22(1) of the Spanish Arbitration Act establish the principle of separability and section 22(3) grants arbitral tribunals the right to rule on their own jurisdictional competence. This Act thus entrenches both the competence-competence principle and the principle of separability.

Attempts are made to link the Act with the rights of the consumer through the incorporation of section 46(2) which states that:

“This Law shall be of supplementary application to the arbitration referred to in Law 26/1984, of 19 July, General Law for the Defence of Consumers and Users, and regulations pursuant to this Law may provide for a decision in equity, unless the parties expressly opt for arbitration at law.”

The Spanish arbitration law, which applies to both domestic and international arbitrations, is premised on UNCITRAL Model Law.¹³³⁶ Furthermore, the Spanish adopted the New York Convention.¹³³⁷

“The recognition of foreign awards shall be governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, made in New York, on 10 July 1958, without prejudice to the provisions of other more favourable international conventions, and shall take place in accordance

¹³³⁵ *Idem* part 2, ch 1 & 2.

¹³³⁶ Cremades & Cairns 1.

¹³³⁷ Spanish Arbitration Act, 2003 s46 (2).

with the procedure established in the civil procedure rules for judgments issued by foreign courts.”

This alignment of Spanish arbitration law with international instruments was crucial for the purpose of marketing Spain as a preferred seat of international arbitration. Several jurisdictions followed the same route in an attempt to allay the fears of the international business community regarding the possibility of having to resolve commercial disputes before a foreign court. In this way, international trade with Spain is promoted.

6.3.5 INTERNATIONAL ARBITRATION LAW

The importance of international trade to domestic economic growth in South Africa was emphasised repeatedly in this thesis.¹³³⁸ There was a general concern amongst the business community globally that should a dispute arise they might be forced to seek justice before a foreign court which might reveal a hostile attitude towards peregrini.¹³³⁹ This challenge could be avoided through resort to international arbitration to settle their disputes in circumstances where enforcement of such awards was assured. The international legal framework is established by the New York Convention and UNCITRAL Model Law.

The New York Convention was introduced to ensure enforcement of international arbitral awards by domestic courts in States parties.¹³⁴⁰ Efforts to enhance the effectiveness of international arbitration were further advanced through the enactment of UNCITRAL Model Law. The Model Law was established for the purpose of unifying and harmonising international trade law.¹³⁴¹ The Model Law was amended in 2006,¹³⁴² an indication of the evolving nature of the business world and the need to regularly update instruments applicable in this area.

¹³³⁸ In ch1 paras 1.4 & 1.6, ch3 para 3.1.1, 3.6 & ch4 para 4.1.

¹³³⁹ Brown F & Rogers C “The role of arbitration in resolving transnational disputes: A survey of trends in the People's Republic of China” (1997) vol 15 *Berkeley J. Int'l Law* 329-351 331.

¹³⁴⁰ Greenberg S, Kee C & Weeramantry R (2011) *International commercial arbitration: an Asia-Pacific perspective* 10.

¹³⁴¹ Weigand F (2009) *Practitioner's handbook on international commercial arbitration* (2ed) 954.

¹³⁴² Burnett R & Bath V (2009) *Law of international business in Australasia* 455.

6.4 CONCLUSION

The analysis of the information gathered regarding the various jurisdictions mentioned above would now be utilised to inform the development of suggested law reform for South Africa. What became evident from the analysis of the practice of arbitration in selected jurisdictions is that arbitration has failed to deliver a cheaper, faster, more confidential, flexible and less formal process than litigation. This failure was attributed to a number of factors such as the increasing involvement of lawyers with an adversarial approach to arbitration, the high cost of qualified arbitrators and delays caused by parties themselves or challenges to awards.

It seems to be common cause in all the jurisdictions reviewed, that the practice of arbitration has been difficult to achieve as to make the realisation of the anticipated benefits listed above cumbersome. As Redfern and Hunter observes:¹³⁴³

“In its early days, arbitration would have been a simple and relatively informal process. Two merchants, in dispute over the price or quality of goods delivered, would turn to a third whom they knew and trusted, and they would agree to abide by his decision-and they would do this not because of any legal sanction, but because this was what was expected of them in the community within which they carried on their business.”

In the past, merchants complied with an arbitral award without much resistance. A mere threat to the reciprocal agreement or the reputation of the party failing to abide by the award was sufficient to force compliance.¹³⁴⁴ This willingness to comply played a vital role in preserving the benefits of arbitration. The creation of legislation to govern arbitration gave the process legal standing and created grounds upon which the award could be challenged. This introduced judicial supervision into the arbitral process. A combination of this shift towards a more formal process, the introduction of a more litigious approach through the involvement of lawyers and the decline in the moral fibre of members of the business community made the process slower, more expensive, more rigid and less confidential.

There is a consensus amongst authors, that South African legislation is inadequate to efficiently deal with a number of critical issues concerning arbitration in South

¹³⁴³ Redfern & Hunter (2015) *International arbitration* (6ed) 4.
¹³⁴⁴ Haydock & Henderson 144.

Africa today.¹³⁴⁵ The shortcomings in the prevailing law regarding domestic arbitration include, *inter alia*,

- excessive opportunities for judicial intervention;
- failure to realise the anticipated benefits of arbitration;
- absence of provision for international arbitration;
- silence on protection of the rights of the consumers in an arbitration process;
- failure to address issues of constitutionality associated with parties to arbitration agreements who have unequal bargaining powers; and
- failure to address concerns regarding the constitutionality of arbitration in circumstances where it has the effect of denying parties the right of access to the courts.

The supreme Constitution of South Africa demanded that all legislation be scrutinised to ensure constitutional compliance.¹³⁴⁶ Arbitration law in South Africa was ruled constitutional on several occasions.¹³⁴⁷ This thesis endorses the view expressed in *Mphaphuli*¹³⁴⁸ that South African arbitration law is, in general, constitutional. Furthermore, the thesis also recognises the significant role that arbitration plays in the commercial sector, both domestically and internationally. It plays a critical role in stimulating commercial dealings between business people in an environment that values the on-going business relationship between the parties.

The issue remains, however, not whether arbitration as a concept is constitutional but whether arbitration as it is practiced in South Africa today is constitutional. Does it unfairly limit the right of consumers to access the courts when necessary? The question begs, is the right of the consumer to equal protection and benefits of the law justifiably curtailed? Recourse was had to the jurisprudence of the courts in answering these questions.¹³⁴⁹

¹³⁴⁵ Sarkodie 1, Butler (1994) 120 & Gauntlett 29.

¹³⁴⁶ Constitution of the Republic of South Africa, 1996 s 2.

¹³⁴⁷ *Mphaphuli & Associates (Pty) Ltd v Andrews and Another* 2009 (4) SA 529 (CC) para 197, *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC) at para 29 & *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA) para 44.

¹³⁴⁸ *Ibid.*

¹³⁴⁹ *Ibid.*

It is commonly understood that by entering into a private arbitration agreement, parties relinquish their right to re-litigate the merits of the dispute.¹³⁵⁰ Therefore, parties cannot appeal the decision. The effect of the selection of the arbitrator as a trier of fact and law is that “the award is final and conclusive, irrespective of how erroneous, factually or legally, the decision was”.¹³⁵¹ It has been demonstrated on numerous occasions earlier in this thesis, that consumers often enter into an arbitration agreement without a proper understanding of the impact of the agreement on their right to seek judicial redress in the event of a dispute.¹³⁵² Therefore, the courts should be justified in intervening and assisting consumers where their commitment to an arbitration agreement appears to lack the requisite voluntariness as a consequence of their poor bargaining position. By so doing, the courts will be implementing what was stated in *Mphaphuli*:¹³⁵³

“Because the courts are requested to adopt, support and trigger the enforcement of arbitration awards, it is permissible for, and incumbent on, them to ensure that arbitration awards meet certain standards to prevent injustice.”

Further definition of arbitration by the court in *Total Support* emphasised the importance of true consent:¹³⁵⁴

“The hallmark of arbitration is that it is an adjudication, flowing from the consent of the parties to the arbitration agreement, who define the powers of adjudication, and are equally free to modify or withdraw that power at any time by way of further agreement.”

