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The finality principle in arbitration: A theoretical exploration

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Abstract

Arbitration remains a popular means of resolving construction industry disputes. Among its purported advantages is an emphasis on the notion of '*finality*'; in order words, that awards made following arbitration proceedings are '*final*' and should bring the dispute to a '*conclusive*' and '*binding*' settlement. However, in most jurisdictions such as in South Africa, the finality principle can be impeached by the courts who are able to vacate awards on the basis of statutory (legislative) or common law provisions (or both). While the finality principle and *vacatur* are both generally well espoused in arbitration literature, our appreciation of broader theoretical discourse in arbitration is arguably, more limited. With this in mind, framed within the '*Law and society*' school of thought, we set out in this paper to elucidate upon existing theories that are regularly relied upon to explain how finality may be generated, dispersed, endorsed, and modified through *vacatur*. In doing so, we clarify and demonstrate (set within the context of South African domestic commercial arbitration), how the finality principle in general and *vacatur* in particular are regulated by the state through legislation. An analysis of some specific construction arbitration case examples is also undertaken.

Keywords: Finality, Arbitration, Principle, Theory

Arbitration

What is arbitration?

Arbitration is a process that focuses on the settlement of disputes (Carlston, 1952). It is construed as a quasi-legal (Carlston, 1952; Weidemaier, 2010, 2011) and *judicialised* (Stipanowich, 1987,

2010) process that involves parties to a dispute submitting their claims to hearing and settlement in a process overseen by one or more individuals of their choice who then decides on matters of controversy between the parties (Sturges, 1960). Central to the arbitration process is the '*arbitrator'* who is defined as: "…*a private extraordinary judge…, from which there lies no Appeal*" (Jacob, 1729; i Roll. Abr. 251). In South Africa, arbitration has been defined as "…*the process by which a dispute or difference between two or more parties as to their mutual legal rights and liabilities is referred to and determined judicially and with binding effect by the application of law by one or more persons (the arbitral tribunal) instead of by a court of law"*[1]*.* Under South African jurisprudence, "*The hallmark of arbitration…is that it is an adjudication*"[2]. In essence, to be operational, arbitration requires a controversy or a dispute[3]*.* Arbitration remains widely used in South Africa to settle construction and other infrastructure-related disputes. Arbitration also has had a long presence in South Africa jurisprudence. In fact, legislative provisions for arbitration can be traced to as early as 1898 with the promulgation in the then colonial South Africa, of various arbitration legislations including The Arbitrations Act, 1898 (Act No. 29 of 1898) of the Cape of Good Hope, The Arbitration Act 24 of 1898 (Natal), The Transvaal Ordinance Act 24 of 1904 and The Arbitration Proclamation Act 3 of 1926, of South-West Africa[4]. The importance of arbitration cannot be over-emphasised with a number of high profile arbitration proceedings becoming subject to intervention by the courts in South Africa[5]*.*

Arbitration as an alternative dispute resolution mechanism

Arbitration essentially serves an 'alternative' means of settling disputes to litigation[6]. Its 'alternative' status emanates from its focus on providing an avenue to resolve disputes *outside* the auspices of national courts. However, the framing of 'alternative' is not restricted to matters

[1] Shoprite Checkers (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others (1998) 19 ILJ 892 (LC); [1998] 5 BLLR 510 (LC) [at 89]

[2] *Bidoli v Bidoli and Another (2011 (5) SA 247 (SCA)) [2011] ZASCA 82; 436/10 (27 May 2011)* [at 14]

[3] *Bidoli v Bidoli and Another (2011 (5) SA 247 (SCA)) [2011] ZASCA 82; 436/10 (27 May 2011)* [at 13]

[4] In Namibia, domestic arbitration is subject to The Arbitration Act 42 of 1965 of South Africa.

[5] Example of such cases includes: Telcordia Technologies Inc v Telkom SA Ltd [2006] ZASCA 112; [2006] 139 SCA (RSA); 2007 (3) SA 266 (SCA); [2007] 2 All SA 243 (SCA); 2007 (5) BCLR 503 (SCA) (22 November 2006); Lufuno Mphaphuli & Associates (Pty) Ltd v Nigel Athol Andrews and Bopanang Construction CC CCT 97107 [2009] ZACC 6; Cool Ideas 1186 CC v Hubbard and Another [2014] ZACC 16 (5 June 2014)

[6] National Union Fire Insurance Company v Nationwide Insurance Company, 82 Cal. Report [1999]

of control in that arbitration can under specific conditions or circumstances be conducted or annexed by the courts (Hensler, 1990; Orenstein, 1999). Despite the notion that arbitration is a creature of contract (del Prado, 2021), arbitration can also be mandated by the legislation or by the courts. For example, in South Africa, in terms of legislation, labour disputes are subject to arbitration on the basis of the Labour Relations Act, 66 of 1995 (South Africa) by the Commission for Conciliation, Mediation and Arbitration (CCMA)[7]. In terms of the courts, procedural rules by the Magistrates Court (Rule 18 and 25 of Magistrates Court Rules – see Department of Justice and Constitutional Development, 2010), High Court (Rule 37 of the High Court Rules – see Department of Justice and Constitutional Development, 2009) and Section 38 of the Superior Courts Act 10 of 2013 (for The Supreme Court of Appeal and The Constitutional Court of South Africa), all make some form of provision for the courts to mandate disputing parties to explore alternative dispute mechanisms.

