Judicial hostility towards international arbitration disputes in South Africa: Case reflections

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Abstract

The term judicial hostility in this context refers to the courts' reluctance to enforce arbitration awards. Judicial hostility towards international arbitration had found its place in American courts as judges were reluctant to enforce the terms of an arbitration agreement that would subject the parties to the arbitration and subsequently bind them to an arbitration award. The judiciary pronounced on the dispute rather than making the arbitration award an order of the court. The court did not provide enforcement mechanisms or execution orders in respect of arbitration awards. However, judicial hostility decreased in America because of the amendment of the Federal Arbitration Act, which governed the enforcement of arbitral awards between parties. Judicial hostility had many facets in South Africa, from the judiciary taking away the force of arbitration awards by finding that the arbitration agreement was void to Hlophe JP not supporting arbitration forums. Despite this fact, the South African judiciary has overcome its hostility but the legislation that governs arbitration is outdated. The intention of the legislature was to ensure that the International Arbitration Bill was promulgated during 2016. This article critically discusses judicial hostility towards arbitration awards.

I Introduction

Judicial hostility has been prevalent in both American and South African case law. Judicial hostility seemed to be multi-faceted in that judges did not recognise arbitration awards. Subsidiary legislation also did not

support arbitration awards, which resulted in case law not supporting the enforcement of arbitration awards. Previously, South African judges did not regard arbitration awards as valid. [1] The legislation that governed international arbitration awards allowed the judiciary to declare arbitration agreements void. [2] However, the Constitution of the Republic of South Africa, 1996 provides for the consideration and interpretation of international law. [3] South Africa has legislation [4] that does not favour the enforcement of arbitration awards, [5] and hence it is necessary to amend the existing legislation.

Unfortunately, some courts [6] in South Africa have failed to apply international law [7] such as the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards. [8] The convention

ensures that signatory states recognise and enforce arbitration awards between contracting states. South Africa acceded [9] to the convention despite the existence of the PBA, [10] which protected it from enforcing arbitration awards. [11] According to Schulze, [12] the REFAA, [13] unlike the Convention, [14] failed to define an arbitration agreement and referred only to the enforcement of foreign arbitration awards.

In South Africa, legislation is needed to address the implementation of international arbitration agreements and allow the country to act as a host in facilitating international commercial disputes. South Africa is at a disadvantage without this legislation and regulation. [15] However, Parliament recognised such a need, as it would appear that there was a

form of commitment to considering and adopting the International Arbitration Bill during its sitting in 2016. [16]

Given South Africa's non-participation in international legislation and protocols relating to the resolution of international disputes (such as not ratifying the Washington Convention), [17] it is necessary to consider the current mechanisms utilised by the country to resolve international disputes. [18] The starting point in resolving an international dispute is for a legal practitioner to establish the venue or seat and the law applicable to the matter in order to determine the appropriate forum for international arbitration.

This article explores case law regarding the validity of arbitration awards and determines the extent of judicial hostility towards such awards. The author suggests some amendments to existing arbitration legislation.

II Arbitration forums or institutions

Arbitration agreements must indicate whether the dispute must be resolved by an arbitration institution following its own rules. Should this not be stipulated, the parties must identify the rules and process to be followed. The written agreement between the parties must indicate the seat of the arbitration and the law governing the place of arbitration proceedings (*lex arbitri*). [19] It is important to emphasise the fact that there should be consensus between the parties about the arbitration forum.

III Judicial decisions

In *Telcordia*, the High Court, on appeal, set aside an interim arbitration award and replaced it with an order that the dispute should be heard *de*

novo before three South African judges. On further appeal, Harms JA held that the court *a quo* had disregarded the principle of party autonomy: [20]

> 'The High Court in setting aside the award disregarded the principle of party autonomy in arbitration proceedings and failed to give due deference to an arbitral award, something our courts have consistently done since the early part of the 19th century. This approach is not peculiar to us; it is indeed part of a worldwide tradition. Canadian law, for instance, ''dictates a high degree of deference for decisions . . . for awards of consensual arbitration tribunals in particular''. And the ''concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes'' have given rise in other jurisdictions to the adoption of a ''standard'' which seeks to preserve the autonomy of the forum selected by the parties and to minimise judicial intervention when reviewing international commercial awards.'