Despite the dire need to protect consumers, the Arbitration Act contains no provisions specifically regulating arbitration agreements concluded between parties of unequal bargaining power. Furthermore, the fact that the Act was enacted a considerable period of time before the Constitution¹³⁵⁵ was promulgated, explains the absence of a constitutional influence on some of its provisions, particularly when it comes to the protection of consumers. It was also clear from the discussion above that the amendments made to the Arbitration Act was superficial and procedural of

¹³⁵⁰ *Telcordia* para 50.

¹³⁵¹ *Idem* para 55.

¹³⁵² Cht 3 para 3.2.2

¹³⁵³ *Mphaphuli* para 25.

¹³⁵⁴ *Total Support Management (Pty) Ltd v Diversifield Health Systems (SA) (Pty) Ltd* 2002 4 SA 661 (SCA) para 25.

¹³⁵⁵ Constitution of the Republic of South Africa, 1996.

nature and did not in fact, align the core of the legislation to the values entrenched in the Constitution.¹³⁵⁶

An arbitration agreement is a contract between parties which will come into operation the moment a dispute arises. A particular focus of this thesis was the position of unsophisticated consumers in private arbitration. There has been a call globally to closely examine how arbitration affects the “little man”.¹³⁵⁷ In its investigation of how to best update the current arbitration law, the SALRC attempted to provide for the rights of consumers.¹³⁵⁸ In my view, such provision for the rights of the consumers was an acknowledgement that consumers are not adequately protected from exploitation by large corporations.

The thesis concludes that arbitration practice in South Africa is unconstitutional in so far as it fails to protect the rights of the unsophisticated and illiterate consumer either adequately or at all. Validity of an arbitration clause depends entirely on consensus between parties. Parties who conclude a contract are entitled by the law to negotiate the terms of the contract and to have insight into what they are binding themselves to.¹³⁵⁹ Contracts between consumers and large corporations are often less than fair and transparent.

Arbitration clauses are often contained in standard-form contracts and buried in the fine print. The fine print is normally prepared by sophisticated lawyers to limit corporate obligations as far as possible, often to the disadvantage of the consumer. The arbitration clause is seldom if ever, explained to the consumer. The common law principle of *pacta sunt servanda*, which is a cornerstone of contract law, demands that a contract that is entered into freely and consensually should be enforced. However, the consensus should be a product of an informed decision, something that may be lacking in cases, which are characterised by unequal bargaining power between parties. The *Barkhuizen*¹³⁶⁰ decision acknowledged and exposed the

¹³⁵⁶ Cht 3 above.

¹³⁵⁷ See comparative discussions cht 4.01

¹³⁵⁸ SALRC (2001) project 94.

¹³⁵⁹ Boella M, Boella M & Pannett A (1999) *Principles of hospitality law* (2ed) 219.

¹³⁶⁰ *Barkhuizen v Napier* 2007 (5) SA 323 (CC).

impact of the inequality in bargaining power on the weaker party. According to Sachs J in *Barkhuizen*.¹³⁶¹

“Prolix standard-form contracts undermine rather than support the integrity of what was actually concluded between the parties. They unilaterally introduce elements that were never in reality bargained for, and that had nothing to do with the actual bargain. It may be said that far from promoting autonomy, they induce automatism. The consumer’s will does not enter the picture at all.”

This view, expressed in the dissenting judgment, was reflected in the majority judgement’s observation that the majority of South African consumers conclude contracts without understanding what they are agreeing to.¹³⁶² This is also true of some sophisticated consumers as well. Even where arbitration clauses are explained to consumers, they often fail to comprehend the import of such clauses, which are often presented to them on a ‘take it or leave it’ basis. As was stated in *Barkhuizen*,¹³⁶³ it is not adequately explained to them that by signing a contract containing an arbitration clause they are depriving themselves of an opportunity to ask for judicial redress when a dispute arises.

The vulnerability of South African consumers is so apparent that the legislature enacted legislation to protect them from abuse by large corporations of which the CPA and in particular section 3(1)(b) is an example. With regard to standard-form contracts the court in *Barkhuizen* observed that:¹³⁶⁴

“Standard – form contracts are contracts that are drafted in advance by the supplier of goods or services and presented to the consumer on a take – it – or- leave- it basis, thus eliminating opportunity for arm’s length negotiations. They contain a common stock of contract terms that tend to be weighted heavily in favour of the supplier and to operate to limit or exclude the consumer’s normal contractual rights and the supplier’s normal contractual obligations and liabilities.”

This is further confirmation that the manner in which arbitration agreements arise between consumers and large corporations often contravenes the CPA where the wording of the clause infringes on the consumer’s fundamental right to fair, just and

1361 *Idem* para 155.
1362 *Idem* para 65.
1363 *Barkhuizen* 155.
1364 *Barkhuizen* paras 135-136.

reasonable terms and conditions (Part G of the Act).¹³⁶⁵ This view that there should be an adequate explanation of rights and obligations to the consumer was also followed by the English court, which stated that an arbitration clause in a contract must be brought to the attention of the consumer and adequately explained to her to guard against it being termed unfair.¹³⁶⁶ Arbitration also received criticism from authors in the USA who based their critique of the process on its potential to limit people's rights to judicial redress.¹³⁶⁷ The fact that arbitration for example deprives an average consumer of her constitutional right to judicial redress when she buys electric appliances, secures insurance or even buys a car is a reality.¹³⁶⁸

The potential vulnerability of the consumer was also addressed in the case of *Mitsubishi Motors v Soler Chrysler-Plymouth*,¹³⁶⁹ where the need to protect the weaker party to negotiations was identified. India too noted that inequality in bargaining powers affects the ability to negotiate the terms of a contract and may thus render clauses in a contract unreasonable, unfair or irrational.¹³⁷⁰ Likewise, Spain also called for consumer protection in this regard.¹³⁷¹

Arbitration agreements may be set aside on the basis of public policy.¹³⁷² If it is established that the weaker party in a relationship is forced by circumstances to enter into a contract that contains an arbitration clause, the impact of which was not explained to her, such an arbitration agreement may be declared invalid. Redfern and Hunter state that:¹³⁷³

“The most important function of an agreement to arbitrate, in the present context, is that of making it plain that the parties have indeed consented to resolve their disputes by arbitration. This consent is essential: without it, there can be no valid arbitration.”

¹³⁶⁵ See discussion Cht 3.

¹³⁶⁶ Hörnle J (2009) *Cross-border internet dispute resolution* 178, *Picardi v Cuniberti* [2002] EWHC 2923 (QB) para 127, *Richard Zellner v Phillip Alexander Securities and Futures Ltd* [1997] ILPr 730 (QB), 724.

¹³⁶⁷ Boyd & Rubenfield 154.

¹³⁶⁸ Brunet *et al* 141.

¹³⁶⁹ Sopata 601.

¹³⁷⁰ *National Building Construction vs State Of Haryana And Anr* on 9 January, 2007AIR 2007 P H 111, (2007) 146 PLR 708 para 7.

¹³⁷¹ Arbitration Act, 42 of 1965 s33.

¹³⁷² *Mphaphuli* para 220.

¹³⁷³ Redfern & Hunter16.

The legal framework of arbitration allows the stronger party in a relationship of this nature dominate the weaker party in enforcing the arbitration clause because the grounds upon which an award can be reviewed are limited.¹³⁷⁴ Whether the arbitrator errs in the interpretation of the law or fact is immaterial. A party disadvantaged by such an error must simply live with the outcome. In the words of Harms J in *Telcordia*:¹³⁷⁵

“.....an arbitrator in a ‘normal’ local arbitration has to apply South African law but if he errs in his understanding or application of local law the parties have to live with it. If such an error amounted to a transgression of his powers it would mean that all errors of law are reviewable, which is absurd.”

This situation is even more worrisome where the party who is prejudiced by the error is a consumer who was systematically forced to relinquish her right of access to the court in preference for an arbitral tribunal selected by a large corporation. Such injustice is common-place in South Africa today and the recommendations made by the SALRC do not adequately address the issue. Until such time that proper measures are put in place to adequately protect consumers, arbitration in such circumstances should be regarded as most likely unconstitutional.¹³⁷⁶ This thesis offers recommendations on how to minimise the prejudice suffered by consumers in a consolidated statement of recommendations below.¹³⁷⁷

It is not however, only vulnerable consumers who may be prejudiced by errors of law or fact on the part of arbitrators. Even those parties in a position of equal bargaining power may find themselves prejudiced by the system they elected to effect justice between them. Parties have a reasonable expectation that the finding of the arbitration tribunal will be factually and legally correct. O’Regan J in *Mphaphuli*, interpreted the submission to arbitration in Roman-Dutch law to include an implied condition that the process would be handled fairly and in accordance with law and justice.¹³⁷⁸ This view is also reflected in the English Departmental Advisory Committee (DAC) report that specifies that parties who choose to use a certain

¹³⁷⁴ The Act.

