



South Africa as an arbitral seat for international commercial arbitration

BU Unegbu

 orcid.org/0000-0002-5114-7972

Mini-dissertation submitted in partial fulfilment of the requirements for the degree *Masters of Law* in *Import and Export Law* at the North-West University

Supervisor: Prof SPLR De La Harpe

Graduation ceremony: May 2018

Student number: 23859725

Abstract

International commercial arbitration remains a growing economy in the world today. People are now turning to arbitration to ensure adjudication by an expert and to ensure a confidential process where the parties involved can influence the outcome of the arbitrator's decision. The process may not always be quicker and cheaper as it is presumed to be - nevertheless, its importance continues to grow especially in the international trade sphere.

When South Africa emerged from the era of isolation in 1994, it was faced with the fact that many of its laws relevant for the purpose of international trade and investments were outdated and inadequate. An example is in the field of international commercial arbitration.¹ This is a big problem in South Africa. Before a foreign party decides to do business in a country, one of the first questions that will be asked is: what provisions does the country provides for the resolution of international trade disputes. The present answer is not encouraging.

The South African *Arbitration Act*² (*Arbitration Act* or *Act*) was designed with domestic arbitration in mind and has no provisions at all expressly dealing with international commercial arbitration. The Act is at present characterised by excessive opportunities for parties to involve the court as a tactic to delay the arbitration process. The arbitral tribunals are recognised as having inadequate powers to conduct the arbitration proceedings. In fact, the *Arbitration Act* is widely perceived by those involved in international commercial arbitration as totally inadequate for the purpose of international commercial arbitration.³

Today, the standard of a country's international commercial arbitration legislation is measured by the UNCITRAL⁴ Model Law on International Commercial Arbitration of 1985 (UNCITRAL Model Law).⁵ The UNCITRAL Model Law can be adopted by a country to regulate international commercial arbitration.⁶ Many countries choose to adopt the UNCITRAL Model Law, their reasons may vary but some can be traced to out-dated arbitration legislation that needs replacement.⁷

¹ South African Law Commission Project 94 Arbitration: *An International Arbitration Act for South Africa Report* (July 1998), par 1.2.

² 42 of 1965.

³ SALC Report 1998, par 1.3.

⁴ United Nations Convention on International Trade Law.

⁵ The Model Law was adopted in 1985 by the then General Assembly, Resolution 40/72.

⁶ Hermann 1998 *Uniform Law Review* 485.

⁷ Venter *The UNCITRAL Model Law on International Commercial Arbitration* 3.

The South African Law Commission published the South African Law Commission (SALC) Report 1998 (SALC Report 1998), dealing with the possible application of the UNCITRAL Model Law to international commercial arbitration in South Africa. The SALC Report strongly supported the adoption of the UNCITRAL Model Law, but with only a few adaptations, with a view to make the South African version user-friendly and attractive to foreign parties and lawyers.⁸ It recommended two arbitration regimes: an *International Arbitration Act*, dealing only with international commercial arbitration; and the *Arbitration Act*, dealing only with domestic commercial arbitration.

Recently, the government approved the *International Arbitration Bill, 2017 (Arbitration Bill or Bill)*. The central aim of the Bill is to make the UNCITRAL Model Law the corner stone of South Africa's international commercial arbitration practice, and to make South Africa a regional hub for international commercial arbitration.

Butler is of the opinion that the *Arbitration Bill* cannot make South Africa a preferred seat for international commercial arbitration.⁹ According to an international arbitration survey conducted by the Queen Mary University of London in 2016,¹⁰ there are a number of factors that influence the choice of seat of international commercial arbitration (legal and non-legal factors). These factors have been investigated in this study.

After investigating the prerequisite to become a preferred seat for international commercial arbitration, South Africa's legal position is compared with Mauritius's legal position. It is concluded that Mauritius is a good example to follow. It is, however, important to keep in mind South Africa's own background. A good example to follow from Mauritius is the separation of its domestic arbitration legislation from its international commercial arbitration legislation. This will bring about effectiveness and clarity for the users of the said legislation. It would be a good idea for South Africa to introduce the *Arbitration Bill*, and emulate Mauritius in improving its arbitration practice.

⁸ SALC Report 1998, par 1.8.

⁹ Butler 1998 *STELL LR 7*.

¹⁰ Mistelis & Friedland 2014 International Arbitration Survey
International Arbitration Survey: Improvements and Innovations in International Arbitration – Queen Mary University of London 2015.

Keywords

Arbitration legislation

International arbitration legislation

Mauritian International Arbitration Act

Model Law

South African Law Commission

UNCITRAL Model Law on International Commercial Arbitration

Seat of arbitration

South African International Arbitration Bill

INDEX

Abstract.....	i
Keywords.....	iv
List of abbreviations.....	vii
Chapter 1.....	1
Introduction.....	1
1.1 Arbitration.....	1
1.2 South African arbitration legislation and the need for reform.....	1
1.2.1 Arbitration Act 42 of 1965	1
1.2.2 UNCITRAL Model Law.....	2
1.2.3 South African Law Commission Report 1998	3
1.3 Scholars' opinion on the Arbitration Bill.....	4
1.4 Arbitration Bill 2017.....	4
1.5 Research question	5
1.6 Mauritius as seat of choice for international commercial arbitration.....	5
1.7 Factors that influences the choice of seat of international commercial arbitration	6
1.8 Outline of the study.....	6
Chapter 2.....	7
Prerequisite to becoming a seat for international commercial arbitration	7
2.1 Introduction.....	7
2.2 Defining characteristics of arbitration.....	7
2.3 Elements of international commercial arbitration.....	9
2.3.1 Rule of law.....	9
2.3.2 Law governing the agreement to arbitrate	10
2.3.3 The law governing the arbitral proceedings.....	10
2.3.4 The law governing the substance of the dispute	12
2.4 The role of the national courts in the arbitration process.....	13
2.4.1 Powers of assistance.....	13
2.4.2 Powers of supervision and intervention	14
2.4.3 Powers of recognition and enforcement of arbitral awards	14
2.5 Other aspects of international arbitration	16
2.5.1 Methods of arbitration	16
2.5.2 Appeal and review	17
2.5.3 Availability of experienced arbitrators.....	18
2.5.4 Trade language.....	18
2.5.5 Cost	19
2.5.6 International trade and track record in recognising and enforcing arbitral awards.....	19
2.5.7 Tourism and culture.....	20
2.5.8 Political stability	20
2.5.9 Other factors.....	20

2.6	Conclusion.....	20
Chapter 3.....		22
The South African legal position		22
3.1	Introduction.....	22
3.2	Defining characteristics of an arbitration agreement.....	22
3.3	The rule of law.....	23
3.4	The law governing the arbitral proceedings.....	24
3.5	Law of contract in South Africa.....	25
3.6	South Africa private international law.....	26
3.6.1	Where the <i>lex causae</i> is a foreign legal system.....	27
3.6.2	Recognition and enforcement of foreign judgements by the courts	27
3.7	The role of the national courts in arbitration	28
3.7.1	Compelling a reluctant party to arbitrate and stay an action.....	28
3.7.2	Discovery of Evidence.....	29
3.7.3	Remittal of an award	30
3.7.4	Recognition and enforcement of arbitration agreements and awards	32
3.7.5	Recognition and enforcement of foreign arbitral awards.....	34
3.8	Other aspects of arbitration in South Africa	35
3.8.1	Arbitration institutions	35
3.8.2	Availability of experienced arbitrators and lawyers.....	36
3.8.3	Appeal and review	37
3.8.4	Language.....	37
3.8.5	Cost and location	37
3.8.6	Availability of transport facilities	38
3.8.7	Political stability	38
3.8.8	Tourism and culture.....	39
3.9	Conclusion.....	39
Chapter 4.....		41
Legal position in Mauritius.....		41
4.1	Introduction.....	41
4.2	Defining characteristics of an arbitration agreement in Mauritian arbitration legislation	42
4.3	The rule of law.....	42
4.4	The law governing arbitral proceedings.....	43
4.5	Mauritian law of contract.....	44
4.6	Private International law	45
4.6.1	Finding the proper law of contract.....	45
4.6.2	Proof of foreign law	45
4.6.3	Recognition and enforcement of foreign judgements.....	45
4.7	Specific features of the Mauritian Arbitration Act.....	46
4.7.1	Power of the Supreme Court	46
4.7.2	The role of the Permanent Court of Appeal.....	46
4.8	The role of the Supreme Court.....	47
4.8.1	Substantive claim before the courts.....	47
4.8.2	Power of the Supreme Court to issue interim measures.....	47

4.8.3	<i>Recognition and enforcement of interim measures</i>	48
4.8.4	<i>Court assistance in taking evidence</i>	49
4.8.5	<i>Exclusive recourse against award</i>	49
4.8.6	<i>Recognition and enforcement of foreign arbitral award</i>	50
4.9	<i>Other aspects of Arbitration in Mauritius</i>	50
4.9.1	<i>Arbitral institution</i>	50
4.9.2	<i>Availability of experienced lawyers or arbitrators</i>	50
4.9.3	<i>Appeal and review</i>	51
4.9.4	<i>Language, cultural diversity and tourism</i>	51
4.9.5	<i>Cost and location</i>	51
4.9.6	<i>Available transport facilities</i>	52
4.9.7	<i>Political stability</i>	52
4.10	<i>Conclusion</i>	53
Chapter 5		54
Comparison		54
5.1	<i>Introduction</i>	54
5.2	<i>South Africa international commercial arbitration legislation</i>	54
5.2.1	<i>Present position</i>	54
5.2.2	<i>Possible future position: International Arbitration Bill 2017</i>	54
5.3	<i>Mauritian international arbitration position</i>	55
5.3.1	<i>Present position</i>	55
5.3.2	<i>Possible future position</i>	55
5.4	<i>Other aspects that are essential for the seat of international commercial arbitration in South Africa and Mauritius</i>	55
5.4.1	<i>Rule of law, the law of contract and the private international law</i>	55
5.4.2	<i>Arbitration institutions, availability of experienced lawyers and arbitrators</i>	56
5.4.3	<i>Language, cost and location, availability of transport facilities</i>	56
5.4.4	<i>Political stability, tourism and cultural diversity</i>	57
5.5	<i>Conclusion regarding South Africa</i>	57
5.6	<i>Conclusion regarding Mauritius</i>	58
Chapter 6		59
Conclusions		59
6.1	<i>International trade as a growing industry in the world</i>	59
6.2	<i>Requirements for a good seat for international commercial arbitration</i>	59
6.3	<i>South Africa as a seat for international commercial arbitration</i> . 60	
6.4	<i>Lessons to be learnt from Mauritius: a developing hub for international commercial arbitration</i>	61
6.5	<i>Adoption of the international arbitration regime in South Africa: the path South Africa should follow</i>	61
6.6	<i>Final conclusions</i>	63

List of abbreviations

AFSA	Arbitration Foundation of Southern Africa
<i>Arbitration Act</i>	English <i>Arbitration Act</i> 1996
<i>Arbitration Act</i>	Mauritian <i>International Arbitration Act</i> 37 of 2008
<i>Arbitration Act</i>	South African <i>Arbitration Act</i> 42 of 1965
<i>Arbitration Bill</i>	South African International Arbitration Bill 2017
ASA	Association of Arbitrators
CAJAC	China Africa Joint Centre Johannesburg
CISG	United Nations Convention on Contracts for the International Sale of Goods 1958 (Vienna Convention)
<i>Enforcement Act</i>	<i>Enforcement of Foreign Civil Judgement Act</i> 40 of 1977
<i>Evidence Act</i>	<i>Law Evidence Amendment Act</i> 45 of 1988
IAA	<i>International Arbitration Act</i>
ICC	International Chambers of Commerce
LCIA	London Court of International Arbitration
MIAC	Mauritius International Arbitration Centre
PCA	Permanent Court of Appeal
REFAA	<i>Recognition and Enforcement of Foreign Arbitral Award Act</i> 40 of 1977
SALC	South African Law Commission
UNCITRAL	United Nations Commission on International Trade Law

Chapter 1

Introduction

1.1 Arbitration

As the world becomes more globalised and international trade and investment grows across Africa, a sound arbitration framework will grant international trading parties a comfortable and familiar process for resolving any trade dispute.¹¹ International commercial arbitration is increasingly becoming the preferred mode of resolving disputes and the chosen path of recourse for the protection of the interest of trading parties.¹²

It has undergone celebrated growth and changes over the years with countries, lawyers and arbitral institutions are developing and placing emphasises on its importance, and its effectiveness as a dispute resolution mechanism.¹³ Arbitration is seen as a process that is: flexible; consent based; robust; expedient; speedy; private; and universally understood.¹⁴

There are a number of issues that have to be taken into account when deciding to arbitrate, these include: the amount in dispute; the applicable procedures and the rules of procedures to be followed; the number of arbitrators and the nature of the dispute.¹⁵ These factors can affect the conduct of the arbitration proceeding. Venter says that the loss of its simplicity can greatly affect the future of arbitration, as users will feel the need to seek other dispute-resolution alternatives that have proven to be cheaper, quicker and more effective.¹⁶

1.2 South African arbitration legislation and the need for reform

1.2.1 Arbitration Act 42 of 1965

South African arbitration law comprised of two statutes: the *Arbitration Act*¹⁷ which governs domestic arbitration; and the *Recognition and Enforcement of Foreign Arbitral Awards Act (REFAA)*¹⁸, which implemented the New York Convention.

¹¹ Wright and Browning 2017 <http://www.businesslive.co.za>.

¹² Wright and Browning 2017 <http://www.businesslive.co.za>.

¹³ Griffith and Mitchell 2002 *Melbourne Journal of International Law* 184.

¹⁴ Mbith *International Commercial Arbitration in Kenya* 1.

¹⁵ Berger 1994 *SA Merc LJ* 251.

¹⁶ Venter *The UNCITRAL Model Law on International Commercial Arbitration* 3.

¹⁷ 42 of 1965.

¹⁸ 40 of 1977; South Africa acceded to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention of 1958) by enacting the *REFAA*.

The *Arbitration Act* was influenced by the English *Arbitration Act* of 1889, 1950, and other relevant English jurisprudence. English arbitration law has undergone celebrated reform process.¹⁹ Although it is not a UNCITRAL Model Law statute, the English *Arbitration Act* 1996 reflects the procedural standard of the UNCITRAL template.²⁰ However, South Africa did not follow suit in this regard. Hence, the *Arbitration Act* is internationally recognised as ‘defective’, ‘out-dated’ and ‘inadequate’, to deal with modern practice of international commercial arbitration.²¹

In 1998, the SALC published a report titled ‘South African Law Commission Project 94 Arbitration: *An International Arbitration Act for South Africa Report*’. The SALC Report recommended that South Africa implements the UNICTRAL Model Law, with minimum changes, in order to achieve uniformity with other Model Law jurisdictions.²² According to the SALC Report, an *International Arbitration Act* would promote arbitration as a method of resolving international commercial disputes,²³ and also increase the prospect for South Africa to become a leading seat for international commercial arbitration.²⁴

1.2.2 UNCITRAL Model Law

The UNCITRAL Model Law has in fact achieved great success over the years, with quite a number of countries around the world adopting and incorporating its provisions into their arbitration legislation.²⁵ Most countries choose to adopt the UNCITRAL Model Law, although their reasons may vary, but some can be traced to outdated arbitration legislations that need replacement or because their arbitration legislation does not reflect the current international commercial arbitration standard.²⁶

The two main strands in the UNCITRAL Model Law are: the liberalisation of international commercial arbitration by limiting the role of national courts; and emphasising party autonomy by allowing parties the freedom to choose how their disputes should be settled.²⁷ There are also mandatory provisions intended to ensure fairness and due process. The UNCITRAL Model Law also contains a framework for conducting international commercial

¹⁹ Sibanda 2008 *VJICLA* 154.

²⁰ Sibanda 2008 *VJICLA* 154.

²¹ Butler 1998 *STELL LR* 1.

²² SALC Report 1998, page 26, at paras 1.13.

²³ SALC Report 1998, page 36, at paras 2.4

²⁴ SALC Report 1998, page 43, at paras 2.22.

²⁵ Hermann 1998 *Uniform Law Review* 485.

²⁶ Hermann 1998 *Uniform Law Review* 485.

²⁷ SALC Report 1998, par 1.9.

arbitration so that in the event that the parties are unable to agree on a procedure, the arbitration proceeding can still be completed.

In 1985 the then General Assembly of the UNCITRAL recommended that all states give due consideration to adopting the UNCITRAL Model Law, “*in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice*”.²⁸ According to Slate, the UNCITRAL Model Law was established to resolve any existing disparities between various countries regarding their international trade laws.²⁹ With these disparities out of the way, international trade laws will be able to grow and develop, and an integrated trading system can be established.³⁰

1.2.3 South African Law Commission Report 1998

The SALC Report 1998 recommended the introduction of international commercial arbitration legislation based on the UNCITRAL Model Law.³¹ It further recommended two arbitration regimes: an *International Arbitration Act*, dealing only with international commercial arbitration; and the *Arbitration Act*, dealing only with domestic commercial arbitration.³²

The SALC Report 1998 further recommended a few adaptations, with a view of making the South African version user-friendly and attractive to foreign parties and lawyers. The SALC Report 1998 also explained that by introducing the UNCITRAL Model Law into South Africa’s international commercial arbitration practice, South Africa might soon become a sought after venue for international commercial arbitration.³³

A crucial defect found in the *Arbitration Act* concerns the intervention of the national courts in the arbitration process.³⁴ This will be discussed later in this study. Sibanda submits that the national courts intervention serves as a ‘default mechanism’, the proper function of which is to support the arbitration proceeding.³⁵ To prohibit court intervention would lead to a lack of

²⁸ SALC Report 1998, par 1.9.

²⁹ Slate *et al* 2004 *Cardozo Journal* 74.

³⁰ Slate *et al* 2004 *Cardozo Journal* 74.

³¹ SALC Report 1998, page 21.

³² The focus of this study is on the *Arbitration Bill* and to what extent the introduction of the Bill can assist in making South Africa a preferred seat for international commercial arbitration, taking into account all other factors.

³³ SALC Report 1998, par 1.21.

³⁴ SALC Report 1998, pages 23, par 1.3.

³⁵ Sibanda 2008 *VJCLA* 154.

confidence in the arbitration process.³⁶ Therefore, if the powers of the national courts exceed the power to support the arbitration proceeding, this could affect the process of arbitrating.

The SALC Report 1998 shows that the *Arbitration Act* grants our courts excessive powers to interfere or intervene in an arbitration process. This could deter parties from choosing South Africa as a seat for international commercial arbitration.³⁷ Further, it may undermine efficient arbitration even if the arbitration is to be held outside South Africa.³⁸

1.3 Scholars' opinion on the Arbitration Bill

Butler, a leading South African scholar of arbitration laws argues that even if South Africa should adopt improved legislation remedying its defects, the country has no pretensions to being an established venue for international arbitration.³⁹ This is because parties considering a venue would logically give preference to a jurisdiction with familiar and tested arbitration legislation.⁴⁰ Parties will always favour a neutral seat of arbitration, but they will also favour a seat and an applicable legal system with which they are comfortable and familiar, and which will be easily ascertainable. Parties will not choose a jurisdiction of which the arbitration legislation is unfamiliar or that is not aligned to the international best standard.

1.4 Arbitration Bill 2017

The *Arbitration Bill* is in the process of being reviewed after 52 years of use. The government recently approved the *Arbitration Bill*. When enacted, the Bill will regulate international commercial arbitration held in South Africa and the enforcement of foreign arbitral awards.⁴¹ The Bill has progressed through the stakeholder engagement process, which included: consultation with the leading local and international arbitral institutions.⁴² The government hopes that the Bill will be introduced in 2017, and will become the highly anticipated *International Arbitration Act*.

It should be noted that after the introduction of the Bill, domestic arbitration will still be governed by the current *Arbitration Act*.

³⁶ Sibanda 2008 *VJCLA* 154.

³⁷ SALC Report 1998, pages 23, par 1.3.

³⁸ Butler 1998 *STELL LR* 7.

³⁹ Butler 1998 *STELL LR* 7.

⁴⁰ Butler 1998 *STELL LR* 7.