In the American case of *Kulukundis Shipping Co v Amtorg Trading Corp*, [21] on the breach of an arbitration agreement, Frank J remarked as follows regarding a two-pronged test:

> 'In light of the clear intention of Congress, it is our obligation to shake off the old judicial hostility to arbitration. Accordingly, in a case like this, involving the federal Act, we should not follow English or other decisions which have narrowly construed the terms of arbitration agreements or arbitration statutes. With this new orientation, we approach the problems here presented. They are twofold: (a) Does the arbitration provision

here have the sweeping effect ascribed to it by appellant? (b) Is it, as appellant contends, wholly without efficacy because appellant asserted that there never was an agreement for a charter party?' [22]

However, since the *Kulukundis* judgment the judiciary has moved away from hostility towards the acceptance of arbitration awards, thus strengthening legislation in upholding arbitration autonomy and carrying out the practicality of awards. [23]

Carbonneau summarises the state of judicial hostility in America and the use of arbitration as a mechanism to create efficiency and to ensure that practicality prevails: [24]

> 'The Court has rarely, if ever, expressed a serious interest in the intellectual content of arbitration law; instead, the Court plays the role of craftsman, fixated on elaborating workable rules that promote recourse to arbitration. It wants doctrine to maintain the objectives of the policy on arbitration, which, in turn, guarantees that U.S. citizens have access to an efficient and effective form of adjudication.
>
> 'The justices envisage arbitration as an instrument of practical policy, and they alter, repair, and modify the doctrine to maintain the efficacy of its application. Arbitration is not a basis upon which to conduct lofty juridical debates.'

In America, the statute governing arbitration limited judicial scrutiny and supervision, and gave vested powers to the courts. [25] The courts had the power to enforce arbitration awards. [26] The reason for the power vesting in the courts was not to give absolute power to the arbitration process: [27]

> 'Practicality thus far has triumphed, but there are serious reasons why both the right and the left would want to oppose the process. For the right, arbitration usurps the legitimate authority of the courts and law; for the left, arbitration exacerbates existing inequalities and reinforces corporate positions.'

In summary, the American position is paradoxical, because recent judgments [28] have been contradictory: [29]

> 'The struggle appears to reside between the hegemony of law and the necessity of recourse to arbitration. On the one hand, the Court does not want to forgo its role as the purveyor of governing standards or its ability to rectify what it perceives to be disturbing arbitrator error. On the other hand, it does not want to cripple the arbitral process with ill-suited, misfit acts of legal regulation. At the very least, provided an overarching systemic perspective is justified and consistent with the reality of the Court's deliberations, the Court is undecided about the future direction of U.S. arbitration law. It is not sure whether to trust the arbitrators, the parties, and their legal counsel, or to protect society and the parties themselves from the choice of arbitrating disputes.'

Hall Street Associates LLC v Mattel Inc concerned the duties of tenants and landlords. A water well used by the tenants was polluted. The questions for decision were who was responsible for maintaining the well, and whether this constituted an environmental issue. [30] The parties agreed in the federal court to resolve the matter through arbitration. The arbitrator found that the landlord was not responsible for maintaining the well. [31] On appeal, the court found that the pollution of the well was indeed an environmental issue and that it was the responsibility of the landlord to maintain the water well. The court referred the matter back to the arbitrator to be reconsidered. The arbitrator reversed its decision in favour of the tenant. [32] The crisp issues before the Supreme Court of Appeals were whether a court could judicially review an award that did not fall within the ambit of sections 9, 10 or 11 of the Federal Arbitration Act; [33] and, if the agreement provided for the variation of the statutory grounds, whether it could be considered and the award reviewed. [34] The majority judgment held that the first decision of the arbitrator stood, and that an agreement could not vary or extend the provisions of the FAA. [35] The dissenting judgment found that the agreement between the parties extended the grounds for judicial review. In this case, it was clear that there was a conflict between the freedom to contract in the arbitration agreement and the statutory provisions (the FAA). [36]