¹³⁷⁵ *Telcordia* para 86.

¹³⁷⁶ I am mindful of the fact that O’Regan J in *Mphaphuli* paras 235-236 & *Telcordia* para 86 particularly because of party autonomy which demands that the decision of the parties of demands respect. See Cht 3 para 3.4.2.

¹³⁷⁷ Para 6.6.3.2

¹³⁷⁸ *Mphaphuli* para 221.

system are entitled to a proper interpretation of the law failing which, a great injustice and a failure to achieve the desired outcomes will ensue.¹³⁷⁹ According to Redfern and Hunter:¹³⁸⁰

“An arbitrator’s main duty lies not in dictating a peace treaty, but in delivery of an accurate award that rests on a reasonable view of what happened and what the law says.....An arbitrator who makes the effort to listen before deciding will enhance both the prospect of accuracy and satisfaction of the litigant’s taste for fairness.”

The conclusion in *Mphaphuli*¹³⁸¹ emphasised that, as private arbitration, by its nature, falls outside the purview of section 34 of the Constitution, this means that the parties cannot claim judicial intervention in terms of this section. The only remedies available to parties aggrieved by the arbitration process are those contained in section 33(1) of the Arbitration Act. The fact that private arbitration is not classified as a tribunal referred to in section 34 of the Constitution does not excuse it from the duty to promote justice through its findings, more particularly where consumers are involved. The Constitution cannot sanction such an approach that potentially permits grave injustice towards vulnerable members of society.

6.5 RECOMMENDATIONS

6.5.1 INTRODUCTION

South Africa undoubtedly has the potential to be the powerhouse of arbitration in Africa due to its sophisticated infrastructure and the second largest economy on the continent.¹³⁸² This potential could be realised through cautious and speedy reform of the arbitration law.

There is an urgent need to reform the domestic arbitration legislation and to introduce legislation to regulate international arbitration. As stated above, judicial jurisprudence promotes the practice of arbitration and, precedents that affirm the

¹³⁷⁹ Dedezade T “Are you in? Or are you out? An analysis of section 69 of the English Arbitration Act 1996: Appeals on a question of law” (2006) *Int.Arb LR* 56-67 58.

¹³⁸⁰ Redfern & Hunter 38.

¹³⁸¹ *Mphaphuli* 213.

¹³⁸² Sarkodie 1.

final and binding nature of arbitral awards abound.¹³⁸³ However, legislation will provide certainty and instil greater confidence in the practice in South Africa.¹³⁸⁴

The SALRC responded to the call for law reform in the area of arbitration and identified shortcomings in the domestic practice and acknowledged the failure of South African law to respond to the need to provide for international arbitration. In making recommendations, the SALRC followed a comparative legal approach, examining foreign jurisdictions in an attempt to inform the reform proposals it made. Due to the extensive influence English arbitration law had on the early development of South African arbitration law, it was selected as a suitable jurisdiction for legal comparison. The SALRC also resorted to the laws of Germany, India, and Zimbabwe amongst others, for ideas. Finally, the SALRC also examined international arbitration law instruments in their efforts to gain insights.

The SALRC further identified some shortcomings in the current arbitration law concerning the protection of consumers who are involved in arbitration proceedings. The prevailing arbitration law makes no provision for adequate protection of consumers who are potentially prejudiced by their weaker position in their dealings with large corporations. By so doing, the law exposed consumers to potential exploitation due to inequality in bargaining powers between them and large corporations. The injustice arising from inequality in bargaining powers is prevalent and can be observed in a number of jurisdictions, which developed measures to combat the problem.¹³⁸⁵ The SALRC, upon realising the need to put measures in place to protect consumers, proposed some provisions which were intended to respond to that need.

The SALRC recommended that there must be a statutory cooling-off period¹³⁸⁶ that will enable the consumer to decide to either accept or reject an arbitration clause within a period of ten days. However, the provision does not address the critical concern that unsophisticated consumers are exploited due to a lack of understanding

¹³⁸³ Cht 3 para 3.1, *Mphaphuli* para 219 & *Telcordia* para 44.

¹³⁸⁴ Sarkodie 1.

¹³⁸⁵ Spain, England, South Africa and India.

¹³⁸⁶ Draft Domestic Arbitration Bill s58.

of what arbitration clauses represent. The provision fails to ensure that the consumer is adequately informed regarding the effect of signing an arbitration agreement.

6.5.2 THE DEVELOPMENT OF INTERNATIONAL ARBITRATION LEGISLATION IN SOUTH AFRICA

The importance of adequate, effective and efficient international arbitration law frameworks in the international commercial sphere cannot be overemphasised. It offers a solution to challenges posed where parties may be compelled to litigate in a foreign court.¹³⁸⁷ As Caron states:¹³⁸⁸

“We undertake this study because an effective system of international dispute resolution is indispensable to the growth of more complex transnational arrangements, and-for the foreseeable future- that system of resolution is primarily international arbitration. The evolution of an effective and trustworthy private international arbitration system over the last half a century has had three major strands. The first strand is embodied in the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards which obliges the courts of state parties (1) to respect the agreement of parties to arbitrate and (2) to recognize and enforce-within certain limits-the result of such an arbitration. In essence, the treaty allows private parties to use the coercive power of national courts to implement private arrangements for international arbitration. The second strand seeks the harmonization of national arbitration statutes, that is, the national law within which the private arbitral arrangement operates and, in a sense, is regulated. This task was substantially advanced by the adoption by the United Nations Commission on International Trade Law (UNCITRAL) in 1985 of a Model Law on International Commercial Arbitration. If the second strand aimed at harmonizing the national overlay of the arbitral process, the third strand sought to provide a model for the process of arbitration itself.”

The adoption and proper implementation of the two critical international instruments mentioned by Caron above, will achieve the required development of the South African arbitration legislative framework. South Africa became party to the New York Convention in 1976 and adopted it through the Recognition and Enforcement of Foreign Arbitral Awards Act.¹³⁸⁹ The 1977 Act proved to be inadequate and was subject to scathing criticisms by the SALRC.¹³⁹⁰

¹³⁸⁷ Hunter J “Journey to the ‘Only game in town’ (2012) vol I, issue 1 *Indian Journal of Arbitration law* 1-3 2.

¹³⁸⁸ Caron A, Caplan L & Pellonpaa M (2006) *The UNCITRAL arbitration rules - A commentary* 2.

¹³⁸⁹ Act 1977.

¹³⁹⁰ See the discussion in Cht 3 para 3.2.1.

The SALRC also recommended adoption of the Model Law. The reason given for this latter recommendation was that the Model Law promotes unification and harmonisation of laws regulating international arbitration procedures.¹³⁹¹

Finally, the SALRC also recommended that the proposed legislation should implement the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Washington Convention).¹³⁹² In other words, the SALRC envisaged that three international instruments, UNCITRAL Model Law, the New York Convention and the Washington Convention would all be adopted by a single Act of Parliament. However, the final International Arbitration Bill that was approved for submission to Parliament, only adopted UNCITRAL Model Law and the New York Convention. The Washington Convention was excluded. The decision to exclude the Washington Convention may probably be attributed to section 12 of Promotion and Protection of Investment Bill, 2013 that states that local remedies should first be exhausted before resorting to international arbitration in investment disputes. This particular aspect was developed quite explicitly in the subsequent Protection of Investment Act which replaced the Bill. It is stipulated in this Act that the State has discretion to allow international arbitration in the event of a dispute between a foreign investor and the state regarding the state's use of public powers.¹³⁹³

The recommendations of the SALRC are fully supported by this thesis. The only point of criticism in this regard is that the need for two separate Acts to regulate domestic and international arbitration remains obscure.