⁴¹ Wright and Browning 2017 <http://www.businesslive.co.za>.

⁴² Wright and Browning 2017 <http://www.businesslive.co.za>.

By introducing the Bill, the government hopes to promote South Africa as a regional hub for international commercial arbitration. The Bill incorporates the recommendations of the SALC Report 1998 and adopts certain provisions of the UNCITRAL Model Law (with a few adaptations) where deemed necessary. The Bill provides for the incorporation of the UNCITRAL Model Law; provides anew for the recognition and enforcement of foreign arbitral awards; repeals the *REFAA*; amend the *Protection of Business Act*⁴³, and removes any reference to arbitrations awards from its ambit.

Butler opines that by adopting the UNCITRAL Model Law, the South Africa will be introduced into a new arbitration era, particularly in the context of international commercial arbitration.⁴⁴ However, how this will come into effect will depend on the way the *Arbitration Bill* is implemented: by the legislators; the courts; arbitrators; and those appearing on behalf of the parties in international commercial arbitration held in the country.⁴⁵

1.5 Research question

The main issue that be discussed in this study is: to what extent will the *Arbitration Bill*, if enacted, assist in making South Africa a regional hub for international commercial arbitration, taking into account all the other non-legal factors that influence the choice of seat of international commercial arbitration?

1.6 Mauritius as seat of choice for international commercial arbitration

South African's present legal position will be compared with the Mauritian legal position, as Mauritius is considered an attractive venue for international commercial arbitration. Because South Africa and Mauritius are not on the same level in this regard, it may be necessary to take into account the steps Mauritius took to conform to the modern international arbitration standard, and how these can be useful to South Africa, especially regarding the Bill that has been introduced.

⁴³ 49 of 1978.

⁴⁴ Butler 1998 *STELL LR 5*.

⁴⁵ Butler 1998 *STELL LR 5*.

1.7 Factors that influences the choice of seat of international commercial arbitration

Against this background, the primary purpose of this study is to identify those general factors that influence the choice of seat of arbitration. Sornum says there are legal and non-legal factors.⁴⁶ These factors will be discussed at length later in this study.

1.8 Outline of the study

Chapter 2 will focus on the nature and scope of international commercial arbitration. It will focus on the general factors that influence the choice of seat of international commercial arbitration.

Chapter 3 will deal South African's legal position. This chapter will compare certain provisions of the *Arbitration Act* with the *Arbitration Bill*. The chapter will highlight the defects found in the *Arbitration Act*, and see how the Bill can assist in remedying these defects for the purpose of international commercial arbitration. It will also focus on the general requirements discussed in Chapter 2 from a South African perspective.

Chapter 4 will focus on the Mauritian position. Mauritius is currently regarded as an attractive seat of arbitration. This chapter will focus on the steps taken by Mauritius to become a regional hub for international commercial arbitration.

Chapter 5 will compare the South African arbitration practice and the Mauritian arbitration practice.

Chapter 6, been the last, will cover the conclusion drawn from the discussion and the analysis made in the foregoing chapters. This chapter will contain brief summaries of the whole document and draw a conclusion from the entire study.

⁴⁶ Sornum "An analysis of Mauritius as an Arbitral Seat" 11.

Chapter 2

Prerequisite to becoming a seat for international commercial arbitration

2.1 Introduction

This chapter will focus on the nature and scope of arbitration. Its aim is to identify those factors that influence the choice of seat of international commercial arbitration by understanding the nature and characteristics of international commercial arbitration

2.2 Defining characteristics of arbitration

Arbitration can be defined as:⁴⁷

A process whereby the parties to the dispute enter into a formal agreement that an independent and impartial third party, the arbitrator chosen directly or indirectly by the parties, will hear both sides of the dispute and make an award which the parties undertake through the agreement as final and binding.

Commercial arbitration is usually contractual in nature and as such the autonomy of the parties is extensive.⁴⁸ This is because parties to a contract are free to enter into a contract on their preferred terms and conditions.⁴⁹ The intention of the parties is an essential element in arbitration. If the parties have not agreed to arbitrate, either party has the option of using litigation⁵⁰ or any other alternative dispute resolution method such as mediation,⁵¹ conciliation⁵² or negotiation.⁵³ Redfern and Hunter submit that the agreement to arbitrate is the cornerstone of arbitration.⁵⁴ It is common practice for parties to include an arbitration agreement⁵⁵ in their main contract that sets out the procedure to be followed when a dispute

⁴⁷ *Total Support Management (Pty) Ltd v Diversifield Health Systems (SA) (Pty) Ltd* 2002 4 SA 661 (SCA) 673 E.

⁴⁸ Rosen 1994 *Fordam International Law Journal* 599.

⁴⁹ Ditedu *The Doctrine of Separability* 9.

⁵⁰ Berger 1994 *SA Merc LJ* 252: Litigation is strictly a court based approach whereby the presiding officer controls the affairs of the proceedings. The parties have no control over the proceedings or the decision of the court and are bound by the decision.

⁵¹ Pretorius *Dispute Resolution* 39: Mediation is a process where the parties in conflict voluntarily enlist the services of a third party to assist them in reaching an agreement on issues between them. Mediation opens communication between the parties and helps them to understand their differences. The mediator is not an adjudicator; his role is to facilitate the mediation and create room for the parties to understand and listen to each other.

⁵² Moses *The Principles and Practice of International Commercial Arbitration* 14: Conciliation and mediation are used interchangeably. However, there is a difference between the two methods. A conciliator listens to the two parties' difference, and sets forth a proposed settlement agreement, representing what he believes is a fair compromise in the dispute.

⁵³ Pretorius *Dispute Resolution* 17: Negotiation is a process whereby the parties involved in a dispute, seek a mutually acceptable settlement or method of resolving their dispute.

⁵⁴ Redfern and Hunter *International Arbitration* 71.

⁵⁵ Redfern and Hunter *International Arbitration* 6.

occurs.⁵⁶ An arbitration agreement is important because it reflects on the parties consent to arbitrate without which a valid agreement does not exist.⁵⁷

There are two types of arbitration agreements: an arbitration clause; and a submission clause. An arbitration clause deals with possible future disputes, commonly and usually incorporated into the main agreement.⁵⁸ A submission agreement deals with disputes of the past - the parties in essence agree to submit an existing dispute to arbitration.⁵⁹

Because the parties are free to exercise their autonomy, they may elect a neutral third party (arbitrator) who will adjudicate on their behalf. The arbitrator or arbitral tribunal will determine the rights of the parties in an impartial manner and reach a decision after assessing all evidence and submissions brought by the parties in a procedure that is equal and fair to both parties.⁶⁰ This requires the independence, impartiality and neutrality of the arbitrator during the course of the proceedings. A lack of any of these criteria may be considered ground for the cancellation of an arbitral award.

Butler and Finsen submit that an arbitrator or arbitral tribunal is subject to the rules of natural justice.⁶¹ The rules of natural justice were originally applied by courts, but have now been extended to any person or body deciding on issues that affects the rights or interests of others.⁶² The aim is to ensure that fairness and procedural rules by which legal rules are considered are applied.⁶³ As Lord Hewart stated:⁶⁴

It is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done

The primacy of arbitration is to resolve disputes by obtaining a final and binding decision.⁶⁵ By so doing, arbitration serves its purpose of bringing the dispute to an irrevocable end and seeing justice being achieved.⁶⁶ Moses submits that in many jurisdictions, there are common

⁵⁶ Redfern and Hunter *International Arbitration* 71.

⁵⁷ Redfern and Hunter *International Arbitration* 6.

⁵⁸ Redfern and Hunter *International Arbitration* 72: Although parties may agree to incorporate an arbitration clause into their main agreement, they hope that the need to invoke never exists.

⁵⁹ Redfern and Hunter *International Arbitration* 72: A submission agreement is a detailed document that indicates the place of arbitration, the substantive law, numbers of arbitrators, and the seat of arbitration among other essential content.

⁶⁰ Butler and Finsen *Arbitration in SA* 2.

⁶¹ Butler and Finsen *Arbitration in SA* 2.

⁶² Ditedu *The Doctrine of Separability* 9.

⁶³ Ditedu *The Doctrine of Separability* 10.

⁶⁴ *R v Sussex Justices, Ex Parte McCarthy* 1924 1 KB 256, 259.

⁶⁵ Redfern and Hunter *International Arbitration* 3.

⁶⁶ Ditedu *The Doctrine of Separability* 11.

grounds under which an arbitral award may be set aside.⁶⁷ These are: a defect in the arbitral process; the arbitrator or arbitral tribunal having exceeded its arbitral power; and the arbitrator or arbitral tribunal having decided on issues not placed before it.⁶⁸ This will be discussed later in the chapter.

2.3 Elements of international commercial arbitration

Like a contract, arbitration does not exist in a legal vacuum.⁶⁹ It is regulated by rules of procedure that have been agreed upon by the parties to the dispute. These rules and procedures are fundamental in order to ensure the success of international commercial arbitration. These elements will be discussed below.

2.3.1 Rule of law

The rule of law embodies four principles:⁷⁰

1. A system of self-government in which all persons, including the government, are accountable under the laws;
2. A system based on fair, publicised, broadly understood and stable laws;
3. A fair, robust, and accessible legal process in which the rights and responsibilities based in law are evenly enforced; and
4. Diverse, competent, and independent lawyers and judges.

The rule of law also includes: separation of power among authorised persons; legal certainty; equality before the law and open access to justice for all; procedural and legal transparency; avoidance of arbitrary application of law; an independent judiciary; and eradication of corruption.⁷¹ It is stated that a country with economic opportunities and political stability, and a legal system that respects the rule of law attracts international trading parties.⁷² Furthermore, access to justice in an independent and impartial judicial system is an essential aspect of the rule of law.

The rule of law is important to the international community because it is the common basis on which parties can make agreements. It gives parties confidence that their disputes can be resolved in a fair and efficient manner.⁷³ The predictability and order that the rule of law promotes in substantive law is regarded as the stabilising force behind economic

⁶⁷ Moses *The Principles and Practice of International Commercial Arbitration* 3.

⁶⁸ Moses *The Principles and Practice of International Commercial Arbitration* 3.

⁶⁹ Redfern and Hunter *International Arbitration* 156.

⁷⁰ World Justice Project 2011 <http://www.worldjusticeproject.org/sites>.

⁷¹ World Justice Project 2011 <http://www.worldjusticeproject.org/sites>.

⁷² World Justice Project 2011 <http://www.worldjusticeproject.org/sites>.

⁷³ Boolell "Impact on the Rule of Law" 1- 16.

development.⁷⁴ Hence, parties to international agreement must be able to know with certainty the provisions of the law that will govern their rights and obligations.

2.3.2 *Law governing the agreement to arbitrate*

An arbitration agreement is usually incorporated in the main contract. This contract usually contains a choice of law clause that identifies the legal system that will govern the arbitration agreement.⁷⁵ It serves as the law applicable to the arbitration agreement. Where the parties choose the law applicable to the arbitration agreement, such a choice is rendered effective by the arbitrator or arbitral tribunal and the courts. However, when the parties fail to express their choice of law, it becomes necessary for the arbitrator or arbitral tribunal to determine the law applicable to the agreement. In such circumstances, Redfern and Hunter submit that there are other possibilities but the principal choice lies between the law of the seat of arbitration and the law that governs the main contract as a whole (depending on the country's private international law rules).⁷⁶ The law governing the main contract is usually a strong indication that the parties intend to adopt the same law to govern the arbitration agreements.⁷⁷ In the absence of a choice of law clause, the arbitrator or arbitral tribunal usually turn to the law that has the closest and most real connection to the parties.

2.3.3 *The law governing the arbitral proceedings*

The *lex arbitri*, commonly referred to as the seat of arbitration,⁷⁸ is the law that almost always governs arbitral proceedings.⁷⁹ It is the country⁸⁰ where arbitration is legally seated and which establishes a link between the arbitration and a system of arbitration law also known as the procedural law or curial law.⁸¹ Redfern and Hunter opine that the seat of arbitration is not merely a matter of geography; it is the territorial link between the arbitration itself and the law of the place where the arbitration is legally suited.⁸²

⁷⁴ Boolell "Impact on the Rule of Law" 1- 16.

⁷⁵ Redfern and Hunter *International Arbitration* 99.

⁷⁶ Redfern and Hunter *International Arbitration* 158.

⁷⁷ *Sulamerica CIA Nacional de Seguros SA v Enesa Engenharia SA* [2012] EWA Civ 638.

⁷⁸ The English *Arbitration Act* 1996: Section 3 defines the seat of arbitration as the juridical seat of arbitration designated by the parties, arbitral tribunal or arbitrator themselves.

⁷⁹ Moses *The Principles and Practice of International Commercial Arbitration* 64.

⁸⁰ Redfern and Hunter *International Arbitration* 167: It requires that each state will decide for itself the law it wishes to lay down to govern the conduct of the arbitration within its own territory.

⁸¹ Hill 2014 *International & Comparative Law Quarterly* 518: The importance of the seat of arbitration is based on the 'jurisdictional theory' which provides that arbitration is rooted in the sovereignty of states and their authority to prescribe the methods for dispute resolution that may, or must, be adopted within their borders.

⁸² Redfern and Hunter *International Arbitration* 173.

When one says that London, Paris or Geneva is the place of arbitration, one does not refer solely to a geographical location. It means that the arbitration is conducted within the framework of the law of arbitration of England, France or Switzerland or, to use an English expression, under the curial law of the relevant country. The geographical place of arbitration is the factual connecting factor between that arbitration law and the arbitration proper, considered as a nexus of contractual and procedural rights and obligations between the parties and the arbitrators.

Although the choice of a seat also indicates the geographical place for the arbitration, it does not mean that the parties are limited to the seat of arbitration.⁸³ It may be convenient for meetings or hearings to be held in other countries, for instance; when there is political unrest at the seat of arbitration.⁸⁴ This does not mean that the seat of arbitration changes with each change of country. The seat of arbitration remains the same unless the parties agree to a change.⁸⁵ The seat deals with issues relating to the: composition; appointment of arbitrators; requirements for arbitral procedure; and the formal requirements for an award. It also deals with: the role of the national courts in arbitration processes; the issue of arbitrability and the impact of arbitration on social; religious and other fundamental values in each state.⁸⁶

The seat of arbitration is also important because it gives an established legal framework to international commercial arbitration, so that instead of 'floating in the transnational firmament, unconnected with any municipal system of law'⁸⁷ the process is anchored to a given legal system.⁸⁸ Hence, by choosing the seat of arbitration, the parties indirectly agree that the national arbitration law of the country will govern the arbitral process and the national courts will intervene where necessary.⁸⁹ The effect is that the national arbitration law prescribes the boundaries of arbitration and enforces such boundaries through its national courts.⁹⁰ These rules are mostly mandatory and must be observed in order to obtain a valid award.⁹¹

With regard to the national courts, it is submitted that for arbitration to be effective and workable, it must recognise the importance of the national courts.⁹² Azsozu submits that the

⁸³ Redfern and Hunter *International Arbitration* 173.

⁸⁴ Hill 2014 *International and Comparative Law Quarterly* 518.

⁸⁵ *PT Garuda Indonesia v Birgen Air* [2002] 5 LRC 560: the parties' arbitration agreement expressly designated Indonesia as the seat of arbitration. As a result of political instability in Indonesia, Jakarta was an inappropriate place for arbitral hearings and those hearings were held in Singapore. The Singapore Court of Appeal held that Indonesia remained the seat of arbitration throughout the arbitration, as such the Singapore courts had no jurisdiction to entertain an application to have the arbitral award set aside.

⁸⁶ Henderson 2014 *Singapore Academy of Law Journal* 887.

⁸⁷ *Bank Mellat v Hellinik Techniki SA* [1984] QB 291, 301, [1983] 3 *All ER* 428 (CA).

⁸⁸ Redfern and Hunter *International Arbitration* 183.

⁸⁹ MIAC 2010 "Flaws and Presumptions: Rethinking Arbitration Law and Practice in a New Arbitral Seat" 851 - 879.

⁹⁰ Schwartz 2012 *Dispute Resolution International* 193.

⁹¹ Redfern and Hunter *International Arbitration* 184.

⁹² Azsozu 1995 *International and Contemporary Law Journal* 69.

role of the national courts in international commercial arbitration is supervisory and supportive. Its aim is to ensure that the process of arbitrating is conducted properly.⁹³ This will be discussed in detail later in the chapter.

Therefore, wherever an international commercial arbitration is to be seated, the provisions of the national arbitration laws should be checked to see whether there are any particular mandatory rules that must be observed to ensure an effective arbitral award. It is also noteworthy that because the law of international commercial arbitration differs from state to state, care should be taken when choosing the seat of arbitration to ensure favourable arbitration practice.⁹⁴

2.3.4 *The law governing the substance of the dispute*

Because parties to an arbitration agreement have virtually complete autonomy in the process, they are free to select for themselves the substantive law of contract. Almost any choice of substantive law chosen by the parties is enforceable provided the arbitral award is enforceable. Where the parties have specified the law of contract in their arbitration agreement, this law is applicable to any contractual disputes that may arise between them. In certain instances, parties may supplement their choice of national law, or avoid it completely by referring to the *lex mercatoria*,⁹⁵ customs of trade,⁹⁶ or the general principles of law.⁹⁷

In the absence of an implied or express choice of law, the arbitrator or arbitral tribunal is faced with the problem of choosing a law or a set of legal rules to govern the contract.⁹⁸ The arbitrator or arbitral tribunal has to decide first whether it has a free choice or whether it must follow the conflict of law rules of the *lex fori*.⁹⁹ Redfern and Hunter submit that every developed national system of law has its own conflict of law rules (also known as private international law).¹⁰⁰ These rules usually indicate what law is to be chosen as the so-called

⁹³ Azsozu 1995 *International and Contemporary Law Journal* 70.

⁹⁴ Redfern and Hunter *International Arbitration* 184.

⁹⁵ Lando 1985 *International and Comparative Law Quarterly* 748: By choosing the *lex mercatoria* the parties avoid the technicalities of national legal systems and avoid rules that are unfit for international contracts.

⁹⁶ Customs of the trade are a part of the *lex mercatoria*: these include conventions and customary law. They are derived from the common law as part of the *lex mercatoria* within specific usages, industries, or trades.

⁹⁷ The general principles of law refer to the generally acceptable guidance in the international context. It is recognized by civilized nations and judicial decisions.

⁹⁸ Redfern and Hunter *International Arbitration* 22; Moses *The Principles and Practice of International Commercial Arbitration* 76.

⁹⁹ Redfern and Hunter *International Arbitration* 221.

¹⁰⁰ Redfern and Hunter *International Arbitration* 221.

“proper law” of the contract.¹⁰¹ The relevant conflict of law rules generally selects a particular criterion that links to the contract in question, known as the ‘connecting factors’.¹⁰² However, this criterion differs from country to country. The arbitrator or arbitral tribunal must decide on the rules that are linked to the contract, and according to these rules, which law will govern the contract.¹⁰³

2.4 The role of the national courts in the arbitration process

One of the key role players in the arbitration process is the national courts of the seat of arbitration. Arbitration depends on the underlying support of the national courts which alone have the power to rescue the system when one party seeks to sabotage it.¹⁰⁴ For a proper evaluation of the powers of the national courts, it may be necessary to categorise their role: powers of assistance; powers of supervision and intervention; and the power to recognise and enforce an arbitral award.¹⁰⁵

2.4.1 Powers of assistance

Before an arbitration process begins, a party who has agreed to submit to arbitration may decide to resolve the dispute through the proper court procedure. However, because an arbitration agreement exists, the other party will insist on having the dispute dealt with by an arbitrator or arbitral tribunal.¹⁰⁶ National courts that support arbitration processes are statutorily obligated to enforce the arbitration agreement by refusing to accept such a proceeding and instead referring the dispute to arbitration.¹⁰⁷

The courts may also assist in appointing an arbitrator in the absence of any institutional rules or appointment procedure. Where parties challenge the independence and impartiality of an arbitrator or arbitral tribunal, or the jurisdiction of an arbitrator or arbitral tribunal is questioned, the courts also exercise the discretion to make a final decision in this regard.