The questions here are: how would the South African courts have dealt with such matter, and do the terms of the arbitration agreement

trump the statutory provisions of the 1965 Act? Contractually the arbitration agreement can extend the grounds for judicial review, even though that defeats the purpose of arbitration. However, in this instance the dispute was about the nature of an environmental issue, and the contamination of a water well was indeed found to be an environmental problem. It is submitted that the law about the interpretation of an environmental issue was incorrectly applied in this case. A critical difference between judicial review in the United States and in South Africa is that in the United States judicial review is solely governed by the FAA while in South Africa it is governed by the arbitration agreement concluded by the parties. In South Africa, the 1965 Act provides limited grounds for judicial review; [37] however, the parties can agree to extend these grounds.

Rent-A-Center v Jackson dealt with the employee and employer relationship. The employee alleged discrimination, and there was an arbitration agreement regarding the dispute. The employee contended that the whole agreement was unenforceable because the clauses relating to limiting discovery and sharing the arbitrators' fees were unconscionable. [38] The issue was whether the arbitration agreement was unenforceable; however, the argument relating to the judicial review of the agreement was not heard by the court as it was not on time. [39] The majority judgment held that the arbitration agreement had the same force as litigation, and that the agreement was enforceable. [40] The dissenting judgment, by contrast, was of the view that only a court could pronounce on whether a matter was arbitrable and whether the contract was void. [41]

In *Stolt-Nielsen v Animal Feeds Int'l*, the main issue was whether a collective class action for arbitration could be instituted if the arbitration agreement did not provide for the class arbitration. [42] The federal district court found that the collective class action for arbitration could not be instituted and rescinded the award. [43] The Supreme Court reversed this decision and held that a collective class action for arbitration for a maritime action was allowed, as the regulations permitted it. [44]

Carboneau [45] has discussed the traditional hostility of the judiciary towards arbitration awards. However, the Federal Arbitration Act was

aimed at protecting the terms of arbitration agreements. [46] Despite this, '[t]he article suggests that federal and state judges retain some measure of the long-standing judicial hostility toward arbitration, and that they have expanded the doctrine of unconscionability beyond its typical uses to revoke arbitration agreements and permit limitation of claims by parties subject to arbitration agreements'. [47]

Judicial hostility adversely affects the principle of party autonomy and corrodes it so that the grit of the award dissipates. The principle of party autonomy is also linked to freedom to contract and to upholding the terms of the arbitration agreement. [48] Christie discusses the principle of party autonomy [49] and, in particular, arbitration matters and the balance of curial intervention. The author states that, at times, it may be required that the balance shifts to commercial arbitration matters and favours party autonomy, which is inevitable in protecting the right of freedom to contract, as the parties have bound themselves to the arbitration agreement. [50]

In *Zhongji Development Construction Engineering Company Ltd v Kamoto Copper Company SARL*, [51] Willis JA, for the majority of the bench, stated that there was a duty to recognise international arbitration:

> 'The South African courts not only have a legal but also a socio-economic and political duty to encourage the selection of South Africa as a venue for international arbitrations. International arbitration in South Africa will not only foster our comity among the nations of the world, as well as international trade but also bring about the influx of foreign spending to our country.' [52]
>
> 'The arbitration must first be given the opportunity to have run its course before the court considers any application relating there.' [53]

Given AJA, in the minority, stated, with a sense of irony, the following about the enforcement of the arbitration agreement:

> 'This approach, and the underlying rationale for circumscribing the powers of a court which has jurisdiction conferred by an arbitration agreement, shows appropriate deference for the autonomy of the parties to decide on the forum which should resolve their disputes. The supreme irony of

the application is that Zhongji, in ostensibly seeking to enforce the arbitration clause, in effect sought to have the court act contrary to some of the terms of the agreement it invoked'. [54]

In *De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the Time Being & another*, [55] the arbitration agreement concluded was upheld and protected, because 'good cause' was not shown [56] to render it void. The second claim of unfair discrimination was not heard because of the 'constitutional subsidiarity' that required the claim to be heard first before the Equality Court, by consolidating the claims 'to be heard under the dual but separate jurisdictions of the High Court'. [57]

Butler proposes that South Africa should adopt the UNCITRAL model only for international arbitrations, as proposed by the South African Reform Commission, for the more expedient and cost-effective resolution of matters. [58]

Schulze proposes that South Africa should promulgate the International Arbitration Bill and adopt the UNCITRAL model rules for domestic arbitration matters. The reasoning for this proposal is to secure foreign investment to mitigate against the substantial financial loss of investment opportunities. [59] This proposal encourages legislation that will stimulate the South African economy at a time when the economy needs to grow and expand. It is submitted that resolving commercial disputes by way of arbitration instead of using litigation should be preferred as it saves time and costs. [60]

In *Bidoli v Bidoli*, [61] the settlement agreement concluded between the parties was made an arbitration award by the arbitrator. However, the High Court declared the award void *ab initio*. [62] On appeal, it was held that the arbitrator was entitled to make such an award, and that the mandate had not ended. [63] The appeal court accordingly upheld

the award as valid. This decision is important as it emphasises the binding nature of settlement agreements. The court also pronounced on the technicality of the arbitrator's powers of making the settlement agreement an award. [64]

Judicial hostility towards arbitration awards has become a relic of the past as the judiciary upholds awards and maintains party autonomy. In the United States of America, the FAA ensures that the practicality and effect of arbitration awards are upheld. In South Africa, the 1965 Act safeguards the effect and enforcement of awards. It is submitted, however, that South Africa still has a long journey ahead regarding the regulation of international arbitration awards.

IV The way forward

Instead of the judiciary being the only body to provide clarity regarding the enforcement of arbitration awards, legislation must be amended to provide clear parameters for the enforcement of international and domestic arbitration awards. Roodt states that the legislature defines the parameters when a court can intervene or not, in that '[c]lear judicial policy direction is vital about sequential consideration; when courts may intervene; and the possibility of express exclusion of the right of access to court.' [65] This suggestion illustrates that judicial policy should clarify when courts can intervene regarding the validity of arbitration agreements and awards, and when the right of access to the courts can be denied through grounds of exclusion.

In 1997, the South African Law Commission [66] recommended:

> 'the compulsory application of the Model Law to international commercial arbitration with optional application to domestic arbitrations. The concept ''international arbitration'' is defined in article 1(3) of the Model Law and this definition should be used for determining which arbitrations qualify as international and are therefore subject to Model Law.'

This recommendation is in line with an international trend. The Model Law is actually the basis of the law relating to arbitration awards in most first world countries.

The Commission also recommended that 'Act 40 of 1977 should be repealed and replaced by legislation which deals expressly with both the

recognition and enforcement of foreign arbitral awards and rectifies certain other defects in the wording of the existing legislation regarding the definition of ''foreign arbitral award'' and the grounds on which recognition and enforcement may be refused'. [67]

It was further recommended that the REFAA be repealed and replaced with legislation that specifically deals with the enforcement of foreign arbitral awards. In particular, the Commission felt 'that South Africa should follow the example of most of the other African countries and ratify the Washington Convention as it would create the necessary legal framework to encourage foreign investment and further economic development in the region'. [68] The ratification of the Washington Convention will encourage foreign investment and economic development in the country as the Convention provides the legal framework.