The SALRC's contention that having a separate statute regulating international arbitration is more convenient and accessible for foreign parties¹³⁹⁴ can easily be countered with the question: What could be more convenient than having the entire arbitration framework of the country in one document? England, the USA, India and Spain each enacted a single piece of legislation to regulate both international and domestic arbitration without any difficulties. A clear delineation of the type of

¹³⁹¹ SALRC (1998) Arbitration: An international Arbitration Act for South Africa (Project 94) 27.

¹³⁹² *Idem* 41.

¹³⁹³ Act 22 of 2013 s 13(5).

¹³⁹⁴ *Ibid.*

arbitration being dealt with in specific sections of the Act should suffice to ensure clarity. For example, the Indian Arbitration Act states explicitly, that part 2 deals with awards made in terms of the New York Convention.

6.5.3 REFORM OF DOMESTIC ARBITRATION LEGISLATION

The courts in South Africa have played a vital role in developing a valuable jurisprudence of arbitration through interpretation of the current Arbitration Act.¹³⁹⁵ The court further played an important role since 1998 in advancing the development of the common law of arbitration on matters not covered by the Act.¹³⁹⁶ The courts progressed far beyond the limits and liberties offered to them by the Act in protecting the autonomy of arbitration. Nevertheless, the shortcomings raised in this thesis hamper the realisation of the full potential of private arbitration and highlight the need for reformed arbitration legislation. A critical shortcoming identified by the thesis is that the principles of separability and competence-competence, that are of fundamental importance to the autonomy of the arbitration process, are not provided for in the South African legislation.

The SALRC appears to have identified this shortcoming and included section 26 in the proposed legislation for domestic arbitration which establishes at least one of the two principles mentioned above, namely the principle of competence-competence. However, the SALRC's efforts to respond to this shortcoming fell short in that it omitted to provide for the principle of separability which also plays a critical role in affirming the autonomy of arbitration. The recommendation in this regard is that section 7 of the English Arbitration Act, 1996 should be imported to South African Arbitration legislation to establish the principle of separability. Section 7 reads as follows:

“Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because

¹³⁹⁵ *Mphaphuli* para 197, *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC) at para 29 & *Telcordia, Cool ideas* 1186 CC v *Hubbard and another* 2014 (4) SA 474 (CC), *De Lange v Methodist Church* 2016 (2) 1 (CC).

¹³⁹⁶ See *North East Finance* paras 8, 9 & 10, *Radon Projects* paras 27, 28 & 29, *Zhongji Development Construction Engineering Co Ltd v Kamoto Copper Co SARL* 2015 (1) SA 345 (SCA) paras 35, 36 & 53. Courts in these cases developed the common law to incorporate principles of separability and competence-competence which were not catered for by the Act.

that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement.”

The thesis further identified other shortcomings which were raised as research questions in chapter 1. These research questions will be dealt with directly below.

6.5.3.1 How evolution altered the benefits of arbitration

The first research question considered whether the character of arbitration in general, and commercial arbitration in particular, has been so radically altered in modern law as to undermine the speedy, cost effective and informal purpose for which it was originally designed. These benefits were described by the SALRC as the objective of a modern arbitration statute.¹³⁹⁷ According to SALRC:¹³⁹⁸

“The objects of a modern arbitration statute are the fair resolution of disputes by an independent and impartial tribunal without unnecessary delay and expense; party autonomy; balanced powers for the courts; and adequate powers for the arbitral tribunal to conduct the arbitral proceedings effectively.”

For reasons stated earlier in the thesis,¹³⁹⁹ the early benefits offered by resort to arbitration have been eroded. As indicated by the SALRC:¹⁴⁰⁰

“It is notorious that the potential advantages claimed for arbitration compared to litigation, as a more expeditious and cost-effective method of resolving disputes, are often not achieved in practice, particularly in complex commercial disputes and in the construction industry.”

The SALRC recommendations designed to enhance the efficiency and cost effectiveness of the process deserve support. These recommendations are three fold:

Firstly, statutory provisions were proposed that place a duty on an arbitrator to adopt an expeditious process and on the parties to facilitate same.¹⁴⁰¹ The arbitrator is also

¹³⁹⁷ SALRC (2001) project 94.

¹³⁹⁸ *Ibid.*

¹³⁹⁹ Cht 3 paras 3.5, 3.5.1-3.5.3.

¹⁴⁰⁰ SALRC (2001) 94.

¹⁴⁰¹ *Idem* 3.

empowered to limit the recoverable costs to curb costs that may be incurred by the parties;¹⁴⁰²

Secondly, draft provisions have been proposed that enhance the powers of the arbitral tribunal and grant it more control over the proceedings, enabling it to adopt the most favourable approach;¹⁴⁰³ and

Thirdly, the powers of the court to interfere in arbitral proceedings in terms of the South African Act were wider than the Model Law and must, therefore be restricted.¹⁴⁰⁴ The recommendation supported the adoption of the Model Law approach in this regard for both domestic and international arbitration.

A look at the Indian arbitration law reveals an approach that might be regarded as best practice and might meaningfully be adopted into South African arbitration law to enhance the efficiency and cost effectiveness of arbitration proceedings in South Africa. The Indian Arbitration Act includes sections 29A and 29B which were introduced specifically to enhance efficiency and curb the costs associated with arbitration proceedings. The example created by the introduction of sections 29A and 29B into the Indian Arbitration Act offers a possible solution to a jurisdiction like South Africa which is struggling to offer the benefits associated with arbitration. Section 29A provides that arbitration proceedings should be finalised within a period of twelve months of the constitution of the tribunal and section 29B enables parties to adopt a process which will guarantee speedy finalisation of the dispute. The process dispenses with oral evidence and empowers the tribunal to decide the dispute on written pleadings, documents and submissions by the parties.

There exists a similar provision in the South African Act which also aims at encouraging the speedily finalisation of arbitral proceedings.¹⁴⁰⁵ The provision was criticised by the SALRC for setting unreasonable goals.¹⁴⁰⁶ Section 23 provides that unless otherwise agreed by the parties the award by the arbitrators should be made within a period of 4 months and 3 months for an award by the umpire. What creates

1402

Ibid.

1403

Idem 4.

1404

Idem 18.

1405

Idem p 75 para 3.211.

1406

Ibid.

the problem according to the SALRC is the fact that the period for making the award starts running from the moment the tribunal hears the evidence or entertains the submissions from the parties.¹⁴⁰⁷ Thus the section makes no reasonable provision for the possible delays which might be caused by the parties themselves.¹⁴⁰⁸

The SALRC proposed that section 23 must be replaced with section 42 of the draft Bill.¹⁴⁰⁹ The SALRC made recommendations that the period for making the award should start running on conclusion of the hearing or on receipt of the parties' last submission in case of documents only process.¹⁴¹⁰ The concern with this approach is that it leaves the period between the inception and the conclusion of the hearing completely unregulated and flexible which may be open to abuse. The period of 12 months which packages the inception of the arbitral proceedings and the making of the award as per section 29A of the Indian provision is necessary to keep the tribunal on their toes. The need for extension can be accommodated by consent of the parties for a limited period of 6 months as stipulated by section 29A. It is advisable to introduce an additional restriction upon which the tribunal is directed to finalise the award within a prescribed period in the event where the hearing is concluded early in the prescribed 12 months period granted by the legislation. It is thus proposed that the South African legislation should include a provision identical to section 29A of the Indian statute with the inclusion of the best features of the proposed section 42 of the Draft Bill.

Section 29B is somewhat more problematic. It may present challenges for consumers in dispute with a large corporation. The challenges arise largely from the fact that the entire case will be decided on paper, a process that might disadvantage unsophisticated consumers who might not know how to state their case or respond sufficiently to averments filed on behalf of their better resourced opponent. The section may, however, have value where the consumer is legally represented. Therefore, section 29B could be of some value if adapted and altered to accommodate the South African commercial context. It could, for example, be applicable only where the consumer received legal advice before consenting to an

¹⁴⁰⁷ *Ibid.*
¹⁴⁰⁸ *Idem* 76.
¹⁴⁰⁹ *Ibid.*
¹⁴¹⁰ *Ibid.*

arbitration clause or is legally represented and the section is invoked on the recommendation of the said representative.

Recommended provision:

- (1) Unless the parties agree otherwise, this provision shall only be applicable to consumers who are legally represented or received legal advice from a duly qualified individual.

