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An evaluation of international commercial arbitration theory and practice in South Africa

by

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DECLARATION OF ORIGINALITY

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3. I have not used work previously produced by another student or any other person to hand in as my own.

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DEDICATION

This dissertation is dedicated to the memory of my dearly loved Mothers:

Gugile Isabella Twala

(1965 – 2002)

and

Nikeliwe Lydia Vilakazi

(1955 – 2021)

Lalani ngoxolo, Manyamande!

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Glory be to my Creator for this and so much more. Unkulunkulu emuhle njalo (God is always good)!

Matthew 21 verses 21-22.

ABSTRACT

In South Africa, the international arbitration regime is regulated under the International Arbitration Act 15 of 2017. Previously, all arbitrations taking place in South Africa were regulated under the Arbitration Act 42 of 1965 and there was no distinction or separation between international, national and (non)-commercial arbitration proceedings prior to the adoption of the International Arbitration Act 15 of 2017. The Arbitration Act 42 of 1965 was the only legislative piece regulating arbitrations in South Africa until 2017. Since the enactment of the International Arbitration Act 15 of 2017, there is now a dual arbitration system in South Africa, with the International Arbitration Act 15 of 2017 regulating international arbitrations and the Arbitration Act 42 of 1965 regulating domestic arbitrations. The promulgation of the International Arbitration Act 15 of 2017 has significantly changed the South African international arbitration landscape and aligned South Africa's international arbitration regime with internationally accepted standards and practices.

This dissertation aims to explain the distinct interpretation of the nature of international commercial arbitration by juxtaposing different theories of international commercial arbitration in order to determine the theories that succinctly encapsulate the South African international commercial arbitration framework. It is evident from reading the literature relating to the arbitration discourse that a theory of arbitration generally accepted as describing the South African international commercial arbitration system in a succinct and nuanced manner is yet to be determined. In this regard, four theories are discussed in order to determine the theories that succinctly encapsulate the South African international commercial arbitration system, namely: the jurisdictional theory; the contractual theory; the party autonomy and delocalisation theory; and the hybrid theory. The evaluation of each of these theories is canvassed by considering the disposition of international commercial arbitration and its interconnection with national laws, the disposition and purview of the powers of an arbitrator in international commercial arbitration and the status of arbitration awards under each theory in respect of the enforceability of international commercial arbitration awards. In this dissertation, the hybrid theory is

identified as the theory that encapsulates the South African international commercial arbitration system in a succinct and nuanced manner.

Furthermore, this dissertation identifies limitations in South Africa's international commercial arbitration framework, and proposes a number of key factors that South Africa needs to address in order to position itself as a leader of international commercial arbitration. In this regard, the following selected factors are assessed in order to present steps that South Africa should undertake in its endeavor to become a leading seat of international commercial arbitration: the international commercial arbitration law regime in South Africa; political stability; trade and investment; technology and infrastructure; increased monitoring / "grey listing" by the Financial Action Task Force; and the South African tax obligations. A deficiency in South Africa is the fact that it has an ailing economic, socio-political and compliance status and this dissertation proposes that the South African government should address these concerns in order to attract more business institutions in the country and strengthen its international commercial arbitration economy.

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CHAPTER 1

INTRODUCTING THE STUDY

1 Introduction and background

1.1 Overview of study

Disputes are a common feature in life, and they arise for various reasons among people. A personal or commercial relationship could be a cause for a dispute to arise, and a dispute can also arise from interactivity with the state and its organs. There are many ways to resolve disputes. A court of law is considered the traditional process of resolving a dispute in western societies. However, in recent years, we have seen that courts of law have inadequate resources to resolve disputes efficiently and it has also become apparent that there are alternative processes to resolve disputes efficiently and to the satisfaction of the parties in dispute.[1] In this regard, the conceptual framework of alternative dispute resolution has come to the fore and it is characterised as involving all forms of dispute resolution except the adjudication or litigation through courts of law.[2]

In line with the ever-changing nature of disputes, the needs of the parties to a dispute also change, and it is therefore crucial to use a fitting dispute-resolution process in order to resolve a particular dispute in an effective manner. This is the reason why the abbreviation 'ADR' can also be used to connote the words 'Appropriate Dispute Resolution'.[3] A delicate arbitration framework is necessary in order to afford international trading parties a reliable and congenial platform for resolving any commercial or trade dispute they may have, especially taking into account the fact that the world is becoming more globalised and international trade and investment is growing across Africa. Recently, international commercial arbitration has progressively become the chosen process for the purposes of commercial dispute resolution and the route of recourse for

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1 Daily Maverick, 21 May 2020 'Justice delayed is justice denied – we must speed up the court system under lockdown', https://www.dailymaverick.co.za/opinionista/2020-05-21-justice-delayed-is-justice-denied-we-must-speed-up-the-court-system-under-lockdown/ (accessed 4 April 2021).

2 As above.

3 See South African Law Commission Issue Paper 8 *Alternative Dispute Resolution* (1997) 13, available at http://www.justice.gov.za/salrc/ipapers/ip08_pr94_1997.pdf.

the trading parties seeking to protect their interests.[4] It has experienced esteemed growth and reorientations over the years, with lawyers, alternative dispute resolution institutions and countries advancing and placing emphasis on its effectiveness and prestige as a dispute resolution process.[5]

There are various factors which have led to the esteemed growth of international commercial arbitration and these factors are of important consideration when parties decide where to take their arbitration, and these factors will be canvassed comprehensively in subsequent chapters. These factors reveal the shortcomings of the South African international commercial arbitration regime, and proposals are offered on how to overcome them and make South Africa a leader of international commercial arbitration.[6] The selection of these factors is based on the crucial role they play in the performance of the country's economy, reputation of a seat of arbitration, and investor-trade confidence (both locally and internationally). It takes time to spearhead a country towards being a leading international commercial arbitration seat and it will also take time to change parties' negative perceptions of South Africa as a hub of international commercial arbitration.

Notwithstanding the fact that it may be of interest to conjecture on the reasons why international commercial arbitration emerges in a particular place, the major cause for the development in the United States of America and, subsequently, in other jurisdictions has always been accepted to be the discontentment with the courts of law processes i.e. its aggressive tone, delays, costs, and the inherent procedural uncertainties. Exponents have contended that this major cause for development did not only involve a shift from the negative facets of litigation, but it also involved a shift towards a more efficient and practical approach. This was to ensure that the requisite development did not only emanate from the deficiency of the old, but also a discernment of value of the new. In light of the foregoing, it is therefore important to assess the amassed developments to

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4 BusinessDay, 31 March 2017 'Arbitration bill to regulate international proceedings', https://www.businesslive.co.za/bd/opinion/2017-03-31-arbitration-bill-to-regulate-international-proceedings/ (accessed 31 March 2021).

5 See PAA Ramsden *The law of arbitration: South African and international arbitration* (2018) 5 and GB Born *International arbitration: Law and practice* (2012) 4.

6 J Karton *The culture of international arbitration and the evolution of contract law* (2013) 58.

date in the South African international commercial arbitration framework with the aim of improvement.

1.2 International commercial arbitration theory

Arbitration, as a concept and a dispute resolution process, has been in place for many years. As briefly discussed above, the fact that the modern society is litigious in nature means that some sort of dissent or dispute between people is prevalent in different spheres of life. As such, arbitration has become a critical feature in our global jurisprudence. An understanding of how a dispute evolves is therefore necessary in order to enable the parties to choose the most appropriate mechanism of alternative dispute resolution. The parties' needs are commonly embedded in a dispute's origin and it is therefore important to have a high-level understanding of the dispute's origin and the parties' needs in order to develop and find an apt resolution framework.

To date, the discourse in arbitration has hinged on which process is a cut above and the outcome appraisal in that regard.[7] Consequently, many arbitration academics have undertaken progressive steps to invigorate the evolution of arbitration theory and present it to the legal practitioners' attention.[8] However, it is apparent from reading the literature relating to the conjectures of arbitration that a theory of arbitration generally accepted as encapsulating the South African international commercial arbitration system in a succinct and nuanced manner is yet to be considered.[9] It is contended that the lack of consideration is because the debates amongst many arbitration scholars have been premised on different underlying objectives and determining which aspect of a theory matters the most.[10] Accordingly, the reports on which theories of arbitration succinctly encapsulate the South African international commercial arbitration system are moderately scant. To address this inadequacy, this dissertation assesses several theories of

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7 TE Carbonneau et al *AAA Handbook on commercial arbitration* (2010) 1-500. See also PJ Carnevale 'The usefulness of mediation theory' (1992) 8(4) *Negotiation Journal* 387-390.

8 As above.

9 Z Saghir & C Nyombi 'Delocalisation in international commercial arbitration: A theory in need of practical application' (2016) 8 *International Company and Commercial Law Review* 269-276. See also HL Yu 'A Theoretical overview of the foundations of International Commercial Arbitration' (2008) 1(2) *Contemporary Asia Arbitration Journal* 255-286.

10 As above. See also ML Moses *The principles and practice of international commercial arbitration* (2017) 1-392.

arbitration with the aim of identifying the theories of arbitration that encapsulate the South African international commercial arbitration system.

In light of the aforementioned inadequacy, this dissertation seeks to unpack the changes, improvements and developments required in the arbitration theoretical framework to enhance the resolution of international commercial disputes in the South African international commercial arbitration regime.

1.3 Arbitration as a practice in South Africa

International commercial arbitration has become the go-to recourse for trading parties seeking to protect their interests and a preferred tool for the resolution of disputes.[11] A cogent arbitration framework affords international investors a congenial and accustomed tool for the resolution of any investor-trade dispute.[12] This congeniality is magnified by the perspicacity that the arbitration process is consent-based, vigorous, private, universal, rapid, flexible and convenient.[13]

In the last few years, trading parties and investors resorted to international commercial arbitration in order to benefit from the confidentiality associated with its processes, expert dispute resolution, and the ability to influence the outcome of the arbitrator's decision.[14] At the present time, international commercial arbitration is still a developing economy world-wide and many countries are looking to profit from this developing economy by ensuring that they become leading arbitral seats in their continents and other jurisdictions. This ambition is not an exception for South Africa and it is therefore important to analyse the factors that influence parties' choice of an arbitral seat in order for South Africa to orientate itself as a leading seat of international commercial arbitration and benefit from this growing economy.

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11 BusinessDay (note 4 above).

12 As above.

13 PM Mbith 'International commercial arbitration in Kenya: Is arbitration a viable alternative in resolving commercial dispute in Kenya?' (2014) published LLM dissertation, University of Cape Town 1-73.

14 BU Unegbu 'South Africa as an arbitral seat for international commercial arbitration' (2018) published LLM dissertation, University of North West 1-79.

The International Arbitration Act[15] was enacted in 2017 to govern international arbitration in South Africa. The Arbitration Act,[16] which did not distinguish between international and national arbitration, was the only piece of legislation regulating arbitrations in South Africa before the advent of the International Arbitration Act.[17] Currently, there is a binary arbitration regime in South Africa, with the International Arbitration Act governing international arbitrations and the Arbitration Act governing local arbitrations.[18] The International Arbitration Act made changes to South Africa's approach to international arbitration in order to align its international arbitration law with the international standards and practices.[19] The changes brought by the enactment of the International Arbitration Act were made with the idea of increasing the resolution of international arbitration disputes in South Africa.

This dissertation seeks to demonstrate that South Africa's mere enactment of legislation to align with international standards is insufficient to make it a leading seat of international commercial arbitration. In order to become a leader of international commercial arbitration, South Africa must have: (i) trade languages that encourage international trade and investment; (ii) a strong international commercial arbitration regime; (iii) cutting edge technology; (iv) good infrastructure; (v) political stability; (vi) stronger anti-money laundering and counter terrorist financing laws and practices; and (vii) tax incentives.[20] Furthermore, it will be shown that, with the increasing growth of arbitration institutions internationally, an improved international arbitration legal system and better resourcing and training can enable South Africa to stamp its authority in global commercial arbitration.[21] This is necessary in order to curb the excuses advanced for choosing seats outside of South Africa for international commercial arbitration proceedings.[22]

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15 International Arbitration Act 15 of 2017 (hereafter, International Arbitration Act).
16 Arbitration Act 42 of 1965 (hereinafter, 'Arbitration Act').
17 C Schulze 'International commercial arbitration: An overview' (2005) 46 *Codicillus* 49.
18 M Wethmar-Lemmer and E Schoeman 'The International Arbitration Act 15 of 2017: Impetus for developments on the cross- border commercial front' (2019) 1 *Tydskrif vir die Suid-Afrikaanse Reg* 127.
19 KB Johaar 'The impact of the International Arbitration Act on the choice of South Africa as a seat for international commercial arbitration' (2019) published LLM dissertation, University of Johannesburg 1-52.
20 Unegbu (note 14 above) 60.
21 Johaar (note 19 above) 37.
22 As above.