¹⁰¹ Redfern and Hunter *International Arbitration* 221.

¹⁰² Redfern and Hunter *International Arbitration* 223.

¹⁰³ Redfern and Hunter *International Arbitration* 223; Moses *The Principles and Practice of International Commercial Arbitration* 77: The *UNCITRAL Model Law* and some national laws provide that the conflict-of-law rules should be used in determining the applicable law of contract - most of these rules provide that the arbitral tribunal shall apply the rules where it deems appropriate. This language appears to permit the arbitrator to decide on the substantive law directly, without engaging with the conflict rules.

¹⁰⁴ Redfern and Hunter *International Arbitration* 415.

¹⁰⁵ Butler 1994 *CILSA* 123.

¹⁰⁶ Redfern and Hunter *International Arbitration* 419.

¹⁰⁷ Redfern and Hunter *International Arbitration* 419.

2.4.2 Powers of supervision and intervention

During the arbitration proceedings, the court may intervene in granting an interim interdict, compelling the attendance of witnesses, ensuring the preservation of relevant evidence and documents, or of the status *quo* pending the determination of the dispute.¹⁰⁸ Interim measures are mostly sought in the courts because the arbitrator or arbitral tribunal¹⁰⁹ may not have the necessary power to hold a party in contempt for violating its order, but the courts are granted such power by national legislation.¹¹⁰ The extent to which the courts may intervene or supervise the process depends on a country's national arbitration legislation.

It should also be noted that each country has its own concept of what measure of control it wishes to exercise over an arbitral process that takes place within its jurisdiction, regardless of whether it is domestic or international.¹¹¹ In this regard, Redfern and Hunter submit that it is important to consult with the national legislation, in order to determine the grounds on which a national court may challenge an arbitral award.¹¹² The authors also explain that there are three broad areas in which an arbitral award is likely to be challenged by the courts of the seat of arbitration. Firstly, an award may be challenged on jurisdictional grounds – that is, the non-existence of a legally binding arbitration agreement. Secondly, an award may be challenged on procedural grounds - such as failure to give a party equal opportunity to be heard. Thirdly, an award may be challenged on substantive grounds, on the basis that the arbitral tribunal made a mistake of law or fact.¹¹³ As stated above, these grounds differ from country to country. It is beyond the scope of this study to review all the different systems of laws. Hence, this study will only focus on the country concerned.

2.4.3 Powers of recognition and enforcement of arbitral awards

The powers of the court to recognise and enforce an arbitral award are essential for the success of the arbitration process.¹¹⁴ Unlike other forms of dispute resolution methods, the purpose of arbitration is to arrive at a binding decision. The main international treaties that apply to the recognition and enforcement of arbitral award are: the New York Convention,

¹⁰⁸ Redfern and Hunter *International Arbitration* 432.

¹⁰⁹ Moses *The Principles and Practice of International Commercial Arbitration* 102: in most jurisdictions, the arbitral tribunal and the courts have concurrent jurisdiction with regard to interim measures, however, there are jurisdictions that do not give arbitrators the power to issue interim decisions.

¹¹⁰ Wagoner 1996 *Arbitration* 132.

¹¹¹ Redfern and Hunter *International Arbitration* 581.

¹¹² Redfern and Hunter *International Arbitration* 581.

¹¹³ Redfern and Hunter *International Arbitration* 581.

¹¹⁴ Butler 1994 *CILSA* 124.

1958; the International Centre for Settlement of Investment Disputes Convention, 1965; and a number of regional conventions.¹¹⁵ However, the New York Convention has the widest scope of application.

The New York Convention facilitates the recognition and enforcement of foreign arbitral awards in the territories of any of its 140 signatory states regardless of the arbitration rules under which they are conducted.¹¹⁶ Its aim is to encourage the recognition and enforcement of commercial agreement in contracts, and to unify the standards by which agreements to arbitrate are observed and awards are enforced in signatory countries.¹¹⁷

Although the Convention refers only to the recognition and enforcement of foreign arbitral awards, it also applies to the recognition and enforcement of arbitration agreements.¹¹⁸

Article 1(1) stipulates:

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

This means that an award made in any state, even if that state is not a party to the Convention would be recognised and enforced by any other state provided the other party state is a party to the Convention and the award satisfied the basic requirements as contained in the Convention.

The Convention provides for two reservations regarding its ratification: reciprocity reservation limits the recognition and enforcement of arbitral awards to those made in a contracting country, and another reciprocity reservation limits recognition and enforcement to only issues considered as commercial under the national law of the country in which enforcement is sought.¹¹⁹ The effect of these reservations is to narrow the application of the Convention and to ensure that an agreement is put in writing. An "agreement in writing" must include an arbitral clause in a contract, signed by the parties or contained in an exchange of letters or telegrams (emails).¹²⁰

¹¹⁵ Redfern and Hunter *International Arbitration* 616.

¹¹⁶ Redfern and Hunter *International Arbitration* 616: For example, the ICC rules, the LCIA rules, UNCITRAL rules, or the ICSID rules.

¹¹⁷ *Scherk v Alberto Culver* 417 US, 506, 520 n.15 (1973).

¹¹⁸ Redfern and Hunter *International Arbitration* 618.

¹¹⁹ Article 1(3) New York Convention.

¹²⁰ Article II (2) New York Convention.

The Convention further sets out grounds on which recognition and enforcement of an award may be refused. Article V (1) states that an award may be refused at the request of a party who invokes, and furnishes to a competent court where the recognition and enforcement is sought, proof that:

- (a) The parties ... [were] under some incapacity, or the said agreement is not valid under the law;
- (b) The party against whom the award is invoked was not given proper notice..., or was otherwise unable to present his case;
- (c) The award deals with a difference not contemplated by or not falling within the scope of the submission to arbitration;
- (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties;
- (e) The award has not yet become binding on the parties

In addition, arbitral awards may be refused under less concrete standards. Article V (2) stipulates that the recognition and enforcement may also be refused if the authority where recognition and enforcement is sought finds that:

- (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that [country]; or
- (b) The recognition or enforcement of the award would be contrary to the public policy of that country.

It is also submitted that even if grounds for refusal exist, the enforcing court is not obliged to refuse enforcement, given that the language is permissive and not mandatory.¹²¹ Ultimately, the court has to decide on the fact of the dispute whether refusal should be allowed.

2.5 Other aspects of international arbitration

2.5.1 Methods of arbitration

Arbitration may be conducted in two ways, an *ad hoc* or an institutional arbitration. In an *ad hoc* arbitration, the parties involved may establish their own rules of procedure.¹²² They have the opportunity to craft a procedure that is carefully tailored to suit a particular dispute.¹²³ They may draft their own rules, or agree to use, among others, the UNCITRAL arbitration rules, which are frequently used because they are accepted as convenient and contain an up-to-date set of rules.¹²⁴ An *ad hoc* arbitration is important because it can be shaped to meet the needs of the parties and serve the needs of the dispute. The principal disadvantage of an *ad hoc* arbitration is that it depends on the effectiveness and co-operation of the parties and the adequate support of the law of the seat of arbitration.

¹²¹ Article V (1) and (2) New York Convention.

¹²² Redfern and Hunter *International Arbitration* 42.

¹²³ Moses *The Principles and Practice of International Commercial Arbitration* 9.

¹²⁴ Moses *The Principles and Practice of International Commercial Arbitration* 9.

On the other hand, an institutional arbitration is administered by a specialised arbitral institution. It has its own rules of arbitration that govern its proceedings. Among the most well-known arbitral institutions are: the International Chambers of Commerce; International Centre for Settlement of Investment Disputes; London Court of International Arbitration; and International Centre for Dispute Resolution. The advantage of this type of arbitration is that their rules have already proven to have worked well in practice. These are well drafted rules and parties who agree to any of these rules agree that their dispute will be settled according to the chosen rules.¹²⁵ By choosing an arbitral institution, the parties are provided with experienced and specialised arbitrators to deal with the dispute. Most parties prefer this type of arbitration because there is a higher degree of certainty with regard to the outcome of the arbitration.¹²⁶ The disadvantage of this type of arbitration is that the fees are fixed and delay may be caused by the arbitral institution.¹²⁷

2.5.2 Appeal and review

The finality of an arbitral award, namely that an arbitral award is binding and not subject to appeal on merit, has generally been regarded as an advantage over litigation.¹²⁸ Some commentators believe although finality is an advantage of arbitration in view of the savings it brings about in cost and time, this may not outweigh the risk of having to live with a flawed or inconsistent award for instance, where the arbitrator commits an error in law.¹²⁹ It is also submitted that finality will only become an advantage of arbitration if the arbitral award is correct or where the damage that is caused by a mistake made is less than the interest brought by the finality.¹³⁰ It is worth noting that most jurisdictions with well-developed arbitration laws refuse to allow an appeal or review save in exceptional circumstances.¹³¹ There are also arbitral institutions that have set up internal arbitral procedures.¹³² If a party does not accept the arbitral award, an appeal to the arbitral institution may be made.¹³³

¹²⁵ Redfern and Hunter *International Arbitration* 45.

¹²⁶ Venter *The UNCITRAL Model law on International Commercial Arbitration* 12.

¹²⁷ Zhou 2014 *China EU Law Journal* 290.

¹²⁸ Zhou 2014 *China EU Law Journal* 290.

¹²⁹ Zhou 2014 *China EU Law Journal* 290.

¹³⁰ Zhou 2014 *China EU Law Journal* 290.

¹³¹ Redfern and Hunter *International Arbitration* 592; *Edmann Controls Inc.* 712 F.3d 1021, 1024-1025 (7th Cir 2013): The court held that neither factual nor legal error is a sufficient ground for appeal or review and the court will not overturn an award because an arbitrator committed a serious error or the decision is incorrect or even irrational. For instance, France does not permit appeals on point of law to its court from an arbitral award.

¹³² The parties can appeal to a temporary or permanent appeal tribunal.

¹³³ Zhou 2014 *China EU Law Journal* 296.

There are also disadvantages to having a legal system that gives unlimited right of appeal from arbitral awards. First, the decision of the court may be substituted for the decision of the arbitral tribunal. Second, parties that have agreed to the private process of arbitration may find themselves unwillingly brought before a national court. Thirdly, the appeal process may cause delay which will defeat the speedy process of arbitration.¹³⁴ Hence, when parties agree on a seat of arbitration, the country's position with regards to appeal and review must be considered.

2.5.3 Availability of experienced arbitrators

It is generally known that international arbitration involves parties from different countries, with different customs, norms and legal systems. They therefore agree to employ a neutral seat where no party has a legal relationship to ensure unwanted advantage to the detriment of the other party. As such, the law of the seat of arbitration remains essential. One essential issue in international commercial arbitration is the availability of experienced arbitrators. It is common knowledge that the most experienced international arbitrators are the busiest - their lack of availability results in significant delay in convening hearings and rendering awards and this has affected the process, which is intended to be quicker than the court process.¹³⁵ The International Chambers of Commerce, for instance, determines that before an arbitrator is appointed, the prospective arbitrator has to disclose the number of cases in which he or she is involved, in order to decide whether the person has enough time to discharge their mandate.¹³⁶

2.5.4 Trade language

It can be assumed that international trading parties speak the language of their jurisdiction. They may also speak a language that is well-known internationally. English is one of the dominant spoken international languages, alongside French, Spanish, Portuguese, Chinese, Arabic and Hindustan.¹³⁷ Because of the nature of international trades, the parties involved in

¹³⁴ Redfern and Hunter *International Arbitration* 592.

¹³⁵ Redfern and Hunter *International Arbitration* 249.

¹³⁶ Redfern and Hunter *International Arbitration* 249: The International Chambers of Commerce rule requires arbitrators to confirm their acceptance of the relevant appointment by showing their ability to devote the time necessary to conduct arbitration diligently, efficient and within the time frame as contained in the rules.

¹³⁷ Mistelis and Friedland 2014 *International Arbitration Survey: Improvements and innovations in International Arbitration* – Queen Mary University of London 2015.

trade agreements will logically give preference to a language that is well-known to them.¹³⁸ For instance, laws written in English enjoy an advantage over those of countries whose laws are written in other languages.¹³⁹

2.5.5 Cost

Cost is regarded as one of the essential factors in an arbitration process.¹⁴⁰ The process of arbitration is intended to be fast and cost-effective. This means that the parties have no intention to incur extra costs in the arbitration process. Parties are only interested in the fees and expenses involved in the arbitration process itself: such as appointing expert arbitrators and witnesses; the fees and expenses of any administrative secretary or registrar; and any other incidental cost that arises during the course of the proceeding.¹⁴¹ These fees and expenses are usually fixed and approved by the arbitral institution.¹⁴² The parties are also responsible for: the hiring of a conference or meeting room; the payment of legal representatives engaged in the arbitration proceeding; the cost incurred in the preparation of the case; fees and expenses relating to those of expert witnesses; accommodation and travelling expenses of the lawyers or arbitrators; witnesses and other essential expenses involved in the proceeding. Because the parties are responsible for all the fees and expenses involved, parties prefer a seat that is cost-effective, accessible and preferably “within its region” to avoid unreasonable expenses.¹⁴³

2.5.6 International trade and track record in recognising and enforcing arbitral awards

Parties always prefer a seat that is involved in international trade because it is easier to associate with other countries that share common relationships, for instance, trading. There is also a likelihood that parties involved in international trade will prefer arbitration to litigation, and will prefer a seat with good arbitration legislation, a trade dispute occur. International parties will also prefer a seat that is a signatory to the New York Convention, which is known for its role in the recognition and enforcement of arbitral awards.¹⁴⁴

¹³⁸ Mistelis and Friedland 2014 International Arbitration Survey: *Improvements and innovations in International Arbitration* – Queen Mary University of London 2015.

¹³⁹ Mistelis and Friedland 2014 International Arbitration Survey: *Improvements and innovations in International Arbitration* – Queen Mary University of London 2015.

¹⁴⁰ Mistelis and Friedland 2014 *International Arbitration Survey: Improvements and innovations in International Arbitration* – Queen Mary University of London 2015.

¹⁴¹ Redfern and Hunter *International Arbitration* 533.

¹⁴² Redfern and Hunter *International Arbitration* 533.

¹⁴³ Redfern and Hunter *International Arbitration* 533.

¹⁴⁴ See 2.4.3 above for discussion on the New York Convention.

2.5.7 Tourism and culture

It is common knowledge that tourism is a fast growing economic activity worldwide. It is a labour intensive industry that brings in foreign revenue and stimulates a broad range of industries.¹⁴⁵ Because international parties are not familiar with the country of choice, they may decide to tour and learn more about the culture, norms and physical infrastructure of the seat. This could assist, among others, in determining whether the country could be used again as a seat of arbitration by the parties.

2.5.8 Political stability

Parties will generally prefer a country that is politically stable to carry out its administrative process because it offers greater certainty in ensuring the process is conducted effectively. This is important because parties want a process that is effective and saves time.¹⁴⁶

2.5.9 Other factors

Other factors include: whether the country has good physical infrastructure; is the safe to arbitrate - in the sense of the crime rate; whether there are specialised lawyers and arbitrators operating in the seat; good accommodation facilities; meeting and conference rooms; electricity and internet services; and whether the flight connection is convenient. These factors are taken into account by the parties before choosing a seat of arbitration.

2.6 Conclusion

Although arbitration is regarded as an alternative dispute resolution process that is fast and effective, it is worth noting that international trade disputes have become complex over time and it is no longer considered a fast and effective way of resolving international trade disputes. With a number of legal systems employed in arbitration, parties are expected to apply their minds in their choice of legal systems. As shown above, the seat of arbitration is essential to the success of the international arbitration process. Countries such as England, Singapore, France, Switzerland, Hong Kong, Dubai and Mauritius are considered arbitration

¹⁴⁵ Department of Environmental Affairs 2011 <http://www.environment.gov.za>.

¹⁴⁶ Namachanja 2016 *Arbitration* 50.

friendly jurisdictions because their arbitration practices are known to be effective and friendly to international trading users.¹⁴⁷

According to the above exposition, the essential legal factors that a country must meet in order to be considered a preferred seat for international commercial arbitration are: firstly - adherence to the rule of law (as shown in section 2.3.1 above); secondly - the country must have a good law of contract – in the sense that parties want to work with well-known contract law that is similar to other international trading jurisdictions and its principles are well known, For instance the principle of party autonomy is important to contract law and its importance is stressed in the United Nations Convention on Contracts for the International Sale of Goods¹⁴⁸ (the internationally accepted standard for contract law). Should an arbitration agreement be entered into in a particular country, parties want to know that it can be enforced. Thirdly - parties want a private international law that conforms to modern principles that are not lagging behind, but similar to other countries' private international law rules. Fourthly, the efficiency of the national court is important; a court is efficient if it assists, supervises and intervenes where necessary in the arbitration process (as shown in 2.4 above). For instance, most international trade countries are signatories of the Model Law, because its provisions are up to date and conform to the modern international acceptable standard. Sixth, good legal representation is crucial because parties want to reduce costs - It would be expensive to take legal representatives from their country to the seat of arbitration. Hence, a seat must have good experienced and knowledgeable arbitrators and lawyers.

Other aspects that are non-legal but essential are: the trading language; locality – where is the country's location compared to other countries; political stability; cost of arbitrating in the country; tourism and culture; accommodation facilities; electricity and internet services; and availability of meeting and conference rooms. These are not priorities of international disputing parties, but they are still taken into account for the purpose of convenience.

The next chapter will focus on the South Africa arbitration position in this regard.

¹⁴⁷ Mistelis and Friedland 2014 *International Arbitration Survey: Improvements and innovations in International Arbitration* – Queen Mary University of London 2015.

¹⁴⁸ United Nations Convention on Contracts for the International Sale of Goods 1980 - Vienna Convention ("CISG").

Chapter 3

The South African legal position

3.1 Introduction

In this chapter, the researcher will focus on the factors that influence the choice of seat of international commercial arbitration from a South Africa perspective. The elements discussed in Chapter 2 will be taken into account. This chapter will also compare relevant aspects of the *Arbitration Act* and the *Arbitration Bill*, the aim is to determine to what extent the *Arbitration Bill* will assist in improving South Africa as a regional hub for international commercial arbitration.

3.2 Defining characteristics of an arbitration agreement

Section 1 of the *Arbitration Act* defines an “arbitration agreement” as:

A written agreement providing for the reference to arbitration of any existing dispute or any future dispute relating to a matter specified in the agreement, whether an arbitrator is named or designated therein or not.

For the Act to regulate an arbitration agreement as shown above: the parties must have reached an agreement; which must be in writing; The agreement must identify whether the dispute is an existing or a future dispute; or relates to any matter specified in the arbitration agreement, regardless of whether an arbitrator is named or designated therein or not.

In a situation where the parties enter into an oral agreement, the agreement is not invalid, but is governed by common law.¹⁴⁹ Jacob submits that the requirement that the agreement should be in writing is to ensure that the parties are *ad idem*.¹⁵⁰ It is however, not necessary for the agreement to be signed by the parties or contained in one document. The author argues that the legislature assumes that the mere fact that the parties have agreed to reduce their agreement in writing is sufficient to show that there has been a meeting of minds.¹⁵¹ Unless the agreement provides otherwise, the arbitration agreement cannot be terminated unless by the consent of all the parties to the agreement.¹⁵²

¹⁴⁹ Rowley 2010 *European Lawyer Reference Series* 503.

¹⁵⁰ Jacobs *The Law of Arbitration in South Africa* 25.

¹⁵¹ Jacobs *The Law of Arbitration in South Africa* 25.

¹⁵² Section 3(1) *Arbitration Act*; *South African Transport Services v Wilson No and Another* 1990 (3) SA 333 (W): The *Arbitration Act* confirms the principle that an arbitration agreement is a distinct and separate contract and can survive on its own even if the main contract is terminated. It is regarded as a self-

The *Arbitration Bill* defines an arbitration agreement in section 1 as contained in Article 7 of the UNCITRAL Model Law. It states that:

an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

The Bill sets out certain requirements before an arbitration agreement is considered as “in writing”. Article 7(3) states that an agreement is in writing if: the content is recorded in any form, whether or not the agreement has been concluded orally, by conduct or any other means; the content is contained in an electronic communication device, provided the information is accessible and useable for subsequent reference.¹⁵³ Article 7(5) states that an:

“Electronic communication” means any communication that the parties make by means of data messages, and “data message” means information generated, sent, received or stored by electronic, magnetic, optical or electronic mail, telegram, telex or telecopy.