Essentially, there are key attributes of arbitration which makes it 'alternative' to litigation. A review of the literature suggests that these attributes includes (i) independence of disputing parties (Christie, 1994; Tobing et al. 2016), (ii) procedural flexibility (Cock, 2014; Burnett and Weiss, 2016)[8] and informality (Tripp, 1949-1955; Kaczmarek, 2000), (iii) quicker resolution time (Delikat and Kleiner, 2003) and lower costs (Kritzer and Anderson, 1983)[9] (iv) attitude towards privacy and confidentiality (El-Awa, 2016; Bennett and Hodgson, 2016-2017), (v) standards and expectations (Sturges, 1960; Webb, 1982; Massoud, 2014), (vi) non-use of precedent (Kaufmann-Kohler, 2007; Weidemaier, 2010, 2011), (vii) the appointment of judges and arbitrators (Sturges, 1960; Opeskin, 2015), (viii) and the authority (Tuck, 2008), immunity (Carroll, 1991; Truli, 2006; Hebaishi, 2014) and independence of arbitrators (Horn, 2014). In the next section of the paper, we briefly discuss the notion of *vacatur* (within the context of finality principle).

Arbitration *vacatur*

Terminology

[7] See Section 112 and also Section 136 of the Labour Relations Act, 66 of 1995

[8] Essex County Council v Premier Recycling Ltd [2006] EWHC 3594

[9] In this case, arbitration conducted under the auspices of the American Arbitration Association (AAA)

For the purpose of this paper, it is observed that there are a number of interchangeable terms which can be employed when discussing arbitration *vacatur*. These includes '*Vacation'*. Generally, when a judgement "…*is vacated, the effect is to nullify the judgment entirely and place the parties in the position of no trial having taken place at all"*[10]. For those reasons, "*a vacated judgment is of no further force or effect"*[11]. Herein, the term '*Vacatur'* is employed to refer to instances where the courts in their supervisory role have sought to make '*null and void*' an arbitration award[12]. Other terms includes *'Nullifying'* which refers to an instance when a court declares that an earlier arbitration award has no legal effect and also no binding force[13].' *Voiding'* on the other hand refers to the process of ensuring that an arbitration award has no legal effect.

When an award is declared '*null and void*', it implies that the law treats the matter as it never happened or existed in the first place. An arbitration award that is declared '*Null and void'* cannot be rectified in order to become valid. Neither can such an award be validated by reason that it has been partly fulfilled[14]. Under South African jurisprudence, an arbitration award can be declared *'Null and void',* '*ab initia'* or '*ipso iure'* [15]. An award is '*Null and void ipso iure'* at law, meaning that the award is *null and void* even at the absence of any effort by a party to set it aside. On the other hand, an award is '*Null and void ab initia'* when, at the very onset of efforts to set the award aside, the specific award is treated as invalid.

Functions

The literature suggests that the original function of *vacatur* in law was to expunge from the public domain all records of judgments that were deemed defective (Purcell, 1997). Thus, *vacatur* was the privilege of the appellant courts. The consequence of *vacatur* is that it pre-empts the potential consequences of *res judicata* or collateral *estoppel* (Fisch, 1991). The need to expunge

[10] United States v Lawson, 736 F.2d 835 (2d Cir.1984); United States v Williams, 904 F.2d 7, 8 (United States Court of Appeals for the Seventh Circuit, 1990)
[11] Simpson v Motorists Mut. Ins. Co., 494 F.2d 850, 854 (United States Court of Appeals, Seventh Circuit); United States v Williams, 904 F.2d 7, 8 (United States Court of Appeals for the Seventh Circuit, 1990)
[12] *Vacatur* Legal Definition | Merriam-Webster Law Dictionary, https://www.merriam-webster.com/, accessed 19/01/20.
[13] BK v ZK & Others Case No: 515/2017 [at 21]
[14] BK v ZK & Others Case No: 515/2017 [at 21]
[15] van der Westhuizen v Engelbrecht and Spouse (1942, O.P.D. 194), Reported. 1943. Ipso Jure Null and Void. South African Law Journal, 60, 331-336.

or remove such records of judgments stems from various reasons, including the need for the courts as part of their general and supervisory review powers to prevent truly defective judgements from inadvertently forming part of precedent (*Stare decisis*). Once a court grants *vacatur*, it is deemed that the original award ceases to have any legal effect. *Vacatur* essentially means that a judgement has been erased and never happened. If in civil litigation, it will be deemed that that judgement ceases to have any impact on precedence as courts will be obliged to erase the judgement from records (Purcell, 1997). Despite intricate differences existing between these legal terms, it is argued that there is an appearance of interchangeability. Thus, while in this study, reference is made to arbitration *vacatur*, it is used in the broadest sense to refer using the words of the Supreme Court of the United States to arbitration awards that have been "*…absolutely vacated, annulled, made void, set aside, so that the same shall have no further effect whatever"*[16].