2 Research statement

The contemporary South African international commercial arbitration framework appears to be lagging behind international trends and developments necessary for it to become a hub of international commercial arbitration in Africa and other continents. In this regard, this study investigates the shortcomings of the South African international commercial arbitration system in order to propose the actions that South Africa needs to undertake to change parties' negative perceptions and thereby become a leader of international commercial arbitration.

3 Research question

The main research question is: what changes, improvements and developments are required in South Africa's international commercial arbitration theory and practice in order to firmly place South Africa as a leader of international commercial arbitration?

4 Research objectives

The objectives of this dissertation are to:

4.1 scrutinize the potential of arbitration theories to strengthen the South African international commercial arbitration system as a mechanism for the successful resolution of international commercial disputes; and

4.2 critically examine the actions that South Africa needs to take in order to become a leading seat of international commercial arbitration proceedings internationally.

5 Research methodology and approach

This research will entail an analysis, assessment, evaluation, critique, interpretation, discussion and comparative analysis of articles, case law, journal articles, legislation, legal and non-legal positions of some of the current top arbitration jurisdictions compared to South Africa's contemporary position. The applicable laws in South Africa, and relevant laws in other jurisdictions, will be discussed with the aim of improving the contemporary South African arbitration framework.

6 Significance of this study

The author is not aware of any South African study that has assessed the arbitration theories that encapsulate the South African international commercial arbitration system in a succinct and nuanced manner.

There are quite a few studies on factors that hinder South Africa from firmly cementing its place as a leader of international commercial arbitration, however, this study seeks to expand the scope of the factors that hinder South Africa from becoming a global leader of international commercial arbitration.

7 Delimitations

This research is limited to international commercial arbitration and does not discuss all the tribunals (local and/or foreign) and tribunal systems thereto, nor does it relate to the International Centre for Settlement of Investment Disputes arbitration.

8 Overview of chapters

This dissertation consists of four chapters and a brief overview of each chapter is set out hereunder.

Chapter 1 (Introducing the study)

This chapter sets-out the brief introduction of the study. It provides an overview of what the study aims to achieve as well as the objectives, methodology and approaches to be employed in order to achieve these aims. Chapter 1 places the study within a particular context of the international arbitration theories, practices and general effectiveness.

Chapter 2 (An assessment of international commercial arbitration theories in South Africa)

This chapter investigates different international commercial arbitration theories for the purposes of enhancing South Africa's international commercial arbitration theoretical framework. This chapter discusses how the use of international commercial arbitration theories in resolving international commercial disputes in South Africa has been moderately scant in recent years, resulting in the restriction of its theoretical base. In this regard, this chapter seeks to address this restriction by assessing several historical and

contemporary theories that may enhance the South African international commercial arbitration regime as a successful process of resolving international commercial disputes.

Chapter 3 (An appraisal of South Africa as a main seat of international commercial arbitration)

This chapter appraises South Africa as the main seat of arbitration and exposes the shortcomings, difficulties and challenges which prevent South Africa from being a leader of international commercial arbitration. This chapter focuses on the nature and purview of international commercial arbitration with the aim of improving the South African international commercial arbitration framework. To attain this improvement, the selected factors that play a crucial role in the parties' consideration for a seat of international commercial arbitration are critically examined with the objective of positioning South Africa as a leader of international commercial arbitration. In this regard, the following selected factors are assessed: the international commercial arbitration law regime in South Africa; political stability; trade and investment; technology and infrastructure; increased monitoring / "grey listing" by the Financial Action Task Force; and the South African tax obligations.[23]

Chapter 4 (Conclusion and recommendations)

This chapter provides a conclusion drawn from the analysis and discussion advanced in the foregoing chapters. This chapter encompasses a conclusion from the entire study and presents the following recommendations to orient South Africa as a global hub of international commercial arbitration: (i) the active consideration of a general international commercial arbitration theoretical framework that encapsulates the South African international commercial arbitration system in a succinct and nuanced manner; (ii) a stable political climate and economic opportunities in order to attract international trading parties; (iii) a legal system that respects the rule of law; (iv) an improvement of the country's technology and infrastructure; (v) the mandatory building of a strong local business community with an international reach; (vi) a stronger anti-money laundering

[23] Unegbu (note 14 above) 60.

and counter terrorist financing system; and (vii) the provision of tax incentives for international commercial arbitration services rendered in South Africa.

CHAPTER 2

AN ASSESSMENT OF INTERNATIONAL COMMERCIAL ARBITRATION THEORIES IN SOUTH AFRICA

1 Introduction

This chapter explores different theories of international commercial arbitration with the aim of determining the theory that encapsulates the South African international commercial arbitration system. The study of international commercial arbitration theories in South Africa has been moderately scant, thus resulting in the restriction of the theoretical base in South Africa's international commercial arbitration framework.[24] In this regard, several historical and contemporary theories that may enhance the South African international commercial arbitration framework as a successful process of resolving international commercial disputes are assessed in order to address the aforementioned restricted theoretical base.[25]

This chapter explains the distinct interpretation of the nature of international commercial arbitration by juxtaposing different theories of international commercial arbitration. In this regard, four theories are discussed, namely: the jurisdictional theory; the contractual theory; the party autonomy and delocalisation theory; and the hybrid theory.[26] The evaluation of each of these theories is canvassed by considering: (i) the disposition of international commercial arbitration and its interconnection with national laws; (ii) the disposition and purview of the powers of an arbitrator in international commercial arbitration; and (iii) the status of arbitration awards under each theory in respect of the enforceability of international commercial arbitration awards. The following section of this chapter provides an overview of international commercial arbitration theories.

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24 HL Yu (note 9 above) 255-283. Please note that the author is not aware of any South African study that has considered theories of arbitration.

25 As above.

26 HL Yu (note 9 above) 257.

2 An overview of international commercial arbitration theories

As mentioned in Chapter 1, the arbitration discourse has mainly focused on which process is a cut above and the appraisal of arbitration outcomes thereto.[27] As such, many arbitration academics have come up with progressive steps to revitalise the development of arbitration theory and put it forward to legal practitioners' attention.[28] However, it is evident from reading the literature relating to the arbitration discourse that a theory of arbitration generally accepted as describing the South African international commercial arbitration system in a succinct and nuanced manner is yet to be determined.[29] It is therefore important to assess several theories of arbitration with the aim of determining the theories that succinctly encapsulate the South African international commercial arbitration framework, which will help South Africa gain some positive traction towards changing the perceptions of stakeholders and role players in the international commercial arbitration market.[30]

Some arbitration theorists assert that there are two main categories of international commercial arbitration theories, namely the judicial and political theories.[31] The judicial wing of the international commercial arbitration theories suggests that a "just" panacea of a dispute exists, and that it is the responsibility of an arbitrator to adjudge on the facts and principles involved in a dispute.[32] In the judicial theoretical paradigm, it is argued that an arbitrator is appointed to make rulings in respect of the economic interests and the legal rights of the parties involved, as contained in the information provided by the parties during the arbitration proceedings. On the other hand, the political wing of the international commercial arbitration theories views arbitration as an extension of both collective bargaining and collective coercion.[33] In the political theoretical paradigm, it is argued that one of the functions of an arbitrator is to accurately inscribe the respective

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27 Carbonneau (note 7 above) 1-500. See also Carnevale (note 7 above) 387-390.

28 As above.

29 Saghir & Nyombi (note 9 above) 269-276. See also HL Yu (note 9 above) 255-286.

30 As above. See also Moses (note 10 above) 1-392.

31 HL Yu (note 9 above) 257. See also KS Carlston 'Theory of the arbitration process' (1952) 17(4) *Law and Contemporary Problems* 1-28.

32 F Filippo *Jurisdiction and admissibility in investment arbitration (Brill research perspectives in international law* (2018) 1-200.

33 W Mattli & T Dietz *International arbitration and global governance: Contending theories and evidence* (2014) 5-272.

strengths of the parties' merits and ensure that 'the lion gets his share'.[34] This argument is similar to the notion of compromise that is a core feature in conciliation and, although the notion of compromise may have a guidance role in arbitration proceedings, an arbitration process requires the decision of an outsider in respect of the merits of a dispute rather than an accommodation of the parties themselves (except in instances whereby parties initiate negotiation and the outcomes of such negotiation are made the award). An international commercial arbitration system that is firmly grounded on the political theory may therefore be less preferable to both parties in a dispute, notwithstanding the obvious practicality of compromise from one instance to another.

In terms of the contractual theory, it is contended that international commercial arbitration emanates from a valid arbitration agreement between parties to a dispute and, as such, it must be coordinated or managed in a manner that accords with the wishes of the parties in dispute.[35] It argues that, in lieu of attaching international commercial arbitration into the national laws applicable to arbitration proceedings, international commercial arbitration should be treated as an autonomous institution and should not be controlled by the applicable national laws to arbitration proceedings.[36] This is to ensure that parties have unbridled autonomy to determine the manner in which their arbitration proceedings should be managed.[37] Contrastingly, the delocalisation theory endorses the view that arbitration proceedings must be free from the seat of arbitration's national legal framework.[38] On the other hand, the jurisdictional theory is premised on the notion that states must have complete supervisory powers to regulate all arbitration proceedings conducted in their jurisdiction.[39] However, the hybrid theory is a nexus between the jurisdictional theory and the contractual theory in that it advances the argument that international commercial arbitration has both a contractual character and a jurisdictional character, which coexist

34 T Schultz 'The ethos of arbitration' (2019) 23 *King's College London Law School Research Paper* 1-28.
35 HL Yu (note 9 above) 265. See also J Romeyn 'Towards a motivational theory of arbitration in Australia' (1980) 22(2) *Journal of industrial relations* 181-195.
36 HL Yu (note 9 above) 265.
37 As above.
38 Saghir & Nyombi (note 9 above) 269.
39 CF Amerasinghe *International arbitral jurisdiction* (2011) 10-284.

in harmony despite different ideologies or interests.[40] The next section of this chapter unpacks the aforementioned theories of international commercial arbitration.

3 Unpacking the theories of international commercial arbitration

3.1 The jurisdictional theory

The jurisdictional theory brings to light the importance of states' supervisory powers, especially the supervisory powers of a state in respect of an arbitration taking place within the relevant state's jurisdiction. Jurisdictional theorists contest that the validity of an arbitration award must be decided upon based on the laws of the country where the enforcement or recognition of such an arbitration award is pursued.[41] Jurisdictional theorists also submit that the validity of an arbitration agreement, together with the applicable arbitration procedure thereto, must be governed by the national laws of the seat where an arbitration takes place.[42] The proponents of the jurisdictional theory submit that all arbitration proceedings must be governed by the legal rules of the place where an arbitration is conducted and/or the parties' choice of law set out in their arbitration agreement.[43] These proponents state that arbitrators bear a resemblance to judges in courts of law because they draw their powers from the national laws of a state. Jurisdictional theorists advance that arbitrators, as is the case with judges in courts of law, have an obligation to apply the legal rules of the relevant state when settling the disputes before them.[44] Furthermore, the jurisdictional theory also argues that arbitration awards have a similar effect and status as a judgment in national courts.[45] On this score, jurisdictional theorists propound that arbitration awards should be enforced by the national courts of the place where such an enforcement or recognition is pursued, as is the case with judgments passed by the national courts of various jurisdictions.[46]

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40 A Roberts 'State-to-state investment treaty arbitration: A hybrid theory of interdependent rights and shared interpretive authority' (2014) 55(1) *Harvard International Law Journal* 1-70.

41 I Bantekas *An introduction to international arbitration* (2015) 1-35.

42 As above.

43 AJ Belohlavek *Arbitration and basic rights: Movement from contractual theory to jurisdictional theory* (2013) 66-75.

44 P Sanders 'Trends in the field of international commercial arbitration' (1975) 145(2) *Recueil des cours* 205-234.

45 As above.

46 N Seyalova 'Foreign court judgments and international arbitration awards enforcement' (2019) 12(47) *International In-house Counsel Journal* 1-5.