The requirement of writing is satisfied if it is contained in an exchange of statements of claim and defence in which the agreement is alleged by one party and not denied by the other party.¹⁵⁴ In a contract containing an arbitration clause, an arbitration agreement is in writing, provided its aim is to make that clause part of the contract.¹⁵⁵

3.3 The rule of law

The Republic of South Africa is one, sovereign, democratic state, which is founded on the supremacy of the *Constitution*,¹⁵⁶ and the rule of law. The rule of law also states that any law or conduct inconsistent with it is invalid and the obligations imposed by it must be fulfilled.¹⁵⁷ South Africa acknowledges the importance of the rule of law, and ensures that its founding values are based in its principles,¹⁵⁸ which constitute the standard against which conducts and laws are tested.¹⁵⁹

In *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council*,¹⁶⁰ the Constitutional court held that the rule of law includes, at a minimum standard, the

contained or ancillary contract to the main contract that remains in existence even when the main agreement is terminated.

¹⁵³ Article 7(4) *Arbitration Bill*.

¹⁵⁴ Article 7(5) *Arbitration Bill*.

¹⁵⁵ Article 7(6) *Arbitration Bill*.

¹⁵⁶ *Constitution* of the Republic of South Africa 1996 (*Constitution*).

¹⁵⁷ Section 2 *Constitution*.

¹⁵⁸ Section 1(c) *Constitution*.

¹⁵⁹ Moseneke “Reflections on the Rule of Law in Modern African States” 1 – 19.

¹⁶⁰ 1998 (2) SA 374 (CC).

principle of legality. Legality requires the executive,¹⁶¹ legislature¹⁶² and judiciary¹⁶³ in every sphere to act in accordance with the law and may exercise no power and perform no function that is beyond what is conferred on them by the law.¹⁶⁴ It also requires that the law should be formulated in a way that will constitute a clear guide to human conduct and will be administered evenly under the control of independent courts or tribunals.¹⁶⁵ By binding all organs of government to the law, the principle of legality ensures that all organs of state are prohibited from using their coercive power without being authorised to do so by law, and in so doing, subjecting themselves to the control of the courts.¹⁶⁶ This means that - the rule of law imposes a duty on all organs of government and individuals to resolve their disputes through the application of law.¹⁶⁷

The *Constitution* provides for an independent, impartial, dignified, accessible, and effective court of law that is subject only to the *Constitution* and the law which the courts must apply impartially, without fear, favour or prejudice.¹⁶⁸ In order to provide greater access to justice, judicial functions are increasingly entrusted to other tribunals such as the Commission for Conciliation, Mediation and Arbitration. It should be noted that even though the organs of state are expected to act separately and individually, they are still subject to one another. This is known as the principle of checks and balances which requires all organs of state to be accountable to one another, and each organ of state must not exercise more power than is expected.¹⁶⁹

3.4 The law governing the arbitral proceedings

The *Arbitration Act* is currently the governing law of domestic arbitration in South Africa. Section 2 of the Act excludes certain matters from arbitration. These include: any matrimonial cause or any matter incidental to any such cause; or any matter relating to status.¹⁷⁰ It is important to know that not all matters may be referred to arbitration. It is also important to know that parties are bound by the arbitration agreement they enter into. Which

¹⁶¹ Section 43 *Constitution*: The *Constitution* vests the legislative authority in the parliament. The parliament serves as the law making body.

¹⁶² Section 85 and 125 *Constitution*: The *Constitution* vests executive authority in the president. He is responsible for the enforcement of laws.

¹⁶³ Section 165 *Constitution*: The *Constitution* vests judicial authority in the courts.

¹⁶⁴ Kruger 2010 *PELJ* 481.

¹⁶⁵ Maswanganyi *Rule of Law in South Africa* 38.

¹⁶⁶ Maswanganyi *Rule of Law in South Africa* 39.

¹⁶⁷ Maswanganyi *Rule of Law in South Africa* 39.

¹⁶⁸ Section 165 *Constitution*.

¹⁶⁹ Mojapelo 2013 *Advocate Forum* 40.

¹⁷⁰ Section 2 *Arbitration Act*.

means the agreement cannot be terminated without the consent of all parties to the agreement.¹⁷¹

International commercial arbitration held in South Africa shall be governed by the *Arbitration Bill* if introduced. Section 4 of the *Arbitration Bill* states that the *Arbitration Act* does not apply to an arbitration agreement, arbitral award or reference to arbitration covered by this Act. The *Arbitration Act*¹⁷² will only apply to Chapter 3 of this Act.¹⁷³ Section 6 states that the Model Law applies in the Republic subject to the provisions of this Act.

Section 7 of the *Arbitration Bill* states that any international commercial dispute that the parties have agreed to submit to arbitration under an arbitration agreement and that relates to a matter the parties are entitled to dispose of by agreement, may be determined by arbitration unless such dispute cannot be resolved by arbitration under any law of the Republic, or the agreement is contrary to the public policy of the Republic.¹⁷⁴ Arbitration may not be excluded solely on the ground that an enactment confers jurisdiction on a court or other tribunal, to determine a matter falling within the terms of the arbitration agreement.

Section 8 of the *Arbitration Bill* further states that when interpreting¹⁷⁵ the provisions in this chapter,¹⁷⁶ and the Model Law,¹⁷⁷ the arbitral tribunal or the court must refer to the relevant UNCITRAL instruments for guidance, authority and references. This means that this chapter and the Model Law must not be read in isolation, but should be supported by relevant reports of the UNCITRAL.

3.5 Law of contract in South Africa

The South African common law serves as the governing law of contract. It affords parties the freedom to contract in pursuant to the general principle of party autonomy.¹⁷⁸ The common law exists alongside the Constitution, which requires all laws, including the common law, to

¹⁷¹ Section 3 *Arbitration Act*.

¹⁷² Section 2 *Arbitration Act*.

¹⁷³ See Chapter 3 *Arbitration Bill* with reference to the *REFAA*.

¹⁷⁴ Section 1 *Arbitration Bill* defines the Republic, as the Republic of South Africa.

¹⁷⁵ Section 2 *Arbitration Bill* states that a word or expression used in Chapter 2 of the Bill bears the same meaning as it has in the Model Law, unless this is inconsistent with the context and the Constitution.

¹⁷⁶ It should be noted that the *Arbitration Bill* is divided into chapters (1-4) and schedules (1-4). For the purpose of this study, the chapters will be referred to as sections and schedules and as articles as contained in the Model Law provisions. It should be noted further that the provisions of these chapters take precedence over Model Law provisions as adapted and incorporated into the Bill. It also applies where the Model Law provisions as adopted do not cater for a particular situation.

¹⁷⁷ The *Arbitration Bill* adopts the provisions of the Model Law with certain amendments and improvements to suit South African circumstances.

¹⁷⁸ Sibanda 2008 *De Jure* 324.

conform to its principles.¹⁷⁹ South African courts have also acknowledged party autonomy as the cornerstone of South African law of contract.¹⁸⁰ Contractual freedom demands that one respects the autonomy of consenting parties to contract as they deem fit.

Party autonomy has also been given Constitutional recognition by Cameron in *Brisley v Drotzky*,¹⁸¹ where he held that the *Constitution's* values of “dignity, equality and freedom” requires that the courts must approach their task of cancelling contracts or declining to enforce contracts with perceptive restraint because contractual autonomy is part of freedom. He further stated that contractual autonomy informs the constitutional value of dignity. According to Sharp,¹⁸² following the *Brisley* case, one can correctly argue that the constitutional values justify party autonomy. It should be noted that the principle of party autonomy is also an internationally recognised standard of contracting.¹⁸³

3.6 South Africa private international law

South African private international law is well developed based on Roman Dutch Law and influenced by English Law.¹⁸⁴ Most of the principles used world-wide are recognised in South Africa's private international law. The idea is to create global uniformity. International conventions¹⁸⁵ are powerful instruments in this regard, but are also limited in that a country first has to ratify the Convention before it becomes effective.¹⁸⁶

Under South African law too, the rule is that the law which creates and governs the contract (the proper law of contract), is the law that the parties have chosen or intended to govern their agreement, or in the absence of an express or implied choice of law by the parties, the legal system with which the agreement has its closest and most real connection.¹⁸⁷

¹⁷⁹ Section 2 *Constitution*.

¹⁸⁰ See *Brisley v Drotzky* 2002 SA 1 (SCA) par 94; *Sasfin (Pty) Ltd Beukes* 1989 1 SA 1 (A); *Mort v Henry Shields-Chiat* 2001 1 SA 464 (C) 475B.

¹⁸¹ *Brisley v Drotzky* 2002 SA 1 (SCA) par 94E-F.

¹⁸² Sharp *A Critical Analysis of the Role of Boni Mores in SA Law of Contract* 46.

¹⁸³ The CISG as highlighted in chapter 2, is the well-recognised international law of contract.

¹⁸⁴ Calitz 2007 *PELJ* 5: There are many similarities in the rules of private international law of different countries especially countries whose rules of private international law are based on Roman Dutch Law, but there are also some substantial differences.

¹⁸⁵ Forsyth *Private International Law* 51 – 52: For instance, the Hague Convention unifies the rules of private international law of different countries; the Rome Convention on the Law Applicable to Contractual Obligations of 1980 and the Brussels Convention of 1968 on jurisdiction and the enforcement of judgements in civil and commercial matters; Calitz 2007 *PELJ* 4.

¹⁸⁶ Calitz 2007 *PELJ* 4.

¹⁸⁷ Schulze 1995 *CILSA* 391.

In determining the legal system with the most real connection, the arbitral tribunal will take into account: where the cause of action took place; where the contract was concluded, performed or breached; and the domicile or residence of the parties, in order to determine the connecting factor.¹⁸⁸

3.6.1 *Where the lex causae is a foreign legal system*

Section 1 of the *Law of Evidence Amendment Act*¹⁸⁹ allows the court to take judicial notice of a foreign law, where the law can be ascertained readily and with sufficient certainty. In *Harnischfeger Corporation and another v Appleton and another*,¹⁹⁰ the court held that in determining whether a foreign law can be ascertained readily with sufficiency depends mainly on the availability of necessary sources of law. Forsyth says that foreign law will be ascertained as prescribed by the Act when the relevant local statutes and subordinate legislation of the foreign law are placed before the court.¹⁹¹

3.6.2 *Recognition and enforcement of foreign judgements by the courts*

South Africa is not party to any treaty regarding the reciprocal enforcement of foreign commercial judgements,¹⁹² as opposed to foreign awards. South African courts will however enforce a foreign judgement if certain common law requirements are met.¹⁹³

- Firstly, the foreign judgement must be final – it must not be capable of alteration by the foreign court that pronounced it. If an appeal has been noted, a South African court may, at its discretion, decide whether to enforce such judgement or to stay the enforcement proceeding pending the outcome of the appeal. In exercising its discretion, the court will have regard to the question of whether the foreign judgement is enforceable in its own jurisdiction pending an appeal;
- The foreign court must have had international competence: The defendant must have been present in the area of the foreign court's jurisdiction at the commencement of the action; or the defendant must have been resident in the area of the foreign court's

¹⁸⁸ Calitz 2007 *PERJ* 5.

¹⁸⁹ 45 of 1988.

¹⁹⁰ 1993 (4) SA 479 (W).

¹⁹¹ Forsyth *Private International Law in South Africa* 104.

¹⁹² For instance, the Hague Convention on the Recognition and Enforcement of Foreign Judgements in Civil and Commercial Matters 1971.

¹⁹³ Wakefield 2014 <http://www.lexafrica.com/the-enforcement-of-foreign-judgement>.

jurisdiction at the commencement of the action; or the defendant must have submitted to the jurisdiction of the foreign court either directly or by conduct.

- Thirdly, enforcement of foreign judgement must not be contrary to South African public policy or the rules of natural justice. This includes that an arbitral tribunal must have been impartial and the defendant should have had due notice of the proceeding against him. Punitive awards are regarded as contrary to public policy;
- Lastly, the foreign judgement must not fall foul of section 1 of the *Protection of Business Act*.¹⁹⁴ Section 1 states that except with the permission of the Minister of Trade and Industry, no judgement, order, direction, arbitration award given or issued or emanating from outside the Republic in connection with any act or transaction that took place at any time whether before or after the commencement of this Act, and which is connected with the mining, production, importation, exportation, refinement, possession, use of sale of or ownership of any matter or material, or whatever nature, whether within, outside, into or from South Africa.¹⁹⁵

3.7 The role of the national courts in arbitration

This section will examine the nature and extent of the national court intervention in arbitration proceedings conducted in South Africa. The aim is to determine the extent of permissible court intervention under the national law, an objective more relevant by the prospect of new international commercial arbitration in South Africa. The section will compare the position of the national courts intervention under the *Arbitration Act* and *Arbitration Bill* with regards compelling arbitration, the discovery process, remittal of awards, and the recognition and enforcement of arbitration agreement and arbitral awards.

3.7.1 Compelling a reluctant party to arbitrate and stay an action

Section 16 of the *Arbitration Act* gives the courts a wide discretion in determining whether or not a reluctant party may be compelled to arbitrate. Section 16(2) of the Act allows the arbitral tribunal to compel a reluctant party through a Magistrate Court by Subpoena. Section 16(4) of the Act provides that the court may compel a reluctant witness to attend arbitration upon request of the arbitral tribunal.

¹⁹⁴ 99 of 1978.

¹⁹⁵ Wakefield 2014 <http://www.lexafrica.com/the-enforcement-of-foreign-judgement>.

Section 6 of the *Arbitration Act* provides that the court may not stay litigation proceedings if there is no 'sufficient reason' for the matter not to be referred back to arbitration. If a party has provided sufficient reasons to stay an action, Sibanda submits that the onus will rest on the party that seeks to avoid litigation to convince the courts otherwise.¹⁹⁶ What constitutes 'sufficient reason' will depend on the circumstances of the case.¹⁹⁷ In *Welihockyj and others v Advtech Ltd and Others* 2003 (6) SA 737 (W), it was held that the requirement of 'sufficient reason' is satisfied if:

a number of legal issues are in dispute and these are technical issues that can easily be resolved by a court;¹⁹⁸ if a party against whom fraudulent conduct was alleged requests that the dispute should be resolved by an open court, and the court after weighing the dispute finds that the dispute will be properly resolved in an open court;¹⁹⁹ and if the court finds that it will be in a better position to adjudicate and conclude on the issues.²⁰⁰

In contrast, Article 8(1) of the *Arbitration Bill* states that:

A court before which an action is brought in a matter which the scope is subject of an arbitration agreement shall, if a party so request not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds the agreements is null and void, inoperative or incapable of being performed.

Article 8(2) of the *Arbitration Bill* further provides that arbitral proceeding may commence, or continue, irrespective of a challenge pending before one of the courts.

Sibanda submits that the purpose of this provision is to discourage parties from using the courts' intervention as a dilatory tactic to avoid arbitration.²⁰¹ Bredenkamp submits that by adopting the provision of the UNCITRAL Model Law in the *Arbitration Bill*, an arbitral tribunal or an arbitrator may be able to avoid the cost and delays that may arise, as well as reigning in a defiant party who constantly appeals for a court's intervention.²⁰²

3.7.2 *Discovery of Evidence*

The *Arbitration Act* grants the arbitrators the same powers as the judicial officers to order the discovery of evidence. It is a general rule that arbitral tribunal seated in South Africa follow the rules of evidence applicable to proceedings in civil courts, provided that the rules are necessary and not excluded by agreement, estoppel or waiver.²⁰³ For instance, section 16 of

¹⁹⁶ Sibanda 2008 *VJICLA* 159.

¹⁹⁷ Sibanda 2008 *VJICLA* 159.

¹⁹⁸ *Sera v De Wet* 1974 (2) SA 645 (T).

¹⁹⁹ *Welihockyj and others v Advtech Ltd and Others* 2003 (6) SA 737 (W).

²⁰⁰ *Welihockyj and others v Advtech Ltd and Others* 2003 (6) SA 737 (W).

²⁰¹ Sibanda 2008 *VJICLA* 161.

²⁰² Bredenkamp Unknown Date <http://www.pretoriabar.co.za>.

²⁰³ Sibanda 2008 *VJICLA* 161.

the *Arbitration Act* allows the arbitral tribunal to summon any person, through a Magistrate Court,²⁰⁴ to attend arbitral proceedings and to give evidence in the same way as a civil court may summon a party.²⁰⁵ Section 14(1) (a) (i) of the *Arbitration Act* also provides that discovery may be made by way of an affidavit or by interrogatories on oath.

Similarly, Section 21(1) of the Act empowers the courts to intervene before or during the arbitral proceedings. The court may intervene in the following manner: by making orders in respect of discovery; by ordering evidence to be given by affidavit, by ordering interim custody or preservation of property; and by issuing other interim orders.²⁰⁶ Sibanda submits that the level of court intervention permitted under the *Arbitration Act* offends independence and contractual nature of the arbitral process.²⁰⁷

Article 5 of the *Arbitration Bill* states that ‘no court shall intervene in arbitration proceedings unless as provided in the Model Law itself’. Although the *Arbitration Bill* limits court intervention, this provision indicates that the court may only intervene in certain circumstances. Article 27 of the *Arbitration Bill* states that:

The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of the State assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence.

Similar to section 21 of the *Arbitration Act*, Article 9 of the *Arbitration Bill* empowers the courts, upon application by either a party or an arbitral tribunal,²⁰⁸ to make any order relevant to the issue of interim relief including orders for temporary interdict,²⁰⁹ preservation,²¹⁰ interim custody or sale of which are the subject of the dispute,²¹¹ and anti-dissipation of assets.²¹²

3.7.3 Remittal of an award

Section 32(2) of the *Arbitration Act* provides that:

the court may, on the application of any party to the reference after due notice to the other party or parties made within six weeks after the publication of the award to the parties, ‘on

²⁰⁴ Section 16(4) *Arbitration Act*.

²⁰⁵ Section 16(1) *Arbitration Act* read with Section 14 *Arbitration Act*, and subject to evidence rules pertaining to competence and compellability of witnesses.

²⁰⁶ Section 21(1) (a) – (i) *Arbitration Act*.

²⁰⁷ Sibanda 2008 *VJICLA* 161.

²⁰⁸ Sibanda 2008 *VJICLA* 160.

²⁰⁹ Article 9(2) (e) *Arbitration Bill*.

²¹⁰ Article 9(2) (a) *Arbitration Bill*.

²¹¹ Article 9(2) (e) *Arbitration Bill*.

²¹² Generally Article 9 *Arbitration Bill*.

good cause shown', remit any matter which was referred to arbitration, to the arbitration tribunal for reconsideration and for the making of a further award or a fresh award or for such other purposes as the court may direct.²¹³

Remittal is an alternative to setting aside of an award, basically because the defect is minor and can be rectified by the arbitrator who granted the award, other than setting aside the arbitral award.²¹⁴ If the court decides to remit an award, the dispute returns to the original arbitrator, if he is still alive, thereby avoiding the expense and delay that comes with a fresh hearing before a new arbitral tribunal.²¹⁵ An application for remittal would be entirely inappropriate if the arbitrator's misconduct is such that the parties should not place their dispute before him again.²¹⁶

The requirement of 'on good cause shown' is satisfied if the arbitrator admits to a mistake.²¹⁷ An arbitrator has the power to correct any clerical mistake or any patent error that arises from any accidental slip or omission in his award.²¹⁸ The court has similar power to correct errors in an arbitrator's award when dealing with an application to have an award made an order of court.²¹⁹ Where an arbitrator makes an error that has a significant effect on the content of the award made, and admits to the mistake, Butler submits that the court may return the matter to the arbitrator to enable him/her to issue a fresh award.²²⁰

The requirement of 'on good cause shown' is further satisfied if the parties have discovered new evidence that could change the outcome of the arbitrator's previous decision.²²¹ The applicant must prove that he or she could not have reasonably adduced the evidence before the arbitral award was made. The court will weigh the evidence provided by the applicant to make a conclusive decision as to whether the evidence is sufficient for remission to be granted, taking into account the prejudicial effect the remittal may have on a party.²²²

²¹³ In *Benjamin v Sobac South African Building and Construction (Pty) Ltd* 1989 4 SA 940 (C) 957E-F: Although the six weeks period for a court to decide on a remittal had elapsed, the court decided not to exercise its discretion in this regard.

