
South Africa's jurisdictional challenge with the under-development of cross-border commercial litigation: Litigation v Arbitration

Primrose E.R. Kurasha

BALaw LLB LLM (UP)

Doctoral Candidate, University of Pretoria

SUMMARY

Private international law is a globally established field of law however, its pre-eminence in Africa is insignificant and this has been as a result of its relevance, which according to many scholars is arguable. It follows logically therefore, that it is underdeveloped in Africa, and as this article posits, specifically in South Africa. This article advocates for the development of South African private international law by endorsing South Africa as a viable neutral jurisdiction venue for cross-border commercial disputes, in future. According to this article, this is to be achieved by the recognition of neutral jurisdiction clauses in South African courts. This can only be done by developing an effective and just system of cross-border/trans-national litigation. The proposed sound cross-border jurisdictional rules will supplement the newly established transnational arbitration regime. In order to achieve this, this research reflects an integrated comparative approach by establishing comparative perspectives mainly from the UK, USA, Brazil, Kosovo and South Africa.¹ Based on its constitutional values of inalienable human rights and access to courts (justice), South Africa stands to gain immensely from incoming commercial arbitration and commercial litigation as forms of dispute resolution. This will establish the country as the preferred venue for arbitration and litigation on the African continent and beyond.

1 Introduction

South Africa recently adopted the International Arbitration Act ("IAA"),² the aim of which is to position and promote South Africa as a desirable neutral arbitration venue for Africa and the rest of the world. While our international arbitration regime now represents best practice internationally, this is not the case when it comes to our international commercial litigation regime which continues to turn away foreign litigants. Since arbitration and litigation go hand-in-hand, it follows logically that South Africa should also become a desirable neutral venue for international or cross-border commercial litigation. Nonetheless,

1 These were chosen because they have sound jurisprudence juxtapositioning litigation and arbitration as will be seen in the paragraphs that follow.

2 15 of 2017.

various schools of thought in private international law are at loggerheads on the relevance of employing both dispute resolution mechanisms in cross-border commercial disputes, especially litigation, in the face of rising popularity in arbitration globally.

It is therefore behind this backdrop that this article focuses on the alternative dispute resolution discourse, with an analytic comparison between litigation and arbitration. Section 1 is a theoretical study of litigation accompanied by case law. Section 2 follows the same pattern but applies it to arbitration. The advantages and disadvantages of both litigation and arbitration are the focal points in sections 3 and 4 respectively. Section 5 is a conclusion arguing for the peaceful co-existence of both arbitration and litigation as equally appropriate dispute resolution mechanisms in the adjudication of cross-border commercial disputes. It is in this sense that section 5 also provides recommendations.

2 Litigation v Arbitration: Theory and application

Globally recognised dispute resolution mechanisms are litigation, arbitration, mediation, and conciliation. The focus of this paper is on two of these, litigation and arbitration. Litigation is defined as a judicial process used by parties to resolve disputes by appearing in a court of law before a judge. Arbitration is an alternative dispute resolution mechanism which is not court driven and is characterised by a settlement in the form of an arbitration award (as opposed to litigation's "judgment").³ An arbitration award is recognised and can be enforced by litigation in a court of law. It is generally not subject to appeal unless an appeal board is set up by the parties from the outset. This speaks to curial intervention in arbitration and is discussed later in this paper.

Having provided a basic distinction between litigation and arbitration, I now progress to an in-depth examination of both, within a domestic and a global context.

The interaction between litigation and arbitration has evolved over the decades from a tense relationship to present-day amicable and accommodating coexistence. The original tense interaction was evident in the courts' judicial apathy towards arbitration, which alternatively manifested as contempt or disdain in the case of legislation. So rampant was it, that it earned its own official name – "judicial hostility" – coined by Justice Frank in the case of *Kulukundis Shipping Co v Amtorg Trading Corp.*⁴ Judicial apathy can be defined as an approach by the judiciary characterised by disregard or contempt – whether blatant or subtle – for arbitration, which manifests in courts' refusal to acknowledge and

3 Imhoos and Verbist "Settling out of Court" Issues 4/2002 *International Trade Forum Magazine* <https://www.tradeforum.org/Settling-Out-of-Court/> (accessed 19 May 2021).

enforce arbitration awards. This reluctance to acknowledge arbitration as a legitimate dispute resolution mechanism with binding findings, was commonplace both in South Africa and globally in countries such as the USA.

2 1 South Africa

South African case law reflects a contemptuous history of arbitration. This was exacerbated by a dearth of arbitration-enforcing legislation and recognition of the mechanism process by the courts. This was the status quo until the recent enactment of the IAA. The case of *Telcordia Technologies Inc v Telkom SA Ltd* is the most recent noteworthy case involving the judicial apathy arbitration has traditionally experienced in South Africa.⁵ The High Court (court *a quo*) in this case set aside an arbitration award and effectively replaced the English arbitrator with three retired South African judges. This was blatant non-recognition and non-enforcement of arbitration and the resulting award by the South African judiciary.

Furthermore, Hlope J was noted as harbouring judicial apathy towards arbitration by Wilske and Ewers, as he explicitly expressed his lack of support and acknowledgment for arbitration as a dispute resolution mechanism.⁶ Hlope J's judicial apathy was a manifestation of the legislative contempt towards arbitration, as will be seen shortly with the Recognition and Enforcement of Foreign Arbitral Awards Act ("the REFAA").⁷

The case of *Bidoli v Bidoli & another* further illustrates the judicial apathy that exists in the South African judiciary towards arbitration.⁸ The South African High Court in this case refused to acknowledge and enforce an arbitration award which had been granted by the arbitrator as a settlement agreement.⁹

4 *Kulukundis Shipping Co v Amtorg Trading Corp.* 126 F 2d 978 (2d Cir 1942). See also Baboolal "Judicial Hostility towards International Arbitration Disputes in South Africa: Case reflections" 2019 *South African Mercantile Law Journal* 369.

5 *Telcordia Technologies Inc v Telkom SA Ltd* 2007 3 SA 266 (SCA) para 1.

6 Wilske and Ewers "Why South Africa should update its International Arbitration Legislation: An Appeal from the International Arbitration Community" 2011 *Journal of International Arbitration* 9.

7 40 of 1977 ("the REFAA").

8 *Bidoli v Bidoli* (2982/08) [2010] ZAWCHC 39 (15 March 2010).

9 *Bidoli v Bidoli* para 40.

Moving on to legislation, historically South African legislation perpetuated contempt for arbitration by hindering the use of arbitration as an alternative dispute resolution mechanism. This is evident in section 1 of the original Protection of Businesses Act (“PBA”).¹⁰ This provision placed restrictions and prohibitions on the recognition and enforcement of foreign arbitral awards. For example, ministerial consent was essential for the recognition and enforcement of certain foreign arbitral awards, while others could not be enforced at all. However, this has changed as the IAA now covers this area of the recognition and enforcement of foreign arbitral awards.¹¹ As a result, such restrictions and prohibitions no longer apply.

The contempt towards arbitration which was evident in legislation was noted by Schulze in his critique of the *Bidoli* case.¹² In this case, the High Court declared the arbitration award which had been converted from a settlement agreement null and void.¹³ It is this which Schulze criticised as disdain and disrespect for arbitration, especially within South Africa’s private international law space. He argues that arbitration ought to be regarded as highly as litigation because of its legal and economic benefits to South Africa. In a judicial sense, arbitration saves time and costs. Moreover, economically, international arbitration in South Africa would secure an influx of foreign direct investment (“FDI”), and ensure that South Africa would not miss out on future investment opportunities. It is for this reason that Schulze in his critique went further and offered a solution in the form of the International Arbitration Bill (now enacted as the International Arbitration Act 15 of 2017). Be that as it may, this is not the case with the entire body of legislation in South Africa as section 34 of the Constitution of the Republic of South Africa provides for the legitimacy and genuine appreciation of arbitration tribunals.¹⁴ Furthermore, section 39(1) of the Constitution promotes arbitration through the mandatory recognition and consideration of international law, which includes international case law – in the form of judgments made by tribunals that operate under international law, eg the International Court of Justice – arbitration decisions, conventions and legislation. For example, the IAA incorporates the New York Convention

10 99 of 1978. The original sec 1 of the PBA provided:

“(a) no judgment, order, direction, arbitration award, interrogatory, commission rogatoire, [or] letters of request or any other request delivered, given or issued or emanating from outside the Republic and arising from any act or transaction contemplated in subsection (3), shall be reinforced in the Republic;”

11 Wethmar-Lemmer and Schoeman “The International Arbitration Act 15 of 2017: Impetus for Developments on the Cross-border Commercial Front” 2019 *TSAR* 128.