Jurisdictional theorists hold strong emphasis on the significance of the place in which arbitration proceedings take place (the so-called *lex fori*).[47] In this regard, Mann, a jurisdictional theorist, expands on the significance of law of the place where an arbitration is conducted.[48] Mann's expansion is premised on the argument that each state is empowered to either accept or reject activities that are carried out within its jurisdiction.[49] On this premise, he contests that all arbitration proceedings are subject to the law of the place where such arbitration proceedings are conducted.[50] This contention has led jurisdictional theorists to submit that an arbitrator has an obligation to ensure that arbitration proceedings are conducted in line with the parties' arbitration agreement, provided that the law of the place in which an arbitration takes place permits such terms of engagement.[51] This is because an act contrary to the mandatory rules and the principles on which the national laws of the place of arbitration are based is considered to be unjustified and unlawful from a judicial perspective.[52]

The several challenges faced by parties in international commercial arbitration, such as arbitration procedures, the enforceability of arbitration awards, the powers of arbitrators and the validity of an arbitration agreement, have to be decided upon based on the mandatory rules and the principles on which the national laws applicable to the arbitration proceedings are based.[53] If these issues are not decided upon within the parameters of the mandatory rules and the principles on which the national laws applicable to the arbitration proceedings are based, it means that arbitration awards stand the risk of not surviving the scrutiny of the national courts of the relevant jurisdiction.[54] The national courts of such jurisdictions wherein arbitration awards are to be enforced would also be reluctant to allow the enforcement of such arbitration awards.[55]

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47 F Ferrari et al *Conflict of laws in international arbitration* (2011) 1-178.
48 FA Mann 'Lex facit arbitrum' (1983) 2(3) *Arbitration international* 245-246.
49 Mann (note 48 above) 245.
50 As above.
51 E Gaillard *Legal theory of international arbitration* (2010) 1-202.
52 HL Yu (note 9 above) 258-265.
53 MRP Paulsson 'Enforcement of annulled awards: A restatement for the New York Convention?' (2017) *Kluwer Arbitration Blog* 2.
54 As above.
55 As above.

The proponents of the jurisdictional theory also bestow a firm argument in respect of national courts having supervisory powers over arbitration proceedings.[56] The Convention on the Recognition and Enforcement of Foreign Arbitral Awards[57] confirms such supervisory powers. In terms of Article V of the New York Convention, the arbitration procedures, the composition of authority in arbitration proceedings and the validity of arbitration agreements and arbitration awards have to be decided upon in terms of the law of the place where an arbitration is conducted.[58] The national courts of the place where enforcement or recognition of an arbitration award is required by a party can exercise supervisory powers over the validity of such an arbitration award if the enforcement of such an arbitration award would be against its mandatory rules and the principles on which the national laws applicable to the arbitration proceedings are based, or if the dispute is not arbitrable under its laws.[59]

The jurisdictional theorists submit that the jurisdiction over arbitration proceedings is based on three pillars in respect of the supervisory powers of the national courts where arbitration proceedings are conducted, namely: (i) an arbitrator has the power to make binding arbitration awards, which power stems from the state's delegation of its exclusive powers in respect of arbitration proceedings; (ii) an act is generally susceptible to the law of the place where such an act occurred, unless agreed otherwise by the parties and within the confines of the applicable laws; and (iii) the application of the law of the place in which an arbitration takes place and its courts are often more efficient than other legal systems.[60] In this regard, it can be argued that the supervisory powers of national courts over arbitration proceedings are, in practice, conferred by applicable law. By way of example, the jurisdiction of South African courts over international arbitration proceedings conducted in South Africa is provided for by article 6 under schedule 1 (read with section 6) of the International Arbitration Act[61] which, *inter alia*, grants the national courts of South

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56 HL Yu (note 9 above) 259.

57 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (hereafter, New York Convention).

58 As above.

59 C Koch 'The enforcement of awards annulled in their place of origin' (2009) 26(2) *Journal of International Arbitration* 267-292.

60 A Samuel 'Jurisdictional problems in international commercial arbitration. A study of Belgian, Dutch, English, French, Swedish, USA and West German Law, Zürich' (1989) 24(1) *The International Lawyer* 294-296.

61 International Arbitration Act (note 15 above).

Africa jurisdiction in respect of certain functions that require supervision and/or arbitration assistance.[62]

It is also argued that arbitrability succinctly expresses the central features of national courts having jurisdiction over arbitration proceedings.[63] This argument is based on the notion that arbitrators can only deal with a dispute if the applicable law that the parties have opted to subject themselves to before the relevant arbitration proceedings permits.[64] This is fundamentally because the arbitrability of a dispute must always be assessed against the law of the place where the relevant arbitration proceedings are conducted in instances whereby the parties have not agreed to the applicability of the law of another jurisdiction in their arbitration agreement to regulate such arbitration proceedings.[65] As such, the parties before arbitration proceedings may institute proceedings before the relevant national courts in order to challenge any concerns they may have regarding their arbitration proceedings, for example, where an arbitrator allows a dispute that is beyond the scope of arbitrability under the laws governing the arbitration proceedings to be arbitrated.[66]

Mann argues that, as is the case with procedural matters, the substantive issues of the dispute are also governed by national laws.[67] He remarked as follows in this regard:

> No one has ever or anywhere been able to point to any provision or legal principle which permit[s] individuals to act outside the confines of a system of [national] law; even the idea of the autonomy of the parties exists only by virtue of a given system of [national] law and in different systems may have different characteristics and effects. Similarly, every arbitration is necessarily subject to the law of a given [s]tate. No private person has the right or the power to act on any level other than that of [national] law. Every right or power a private person enjoys is inexorably conferred by or derives from a system of [national] law which may conveniently and in accordance with tradition be called the [*lex fori*], though it would be more exact to speak of the [*lex arbitri*].[68]

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62 International Arbitration Act (note 15 above) article 6 under schedule 1.
63 LA Mistelis & SL Brekoulakis *Arbitrability: international & comparative perspectives* (2009) 1-375.
64 C Mrotzek 'The development of concept of arbitrability – an international comparison' (2017) published LLM dissertation, University of Cape Town 1-62.
65 GA Bermann 'Arbitration fundamentals' (2012) 23 *The American Review of International Arbitration* 367-378.
66 I Bantekas 'The foundations of arbitrability in international commercial arbitration' (2008) 27 *Australian Year Book of International Law* 193-223.
67 Mann (note 48 above) 245.
68 As above.

Accordingly, as Mann articulates it, any compositions of arbitration tribunals and structures of arbitration proceedings are obliged to subject themselves to the national laws of the jurisdictions in which such arbitration tribunals and structures are based, unless there is an exemption system from such requirements.[69] Within the international commercial arbitration framework, only the national laws of the place in which an arbitration is conducted can provide an efficacious and complete control over arbitration proceedings in order to decide both the relevant substantive and procedural matters that may arise during such proceedings.

3.2 The contractual theory

It is often argued that, notwithstanding the considerations of compulsory arbitration and arbitrability, the interconnection between the parties and arbitrators before arbitration proceedings is based on a contractual relationship.[70] This contractual relationship can be described as two-fold: (i) the contract between the parties which, in this case, is the arbitration agreement agreed to by the parties; and (ii) the agreement between the parties to appoint an arbitrator for their arbitration proceedings.[71] This categorisation means that a valid arbitration agreement between the parties must exist in order to initiate arbitration proceedings as well as an appointment agreement from the parties in order to ensure that the appointment of the relevant arbitrator is valid.[72] Upon the conclusion of the aforementioned contracts, a dispute between parties can be brought before an arbitrator who is then entrusted to preside before the arbitration proceedings and ensure that the dispute is appropriately finalised.[73]

The exponents of the contractual theory do not accord significance to the law of the place where arbitration proceedings are conducted or national laws that govern arbitration proceedings by operation of law but, instead, they contest that arbitration proceedings

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69 Mann (note 48 above) 246.

70 HL Yu (note 9 above) 265-266.

71 Please note that the appointment agreement between the parties can sometimes be incorporated as a clause and annexure in an arbitration agreement.

72 JL Dodge & E Pollman 'Arbitration, consent and contractual theory: The implications of EEOC v.Waffle House' (2003) 8 *Harvard Negotiation Law Review* 289-312.

73 S Escher & K Krueger 'The cost of carry and prejudgment interest' (2003) 6 *Litigation Economics Review* 12-16.

are, in fact, governed by the arbitration agreement concluded by the parties.[74] In this regard, contractual theorists argue that there are no strong ties between arbitration proceedings and the law of the place in which such an arbitration is conducted.[75] In their view, parties before the arbitration proceedings have the prerogative to decide on issues pertaining to their arbitration proceedings and this prerogative must not be impinged upon by the powers created by any national laws.[76] As such, in terms of the contractual theory, the resolution of a dispute before arbitration proceedings should not be influenced by national laws of the relevant jurisdiction and the principle of sanctity of contracts must prevail, free from any state influence.[77] In this regard, Kellor states that:

> [A]rbitration is wholly voluntary in character. The contract of which the arbitration clause is a part is a voluntary agreement. No law requires the parties to make such a contract, nor does it give one party power to impose it on another. When such an arbitration agreement is made part of the principal contract, the parties voluntarily forgo established rights in favour of what they deem to be the greater advantages of arbitration.
>
> Accordingly, with the exceptions of arbitrability and public policy which are reserved for the l*ex fori*, the *lex fori* has very little influence over the procedures and outcome of the arbitration. Moreover, it has been concluded that 'national arbitration laws are only to supplement and fill lacunae in the parties' agreement as to the arbitration proceedings and to provide a code capable of regulating the conduct of an arbitration.[78]

Kellor's argument demonstrates that the contractual theory, in contrast to the jurisdictional theory, investigates the nature and function of arbitration processes from a contractual perspective.[79] In terms of the available literature, it is apparent that contractual theorists concede that arbitration processes have the potential to be influenced by applicable national laws, however, there is insistence on the argument that arbitration has a contractual disposition which stems from an arbitration agreement between parties.[80]

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74 HL Yu (note 9 above) 266.
75 TD Rakoff & JS Rakoff 'Arbitration, "pseudo-contract," and objective theory' (2019) 133 *Harvard Law Review Forum* 13-22.
76 HL Yu (note 9 above) 266.
77 As above.
78 FE Klein *Considérations sur l'arbitrage en droit international privé précédées d'une étude de législation, de doctrine et de jurisprudence comparées en la matière* (1955) 52-53.
79 Klein (note 78 above) 1-320.
80 HL Yu (note 9 above) 265-278.

International commercial arbitration is largely configured on the contractual theory in most jurisdictions around the world.[81] The national courts of most jurisdictions gravitate towards the contractual theory and the relationship between an arbitrator and the parties is interpreted as one that is contractual in nature. This is amplified by the belief that this theoretical framework recognises the interests of businesses and their desire to have a more informal and flexible form of resolving disputes.[82] In England, the case of *Cereals S.A. v. Tradax Export SA*[83] is a good case study that depicts how national courts hold the contractual theory as crucial in the international commercial arbitration context. In this case, the court held that an arbitrator becomes a party to an arbitration agreement when such an arbitrator accepts the appointment to preside over such proceedings and must adhere to the terms of engagement set out in such an arbitration agreement.[84]

Amongst contractual theorists, there is also an issue regarding the nature of arbitration awards which centres around the agent theory. The proponents of the agent theory, such as Merlin and Foelix, argue that an arbitration award is a contract made by an arbitrator who acts as an agent of the parties before the arbitration proceedings.[85] Viewed from the perspective of an agent-principal relationship, the 'contract' made by the agent (an arbitrator) has a binding effect on the principals (being the parties).[86] Therefore, it is argued that the parties are obliged to accept the arbitration award as a contractually binding instrument between the parties and to give effect to it.[87] The contractual and/or agent theorists contest that such a contractual agreement demands that an arbitration award must be enforced by the parties in any jurisdiction where such an arbitration award may require recognition or enforcement.[88]

It is advanced that the concerns around territoriality must not come to the fore and that an arbitration award must be recognised and enforced as a contract in any jurisdiction because there is no state authority or power that should vest in international commercial

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81 NR Weiskopf *Commercial arbitration: Theory and practice* (2012) 1-672.
82 HL Yu (note 9 above) 265-278.
83 *Cie Europeene de Cereals SA v. Tradax Export SA* 1986 2 *Lloyd's Rep.* U.K. 301.
84 HL Yu (note 9 above) 266.
85 PA Merlin *Recueil alphabétique de questions de droit* (1829) 34.
86 JJG Foelix & C Demangeat *Traité du Droit International Privé ou du Conflit des Lois de Différentes Nations en Matière de Droit Privé* (2013) 1-318.
87 Merlin (note 85 above) 34.
88 Foelix & Demangeat (note 86 above) 1-318.

arbitration proceedings.[89] Concurring with Merlin's view, Niboyet states that the contractual nature of arbitration awards stems from the fact that the authority of an arbitrator in a particular arbitration proceeding is derived from the parties' arbitration agreement, as opposed to the judicial authorities or national laws.[90] However, Klein, Bernard and Pallieri have made some attempts to counter Merlin's contention that an arbitration award is a contract moulded by the arbitrating parties, through their agent (an arbitrator).[91] Pallieri argues that it is not necessary to place arbitration awards into a particular juridical category, while Klein and Bernard state that an arbitration award is a by-product of the contractual relationship between an arbitrator and the parties in that "*an arbitration award is the work of the arbitrators*".[92] Therefore, it is arguable that the parties simply undertake that an arbitration award will be binding upon them and, in light of such an obligation agreed to by the parties, the national courts of the relevant jurisdictions will simply be required to recognise or enforce the relevant arbitration award - arbitrators therefore do not act as agents of the parties, but as presiding officers before the parties arbitration proceedings.