I am mindful of the fact that the involvement of legal representation at this stage might attract unwanted costs for the consumer. However, the supplier will also receive certainty that the consumer had adequate knowledge of what are the implications of an arbitration clause in the agreement which is an ultimate protection that this research is aimed at achieving for the consumer. Thus, the ultimate protection of the consumer may be attained by preventing large corporations from concluding contracts containing arbitration clauses with consumers who are not legally represented. There must be a duty upon a stronger party to draw the attention of the consumer to the existence of an arbitration clause and further to provide an adequate explanation of what it entails. A recommended provision to address the issue of legal representation for consumers entering into arbitration agreements should read as follows:

- (1) Where a consumer enters into an arbitration agreement to refer future disputes arising from or in relation to a consumer contract to arbitration, caution should be taken by the party in the stronger bargaining position to ensure that only a consumer who is legally represented conclude an arbitration agreement, as provided in subsection 2 below.
- (2) No agreement to refer a future dispute to arbitration should be concluded with a consumer who is not legally represented. The court has a duty to ascertain the compliance with subsection 1 where the arbitration agreement is challenged based on a disparity in bargaining powers between parties.

Further best practice that can be identified from Indian arbitration law is, the suggested inclusion of a provision similar to section 30(1)(2) of the Indian Arbitration Act into South African legislation which encourages settlement of the matters in

dispute between the parties. Parties may be directed by the arbitrator in terms of section 30 (1) to consider settling the matter through other processes like mediation or conciliation at any stage of the proceedings. Thus the arbitrator is the initiator of a process contemplated in section 30 (1). Parties are also permitted by the provisions of section 30 (2) to engage in conciliation proceedings at any stage of the proceedings. Such engagement may be done *suo motu*. In the event they reach a settlement, the settlement may be recorded as an arbitral award. This grants the tribunal the flexibility to seize a settlement opportunity should it arise, and by so doing, to save the parties time and money whilst delivering a final and binding award. Incorporation of a similar provision, with the appropriate adaptations to suit the South African context, would substantially facilitate the realisation of the benefits of speed and cost effectiveness initially envisaged by supporters of the arbitration process. Adaptations should include a warning to arbitration tribunals to be cautious in encouraging and accepting settlement arrangements in matters involving parties of unequal bargaining power.

The SALRC did consider the possibility of incorporating a provision of this nature in the Domestic Arbitration Bill. It rejected the possibility on the basis that the proposed section 16 of the Domestic Arbitration Bill deals adequately with settlement. This is not however, an adequate provision as it relates only to settlements concluded before the establishment of a tribunal and thus makes no provision for the tribunal itself to promote settlement. The following recommended provision, will, it is submitted, encourage settlement at any stage of the proceedings:

Unless the parties agree otherwise, an arbitral tribunal may refer the matter for mediation or conciliation to a qualified individual or an institution at any time during the arbitral proceedings to encourage settlement of the dispute where parties are amenable to a settlement. The Arbitration tribunal should be cautious in so encouraging parties where it appears from the circumstances of the parties that one may be in a significantly weaker bargaining position than the other.

The process required to afford an award recognition and enforcement also prolongs the finalisation of the matter due to the process that must be followed in terms of section 31 of South African Arbitration Act. Section 31 states that:

- “(1) An award may, on the 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.
- (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.
- (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.”

South African arbitration law burdens the party who obtained the award in her favour with the responsibility of making an application to the court for recognition and enforcement of the said award.¹⁴¹¹ This party also bears the responsibility of notifying the other party of her intention to apply for the award to be made a court order. Not only does the application process prolong the finalisation of the process but it also contributes to costs as counsel is often retained to handle the matter in court. Furthermore, this procedure compromises the confidentiality of the matter as the application to have the award made an order of court is made in an open court, a public space.

The Indian Arbitration Act avoids resort to the courts for confirmation of the award. Section 36 grants parties a period of three months during which to challenge the arbitral award in court. Absent such a challenge, the award will be enforced in the same manner as any court order. This approach avoids unnecessary litigation processes, which cause both delays and a risk of public exposure of matters, intended to be kept confidential. The process will eliminate the hustle of bringing formal application to court for recognition and enforcement of the arbitral awards. The procedure is not provided for by the New York Convention the purpose of which is to promote the recognition and enforcement of the foreign arbitral awards. The question begs, how do you find synergy between the conflicting national law and the New York Convention?

The application of more-favourable-rights rule enshrined in the provisions of article 7 (1) of the New York Convention provides the answer to this conundrum. The provision permits the application of the national law in the instance where it is favourable to the party seeking recognition and enforcement of foreign arbitral

¹⁴¹¹ The Act s 31.

awards.¹⁴¹² The support for this approach is further found in the provisions of article 3 of the New York Convention that prohibits subjecting the Convention awards to more stringent conditions than any other awards. Thus, the introduction of section 36 is not in conflict with the provisions of article 3 as it introduces a system, which shortens the process of seeing the execution of the awards. Such a provision would restore the benefit of confidentiality that arbitration initially promised and may also contribute towards ensuring the constitutionality of arbitration.¹⁴¹³

It may well be argued that South Africa does not have to give the same form of treatment to foreign arbitral awards. The proposed section 36 which if adopted shall form part of the domestic arbitration law only requires a lapsing of a period of 3 months without the challenge for the arbitral award to be recognised and enforced as a court order. The procedure of obtaining an enforcement of a foreign arbitral award is aptly described under article iv of the New York Convention. The requirements under article iv must be fulfilled prior to the submission of the application for enforcement of a foreign award in terms of the domestic law. Thus, domestic court upon satisfying itself that the requirements outlined in article IV are satisfied shall enforce the award as if it's a court order. The proposed incorporation of section 36 will not impose more strict requirements contemplated in article 3 prior to the enforcement of a foreign award. The requirements for enforcement of a foreign award would have been satisfied when the provisions of article IV of the New York Convention are complied with. Thus, necessity will not exist to subject the foreign arbitral awards to the domestic requirements for recognition and enforcement on the face of prior mandatory compliance requirement with article IV of the Convention that must be adhered to.

¹⁴¹² Kronke H (2010) *Recognition and enforcement of foreign arbitral awards: A global commentary* 47.

¹⁴¹³ The proposed legislative foundation for confidentiality of arbitral proceedings in the draft Bill deserves support. The recommended section 34 was crafted in such a way that it eliminates any uncertainty created by the approach by Australian decisions. The proposed provision of section 34 reads thus:

- 34.** (1) Unless the **parties** otherwise agree, the **arbitral proceedings** must be held in private.
(2) Unless the **parties** otherwise agree, where the **arbitral proceedings** are held in private, the **award** and all documents created for the arbitration which are not otherwise in the public domain must be kept confidential by the **parties** and **tribunal**, except to the extent that the disclosure of such documents may be required by reason of a legal duty or to protect or enforce a legal right."

The formulation of the recommended Indian provision differs significantly from section 31 of the South African Arbitration Act and lacks the detail stipulated in article 36 of the Model Law. The disparity between the abovementioned articles of the Model Law, the proposed replacement by the SALRC and the Indian provision may justifiably trigger the need to compare and contrast the enforcement under these three provisions. Articles 35 and 36 of the Model Law correspond with the SALRC's proposed replacement for section 31. This approach may be arguably said to be partly corresponding with article 36 of the Indian Arbitration Act.¹⁴¹⁴ However, the Indian provision is very specific on the period at which the award becomes enforceable. South African and Indian provisions are silent on the grounds upon which the enforcement of the award may be refused, a detail, which may greatly enhance the integrity of the award. The common feature about these provisions is their intention to promote the recognition and enforcement of the arbitral award. There are disparities in their contents.

The basis for the distinction between article 35 of the Model Law, section 36 of the Indian Arbitration Act and section 31 of the South African Act stem from the fact that the South African provision demands that the application for enforcement of the award should be preceded by an application for the declaration of the award as a court order. The Indian provision has curtailed the process of enforcing the award by eliminating the process of having to apply to court for recognition and the subsequent enforcement of the award. The Indian provision provides more benefits to the parties.