Finally, the Commission thought it 'desirable that all South African legislation on international arbitration should be embodied in a single statute, the International Arbitration Act'. [69]

Parliament is committed to adopting new legislation to regulate international arbitration.

> 'The legislation implementing the Model Law can usefully be consolidated with legislation replacing the Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977. The legislation should furthermore include legislation implementing the Washington Convention. The International Arbitration Act will only apply to arbitrations pursuant to an agreement between the parties.' [70]

The recommendation of one piece of legislation that incorporates the Model Law and the Washington Convention and addresses international arbitration will result in a comprehensive, clear and structured Act.

Almost 20 years later there has been not much progress regarding the implementation of these recommendations. It is apparent that South Africa is years behind the international commercial arbitration laws. As a result, private persons and companies have relied on other institutions and their forums to take South Africa forward, until the legislature introduces the relevant Act. It is important to note that in 2016 the

Parliament liaison officer indicated that the Act would be promulgated. [71]

V Conclusion

Judicial hostility towards arbitration awards is a relic of the past in that the judiciary now protects the principle of party autonomy and freedom to contract relating to the conduct of arbitration proceedings and the final and binding effect of arbitration awards. This is true for both the American and South African contexts. However, although the judiciary in South Africa supports the enforcement and finality of arbitration awards, there is still a long way to go before the country can host international commercial arbitration disputes. Legislation needs to reflect current norms and practices, and the fact remains that South Africa does not have any legislation that supports the recommendations of the South African Law Reform Commission Report relating to international commercial arbitration disputes. However, there is some hope that Parliament will soon ensure that South Africa has an International Arbitration Act that will enable it to host commercial arbitration disputes and attract foreign investment.

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1 In *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (5) BCLR 503 (SCA) para 1, the High Court set aside an arbitration award effectively replacing the arbitrator with three South African judges. See also Wilske & Ewers, 'Why South Africa Should Update its International Arbitration Legislation: An Appeal from the International Arbitration Community' (2011) 28(1) *Journal of International Arbitration* 1 at 9. They note that Hlophe JP did not support arbitration as a forum for

the resolution of disputes. In *Bidoli v Bidoli & another* (2982/08) [2010] ZAWCHC 39 (15 March 2010), the settlement agreement concluded between the parties was made an arbitration award by the arbitrator. The High Court declared the award void *ab initio* (para 40).

2 Section 1 of the Protection of Businesses Act 99 of 1978 (PBA) relates to the '[p]rohibition of enforcement of certain foreign judgments, orders, directions, arbitration awards and letters of request and furnishing of information relating to businesses in compliance with foreign orders, directions or letters of request'.

3 Section 39(1) and (2) of the Constitution of the Republic of South Africa, 1996 ('the Constution').

4 Section 1 of the PBA.

5 Butler, 'A New Domestic Arbitration Act for South Africa: What Happens After the Adoption of the UNCITRAL Model Law for International Arbitration?' (1998) 9 *Stellenbosch LR* 3.

6 In *Telcordia* para 1, the High Court set aside the arbitration award, removed the arbitrator, and replaced the arbitrator with three South African judges. See also Schulze, 'Of Arbitration, Politics and the Price of Neglect — South African International Arbitration Legislation Continues to Lag Behind: *Bidoli v Bidoli*' (2011) 23 *SA Merc LJ* 291 at 294–297. In *Bidoli* para 40, the settlement agreement concluded between the parties was made an arbitration award by the arbitrator. The High Court declared the award null and void

7 Dugard et al, *Dugard's International Law: A South African Perspective* 5 ed (Juta 2019) 48–51.

8 The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, concluded in New York on 10 June 1958 (New York Convention). It came into effect on 7 June 1959 and was published in 330 UNTS 38 (1959) (see no 4739). Article 1(1) states: '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 recognitions and enforcement are sought.' Article 1(3), in turn, provides: 'When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the territory of another Contracting State. It may also declare that it will apply the Convention 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.'