3.3 The party autonomy and delocalisation theory

Party autonomy is defined as the representation of a party's free will when entering into a contract, while delocalisation is a theory which argues that the arbitration system must be free from the surveillance of national laws.[93] The proponents of a delocalised arbitration submit that arbitration proceedings regulate themselves without external influence, which affords the parties in arbitration proceedings an opportunity to set their procedural rules and abide by them.[94] According to delocalisation theorists, delocalisation creates room for disputes to be resolved by way of a common understanding and mutual

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89 HL Yu (note 9 above) 272.

90 JP Niboyet *Traité de droit international privé francais* (1950) 137.

91 Klein (note 78 above) 1-320. See also A Bernard *Arbitrage volontaire en droit privé : l'arbitrage en droit interne belge et français, étude critique comparée, l'arbitrage en droit international privé, droit compare* (1937) 28 and GB Pallieri 'L'Arbitrage privé dans les rapports internationaux' (1935) 51 *Recueil des cours* 287-311.

92 As above.

93 AGS Dursun 'A critical examination of the role of party autonomy in international commercial arbitration and an assessment of its role and extent' (2012) 1 *Yalova Üniversitesi Hukuk Fakültesi Dergisi* 161-186. See also Saghir & Nyombi (note 9 above) 269.

94 OS Perepelynska 'Party autonomy vs. mandatory rules in international arbitration' (2012) *Ukrainian Journal of Business Law* 38.

support between parties and arbitration institutions.[95] On the basis of this model, delocalisation proponents contend that there is no need for judicial intervention in arbitration proceedings because parties agree to resolve disputes in a manner that is compliant with the arbitration processes autonomously agreed to by the parties.[96] Delocalisation espouses the view that arbitration proceedings must be supra-national, and that the national laws of the relevant jurisdiction must not have power or control over arbitration processes.[97]

It is therefore unsurprising that the delocalisation scholarship raises concerns over judicial intervention that takes place over arbitration proceedings, akin to the contractual theory albeit from a different perspective.[98] Delocalisation theorists contend that the arbitration system must be wholly independent and free from judicial intervention.[99] Although this contention may seem attractive to some persons, it is very difficult to give empirical substance to this theoretical standpoint without an arbitration appeal or review structure in place. In this regard, it is often questioned whether a thinned out form of delocalisation is possible and, if so, the kind of model that it would adopt.[100] As part of the solution-finding process, the core objective of this section is essentially to investigate the evolution of the delocalisation theory, with a distinct focus around the limitation of judicial intervention in arbitration proceedings.

Given the fact that privacy is one of the core principles of arbitration, delocalisation theorists also argue that the affiliation of the arbitration system with judicial oversight is antithetical because intervention by national courts undermines the aforementioned core principle of arbitration, amongst others.[101] Notwithstanding this point, it is apparent that legal scholars and practitioners have started to appreciate the national laws' non-controlling function in that the national courts' role in arbitration proceedings is now

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95 A Redfern et al *Law and practice of international commercial arbitration* (2004) 1-661.

96 M Pryles 'Limits to party autonomy in arbitral procedure' (2008) *International Council for Commercial Arbitration* 1-6.

97 J Li 'The application of the delocalisation theory in current international commercial arbitration' (2011) *International Company and Commercial Law Review* 1-6.

98 Saghir & Nyombi (note 9 above) 275.

99 Pryles (note 96 above) 1-6.

100 Saghir & Nyombi (note 9 above) 276.

101 KP Berger *Private dispute resolution in international business: Negotiation, mediation and arbitration* (2006) 1-992.

viewed as being a support structure to the arbitration system, as opposed to a controlling role.[102]

While delocalised arbitration may be an ideal concept, legal scholars and practitioners regard it as a far-fetched reality.[103] The main critique around delocalisation is that it is "wholly unrealistic", with the critics describing delocalisation as an attempt to create a 'legal vacuum' in arbitration proceedings.[104] Redfern and Hunter contend that delocalisation is a deceptive theoretical framework because, in their view, the national laws of the place where an arbitration is conducted should govern or regulate such arbitration proceedings, including the national laws of the jurisdiction where a party seeks the enforcement of an arbitration award.[105] This contention is also supported by Mann who argues that delocalisation is impractical because every right that a person is entitled to inexorably attains its heart beat from a system of national laws and, as such, all arbitration proceedings must be subject to the national laws of a given state.[106] In this regard, the proponents of the delocalisation theory contest that delocalisation must not be viewed as an attempt to evade the legal regime of any jurisdiction.[107] Instead, the delocalisation theory should be understood as a contestation that national laws must not impose limits or parameters on how arbitrations should be conducted, which will ensure that all arbitration proceedings are extricated from the confines of the national laws of the place where an arbitration is conducted.[108]

The critics of the delocalisation theory argue that it is imperative to maintain judicial oversight over arbitration proceedings in order to safeguard each country's justice system by keeping track of the quality of decisions made by arbitrators.[109] On this score, it is argued that judicial oversight is undoubtably justifiable and important for the purposes of inoculating national commercial or jurisdictional interests.[110] The idea of having arbitration

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102 Saghir & Nyombi (note 9 above) 269-276.
103 A Tweeddale & K Tweeddale *Arbitration of commercial disputes: International and English law and practice* (2007) 1-1128.
104 Li (note 75 above) 1-4.
105 A Redfern et al *Redfern and Hunter on international arbitration* (2015) 187.
106 FA Mann 'Lex Facit Arbitrum' in P Sanders (ed.) *International arbitration: Liber amicorum for Martin Domke* (1967) 157.
107 Saghir & Nyombi (note 9 above) 271.
108 As above.
109 WW Park *Arbitration of international business disputes: Studies in law and practice* (2007) 1-904.
110 As above.

processes that are distinct from national laws and without any judicial oversight carries the possibility of damaging the feasibility of arbitration proceedings - there must be a delicate balance between the arbitration jurisprudence and party autonomy principles in order to avoid the possibility of such a compromise. In this regard, article 11(4) of the UNCITRAL Model Law on International Commercial Arbitration[111] provides a useful guideline by recognising the important function of national courts to ensure that arbitration proceedings do not reach an impasse. For the sake of completeness, article 11(4) of the UNCITRAL Model Law sets out the instances whereby judicial intervention may be required in respect of certain issues that arise prior, during or upon the conclusion of arbitration proceedings.[112] It is therefore vital to afford parties an opportunity to seek judicial intervention where necessary, within the legal parameters permitted by the relevant jurisdiction.

In light of the contrasting views set out above, Saghir and Nyombi propose a solution that ensures that delocalisation and judicial oversight coexist in harmony in respect of arbitration proceedings.[113] Paulsson submits that the question that we should ask ourselves is whether the arbitration system can be unfettered from the local peculiarities of the place where arbitration proceedings are conducted.[114] On the other hand, Bucher states that, while he understands the legitimacy of Paulsson's contention, the primary objective behind the delocalisation of the arbitration system can rather be accomplished by parties connecting or aligning their arbitration proceedings to jurisdictions whereby the arbitration award made from such proceedings can be enforced in the relevant jurisdictions without hassle.[115] In Bucher's view, this kind of an approach will ensure that an arbitration award is not frivolously challenged, and also capture the veracious meaning of delocalisation in order to sensibly accomplish a delocalised arbitration system.[116]

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111 UNCITRAL Model Law on International Commercial Arbitration, 1985 as amended (hereafter, UNCITRAL Model Law).

112 Article 11(4) of the UNCITRAL Model Law.

113 Saghir & Nyombi (note 9 above) 275.

114 J Paulsson 'Delocalisation of international commercial arbitration: When and why it matters' (1983) 32 *International & Comparative Law Quarterly* 53-54.

115 Saghir & Nyombi (note 9 above) 274.

116 As above.

Greenberg and Weermantry also provide an alternative solution to the predicament faced by the delocalisation theory and submit that a diluted version of the concept exists and should be considered in the absence of a pure delocalisation.[117] In this diluted version, it is argued that the national laws of the relevant jurisdictions must cater for a relaxed approach to arbitration proceedings occurring within their jurisdictions.[118] According to Greenberg and Weermantry, a relaxed approach with limited intervention of national law processes makes sense as it helps preserve the autonomy of the parties, while enforcing national laws where necessary in certain circumstances.[119] Therefore, instead of separating delocalisation from national laws with little to no success, it is better to have a diluted delocalisation version as it preserves the autonomy of the parties and ensures that national laws are enforced where required.

3.4 The hybrid theory

The jurisdictional and contractual theories have ample backing at antithetical ends of the arbitration spectrum, however, according to some jurists, neither the jurisdictional theory nor the contractual theory explains the modern framework of international commercial arbitration in a logical and concise manner.[120] As Lew puts it, the development of a mixed or hybrid theory as a compromise theory is therefore not surprising.[121] The advocates of the hybrid theory are of the view that the ideal international commercial arbitration model hinges on both jurisdictional and contractual components, which explains why the hybrid theory is viewed as a compromise theory in that it is essentially a mix of both the contractual and jurisdictional theories.[122]

Sauser-Hall propounds that international commercial arbitration is an alternative dispute resolution mechanism with a binary composition because, on the one hand, it carries a contractual component of arbitration which is denoted in the reasoning that arbitration proceedings originated from a contract between the parties, where such parties derive

117 S Greenberg et al *International commercial arbitration: An Asia-pacific perspective* (2011) 1-582.
118 As above.
119 As above.
120 HL Yu (note 9 above) 274.
121 JDM Lew *Applicable law in international commercial arbitration: A study in commercial arbitration awards* (1978) 53.
122 Lew (note 121 above) 57.

their power to select an arbitrator to preside over their arbitration proceedings and also agree on the rules that govern the relevant arbitration proceedings.[123] On the other hand, Sauser-Hall submits that international commercial arbitration also carries a jurisdictional component in that arbitration proceedings must be conducted within the parameters of the applicable national laws in order to, *inter alia*, determine whether an arbitration agreement is valid and whether an arbitration award is enforceable.[124]

It is on the basis of the dual character nature of the hybrid or mixed theory that hybrid theorists define arbitration as "*a mixed juridical institution, sui generis, which has its origin in the [parties'] agreement and draws its jurisdictional effects from the civil law*".[125] Accordingly, arbitration proceedings derive their heartbeat from the arbitration agreement concluded by the parties, while the jurisdictional nature of arbitration proceedings stems from the application of national laws in such proceedings. Some practitioners, such as Redfern and Hunter, endorse Sauser-Hall's argument and expressly state that:

> International commercial arbitration is … 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 being met, the courts of most countries of the world will be prepared to recognise and enforce. The private process has a public effect, implemented by the support of the public authorities of each state expressed through its national law.[126]

According to Sanders, the hybrid theory seems to be a better theoretical framework than the contractual theory or jurisdictional theory to address issues that concern arbitration proceedings.[127] In Sanders' view, this is because placing an emphasis on (or choosing) one element of the arbitration system (contractual or jurisdictional) would be inadequate.

Robert, who supports the dual nature of the arbitration system, submits that there is a contiguous connection between arbitration proceedings and the national laws of the place where an such an arbitration is conducted.[128] Robert explains that the make-up of

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123 G Sauser-Hall 'L'arbitrage en droit international privé' (1952) *Annuaire de l'Institut de droit international* 1-469.
124 As above.
125 Roberts (note 40 above) 1-70.
126 Redfern & Hunter (note 95 above) 1-661.
127 HL Yu (note 9 above) 275.
128 HL Yu (note 9 above) 276-277.

arbitration proceedings and the powers of an arbitrator are rooted on the arbitration agreement concluded by the parties, while the determination on whether an arbitration agreement is valid and/or whether an arbitration award can be enforced has to be made in accordance with the national laws of the relevant jurisdiction.[129] Contrary to the contractual theory, the powers of an arbitrator are subject to the national laws and the public policy rules of the relevant jurisdiction.[130] In respect of the nature of the arbitration awards, the hybrid theory defines the sum and substance of arbitration awards as a combination of both a judicial component and a contractual component, which is also distinct from both the jurisdictional and contractual theories.[131]

4 Conclusion

This chapter demonstrated that it is imperative for South Africa to comprehend how international commercial arbitration functions from a theoretical perspective. From a South African perspective, the enactment of the International Arbitration Act and its adoption of the UNCITRAL Model Law is an indication of South Africa's standpoint being, to a large extent, grounded on the hybrid or mixed theory as it is a combination of both the jurisdictional theory and the contractual theory.