12 Schulze “Of Arbitration, Politics and the Price of Neglect – South African International Arbitration Legislation Continues to Lag Behind: *Bidoli v Bidoli*” 2011 *South African Mercantile Law Journal* 294-297.

13 *Bidoli v Bidoli* para 40.

14 Sec 34 of the Constitution of the Republic of South Africa, 1996 provides that: “Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.”

(sch 3) and the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration (“the UNCITRAL Model Law on International Commercial Arbitration”) (sches 1 & 2). Moreover, one might further argue the absence of contempt by citing other supporting pieces of legislation such as the REFAA. However, this recognition of arbitration is not as clear cut as it would appear as REFAA fails to define “arbitration” but only acknowledges an “arbitral award”.¹⁵ Furthermore, the REFAA has been criticised for its blatant disregard of arbitration as it made no provision for the enforcement of arbitration agreements.¹⁶ Moreover, it was the text of the New York Convention that was published in the *Government Gazette* but not incorporated into the implementing legislation, ie, the REFAA.¹⁷ Objectively, one can validly argue that this oversight in REFAA regarding the inclusion of the provision was a subtle snub to arbitration as a fully legitimate and recognised dispute resolution mechanism. As was noted earlier by Wilske and Ewers, such policy disregard for arbitration later manifested in judicial apathy as illustrated by Hlope J when he refused to acknowledge arbitration as a dispute resolution mechanism. Disdain towards arbitration in South Africa continued to be evident in legislation, especially when one looks at the failure by South Africa to sign and ratify international alternative dispute resolution mechanism treaties such as the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (“the Washington Convention”)¹⁸ – the treaty that enforces ICSID’s over-arching jurisdiction in international arbitration.

Why South Africa has not ratified the Washington Convention has never been explained by the South African government. This was confirmed as recently as 2016 by the then Minister of International Relations and Cooperation in a Parliamentary question and answer directed to her.¹⁹ Be that as it may, one can logically conclude that South Africa harbours a certain contempt towards the jurisdiction of ICSID, a self-contained system which it likely deems encroaching and overarching in that its arbitral awards are binding to an extent that domestic South African courts have no power to review, annul, stay, compel, or influence the proceedings in any way.²⁰ To further distance itself from the Washington Convention and ICSID, in 2015 South Africa terminated its

15 Schulze “International Commercial Arbitration: An Overview” 2005 *Codicillus* 56-57.

16 Wethmar-Lemmer and Schoeman 2019 *TSAR* 127.

17 As above.

18 of 1965. See also International Centre for Settlement of Disputes (“ICSID”) “List of contracting states and other signatories of the Convention” <https://icsid.worldbank.org/sites/default/files/ICSID-3.pdf> (accessed 21 May 2021).

19 The Department of International Relations and Cooperation “South African Ratification of the Convention on the Settlement of Investment Disputes between States and Citizens of other Countries (Washington Convention)” <http://www.dirco.gov.za/docs/2006pq/pq1474.htm> (accessed 21 May 2021).

20 Deelstra “Protecting FDI in South Africa” *Global Trade Review* <https://www.gtreview.com/news/africa/protecting-fdi-in-south-africa/> (accessed 21 May 2021).

Bi-lateral Investment Treaties (“BITs”), which enforce the Washington Convention’s ICSID arbitration rules. This notwithstanding, although South Africa remains a non-member state, it does subscribe in part to the Washington Convention in that South African investors can use ICSID Centre facilities under the Additional Facility Rules (“AF-Rules”) without falling under ICSID’s jurisdiction.²¹ In terms of the AF-Rules, investors do not benefit from ICSID’s stand-alone mechanisms and the domestic South African courts retain the power to review, stay, or annul arbitral proceedings.

Judicial apathy towards arbitration has had the ripple effect of encroaching upon the contracting parties’ right to party autonomy. Party autonomy denotes a party’s freedom to elect to enter into a contract based on agreed terms and conditions. As a result, parties decide on their preferred dispute resolution mechanism, in this case arbitration, and where they will be adjudicated, through arbitration agreements for example. Also on the basis of party autonomy, parties choose the applicable law.²² This party autonomy has been taken up in our law as evidenced by section 6(2) of the Arbitration Act²³ (prior to the enactment of the International Arbitration Act); section 16(1) of the International Arbitration Act; article 28 of the UNCITRAL Model law on International Commercial Arbitration; and article II(3) of the New York Convention – all of which expressly provide for the recognition and enforcement of arbitration agreements. Section 6(2) of the Arbitration Act provided that:

If on any such application the court is satisfied that there is no sufficient reason why the dispute should not be referred to arbitration in accordance with the agreement, the court may make an order staying such proceedings subject to such terms and conditions as it may consider just.

Article 28(1) of the UNCITRAL Model Law on International Commercial Arbitration provides that the arbitral tribunal shall decide the dispute “in accordance with the rules of law chosen by the parties as applicable to the substance of the dispute”.

Article II(3) of the New York Convention provides:

The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

In *Telcordia*, Harms JA, in an *obiter dictum*, expresses this corrosion of party autonomy as a result of judicial apathy towards arbitration, when he says:

21 As above.

22 Nygh *Autonomy in International Contracts* (1999) 15, 37.

23 42 of 1965.

The High Court in setting aside the award disregarded the principle of party autonomy in arbitration proceedings and failed to give due deference to an arbitral award, something our courts have consistently done since the early part of the 19th century. This approach is not peculiar to us; it is indeed part of a worldwide tradition. Canadian law, for instance, “dictates a high degree of deference for decisions ... for awards of consensual arbitration tribunals in particular”. And the “concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes” have given rise in other jurisdictions to the adoption of a “standard” which seeks to preserve the autonomy of the forum selected by the parties and to minimise judicial intervention when reviewing international commercial awards.²⁴

The effect of this on the law is cataclysmic because the established right of party autonomy, which empowers parties through the freedom to contract, is openly violated. This is the basis of consent and contracting and once this is threatened, commerce as we know it is jeopardised and largely distorted. This in turn, distorts market principles which threatens the economy on a national and international scale. These economic repercussions and others highlighted earlier in this chapter are a core justification for this investigation. As a result, according to Christie, a fine balance should be struck between arbitration and judicial intervention in order to preserve party autonomy.²⁵ He goes further and predicts a shift in the balance which tips towards commercial arbitration in order to better preserve autonomy and the freedom to contract. According to Christie this is preordained as the parties would have consented to arbitration.

However, coming to the rescue, section 16(1) of the IAA shows South Africa’s recognition of arbitration as a form of dispute resolution.²⁶ It provides that unless the arbitral tribunal objects to the jurisdiction accorded it by the arbitration agreement, the arbitration agreement is to be enforced and recognised as a legitimate agreement, independent of the rest of the contract.²⁷ Moreover, the fact that South Africa is a neutral arbitration venue for cross-border commercial disputes shows an acceptance of arbitration as a dispute resolution mechanism. The fact that no connecting factor is required to establish South Africa as an arbitration venue, as is the case with litigation, points to timely intervention by the IAA and also an erosion of judicial apathy towards arbitration by policy-makers and the judiciary.

Furthermore, the South African courts, whilst complementing legislation, have shown a form of respect for party autonomy by enforcing stringent measures and considerations in cases in which a

²⁴ *Telcordia Technologies Inc v Telkom SA Ltd* para 4.

²⁵ Christie “Arbitration: Party Autonomy or Curial Intervention – The Historical Background” 1994 *SALJ* 151. See also Baboolal 2019 *South African Mercantile Law Journal* 373.

²⁶ 15 of 2017.