9 On 3 May 1976: see http://www.newyorkconvention.org/countries, accessed 5 September 2015.

10 Section 1(1) of the PBA provides: 'Nothwithstanding anything to the contrary contained in any law or other legal rule, and except with the permission of the Minister of Economic affairs *(a)* no judgment, order, direction, arbitration award, interrogatory, commission rogatoire, letters of request or any other request delivered, given or issued or emanating from outside the Republic in connection with any civil proceedings and arising from any act or transaction contemplated in subsection (3), shall be enforced in the Republic; *(b)* no person shall in compliance with or in response to any order, direction, interrogatory, commission rogatoire, letters of request or any other request issued or emanating from outside the Republic in connection with any civil proceedings, furnish any information as to any business whether carried on in or outside the Republic.'

11 In consequence of its accession, South Africa enacted the Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977 (REFAA).

12 Schulze, 'International Commercial Arbitration: An Overview' (2005) 46 *Codicillus* 45 at 56–57.

13 Section 2 of the REFAA states: '(1) Any foreign arbitral award may, subject to the provision of sections 3 and 4, 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.'

14 Article III of the New York Convention states: '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.'

15 Wilske and Ewers ((2011) 28(1) *Journal of International Arbitration* 1 at 5–9) discuss South Africa being an economic powerhouse but note that there are discrepancies between the South African Arbitration Act 42 of 1965 (the 1965 Act) and the REFAA. The International Arbitration Bill was supposed to be taken forward but came to an abrupt halt despite Minister Kader Asmal's intentions.

16 Correspondence between Advocate Michael Kuper SC and J Tshabalala (liaison officer of Parliament) dated 7 April 2015. In a letter titled 'International Arbitration Legislation', Advocate Kuper SC asked Parliament when the Bill would be tabled before Parliament. He was one of the drafters of the Bill that had apparently been forgotten. See also Ensor, 'Bill Will Give Firms Operating Across SA's Borders Access to Justice Services', available at www.bdlive.co.za, accessed 21 April 2016.

17 South Africa does not have legislation that addresses or regulates international commercial disputes or international arbitration disputes.

18 The Washington Convention of 1965 (known more formally as the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States) came into effect on 14 October 1966. This Convention was established to regulate and govern international disputes between states. See Redfern & Hunter, *Law and Practice of International Commercial Arbitration* 4 ed (Sweet & Maxwell 2004) 56.

19 Henderson, '''Lex arbitri'', Procedural Law and the Seat of Arbitration Unravelling the Laws of the Arbitration Process' (2014) 26 *Singapore Academy of Law Journal* 886 at 887–889.

20 *Telcordia* para 4.

21 *Kulukundis Shipping Co v Amtorg Trading Corp* 126 F 2d 978 (2d Cir 1942).

22 Paragraph 985.

23 Brunet, 'The Core Values of Arbitration', in Brunet, Speidel, Sternlight & Ware, *Arbitration Law in America: A Critical Assessment* (Cambridge 2006) at 37 states: 'Important supplemental provisions were Section 3 (Federal Arbitration Act 1925), which authorized a court to stay pending litigation when the dispute was ''referable'' to arbitration, and Section 4, which authorized a court to direct the parties to proceed with arbitration under an otherwise enforceable written agreement. In short, courts now had power to enforce valid arbitration agreements to arbitrate existing and future disputes by specific performance and to stay pending litigation until the arbitration was concluded.' See also Aragaki, 'Equal Opportunity for Arbitration' (2011) 58 *UCLA LR* 1189 at 1242–1250 (a model to place arbitration and litigation on the same footing); Reuben, 'Democracy and Dispute Resolution: The Problem of Arbitration' (2004) 67 *Law & Contemporary Problems* 279 at 281 (the relationship between mandatory arbitration and arbitration agreements, and its effect on democracy); Shackelford, 'Party Autonomy and Regional Harmonization of Rules in International Commercial Arbitration' (2006) 67 *Univ of Pittsburgh LR* 897 at 899–903 (the principle of party autonomy — arbitration forums should be at liberty to change their rules from time to time, and the tension between harmonisation of rules and party autonomy).