The principles of the jurisdictional theory and the contractual theory are endorsed by the UNCITRAL Model Law in that international commercial arbitration proceedings: (i) originate from a contract between the parties, where such parties derive their power to select an arbitrator to preside over their arbitration proceedings and also agree on the rules that govern the relevant arbitration proceedings; and (ii) they must be conducted within the parameters of the applicable national laws in order to, *inter alia*, determine whether an arbitration agreement is valid and whether an arbitration award is enforceable.[132] It is posited that the enactment of the International Arbitration Act and its adoption of the UNCITRAL Model Law is going to continue helping South Africa experience a progressive increase in the number of international commercial arbitration

129 As above.
130 JE Grenig *International commercial arbitration* (2021) 1-30.
131 HL Yu (note 9 above) 276-278.
132 Sauser-Hall (note 123 above) 1-469.

disputes that are brought to its jurisdiction and will also aid South Africa's quest to be a leading international commercial arbitration jurisdiction.[133]

The delocalisation theory is strongly criticised and has a lot of shortcomings in that only a few parties, if any, would not want to be bound to any national legal system and thereby compromise legal certainty over their arbitration proceedings. Practically, the success of international commercial arbitration proceedings lies in the successful enforcement of an arbitration award which can only be achieved if the relevant proceedings conform with applicable standards of international commercial arbitration. In contrast to the jurisdictional, contractual and hybrid theories, it is evident that the autonomous theory goes further on than the reality of modern international commercial arbitration. While both the jurisdictional and contractual theories take two antithetical positions on the same gamut, the hybrid theory is an important compromise that South Africa has developed over the years and it is a more generally acceptable and feasible theory of international commercial arbitration in most jurisdictions. Within the present international commercial arbitration framework, the yardstick for determining whether an arbitration award can be enforced is based on the relevant national laws of the jurisdiction where such enforcement is sought. As such, based on the fact that South Africa's international commercial arbitration comprises of this yardstick and the jurisdictional and contractual theories, it can be said that the hybrid theory is the theory that encapsulates the South African international commercial arbitration system in a succinct and nuanced manner.

South Africa has a contiguous connection between its arbitration proceedings and the national laws. The make-up of arbitration proceedings and the powers of an arbitrator in South Africa are rooted on the arbitration agreement concluded by the parties and the determination on whether an arbitration agreement is valid and/or whether an arbitration award is enforceable has to be determined in accordance with its national laws.[134] The enactment of the International Arbitration Act has helped South Africa align its international commercial arbitration framework to various jurisdictions via the UNCITRAL Model Law whereby arbitration awards made from international commercial arbitration

133 Wethmar-Lemmer & E Schoeman (note 18 above) 127.
134 As above.

proceedings subject to its national laws can be enforced in the various jurisdictions without hassle. This alignment and approach towards applying internationally accepted standards does help enhance the feasibility of international commercial arbitrations and it can be argued that the hybrid theory of arbitration encapsulates the South African international commercial arbitration system in a succinct and nuanced manner.

It is important for South Africa's arbitration scholarship to continue considering conflict dynamics involved in international commercial arbitration as they develop over time in order to keep improving South Africa's theoretical framework, to ensure that the South African international commercial arbitration system is constantly working towards maximising its effectiveness and also foster change in the perception of South Africa lagging behind other leading jurisdictions.

CHAPTER 3

AN APPRAISAL OF SOUTH AFRICA AS A MAIN SEAT OF INTERNATIONAL COMMERCIAL ARBITRATION

1 Introduction

As indicated in the preceding chapters, parties in dispute are increasingly choosing international commercial arbitration as their preferred mechanism of settling their disputes because it protects the relevant parties' legal and commercial interests in an effective manner.[135] It has therefore become important for every country to take charge in developing a strong international commercial arbitration framework in order to benefit from the growing international trade and investment around the world.[136] A strong international commercial arbitration framework is characterised by arbitration proceedings that observe the core values of arbitration including, but not limited to, flexibility, robustness, expediency, privacy, and speedy resolution of disputes.[137] In the international arbitration community, international commercial arbitration is still a developing economy within the alternative dispute resolution space and a number of countries (including South Africa) are looking to become leading seats of arbitration around the world in order to benefit from this growing economy.[138]

There are numerous key factors that need to be borne in mind by international commercial arbitration parties when considering which jurisdiction to choose as a seat of arbitration for their dispute, especially in the South African context. These factors involve an assessment of: (i) whether the relevant seat of arbitration has endorsed the UNCITRAL Model Law into the South African international arbitration framework;[139] (ii) whether the relevant seat of arbitration has an arbitration-friendly environment; and (iii) whether the

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135 D Williams 'International arbitration in Africa: The bigger picture' (2017) *Without Prejudice* 6-9. See also BusinessDay (note 4 above).

136 As above.

137 S Nurney 'Dispute resolution in international contracts: English arbitration?' (1998) *De Rebus* 53- 57. See also Mbith (note 10 above) 1.

138 Unegbu (note 14 above) 1-25.

139 UNCITRAL Model Law (note 111 above).

relevant seat of arbitration has the required infrastructure to ensure that all international commercial arbitration participants are afforded efficient arbitration proceedings.[140] Before South Africa enacted the International Arbitration Act,[141] a number of scholars believed that the South African legislature needed to develop international commercial arbitration laws that accord with internationally-accepted standards in order to be at the forefront of leading international commercial arbitration jurisdictions.[142] This advice was carried-through by the South African legislature, but the question still remains whether the adoption of the UNCITRAL Model Law is enough to turn South Africa into a leading jurisdiction of international commercial arbitration around the world.[143] This chapter answers this question through a critical examination of South Africa's international commercial arbitration framework and its capacity to become a main seat of international commercial arbitration internationally.

2 Dissecting the meaning of 'seat of arbitration', as influenced by internationally-recognised legal instruments of international commercial arbitration

2.1 The 'seat of arbitration' construction

There is a trite differentiation between the actual location of the arbitration proceedings and the seat of arbitration.[144] This differentiation can be very blurry to those inexperienced in the international arbitration framework in respect of understanding that a seat of arbitration is not limited to the physical location of the country of the chosen seat of arbitration, but includes a connecting factor or link to the procedural framework of the country of the chosen seat of arbitration.[145] In simple terms, a seat of arbitration is understood as a legal place of arbitration proceedings, whereby the applicable law of this

140 BusinessDay (note 4 above).

141 International Arbitration Act (note 15 above).

142 JE Ewers & S Wilske 'Why South Africa should update its international arbitration legislation: An appeal from the international arbitration community for legal reform in South Africa' (2011) 28(1) *Journal of International Arbitration* 5.

143 WG Schulze 'Of arbitration, politics and the price of neglect - South African international arbitration legislation continues to lag behind: *Bidoli v Bidoli*' (2011) 23(2) *South African Mercantile Law Journal* 291-299.

144 Ramsden (note 5 above) 1-416.

145 PAA Ramsden and K Ramsden *The law of arbitration: South African and international arbitration* (2009) 1-334.

legal place governs the procedural aspect of the relevant arbitration proceedings.[146] Whereas, a venue of arbitration is understood as a geographic and operational choice by parties in arbitration proceedings where certain processes within arbitration proceedings are conducted (for example, the inspection of goods and properties and the hearing of witnesses, amongst others).[147]

It is therefore important to understand a seat of arbitration as a legal design or construct and a jurisdiction where arbitration proceedings have their juridical home and legal residence.[148] Practically, the parties before arbitration proceedings may specify their preferred seat of arbitration in their arbitration agreement and, where there is no such specification in the arbitration agreement, the arbitrator(s) or the relevant arbitration institution are permitted to choose the seat of arbitration for such parties.[149] As indicated earlier, the process of parties selecting their preferred seat of arbitration is imperative because its law may be the applicable law that governs the relevant arbitration proceedings.[150] Accordingly, where there is court intervention required during such arbitration proceedings, the applicable law of the seat of arbitration would have to be used for such court intervention. As such, parties must, when making a choice in respect of their preferred seat of arbitration, be mindful of whether the arbitration laws applicable at a particular seat of arbitration are "arbitration-friendly".[151]

It is a challenging task to build towards becoming a leading seat of international commercial arbitration around the world, and South Africa has to go over and above meeting the minimum international commercial arbitration requirements and standards in order to equal or surpass other leading jurisdictions around the world.[152] A strong seat/jurisdiction of international commercial arbitration is required to be competitive considering a number of factors, for example: (i) competitive alternative dispute resolution

146 Ramsden (note 5 above) 1-416.

147 As above.

148 Born (note 5 above) 4.

149 DP Rantsane 'The origin of arbitration law in South Africa' (2020) 23 *PELJ* 1-27.

150 Ramsden (note 5 above) 1-334.

151 T Bates 'Will they stay or will they go?: An examination of South Africa's international investment arbitration policy' (2020) *Brooklyn Journal of International Law* 149-182.

152 Johaar (note 19 above) 1-40.

institutions and arbitration practitioners; (ii) fair and equal appointment of arbitration practitioners; and (iii) strong alternative dispute resolution infrastructure.[153] South Africa has adopted a pro-arbitration approach, with minimal court interference.[154] Of course, there are several other material factors and considerations to take into account when building towards becoming a leading seat of arbitration around the world and the author discusses some of these factors in so far as they relate to South Africa below.

2.2 Which factors influence the international commercial arbitration parties' choice of their preferred seat of arbitration?

Amongst academic scholarship, there are a number of varying factors that are considered as being material during the international commercial arbitration parties' decision-making process on which seat of arbitration to choose.[155] According to Born, the following factors (amongst others) are considered as material by international commercial arbitration parties when deciding on their preferred seat of arbitration for their arbitration proceedings: (i) whether the relevant jurisdiction is a signatory to the UNCITRAL Model Law; (ii) whether the relevant jurisdiction has a pro-arbitration regime (including the substantive and procedural laws in place at the relevant jurisdiction); (iii) cost and convenience; (iv) judicial efficiency; and (v) the socio-economic and political landscape of the relevant jurisdiction.[156]

According to Unegbu, the core principles that influence international commercial arbitration parties' decision-making process are: (i) a jurisdiction's level of commitment towards the rule of law.[157] In this regard, it is argued that a higher level of commitment towards the rule of law plays a major role in gaining the trust and confidence of international parties in that their arbitration proceedings will be resolved fairly and efficiently;[158] (ii) a well-developed contract law system that upholds and advances party

153 Karton (note 6 above) 58.

154 R Henrico 'The law of arbitration: South African and international arbitration' 2019(2) *Journal of South African Law* 419-420.

155 Johaar (note 19 above) 1-40.

156 Born (note 5 above) 119.

157 Unegbu (note 14 above) 59.

158 S Boolell 'Impact on the rule of law' (2011) *World Jurist Association's Conference on International Arbitration and ADR* 1-16.

autonomy;[159] (iii) a strong economic and socio-political landscape that is attractive for trade and investment;[160] (iv) an internationally-recognised private international law regime in respect of the enforcement of arbitration awards, *inter alia*;[161] and (v) as advanced by Greenberg et al, the proposed arbitrator's familiarity with the subject matter and applicable laws of the parties' preferred seat of arbitration.[162] It is also imperative to ensure that the proposed arbitrator possesses the necessary knowledge of the applicable legal principles and eradicate the costs of acquiring the services of additional arbitrators or officers.[163] Other factors such as applicable rules and the nature of the dispute also play a critical role in the parties decision-making process.[164] In the interests of time and space, the discussion in this dissertation is limited to the following factors or themes: (i) the South African arbitration regime; (ii) political instability; (iii) technological and infrastructural challenges; (iv) trade and investment; (v) increased monitoring / "grey listing" by the Financial Action Task Force; and (vi) tax exemption/incentives.

3 Assessing some of the crucial factors for South Africa to become a main seat of arbitration world-wide

3.1 The international arbitration framework in South Africa

In South Africa, the international arbitration regime is regulated under the International Arbitration Act. Previously, all arbitrations taking place in South Africa were regulated under the Arbitration Act[165] and there was no distinction or separation between international, national and (non)-commercial arbitration proceedings prior to the adoption of the International Arbitration Act in 2017 – the Arbitration Act was the only legislative piece regulating arbitrations in South Africa until 2017.[166] Since the enactment of the International Arbitration Act, there is now a dual arbitration system in South Africa (i.e. the

159 Unegbu (note 14 above) 59.

160 Unegbu (note 14 above) 59-60.

161 As above.

162 Greenberg et al (note 117 above) 82.

163 As above.

164 KP Berger 'Re-examining the arbitration agreement, applicable law consensus or confusion?' (1994) *South African Mercantile Law Journal* 251.