²⁷ Sec 16(1) of the International Arbitration Act 15 of 2017.

party (the plaintiff) has sought to breach the arbitration agreement. Recently, in the case of *Zhongji Development Construction Engineering Co Ltd v Kamoto Copper*,²⁸ the judges favoured the enforcement of the international arbitration clause. This preserves party autonomy and the sanctity of contract. In this case, South Africa (Gauteng, specifically) was the arbitration venue, and this was the only link the case had with South Africa.²⁹ The parties were *peregrini* of South African courts, the contracts had been concluded outside of South Africa, contractual performance was to take place outside of South Africa and, according to their choice of law clause, English law was chosen as the applicable law.³⁰ According to Willis JA:

South African courts not only have a legal but also a socio-economic and political duty to encourage the selection of South Africa as a venue for international arbitrations. International arbitration in South Africa will not only foster our comity among the nations of the world, as well as international trade but also bring about the influx of foreign spending to our country.³¹

Govern AJA also agreed saying:

With reference to the rules and 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.³²

In conclusion, this section has examined the landscape of the evolution of arbitration in South Africa. It has been highlighted by a renaissance of arbitration in South Africa, which has traditionally been characterised by apathy and seen as being in competition with litigation, which later morphed into the interaction of arbitration with litigation, and an appreciation of both.

2 The United Kingdom

Arbitration in the UK comprises both local and foreign (or international) arbitration. As a result of this article's focus on transnational or cross-border commerce, this section investigates the UK's position on arbitration, in so far as it concerns foreign arbitration. Historically, judicial apathy and contempt towards arbitration dominated English law, as the courts wrongly regarded arbitration as a form of judicial

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

29 Wethmar-Lemmer and Schoeman 2019 TSAR 130.

30 As above.

31 *Zhongji Development Construction Engineering Co Ltd v Kamoto Copper* para 30.

32 *Zhongji Development Construction Engineering Co Ltd v Kamoto Copper* para 59.

dethronement and a battle for powers.³³ The resentment was so strong, that it was only in the 1920s that the English courts began to recognise arbitration agreements,³⁴ which were till then considered void and against public policy. According to Bagwell, an expansion of world trade, born of World War I, saw various Western countries enact arbitration statutes.³⁵ However, arbitration agreements are still scrutinised in the UK courts, especially as regards their wording. It is in this way that the UK courts, have significantly continued to prevail over arbitration agreements as they dispositively rule on the validity of these agreements.

Be that as it may, arbitration in the UK has been fully embraced as is evidenced by the significant development of the jurisprudence around it, in legislation, case law, and scholarly work. According to Born, arbitration cases have increased significantly – from 1 104 in 1992 to 4 339 in 2010 – in the top ten global arbitration institutions, some of which are housed in the UK, for example the London Court of International Arbitration and the Chartered Institute of Arbitrators.³⁶ This section discusses these developments in foreign arbitral awards in the UK.

The recognition and enforcement of arbitral awards and judgments hinges on the doctrine of territorial sovereignty. The doctrine of territorial sovereignty denotes each country and its courts' power to rule over its land and make rules and laws independently, without hindrance or interference. As a result of the doctrine of territorial sovereignty, an arbitration order made in one country cannot be directly implemented in another, in the absence of an international agreement.³⁷

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

34 Rosen "Arbitration under Private International Law" (1993) 17(3) *Fordham International Law Journal* 628. See also *Scott v Avery* [1856] 4 H.L. Cas. 811, 853. In this case, the court, in an *obiter dictum*, held that the English courts' hostility towards arbitration began "in the contests of the different Courts in ancient times for extent of jurisdiction, all of them being opposed to any thing that would altogether deprive every one of them of jurisdiction".

35 Bagwell "Enforcement of Arbitration Agreements: The Severability Doctrine in the International Arena – *Republic of Nicaragua v Standard Fruit Co*, 937 F.2d 469 (9th Cir.) 1991 *Georgia Journal of International and Comparative Law* 492.

36 Robin "The Advantages and Disadvantages of International Commercial Arbitration" 2014 *International Business Law Journal* 136. See also Christine "The seven most famous arbitration institutions in the world" 28 October 2020 <https://soapboxie.com/government/The-Seven-Most-Famous-Arbitration-Institutions-in-the-World> (accessed 30 June 2021); A Ahmedov "Born's finest: 19 leading arbitral institutions of the world" 18 March 2015 <https://www.linkedin.com/pulse/borns-finest-19-leading-arbitral-institutions-world-aibek-ahmedov> (accessed 30 June 2021).

37 This is with the exception of common law systems which have permitted the enforcement of particular foreign arbitral awards in line with private international law, for example, attaining the protection of rights acquired under a foreign system of law. Another example is that of recognising foreign arbitral awards as a *res judicata* by "treating the relevant claim as having been decided once and for all". See Art 2(1)-(5) of the United Nations Charter.

It is because of this doctrine of territorial sovereignty that the UK has entered into the international agreements identified above with other countries so as to recognise and enforce foreign arbitral awards. Because the UK follows a dualist approach to international law, in order to implement these agreements nationally in the UK, governing statutes have been enacted for the recognition and enforcement of various foreign arbitral awards. In terms of the dualist doctrine, treaties only find legitimacy in a particular jurisdiction if enacted into legislation and operate independently.³⁸ These statutes are:

- i the Arbitration Act 1996 (“the Arbitration Act”);
- ii the Administration of Justice Act 1920 (“the Administration of Justice Act”);
- iii the Foreign Judgments (Reciprocal Enforcement Act) 1933 (“the Foreign Judgments Act”);
- iv the Arbitration Act 1950; and
- v the Civil Jurisdiction and Judgments Act 1982 (“the Civil Jurisdiction and Judgments Act”).

These statutes are complemented by English common law which recognises and enforces certain foreign arbitral awards.

These arbitration laws are briefly discussed below in the interests of time and space.

2 2 1 Enforcement of foreign arbitral awards under the Arbitration Act 1996 (“The Arbitration Act”)

The Arbitration Act, which repealed the Arbitration Act 1975, implements the New York Convention in the UK. Under this Act, the recognition and enforcement of foreign arbitral awards by UK courts in England, Wales, and Northern Ireland has occurred throughout the years.³⁹ Section 100 of the Arbitration Act provides for the recognition and enforcement of the New York Convention in the UK, and specifically foreign arbitral awards which have been finalised in a written arbitration agreement in a foreign country party to the New York Convention.

2 2 2 Enforcement of foreign arbitral awards under the Administration of Justice Act 1920 (“The Administration of Justice Act”)

Section 12(1) of the Administration of Justice Act (“the Administration of Justice Act”) applies equally to judgments as it does to arbitral awards. This is because provisions pertaining to judgments made in Commonwealth countries and registered and enforced in England, are the same as those applicable to arbitral awards.

38 Dugard *International law: A South African Perspective* (2019) 57.

39 Cheshire, North and Fawcett *Cheshire and North’s Private International Law* (2017) 670-675.

2 2 3 Enforcement under the Arbitration (International Investment Disputes) Act 1966 (“the Arbitration (ICSID) Act”)

The Arbitration (ICSID) Act implements the Washington Convention which established ICSID in domestic law.⁴⁰ This part of the Act dealing with ICSID is incorporated as a Schedule to the Arbitration Act. Based on a written arbitration agreement concluded by the parties, the ICSID arbitration tribunal has jurisdiction over disputes that may arise.⁴¹ Sections 1 and 2 of the Act provide that, if registered in the High Court, any arbitral award made thereunder, is as binding as a High Court judgment, specifically with regard to pecuniary obligations it imposes. In terms of the Act there are no grounds for refusing to recognise and enforce the arbitral awards – although execution might be resisted on the basis of state immunity.⁴²

2 2 4 Enforcement under the Arbitration Act 1950

This Act implements the Geneva Convention of 1927.⁴³ Part II of the Arbitration Act 1950 provides for the enforcement of certain arbitral awards. Part II comprises of Protocol 23 and the Geneva Convention of 1927. It applies to foreign arbitral awards made in pursuance of international validity of arbitration agreements in terms of Protocol 23. Part II also applies to foreign arbitral awards made between parties subject to different jurisdictions both of which are subject to the Geneva Convention.⁴⁴ However, Part II is rarely applied by the courts as it does not apply to the New York Convention.⁴⁵ Moreover, the enforcement and application of Part II is not mandatory, and an award creditor can seek recourse under the common law.