South African perspective

The idea that an arbitration award represents a '*final'*, '*conclusive'* and '*binding'* resolution is an essential attribute of arbitration as a dispute resolution mechanism. In South Africa, this principle (of finality), is espoused in national domestic commercial arbitration legislation in the form of The Arbitration Act 42 of 1965[17]. It has also been emphasized in domestic case law of not only the Supreme Court of Appeal[18], but also the Constitutional Court of South Africa ('The Constitutional Court')[19] which is the highest court in the country. However, while the finality principle is a central attribute of arbitration, there are both legislative/statutory and common

[16] Lawrence G. Graham and Donald D. Scott v The LA Cross & Milwaukee R.R Co and Salah Chamberlain; The Milwaukee & Minnesota R.R Coo. V Selah Chamberlain [Supreme Court of the United States, 1866], Cases decided in US Supreme Court, 70, https://play.google.com/books/reader?id=2FxMAQAAIAAJ&hl=en_GB&pg=GBS.PA34, accessed 19/01/20.

[17] Section 28, The Arbitration Act 42 of 1965 states that "*Award to be binding…Unless the arbitration agreement provides otherwise*". This implies that finality in arbitration is qualified.

[18] Telcordia Technologies Inc v Telkom SA Ltd [2006] ZASCA 112; [2006] 139 SCA (RSA); 2007 (3) SA 266 (SCA); [2007] 2 All SA 243 (SCA); 2007 (5) BCLR 503 (SCA) (22 November 2006) [at 65 and 154]; Hubbard v Cool Ideas 1186 CC (580/12) [2013] ZASCA 71 (28 May 2013)

[19] Sidumo and Another v Rustenburg Platinum Mines Ltd and Others (CCT 85/06) [2007] ZACC 22; [2007] 12 BLLR 1097 (CC); 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 (CC); 2008 (2) BCLR 158 (CC) (5 October 2007) [at 245]; Lufuno Mphaphuli & Associates (Pty) Ltd v Nigel Athol Andrews and Bopanang Construction CC CCT 97107 [2009] ZACC 6 [at 235]; Cool Ideas 1186 CC v Hubbard and Another [2014] ZACC 16 (5 June 2014) [at 56]

law grounds for a court of competent jurisdiction to impeach this principle. In South Africa, there are two legislative/statutory avenues that can be employed to impeach the finality principle. The first avenue is through Section 33 and Section 34 of The Constitution of the Republic of South Africa. The second avenue that can be employed to impeach the finality principle can be found in Sections 28 and 33 of The Arbitration Act 42 of 1965. Common law grounds for impeaching the finality principle are much more nuanced. However, based on international comparative case law, they are approximately six such avenues available which may include (i) Violation of essence (Gentry, 2018; Tompkins, 2018), (ii) Manifest disregard of the law (Yates, 2018), (iii) Illegality (Stalker et al. 2016; Polkinghorne and Volkmer, 2017), (iv) Arbitrary and capriciousness (Breger, 1995-1996; Hayford 1996) (v) Complete irrationality (Hayford, 1996; 1998a; 1998b), and (vi) Public policy (Becker and Kleyn, 1989; Arfazadeh, 2002; Drummonds, 2012; Badah, 2016).

Under South African law, parties to a domestic arbitration proceeding who are dissatisfied with its outcome generally have two options; either (i) to accept the finality of the award or (ii) to seek relief in the form of *vacatur*. If they choose to seek relief, there are generally two avenues open to them (Gurian, 2016- 2017). *First*, although, arbitration awards in general are not subject to appeal[20], they can seek to *appeal* the arbitral award through, for example, an arbitration appeal tribunal (Platt, 2013) or the courts depending on contractual provisions[21]. The basis for such appeals being Section 28 of The Arbitration Act 42 of 1965, which states that appeals are foreseeable if such an exception is expressed and stipulated within the original agreement. Disputing parties who are dissatisfied with the outcome of arbitration proceedings may on the alternative seek judicial review in the form of *vacatur*. Judicial review operates on the notion that private parties to a dispute cannot contract out the rights of national courts to scrutinise and review awards obtained through arbitration (Van Ginkel, 2002). The basis for *vacatur* in this instance being Section 33 of The Arbitration Act 42 of 1965 which sets out three very narrow

[20] In South Africa, see section 28 of the Arbitration Act 42 of 1965 ('Arbitration Act') and also case law, Lufuno Mphaphuli & Associates (Pty) Ltd v Nigel Athol Andrews and Bopanang Construction CC CCT 97107 [2009) ZACC 6; Cool Ideas 1186 CC v Hubbard and Another [2014] ZACC 16 (5 June 2014); International comparative law, see section 58 (1) of the Arbitration Act 1996 (United Kingdom) and international comparative case law, Shell Egypt West Manzala GmbH and anor v Dana Gas Egypt Ltd [2009] EWHC 2097 (Comm).

[21] See for example, Section 28 of The Arbitration Act 42 of 1965, which states that appeals are foreseeable if such an exception is expressed and stipulated within the original agreement.

grounds for *annulling* or *nullifying* (cancelling) or *vacating* (cancelling and replacing) the award based (Gurian, 2016- 2017). Judicial review on the basis of the legislative provisions set out in Section 33 of The Arbitration Act 42 of 1965 enables the court, through its inherent oversight, review and supervisory powers (Hamilton and Slutsky, 2017), to review the merits of an arbitral proceeding and if deemed necessary, to annul and set aside awards that flow from its proceedings. Unlike appeals which may hear the entirety of the dispute again, judicial review of arbitration awards operate within very tightly defined parameters.