165 See Arbitration Act (note 16 above).

166 Schulze (note 17 above) 49.

International Arbitration Act regulates international arbitrations and the Arbitration Act regulates domestic arbitrations).[167] The promulgation of the International Arbitration Act has significantly changed the South African international arbitration law landscape and aligned the South Africa international arbitration regime with internationally accepted standards and practices.[168]

Since the enactment of the International Arbitration Act, South Africa has made significant inroads in that some of its arbitration institutions experienced an increase in matters brought before such institutions after the adoption of the International Arbitration Act.[169] For example, in 2018 and immediately after the enactment of the International Arbitration Act, the Arbitration Foundation of Southern Africa experienced a significant and unanticipated growth in its caseload.[170] The Arbitration Foundation of Southern Africa credited the enacted International Arbitration Act as the major factor behind the significant increase in its case load at the time and it also revealed that its international caseload went beyond double its 2018 international caseload in 2019.[171]

According to the Arbitration Foundation of Southern Africa's 2019 statistics, the Arbitration Foundation of Southern Africa found that approximately 67% of its international caseload involved disputes brought by parties from other countries in Africa – this is a positive sign that South Africa is making significant strides towards becoming a highly reputable international arbitration destination in Africa.[172] Part of the Arbitration Foundation of Southern Africa's increase in international caseload is also attributed to the fact that the South African legal regime allows parties before arbitration proceedings seated or governed by South African law to be represented by foreign lawyers.[173]

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167 Wethmar-Lemmer & E Schoeman (note 18 above) 127.

168 Johaar (note 19 above) 3.

169 R Browning, June 2017 'South Africa as a preferred arbitration venue on the horizon?', https://www.withoutprejudice.co.za/free/article/5404/view (accessed 11 October 2022).

170 'AFSA@Work' *The Arbitration Foundation of Southern Africa Newsletter* June 2019 1.

171 The Arbitration Foundation of Southern Africa Newsletter (note 170 above) 3.

172 As above.

173 G Vial & F Blavi 'New ideas for the old expectation of becoming an attractive arbitral seat' (2016) 25 *Transnational Law & Contemporary Problems* 302.

The South African jurisprudence has, in recent years, seen the South African courts adopting a pro-arbitration approach in arbitration-related disputes. In *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and another*,[174] the Constitutional Court considered, *inter alia*, the UNCITRAL Model Law and the New York Convention and held that:

> The international and comparative law considered in this judgment suggests that courts should be careful not to undermine the achievement of the goals of private arbitration by enlarging their powers of scrutiny imprudently.[175]

In *Zhongji Development Construction Engineering Co Ltd v Kamoto Copper Co*,[176] the Supreme Court of Appeal endorsed the *Lufuno* judgment and demonstrated a staunch support of the notion that South African courts must have very little involvement in arbitration proceedings seated in South Africa. In this regard, the Supreme Court of Appeal stated that:

> With reference to the … international trend referred to and relied on by both parties, it is clear that if courts arrogate to themselves the right to decide matters which parties have agreed should be dealt with by arbitration, the likelihood of this country being chosen as an international arbitration venue in future is remote in the extreme. Persons wishing to have their disputes resolved by arbitration do not wish the process to be retarded by constant recourse to courts.[177]

In *Bidoli v Bidoli*,[178] the arbitrator made the parties' settlement agreement an arbitration award, however, the High Court held that the arbitration award was void from the beginning.[179] On appeal, the Supreme Court of Appeal upheld the arbitration award and reiterated that the law affords an arbitrator a considerable variety of forms from which to choose the type of award best suited to the circumstances of the case, including the power to make an award declaring what the rights of the parties are.[180] In this regard, the following remarks were made by the Supreme Court of Appeal:

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174 *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and another* 2009 (4) SA 529 (CC) (hereinafter, '*Lufuno*').

175 *Lufuno* (note 174 above) paras 220-235. See also *Telecordia Inc v Telkom SA Ltd* 2007 (5) BCLR 503 (SCA).

176 *Zhongji Development Construction Engineering Co Ltd v Kamoto Copper Co* 2015 (1) SA 345 (SCA) (hereinafter, *Zhongji*).

177 *Zhongji* (note 176 above) para 59.

178 *Bidoli v Bidoli* 2011 JOL 27352 (SCA) (hereinafter, '*Bidoli*').

179 R Baboolal-Frank, 'Judicial hostility towards international arbitration disputes in South Africa: Case reflections' (2019) 31(3) *South African Mercantile Law Journal* 374.

180 *Bidoli* (note 178 above) para 16.

> The arbitrator here – as all arbitrators do - plainly derived his powers from his acceptance of a reference from the parties to the arbitration agreement. [The arbitrator] thereby undertook to hear their dispute and to make an award. Only when a final award was made did his authority as an arbitrator come to an end and with it his powers and duties in the reference … Thus, [it is] wrong [to] conclu[de] that our common law does not permit for the making of an agreed award by an arbitrator.[181]

The judgments referred to above are a clear demonstration that the South African judiciary is conscious of the importance of judicially enforcing arbitration awards made by arbitrators, and not to trammel the arbitration process by incessant recourse to courts.[182] In this regard, the aforementioned judgments reinforce South Africa's approach of arbitration proceedings and arbitration awards being recognised as autonomous, and free from intemperate recourse to courts.[183] This is one of the key stepping stones towards South Africa becoming a leading seat for international commercial arbitration disputes to all stakeholders involved in the international arbitration regime.[184]

It is trite that the International Arbitration Act is still a new piece of legislation and, as such, South Africa is still building its way towards positioning itself as a leading seat of international commercial arbitration amongst stakeholders involved.[185] As will be demonstrated in this chapter below, there are still a number of issues to be addressed by South Africa in order to become a leading seat of international commercial arbitration.[186]

3.2 Unstable political landscape

Political instability, as a concept, refers to the potential for material and abrupt alterations in the condition or leadership policies of a country. Political stability is a colossal issue in various jurisdictions internationally, which is caused by ineffectiveness and substandard political culture.[187] The stability of a jurisdiction's political space has a direct impact in so

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181 *Bidoli* (note 178 above) para 15.
182 *Zhongji* (note 176 above) para 59.
183 *Lufuno* (note 174 above) paras 220-235.
184 Williams (note 135 above) 6.
185 Johaar (note 19 above) 3.
186 Redfern & Hunter (note 95 above) 1-568.
187 C Twala 'The causes and socio-political impact of the service delivery protests to the South African citizenry: A real public discourse' (2014) 39(2) *Journal of Social Sciences* 159-167.

far as the growth of a country's economy is concerned.[188] It is one of the most important factors considered by international trading parties when choosing a jurisdiction as a seat of arbitration for their disputes.[189] A jurisdiction that has a firm political landscape, a legal system that esteems the rule of law and good economic opportunities is bound to enchant international trading parties.[190] This is because international trading parties prefer to take their arbitration proceedings to places that have a good political climate, efficiency and decent economic stability.[191] This ensures a process that is efficient, cost effective and time effective.[192]

In the South African context, as recorded by Cilliers and Aucoin et al, poor governance, poverty and inequality are highly prevalent and have a significant impact on the social and political instability in South Africa.[193] The prevalence of poor governance in South Africa has resulted in the increased tendency of individuals engaging in civil unrests, threats of government destabilisation and fuelling political violence in order to voice their concerns towards ineffective governance in South Africa.[194]

The Eurasia Group, a political science group of analysts, recently conducted an analysis of political conduct events that are believed to have caused an impasse in international relations and foreign policy, which are termed as political crises and cause for concern to international trading parties and South African investors.[195] The Eurasia Group suggests that, amongst others, the dissension around the African National Congress and the former President, Jacob Zuma, is likely to further damage the (in)stability of South Africa's

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188 O Solomon et al 'Effect of political instability on the performance of mobile telecommunication organisations in South Africa' (2020) 10(2) *African Journal of Development Studies* 153-170.

189 NB Neneh & JH Van Zyl 'Achieving optimal business performance through business practices: Evidence from SMEs in selected areas in South Africa' (2012) *Southern African Business Review* 118-144.

190 Moses (note 10 above) 51.

191 As above.

192 C Namachanja 'The challenges facing arbitral institutions in Africa' (2016) 82(1) *Arbitration* 50.

193 J Cilliers & C Aucoin 'Economics, governance and instability in South Africa' (2016) 293 *Institute for Security Studies* 1-24.

194 P Brett 'Politics by other means in South Africa today' (2020) 47(1) *Journal of Law and Society* 126-144.

195 Eyewitness News, 4 January 2017 'SA on list of global risks to political stability, should we be worried?', https://ewn.co.za/2017/01/04/sa-on-list-of-global-risks-to-political-stability-should-we-be-worried. (accessed 14 May 2022).

economy and place its economic landscape at a greater risk of losing the confidence of international and regional investors or trading parties.[196]

As indicated above, international arbitration parties prefer a country that possesses a stable political landscape when choosing a seat of arbitration.[197] This is premised on the understanding that it is difficult for a stable legal framework to exist in a politically volatile jurisdiction.[198] The unsettled political environment in South Africa deprives it of its potential to forge South Africa into a core seat of international commercial arbitration world-wide because international parties will shy away from bringing their dispute to a jurisdiction that lacks certainty in that it does not have predictable results.[199] This is therefore one of the major factors that affect South Africa's aspirations of becoming a leading seat of international commercial arbitration in Africa and beyond.[200]

South Africa's shortcoming of having an unsettled political environment cannot only be remedied by the aforementioned adoption of internationally-accepted arbitration standards.[201] South Africa should develop practically implementable solutions in respect of the issues around the country's unstable political landscape as this will contribute immensely towards ensuring that international arbitration parties do not get dissuaded by South Africa's turbulent political climate.[202] It is important for South Africa to have a good political integration and consistent government programmes, policies and frameworks in order to retain the confidence of international commercial arbitration stakeholders.[203]

3.3 Technology and Infrastructure

A strong technology and infrastructure in a jurisdiction is one of the key tenets or components for a country to become one of the best seats of international commercial

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196 As above.

197 ABM Abang 'The seat of arbitration: To what extent does it influence important aspects of the arbitration process?' (2021) 4(5) *International Journal of Law Management and Humanities* 918-925.

198 JDM Lew et al *Comparative International Commercial Arbitration* (2001) 1-992.

199 Mail & Guardian, 20 May 2015 'Phosa: South Africa's instability scares away investors', http://south-africa's-instability-scares-away-investors. (accessed 3 June 2022).

200 Abang (note 197 above) 924.

201 RW Johnson *How long will South Africa survive?: The looming crisis* (2015) 1-288.

202 Unegbu (note 14 above) 38-57.

203 Solomon (note 188 above) 153-170.

arbitration.[204] International arbitrating parties tend to opt to take their arbitration proceedings to a jurisdiction that boasts strong and well-developed basic technology and infrastructure.[205] According to Bosman, South Africa has one of the strongest economies in the African continent, coupled with well-developed legal and non-legal infrastructure to a large extent.[206] In this regard, Bosman asserts that South Africa has a number of advantages in that (amongst others): (i) most cities in South Africa have developed infrastructures and good roads; (ii) South Africa has one of the best accommodations and clean water supplies around the world; (iii) a decently developing technological infrastructure (especially in the telecommunications, data and media spaces); and (iv) most arbitration facilities in South Africa are in a good state.[207]

Notwithstanding the plethora of advantages that South Africa possesses from a technological and infrastructural perspective, 'load shedding'[208] is one of the crucial challenges faced by South Africa due to low electricity-generation capacity by its electricity public utility, Eskom.[209] The constant implementation of electricity blackout schedules and interruption of internet connection in the process have a substantial impact on South Africa's quest towards becoming a leading seat of international commercial arbitration in Africa and beyond.[210] These electricity blackout schedules mean that South African arbitration institutions' objectives of running efficient physical arbitration proceedings and having hybrid hearing models is hampered because there are times during the day whereby the arbitration institutions are not able to conduct hearings virtually (and physically), and the virtual hearing process has significantly become an

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204 F Rust & R Koen 'Positioning technology development in the South African construction industry: A technology foresight study' (2011) 53(1) *Journal of the South African Institution of Civil Engineers* 1-8.

205 Moses (note 10 above) 52.

206 L Bosman 'Chapter 1.10: South Africa' in L Bosman (ed) *Arbitration in Africa: A practitioner's guide* (2013) 81.

207 As above.

208 'Load shedding' is a term used in South Africa to refer to the implementation of electricity blackout schedules by South Africa's power utility, Eskom, in order to prevent the collapse of the power grid as a result of consumers using or requiring more power than the power grid can supply.