The issue of costs, which might be incurred by consumers during arbitration process, continues to haunt the efforts to afford adequate protection to the consumer. The high number of consumers who suffers the exploitation is often those who are involved in transactions with costs less than R50, 000. The concerns regarding the exploitation of consumers through the application of an arbitration process may be largely curtailed by restricting the use of arbitration for consumer disputes where the claim is less than R50, 000. The use of this controversial process against the

¹⁴¹⁴ SALRC (2001) 84.

consumer has been largely mitigated by an effective use of ombudsman, particularly in the financial services industry in South Africa.¹⁴¹⁵

Ombudsman and an arbitrator share similar functions in as far as they are expected to resolve disputes in procedurally fair, cheaper, informally and speedily manner. The primary objective of the Ombud in terms of Financial Advisory Intermediary Services Act is stipulated in section 20 (3) which reads as follows:

“The objective of the Ombud is to consider and dispose of complaints in a procedurally fair, informal, economical and expeditious manner and by reference to what is equitable in all the circumstances, with due regard to –
(a) the contractual arrangement or other legal relationship between the complainant and any other party to the complaint;...”

The majority of clients served by the Ombud are predominantly consumers. The Office generates funds from other sources rather than the complainant, which makes justice easily accessible to the consumers.¹⁴¹⁶ The presence of Ombud in the financial services industry for long and short term insurance rendered the relevancy of private arbitration in this regard less important due to the financial benefits of the process to the consumer. Thus, the process is indispensable and its existence should not be disturbed.

Recommended provision:

- (1) Arbitration must not be used for consumer disputes where the claim is less than R50,000. The restriction does not apply to claims submitted to an ombudsman, in terms of a statutory or private-sector ombud scheme. .
- (2) “Subsection (1) applies to every **arbitration agreement** entered into by a consumer in South Africa after the commencement of this Act notwithstanding a provision in the **arbitration agreement** to the effect that it is governed by a law other than South African law.”

¹⁴¹⁵ See for example the Long-Term Insurance Ombudsman governed by Financial Services Ombud Schemes Act, 2004 and the FAIS Ombud, established in terms of s 20 of the Financial Advisory and Intermediary Services Act 37 of 2002.

¹⁴¹⁶ FAIS s 22.

6.5.3.2 The constitutionality of arbitration clauses concluded by parties of unequal bargaining powers

The second research question related to the constitutionality of private arbitration in general and, more particularly in a context characterised by transactions between parties of unequal bargaining power. The greatest concern this thesis has regarding the current South African Arbitration Act is that it makes no sufficient provisions for the protection of consumers. The fact that the Act takes no serious account of the effect of a disparity in bargaining powers between parties leaves the weaker party vulnerable and exposed to exploitation. This is despite that fact that section 3(2) gives the High Court, on application, a discretion not to enforce an arbitration agreement, by declaring that it should cease to have effect.¹⁴¹⁷ This protection is however beyond the financial means of most consumers. It is therefore of little practical value. Section 35(6) of the 1965 Act prohibits a provision in an agreement to refer a future dispute to arbitration to the effect that a party will in any event pay his or her own costs. The SALRC in its May 2001 report regarded the aim of this provision as being protection for financially weaker parties, particularly consumers.¹⁴¹⁸ The jurisprudence around this issue was explored and it became apparent that consumers are most prejudiced by the fact that the existence of an arbitration agreement restricts their later right of access to the courts in circumstances where the agreement was not adequately explained to them. Such uninformed agreement should, I contend, vitiate the party's consent to arbitration as, the SALRC stated:¹⁴¹⁹

“Arbitration is a consensual process in that the primary source of the arbitral tribunal's jurisdiction is the arbitration agreement between the parties. The consensual basis of arbitration gives arbitration the potential to be a very flexible method of dispute resolution. The parties can, by agreement, tailor the process to the needs of their dispute, bearing in mind its nature and complexity, as well as the amounts in dispute. The advantage of flexibility, if used, is one of the most important advantages of arbitration compared to litigation. A fundamental principle of modern arbitration legislation is therefore party autonomy. This entails that the parties should be free to agree how their dispute should be resolved, subject only to those safeguards that are necessary in the public interest.”

¹⁴¹⁷ See also section 6(2), which achieves the same result by a different procedural route.

¹⁴¹⁸ See discussion in Cht 3.266 and 3.278 of this thesis.

¹⁴¹⁹ SALRC (2001) 2.

Both the SALRC and this thesis agree that consumers often enter into contracts with large corporations and accept clauses of which they are not aware. In such cases, no consensus is reached, which negatively affects the validity of the contract or agreement. There exists no justification for the restriction of the consumer's constitutional right of access to court either before the arbitral proceedings or during the challenge to the award under circumstances where it is apparent that no consensus was reached between the contracting parties. The Constitution cannot be said to be in support of a process that appears to prejudice consumers rather than dispensing justice.

There is a need to approach an arbitration agreement between parties of unequal bargaining power with the utmost care, especially in the South African context where many consumers are either unsophisticated laypersons or not in a position to negotiate a contract without an arbitration clause. The presence of true consensus must first be established for valid conclusion of a contract. The presence of the arbitration clause must be brought to the attention of the consumer as recommended by the SALRC; there is a further need to adequately explain the concept and its consequences to the consumers. This view is also supported by English law where best practice requires that an arbitration clause must be fully discussed with the consumer to avoid it being termed unfair.¹⁴²⁰

An obligation should rest on the party in the stronger bargaining position to ensure the clause is explained clearly to the weaker party who should not be compelled to accept the clause. Arbitration clauses should only be permissible where consumers can comprehend the consequences of entering into such an agreement. The courts should have extended powers of supervision where an arbitration clause is being enforced against a consumer. This is to ensure that justice is served. As the court said in *R v Hepworth*:¹⁴²¹

“A judge is an administrator of justice, he is not merely a figure-head, he has not only to direct and control the proceedings according to recognised rules of procedure but to see that justice is done.”

¹⁴²⁰ Hörnle 724.

¹⁴²¹ 1928 AD 265 at 277.

The CPA was enacted specifically to protect consumers in weak bargaining positions who get involved in potentially prejudicial contractual relations with large corporations. As Mupangavanhu states:¹⁴²²

“Such contracts undermine freedom of contract between the contracting parties as they eliminate the opportunity for negotiating terms. Consumers have no bargaining power to negotiate the terms of the contract and they are imposed on a take-it-or-leave-it basis.”

The consumer often finds herself bound to a contract with a large corporation in circumstances that are far from fair. They are persuaded to sign standard-form contracts, which are already prepared by the corporate lawyers representing such corporations. These contracts often contain terms, which are excessively one-sided, favouring the stronger party in the relationship. Contracts of this nature facilitate slipping clauses like arbitration clauses in through the back door and burying them in the fine print where they are not obvious to the consumer who may reject them.

Arbitration is potentially unfair to the unsophisticated consumer since its existence deprives the parties of their right to judicial redress. Having established that arbitration originates in a contract, I can find no reason to exclude it from the application of the CPA. Section 48(2) of the CPA states that:

- “(2) Without limiting the generality of subsection (1), a transaction or agreement, a term or condition of a transaction or agreement, or a notice to which a term or condition is purportedly subject, is unfair, unreasonable or unjust if—
- (a) it is excessively one-sided in favour of any person other than the consumer or other person to whom goods or services are to be supplied;
 - (b) the terms of the transaction or agreement are so adverse to the consumer as to be inequitable;
 - (c) the consumer relied upon a false, misleading or deceptive representation, as contemplated in section 41 or a statement of opinion provided by or on behalf of the supplier, to the detriment of the consumer; or
 - (d) the transaction or agreement was subject to a term or condition, or a notice to a consumer contemplated in section 49 (1), and—
 - (i) the term, condition or notice is unfair, unreasonable, unjust or unconscionable; or
 - (ii) the fact, nature and effect of that term, condition or notice was not drawn to the attention of the consumer in a manner that satisfied the applicable requirements of section 49.”

¹⁴²²

Mupangavanhu 121.

It has been established in this thesis that standard-form contracts containing arbitration clauses are generally formulated in such a way that they favour the large corporation. It further became apparent that consumers' attention is often not drawn to the existence of an arbitration clause in a contract and its implications. The CPA, through the abovementioned section, offers adequate protection to consumers in weaker bargaining positions and thus is supported by this thesis as offering a possible solution to the possible dangers arbitration clauses may pose to South African consumers where the Act would be applicable.