²¹⁴ Butler 1990 *STELL LR* 257.

²¹⁵ Butler 1990 *STELL LR* 257.

²¹⁶ Butler 1990 *STELL LR* 259: For example, where the arbitrator has misconducted himself by hearing all evidence of one party in the absence of the other party.

²¹⁷ Butler 1990 *STELL LR* 261: In common law, an arbitrator has no power to correct an error in his award, even though he admits fault on his part, basically because once he has delivered his award he is *functus officio*.

²¹⁸ Section 30 *Arbitration Act*.

²¹⁹ Section 31 *Arbitration Act*.

²²⁰ Butler 1990 *STELL LR* 261.

²²¹ In *Benjamin v Sobac South African Building and Construction (Pty) Ltd* 1989 4 SA 940 (C) 963B, the court held that a court's discretionary power is in principle available where new evidence is discovered after the publication of the award.

²²² Butler 1990 *STELL LR* 288.

Article 33 of the *Arbitration Bill* on the other hand, grants the arbitral tribunal, without any court intervention, the power to correct, interpret and make an additional award, at the request of any party to the arbitration agreement. A party giving notice to the other party may request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors or any errors of similar nature;²²³ or may request the arbitral tribunal to interpret a specific point or part of the award,²²⁴ or make an additional award that was omitted from the award.²²⁵ The arbitral tribunal will correct, interpret or make an additional award within 30 to 60 days of receipt, if it finds the request justifiable. The arbitral tribunal may extend, if necessary, the time within which it makes a correction, interpretation or an additional award.²²⁶

It is important to know that Article 33 of the *Arbitration Bill* excludes any interference of the court. The process is conducted by the arbitral tribunal on request by a party who is not satisfied with the outcome of the arbitral award.

3.7.4 Recognition and enforcement of arbitration agreements and awards

The *Arbitration Act* allows for court intervention in both the enforcement of the arbitration agreement and the recognition and enforcement of arbitral awards. Section 3 of the *Arbitration Act* allows a party to have the agreement set aside. It also allows the courts to prohibit any matter from being referred to arbitration.²²⁷ It further has the power to declare the arbitration agreement to be of no force and effect.²²⁸

Section 33 of the *Arbitration Act* states that:

Where –

- (a) any member of an arbitration tribunal has misconducted himself in relation to his duties as arbitrator or umpire; or
- (b) an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings; or
- (c) an award has been improperly obtained.

The court on application of any party, after due notice to the other party or parties, may make an order setting aside the award. In *Bester v Easigas (Pty) Ltd NS Another*²²⁹ the court

²²³ Article 33 (1) (a) *Arbitration Bill*.

²²⁴ Article 33 (1) (b) *Arbitration Bill*.

²²⁵ Article 33 (3) *Arbitration Bill*.

²²⁶ Article 33 (4) *Arbitration Bill*.

²²⁷ Section 7(1) *Arbitration Act*.

²²⁸ Section 3 *Arbitration Act*.

²²⁹ 1993 (1) SA 30 (C).

followed to the *locus classicus* in the matter of *Dickenson & Brown v Fisher's Executors*.²³⁰ It held that 'misconduct' is present where there has been some wrongful or improper conduct on the part of the arbitrator.²³¹

With regard to 'gross irregularity in the conduct of proceedings', the court in *Bester v Easigas* cited with approval the *dictum* of Mason J in *Ellis v Morgan; Ellis v Desaa*.²³² It held that 'irregularity' refers to the method of a trial such as 'high-handed or mistaken action' of a serious nature which prevents the other party from having their case fully and fairly determined.²³³

In *Telecordia Inc v Telkom SA Ltd*²³⁴ the Supreme Court of Appeal looked extensively and critically at section 33 (1) (b) of the Arbitration Act, referred to the dictum in *Dickenson & Brown v Fisher's Executors*.²³⁵ The court held that even if the arbitrator may have been wrong in his reasoning (which he was not), that did not mean that he had misconceived the nature of the inquiry or his duties or that he had acted irrationally. According to the Supreme Court of Appeal, it could not be said that the arbitrator had committed any gross irregularities in the arbitration proceedings or exceeded his powers as envisaged in s 33 (1) (b) of the Act.

In terms of the *Arbitration Bill*, Article 34 states that a party against whom recognition of award is sought may request the courts to refuse to recognise the award. The request may be upon a denial of the validity of the arbitration agreement,²³⁶ incapacity of a party,²³⁷ breach of procedural fairness such as a lack of notice or an inability to present a case,²³⁸ or ground based on a denial of natural justice argument.²³⁹ Other grounds for refusing recognition of an award includes: the lack of the proper constitution of the arbitral tribunal or the lack of due process;²⁴⁰ that the award was set aside by the competent authority of the country in which the award was made; that the award is not binding under the laws of the competent authority to which the award was made;²⁴¹ and the subject matter is not arbitral under the *lex fori*.²⁴²

²³⁰ 1915 AD 166.

²³¹ Sibanda 2008 VJICLA 167.

²³² 1909 TS 576 at 581.

²³³ Sibanda 2008 VJICLA 167.

²³⁴ 2007 (5) BCLR 503.

²³⁵ 1915 AD 166.

²³⁶ Article 36 (1) (i) *Arbitration Bill*; See also Article V (1) (a) New York Convention.

²³⁷ Article 36 (1) (a) (i) *Arbitration Bill*; Article V (1) (a) New York Convention.

²³⁸ Article 36 (1) (ii) *Arbitration Bill*.

²³⁹ Section 36(1) (a) *Arbitration Bill*.

²⁴⁰ Article 36 (1) (a) (iii) *Arbitration Bill*; See also Article V (1) (c) New York Convention.

²⁴¹ Article 36 (1) (a) *Arbitration Bill*; See also Article V (1) (d) New York Convention

²⁴² Article 36 (1) (b) (i) *Arbitration Bill*; See also Article V (1) (d) New York Convention

3.7.5 Recognition and enforcement of foreign arbitral awards

It should be noted that the recognition and enforcement foreign arbitral award in South Africa is governed by the *REFAA Act*. Section 4 of the Act states that a court will refuse to enforce a foreign arbitral award if:

the reference to arbitration is not permissible in South Africa in respect of the subject matter in dispute; where the enforcement of the award will be contrary to public policy or was made in bad faith; if the party against whom the award is enforced proves that the parties involved in the arbitration agreement lack the necessary capacity to contract, or the agreement is invalid based on the law of the country where it was made; where a party fails to give reasonable notice of the appointment of an arbitrator, or the dispute was not covered in the arbitration agreement; where the award is beyond the scope of the arbitrator; where the constitution of the arbitral tribunal does not fall within the scope of the arbitration agreement or the law of the seat; where the award was not yet binding on the parties; or where the award has been set aside or suspended by a competent authority where the award was made.

Unless one of the conditions exists, the arbitral award may be made an order of court with the effect that it is enforceable in the same manner as a judgement of the court.²⁴³ Where the award complies with the requirement of an arbitration agreement, a successful party may apply to the court with the effect of making the award an order of court.²⁴⁴

On the other hand, Section 16 (1) of *Arbitration Bill* states that subject to section 18, an arbitral award and foreign arbitral award²⁴⁵ must be recognised and enforced in the Republic as required by the Convention,²⁴⁶ subject to the provisions of this Chapter.²⁴⁷ Section 18 states that the court may only refuse to recognise and enforce a foreign arbitral award if it finds that: a reference to arbitration of the subject matter of the dispute is not permissible under the law of the Republic; or the recognition and enforcement of the award, are contrary to the public policy of the Republic.²⁴⁸

A party, against whom the award is invoked, bears the burden to proof that:

a party to the arbitration agreement had no capacity to contract under the law applicable to the arbitration agreement or is not valid under the law to which the parties have subjected to or under the law of the Republic;..... or the party given notice was not given proper notice of the appointment of an arbitrator or the arbitral proceedings or was otherwise not able to present his or her case; the award deals with issues does not contemplated, by or not falling within the terms of reference of arbitration, or contains decisions on matters beyond the scope of reference of arbitration, subject to the...;the constitution of the arbitral tribunal or the arbitration, procedure was not in accordance with the

²⁴³ Rowley 2010 *European Lawyer Reference Series* 515.

²⁴⁴ Section 31 *Arbitration Act*.

²⁴⁵ Section 14 *Arbitration Bill* defines "foreign arbitral award" as an award made in the territory of a state other than the Republic.

²⁴⁶ Section 14 *Arbitration Bill* defines "Convention" as the *REFAA*. The test is set out in Schedule 3 of the *Arbitration Bill*.

²⁴⁷ Chapter 3 *Arbitration Bill*.

²⁴⁸ Section 8(a) *Arbitration Bill*.

relevant arbitration or, if the agreement does not provide for such matters, with the law of the country in which the arbitration took place; or the awards is not yet binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made.²⁴⁹

An award that contains decisions on matters that are not subject to arbitration, may be recognised or enforced to the extent to that it contain decisions which are submitted to arbitration, and separated from those that are not submitted to arbitration.²⁵⁰ Where an application for the setting aside or suspension of an award has been made to a competent court, the court where recognition and enforcement are sought may if it considers it appropriate: adjourn its decision on the enforcement of the award; and on application of the claiming party, order the other party to provide suitable security.²⁵¹

3.8 Other aspects of arbitration in South Africa

3.8.1 Arbitration institutions

The principal arbitration institutions in South Africa are: the Arbitration Foundation of Southern Africa (AFSA);²⁵² and the Association of Arbitrators (ASA).²⁵³ The standard procedural rules published by the institutions are closely aligned with those of the Model Law and they specifically regulate matters not regulated in the *Arbitration Act*. These include: the ability of an arbitrator to rule on his or her own jurisdiction; the rules of law applicable to a dispute; and the grounds and procedure for challenging an arbitrator's appointment.²⁵⁴ Both the ASA and the AFSA have published a summary of rules, that are to find application in arbitrable matters.

A new development in South Africa is the creation of the China Africa Joint Centre Johannesburg (CAJAC) in cooperation with AFSA, the Africa Alternative Dispute Resolution

²⁴⁹ Section 18(b) *Arbitration Bill*.

²⁵⁰ Section 18(2) *Arbitration Bill*.

²⁵¹ Section 18(3) *Arbitration Bill*.

²⁵² Rules of the Arbitration Foundation of Southern Africa (AFSA): A joint venture between business organisations, the legal fraternity and accounting professions. It provides for the resolution of commercial disputes primarily by way of arbitration or mediation with a fully administered dispute resolution service and offers disputants a choice of rules depending on the size and complexity of the dispute in comfortable surroundings.

²⁵³ The Association of Arbitrators (AOA) aims to promote arbitration as a means of dispute resolution, to provide a body of experienced arbitrators and alternative dispute resolution specialists, to assist arbitrators and ADR specialists in the efficient discharge of their arbitral obligations and to make the dispute resolution process more effective. It is worth mentioning that the association has concluded co-operation agreements with a number of arbitration institutes elsewhere in the world for instance the London Court of International Arbitration.

²⁵⁴ McKenzie 2017 <http://globalarbitrationreview.com>.

(Africa ADR - AFSA's external arm), the Association of Arbitrators (ASA) and the Shanghai International Trade Arbitration Centre.²⁵⁵ These institutions will serve as an international arbitration venue for disputes involving parties from China and Africa. It is presumed that CAJAC will operate from both South Africa and China and will hear disputes relating to international trade in Africa in Johannesburg and disputes relating to international trade in China in Shanghai, respectively.²⁵⁶

McKenzie says that apart from CAJAC, there is still a need for the facilitation of other cross-border international arbitrations that fall outside the scope of CAJAC. AFSA is in the process of establishing an international body (AFSA international), which will facilitate international arbitration in the region. This division seeks to provide a specialised panel of arbitrators and specific rules that are based on the Model Law and international best practice, which will cater for a wide range of international dispute areas. AFSA international will further enhance arbitration infrastructure development in South Africa, placing South Africa within the global purview.²⁵⁷

3.8.2 Availability of experienced arbitrators and lawyers

At the moment, South Africa does not have well experienced arbitrators involved in international commercial arbitration. It should be noted that there are no restrictions preventing foreign arbitrators from operating in South Africa. This can be deduced from the fact that the restrictions applicable in court to only lawyers who have been admitted by the High Court of South Africa to practice as legal practitioners are not applicable in arbitration proceedings. As such, foreign arbitrators can act as arbitrators in international arbitration in South Africa.²⁵⁸

This could assist local arbitrators and law firms to be exposed to international commercial arbitration processes, and the manner in which these are conducted. It will also allow the parties involved in international commercial arbitration to choose for themselves their preferred arbitrators.

²⁵⁵ McKenzie 2017 <http://globalarbitrationreview.com>.

²⁵⁶ McKenzie 2017 <http://globalarbitrationreview.com>.

²⁵⁷ McKenzie 2017 <http://globalarbitrationreview.com>.

²⁵⁸ McKenzie 2017 <http://globalarbitrationreview.com>.

3.8.3 Appeal and review

With regards to appeal, section 28 of the *Arbitration Act* provides that unless the arbitration agreement states otherwise, an award is final and not subject to appeal. In *Telcordia Technologies Inc v Telkom South Africa Ltd*,²⁵⁹ Harms stated that by agreeing to arbitration, the parties waive their right to appeal, which means that they waive the right to have the merits of their dispute reconsidered. However, they may agree otherwise by appointing an arbitral tribunal to have the award subjected to appeal within the arbitral institution because they cannot by agreement impose jurisdiction on the court. With regards to review, the arbitral award is only subject to review if any of the grounds set out in section 33 of the *Arbitration Act* exists.²⁶⁰

The *Arbitration Bill* on the hand ensures that all decisions of the courts are final and not subject to appeal.

3.8.4 Language

South Africa is known as a country with a number of languages.²⁶¹ It has 11 official languages, including English. Most South Africans are multilingual, which makes communication on a local level very easy. Lawyers and arbitrators may be able to communicate with the parties involved in a dispute in the local language they understand best. When international parties are concerned, all documents and communication are best done in English, unless the parties have agreed otherwise.

3.8.5 Cost and location

The process of arbitration is meant to be speedy but too much intervention of the courts may cause unnecessary adjournments and interlocutory applications. All this serves only to delay the arbitral process and increase costs which arbitration aims to defeat. For example, in the case of *Lufuno Mphaphuli v Andrews and Bopanang Construction CC*²⁶² it was observed that the dispute between the parties started in 2003 and was only finally resolved in 2009. This

²⁵⁹ [2006] 139 SCA (RSA) at 50.

²⁶⁰ As explained above.

²⁶¹ The South Africa official languages are: Afrikaans, English, Ndebele, Swati, Setswana, Northern Sotho, Sotho, Tsonga, Venda, Xhosa and Zulu.

²⁶² (CCT 97/07) [2009] ZACC 6 at [216].

shows how the interference of the court in an arbitration process can extend the process, causing delay and unfair costs for the disputing parties.²⁶³

As stated above, South Africa is known as the third largest economy in Africa, it has vast infrastructure, both legal and general infrastructure. South Africa occupies the southern tip of Africa; its long coastline stretches more than 2500km from the desert border with Namibia on the Atlantic coast, southwards around the tip of Africa, then north to the border with subtropical Mozambique on the Indian Ocean.²⁶⁴ The country has nine provinces, which vary considerably in size.²⁶⁵ Most of its large law firms are located in big cities such as Cape Town, Durban, Pretoria and Johannesburg, but they do not deal with international commercial arbitration for many reasons associated with arbitration legislation.

3.8.6 *Availability of transport facilities*

As one of the most developed counties in Africa, South Africa is quite effective, and has a reasonably effective transport system, but there is always room for improvement.

3.8.7 *Political stability*

An unsettled political environment deprives South Africa of the experience it needs to build the country into a hub for international commercial arbitration because foreign disputants would prefer to arbitrate in countries with more predictable results.²⁶⁶ The country faces threats of government destabilisation and civil action.²⁶⁷ For instance, global analysts, the Eurasia Group²⁶⁸ recently released an overview of ten political events believed to lead to a breakdown in international relations and foreign policy, listing South Africa's so-called political crisis as cause for concern. The group suggests that the controversy surrounding the President (Jacob Zuma) and the African National Congress will only worsen and putting the country's economy at greater risk as well as damaging regional stability.

This could affect South Africa's chances of becoming a regional hub, even when the Bill is introduced. The government needs to address the issues the country's concerning the country's stability.

²⁶³ Ditedu *The Doctrine of Separability* 62.

²⁶⁴ Alexander 2002 <http://www.mapsofworld.com>.

²⁶⁵ Western Cape, Eastern Cape, Northern Cape, Free State, North West, Gauteng, Limpopo, Mpumalanga, and KwaZulu- Natal.

²⁶⁶ Wakefield 2015 <http://south-africa's-instability-scares-away-investors>.

²⁶⁷ Namachanja 2016 *Arbitration* 47.

²⁶⁸ Koza 2017 <http://www.ewn.co.za>.

3.8.8 Tourism and culture

South Africa is a country with spectacular scenery, friendly people, and world-class infrastructure that makes it one of the most desired destinations in the world.²⁶⁹ It is considered a tourist attraction with diverse cultures and languages; each cultural practice has developed its own distinctive forms of art and music and traditional rituals.²⁷⁰

3.9 Conclusion

As discussed above, there are certain factors that influence the seat of international commercial arbitration. These aspects have been discussed from a South African perspective.

South Africa is a country with a well-recognised Constitution which is the supreme law of the land; it has a good contract law which promote party autonomy and freedom to contract, and a private international law that recognises foreign judgements. Although South Africa is not affiliated to the CISG or the Hague Convention,²⁷¹ it can be submitted that its standard of practice in this regard complies with the CISG and the Hague Convention. It is recommended that South Africa adopts these Conventions for uniformity in international best practice.

With regards to the excessive national court intervention in arbitration proceedings, it can be submitted that should the *Arbitration Bill* be introduced, the power of the courts will be brought in line with the international standard. The Bill will ensure that the courts intervene when necessary. It is further submitted that the desired approach is supportive court intervention that is either sanctioned by the arbitral tribunal or done with the approval of the arbitral tribunal.²⁷² The provisions of the *Arbitration Bill* suggest that South Africa will follow the international standards and practices in international commercial arbitration. As a result, the role of the South African courts will be confined to supervisory and supportive in international commercial arbitration.

It should be noted that although the *Arbitration Bill* has not yet been introduced, the country has already taken measurable steps to improve itself as a regional hub for international commercial arbitration, for instance, the introduction of the CAJAC, Africa ADR and AFSA

²⁶⁹ Tourism in South Africa 2016 <http://www.environment.gov.za/sites/default>.

²⁷⁰ Department of Environmental Affairs 2011 <http://www.environment.gov.za>.

²⁷¹ Calitz 2007 *PELJ* 4.

²⁷² Sibanda 2008 *VJICLA* 168.

international. South Africa is still a developing country with regard to international trade, and the present introduced Bill is an appropriate time to test some theories and their associated benefits.

With regards to other factors, it is submitted that with the *Arbitration Bill* will assist in improving the knowledge, experience and skills of local arbitrators and lawyers by acquainting them with the manner in which international commercial arbitration is conducted in other countries through participating in international arbitration activists and all. It is further recommended that South Africa improves other factors that may hinder its process in becoming a seat for international commercial arbitration.

Mauritius is currently recognised as a hub for international arbitration. The next chapter will investigate the Mauritian international arbitration practice. It will focus on those elements that the country was able to satisfy in order to become a hub for international commercial arbitration.