24 Carbonneau, 'The Rise in Judicial Hostility to Arbitration: Revisiting *Hall Street Associates*' (2012–2013) 14 *Cardozo Journal of Conflict Resolution* 593 at 596.

25 Idem 602.

26 Idem 615.

27 Idem 599.

28 Carbonneau ((2012–2013) 14 *Cardozo Journal of Conflict Resolution* 593) cited *Hall Street Associates LLC v Mattel Inc* 552 US 576 (2008), which confirmed that the statutory framework controlled enforcement. He also cited *Rent-A-Center v Jackson* 130 S Ct 2772, 177 L Ed 2d 403 (2010) and *Stolt-Nielsen v Animal Feeds Int'l* 130 S Ct 1758, 176 L Ed 2d 605 (2010), which confirmed *Hall Street Associates*.

29 Carbonneau, (2012–2013) 14 *Cardozo Journal of Conflict Resolution* 593 at 619. See also Randall, 'Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability' (2004) 52 *Buffalo LR* 185 at 186.

30 *Hall Street Associates* at 1–2.

31 At 2.

32 At 3.

33 Pub L 68–401, 43 Stat 883, enacted on 12 February 1925, codified at 9 USC ch 1 (FAA).

34 *Hall Street Associates* at 5.

35 At 7–15.

36 At 16–21.

37 Section 33.

38 *Rent-A-Center* at 1–14.

39 At 14.

40 *Ibid*.

41 At 12–13.

42 *Stolt-Nielsen* at 7.

43 At 1–2.

44 At 34–35.

45 Carbonneau, (2012–2013) 14 *Cardozo Journal of Conflict Resolution* 593.

46 Ibid.

47 Ibid.

48 Burton, 'The New Judicial Hostility to Arbitration: Federal Preemption, Contract Unconscionability, and Agreements to Arbitrate' (2006) *Journal of Dispute Resolution* 469 at 478–480. The principle of party autonomy is also linked to freedom to contract and to uphold the terms of the arbitration agreement.

49 Idem at 469.

50 'Arbitration: Party Autonomy or Curial Intervention: The Historical Background' (1994) *SALJ* 143 at 151.

51 *Zhongji Development Construction Engineering Company Ltd v Kamoto Copper Company* 2015 (1) SA 345 (SCA).
52 Paragraph 30.
53 Paragraph 38.
54 Paragraph 55.
55 *De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the Time Being & another* [2015] ZACC 35.
56 Paragraph 30(a).
57 *De Lange* para 30(c).
58 Butler, (1998) 9 *Stellenbosch LR* 3 at 3–5.
59 Schulze, (2011) 23 *SA Merc LJ* 291.
60 Van Niekerk, 'Aspects of Proper Law, Curial Law and International Commercial Arbitration' (1990) 2 *SA Merc LJ* 117 at 149
61 (2982/08) [2010] ZAWCHC 39 (15 March 2010).
62 Paragraph 40.
63 *Bidoli v Bidoli & another* 2011 (5) SALR 247 (SCA) para 15.
64 Paragraph 16.
65 Roodt, 'Autonomy and Due Process in Arbitration: Recalibrating the Balance' (2011) 44 *CILSA* 311 at 338.
66 Discussion Paper 69 (Project 94) *Arbitration: A Draft International Arbitration Act for South Africa* (Government Printer 1997) v.
67 Ibid.
68 Ibid.
69 Ibid.
70 Idem vi.
71 Ensor, 'Bill Will Give Firms Operating Across SA's Borders Access to Justice Services', available at www.bdlive.co.za, accessed on 21 April 2016.