In the next section, we set out the principle school of thought guiding our study which is '*Law and society'*.

Law and society

Legal studies can be categorised into approximately three distinct schools of thought. The first is '*Analytical jurisprudence'* (Stone, 1946) also referred to as *'Law and Logic'* (Stone, 1946; Twining, 2005; Lacey, 2015), which encapsulates methods of legal study that focus exclusively on the "…*application of a range of techniques of analysis to issues of legal theory*" (Twining, 2005). The second is *Justice or Jurisprudence* – also referred to as '*Law and justice'* (Stone, 1946), and the third is *Sociological jurisprudence* – also referred to as '*Law and society*' (Stone, 1946; Krygier, 1982; Teitelbaum, 1985; Suchman and Edelman, 1996; Cotterrell, 1998; Cotterrell, 2002; Nonet et al. 2017). In all three schools of thought ('*Analytical Jurisprudence'*, '*Law and justice'* and '*Law and society'*), legal studies can generally progress through either key-concept theory building (Twining, 1979, 2005) and doctrinal work (Bell, 2016) or through a general hypothesis and associated testing of a phenomenon of legal discourse and/or interest. Ziegler (1988) opines that there are two approaches that can be employed for such test of phenomenon; (i) casual observation or (ii) empirical studies.

The underlying school of thought adopted in this study is *Sociological jurisprudence* – in other words, '*Law and society*'.

Our study is framed within the '*Law and society'* school of thought for two main reasons. The first is its test for success, which is intellectual leadership. Cotterrell (2009) identified this as being its ability to provide broad but concise and plausible explanations and interpretations

(through empirical studies) of specific legal phenomena. The second reason for adoption of this philosophy is that because the law reflects the society within which it operates (Tamanaha, 2001), the law is likely to "*remain unintelligible when interpreted in a non-contextual manner which excludes their social, political and policy dimension[s]*" (Charlesworth, 2007; p. 35). In effect, '*Law and society'* represents a much more balanced approach to understanding how the law contributes to the framing of the society (Cotterrell, 2002). This is particularly relevant to arbitration noting that, as in other forms of alternative dispute resolution, there is a limited monopoly of the state in resolving disputes within the society.

Researchers who adhere to the '*Law and society'* school of thought engage in research by drawing upon ideas rooted in the social sciences to explain, predict and understand phenomena (Trubek, 1972; Teitelbaum, 1985). Central to the '*Law and society'* school of thought is the idea that the legitimacy of any law is largely determined not by the authority of the state, but by the relevancy of laws to the society within which it is set to operate (Ehrlich and Ziegert, 2017). As noted by Cotterrell (1998), understanding the law entails understanding its social context. For any society to exist in harmony, it requires means of controlling conflict and maintaining order through rules (Jenks, 1923; Sunstein, 1996; Friedman, 1996; Ehrenberg, 2016; Vago and Barkan, 2017). Essentially, legal systems do not, as Friedman (1996) posits, "…*float in some cultural void, free of space and time and social context; necessarily, they reflect what is happening in their own societies*".

The '*Law and society'* school of thought emphasises that because societal values are constantly shifting, there is a need for constant readjustment of legal principles and logic. It rejects the abstract and instrumental/ purposive nature of the law by emphasising that the law must adhere to natural and/or non-legal reasons (Pound, 1911). Cotterrell (1998) explains that there are three main assumptions core to the notion of '*Law and society'*. These are that (i) law is purely a social construct that can best be understood through the nature of the society and the relationships that exist between individuals within a social group, (ii) that this social construct is best understood through empirical studies rather than abstract theories, and (iii) that this social construct is best understood through rigorous systematic analysis (Cotterrell, 2002) which seeks to broaden and provide a much wider perspective of how the law is to be understood.

While this no doubt appears beneficial to understanding the society within which the law operates, it must however be noted that the '*Law and society'* school of thought has attracted some criticism. For example, the notion of a *sociological jurisprudence* or '*Law and society'* has not been widely accepted by some scholars (Kelsen, 1991). More specifically, Kelsen (1991) claims that sociology "…*does not describe the creating behaviour and law-observing or law-violating behaviour*". Other criticisms of this school of thought have been related to its methodological approach. For example, while noting the inseparability of law and society, Donoghue (2009) opines that the current approach to this philosophy entailed the exploration of formal legal rules on their own and then efforts by researchers (Cotterrell, 1998, 2002) to show a connection to social factors. Instead, she (Donoghue, 2009) contends that *'Law and society'* studies should be fused for the purpose of analysis and appraisal. Roger Cotterrell (2009), himself one of the proponents of this philosophy, claims that the philosophy may be unable to support cross-cultural, jurisdictional and transnational studies because the philosophy construes the law as a means of the state to undertake social control.