Chapter 4

Legal position in Mauritius

4.1 Introduction

Mauritius is recognised as a small island endowed with a hybrid legal system, where the French civil law cohabits with English common law, which results from its history of French and British colonisation. The French occupied the island (then known as Isle de France) between 1710 and 1810. In 1810 when the island was captured by the British, the French Codes (known as the *Code de Procedure Civile*, *Code Penal*, *Code de Procedure Penale* and *Code de Commerce*) were still in force in Mauritius. These rules remained in force under British rule in terms of Article 8 of the *Treaty of Capitulation*, which stated that French laws and customs would be maintained under British rule.²⁷³ Over the years, amendments have been made to the existing laws and new laws have been introduced to keep up with changing circumstances.

In 2008, Mauritius introduced the Mauritian *International Arbitration Act* (Mauritian *Arbitration Act* or Act)²⁷⁴, which came into force on 1 January 2009. The Mauritian *Arbitration Act* is based largely but not exclusively on the UNCITRAL Model Law. It also incorporates the provisions of the English *Arbitration Act*, 1996 and the New Zealand *Arbitration Act*, 1996 as amended in 2007, which gives it its distinct quality. This will be discussed later in this chapter. The object of the Mauritian *Arbitration Act* is to create a favourable environment for the development of international arbitration in Mauritius.

The Mauritian *Arbitration Act* introduced two distinct and separate regimes for domestic arbitration and international arbitration. The current arbitration legislation being investigated covers only the latter. The provisions of the UNCITRAL Model Law were incorporated into the Mauritian *Arbitration Act*, in order to assist international users. Schedule 3 of the *Act* sets out where the provisions of the Model Law will be incorporated. Because of the Mauritian *Arbitration Act* and other non-legal factors, the country has become a hub for international commercial arbitration. The *Recognition and Enforcement of Foreign Arbitral Award Act* 2001 (“*REFAA* 2001”) serves as the law governing the recognition and enforcement of foreign arbitral award in Mauritius.

²⁷³ Sornum “An analysis of Mauritius as an Arbitral Seat” 7.

²⁷⁴ 37 of 2008.

This chapter will focus on Mauritius's international arbitration practice. It will take into account those factors identified in chapter 2 and all other non-legal factors that Mauritius was able to meet in order to be considered a hub for international commercial arbitration. The aim is to investigate how Mauritius's international arbitration regime can assist South Africa in its quest to become a preferred seat for international arbitration.

4.2 Defining characteristics of an arbitration agreement in Mauritian arbitration legislation

Mauritian *Arbitration Act* defines an "arbitration agreement" as an agreement by which the parties agree to submit all or certain disputes which have arisen or may arise between them in respect of a legal relationship, whether contractual or not to arbitration.²⁷⁵ An "arbitration agreement", "electronic communications" and "data messages" are defined in Section 2(1) of the Act.²⁷⁶ Section 4 states that an arbitration agreement may take the form of an arbitration clause in a main contract or other legal instrument or in the form of a separate agreement, and the agreement must be in writing. The phrase "other legal instrument" was added to Section 4(1) (a) with the aim to ensure that investment treaty arbitrations that arise under bilateral or multilateral investment treaties are also covered by the *Arbitration Act*.

4.3 The rule of law

The *Constitution* of the Republic of Mauritius (*Constitution*),²⁷⁷ states that Mauritius is a sovereign democratic state which is founded on the supremacy of the *Constitution*, to the effect that any laws that are inconsistent with the *Constitution* are void to the extent of their inconsistency. The branches of government are divided into: the legislative; executive; and judiciary. This division is based on the doctrine of separation of power to prevent abuse of power and acts as a weapon against arbitral control. Section 45 of the *Constitution* grants the law making power to parliament, to ensure good governance, peace and order in Mauritius. The judiciary system is responsible for the administration of justice and makes provision for a mechanism for the resolution of disputes.²⁷⁸ It is responsible for interpreting the law, while the executive is responsible for implementing the laws made by the executive authority which comprises the President, ministers and others.²⁷⁹

²⁷⁵ Section 1 *Arbitration Act*.

²⁷⁶ It is the same as defined in Article 7 of the Model Law.

²⁷⁷ *Constitution* of the Republic of Mauritius 1968 as amended in 2010.

²⁷⁸ Section 76 *Constitution*.

²⁷⁹ Section 58 and 59 *Constitution*.

The *Constitution* ensures that the judicial system is independent and separate from the other arms of government, which is responsible for the administration of justice and has a mission to maintain an independent and competent legal system with the aim to uphold the rule of law, safeguard the rights and freedom of all citizens and promotes domestic and international confidence in the legal system.

The *Constitution* places the Supreme Court as the highest court of the land.²⁸⁰ The Supreme Court describes the rule of law as the citadel that guards the people against dictatorship, and guards the government against anarchy.²⁸¹ The Supreme Court is granted unlimited jurisdiction to hear and determine any civil or criminal proceedings under any law other than a disciplinary law and its powers are conferred on it by the *Constitution* or any other law.²⁸² The *Constitution* also states that the Supreme Court shall have jurisdiction to supervise any civil or criminal proceedings brought before a subordinate court. Hence, by embracing the rule of law, international trading parties will feel confident in trading in the country knowing that its legal system is fair and impartial.²⁸³

4.4 The law governing arbitral proceedings

The *Arbitration Act* serves as the governing law for international commercial arbitration in Mauritius. It differentiates between domestic and international arbitration, making it clear that this Act it applies exclusively to international commercial arbitration.²⁸⁴ According to its preamble, the purpose of the Act is to promote the use of Mauritius as a venue for international commercial arbitration.²⁸⁵ The Act provides for: the composition of an arbitral process; the conduct of arbitral proceedings; the role of the courts in the arbitration process; the handing down of an arbitral award; the role of the Permanent Court of Appeal (“PCA”) in the arbitration process; appeal proceedings; and the recognition and enforcement of foreign awards.

²⁸⁰ Section 76 *Constitution*.

²⁸¹ Boolell 2011 “Impact on the Rule of Law” 1-8.

²⁸² Section 76 *Constitution*.

²⁸³ Boolell 2011 “Impact on the Rule of Law” 1-8.

²⁸⁴ Soopramaniem 2013 *International Arbitration Law Review* 4; at the Mauritius Conference (MIAC) which was held in the country in December 2010, the Act was hailed as a major milestone for the country to promote itself as a platform of international commercial arbitration in Africa. See also section 3(c) providing that the Act shall apply exclusively to international arbitration.

²⁸⁵ Sornum “An Analysis of Mauritius as an Arbitral Seat” 50; See also Mauritian *Arbitration Act* preamble.

4.5 Mauritian law of contract

The law of contract in Mauritius is governed by the *Code Napoleon (Civil Code)*, which is based on the *French Civil Code*, and it provides adequately for commercial contracts. There is also the *Code de Commerce*, and other legislation such as the *Companies Act* of 2001, which deals adequately with issues concerning commercial contracts.²⁸⁶ The law is regarded as modern and stable, and amendments are often made to ensure that it remains up to date.²⁸⁷ Mauritius is also a signatory to the United Nations Convention on Contracts for the International Sale of Goods (Vienna Convention – CISG). The CISG is an influential, modern, uniform substantive international law Convention²⁸⁸ aimed at harmonising and unifying the law of international trade.²⁸⁹ It governs the formation of a contract for the international sale of goods, as well as the rights and obligations of the parties involved.²⁹⁰ It is a well-known international convention used by most international trading countries in the world. The CISG is applicable to contracts of sale of goods between parties that have their places of business in different states either because the states are contracting states, or because the private international law rules lead to its application.²⁹¹

Its founding values are based on party autonomy and freedom of contract.²⁹² The Convention ensures that parties are free to contract as they deem fit provided it falls within the ambit of the law. It also entails that the parties may contract in any form,²⁹³ and they are not subject to any requirements unless they have agreed to a particular form. The parties are bound to the agreement they voluntarily enter into.²⁹⁴ The Convention also requires the principle of good faith and fair dealings to be taken into account by parties when entering into a contract.²⁹⁵

²⁸⁶ Sornum “An analysis of Mauritius as an Arbitral Seat” 16.

²⁸⁷ Sornum “An analysis of Mauritius as an Arbitral Seat” 16.

²⁸⁸ Wethmar-Lemmer 2011 *De Jure* 289.

²⁸⁹ See CISG preamble.

²⁹⁰ Wethmar-Lemmer 2011 *De Jure* 289.

²⁹¹ Article 1 *CISG*.

²⁹² Article 6 *CISG*.

²⁹³ Article 11 *CISG*.

²⁹⁴ Article 9 *CISG*.

²⁹⁵ Article 7 *CISG*.

4.6 Private International law

As with the law of contract in Mauritius, its private international law is based on the *French Civil Code* 1804. Mauritius has no codified legislation regulating its private international law. This aspect is contained in a number of Mauritian codes,²⁹⁶ and also in case laws.

4.6.1 Finding the proper law of contract

In order to determine the applicable law, the court will start by: establishing jurisdiction; understanding the nature and characteristics of the dispute; considering the connecting factors to the characterised dispute that has been identified; and finally ascertaining the legal system as identified.²⁹⁷

Just like most foreign jurisdictions with regards to the proper law of contract, the parties must agree on the proper law of contract. In the absence of such an agreement, the legal system with which the agreement has the closest and most real connection will apply. The court or arbitral tribunal also take into account: the place where the contract was concluded; where performance took place; where breach occurred and; the domicile or residence of the parties.

4.6.2 Proof of foreign law

In *D'Arifat v Lesuer*,²⁹⁸ the court held that foreign law is a matter of fact that can only be proved by expert evidence.

4.6.3 Recognition and enforcement of foreign judgements

In order to enforce foreign judgement, certain conditions must be fulfilled. These conditions are not contained in the Mauritian *Code of Civil Procedure* 1808, but have been consistently applied by the Supreme Court of Mauritius. These conditions were laid down by a full bench of the Supreme Court in *D'Arifat v Lesuer*.²⁹⁹

These conditions are the following:

- The foreign judgement is still valid and capable of execution in the country where it was delivered;

²⁹⁶ Civil Code, Commercial Code, Consumer Code.

²⁹⁷ Forsyth *Private International Law* 51 – 52.

²⁹⁸ 1949 MR 191.

²⁹⁹ [1949 MR 191].

- It must not be contrary to public policy or any principle affecting public order;
- The defendant was regularly summoned to attend the proceedings;
- The court that delivered the judgement has the jurisdiction to deal with the matter.³⁰⁰

In light of the above conditions, the party seeking to apply for an order to recognise and enforce foreign judgement in Mauritius must submit expert evidence which confirms that the above conditions have been met.³⁰¹

4.7 Specific features of the Mauritian Arbitration Act

4.7.1 Power of the Supreme Court

The *Arbitration Act* provides that all court applications relating to arbitration should be made to a panel of three judges of the Supreme Court,³⁰² with a direct and automatic right of appeal to the Privy Council. The Act affirmed the position that the Supreme Court is the highest court of the land. It ensures that the Supreme Court deals with all issues relating to arbitration. This will give international users the reassurance that any issue relating to arbitration brought before a Court of the land will be handled and disposed of swiftly, and by eminently qualified jurists.³⁰³ The Supreme Court shall only intervene in the arbitration proceeding to the extent allowed by the Act.³⁰⁴

4.7.2 The role of the Permanent Court of Appeal

The Mauritian *Arbitration Act* adopts a uniquely modern solution in disconnecting the arbitral proceedings from the national courts by introducing the PCA. The PCA is a neutral international organisation based in The Hague. It has been an authority of reference under the UNCITRAL rules for years.³⁰⁵ It is uniquely designed to fulfil the role of appointing and administrative functions in an independent and efficient manner.

In order to ensure effectiveness on the part of the PCA, the government of Mauritius concluded a host country agreement with the PCA pursuant to which the PCA appointed a permanent representative for Mauritius funded by the government, whose tasks entail assisting the secretary-general of the PCA in discharging all his functions under the

³⁰⁰ *D'Arifat v Lesuer* [1949 MR 191].

³⁰¹ *D'Arifat v Lesuer* [1949 MR 191].

³⁰² Section 42 (1) *Mauritian Arbitration Act*.

³⁰³ *Mbithi International Commercial Arbitration in Kenya* 54.

³⁰⁴ Section 2A *Mauritian Arbitration Act*.

³⁰⁵ Mauritius Travaux Préparatoires, par 2 (d) (ii).

Arbitration Act, and of promoting Mauritius as a seat for international arbitration within the region and beyond.³⁰⁶ In order to avoid delay in the process and the use of dilatory tactics by recalcitrant parties, the Act expressly provides that all the decisions of the PCA are final and not subject to appeal or review. It further states that any complaints regarding the outcome of the decisions can only be directed at an award rendered by the arbitral tribunal in the proceedings.³⁰⁷

4.8 The role of the Supreme Court

4.8.1 Substantive claim before the courts

Section 5 gives effect to Mauritius's obligations under Article XI (c)³⁰⁸ of the New York Convention.³⁰⁹ The Act provides that any dispute that is subject to an arbitration agreement that is brought before any court should automatically be transferred to the Supreme Court.³¹⁰ The Supreme Court shall refer the dispute to arbitration unless either party who refuses to have the matter referred to arbitration can show on a *prima facie* basis that there is a strong probability that the arbitration agreement is null and void, inoperative or incapable of being performed.³¹¹

This mechanism is intended to ensure that parties are always referred to arbitration save in exceptional circumstances. The burden of proof rests on the party seeking to impugn the arbitration agreement. Where doubt remains after a *prima facie* case has been proven, that doubt must be resolved in favour of referral to arbitration without a full trial of the unresolved issues. It will then fall upon the arbitrators to resolve these issues in terms of Section 20 of the *Arbitration Act*.³¹² This section will be discussed below.

4.8.2 Power of the Supreme Court to issue interim measures

Section 23 (1) states that the Supreme Court shall have the same power as the arbitral tribunal to issue an interim measure in relation to arbitration proceedings as it has in relation

³⁰⁶ Mauritius Travaux Préparatoires, par 17 (b) (i).

³⁰⁷ Section 19 (5) Mauritian *Arbitration Act*.

³⁰⁸ Article XI(c) of the New York Convention states that "a federal state party to the Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of law and practice of the federation and its constituent units in regard to any particular provision showing the extent to which effect has been given to the provision by legislative or other action".

³⁰⁹ Mauritius Travaux Préparatoires, par 40.

³¹⁰ Section 5 *Arbitration Act* enacts Article 8 Model Law and gives effect to Mauritius' obligations under Article II.3 of the New York Convention.

³¹¹ Section 42 Mauritian *Arbitration Act*.

³¹² Mauritius Travaux Préparatoires, par 43.

to proceedings in court, regardless of whether the arbitration is seated in Mauritius or not. The court shall have regard to the specific features of international arbitration, and whether that power is usually exercised by a judge in chambers or otherwise.³¹³ Section 23 (2A) states that the court shall exercise the power in such a way as to support, and not to disrupt, the existing or contemplated arbitration proceedings. Where the case is one of urgency, the court may make such order as it thinks necessary.³¹⁴ Where the case is not one of urgency, the court shall act only on the application of a party to the arbitral proceedings made – on notice to the other parties and to the arbitral tribunal; and with the permission of the arbitral tribunal or the written agreement of the other parties.³¹⁵ Section 23 (5) states that the court shall act only to the extent that the arbitral tribunal or other institution or person vested with power in this regard, has no power or is unable to function for the time being. Section 23 (6) states that where the court makes an order, an order of the court shall cease to have effect on the order of the arbitral tribunal, institution, or person having power to act in relation to the subject matter of the order.

4.8.3 *Recognition and enforcement of interim measures*

The court may refuse recognition and enforcement only at the request of the party against whom the measure is invoked: where the court is satisfied that the refusal is warranted on the grounds set out in section 39(2)(a);³¹⁶ where the arbitral tribunal's decision in respect of the provision of security in relation to the proceeding is not complied with; where the measure is incompatible with the powers conferred on the court unless the court decides to reformulate the measure to the extent necessary to adapt it to its power and purpose; and any of the grounds set out in section 39(2)(b)³¹⁷ that applies to the recognition and enforcement of the measure. Any determination made by the court in this regard is effective

³¹³ The provision of the English *Arbitration Act*, 1996 was followed in this regard. The Act adopted section 44 of the English *Arbitration Act*.

³¹⁴ Section 23 (3) Mauritian *Arbitration Act*.

³¹⁵ Section 23 (4) Mauritian *Arbitration Act*.

³¹⁶ Section 39(2)(a) Mauritian *Arbitration Act* states that an award may be set aside by the Supreme Court where: the party making the application furnishes proof that a party to the arbitration agreement was under some incapacity or the agreement was invalid; it was not given proper notice of the appointment of an arbitrator or arbitral proceeding or was unable to present its case; or the award deals with a dispute not contemplated by, or not falling within the terms of the submission, or contains a decision on a matter beyond the scope of the arbitration, or the composition of the arbitral tribunal or the procedure was not in accordance with the agreement of the parties, or such agreement was not in accordance with the Act.

³¹⁷ Section 39 (2) (b) Mauritian *Arbitration Act*. The court finds that the matter is not capable of settlement under arbitration; the award is in conflict with public policy; the making of the award was induced or affected by fraud or corruption; or breach of the rules of natural justice occurred during the arbitral proceedings or in connection with the making of an award by which the rights of any of the parties have been or will be substantially prejudiced.

only for the purpose of interim measures.³¹⁸ The court in reaching its decision shall not undertake to review the substance of the interim measure.

4.8.4 *Court assistance in taking evidence*

Section 29(1) provides that the arbitral tribunal or a party with the approval of the arbitral tribunal may request from the Supreme Court assistance in taking evidence. The court may deal with this request according to its own rules when taking evidence. Section 29(2) specifies without any limitation, the two powers that are available to the Supreme court: the court may summon a witness, give evidence or produce relevant documents before an arbitral tribunal; or order that any witness must submit to examination on oath before the arbitral tribunal or before an officer of the court or any person for the purpose of the arbitration process.

4.8.5 *Exclusive recourse against award*

Section 39 (1) (a) states that an arbitral award may be set aside by the Supreme Court only where the party making the application furnishes proof that: a party to the arbitration agreement was under some incapacity; or the agreement is not valid under the law agreed upon by the parties or the Mauritian law; or the party was not given proper notice of the appointment of an arbitrator of arbitral tribunal; or was unable to present its case; or where the award deals with an issue not contemplated or falling within the scope of the arbitration or the arbitration agreement; or where the composition of the arbitral tribunal or arbitral procedure was not in accordance with the agreement of the parties, arbitration agreement, or in accordance with the law. The court may set aside an award if: it finds that the subject matter of the dispute is not capable of settlement by arbitration; the award is in conflict with the public policy of Mauritius; the making of the award was induced or affected by fraud or corruption; or where a breach of the rules of natural justice occurred during the arbitral proceedings or in connection with the making of the award.³¹⁹ The Act extends the grounds for setting aside an award to include: fraud or corruption; and breach of the rules of natural justice". This is in line with the modifications already made in Singapore and in New Zealand.³²⁰

³¹⁸ Section 22(5) Mauritian *Arbitration Act*.

³¹⁹ Section 39(2) (b) (iii) and (iv) *Arbitration Act*.

³²⁰ Mauritius Travaux Préparatoires, par 130.

4.8.6 Recognition and enforcement of foreign arbitral award

Section 40 sets out the regime for the recognition and enforcement of arbitral awards. It states that the *REFAA* 2001 shall apply to the recognition and enforcement of awards rendered under this Act. It should be noted that the provisions of the *REFAA* Act are similar to those contained in the New York Convention as explained in Chapter 2.

4.9 Other aspects of Arbitration in Mauritius

4.9.1 Arbitral institution

It should be noted that the *Arbitration Act* does not link international commercial arbitration held in Mauritius to any arbitral institution, or any institutional rules. The primary aim of this Act is to make Mauritius arbitration friendly to all international users, whether such arbitration arises under an *ad hoc* agreement or an institutional rule.