2 2 5 Enforcement under the Civil Jurisdiction and Judgments Act 1982 (“the Civil Jurisdiction and Judgments Act”)

Section 18 of the Civil Jurisdiction and Judgments Act enforces a foreign arbitral award which is granted in one part of the UK but is enforced in another. The provision provides for the registration of UK judgments but allows for a few exceptional defences against such enforcement. Section 18(2)(e) defines “judgment” widely to include “an arbitration award which has become enforceable in the part of the UK in which it was given in the same manner as a judgment given by a court of law in that part”. This foreign arbitral award can be enforced through the section 66 recourse (under the Arbitration Act) or at common law.

40 Cheshire, North and Fawcett 670-675.

41 Art 25, Sch, Arbitration Act of 1996.

42 Art 55, Sch, Arbitration Act of 1966.

43 Cheshire, North and Fawcett 670.

44 Sch 1, para 1 of the Arbitration Act 1950.

45 Sec 99 of the Arbitration Act 1996.

2 2 6 *Enforcement under the common law*

According to common law, a foreign arbitral award is enforceable if the following requirements are met:

- i the parties must have submitted to arbitration;
- ii the arbitration must have been conducted in accordance with that submission; and
- iii the foreign arbitral award must be valid in terms of the law of the seat of arbitration, where it was made.⁴⁶

Submission to arbitration can be either in terms of an arbitration clause in a contract, or under a free-standing agreement to arbitrate.⁴⁷ The common law further provides that in order for a foreign arbitration clause to be enforceable in the UK, it must be also be valid. Validity is determined by the proper law of the arbitration agreement – not of the substantive contract – based on the doctrine of separability.⁴⁸ In terms of this doctrine, an arbitration clause is autonomous and is separate from the contract in which it is included.⁴⁹

In order for the foreign arbitral award to be enforceable in England under common law, it must be final and binding according to the law governing the arbitration proceedings. In the case of a clear chosen law, ie, the explicit choice of law in the arbitration clause and not the substantive contract, this is the law that will govern the proceedings. However, where unstated the law of the seat of arbitration applies.⁵⁰ This was confirmed recently in the case of *Enka Insaat ve Sanayi AS v OOO Insurance Chubb*.⁵¹ The Court of Appeal in this case distinguished the choice of law (of the contract) from the law of the arbitration seat in

46 Cheshire, North and Fawcett 667.

47 As above.

48 Sec 7 of the Arbitration Act 1996; *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40, [2007] 4 All ER 951. The proper law of the parties, explicitly or implicitly. This is their choice of law. In the absence of a choice of law governing the arbitration agreement, the law of the seat of arbitration will then be the governing law. This is because the arbitration clause will have the closest and real connection with the law of the seat of arbitration. According to the common law, the arbitration proceedings in the foreign arbitration matter are governed by the law of the seat of arbitration as well. This is the same law that determines the validity of the arbitration clause. See *Enka Insaat ve Sanayi AS v OOO Insurance Chubb* [2020] 2 All ER (Comm) 315, [2020] 2 Lloyd's Rep 389, [2020] EWCA Civ 574, [2020] Bus LR 1668, [2020] WLR(D) 256, [2020] 3 All ER 577 ("the *Enka Insaat* case"), as discussed below.

49 Bagwell 1991 *Georgia Journal of International and Comparative Law* 500.

50 Cheshire, North and Fawcett 668.

51 *Enka Insaat ve Sanayi AS v OOO Insurance Chubb* [2020] 2 All ER (Comm) 315, [2020] 2 Lloyd's Rep 389, [2020] EWCA Civ 574, [2020] Bus LR 1668, [2020] WLR(D) 256, [2020] 3 All ER 577 <https://www.bailii.org/ew/cases/EWCA/Civ/2020/574.html> (accessed 3 June 2021).

determining the arbitration agreement.⁵² The court held that the court must determine the following:⁵³

- i Whether there is an express choice of law in the arbitration agreement?
- ii If not, whether the express choice of law in the main contract is properly construed as an express choice of law for the arbitration agreement?
- iii If not, whether there is an implied choice of law? The ‘general rule’ is that the law of the seat of arbitration is by implication the choice of law of the arbitration agreement.
- iv If not, what is the system of law with the closest and most real connection to the arbitration agreement?

Briefly, this case was an appeal, specifically in the form of an anti-suit injunction application, by the claimant to stop litigation proceedings that Chubb, the respondent, had initiated in Russia in breach of clause 50.1 of an arbitration agreement agreed upon by both parties.⁵⁴ In this case, it was held that English law was the applicable choice of law for the arbitration as it was the law of the seat. This is because the arbitration agreement provided for the Court of Arbitration of the International Chamber of Commerce arbitration seated in London. The appeal was upheld.

The common-law defences used to counter the enforcement and recognition of a foreign arbitral award are: that an arbitrator lacked jurisdiction;⁵⁵ fraud was used to obtain the award;⁵⁶ that recognition and enforcement would be contrary to public policy; and that the award was obtained in proceedings that violated the rules of natural justice.⁵⁷ According to the common law, recognition and enforcement will also not be granted by an English court where the foreign award has been set aside by the courts of the seat of arbitration, unless the setting aside is not recognised by England.⁵⁸ Again, an alternative to common-law enforcement and recognition is recourse by the award creditor in terms of section 66 of the Arbitration Act.

2 3 The USA

The USA, like South Africa, has not been immune to judicial apathy towards arbitration. This can even be seen in the *Kulukundis* case, in which Frank J, explicitly alludes to “judicial hostility” in his judgment. He states:

In light of the clear intention of Congress, it is our obligation to shake off the old judicial hostility to arbitration. Accordingly, in a case like this, involving the federal Act, we should not follow English or other decisions which have narrowly construed the terms of arbitration agreements or arbitration

⁵² *Enka Insaat ve Sanayi AS v OOO Insurance Chubb*.

⁵³ *Enka Insaat ve Sanayi AS v OOO Insurance Chubb* para 23.

⁵⁴ *Enka Insaat ve Sanayi AS v OOO Insurance Chubb* para 4.

⁵⁵ Cheshire, North and Fawcett 668-669.

⁵⁶ As above.

⁵⁷ As above.

⁵⁸ As above.

statutes. With this new orientation, we approach the problems here presented. They are twofold: (a) Does the arbitration provision here have the sweeping effect ascribed to it by appellant? (b) Is it, as appellant contends, wholly without efficacy because appellant asserted that there never was an agreement for a charter party?⁵⁹

From a scholarly perspective, Carbonneau exposes judicial apathy in the American judiciary by detailing how the courts manipulate their overriding law-enforcing power, by ensuring litigation prevails over arbitration.⁶⁰ The latter is left as nothing but an option of legal “recourse”. Moreover, by doing this, he claims, they ensure that legal doctrine crafts rules of arbitration and in the end, arbitration does nothing but act as a lubricant in the machinery of the judiciary, ensuring efficacy, efficiency, effectiveness, and practicality in the application of the law.

Nonetheless, judicial apathy has slowly disappeared from the American judiciary as can be seen with the continuous reinforcement of the Federal Arbitration Act (“FAA”), an Act intended to protect the terms of arbitration agreements.⁶¹ Section 3 of the FAA directs a court to stay any pending litigation initiated by a party while the dispute was “referable” to arbitration. Furthermore, section 4 authorises courts to direct contracting parties to proceed with arbitration as agreed upon in an enforceable, written arbitration agreement. Brunet concludes that these particular provisions have enabled the co-existence of litigation and arbitration by empowering the courts to enforce valid arbitration agreements. This allows existing and future disputes to be resolved through arbitration by specific performance and the stay of litigation until the arbitration has been concluded.⁶²

The case of *Rent-A-Center, West, Inc v Jackson* illustrates the embracing of arbitration by the American judiciary.⁶³ This was an employment dispute between an employee and an employer who had agreed contractually in their arbitration clause to resolve any dispute through arbitration. The employee challenged the enforceability of the arbitration agreement claiming the discovery and arbitrators’ fees clauses were unconscionable. Therefore, the legal issue was whether or not the arbitration agreement was enforceable. However, a delay prevented the court’s judicial review of the arbitration agreement taking place. The

59 *Kulukundis Shipping Co v Amtorg Trading Corp* para 985.

60 Carbonneau “The Rise in Judicial Hostility to Arbitration: Revisiting Hall Street Associates” 2012–2013 *Cardozo Journal of Conflict Resolution* 596.