Understanding the society within which the law operates allows researchers to understand the nature of the institution of arbitration (Carlston, 1952; Sayed, 2008; Gaillard, 2015; Jemielniak and Kaczmarczyk, 2016). The '*Law and society'* school of thought represents a viable means of exploring arbitration because how arbitration is framed and operates in different jurisdictions, tends to be constrained by the prevailing social norms (Abu Sadah, 2009). There are further considerations for the **'***Law and society'* school of thought as applied to arbitration. For example, arbitration can serve as a foundation of societal control and governance in that as an institution (see Ojiako, 2019; AlRaeesi and Ojiako, 2021; Ojiako et al. 2021). In addition, despite supposedly being a creature of contract, it is a procedure regulated by national legislative provisions. In addition, the '*Law and society'* school of thought is manifest in arbitration in that its process (despite being private), must espouse socially constructed views of fairness (Desierto, 2015). More specifically, arbitration demands, even when disputes are resolved privately, that its proceedings are conducted in a manner that is transparent and consistent and affords

disputants the "…*minimum procedural requirements of equality of treatment and natural justice i.e., reasonable opportunity to be heard and to present one's own case*"[22].

In the next section, we set out to elucidate the theoretical foundations of arbitration as relates to its finality principle and *vacatur.*

The theories of arbitration

The role of theory in research

The main emphasis of theory is to address the question of '*why'* (Sutton and Staw, 1995). Theory plays a major role in research because "*without theory, research is impossibly narrow. Without research, theory is mere armchair contemplation*" (Silverman, 2005). In the context of this study, we see theory as representing an organised series of assertions that serves as a means of ensuring that all knowledge drawn from existing literature is combined into a single and concise body of applicable knowledge (Weick, 1995; Wacker, 1998, 2004).

As a discipline, although law does not possess a theory (Ziegler, 1988), nor does it maintain precise disciplinary boundaries (Herget, 1984) or methodologies (Levit, 1989), understanding theory in arbitration is critical to our framing of the mechanisms of arbitration because such theory or theories represents the overarching scholarly attitude of arbitration as a dispute resolution mechanism (Yu, 2008). Theory serves as the essential supporting structure for arbitration research (Ziegler, 1988; Cownie, 2000) in that how researchers examine arbitration related problems, what they construe as relevant to those problems are all determined by theory (Feinman, 1989). Theory also serves to provide viable and plausible enumeration of phenomena (Levit, 1989). The literature alludes to theories being formulated in order to support the explanation, prediction and understanding of phenomena (Cownie, 2000). Ultimately, the function of theory is to serve as a prism or lens through which one can objectively view and understand topics of interest (which in this case is arbitration) and, in the process, answering the "*Why*", "*When*" and "*How*" questions on the occurrence of a phenomenon (Walker et al. 2015). DiMaggio (1995) summarises three main functions of theory as, first, to serve as a basis of generalisation of phenomena (occurrences or non-occurrences); second to serve as a series of assumptions capable of explaining and providing detailed insights and deriving logical deductions

[22] Triulzi Cesare SRL v XinyiGroup (Glass) Co Ltd [2014] SGHC 220 [at 46]

into specific phenomena (occurrences or non-occurrences); and third to serve as a narrative capable of accounting for such phenomena (occurrences or non-occurrences). Briefly, these relevant theories which will be discussed within the context of three seminal South African construction cases; *Telcordia Technologies v Telkom*[23] and *Hubbard v Cool Ideas (Cool Ideas 1)*[24] decided by the Supreme Court of Appeal and *Lufuno Mphaphuli v Bopanang Construction*[25] and *Cool Ideas v Hubbard (Cool Ideas 2)*[26], both heard by the Constitutional Court of South Africa, are now expanded upon.

The Jurisdictional or territorial theory

The first of such arbitration theories is the jurisdictional theory (Yu, 2004, 2008; Alcolea, 2020) also referred to as the territorial theory (Paulsson, 2011). At the core of this theory (from the perspective of domestic commercial arbitration in construction) is the need for disputants to acknowledge, the inherent power of national courts (acting on behalf or as instruments of the state) to supervise the institution of arbitration undertaken within its defined sphere of authority and responsibility (Marchisio, 2014). In *Cool Ideas v Hubbard* (*Cool Ideas 2*)[27], the Constitutional Court observed that this power included "…*confirming or setting aside arbitration awards*" [at 59]. The focus of such powers being as also observed by the court in *Lufuno Mphaphuli v Bopanang Construction*[28], "…*the administration of justice*" [at 25]. Legal effect to arbitration as a dispute resolution mechanism is dependent on the power exercised by the state holding dominion over that specific jurisdiction (Paulsson, 2011). As the arbitration mechanism does not have any legal effect without state sanction, its entire system must adhere to the law as nationally framed[29]. The critical element of the jurisdictional or territorial theory is that although it takes cognisance of disputant independence (Christie, 1994) as relates to for example, the form

[23] Telcordia Technologies Inc v Telkom SA Ltd [2006] ZASCA 112; [2006] 139 SCA (RSA); 2007 (3) SA 266 (SCA); [2007] 2 All SA 243 (SCA); 2007 (5) BCLR 503 (SCA) (22 November 2006)
[24] Hubbard v Cool Ideas 1186 CC (580/12) [2013] ZASCA 71 (28 May 2013) [at 15]
[25] Lufuno Mphaphuli & Associates (Pty) Ltd v Nigel Athol Andrews and Bopanang Construction CC CCT 97107 [2009] ZACC 6
[26] Cool Ideas 1186 CC v Hubbard and Another [2014] ZACC 16 (5 June 2014)
[27] Cool Ideas 1186 CC v Hubbard and Another [2014] ZACC 16 (5 June 2014)
[28] Lufuno Mphaphuli & Associates (Pty) Ltd v Nigel Athol Andrews and Bopanang Construction CC CCT 97107 [2009] ZACC 6
[29] Hubbard v Cool Ideas 1186 CC (580/12) [2013] ZASCA 71 (28 May 2013) [at 15]