209 IT News Africa, 23 March 2021 '3 things affecting internet connectivity in South Africa', https://www.itnewsafrica.com/2021/03/3-things-affecting-internet-connectivity-in-south-africa (accessed 23 March 2022).

210 N Marta & T Agnieszka 'Load shedding and the energy security of Republic of South Africa' (2015) 6(3) *Journal of Polish Safety and Reliability Association* 99-105.

attractive phenomenon in South Africa since the advent of the Covid-19 pandemic.[211] Many international parties will be deterred from choosing South Africa as their seat of arbitration because it has uncertain power supply as a result of constant electricity blackout schedules, which affects the ability to run arbitration proceedings in an efficient manner.[212]

As part of the South African government's legal and investment policy strategy, South Africa needs to adopt practically implementable approaches in its attempt to gain the trust of international parties in its electricity infrastructure and power-generation capacity.[213] In terms of the national development plan published by the National Planning Commission in August 2012, the South African government has set a target that more than 90% of the South African population should have access to off-grid or grid-connected electricity by 2030, and arbitration institutions could leverage on this target to improve their electricity supply.[214] As set out in the national infrastructure plan published by the Department of Public Works and Infrastructure in March 2022, an expansion of renewable energy and electricity generation capacity at existing power stations such as Medupi and Kusile would play a major role in enhancing sustainable power supply.[215]

Accordingly, a strategic approach that South Africa could adopt in order to gain the trust of international parties in our electricity infrastructure and power-generation capacity could be engaging in a program that allows arbitration institutions to go off-grid at lower or subsidised-costs and allow arbitration institutions and other businesses to sell their excess power generated back into the grid, while developing long-term solutions to improve Eskom's infrastructure and increase its power-generation capacity.[216] This approach could help attract more international commercial arbitration disputes in South

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211 N Madyoon 'Virtual hearings in international arbitration: Challenges, solutions, and threats to enforcement' (2021) 87(4) *The International Journal of Arbitration, Mediation and Dispute Management* 597-611.

212 Marta (note 210 above) 99-105.

213 As above.

214 National Planning Commission 'National development plan 2030: Our future - make it work' (2012) *The Presidency: Republic of South Africa* 63.

215 P De Lille 'South Africa's national infrastructure plan 2050' (2022) *Department of Public Works and Infrastructure* 15.

216 As above.

Africa and boost the South African economy as the power challenges faced by arbitration institutions and other businesses would be curbed.[217]

3.4 Trade and investment

It is important for a country to attract investment parties that have a long-term approach in gradually building wealth through South African investing schemes, and trading parties that have a sustainable approach towards engaging in frequent processes and transactions that involve the buying and selling of South African goods and services.[218] Singapore's quest towards becoming a leading arbitration jurisdiction in Asia has been bolstered by the constant growth of India and China's economy over the last couple of years, and this is evidenced by the fact that most of the participants in arbitration proceedings brought before the Singapore International Arbitration Centre are from India and China.[219] This is a demonstration that, if the jurisdictions that form part of the Southern African Development Community (which includes South Africa) can strongly grow their economies, such growth would significantly bolster South Africa's quest towards becoming a firmly leading seat of international arbitration in Africa and the world at large.[220] This is in line with Advocate Michael Kuper SC's view that:

> Appropriate legislation is a *sine qua non* of a viable arbitration hub, but it is no guarantee of one. Everything depends not upon the support of [g]overnment, or upon the endorsement of leading arbitration institutions – success is dependent on the support of a strong local business community with an international reach.[221]

It is argued that South Africa has an upper-hand compared to other jurisdictions in that it has a fairly strong local business coterie that engages in international transactions.[222] South Africa's engagement in international transactions means that there is an opportunity for parties to consider choosing South Africa as their seat of arbitration where there are disputes stemming from such international transactions, especially in light of

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217 A Dubresson *Eskom: Electricity and technopolitics in South Africa* (2016) 1-196.

218 D Kellerman et al 'Analysing investment product choice in South Africa under the investor lifecycle' (2020) 8(1) *Cogent Economics & Finance* 1-20.

219 T Kaul 'Singapore international arbitration centre' (2019) *Court Uncourt* 5-6.

220 Williams (note 135 above) 6.

221 The Arbitration Foundation of Southern Africa Newsletter (note 170 above) 13.

222 The Arbitration Foundation of Southern Africa Newsletter (note 170 above) 1-2.

South Africa's recent legislative reform adopting internationally-accepted standards into its international arbitration practice.[223]

According to a study conducted by the Arbitration Foundation of Southern Africa, South Africa has been the largest recipient of investments made by China in Africa as a result of the close ties between South Africa and China, especially after their association through the BRICS programme – this is a prototype of many other leadings jurisdictions around the world.[224] Unfortunately, foreign direct investment has been on a decline in South Africa, despite the enactment of the Protection of Investment Act[225] which is aimed at protecting investors and investments in order to maximise South Africa's investment potential.[226] One of the reasons for the decline in foreign direct investment, notwithstanding the enactment of the Protection of Investment Act, is because of the fact that the Protection of Investment Act does not permit foreign investors to use international arbitration to settle an investment dispute.[227] The Protection of Investment Act permits international arbitration between the South African government and the home state of the investor, provided that the South African government consents to international arbitration and the domestic remedies have been exhausted by the foreign investor.[228] As advanced by Qumba, the failure to permit foreign investors to use international arbitration to settle their investment disputes has gradually corroded the protection that foreign investors are accustomed to internationally, which has contributed to the reduction in foreign direct investment in South Africa.[229]

The World Investment Report issued by the United Nations Conference on Trade and Development in 2020 reveals that South Africa's foreign direct investment value of inflows in 2019 dropped by 15.1%, bringing down its foreign direct investment value of inflows to USD 4.6 billion (from a USD 5,4 billion foreign direct investment value of inflow recorded

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223 As above.

224 The Arbitration Foundation of Southern Africa Newsletter (note 170 above) 3.

225 Protection of Investment Act 22 of 2015 (hereinafter, Protection of Investment Act).

226 United Nations Conference on Trade and Development, 2020 'World Investment Report: International production beyond the pandemic', https://unctad.org/system/files/official-document/wir2020_en.pdf (accessed 5 July 2022).

227 MF Qumba 'South Africa's move away from international investor-state dispute: a breakthrough or bad omen for investment in the developing world?' (2019) 52(1) *De Jure Law Journal* 358-379.

228 Section 13(5) of the Protection of Investment Act.

229 Qumba (note 227 above) 372.

in 2018).[230] In this regard, it is stated that foreign direct investment stocks increased from USD 127 billion in 2018 to USD 151 billion in 2019, and South Africa intends to attract an additional foreign direct investment growth of USD 100 billion by the end 2023.[231]

There are a number of attractive investment opportunities in South Africa for both local and international investors as South Africa has an abundance of natural resources and one of the most productive, advanced and diversified economies in Africa.[232] However, one of South Africa's major impediments from an investment and trade perspective is the fact that South Africa is constantly suffering from increasing social unrests, high crime rate, corruption and structural difficulties relating to cuts in the supply of electricity.[233] The Department of Trade and Industry, through its investment promotion agency called InvestSA, is rolling out an operations support services which entails the coordination and assistance of licensing, registration and permit approvals with the intent of turning South Africa into one of the most investor-friendly jurisdictions around the world.[234]

According to InvestSA, South Africa is facing an uphill battle in enticing the required inflow of investment in order to satisfy its post COVID-19 recovery plan.[235] South Africa was downgraded deeper into junk status in 2020 following Moody's Investors Service's lowering of South Africa's credit ratings.[236] South Africa remains at an increased risk of recession owing to an assortment of factors (including, but not limited to, the constant implementation of scheduled electricity blackouts).[237] Of course, this has a significant impact on South Africa's ability to attract foreign direct investment, especially in an economic climate where economic valuations are at historic low.[238] The development of a leading international arbitration jurisdiction is severely stunted in countries where the confidence of investors are minimal because developing countries are hardly considered

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230 United Nations Conference on Trade and Development (note 226 above).

231 Nordea Trade, March 2021 'Foreign direct investment (FDI) in South Africa', https://www.nordeatrade.com/dk/explore-new-market/south-africa/investment (accessed 7 May 2022).

232 United Nations Conference on Trade and Development (note 226 above).

233 BusinessDay (note 4 above).

234 As above.

235 As above.

236 As above.

237 As above.

238 As above.

as a seat of arbitration by international arbitration stakeholders.[239] South Africa should consolidate and put some work towards building a business community that has a stronger international reach and grow its international investment and trade, in addition to its adoption of an internationally-accepted legal standards of international arbitration that allows all stakeholders involved to have a sound framework of resolving international arbitration disputes.[240]

3.5 Increased monitoring / "grey listing" by the Financial Action Task Force

The Financial Action Task Force is an international body that is tasked with reviewing and identifying signatory countries that have strategic anti-money laundering and counter-terrorist financing deficits which pose a risk to the international financial system.[241] The revised Financial Action Task Force standards and mutual evaluation processes assesses the effective implementation of measures in place for countries that face anti-money laundering and counter-terrorist financing deficits in order to address any particular risks, vulnerabilities and threats identified by the Financial Action Task Force.[242]

The Financial Action Task Force places a particular jurisdiction under increased monitoring when it has, amongst other things, obtained poor ratings/outcomes on a mutual evaluation by the Financial Action Task Force.[243] The Financial Action Task Force's mutual evaluations are used to assess a country's level of compliance with the Financial Action Task Force's anti-money laundering, counter-terrorist financing and countering proliferation financing standards.[244] Mutual evaluations also help countries identify the necessary steps required to strengthen the effective implementation of

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239 AA Asouzu *International commercial arbitration and African states: Practice, participation and institutional development* (2001) 419-425.

240 Unegbu (note 14 above) 1.

241 G Pavlidis 'Financial action task force and the fight against money laundering and the financing of terrorism: Quo vadimus?' (2020) 28(3) *Journal of Financial Crime* 765-773.

242 Bosman (note 206 above) 81.

243 Pavlidis (note 241 above) 765-773.

244 As above.

measures geared towards combatting anti-money laundering, counter-terrorist financing and countering proliferation financing in the financial system.[245]

In October 2021, the Financial Action Task Force published its mutual evaluation report on South Africa's measures in place to combat money laundering and counter-terrorist financing, titled 'AML & CTF Measures - South Africa Mutual Evaluation Report'.[246] The SA Mutual Evaluation Report sets out a summary of the anti-money laundering and counter-terrorist financing measures in place in South Africa for the period between 2019 and 2021 by evaluating its level of compliance with the Financial Action Task Force standards and the effectiveness of its anti-money laundering and counter-terrorist financing system.[247] It also identifies a number of weaknesses in South Africa's anti-money laundering, counter-terrorist financing and counter financing of proliferation system.[248] In this regard, the Financial Action Task has granted South Africa an opportunity to take remedial steps by no later than October 2022 aimed at addressing the deficits set out in the SA Mutual Evaluation Report.[249] In the event that the remedial steps undertaken in South Africa are deemed to be insufficient by the Financial Action Task Force, South Africa is likely to be placed under increased monitoring by the Financial Action Task Force (which is often referred to as the "grey list").[250]

If South Africa is placed under increased monitoring by the Financial Action Task Force, this means that South Africa would be viewed as a country that poses a great risk of money laundering or terrorist financing and business entities will be required to increase the nature and degree of monitoring their business relationships in an attempt to efficiently identify suspicious or unusual transactions or activities.[251] In this regard, business entities would be required to enhance their customer due diligence measures in order to mitigate

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245 E Mekpor et al 'The determinants of anti-money laundering compliance among the Financial Action Task Force (FATF) member states' (2018) 26(3) *Journal of Financial Regulation and Compliance* 442-459.

246 Financial Action Task Force, October 2021 'AML & CTF Measures - South Africa Mutual Evaluation Report', http://www.treasury.gov.za/publications/other/Mutual-Evaluation-Report-South-Africa.pdf (accessed 23 July 2022) (Hereinafter, 'SA Mutual Evaluation Report').

