

The Role of National Courts in the Arbitration Process

By

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ACKNOWLEDGEMENT

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

-Orison Swett Marden

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

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LIST OF ABBREVIATIONS

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

UNCITRAL United Nations Commission on International Trade Law

UNGA United Nations General Assembly

KEY CONCEPTS/ WORDS

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

SUMMARY

The thesis entitled “The Role of National Courts in the Arbitration process” notes with concern the outdated and inadequate nature of the Arbitration law currently applied in South Africa. The fact that the Act was enacted in 1965 and has never been amended highlights the desperate need to review the prevailing arbitration law with a view to aligning it with the current needs of the business world. It raises three primary research questions in this context. First, does arbitration law in South Africa offer the benefits that were envisaged when arbitration was first developed as an alternative dispute resolution mechanism? Second, does the manner in which arbitration law is practiced in South Africa offer adequate protection to consumers who are vulnerable due to the inequality of bargaining power between themselves and large corporations? Third, is the current practice of arbitration in South Africa constitutional, particularly because of its potential limitation of the constitutional right of the parties to access the court?

The thesis attempts to answer these questions and offer recommendations for the South African Law Reform Commission (SALRC) within the specific context of commercial arbitration. In addressing these research questions, the thesis incorporates a brief overview followed by a detailed discussion of the Arbitration law framework in South Africa and abroad. The discussion of arbitration abroad is done in order to identify best practices which could be adapted to suit the South African environment. The International Arbitration law receives attention and a few observations regarding how selected foreign jurisdictions treat arbitration is also included. Finally, the thesis explores the possibility of establishing an independent institution that will be fully equipped to handle arbitration proceedings from inception to completion.

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