In 2011, Mauritius introduced the Mauritius International Arbitration Centre (MIAC). The centre is a product of the Mauritius Chamber of Commerce, which was founded in 1850, and it remains the oldest business group in the country.³²¹ The centre also partnered with the London Court of International Arbitration, and it is referred to as the LCIA-MIAC. By joining the experience and expertise of the LCIA, which is one of the oldest established arbitral institution in the world, Mauritius intends to offer the services offered by the LCIA with necessary care to ensure the expeditious, cost effective and totally neutral administration of arbitral proceedings and other forms of ADR conducted under its auspices, whether according to the LCIA-MIAC's rules or the UNCITRAL rules, or any procedural rules parties may have agreed to.³²²

4.9.2 Availability of experienced lawyers or arbitrators

Section 31 of the *Arbitration Act* expressly clarifies that foreign lawyers are entitled to represent parties and to act as arbitrators in international commercial arbitration held in Mauritius. It is submitted that this is a great development in Mauritius's arbitration practice. This will give parties the opportunity to appoint lawyers or persons who are well-versed in international arbitration, but who may not be from Mauritius.³²³ Sornum says that this is a sign that Mauritius has not isolated itself from other countries, and has moved beyond its

³²¹ Mbiti *International Commercial Arbitration in Kenya* 55.

³²² Mbiti *International Commercial Arbitration in Kenya* 55.

³²³ Mbiti *International Commercial Arbitration in Kenya* 55.

national interest in an effort to become a successful seat for international commercial arbitration.³²⁴ Furthermore, it is submitted that despite being located on a small island, Mauritian lawyers are becoming specialist in international commercial arbitration, especially with the assistance of the PCA.³²⁵ It is worth noting that, one of the duties of the PCA is to engage in training and educating individuals about international arbitration in order to cultivate a pro-arbitration environment.³²⁶

4.9.3 Appeal and review

The decision of the arbitral tribunal or the PCA is final and binding upon all parties, and it is not subject to appeal or review. The parties may exercise their autonomy by agreeing among themselves that their dispute will be subject to appeal or review with the arbitral tribunal but not by a court or the PCA.

4.9.4 Language, cultural diversity and tourism

One of the strengths of Mauritius is its cultural diversity. Not only does the country have a hybrid legal system, its people are mostly bilingual or multilingual, being quite fluent in English and French.³²⁷ These languages are well used in international arbitration, as well as Creole and Asian languages.³²⁸ This means that the country has lawyers who are conversant with the different legal systems and can communicate effectively in various languages.

Furthermore, Mauritius is known as a beautiful island that is 500 miles away from the coast of Madagascar. It has natural beaches, tropical forests and mountains, very calm sea conditions, pleasant weather and a friendly local population, making this island a tourist destination for people from all over the world.³²⁹

4.9.5 Cost and location

Mauritius is geographically situated in the Indian Ocean, at the cross roads of Africa, Europe and Asia.³³⁰ It has a good business relationship with both India and China, the two rising

³²⁴ Sornum "An analysis of Mauritius as an Arbitral Seat" 17.

³²⁵ Sornum "An analysis of Mauritius as an Arbitral Seat" 17.

³²⁶ Sornum "An analysis of Mauritius as an Arbitral Seat" 17.

³²⁷ Sornum "An analysis of Mauritius as an Arbitral Seat" 18.

³²⁸ For instance: Yue Chinese; Tami; Thai; Panjabi etcetera.

³²⁹ Private Ocean Island 2013 <http://www.privateoceanislands.com/mauritius>.

³³⁰ MIAC 2010 "Flaws and Presumptions: Rethinking Arbitration Law and Practice in a New Arbitral Seat, Mauritius".

economic powers in the world.³³¹ Parties from China and Africa are currently entering into trade and their routes are often through Mauritius.³³² This has given Mauritius the opportunity to position itself as a hub for dispute resolution between Chinese disputants and African disputants. Mauritius is also well positioned to get international parties who trade in India to mention it as a venue for resolving their disputes,³³³ especially because arbitral proceedings in India are often delayed significantly when parties need to have recourse to the courts.³³⁴ Mauritius presents a better option since it has a better legal infrastructure and; its courts are in a better position to deal with disputes in a neutral, speedy and efficient manner, enabling parties to save time and money.³³⁵ Indian lawyers are encouraged to choose Mauritius as a venue for international arbitration. Parties to international arbitration in African, China and India can arbitrate in Mauritius and save on the cost and expenses associated with arbitrating abroad, yet assured of effective and efficient arbitral proceedings.

4.9.6 Available transport facilities

In order to build its relationship with other countries and build its reputation, the country has invested in improving its air transport facilities. There are already regular flights from Mauritius to Europe, South Africa, Singapore and India. The government has also built a new terminal at the airport of Mauritius, which can accommodate at least 4.5 million passengers annually.³³⁶ Moreover, a memorandum of understanding has been signed with Singapore to allow at least 14 flights weekly.³³⁷ Investing in upgrading its traveling has helped in promoting the country the country on international level.

4.9.7 Political stability

Mauritius is a politically stable country, with a long tradition of democracy, the rule of law and good governance.³³⁸ For the third consecutive year,³³⁹ the Mo Ibrahim Index of African Governance ranked Mauritius first out of 53 African countries.³⁴⁰

³³¹ Sornum “An analysis of Mauritius as an Arbitral Seat” 18.

³³² Sornum “An analysis of Mauritius as an Arbitral Seat” 18.

³³³ Sornum “An analysis of Mauritius as an Arbitral Seat” 18.

³³⁴ Sornum “An analysis of Mauritius as an Arbitral Seat” 18.

³³⁵ Sornum “An analysis of Mauritius as an Arbitral Seat” 18.

³³⁶ Airport world 2013 <http://www.airport-world.com.mauritius.investment>.

³³⁷ Sornum “An analysis of Mauritius as an Arbitral Seat” 18.

³³⁸ Meiring 2011 *Advocate Forum* 20 – 21.

³³⁹ 2008 – 2010.

³⁴⁰ Sornum “An analysis of Mauritius as an Arbitral Seat” 18.

4.10 Conclusion

The reform of Mauritian arbitration legislation includes the following: first, updating and modifying its arbitration practice (introducing two separate pieces of legislation for domestic and international arbitration); second, introducing international arbitration legislation based on the Model Law and modifying some of its provisions to satisfy the country's needs; third, introducing the PCA from The Hague, of which the role is aimed at appointing and performing administrative functions. The aim of introducing the PCA is to reduce courts' intervention in the arbitration process and to introduce a system that creates room for informal proceedings, other than frequent court intervention. Fourth, the *Arbitration Act* ensures that the Supreme Court serves as the highest court of the land, and deals with arbitration processes. The *Arbitration Act* also ensures that only in exceptional circumstances is the court allowed to intervene in an arbitration process as shown above.

Other elements that influence the seat of arbitration are discussed above. Mauritius is a growing economy in Africa, and in order to be considered a competitive country in Africa or the world as a whole, there is a need for its constant growth in international trade. The country is taking all relevant steps in improving itself as a hub for international arbitration, especially on the African continent. Mauritius, just like South Africa is still a developing country with regard to international trading, but the country continues to upgrade itself. Should Mauritius lag behind in any of its infrastructure (legal and non-legal infrastructure), it may fall behind other countries and no longer be considered a hub for international commercial arbitration.

In the next chapter, the South African and Mauritian arbitration practice will be compared.

Chapter 5

Comparison

5.1 Introduction

This chapter is based on the information contained in the previous chapters pertaining to the Mauritian and South African international arbitration regime. The purpose of this chapter is to compare the Mauritian and South African arbitration position.

5.2 South Africa international commercial arbitration legislation

5.2.1 Present position

At present, there is no legislation expressly governing international commercial arbitration in South Africa. The *Arbitration Act* still serves as the governing law of arbitration for both international and domestic arbitration.

5.2.2 Possible future position: International Arbitration Bill 2017

It is presumed that the *Arbitration Bill* will soon be introduced as the legislation governing international commercial arbitration in South Africa.

The *Arbitration Bill* has expressly stipulated provisions regarding the following: the application;³⁴¹ an arbitration agreement;³⁴² party autonomy;³⁴³ the extent of court intervention;³⁴⁴ and the recognition and enforcement of foreign arbitral awards.³⁴⁵ The *Bill* aims to encourage the use of arbitration as an alternative dispute resolution mechanism in the international commercial arbitration sphere.³⁴⁶ This in turn will contribute to the goal of the UNCITRAL – to harmonise and unify international commercial arbitration. The *Bill* creates more clarity and certainty for parties as it stipulates in section 7 that it applies only to international commercial arbitration.³⁴⁷

It should be noted that the *Bill* does not contain all the provisions of the UNCITRAL Model Law. Certain provisions were added, and some were modified to suit South African

³⁴¹ Article 1 *Arbitration Bill*.

³⁴² Article 7 *Arbitration Bill*.

³⁴³ Article 10 *Arbitration Bill*.

³⁴⁴ Article 5 *Arbitration Bill*.

³⁴⁵ Chapter 3 *Arbitration Bill*.

³⁴⁶ Section 3 *Arbitration Bill*.

³⁴⁷ Section 7 *Arbitration Bill*.

circumstances, for example, the number of arbitrators, and the grounds for challenging the appointment of an arbitrator.

5.3 Mauritian international arbitration position

5.3.1 Present position

Mauritius's *International Arbitration Act* focuses solely on international commercial arbitration held in the country. Mauritius also incorporates the provisions of the Model Law as discussed in Chapter 4 of this study and certain provisions of the English *Arbitration Act*, and the New Zealand *Arbitration Act*.

The Act makes provision for the following: its application;³⁴⁸ an arbitration agreement;³⁴⁹ the extent of court intervention;³⁵⁰ the role of the PCA,³⁵¹ and the recognition and enforcement of foreign arbitral awards.³⁵² The provisions of the Mauritian *Arbitration Act* are similar to those of the Model Law and most Model Law jurisdictions.

5.3.2 Possible future position

It is presumed that any changes to the Mauritian *Arbitration Act* may be made as a result of changes to the Model Law or the needs of the country.

5.4 Other aspects that are essential for the seat of international commercial arbitration in South Africa and Mauritius

5.4.1 Rule of law, the law of contract and the private international law

The *Constitution*³⁵³ serves as the supreme law of the land. South Africa and Mauritius highlight the importance of the rule of law in their *Constitutions*.³⁵⁴ South Africa is not yet a signatory to the CISG; however its common law rules on the law of contract are similar to those contained in the CISG. Mauritius is a signatory to the CISG. It is advised at this stage that South Africa should become a state party to the CISG. Even though South Africa can use the CISG provisions in its contracts without becoming a signatory, it is advised for international purposes to update its legislation to the international standard.

³⁴⁸ Section 3 Mauritian *Arbitration Act*.

³⁴⁹ Section 4 Mauritian *Arbitration Act*.

³⁵⁰ Section 2A Mauritian *Arbitration Act*.

³⁵¹ Section 1 Mauritian *Arbitration Act*.

³⁵² Section 40 Mauritian *Arbitration Act*.

³⁵³ *Constitution* 1996.

³⁵⁴ *Constitution* 1968 as amended in 2010.

South African's private international law is based on Roman Dutch law and influenced by English law. Mauritius's private international law is based on French law. It should be noted that most of the principles in both countries private international laws are similar to those recognised internationally.

5.4.2 Arbitration institutions, availability of experienced lawyers and arbitrators

South Africa has a number of well-established national arbitration institutions (AFSA and ASA), lawyers and arbitrators who are efficient and effective for domestic arbitration. It has also introduced the CAJAC that will operate between South Africa and China. Although the country is taking steps to improve itself, it is advised that South Africa should get involved or partner with any other international commercial arbitration centre, such as the ICC or the LCIA. This will assist in grooming the country's arbitration institutions, lawyers and arbitrators, equipping them with the necessary skills and knowledge in the field of international commercial arbitration.

Mauritius has partnered with the LCIA, and introduced the LCIA-MIAC Arbitration Centre. It aims to speed up its growth by gaining experience and skills related to the international commercial arbitration process.³⁵⁵

The Act also encourages parties to engage foreign lawyers to act as arbitrators,³⁵⁶ giving the parties the opportunity to appoint arbitrators of their choice with vast knowledge of international commercial arbitration. South African's position in this regard is unknown at this stage. In the interim, it is advised that foreign arbitrators and lawyers be allowed to assist parties in international commercial arbitration matters, until such time as the local arbitrators acquire the necessary skills and knowledge for international commercial arbitration. Even afterwards, there is no reason why foreign arbitrators should not be allowed to represent international parties. This will promote party autonomy in the long run.

5.4.3 Language, cost and location, availability of transport facilities

South Africa is a country with a number of languages, English being one of them. Although Mauritius has the added advantage of French, English is one of the common languages in international trade and arbitration. Hence language might never be a problem.

³⁵⁵ Mbiti *International Commercial Arbitration in Kenya* 55.

³⁵⁶ Section 31 *Arbitration Act*.

Just like Mauritius, South Africa is at the centre of Africa, which means that parties from China, India, and many African countries may consider the country a hub for international commercial arbitration, and may cut the cost of travelling abroad to find experienced arbitrators and lawyers. Being one of the most developed countries in Africa, South Africa has quite good transport facilities. Although Mauritius is considered a hub for international commercial arbitration, the country is still improving itself, among others by making transport facilities for more convenient. It is advised that South Africa should follow suit in this regard, and consider those aspects in its infrastructure that need upgrading.

5.4.4 Political stability, tourism and cultural diversity

South Africa is a country known for its beautiful tourist attractions and cultural diversity.

However, one problem that the country may face in its future international commercial arbitration practice and international trade could be its political stability as discussed in Chapter 3 of this study. This could deter international trading parties from arbitrating in South Africa. Parties involved in international dispute always prefer a politically stable country because, political stability ensures legislation is stable. Unfortunately, this cannot be corrected by the *Arbitration Bill*, only by the government.

Mauritius is considered a stable democratic country that promotes the rule of law and good governance.³⁵⁷ It is advised that the South African government should focus on stabilising the country, to assure international trading parties that its legislation is also stable.

5.5 Conclusion regarding South Africa

Basing the *Arbitration Bill* on the UNCITRAL Model Law, with a few modifications, could enhance South Africa's position as a possible hub for international commercial arbitration. The *Arbitration Bill* will create more clarity and certainty for international users. It will also create clarity and certainty for international parties who are already familiar with the Model Law. However, there are other aspects that South Africa still needs to improve, for the purpose of international commercial arbitration. This has been discussed above. South Africa is advised to take measurable steps to achieve this soon.

³⁵⁷ Meiring 2011 *Advocate Forum* 20 – 21.

5.6 Conclusion regarding Mauritius

Since the enactment of its *Arbitration Act*, the country has continued to take measurable steps to improve itself as a sought after venue for international commercial arbitration. The country has introduced the PCA to regulate and reduce courts' interference in the arbitration process, and has given more power to the arbitral tribunal and the PCA.

The PCA also helps to train arbitrators and lawyers to become specialists in this field. The country has partnered with the LCIA, and exposed itself to other international arbitral institutions. It further ensures that it does not limit itself to local arbitrators and lawyers but allows foreign lawyers and arbitrators to ensure effectiveness and promote party autonomy. It should be noted that the country is improving its general infrastructure as well for instance, its air transportation facilities. These are the factors that have contributed to the country's growth internationally.

Chapter 6

Conclusions

6.1 *International trade as a growing industry in the world*

With the rapid growth of international trade in the world, arbitration, as an alternative to dispute resolution continues to grow and flourish. There are countries, both under-developed and developing ones that are still reluctant to develop themselves in the international trading industry. Their reasons are unknown, but most may be associated with lack of resources, information or knowledge. However, none can fight against or stop the rapid growth of international trade. In due time, countries that have failed to acknowledge the importance of international trade and international commercial arbitration will be left behind, while the whole world keeps moving forward without them. This will be detrimental to such countries because no country will want to have any international relationship with them.

The UNCITRAL Model Law has proven to be the most important tool (international instrument) regulating the growth of international trade and international commercial arbitration throughout the world.³⁵⁸ It is used by most countries in the world that have acknowledged the importance of international trade and commercial arbitration. It has not only opened the world to global trade, it has also exposed the world to the so-called “soft law”.³⁵⁹

6.2 *Requirements for a good seat for international commercial arbitration*

As explained in Chapter 2 of this study, the factors that influence the seat of arbitration are: firstly, adherence to the rule of law is of primary importance– the rule of law therefore must be clear and ascertainable. It is important to international parties because it promotes confidence that their disputes will be settled in a fair and effective manner by a system that is stable and fair.³⁶⁰ Secondly, a good contract law is required for the purpose of international arbitration, a contract law can be considered good and effective if it promotes the principle of party autonomy, and its provisions are similar to those contained in the CISG. Thirdly, a good private international law rules that make provision for the choice of law in an arbitration agreement, proof of foreign law and the recognition and enforcement of foreign judgment that is internationally acceptable are crucial. Fourthly, parties to arbitration require

³⁵⁸ Venter *The UNCITRAL Model Law on International Commercial Arbitration* 79.

³⁵⁹ Venter *The UNCITRAL Model Law on International Commercial Arbitration* 79.

³⁶⁰ Boolell “Impact on the Rule of Law” 1- 16.

international commercial arbitration legislation that is of good quality and that can offer an effective and suitable solution to any arbitration matter.

According to the SALC Report, the primary objectives of modern international arbitration legislation are: fair resolution of dispute; an independent and impartial arbitral tribunal; freedom of contract; a fast and inexpensive procedure; and a balance of power between the arbitral tribunal and the courts.³⁶¹

For arbitration legislation to be considered modern, it must also contain certain features: a provision that the dispute will be settled by an impartial, confidential arbitral tribunal; and balance of power between the arbitral tribunal and the courts. Venter says that the arbitration legislation must meet the needs of parties, and it would be advantageous if the arbitration legislation is more or less similar to other countries arbitration legislation.³⁶² This could contribute to the uniformity and harmonisation that the UNCITRAL strives to achieve.

As explained above, it is not sufficient that a country has good legal infrastructure. For a country to be a good seat for international commercial arbitration it must also have good physical infrastructure; specialist and experienced arbitrators and; skilled legal practitioners; Experienced and skilled arbitral institutions will also be needed. Factors such as: political stability; location and cost; cultural diversity and tourism, as well as trade languages are also essential factors that promote a good seat of international arbitration.

6.3 South Africa as a seat for international commercial arbitration

Brand and Wewege say it is unsafe to arbitrate in South Africa as “arbitration undermines judicial transformation in South Africa”.³⁶³ This may be traced to the failure of the South African government to introduce the international arbitration legislation as recommended by the SALC Report years ago.

The introduction of the *Arbitration Bill* will introduce a new era of Arbitration in South Africa, as international and local trading parties will be aware and gain familiarity with the *Arbitration Bill*, and parties to international commercial arbitration will be certain that there will be less court interference in arbitration conducted in South Africa. It is recommended that South

³⁶¹ SALC Report 1998 par 2.19.

³⁶² Venter *The UNCITRAL Model Law on International Commercial Arbitration* 80.

³⁶³ Brand and Wewege 2009 *PLC Arbitration* 1: submits that arbitration undermines judicial transformation in South Africa.

Africa not only focus on its *Arbitration Bill*, but other non-legal factors that promote the seat of international commercial arbitration.

6.4 *Lessons to be learnt from Mauritius: a developing hub for international commercial arbitration*

Mauritius is a good example of international commercial arbitration as Mauritius is considered a hub for international commercial arbitration for South Africa, and it is a growing economy in Africa, doing everything possible to be recognised internationally. One good point to note is the fact that the legislators found it necessary to have two pieces arbitration legislation (domestic and international arbitration). It would be more efficient to have separate arbitration legislation, each containing specific provisions relating to the different spheres (national and international). This will promote certainty and clarity for the users of the legislation.

Mauritius's international arbitration legislation is based on the Model Law, but not exclusively. The country also incorporated provision of English arbitration legislation and New Zealand arbitration. This gives it a distinct quality as discussed in Chapter 4.³⁶⁴ The legislators only incorporate the best provisions of the Model Law, and other provisions of the Model Law were either side-lined or adapted to suit the country's circumstances.

Good practice to follow is the fact that Mauritius introduced the PCA into its international arbitration practice to ensure limited court interference. This is a unique development as not many Model Law jurisdictions found this necessary. Other factors include the fact that the country's lawyers and arbitrators are becoming specialists in the field of international commercial arbitration, with the help of the PCA training and the LCIA-MIAC institution. Although it already has good transport infrastructure, the country is still developing its air transport facility to accommodate more passengers.