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

62 Brunet “The Core Values of Arbitration” in Brunet, Speidel, Sternlight and Ware *Arbitration Law in America: A Critical Assessment* (2006) 37. See also Aragaki, “Equal Opportunity for Arbitration” 2011 *UCLA LR* 1242-1250 (proposes a model which can be employed to place arbitration and litigation on equal footing).

63 *Rent-A-Center, West, Inc v Jackson* 561 U.S. 63, 130S. Ct. 2772 (2010) (No. 09 – 497) 581 F.3d 912, reversed.

bench acknowledged the arbitration agreement and enforced it because, according to the court, it was as binding as litigation. A dissenting view, however, given by Stevens J, in which Ginsburg J, Sotomayor J and Breyer J concurred, was that arbitration was subordinate to litigation as a court was the only forum that could pronounce on the validity of the contract and whether the arbitration agreement was enforceable.⁶⁴

Be that as it may, whilst it might appear that the American judiciary has evolved to the extent that it now recognises litigation and arbitration on equal footing, the interaction of litigation and arbitration in the American judiciary is marred by confusion. It is faced with the dilemma of not knowing how and whether to strike a balance between litigation and arbitration as suitable cross-border commercial dispute resolution mechanisms. Carbonneau eloquently alludes to this in his article:

The struggle appears to reside between the hegemony of law and the necessity of recourse to arbitration. On the one hand, the Court does not want to forgo its role as the purveyor of governing standards or its ability to rectify what it perceives to be disturbing arbitrator error. On the other hand, it does not want to cripple the arbitral process with ill-suited, misfit acts of legal regulation. At the very least, provided an overarching systemic perspective is justified and consistent with the reality of the Court's deliberations, the Court is undecided about the future direction of U.S. arbitration law. It is not sure whether to trust the arbitrators, the parties, and their legal counsel, or to protect society and the parties themselves from the choice of arbitrating disputes.⁶⁵

The interaction of litigation and international commercial arbitration is clearly evolving, but considerable progress is still required. Steps towards this progress are clearly detailed in the final section of this chapter.

This investigation now turns to an analysis of the advantages and disadvantages of litigation and arbitration.

3 Litigation: Advantages and disadvantages

3 1 Advantages

This article advocates the improvement of the South African jurisdiction in cross-border commercial litigation, in order to place litigation in a better position vis-à-vis arbitration. This section examines litigation by carrying out a cost-benefit analysis. Included are insights from other jurisdictions such as Brazil and Kosovo, in addition to those already mentioned, ie, South Africa, the USA, and the UK.

The main advantage of developing cross-border litigation in South Africa is that it would incentivise foreign investors to inject an economic boost into the South African economy, by bringing cross-border

64 *Rent-A-Center, West, Inc v Jackson* 12-13.

65 Carbonneau 2012–2013 *Cardozo Journal of Conflict Resolution* 619.

commercial disputes to the doors of the South African judiciary. This economic boost will, in the main, be in the form of engaging and employing local lawyers for legal representation, experts who will lead evidence, and hospitality services during the litigation proceedings. Inevitably, other economic sectors such as tourism also stand to benefit from South Africa becoming a neutral venue in which cross-border commercial litigation takes place. It is therefore safe to conclude that this will open up South Africa to “judicial tourism” much as India has gained prominence over the past decade for its medical tourism, which has boosted its economy considerably.⁶⁶

Foreign investors will choose South Africa if they are confident that their business interests will be safe due to legal certainty resulting from a well-established litigation infrastructure in a neutral South Africa which is able to address their cross-border disputes which may arise. They will be rest assured that their basic rights are guaranteed and enforceable, and this will engender confidence that their international investments will be treated fairly in accordance with the rule of law and international best practice. This is the advantage of legal certainty arising from litigation working in tandem with arbitration.

Remaining with the advantage of legal certainty, litigation offers a greater level of continuity and legal certainty than arbitration as regards both predictability and policy-making. Judgments in South Africa involve a trail and are recorded to a greater extent than arbitration decisions delivered in private arbitral proceedings, eg SAFLII.⁶⁷ This is because litigation and the resulting judgments are open to the public, unlike arbitration proceedings where the parties elect whether or not to make the arbitral decision and the award public unless the arbitral award is made an order of court.⁶⁸ Consequentially, judgments are more accessible to the public at large and future entrepreneurs and investors, than arbitration decisions. This means that the substantive law, procedural law, and policies will be at their disposal to gauge the legal aspects and potential pitfalls of their prospective business ventures. It is in this sense that one can conclude that litigation is preferable to arbitration – including as regards policy-making – because of the legal certainty it brings.

Litigation is advantageous because in light of the public nature of the disputes and court judgments, it serves as a deterrent which, it is hoped, will result in parties thinking twice before engaging in unscrupulous

66 Suri “India wants to make medical tourism a \$9 billion industry by 2020” *CNN* 15 February 2019 <https://edition.cnn.com/2019/02/13/health/india-medical-tourism-industry-intl/index.html> (accessed 28 June 2021). See also DP George “Easing of visa norms to boost medical tourism” *The Times of India* 5 December 2012 https://archive.ph/20130411033957/http://articles.timesofindia.indiatimes.com/2012-12-05/chennai/35619712_1_visa-norms-tourist-visas-medical-tourism (accessed 28 June 2021).

67 SAFLII <http://www.saflii.org/za/cases/ZACC/> (accessed 18 June 2021).

68 Polity “Arbitration in South Africa” <https://www.polity.org.za/article/arbitration-in-south-africa-2017-05-05> (accessed 10 June 2021).

business activities. These consequences include the unsuccessful party losing its market share and clients, losing its reputation, paying damages, and suffering prejudice by its competitors no longer being willing to cooperate in future ventures.⁶⁹

Although this is not always the case, nonetheless, credibility is generally more assured by litigation than arbitration because judges are appointees of the state, unlike arbitrators who are appointed by the parties.⁷⁰ Although purported to be neutral, arbitrators present a conflict of interest not only because they are appointed by the parties but also because they may have worked for the respective parties on numerous occasions and that experience serves as an important criterion in the selection of arbitrators.⁷¹ Moreover, they are paid by the parties they represent so it follows logically that they would not jeopardise their professional relationship. Judges, on the other hand, are appointed independently by the state. They generally have no interest in the matter or the parties themselves, and if faced with a likely conflict of interest, they must recuse themselves in line with professional ethics. The judges bear the responsibility of credibility heavily on their shoulders as loss of credibility may see them dismissed, disbarred, and unemployed. Therefore, litigation scores high in the credibility stakes.

Cross-border commercial disputes which will be litigated in South Africa when it becomes a neutral venue are likely to be open to the public and any citizen who has an interest in the matter will be privy to the proceedings. This highlights two advantages of litigation over arbitration, specifically credibility as brought about by transparency.

It is also in this instance that a third-party joinder is characteristic (and advantageous) of litigation as compared to arbitration. This is because arbitral proceedings do not have an automatic right of joinder of third parties.⁷² A third party can only be joined to or bound by an arbitration with that third party's consent.

The quality of decisions and professionalism of judges is rarely disputed as opposed to that of arbitrators. Judges the world over are employed full-time. On rare occasions they may be employed elsewhere, but this is part-time employment in academia or even media spaces.⁷³ On the other hand, for arbitrators, arbitration is a "job on the side".⁷⁴ They are employed full-time elsewhere and arbitration comes second as

69 Mulaj "The Advantages and Disadvantages of Arbitration in relation to the Regular Courts in Kosovo" 2018 *Hungarian Journal of Legal Studies* 142.

70 Mulaj 2018 *Hungarian Journal of Legal Studies* 123; Baraliu *Business Law* (2010) 404.

71 As above.

72 *CJD v CJE* [2021] SGHC 61. See also CMS "Joinder of third-parties to arbitration proceedings: High Court of Singapore rules on the requirements for consent" <https://www.lexology.com/library/detail.aspx?g=0e57b65c-5c84-4ad2-af83-19435104d291> (accessed 24 June 2021).

73 Davis <http://www.commerciallaw.uct.ac.za/claw/staff/academic/ddavis> (accessed 28 June 2021).

a part-time job. This is problematic and speaks to the issue of prioritisation in resolving cross-border commercial disputes. The question arising is whether the arbitrators actually devote their full attention and expertise to their “cases”, as do judges with the added benefit of input from their researchers.