of the arbitration proceedings (Tobing et al. 2016) and choice of law (Ababnch, 2017**)**, it acknowledges national sovereignty and more specifically the requirement for domestic commercial arbitration as a dispute resolution mechanism to be supervised by any sovereign nation via their national instruments such as national legislation or the courts[30]. Thus, if domestic commercial arbitration contractual provisions in any form whatsoever do conflict with national laws, these national laws – *not* the contract – take precedence. As observed by the Supreme Court of Appeal in *Hubbard v Cool Ideas (Cool Ideas 1)*[31]*,* in arbitration cases, "*A court, no matter how well intentioned, is [] not free simply on a whim to act in flagrant disregard of a statutory prohibition thereby rendering the will of the legislature nugatory*" [at 15]. There are two reasons for this. First, the state justifies its precedence on the notion that through its supervision, disputing parties are assured that legitimate contractual rights and obligations will be enforced (Zemach and Ben-Zvi, 2017). The second reason is that arbitration draws upon its legitimacy (and ability to have its awards enforced), from the state that has either derogated powers of the court in limited circumstances to the arbitrator (through legislation) or where judges (as part of their practice) have maintained judicial deference to arbitrators. In *Lufuno Mphaphuli v Bopanang Construction*[32]*,* the Constitutional Court noted that "*Arbitrators have no powers to enforce their awards and the effectiveness of the private process therefore rests on the binding, even coercive, powers the state entrusts to its courts*" [at 26(b)]. The jurisdictional theory is not widely supported. For example, Brekoulakis (2019) opines that arbitration proceedings and awards flow from fiduciary (that is, the contract between disputants and the arbitrator/arbitration panel) as against judicial powers which are constitutional powers vested in the courts.

Both Yu (2004, 2008) and Paulsson (2011) opine that the jurisdictional (territorial) theory does not limit the extent to which nations may use specific instruments such as national legislation or the courts to supervise arbitration. Thus, either through legislation or through the courts, various facets of arbitration, such as the contract to arbitrate, its proceedings, the powers of the arbitrator, who can serve and not serve as an arbitrator, and the nature of the awards are

[30] Hubbard v Cool Ideas 1186 CC (580/12) [2013] ZASCA 71 (28 May 2013) [at 15]
[31] Hubbard v Cool Ideas 1186 CC (580/12) [2013] ZASCA 71 (28 May 2013) [at 15]
[32] Lufuno Mphaphuli & Associates (Pty) Ltd v Nigel Athol Andrews and Bopanang Construction CC CCT 97107 [2009] ZACC 6

all subject to the supervision. For example, as South Africa is not a *double exequatur* jurisdiction, arbitration awards are not subject to ratification or confirmation by the courts before being enforceable.

Contractual theory

The second of such arbitration theories is the contractual theory (Yu, 2004, 2008; Alcolea, 2020). This theory posits that through an agreement or premise to arbitrate that is legally enforceable (Tsuruda, 2017), two or more individuals can create the mechanism for arbitration as a private dispute resolution mechanism primarily supervised by contractual provisions. This theory therefore posits that, on the basis of party autonomy (Ghodoosi, 2016) and freedom of contract (Kimel, 2001), the state's jurisdictional power should be limited if not actually superseded or nullified. The Supreme Court of Appeal observed in *Telcordia Technologies v Telkom*[33] [at 4] that deference to the principles of party autonomy and freedom of contract is something that South African courts have consistently done since at the very least, 1898[34].Being contractual, arbitration in this case therefore implies that its provisions should be binding on the parties and, therefore, enforceable in a manner less challenging than that of court judgements.

The contract theory of arbitration does not recognise that there is any justifiable basis for domestic commercial arbitration as a dispute resolution mechanism to be supervised by any sovereign nation via their national instruments such as national legislation or national courts (Yu, 2004, 2008). Thus, various facets of arbitration, such as the contract to arbitrate, its proceedings, the powers of the arbitrator, who can serve and not serve as an arbitrator, and the nature of the awards should all be solely subject to the terms of the contract to arbitrate. At a very basic form, the contractual theory of arbitration opines that at the point an individual voluntarily seeks to resolve their dispute privately and, in the process, exclude any form of interference from the state, the provisions of such contract should be strictly observed and adhered to.

There are perhaps two dimensions to the contract theory of arbitration (Yu, 2004, 2008). The first dimension focuses on the actual contract between the two disputants. Here, the

[33] Telcordia Technologies Inc v Telkom SA Ltd [2006] ZASCA 112; [2006] 139 SCA (RSA); 2007 (3) SA 266 (SCA); [2007] 2 All SA 243 (SCA); 2007 (5) BCLR 503 (SCA) (22 November 2006)

[34] In arriving at this proposition, the Supreme Court of Appeal cited a number of historical cases starting with Dutch Reformed Church v Town Council of Cape Town (1898) 15 SC 14 [at 21]; Dickenson & Brown v Fisher's Executors 1915 AD 166 [at 174]; Amalgamated Clothing & Textile Workers Union of SA v Veldspun (Pty) Ltd 1994 (1) SA 162.

contractual theory emphasises that, prior to being bound to arbitrate in domestic commercial disputes, there must be a contract between the parties encapsulating an agreement to arbitrate.