247 SA Mutual Evaluation Report (note 246 above).

248 As above.

249 As above.

250 As above.

251 E Mekpor 'Anti-money laundering and combating the financing of terrorism compliance' (2019) 22(3) *Journal of Money Laundering Control* 451- 471.

the risks associated with South Africa's weak anti-money laundering and counter-terrorist financing systems.[252] The enhanced customer due diligence measures would result in stringent compliance measures for all stakeholders involved in transactions relating to South African businesses and this will, of course, be very costly to put in place.[253]

Accordingly, the stringent compliance measures against countries placed under increased monitoring would have dire consequences in South Africa's quest to become a leading seat of international arbitrations.[254] The business community will lose confidence in South Africa as a result of its weak and inadequate anti-money laundering and counter-terrorist financing systems.[255] This loss of confidence in South Africa would be exacerbated by the fact that stakeholders' funds when engaging in financial transactions in South Africa would have less protection than is expected in terms of the standards set out by the Financial Action Task Force. South Africa therefore has to develop technically sound remedial steps to address the concerns identified by the Financial Action Task Force in the South Africa Mutual Evaluation Report within the prescribed timeframe in order to mitigate the risk of deterring the international arbitration community away from South Africa.

3.6 Tax exemptions / incentives for arbitration services conducted in South Africa

In addition to South Africa's adoption of internationally-recognised standards, the South African government should consider constantly engaging in dialogues that can aid the development of South Africa's arbitration framework towards becoming a leading seat of international arbitration.[256] In Bosman's view:

> Southern African governments and [arbitration institutions] should commit resources to the strengthening of local arbitration cultures, the building of local capacity in the conduct of [arbitration] proceedings and judicial training programmes.[257]

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252 SA Mutual Evaluation Report (note 246 above).

253 As above.

254 Mekpor (note 251 above) 451- 471.

255 Mekpor (note 251 above) 451- 471.

256 J Choong et al *A guide to the SIAC arbitration rules* (2018) 1-400.

257 Bosman (note 206 above) 25.

In this regard, Singapore is a good case study and point of reference for the South African government based on its solutions in the development of a strong and reputable international arbitration framework.[258] In 2008, Singapore launched two new important developments which were intended to contribute towards building Singapore to become one of the leading seats for international arbitrations.[259] These two developments were as follows: (i) Singapore launched an exemption framework for those entering Singapore to render (or participate in) arbitration proceedings taking place in Singapore; and (ii) Singapore also launched a tax incentive system for law firms conducting international arbitration proceedings in Singapore.[260]

In practice, Singapore's international arbitration tax incentive system initially offered qualifying law firms a 50% tax exemption (for a five years, lapsing in 2017) on their income derived from rendering services in international arbitration proceedings where a substantial part of such hearings were held in Singapore.[261] Presently, Singapore's arbitration tax exemption benefit is understood to only apply to income derived by a non-resident arbitrator for arbitration services rendered in Singapore from 3 May 2002 to 31 March 2022.[262] In this regard, South Africa should consider adopting a similar approach and exempt a certain percentage of the income derived by qualifying law firms and non-resident legal practitioners from rendering international arbitration services in South Africa, or treat such a percentage as a form of an allowable deduction under the South African tax laws.[263] Alternatively, South Africa could also consider offering a rebate to arbitrating parties on their tax payable in South Africa for costs incurred in arbitration proceedings whereby a substantial part of such hearings were held in South Africa.[264]

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258 Greenberg et al (note 117 above) 36.

259 As above.

260 As above.

261 Ernst & Young LLP, 2010 'Singapore budget 2010 synopsis: Investment management association of Singapore', http://www.imas.org.sg (accessed 9 April 2021).

262 Inland Revenue Authority of Singapore, Undated 'Non-resident arbitrator', https://www.iras.gov.sg/taxes/withholding-tax/payments-to-non-resident-professional-(consultant-trainer-coach-etc-)/non-resident-arbitrator (accessed 12 August 2022).

263 S Balthasar *International Commercial Arbitration: A Handbook* (2021) 1-864.

264 As above.

4 Conclusion

South Africa's enactment of international arbitration legislation that is informed by internationally-accepted standards is not enough to turn South Africa into a main seat of arbitration in Africa and other continents.[265] The South African government should demonstrate an apt understanding of the political environment in which business organisations prefer to conduct their businesses and also find practical solutions to the issues around the country's unstable political landscape.[266] South Africa must strengthen its economy, governance and political leadership in order to curb civil unrests, threats of government destabilisation and political violence.[267]

As part of its legal and investment strategy, South Africa should urgently take the necessary steps required to develop adequate and sustainable power-generation capacity in order to gain the trust of the international business community.[268] In this regard, South Africa must increase its renewable energy and electricity-generation capacity at existing power stations in order to develop adequate and sustainable power supply.[269] If South Africa can resolve its power-generation shortcomings, its work towards building a business community that has a larger international reach and growth in international investment and trade can be accelerated and stand a good chance to yield positive outcomes.[270]

South Africa should consider exempting a certain percentage of the income derived by qualifying law firms and non-resident legal practitioners from rendering international arbitration services in South Africa, or treat such a percentage as a form of an allowable deduction under the South African tax laws.[271] Alternatively, South Africa could also consider offering a rebate to arbitrating parties on their tax payable in South Africa for costs incurred in arbitration proceedings whereby a substantial part of such hearings were

265 Abang (note 197 above) 924.
266 Johnson (note 201 above) 1-288.
267 Brett (note 194 above) 126-144.
268 SA Mutual Evaluation Report (note 246 above).
269 Dubresson (note 217 above) 1-196.
270 De Lille (note 215 above) 15.
271 Balthasar (note 263 above) 1-864.

held in South Africa.[272] This approach of offering tax incentives to qualifying law firms and non-resident legal practitioners can play a positive role in increasing South Africa's attraction of disputes brought by parties who are non-South African residents.[273]

Furthermore, South Africa must, within the prescribed timeframe, develop technically sound remedial steps to address the concerns identified by the Financial Action Task Force in the SA Mutual Evaluation Report in order to mitigate the risk of being placed under increased monitoring.[274] Such remedial steps will help towards assuring the international arbitration community that South Africa is a pro-compliance jurisdiction, and avoid a situation whereby parties become reluctant to bring their disputes before South African arbitration institutions as a result of being placed under increased monitoring by the Financial Action Task Force.[275] If South Africa can continue to positively draw the attention of the international commercial arbitration community, it will continue to make significant strides towards turning itself into an internationally-preferred arbitration jurisdiction.[276]

272 Greenberg et al (note 117 above) 36.
273 Choong (note 256 above) 1-400.
274 SA Mutual Evaluation Report (note 246 above).
275 Mekpor (note 245 above) 442-459.
276 Johaar (note 19 above) 37.

CHAPTER 4

CONCLUSION AND RECOMMENDATIONS

1 Introduction

The research statement of this dissertation was that the contemporary South African international commercial arbitration framework appears to be lagging behind international trends and developments necessary for it to become a hub of international commercial arbitration.[277] This statement proved to be true as this study's investigation and findings revealed a number of factors or issues that need to be addressed to turn South Africa into a leading seat of international commercial arbitration, including the importance of constantly considering conflict dynamics as they develop over time in order to keep improving South Africa's international commercial arbitration theoretical framework.[278]

The objectives of this dissertation were to scrutinize the potential of arbitration theories in order to strengthen the South African international commercial arbitration system as a mechanism for the successful resolution of international commercial disputes, and to also critically examine the actions that South Africa needs to take in order to become a leading seat of international commercial arbitration proceedings. These objectives were met as this study's investigation revealed that a constant assessment of conflict dynamics involved in a dispute has the potential to strengthen the theoretical framework of the South African international commercial arbitration system, and it has also been demonstrated that South African can become a leading seat of international commercial arbitration if it addresses certain issues.

In line with the main research question of this dissertation, the relevant changes, improvements and developments that are required in South Africa's international commercial arbitration theory and practice in order to firmly place South Africa as a leader of international commercial arbitration have been proposed in detail in the preceding chapters. This chapter sets out a conclusion drawn from the analysis and discussion

277 Refer to Chapter 1 above, which sets out the research statement for this dissertation.

278 Refer to Chapters 2 and 3 above, which discusses the international commercial arbitration theories and South Africa as a seat of international commercial arbitration in depth.

advanced in the foregoing chapters, and presents several recommendations in order to orient South Africa as a hub of international commercial arbitration.

2 Theories of international commercial arbitration in the South African context and related recommendations

From a South African perspective, the enactment of the International Arbitration Act and its adoption of the UNCITRAL Model Law is an indication of South Africa's standpoint of being substantially grounded on the hybrid or mixed theory as it is a combination of both the jurisdictional theory and the contractual theory.[279] The principles of the jurisdictional theory and the contractual theory are endorsed by the UNCITRAL Model Law and, by extension, the International Arbitration Act.[280]

As demonstrated above, the hybrid theory is an important compromise that South Africa has developed over the years and it is a more generally accepted and feasible theory of international commercial arbitration in most jurisdictions.[281] The yardstick for determining whether an arbitration award can be enforced is based on the relevant national laws of the jurisdiction where such enforcement is sought.[282] In this regard, South Africa's international commercial arbitration comprises of this yardstick as it incorporates both the jurisdictional theory and the contractual theory, and it can therefore be said that the hybrid theory is the theory that encapsulates the South African international commercial arbitration system in a succinct and nuanced manner.[283]

South Africa's arbitration scholarship should continuously assess conflict dynamics involved in international commercial arbitration as they develop over time in order to keep improving South Africa's theoretical framework.[284] This will aid South Africa in keeping up to speed with emerging conflict dynamics that may improve the international commercial arbitration framework, and also help place South Africa at the forefront of developing

279 Refer to Chapter 2 above, which discusses the international commercial arbitration theories in depth.
280 As above.
281 As above.
282 As above.
283 As above.
284 As above.

international commercial arbitration theories as variation in conflict dynamics may require from time to time.

3 South Africa as a seat of international commercial arbitration and related recommendations

The enactment of the International Arbitration Act and the adoption of the UNCITRAL Model Law in South Africa have brought some much needed confidence in the international commercial arbitration community.[285] The International Arbitration Act has shown good signs in recent years and, as predicted by legal scholars and practitioners, it is expected to play a key role in transforming South Africa into a leading hub of resolving International commercial disputes and at the forefront of international commercial arbitration best practices.[286] However, as demonstrated in the foregoing chapters, the mere enactment of international arbitration legislation that accords with international standards is not enough to turn a jurisdiction into a leading seat of international commercial arbitration.

The South African government should address concerns around its socio-political or economic status in order to attract more business institutions in the country and strengthen its economy.[287] The challenges faced by South Africa in respect of its ability to adequately supply its population with electricity should also be curbed by developing adequate power-generation capacity in order to gain the trust of the international business community.[288] If South Africa can resolve its socio-political, economic and power-generation shortcomings, it will be able to build a strong business community that has a larger international reach and stand a good chance to yield positive economic outcomes.[289]

South Africa must develop technically sound remedial steps to address the concerns identified by the Financial Action Task Force in the SA Mutual Evaluation Report to

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285 Refer to Chapter 3 above, which discusses South Africa as a seat of international commercial arbitration in depth.

286 As above.

287 Johnson (note 201 above) 1-288.

288 SA Mutual Evaluation Report (note 246 above).

289 De Lille (note 215 above) 15.

mitigate the risk of being placed under increased monitoring.[290] In order to increase its attraction of disputes brought by parties who are non-South African residents, South Africa should also consider offering tax incentives to qualifying law firms and non-resident legal practitioners rendering international arbitration services in South Africa.[291]

It is important for South Africa to continue building a positive reputation in the international commercial arbitration community in order to make significant strides towards turning itself into an internationally-preferred arbitration jurisdiction.[292] South Africa must commit adequate resources towards the scale up of its international arbitration system, including the enhancement of its capacity and training programmes in the conduct of international commercial arbitration proceedings.[293]

4 Concluding observations

It is submitted that, through the analysis of international commercial arbitration theories and South Africa as a seat of international commercial arbitration, the objectives of this dissertation were met.[294] This dissertation adequately addressed the question around which theory best encapsulates the South African international commercial arbitration system, and identified the hybrid theory as the theory that succinctly encapsulates the South African international commercial arbitration system.[295] Furthermore, this dissertation also adequately addressed the identified factors or issues that South Africa needs to overcome in order to turn itself into a hub of international commercial arbitration.[296] It will take time to implement some of the recommendations proposed by the author given the economic and socio-political challenges faced by South Africa, but South Africa has a lot of potential to become a leading seat of international commercial arbitration. This potential can only be maximised if all the stakeholders involved can

290 SA Mutual Evaluation Report (note 246 above).

291 Choong (note 256 above) 1-400.

292 Johaar (note 19 above) 37.

293 Bosman (note 206 above) 25.

294 Refer to Chapter 1 above, which sets out the objective of this dissertation.

295 Refer to Chapter 2 above, which discusses the international commercial arbitration theories in depth.

296 Refer to Chapter 3 above, which discusses South Africa as a seat of international commercial arbitration in depth.

actively attend to the aforementioned concerns through technically sound and practically implementable solutions.

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