Contrary to popular belief, litigation can be just as brief as arbitration, resulting in a manageable caseload for the courts. For instance, an arbitration case presented to the International Chamber of Commerce (“ICC”) runs, on average, for two years. Emmanuel Jolivet, the ICC’s General Counsel, confirmed this saying:

[The] ICC has not published any statistics on the average duration of arbitration cases administered under its auspices. It seems however that the average duration is around two year [sic]. This of course takes into account the cases that are suspended. It is important to note that the parties and their counsel are primarily responsible for the length of the proceedings.⁷⁵

A commercial case in a South African court would take just as long, especially in light of the Court Management System put in place by the Commercial Court Practice Directive in order to avoid a strain on the court roll of the newly established Commercial Court.⁷⁶ The same was also said of the district courts of Brazil by Valverde, assuming all parties accept the judgment and there is no appeal.⁷⁷ Moreover, the reduction in the duration of court cases – or at the very least their management to avoid case backlogs – can be managed by statute. This was seen with the Kosovo Judicial Council’s drafting of the National Strategy to Reduce Backlog Cases to avoid the roll-over of old cases from one year to the next.⁷⁸ As indicated above, South Africa has attempted to do the same with the Commercial Court Practice Directive.

In summary, this goes to show that when the proper legal framework is in place, litigation need not be a long and tedious process, that is so dreadful that arbitration becomes not merely an alternative but the sole dispute resolution mechanism in cross-border commercial disputes. This reduction in litigious periods through the enactment of statutes increases

74 Upon close examination of the list of arbitrators of the Arbitration Tribunal in Kosovo Chamber of Commerce, this secondary job reality is the norm. See also Mulaj 2018 *Hungarian Journal of Legal Studies* 130.

75 E-mail from Jolivet, ICC General Counsel, to Gustavo Valverde (Nov. 2, 2005, 10:32:39EST) (on file with author).

76 Cliff Dekker Hofmeyr “A commercial court? A blessing or a curse?” <https://www.cliffedekkerhofmeyr.com/en/news/publications/2018/Dispute/dispute-resolution-alert-10-october-a-commercial-court-a-blessing-or-a-curse.html> (accessed 24 June 2021). See also Clyde & Co “Fast-tracking commercial litigation in the South African High Court” <https://www.clydeco.com/en/insights/2021/01/fast-tracking-commercial-litigation-in-the-south-a> (accessed 24 June 2021).

77 Valverde “Potential Advantages and Disadvantages of Arbitration v Litigation in Brazil: Costs and Duration of the Procedures” 2006 *Law and Business Reviews of the Americas* 538.

78 Mulaj 2018 *Hungarian Journal of Legal Studies* 126.

efficiency, leads to better judgments which are thoroughly reasoned, and also increases uniformity in decision-making and promotes legal certainty.

Litigation is on occasion more affordable than arbitration depending on the size and scale of the claim. In Brazilian cases, the ICC has proven to be more costly than litigation in medium and large-sized transnational commercial claims in excess of US\$30-US\$100 million.⁷⁹ And this is not limited to Brazil, but applies globally, as Robin argues.⁸⁰ According to Valverde, the arbitral framework and procedures contribute to this⁸¹ – notably, lack of skill, dilatory tactics by the parties and unsuitable procedural rules. Furthermore, an inadequate identification and delimitation of the relevant legal issues increases the cost of arbitration as disputes are dragged on for longer periods. This is not so with litigation as the parties are not in charge and all matters are left to the judge to determine, including procedural issues. They also cannot decide on the language, specific court, or negotiate the specific law and how it is to be applied by the judge.⁸² In short, there is little room for interference. It is in this way that the parties who choose to litigate do not influence either the costs or the duration of the proceedings.

However, litigation is not all positive, and the focus now shifts to the disadvantages of litigation.

3 2 Disadvantages

Unlike arbitration, parties do not select their adjudicators as judges are randomly allocated to cases using a “roll of the dice” approach. This is disadvantageous as some judges tend to be inexperienced when it comes to commercial disputes. Thus, “generalists” in cross-border commercial law and private international law will be judging and settling these important disputes.⁸³ On the other hand, parties to arbitration tend to select suitable arbitrators based on qualifications, expertise, experience, nationality, neutrality, whether or not the arbitrator is a “commercial person”, etcetera. Furthermore, due to state-based selection, judges are suspected of partiality towards the executive and a bias against the foreign investors and companies involved in the dispute.⁸⁴ Moreover, in a two-tiered federal legal system such as the USA, this disadvantage of a lack of expertise and experience in the judiciary might also be compounded by other structural issues including the random allocation of a jury regardless of its independence and other judicial functions, and the complexity of the court system.⁸⁵ In other jurisdictions, judges also

79 Valverde 2006 *Law and Business Reviews of the America* 529-532.

80 Robin 2014 *International Business Law Journal* 132.

81 Valverde 2006 *Law and Business Reviews of the America* 531.

82 Law Nr. 03/L-199, on Courts in Kosovo (2010); Law Nr. 03/L-006 on Contested Procedure in Kosovo (2008).

83 Robin 2014 *International Business Law Journal* 133.

84 As above.

85 As above.

risk reassignment to other cases during the course of the cross-border commercial dispute.⁸⁶ This threatens the continuity and predictability of the proceedings. It is in light of these (unlikely) eventualities, that cross-border litigation works well with arbitration.

Be that as it may, the judicial disadvantage of inexperienced judges who are appointed by the state and are therefore likely to be biased and partial towards the executive, does not generally apply in South Africa. This can be seen from the recent Constitutional Court judgment in *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Jacob Gedleyihleksia Zuma and Others*, in which the Khampepe ACJ delivered the majority judgment convicting the respondent, an influential political figure and former Head of State for contempt of court, and sentencing him to fifteen months' imprisonment.⁸⁷ Contrary to public opinion, this speaks to the impartiality and independence of state-appointed judges and shows how advantageous it is for litigation to develop in South Africa as a dispute resolution mechanism for cross-border commercial disputes. This is not the only case in South Africa in which the judiciary has risen to the occasion by proving its independence.⁸⁸

The problem of inexperienced judges results in a further disadvantage of litigation, that of delay. According to the World Bank, litigation proceedings remain unacceptably lengthy.⁸⁹ Various factors influence this, including the judges' experience and diligence, case backlogs, the parties' behaviour, technical changes, and the number and nature of appeals.

Nonetheless, the problem of delays and lengthy proceedings can also arise in arbitration which is prone to abuse by the parties resorting to frustrating and dilatory tactics. State parties are generally the culprits in this regard as they attempt to evade arbitration agreements by claiming sovereign immunity in terms of the 1961 Vienna Convention on Diplomatic Relations, as a ground of exemption. This emerged clearly in *Compagnie Noga d'importation et d'exportation v Embassy of the Russian Federation* ("the Noga case"), where Russia evaded an arbitration agreement by claiming sovereign immunity which resulted in unending

86 As above.

87 *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Jacob Gedleyihleksia Zuma and Others* CCT 52/51.

88 *S v Shaik* (Criminal Appeal) 2007 1 SA 240 (SCA); *S v Zuma* 2006 7 BCLR 790 (W); *S v Yengeni* [2005] ZAGPHC 117.

89 World Bank, Report No. 32789-BR, "Brazil: Making justice count: measuring & improving judicial performance in Brazil" (Dec. 30, 2004) <http://www.bancomundial.org.br/content/downloadblob.php?codblob = 1635> [hereinafter REPORT No. 32789-BR].

litigation proceedings.⁹⁰ It was only on final appeal that the French Court of Appeal, the *Cour de cassation*, held that states who enter into arbitration agreements which provide for the immediate enforcement of awards to be rendered, are deemed to have waived their state immunity.⁹¹ This goes to show that there is no “lesser evil” when it comes to arbitration or litigation – one can take as long and cost just as much as the other. The viability of both hinges on the good faith of the parties rather than on the inherent nature of the system or those applying it.

The consequences of the court outcome might be negative – for arbitrators eg, the losing party might suffer profit loss and even bankruptcy as a result of the court’s decision.⁹² This is regardless of the winning party receiving its litigation award. Nonetheless, as was shown above, the deterrent value of such promulgation outweighs the cost for a party who is in the right.