An important consideration as observed by the Constitutional Court in *Lufuno Mphaphuli v Bopanang Construction*[35] [at 220] is that of '*separability'* or '*severability'*; in effect, whether the contract to arbitrate may be construed to be completely separate from the commercial contract that it is a constituent element of (Czernich, 2018**)**. In all sense and purpose, the Constitutional Court in both *Lufuno Mphaphuli v Bopanang Construction*[36] [at 220] and *Cool Ideas v Hubbard (Cool Ideas 2)*[37] [at 129] have ruled that the fact that the main containing contract is not enforceable does not automatically imply that the agreement to arbitrate within the main contract is also not enforceable. From a contract theory of arbitration perspective, this essentially implies that contracts to arbitrate cannot be indirectly impeached. However, there have been occasions when this doctrine has not stood up. In fact, this position has been the case following the Supreme Court of Appeal's judgement in *North West Provincial Government v Tswaing Consulting*[38] where it was opined [at 13] that "*This conclusion entails that the arbitration agreement also cannot stand. This is for two reasons. First, the arbitration clause was embedded in a fraud-tainted agreement the province elected to rescind. The clause cannot survive the rescission, and the agreement purporting to give effect to it is still-born*". Examining the context of the judgement however does suggest that the court was not only concerned that "*First the arbitration clause was embedded in a fraud-tainted agreement*" [at 13], but also that, "*Second, the arbitration agreement was in any event signed by officials acting on behalf of the province who did not know of the fraud when they signed*" [at 14]. The second of the two dimensions to the contract theory of arbitration is that there must be a contract to arbitrate with the arbitrator. Having such a contract inevitably means that the arbitrator becomes a party to the arbitration proceedings (Yu, 2004, 2008) with fiduciary duties to the disputants (Brekoulakis, 2019)**.**

[35] Lufuno Mphaphuli & Associates (Pty) Ltd v Nigel Athol Andrews and Bopanang Construction CC CCT 97107 [2009] ZACC 6
[36] Lufuno Mphaphuli & Associates (Pty) Ltd v Nigel Athol Andrews and Bopanang Construction CC CCT 97107 [2009] ZACC 6
[37] Cool Ideas 1186 CC v Hubbard and Another [2014] ZACC 16 (5 June 2014)
[38] North West Provincial Government & another v Tswaing Consulting & Others 2007 (4) SA 452 (SCA)

The hybrid theory

The third of such arbitration theories is the hybrid theory (Yu, 2005, 2008; Fan and Jemielniak, 2016; Alcolea, 2020)**.** At the essence of the hybrid theory is a rejection of both the jurisdictional theory (and its emphasis on state sovereignty, the inherent power of the state to supervise arbitration as an institution through various instruments such as national courts) and also the contractual theory (and its emphasis on individual independence and/or freedom of contract, party autonomy, and the rejection of the jurisdictional theory). Essentially, the hybrid theory is a theory of compromise that seeks to draw upon, balance and mix those desirable elements – one may claim – of both the jurisdictional theory and the contractual theory (Grant, 2016). In the context of domestic commercial arbitration, the hybrid theory will acknowledge that arbitration originates from a private contract and that disputants maintain autonomy/independence (contractual theory); however, at the same time, it will also acknowledge that an agreement to arbitrate, its procedures, and the award that emanates from such an agreement must occur within associated domestic public policy norms and values, expectations and laws (jurisdictional theory). Without this being the case, such awards become unenforceable and, where challenged, subject to *vacatur*.

The autonomous (pluralistic) theory

The fourth of such arbitration theories is the autonomous or pluralistic theory of arbitration (see Carlston, 1952; Lew, 2006; Paulsson, 2011; Alcolea, 2020). At the core of this theory of arbitration is the notion of an institution that is self-created, self-regulated and self-focused, operating outside the legal framework of the state (Michaels, 2013). The autonomous theory of arbitration departs from the approach adopted by the hybrid theory. More specifically, the autonomous theory of arbitration does not as in the case of the hybrid theory seek to draw upon specific elements of either the jurisdictional theory or the contractual theory. Instead, the autonomous theory seeks to develop a theory of arbitration that is independent (of jurisdictional constraints) and therefore, truly reflective of the desirable elements of arbitration over litigation (Dayton and Takahashi, 2018). It has been posited that these elements include flexibility (Dayton and Takahashi, 2018), speed (Delikat and Kleiner, 2003; p. 85), privacy and confidentiality (Bennett

and Hodgson, 2016-2017), disputant independence (Christie, 1994) (for example, determining mode of proceedings – Tobing et al. 2016), determining seat arbitration (Webster, 2014), engaging arbitrator/s - Ababnch, 2017), and choice of law where applicable to a domestic context[39]. Proponents of the autonomous theory of arbitration claim that when arbitration is truly autonomous, its outcomes become more predictable as its proceedings and outcome become less hampered or constrained by national law and likely interference by national courts (Theofrastous, 1999).