6.5 *Adoption of the international arbitration regime in South Africa: the path South Africa should follow*

Venter says that the reform of arbitration procedure should focus more strongly on the role of arbitrators and the nature of arbitration than the role of the courts and the possible changes

³⁶⁴ See Chapter 4 of this study.

of court-based procedures.³⁶⁵ Most countries are reforming and amending their arbitration legislation so as to become favourable seats for international commercial arbitration, and also to attract more international parties and businesses. The author submits that it is good that a number of countries are reforming their arbitration legislation, and adopting the principles and practice of the UNCITRAL Model Law in their international commercial arbitration practice, but this leads to certain problems, such as, diversity and non-conformity.³⁶⁶ Even with the UNCITRAL Model Law as a prominent international convention in this regard, there are disparities and problems that cannot be side lined or overlooked.³⁶⁷

The fact that the recommendations of the SALC Report were taken into account by the government is a positive outcome. One fundamental recommendation is the separation of domestic and international arbitration legislation. Separating the international arbitration statute from the domestic arbitration statute will ensure clarity and certainty to users of the arbitration legislation. Depending on the nature of the dispute, the parties are able to refer to particular legislation, without any concerns about referring to the other.³⁶⁸ Venter says the suggestion of the SALC Report can be seen as wise as this would exclude any possible confusion.³⁶⁹

According to the SALC report, South Africa will not become a regional hub for international arbitration unless it is seen to have the necessary national courts' support for arbitration. Arbitration requires the support of judges who are sympathetic towards arbitration as a means of dispute resolution.³⁷⁰ The UNCITRAL Model Law ensures that the power of the courts is limited. However, coming from a country whose arbitration legislation is considered "out-dated and ineffective", especially because of the excessive powers granted to the courts, it would be advisable to take the road followed by Mauritius: introducing the PCA to carry out the administrative functions; and to assist in training arbitrators and lawyers to become specialists in the field; as well as introducing an international institution such as the ICC or LCIA, alongside the CAJAC and other local arbitral institutions. This way, the national courts may only interfere in the arbitration proceeding in exception circumstances, where the arbitrator or the PCA has limited powers or the court is in a better position to solve the matter.

³⁶⁵ Venter *The UNCITRAL Model Law on International Commercial Arbitration* 82. Berger 1994 *SA Merc LJ* 256.

³⁶⁶ Venter *The UNCITRAL Model Law on International Commercial Arbitration* 83.

³⁶⁷ Venter *The UNCITRAL Model Law on International Commercial Arbitration* 83.

³⁶⁸ SALC Report 1998 par 2.32.

³⁶⁹ Venter *The UNCITRAL Model Law on International Commercial Arbitration* 83.

³⁷⁰ SALC Report 1998 par 2.19.

6.6 *Final conclusions*

After many years, it is time for South Africa to improve itself as a hub for international commercial arbitration. It will take more than just the introduction of the Bill; however, the Bill will go a long way in opening doors for South African international trade and arbitration practice. By acknowledging the globally accepted standard of practice; South Africa will contribute to the harmonisation and unification of international trade laws. The adoption of an international standard will improve South Africa's standing on the international level. The country must ensure that it develops not just its legislation but also general practice (physical infrastructure that can attract international trading parties) to ensure that it soon becomes a hub for international commercial arbitration.

BIBLIOGRAPHY

1 Books

B

Butler & Finsen *Arbitration in SA*

Butler D & Finsen E *Arbitration in South Africa – law and practice*
(Juta Cape Town 1993)

C

Constitution 1996

Constitution of the Republic of South Africa, 1996

Constitution 1968

Constitution of the Republic of Mauritius, 1968 as amended in 2010

R

Ramsden *The Law of Arbitration: South African and International Arbitration*

Ramsden PA & Ramsden K *The Law of Arbitration: South African and International Arbitration* (Juta Cape Town 2009)

Redfern & Hunter *International Commercial Arbitration*

Redfern A and Hunter M *International Commercial Arbitration*
(Oxford University Press 2015)

M

Moses *The Principles and Practice of International Commercial Arbitration*

Moses ML *The Principles and Practice of International Commercial Arbitration*
(Berkeley Law 2012)

F

Forsyth *Private International Law*

Forsyth CF *Private International Law* (Juta Cape Town 2012)

J

Jacobs *The Law of Arbitration in South Africa*

Jacobs M *The Law of Arbitration in South Africa* (Juta Cape Town 1977)

P

Pretorius *Dispute Resolution*

Pretorius P *Dispute Resolution* (Juta Cape Town 2012)

Pete *et al Civil Procedure*

Pete S, Hulme D, Du Plessis Max, Palmer R and Sibanda O *Civil Procedure: A Practical Guide* (Oxford University Press 2012)

2 Case Law

B

Bank Mellat v Hellinik Techniki SA [1984] QB 291, 301, [1983] 3 All ER 428 (CA).

Bester v Easigas (Pty) Ltd 1993 (1) SA 30 (C) 38F

Benjamin v Sobac South African Building and Construction (Pty) Ltd 1989 4 SA 940 (C) 957E-F

Brisley v Drosky 2002 SA 1 (SCA)

D

Dickenon & Brown v Fisher's Executors 1915 AD 166.

E

Edmann Controls Inc. 712 F.3d 1021, 1024-1025 (7th Cir 2013)

Ellis v Morgan; Ellis v Desaa 1909 TS 576

F

Field v Grahamstown Municipality 1928 EDL 135

Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council 1998 (2) SA 374 (CC)

H

Holmes Oil Co. v Pumpherstons Oil Co. (Court of Sess., R.18, p. 53)

L

Lufuno Mphaphuli & Associates (Pty) Ltd v Nigel Athol Andrews & Bopanang Construction CC Case CCT 97/07 [2009] ZACC 6

M

Mort v Henry Shields-Chiat 2001 1 SA 464 (C) 475B

N

Naidoo v EP Property Projects (Pty) Ltd (444/2012) [2014] ZASCA 97

P

Parekh v Shah Jehan Cinemas (Pty) Ltd v Benoni Town Council 1975 (4) SA 301 (D) 304E-305(B)

PT Garuda Indonesia v Birgen Air [2002] 5 LRC 560

R

R v Sussex Justices, Ex parte McCarthy 1924 1KB 256, 259

S

Sasfin (Pty) Ltd Beukes 1989 1 SA 1 (A)

Scherk v Alberto Culver 417 us, 506, 520 n.15 (1973)

Sera v De Wet 1974 (2) SA 645 (T)

South African Transport Services v Wilson NO and Another 1990 (3) SA 333 (W)

Stocks Constructions (OFS) (Pty) Ltd v Metter-Pingon (Pty) Ltd 1980 (1) SA 507 (A) 521A-B

Sulamerica CIA Nacional de Seguros SA v Enesa Engeharia SA [2012] EWA Civ 638

T

Total Support Management (Pty) Ltd v Diversified Health Systems (SA) (Pty) Ltd 2002 (4) SA 661 (SCA)

Telecordia Inc v Telkom SA Ltd 2007 (5) BCLR 503.

U

United Democratic Movement v President of the Republic of South Africa 1 2002 11
BCLR 1179 (CC)

V

Van Heerden v Sentrale Kunsmiskorporasie (Edmsl) Bpk 1973 (1) SA 17 (A) 26B

W

Welihockyj and Others v Advtech Ltd and Others 2003 (6) SA 737 (W)

Z

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

3 Conference contribution and others

B

Boolell "Impact of the Rule of Law" 1-16

Boolell S "Impact on the Rule of Law" was published in the *World Jurist Association's Conference on International Arbitration and ADR* (5 – 7 April 2011 Mauritius) 1 – 16

I

International Law Association "Ascertaining the Contents of the Applicable Law in International Commercial Arbitration" 851 - 879

International Law Association "Ascertaining the contents of the applicable law in International Commercial Arbitration" was published in *International Law Association at the Rio de Janeiro Conference* (August 2008 Rio de Janeiro) 851 - 879

M

MIAC 2010 "Flaws and Presumptions: Rethinking Arbitration Law and Practice in a New Arbitral Seat" 46 - 58

MIAC "Flaws and Presumptions: Rethinking Arbitration Law and Practice in a New Arbitral seat" was published by the *Mauritius Government Printing Department* (13 – 14 December 2010 Mauritius) 1 - 394

Moseneke "Reflections on the Rule of Law in Modern African States" 1 – 19

Moseneke D "Reflections on the Rule of Law in Modern African States"
Unpublished contribution delivered at the *Pre-Congress Seminar of International Council for Commercial Arbitration* (28 July 2015 Johannesburg) 1- 19

4 Legislation

English

Arbitration Act, 1996

Mauritius

Code Napoleon (Civil Code)

Companies Act, 2001

International Arbitration Act, 2008

Travaux Preparatoires Text and Materials 2008

New Zealand

International Arbitration Act 1996

South Africa

Arbitration Act, 42 of 1965

Law of Evidence Amendment Act, 45 of 1988

Enforcement of Foreign Civil Judgment Act, 32 of 1988

Protection of Business Act, 99 of 1978

International Arbitration Bill, 2017

5 International Instruments

C

Convention on the Recognition and Enforcement of Foreign Arbitral Awards
(1958) (New York Convention)

F

French Codes (Code de Procedure Civile, Code penal, Code de Procedure penale and Code de Commerce)

Hague

Hague Convention on the Recognition and Enforcement of Foreign Judgment in Civil and Commercial Matter, 1971

T

Treaty of Capitulation, 1810

United Nations (CISG: Vienna Convention)

United Nations Convention for the Contracts of the Sale of Goods, 1980

6 Internet Sources

A

Anon Unknown Date *Mauritius/Private Ocean*

<http://www.privateoceanislands.com/mauritius> [date of use 21 April 2017]

Anon 2013 *Airport World in Mauritius*

<http://www.airport-world.com....Mauritius>. Investment [date of use 21 April 2017]

Alexander 2012 *South Africa's Geography*

<http://www.mapsofworld.com> [date of use 21 April 2017]

B

Bredenkamp IM Unknown Date *International Arbitration Bill Republic of South Africa*

http://www.pretoriabar.co.za/.../arbitrators/international_Arbitration_Bill%20articl.

[date of use 21 October 2016]

C

Chutel L 2016 *South Africa just Lost its Spot as Africa's Second Largest Economy*

<http://www.qz.com/.../south-africa-loses-its-spt-as-africas-second-largest-economy-to-egypt>

[date of use 17 May 2016]

D

Department of Environmental Affairs 2011 *Tourism*

<http://www.environment.gov.za/content/home>

[date of use 14 July 2017]

K

Krisch K 2015 *Foreign Judgements v Arbitral Awards*

<http://www.hoganlovells.cn.enUS/newsmedia/newspubs/PubDetail.aspx?publicati>

[date of use 12 December 2016]

Koza N 2017 *South Africa on List of Global Risks to Political Stability, Should we be Worried?*

<http://www.ewn.co.za/2017/...sa.on/list.of.globalrisks.to.politica;stability.should.w>

[e.be.worried](http://www.ewn.co.za/2017/...sa.on/list.of.globalrisks.to.politica;stability.should.w)

[date of use 15 June 2017]

M

McKenzie B 2017 *Commercial Arbitration 2017: South Africa*

<http://ww.globalarbitrationreview.com/jurisdiction/10000205/South-africa>

[date of use 15 June 2017]

Michelle W and Rebecca W 2017 *Arbitration Bill to Regulate International Proceedings*

<http://www.pressreader.com/south-africa/business-day/20170331/281655369913089>

[date of use 11 May 2017]

S

Sabinet Law 2016 *Draft International Arbitration Bill to be Tabled Soon*

<http://www.sabinetlaw.co.za>justiceandconstitution>articles>

[date of use 11 February 2017]

T

Tourism in South Africa 2016 *10 Years Review*

http://www.environment.gov.za/sites/default/files/docs/10yearsreview_tourism

[date of use 17 February 2017]

W

Wakefield A 2015 *South Africa's Instability Scares Away Investors*

<http://mg.co.za/...../2015-05-20-south-africas-instability-scares-away-investors>

[date of use 12 February 2016]

World Justice Project 2011 *Rule of Law Index*

http://worldjusticeproject.org/sites/default/.../WJP_Rule_of_Law_Index_2011

[date of use 12 October 2016]

7 Journal Articles

A

Asozu 1995 *International and Contemporary Law Journal*

Asozu AA “The National Arbitration Law and International Commercial Arbitration; the Indispensability of the National Court and Setting Aside Procedure” 1995 *International and Contemporary Law Journal* 68 – 97

B

Brand and Wewege 2009 *PLC Arbitration*

Brand J and Wewege E “Is it Safe to Arbitrate in South Africa” 2009 *PLC Arbitration* 1-7 (found at <http://www.practicallaw.com> [accessed date 14 October 2015])

Berger 1994 *SA Merc LJ*

Berger KP “Re-examining the Arbitration Agreement, Applicable law Consensus or Confusion?” 1994 *South African Mercantile Law Journal* 301 – 334

Butler 1998 *STELL LR*

Butler DW “A New Domestic Arbitration Act for South Africa: What Happens After the Adoption of the UNCITRAL Model Law for International Arbitration” 1998 *STELL LR* 3 – 20

Butler 1990 *STELL LR*

Butler DW “Challenging an Arbitrator’s Award: Remittal and Setting aside” 1990 *STELL LR* 252 – 270

Butler 1994 *CILSA*

Butler D “South African Arbitration Legislation – The Need for Reform” 1994 *CILSA* 118 – 162

C

Calitz 2007 *PELJ*

Calitz K “Globalisation, the Development of Constitutionalism and the Individual Employee” *Potchefstroom Electronic Law Journal* 2 – 19

G

Griffith and Mitchell 2002 *Melbourne Journal of International Law*

Griffith G and Mitchell AD “Contractual Dispute Resolution in International Trade: The UNCITRAL Arbitration Rules (1976) and the UNCITRAL Conciliation Rules (1980)” 2002 *Melbourne Journal of International Law* 184 – 199.

H

Haersolte-van Hof and Koppe 2015 *Arbitration International*

Haersolte-van Hof JJ and Koppe EV 2015 “International Arbitration and the *Lex arbitri*” 2015 *Arbitration International* 27 – 62

Hermann 1998 *Uniform Law Review*

Hermann G “The UNCITRAL Arbitration Law: a Good Model of a Model Law” 1998 *Uniform Law Review* 483 – 499

Henderson 2014 *Singapore Academy of Law Journal*

Henderson A “*Lex arbitri* Procedural Law and the Seat of Arbitration” 2014 *Singapore Academy of Law Journal* 886 – 910

Hill 2014 *International and Comparative Law Quarterly*

Hill J “Determining the Seat of an International Arbitration; Party Autonomy and the Interpretation of Arbitration Agreement” 2014 *International and Comparative Law Quarterly* 517 – 534

I

Ilhyung 2008 *Fordham International Law Journal*

Ilhyung L “Practice & Predicament: The Nationality of the International Arbitration (with survey results)” 2008 *Fordham International Law Journal* 603 – 633

K

Kruger 2010 *PELJ*

Kruger R “The South African Constitutional Court and the Rule of Law: The Masethla Judgement, a Cause for Concern?” 2010 *Potchefstroom Electronic Law Journal* 1 – 24

L

Lando 1985 *International and Comparative Law Quarterly*

Lando O “The *Lex Mercatoria* in International Commercial Arbitration” 1985 *International and Comparative Law Quarterly* 747 – 768

M

Meiring 2011 *Advocate Forum*

Meiring J “Mauritius launched as New International Arbitration Seat” 2011 *Advocate Forum* 20 – 21

Mojapelo 2013 *Advocate Forum*

Majapelo P “The Doctrine of Separation of Powers (A South African Perspective)” 2013 *Advocate Forum* 37 – 45

N

Namachanja 2016 *Arbitration*

Namachanja C “The Challenges Facing Arbitral Institutions in Africa” 2016 *Arbitration* 44- 62

R

Rosen 1994 *Fordam International Law Journal*

Rosen JA “Arbitration under Private International Law: The Doctrines of Separability and *Competence de la Competence*” 1994 *Fordham International Law Journal* 599 – 666

Rowley 2010 *European Lawyer Reference Series*

Rowley J “Arbitration World – Jurisdictional Comparisons” 2010 *European Lawyer Reference Series* 503 – 513

S

Sibanda 2008 *VJICLA*

Sibanda OS “National Court Intervention in International Commercial Arbitration in South Africa” 2008 *Vindobona Journal of International Commercial Law and Arbitration* 103 – 168

Schwartz 2012 *Dispute Resolution International*

Schwartz EA “Is Procedure Really Neutral? The Seat: Does it Matter? (A Tale of More than Two Cities)” 2012 *Dispute Resolution International* 194 – 207

Slate *et al* 2004 *Cardozo Journal*

Slate I WK *et al* “UNCITRAL: Its Working in International Arbitration and a New Model Conciliation Law” 2004 *Cardozo Journal of Conflict Resolution* 73 - 106

Soopramaniem 2013 *International Arbitration Law Review*

Soopramaniem SO “The International Arbitration Act of Mauritius – Addressing the Challenges and Opportunities of an Emerging International Arbitration Centre in Africa” 2013 *International Arbitration Law Review* 4 – 18

T

Turley *TSAR* 1999 240

Turley IF “The Proposed Rationalisation of South African Arbitration Law” 1999 *TSAR* 240 – 255

W

Wagoner 1996 *Arbitration*

Wagoner DE “Interim Relief in International Arbitration” 1996 *Arbitration* 131 – 136

Wethmar-Lemmer 2011 *De Jure*

Wethmar-Lemmer “Regional Harmonisation of International Sales Law via Accession to the CISG and the Importance of Uniform Interpretation of the CISG” 2014 *De Jure* 298 – 309

Z

Zhou 2014 *China EU Law Journal*

Zhou Y "Breaking the ice in the International Commercial Arbitration: From the Finality of Arbitral Award to the Arbitral Appeal Mechanism" 2014 *China EU Law Journal* 289 – 299

8 Dissertations

D

Ditedu *The Doctrine of Seperability*

Ditedu AL *The Doctrine of Seperability in Respect of the Arbitration Clause of a Contract: A Comparative Study of English Law and South African law* (LLM dissertation – North West University 2014)

M

Maswanganyi *Rule of Law in South Africa*

Maswanganyi MP *Rule of Law in South Africa*
(LLB dissertation - University of Limpopo 2010)

Mbith *International Commercial Arbitration in Kenya*

Mbith PM *International Commercial Arbitration in Kenya: Is Arbitration a Viable Alternative in Resolving Commercial Dispute in Kenya?* (LLM dissertation – University of Cape Town 2014)

Mbhele *The South African Law of Contract as influenced by the NCA*

Mbhele TV *The South African Law of Contract as Influenced by the National Credit Act 34 of 2005: An Evaluation*
(LLM dissertation - University of Pretoria)

S

Sharp *A Critical Analysis of the Role of the Boni Mores in the SA Law of Contract*

Sharp M *A Critical Analysis of the Role of the Boni Mores in the South Africa Law of Contract and its Implications in the Constitutional Dispensation*
(LLM dissertation – University of KwaZulu Natal 2014)

V

Venter *The UNCITRAL Model Law on International Commercial Arbitration*

Venter D *The UNCITRAL Model Law on International Commercial Arbitration as basis for International and Domestic Arbitration in South Africa* (LLM dissertation – North West University 2010)

9 Others

Mistelis L & Friedland P 2014 International Arbitration Survey

International Arbitration Survey: Improvements and innovations in International Arbitration – Queen Mary University of London 2015

Sornum An analysis of Mauritius as an Arbitral Seat for International Commercial and Investment Dispute Resolution

10 South African Law Commission reports and publications

S

SALC 1998 Report

South African Law Commission Project 94 Arbitration: *An International Arbitration Act for South Africa Report* (July 1998)

11 UNCITRAL and UN General Assembly Publications

E

Model Law Explanatory Note by the Secretariat

Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006

U

UNCITRAL Model Law

UNCITRAL Model Law on International Commercial Arbitration (1985)

UNCITRAL Model Law on International Commercial Arbitration
(with the 2006 amendments)