When it comes to forum selection, litigation lacks security for some parties and it is for this reason that they prefer arbitration.⁹³ Unlike in arbitration, parties in litigation cannot select a preferred venue which will be a neutral forum and they are bound to the courts of the state as determined by connecting factors such as the location where the delict occurred. A forum is an important factor to consider because it determines the legal recourse available. Moreover, these courts might be characterised by a problematic legal system which could also be unfamiliar to the foreign investors. It is in light of these problems that security is threatened. However, this does not apply to an established permanent international tribunal with exclusive jurisdiction over cross-border commercial disputes. This is the solution to this litigation problem. Another solution is to include a jurisdiction clause or choice of court agreement in the contract between the parties. In this case the litigants agree on the forum themselves and so ensure that they have security and predictability.

Having considered litigation as a viable dispute resolution mechanism, we now proceed to examine arbitration.

90 Paris, August 10 2000, *Compagnie Noga d'importation et d'exportation v Ambassade de la Fédération de Russie*, No XP100800X, obs E Fongaro in *Recueil Dalloz*, 2000, 2157.

91 Gaillard *Chapter II. The Consequences of the Representations of International Arbitration* (2010) 67-149. This was also Gaillard’s commentary on Cass civ 1, July 6 2000, *Creighton Ltd v Ministère des Finances de l’Etat du Qatar*, 98-19068, obs C Kaplan and G Cuniberti in JCP G, 2001, 764, which shared the same reasoning as that of the *Noga* case.

92 Mulaj 2018 *Hungarian Journal of Legal Studies* 126.

93 Robin 2014 *International Business Law Journal* 133-134.

4 Arbitration: Advantages and disadvantages

4 1 Advantages

Arbitration is characterised by extensive party autonomy based on its private and voluntary nature which reflects the parties' intentions.⁹⁴ The intention of the parties, as agreed on in the arbitration agreement, to have a private and voluntary dispute resolution process is of paramount importance to arbitration. It is in this way that party autonomy is prioritised in arbitration.⁹⁵ There is also the assurance of confidentiality in arbitral proceedings because, unlike litigation, they are not open to the public. Parties therefore gravitate more towards arbitration to avoid long, drawn-out litigation proceedings which tend to be public and combative. As a result, relations are maintained between the parties.⁹⁶ This also translates into added advantages of arbitration being less expensive and the conclusion being reached expediently without the frustrating delay tactics used by parties in litigation.

Arbitration provides a quicker, more affordable, and less formal dispute resolution process. The process is administered by experts chosen by the parties, who have a special technical knowledge of the field and matter at hand.⁹⁷ In their selection of arbitrators, parties can also agree on the selection criteria, for example qualifications, expertise, neutrality, nationality, whether or not the arbitrator is a "commercial person", etcetera. These arbitrators are generally lawyers, diplomats, academics, judges or even entrepreneurs. This opportunity to select adjudicators is something that is not available in litigation as each case is randomly appointed a judge. This judge might not even have the required expertise. Nonetheless, it is to be noted that the selection criteria for arbitrators is not without problems of its own in that much depends on the arbitrator's skill and judgement which, given the human condition, can never be flawless.

The consensual approach used in the selection of arbitrators, is also used in choosing a neutral seat of arbitration. Unlike litigation, an

94 Rosen 599. See also Robert and Carbonneau "The French law of arbitration" [note Bibliographique] *Revue internationale de droit comparé* (1983) chp 1, part 1. In this text, the authors highlight that an arbitration agreement is effectively a choice of forum clause, reflecting the parties' choice of dispute resolution mechanism and the venue thereof. The authors state that "...just as one would substitute the competence of one court for that of another court, the agreement, in effect, determines which adjudicatory body has jurisdiction to entertain the dispute".

95 Rubino-Sammartano *International Arbitration Law* (1990) 34. In this text the author states that the parties' intent is a "fundamental element of arbitration, whether it is treated as being contractual (arising from an agreement between the parties) or procedural (specifically, the means through which a legal system obtains a decision)."

96 Rosen 600.

97 https://saylordotorg.github.io/text_the-legal-and-ethical-environment-of-business/s07-03-arbitration.html (accessed 11 June 2021).

opposing party is more likely to agree to international arbitration than to a trial in the other party's home country.

Arbitration has more lenient procedural rules than litigation. It is less formal and arbitrators decide on the rules of evidence they are to apply during the arbitration proceedings. The discovery process is not as long or tedious as that of litigation and is less costly as a result. This was cited by the US Supreme Court as a significant benefit of arbitration over litigation in *Circuit City Stores Inc v Adams*.⁹⁸

The arbitral award is binding and not subject to appeal. This ensures its effective enforcement. In the case of the USA, this is with the exception of section 16 of the U.S. Federal Arbitration Act, 9 U.S. ("the FAA").⁹⁹ Section 69 of the UK Arbitration Act 1996 is also a second exception.¹⁰⁰

There are limited court reviews in arbitration. These are found in the New York Convention,¹⁰¹ UNCITRAL Model Law on International Commercial Arbitration,¹⁰² and the FAA.¹⁰³

The focus now shifts to the disadvantages of arbitration.

4 2 Disadvantages

Parties bear the costs of the arbitrator(s), the legal representatives, and other administration costs such as the venue.¹⁰⁴ Considering that arbitration venues are neutral, they tend to be located far from either party. This means that the parties incur travelling expenses as well. These venue and arbitrator costs are unthinkable in litigation – they are borne by the state through public taxes. This is a considerable

98 *Circuit City Stores Inc v Adams* 532 U.S. 105 (2001).

99 Sec 16 of the U.S. Federal Arbitration Act, 9 U.S. provides that an appeal may be taken from a final decision with respect to an arbitration that is subject to its title.

100 According to sec 69 (3)(a)-(d) of the UK Arbitration Act 1996, an appeal of the arbitral award is given if the court is satisfied that:

- i. the determination of the question will significantly affect the rights of one or more of the parties;
- ii. the question is one which the tribunal was asked to determine;
- iii. based on the findings of the award, the tribunal's decision is wrong, the question is one of public importance and the tribunal's decision is open to doubt; and
- iv. it is just and proper for the court to determine the question despite the presence of an arbitration agreement.

101 Art v(1)-(2) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.

102 Art 36(1)-(2) of the UNCITRAL Model Law on International Commercial Arbitration.

103 Code § 10 (a) of the FAA. (According to the Supreme Court in *Hall Street Assocs., LLC v Mattel, Inc.* 552 U.S. 576, 583 (2008), this scope of review covered by the FAA, is not to be expanded contractually by the parties).

104 Schulze 2011 *South African Mercantile Law Journal* 298. See also https://saylordotorg.github.io/text_the-legal-and-ethical-environment-of-business/s07-03-arbitration.html (accessed 11 June 2021).

disadvantage attendant upon “private” dispute resolution such as arbitration.

Arbitration is too flexible as the parties can determine and adjust certain factors such as, the language to be used, the manner of intervention when testimony and the presentation of evidence clash, the rules of procedure, etcetera.¹⁰⁵ This prolongs arbitral proceedings and makes them expensive. In the end arbitration becomes just as expensive as litigation as regards cost and time. Therefore, while dilatory tactics in litigation, for example, extend the time and inflate the costs of the proceedings, the same happens in arbitration as a result of its flexibility.

Arbitral proceedings are not characterised by an automatic right of joinder of third parties. A third party can only be joined to or bound by an arbitration finding with that third party’s consent.¹⁰⁶

As highlighted in section 4.1, one of the advantages to arbitration is that it ensures good relations are maintained between parties. This was seen in the case of *Bidoli v Bidoli*.¹⁰⁷ The two Bidoli brothers, Guido and Rolomo, were building contractors. A dispute arose between them which they decided to settle privately in a non-combative manner through arbitration. They reached a settlement agreement before arbitration started and proceeded to instruct the arbitrator to record the settlement agreement as the arbitral award. Arbitration in this case allowed the brothers to resolve their disputes amicably and privately – temporarily as things turned out. Rolomo was, however, dissatisfied with the agreement and when Guido applied to the court to enforce the arbitral award as a court order in terms of section 31 of the Arbitration Act, Rolomo challenged this. From the High Court, the case went all the way to the Supreme Court of Appeal. This defeated the purpose of the arbitration, the parties ended up fighting, and relations soured. This illustrates that arbitration can be disadvantageous if its awards are not honoured and enforced. Not only did the parties still have to follow the litigious route, but relations were soured. As highlighted by Wethmar-Lemmer and Schoeman, this advantage inherent in arbitration – it being too open to curial intervention – is a glaring weakness in South Africa’s Arbitration Act.¹⁰⁸

The *Bidoli* case is not an isolated instance. Discontent is fairly typical in arbitration cases, even on a global scale as was seen in the case of *FG*

105 Robin 2014 *International Business Law Journal* 135-136.

106 *CJD v CJE* [2021] SGHC 61. See also CMS “Joinder of third-parties to arbitration proceedings: High Court of Singapore rules on the requirements for consent” <https://www.lexology.com/library/detail.aspx?g=0e57b65c-5c84-4ad2-af83-19435104d291> (accessed 24 June 2021).