The provisions of the CPA¹⁴²³ and legislation recommended in 1998 by the Commission in its *Report on Unreasonable Stipulations and the Rectification of Contracts*, should be available as a tool to be utilised by the court to protect the rights of the consumer where she is a subject to a contract containing prejudicial clauses. This is of course only in situations where the CPA would apply to the particular agreement but it is submitted that even where the Act does not apply, the provisions could serve as a guideline to ensure general standards of fairness. This is directly contrary to the SALRC recommendations. The SALRC was convinced that the draft Bill provided sufficient protection to the consumer.¹⁴²⁴ This thesis challenges this view and would urge that the English law approach in this regard be adopted. The English equivalent of the *Regulation on Unreasonable Stipulations and the Rectification of Contracts* and the *Consumer Protection Act*¹⁴²⁵ are expressly extended to arbitration clauses.¹⁴²⁶

The English Regulation, 1994 was established to give effect to the European Economic Community Council (ECC) directive 93/13 which regulates unfair terms in consumer contracts. Spain is also a member of the ECC and, having the provisions of ECC Council directive 93/13 in mind, referred the case of *Elisa María Mostaza Claro*¹⁴²⁷ to the European Court of Justice for determination. The court was required to determine whether the award obtained against a consumer could be annulled

¹⁴²³ See discussion Cht 3.

¹⁴²⁴ SALRC (2001) ix.

¹⁴²⁵ Unfair terms in consumer contracts regulations 1994, English Consumer Protection Act, 1987.

¹⁴²⁶ English Arbitration Act s 89.

¹⁴²⁷ *Elisa María Mostaza Claro v Centro Móvil Milenium SL*, JUDGMENT OF 26. 10. 2006 — CASE C-168/05.

where it is established that it resulted from an arbitration clause, which formed part of a standard-form contract.

The court highlighted the fact that the directive was introduced to protect the consumer against injustices that may occur where there are disparities in bargaining powers and levels of knowledge between the consumer and the supplier. It further stated that the national court of each contracting State seized of an action for annulment may make a determination of whether an award must be set aside after considering the facts of each case.

This particular finding by the European Court of Justice endorses the view expressed in this thesis that a need exists to protect consumers against large corporations who use arbitration clauses to place judicial redress beyond their reach. The nature of arbitration clauses effectively denies consumers their right of access to court, which raises some questions regarding the constitutionality of arbitration as it is currently applied. The following discussion responds to the issue of the constitutionality of arbitration.

6.5.3.3 The constitutionality of private arbitration in South Africa

The third research question related to the constitutionality of the private arbitration process as it is currently applied.

Where an arbitration agreement is entered into between parties of equal bargaining power, this is generally fair and constitutional as it results from a process in which all parties had the power to negotiate and influence the clauses to which they ultimately agree. Parties can then rightly be prohibited from later challenging the contract on the basis that they were unduly influenced to agree to prejudicial clauses. That said, it can be convincingly argued that arbitration, by its exclusion of any appeal process, may even be prejudicial to parties in such circumstances where the arbitrator errs with respect to the facts or the law.

An award may only be reviewed and set aside on the grounds set out in section 33 of the South African Arbitration Act. The section makes no provision for review or

appeals where there has been an error in the interpretation of the facts or law. At times, such an error in the interpretation of either the law or facts may be so significant that it fundamentally influences the final award and compromises fairness and justice. Fairness and justice is understood by O'Regan J in *Mphaphuli* to have been an ingredient that brings arbitration within the confines of the Constitution. According to O'Regan J:¹⁴²⁸

“At Roman-Dutch law, it was always accepted that a submission to arbitration was subject to an implied condition that the arbitrator should proceed fairly or, as it is sometimes described, according to law and justice. The recognition of such an implied condition fits snugly with modern constitutional values.”

As stated above, misinterpretation of the law or facts by the arbitrator is not a ground for setting aside the award, irrespective of the fact that the award may have incorrectly benefitted a party. This situation cannot be allowed to persist. It does not represent justice as envisaged by the parties when they elected arbitration as their preferred dispute resolution mechanism. The term “justice” was unpacked earlier¹⁴²⁹ and this situation in the South African law in my view falls short of providing the justice that O'Regan J believes arbitration provides to the parties. It does not fit “snugly with modern constitutional values”. Measures must be put in place to minimise the potential prejudice caused by entrusting a layperson with a responsibility to interpret the law and issue a fair, balanced and correct award. English arbitration law and the USA, through American Arbitration Association (AAA) rules, may provide the required best practice to inform the development of South African arbitration law in this regard.¹⁴³⁰

English law found the simple enforcement of an award that was based upon an error of law a bitter pill to swallow. Hence, the DAC noted that accepting outcomes premised upon a wrong interpretation of the law will do a disservice to the parties and fail to achieve the contemplated outcomes.¹⁴³¹ Sections 37, 45 and 69 of the English

¹⁴²⁸ *Mphaphuli* para 221.

¹⁴²⁹ Cht 3 para 3.4.2.

¹⁴³⁰ Though it is recognised that there are difference between the institutions the comparison is aimed at providing a guideline for further refinement when applying to the South African dispensation.

¹⁴³¹ See *Dedezade* 58. The DAC supported the incorporation of s69 of the English Arbitration Act, 1996 which supported appeal on points of law.

Arbitration Act¹⁴³² were enacted specifically to deal with the legal aspects of arbitral proceedings. Section 37 empowers the arbitrator to appoint a legal expert or an assessor to attend the proceedings and assist in technical matters. This approach adds value to the process and should also be adopted in South Africa. Such a provision would empower arbitrators to appoint specialists to lend their expertise to the arbitration proceedings. The award would thus emanate from the collaboration of experts.

Furthermore, section 45(1) permits the court to determine any question of law that may arise during arbitration proceedings if requested to do so by a party to the proceedings. Section 45(2) states that:

- “(2) An application under this section shall not be considered unless—
- (a) it is made with the agreement of all the other parties to the proceedings, or
 - (b) it is made with the permission of the tribunal and the court is satisfied—
 - (i) that the determination of the question is likely to produce substantial savings in costs, and
 - (ii) that the application was made without delay.”

Section 45 thus permits parties to decide whether or not they require the intervention of the court for an accurate determination of any question of law with which they are grappling. In the event that they decide against involving the court, they may be justifiably viewed as having impliedly accepted the award with its potential legal defects.

This provision may be alleged to correspond with section 20 of the South African Arbitration Act, 1965 that might create the impression that the criticism of the South African provision is unjustified. However, South African provision lacks comprehensiveness that section 45 of the English Arbitration Act, 1996 contains, which makes it an ideal provision to learn from. Both provisions deal with the reference of a question of law to the court in the course of an arbitration. Section 45 could also be compared to the section 37 of the SALRC's Draft Bill for Domestic Arbitration, which adopted some of the refinements contained in section 45 of the English Act.¹⁴³³ South African provision permits the party to state the question of law

¹⁴³² English Arbitration Act.
¹⁴³³ See discussion Cht 3.2 of this thesis.

for the opinion of the court without the consent of the other party whereas the English provision explicitly states that the question of law can only be stated for the opinion of the court with consent of the parties involved.

An appeal of an award on a point of law may be brought in terms of section 69 of the English Arbitration Act. However, either consent of all the parties or the leave of the court is required for such an appeal to be permitted. The court may only grant leave to appeal if the question meets the criteria set out in section 69(3), for instance if the decision of the tribunal, based on the award is obviously erroneous, or alternatively if the question of law is of general public importance and the decision of the arbitrator is open to serious doubt. The section makes a provision for the parties to exclude the right to appeal the award on a point of law by agreement. The implication of the decision to contract out the right to appeal an award is unavailability of these safeguards to the parties.

If these safeguards and restrictions are found to be suitable for incorporation into legislation governing consumer arbitration in South Africa, determination will have to be made regarding the extent of their applicability. The issue of arbitrability of claims less than R50, 000 that involves consumers was elaborated on earlier in this thesis.¹⁴³⁴ The conclusion was reached that consumer arbitration must not be used for claims less than R50, 000. To this end, the focus will be on consumer arbitration of claims above R50, 000. The incorporation of section 69 of the English Arbitration Act into South African legislation will greatly benefit the process for both general and consumer arbitration equally. This is so particularly because of the recommended prerequisite legal representation for the consumer who intends to conclude an agreement consisting of an arbitration clause with a supplier.¹⁴³⁵

The AAA also introduced an optional appeal process on questions of fact or law. This process too, was only available with the consent of all parties. An appeal will only be permitted to an appeal panel constituted by the AAA if the question of law or fact appealed appears to be material and prejudicial to the parties or clearly

¹⁴³⁴ See cht 6 *para* 6.6.3.1
¹⁴³⁵ *Ibid.*

erroneous.¹⁴³⁶ The manner in which the appeal process can be introduced promotes party autonomy. Should parties elect not to avail themselves of this right of appeal on points of law, they will, by implication, have undertaken to accept any interpretation of the law whether it is right or wrong. If similar provisions were to be incorporated into the South African arbitration law, the integrity of the arbitration process would be enhanced. Parties should be permitted to choose whether or not to include such provisions in their agreement.