The autonomous theory firmly rejects the jurisdictional theory on the basis that it not only contradicts the contractual theory, but also that it may be difficult to draw conceptual lines with the contractual theory. It also rejects the contractual theory on the basis that it not only contradicts the jurisdictional theory, but also it may be difficult to draw conceptual lines with the jurisdictional theory and perhaps, as expected, it also rejects the hybrid theory on the ground that it appears to suggest that its scope of application is not limited (Yu, 2005, 2008). By rejecting not only the jurisdictional theory, but also both the contractual theory and the hybrid theory, the autonomous theory takes the position that arbitration is beyond limit to specific national framing (Paulsson, 2011). In effect, arbitration is both 'jurisdictional-free' (in effect, delocalised - Paulsson, 2011) and 'contractually free'. Instead, arbitration represents an independent delocalised institution with its own recognisable norms, processes and procedures. Autonomy in this context supposes that arbitration contracts, procedures and the resultant awards are not only recognisable but also accepted and enforceable, irrespective of national jurisdiction (Luttrell, 2009). Based on these, *vacatur* represents a major threat to notion of arbitration as autonomous. The reason being that *vacatur* serves as a route to which the autonomy of arbitration can be impeached (Khan, 2013).

Critics of the autonomous theory of arbitration highlight that arbitration cannot in reality be autonomous or pluralistic (see Michaels, 2013; Mance, 2016). This is so because with reference to the Constitutional Court's observation in *Lufuno Mphaphuli v Bopanang*

[39] See Ojiako (2019); Ojiako et al. (2021); Some countries such as the United Arab Emirates operate under mixed and concurrent internal laws. Under such circumstances, disputants may be allowed choice of law in terms of which particular Emirate their dispute is resolved (different Emirates have different laws). There may also be an opportunity to have matters resolved under national civil law or, for example, Sharia law.

Construction[40]*,* for arbitration to be effective, it relies on the state for enforcement. A truly autonomous notion of arbitration which Michaels (2013) construes as a myth, will mean that the legal authorities in the jurisdiction that an arbitration proceeding is either held or to be enforced will relinquish interest in the outcome of such proceedings. Such a scenario is unlikely for a number of public policy reasons, especially where or when it is likely that the enforcement of the award is largely to be undertaken by state institutions or will impact on the rights of individuals or entities within its jurisdiction. As observed by the Constitutional Court in both *Lufuno Mphaphuli v Bopanang Construction*[41] and *Cool Ideas v Hubbard (Cool Ideas 2)*[42], there must always be an expectation that the courts are empowered to pierce the view of autonomy of arbitration, but only on grounds which are reasonably strict[43].

The concession theory

The fifth of such arbitration theories is the concession theory (Yu, 2005, 2008). At the heart of the concession theory is the notion that the institution of arbitration is only able to function in a practical and meaningful manner if the state concedes some of its sovereign powers to the institution (Paulsson, 2011). In effect, the concession theory accepts key elements of the jurisdictional theory, in that it accepts that states holding dominion over a specific jurisdiction have the right to supervise the institution of arbitration utilising various instruments such as legislation and national courts (in the form of judicial deference). It also accepts that arbitration will not have any legal effect without state sanction. Such sanction can take various forms. In some instances, the state has utilised legislative power to allow awards by arbitrators to be construed as the rulings of national courts. An example is in South Africa via provisions of both sections 28 and 31 of The Arbitration Act 42 of 1965 (South Africa). In effect, at the core of the concession theory is the idea that, for numerous reasons (including the need to provide relief for

[40] Lufuno Mphaphuli & Associates (Pty) Ltd v Nigel Athol Andrews and Bopanang Construction CC CCT 97107 [2009] ZACC 6

[41] Lufuno Mphaphuli & Associates (Pty) Ltd v Nigel Athol Andrews and Bopanang Construction CC CCT 97107 [2009] ZACC 6

[42] Cool Ideas 1186 CC v Hubbard and Another [2014] ZACC 16 (5 June 2014)

[43] Lufuno Mphaphuli & Associates (Pty) Ltd v Nigel Athol Andrews and Bopanang Construction CC CCT 97107 [2009] ZACC 6 [at 235]

courts), the state has conceded some element of judicial power to arbitrators. In the process, arbitration has become a *judicialised* (Stipanowich, 1987) and *quasi*-legal process[44].

Conclusion

In this paper, we have set out to briefly outline five key theories of arbitration; namely, the (i) Jurisdictional or territorial theory, (ii) Contractual theory, (iii) Hybrid theory (iv) Autonomous (pluralistic) theory and the (v) Concession theory. These five theories we had opined, served as the foundation for a more detailed and weighty understanding of the nature and mechanisms of domestic commercial arbitration in South Africa, especially as relates to the finality principle. In particular, these four theories serve as a means of not only ensuring that all knowledge drawn from existing literature on finality and *vacatur* are combined into a single and concise body of applicable knowledge, but also provide us with the theoretical foundations to better appreciate how the courts go about limiting via *vacatur*, the difference granted to arbitration by the state to settle disputes conclusively.

Data Availability Statement

No data, models, or codes were generated or used during the study.

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[44] see also case law of the Court of Justice of the European Union, specifically, Case 246/80 Broekmeulen [1981] ECR 2311; Case C-54/96 Dorsch v Bundesbaugesellschaft Berlin [1997] ECR I-4961; Case 416/96 El Yassini v Secretary of State for the Home Department [1999] ECR I-1209; Case 102/81 Nordsee [1982] ECR 1095.

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