107 *Bidoli v Bidoli* (2982/08) [2010] ZAWCHC 39 (15 March 2010).

108 42 of 1965. See also Wethmar-Lemmer and Schoeman 2019 *TSAR* 127; South African Law Commission *Domestic Arbitration*, Project 94 (2001) par 1.03-1.08 and par 2.16-2.23 https://www.justice.gov.za/salrc/reports/tr_prj94_dom2001.pdf; International Arbitration Bill B10 of 2017 par 5.

Hemisphere Associates LLC v The Democratic Republic of Congo FACV (“the *FG Hemisphere case*”).¹⁰⁹

Briefly, the *FG Hemisphere case* was an *ex parte* application to a Hong Kong court of first instance by *FG Hemisphere Associates* (“*FG Hemisphere*”), to enforce arbitration awards made against the Democratic Republic of Congo (“the DRC”). The DRC and its state-owned electricity company, *Société Nationale d’Electricité* (“*SNE*”) embarked on a nationwide infrastructural development project and borrowed credit from Yugoslavian-based *Energoinvest DD*. Having defaulted on their payments in both financing contracts, which also incorporated ICC arbitration clauses, *Energoinvest* took the DRC to arbitration in April 2003. The ICC tribunals in France and Switzerland rendered arbitral awards in favour of *Energoinvest DD* and against the DRC and its *SNE*. In November 2004, *Energoinvest DD* transferred its interest in the awards and, therefore, also the debt, to the American-based company, *FG Hemisphere Associates*. The *ex parte* application to enforce the arbitral awards then ensued. Although the legal issue was DRC’s immunity, the relevance of the case in this regard is to show the quasi-futility of arbitration agreements and their awards in that the arbitration decisions are often not respected by parties, especially powerful parties such as countries.

Again, we see the seemingly inevitable end in the form of curial intervention, with the award-creditor suing the opposing party in a court of law to enforce the arbitration award through a binding court order. Although an arbitration award is binding, it clearly lacks the requisite force of law to ensure its enforcement and its binding nature becomes increasingly suspect in everyday legal practice. This has often resulted in arbitration incurring delays, becoming more expensive, and eroding party autonomy. Arbitration’s disadvantages are therefore compounded in this complex web.

Furthermore, there is a misperception of arbitration amongst the public at large as opposed to wealthy multi-national companies (“*MNCs*”) – historically a white man’s domain – which have resorted to arbitration over the years. This misperception was ventilated by the then Judge President of the Western Cape High Court, Judge Hlope, in his 2005 judicial report. In the report, Hlope J described arbitration as racist and hostile to the post-apartheid transformation project of the South African judiciary. He argued that “white advocates, particularly senior ones, have no confidence in blacks being able to adjudicate upon commercial cases and therefore they remove them (the cases) from the (court) system and refer them to arbitration”.¹¹⁰ It is for this reason, as seen in various instances, that arbitration, and especially transnational or cross-border

109 *FG Hemisphere Associates LLC v The Democratic Republic of Congo FACV* 5-7/2010.

110 Schulze 2011 *South African Mercantile Law Journal* 293; Wilske and Ewers 2011 *Journal of International Arbitration* 8-9.

arbitration, has evolved into the preferred dispute resolution mechanism in international trade and investment for MNCs, but not necessarily for the opposing party who is generally an ordinary small company or person. The MNCs can afford to fork out the money required for the arbitral process, including payment of arbitrators and venues. But the same is not true of a party that does not have equal means.

Moreover, unlike litigation, arbitration falls short with regard to legal certainty in that it lacks a formal precedent system. First, arbitral tribunals have no *stare decisis* system which binds lower courts to the decisions of higher courts.¹¹¹ Each arbitral tribunal makes its own final decision and subsequent arbitral award. At best, prior decisions are persuasive but not binding. Second, the arbitration process and its outcomes are largely confidential, unless the parties and arbitrator(s) agree otherwise.¹¹² Parties, therefore, do not know how their particular case will be decided despite decisions having been given by arbitrators in many analogous cases. This legal uncertainty does not arise in litigation as decisions are not only published but also set precedents that morph into policy. Such policies are laws which parties can rely on when feuding to squash the disputes and thus need not resort to arbitration and incur unnecessary expenses.

Legal uncertainty and the other disadvantages discussed are the negative side of arbitration which can be complemented by litigation.

5 Conclusion

From the examination carried out in this article, namely that of the interaction between litigation and arbitration, one is able to endorse cross-border commercial litigation as a viable dispute resolution mechanism in addition to arbitration. It was shown that tension has typified the co-existence of litigation and arbitration across jurisdictions within the sphere of cross-border commercial disputes. This has manifested as judicial apathy and contempt which have infringed upon contracting parties' fundamental rights to party autonomy and the freedom to contract. Scholars such as Christie call for a fine balance to be struck with judicial intervention when it comes to arbitration.

Whilst Christie follows a more arbitration-oriented approach which respects the well-enshrined rights of party autonomy and freedom to contract, it is the position of this investigation that a litigation-oriented approach remains as sound and suitable as arbitration for cross-border

111 https://saylordotorg.github.io/text_the-legal-and-ethical-environment-of-business/s07-03-arbitration.html (accessed 11 June 2021).

112 University of Missouri School of Law "Finding Public Sector Arbitration Decisions" <https://law.missouri.edu/arbitrationinfo/2015/10/13/finding-public-sector-arbitration-resources/> (accessed 10 June 2021). See also American Arbitration Association "AAA Statement of Ethical Principles" <https://www.adr.org/StatementofEthicalPrinciples> (accessed 10 June 2021).

commercial disputes. This is because party autonomy and freedom to contract will continue to be safeguarded and observed in jurisdiction clauses. After all, the reason for their existence is to honour and preserve the contracting parties' specific choice of court. It is from this, that the synonym for "jurisdiction clause" is a "choice of court agreement". This position is supported by Oppong when he argues for the enforcement of jurisdiction clauses in Nigeria in order to promote party autonomy. He says:

This hostility to jurisdiction agreements is akin to Latin American countries' historical disdain for similar clauses founded on their rejection of the principle of party autonomy- a principle so important in international commerce. This treatment of jurisdiction agreements can be a disincentive to international commercial relations since they are very much part of the current modes of dealing across national boundaries.¹¹³

Furthermore, although the world is slowly shifting towards a preferred out-of-court settlement system for which arbitration has proven a popular dispute resolution mechanism as it saves time and costs,¹¹⁴ for the most part, however, we still live in a litigious global community and South Africa and the rest of the African continent are no exception. This is evident in business hubs other than Johannesburg, such as London, Frankfurt, Singapore, and New York, which remain very popular, busy, and convenient neutral litigation venues.¹¹⁵ These cities harbour independent international commercial courts, as in Singapore for example. Therefore, the main structural recommendation which can be used to implement cross-border/transnational commercial litigation in order to supplement international arbitration, according to this research, is the establishment of an independent international commercial court. This court will attract international commercial litigation to South Africa with the appropriate checks and balances in place to avoid congestion in our courts.

113 Oppong "Private International Law and the African Economic Community: A Plea for Greater Attention" 2006 *International & Comparative Law Quarterly* 917.

114 Van Niekerk, "Aspects of Proper Law, Curial Law and International Commercial Arbitration" 1990 *South African Mercantile Law Journal* 149; Butler "A New Domestic Arbitration Act for South Africa: What Happens after the Adoption of the UNCITRAL Model Law for International Arbitration?" 1998 *Stellenbosch LR* at 3-5.

115 <https://www.sicc.gov.sg/> (accessed 11 June 2021).