The AAA permits appeal on questions of fact or law, a benefit South African arbitration law does not provide.¹⁴³⁷ A similar provision which permits parties to agree to appeal of an award was identified in the rules of the Arbitration Foundation of South Africa (AFSA).¹⁴³⁸ Article 22(1) states that:

“Where the parties have, whether in terms of the arbitration agreement or otherwise, in writing agreed that an interim award or the final award of an arbitrator or arbitrators shall be subject to a right of appeal the following rules shall, save to the extent otherwise agreed by them in writing, apply.”

The Secretariat shall upon the payment of prescribed fees by the parties for the appeal purpose appoint the appeal arbitrator or arbitrators agreed upon in writing by the parties as stipulated in article 22 (5). Thus, the parties may within a period agreed after the issuing of the award initiate appeal proceedings with the relevant court. Incorporation of a section of this nature in the Arbitration Act will mitigate any prejudice, which may be suffered by parties due to the lack of an appeal process in arbitration.

There may be a concern that the process may be too costly for a consumer more particularly if he loses the appeal. However, if the recommendations made in this thesis are incorporated no consumer will conclude a contract without legal representation. The issue of costs would have been properly ventilated with a consumer prior to the conclusion of the contract and the decision to accept

¹⁴³⁶ See rule A-10 which reads: “A party may appeal on the grounds that the underlying award is based upon:
(1) an error of law that is material and prejudicial; or
(2) determinations of fact that are clearly erroneous.”

¹⁴³⁷ (AAA) Optional Appellate arbitration Rules 2013

¹⁴³⁸ Commercial Arbitration Rules of AFSA 2015

arbitration as a form of dispute resolution between the parties would have been an informed one.

It may be argued that the recommendations to incorporate some of the clauses of the AAA or AFSA that introduces an appeal to arbitral tribunals may not sufficiently address the concern raised by this thesis that consumer arbitration unfairly restricts consumer's right in terms of section 34 of the Constitution. It may further be tempting to take a shorter route and recommend that parties must create a right of appeal to the courts by agreement. However, the parties do not have the liberty to extend the review grounds contained in the Act nor create an appeal right and this issue was sufficiently deliberated upon by various cases.¹⁴³⁹

There is an alternative approach which if employed may address the concern regarding the protection of right of access to court in terms of section 34 of the Constitution for parties involved in consumer arbitration. The plight of the consumers who are involved in consumer arbitration may be greatly relieved by the introduction of a mandatory statutory provision for an appeal to a court. This viewpoint may be a bit unsettling to those who unreservedly support party autonomy in arbitration. However, restriction on party autonomy in this regard may be justified by the need for consumer protection.

While law reform may be informed by the recommendations above, there is a further recommendation, which might improve the South African arbitration law landscape. Another possibility, although the answer is not definitive, could be the establishment of an institution that will handle arbitration process from its inception until enforcement stage. The institution shall be created by statute and compulsory to consumer arbitrations. The institution should provide guidance as to the situations where appeal may be sought and all grounds for appeal, which should be incorporated into the founding legislation. The research made recommendations regarding the manner in which the institution could be established.

¹⁴³⁹ See *Telcordia* para 67, *Daljosaphat Restorations (Pty) Ltd v Kasteelhof* CC 2006 SA 91 (C) paras 31-36.

The Department of Trade and Industry (DTI) should be tasked with the responsibility of facilitating the establishment of the institution. The recommended name for the institution is the South African Arbitration Association (SAAA). The institution must be accountable to the DTI, which should assume a supervisory role until the institution is well established and able to run independently from the DTI. A valuable lesson may be learnt from emulating associations similar to the AAA of the USA in developing an independent institution equipped and empowered to deal with the entire arbitration process without court involvement. The AFSA may well be another suitable body to learn from in the conceptualisation, establishment and regulation of such an institution.¹⁴⁴⁰

This institution should not be identical to the Commission for Conciliation, Mediation and Arbitration (CCMA). The two institutions must be distinguishable from each other. As O'Regan J aptly described the distinction in *Mphaphuli*:¹⁴⁴¹

“The twin hallmarks of private arbitration are thus that it is based on consent and that it is private, i.e. a non-state process. It must accordingly be distinguished from arbitration proceedings before the Commission for Conciliation, Mediation and Arbitration (CCMA) in terms of the Labour Relations Act 66 of 1995 which are neither consensual, in that respondents do not have a choice as to whether to participate in the proceedings, nor private.”

The new institution needs to maintain the elements of consent and flexibility and protect the autonomy of arbitration in as far as consumers are not involved. The role of the institution will be strictly administrative in nature. The institution may develop practical rules which should be aligned with the guiding legislation to avoid an unsubstantiated extension of the role of arbitration beyond the limits of the law.

The development of the institution will require initial appointments made by the DTI for a determined period. Once appointed, these members will be empowered to develop the Constitution and rules to apply to the institution. The initial first five years should also be used to identify critical appointments which should be made permanent for the sake of continuity. The initial appointments will comprise of at least eleven members representing the various provinces of the country and various

¹⁴⁴⁰ Arbitration Foundation of South Africa (AFSA) website
<http://www.arbitration.co.za/pages/default.aspx> (accessed on 03 Sep 2016).

¹⁴⁴¹ *Mphaphuli* para 198.

disciplines that make use of private arbitration. A specified number of members will be required to be legal practitioners, either practising attorneys or advocates and all members will be required to have some experience in private arbitration.

It is suggested that the institution be chaired, at national level, by a Chairperson who is possessed of a South African legal qualification and is admitted as an attorney or advocate or is either a retired judge or an academic who specialises in arbitration and who has extensive, relevant practical experience. A minimum managerial experience of eight years in a commercial environment will be an added recommendation. The Chairperson should be assisted by a Deputy Chairperson possessed of a relevant tertiary qualification and five years managerial experience in a commercial environment. The balance of the membership should be comprised of nine regional heads, one from each of the provinces. All regional representatives should possess a tertiary qualification and demonstrate considerable experience in the commercial sector. All members must possess substantial exposure to private arbitration.

Each regional representative should chair a regional sub-committee comprised of four suitably qualified members.

The institution will be an oversight body with a set of institutional rules that parties may elect to apply to their arbitrations. The institution will further maintain a detailed register of arbitrators, their areas of specialisation, their qualifications and years of experience that will be updated from time to time. This information will be provided on request to parties who wish to initiate arbitration proceedings. Parties are not obliged to elect arbitrators from the register kept by the institution. The institution may recommend an arbitrator or arbitrators to parties based on expertise but, the final decision on which arbitrator(s) to utilise must lie with the parties. The arbitrator(s) selected by the parties will be closely monitored to ensure that she comply with the guiding legislation and the rules of the institution from inception to completion of the proceedings to guarantee the delivery of justice. The institution has the responsibility to further create regulations for a possible appeals process that parties may include in their agreements.

The decision whether or not to include an option to appeal the arbitral award should be left entirely up to the parties and they must be adequately informed of the implications of electing not to include an appeal option in their agreement. The appointment of the appeal panel must also remain the prerogative of the parties. The institutional rules will however, establish the parameters within which that selection can take place.

An institution of this type could also be tasked with making recommendations on an on-going basis for the development of arbitration legislation, rules and regulations in South Africa to remain responsive to the changing needs of business. It was pointed out earlier at the beginning of this discussion that the answer provided by this research regarding the establishment of the institution is not definitive, thus further research should be conducted to determine the viability and plausibility of such an institution.

The abovementioned recommendations if implemented, may improve the quality of arbitration law in South Africa tremendously. Furthermore, the implementation of some of the recommendations would offer necessary support and protection to vulnerable consumers, ensuring constitutionality and justice to arbitration parties.

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