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The finality principle in arbitration: A historical exploration

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Abstract

South Africa maintains a robust pro-arbitration policy which emphasizes the principle of finality. Despite the fact that this principle is well advocated in construction, engineering, and other aligned sector arbitration case law, insight into the broader historical discourse on arbitration in South Africa is more limited. Subsequently, in order to develop valuable and comprehensive insight into not only the theoretical foundations surrounding the finality principle in South African arbitration but also its future, this paper undertakes a historical account of the development of the principle of finality in South African domestic arbitration law. The paper suggests that pro-arbitration attitudes towards the finality principle espoused by the judiciary represent a hallmark of early formalization of English legal traditions through legislative frameworks which pre-date modern-day South Africa. The value of this study comes from the valuable insight it provides into past and existing theoretical and judicial debates surrounding the robustness of domestic arbitration frameworks in South Africa and the potential opportunities for their further improvement.

Keywords: Finality, Arbitration, Principle, History

Introduction

Context

There is a general acceptance in the literature (Baboolal-Frank, 2022; Ojiako, 2023a, 2023b, 2023c) and domestic case law in South Africa that arbitration represents a favorable alternative

dispute resolution mechanism. Examples of construction- and engineering-aligned case law espousing the pro-arbitration stance of appellant courts in South Africa include *Telcordia Technologies Inc v Telkom SA Ltd (2006)* [at 4] and *Zhongji Development Construction Engineering Company Limited v Kamoto Copper Company Sarl (2014)* [at 26] decided by the Supreme Court of Appeal of South Africa (hereafter 'The Supreme Court of Appeal'). Other cases includes *Lufuno v Nigel (2009)* [at 85, 196, 197, 221, 224 and 235] and *Cool Ideas 2 (2014)* [at 26 and 196 to 197] decided by the Constitutional Court of South Africa (hereafter 'The Constitutional Court'). More specifically, in *Lufuno v Nigel* [at 85 and 221], the Constitutional Court observed [at 196] that: "*Most jurisdictions in the world permit private arbitration of disputes and also provide for the enforcement of arbitration awards by the ordinary courts*".

The 'finality principle' is a key attribute of arbitration (Leasure, 2016; Bromley, 2018). Core to this principle is that parties to formal arbitration proceedings cannot be allowed to appeal the award that flows from such proceedings. The intention of this principle is to avoid continuous re-hearing of the same matter. This is because doing so impinges on the role of arbitration as a cost- and time-effective alternative mechanism for dispute resolution. The finality principle also serves to ensure that arbitration does not, either deliberately or inadvertently, serve as a test-run to litigation (Leasure, 2016).

Appellant courts in South Africa have consistently shown support for the finality principle in construction- and engineering-aligned arbitration disputes. Examples of such support are the High Court of South Africa ('High Court') in *City of Johannesburg v International Parking Management (2011)* [at 49], the Supreme Court of Appeal in *Telcordia Technologies v Telkom* [at 51, 65 and 154] and *Cool Ideas 1* [at 11 and 42], and also the Constitutional Court in cases such as *Sidumo (2007)* [at 245], *Lufuno v Nigel* [at 224 and 235], and *Cool Ideas 2* [at 61]. In South Africa, legislative support for the finality principle in domestic commercial arbitration is contained in Section 28 of The Arbitration Act 42 of 1965.

The finality principle is, historically, deeply enshrined within South African jurisprudence. For example, it has been a feature of both pre- and post-colonial South African case law such as *Dutch Reformed Church v Town Council of Cape Town* [at 21], *Dickenson & Brown v Fisher's Executors (1915)* [at 174], *Theron en Andere v Ring van Wellington* [at 99], and *Amalgamated*

Clothing (1994) [at 9]. Adherence to this principle continues to the present day (Ojiako, 2023a, 2023b, 2023c).

The role of history in legal studies

History represents the archives of the collective memory and thoughts of the human experiences of past generations (Lerner, 1998). It provides scholars with the tools necessary to undertake rational assessment of and provide explanations for challenges faced in the past (Lawson, 1951). In the process, they develop critical insights necessary to address contemporary problems. In effect, by understanding the history of specific phenomena, past errors can be analyzed in a manner that prevents their future repetition (Rose, 2010). Meanwhile, past experiences continue to frame future development of ideas and practices (Quadagno and Knapp, 1992).

The importance of understanding the past cannot be overstated as relates to its general application within the law and specific application within engineering and construction dispute resolution. Rose (2010), for example, observed that: "*Studying the legal past has an important function as it produces knowledge and information about legal institutions and concepts"* (p. 110). Sweet (2010) similarly noted that historic opinions serve as the foundation to best appraise the development of legal rules. The importance of legal history is regularly acknowledged by the courts in numerous seminal arbitration cases heard by the appellant courts in South Africa. For example, in *Concor Holdings v Minster of Water Affairs and Forestry and VKE Consulting Engineers,* numerous references to legal history and parlance were made by the High Court, in a judgment spanning 314 pages. Another engineering- and construction-related arbitration dispute with substantial historical references by an appellant court is *Cool Ideas 1* [at 17 to 44].

Relevance to the engineering and construction community

The paper is important because it provides valuable insights into the theoretical foundations surrounding the use of arbitration and application of the finality principle in engineering and construction dispute resolution. A historical account of the finality principle also serves as an avenue for future theoretical enrichment and practical reform of existing primary domestic commercial arbitration legislation in South Africa. This is particularly important in the light of

observations made by the South African Law Commission (1998, 2001), and also in response to past and present criticism of South Africa's arbitration legislation within academic literature (Butler, 1994; Du Plessis, 2007; Burrow, 2008; Schulze, 2011; Wilske, 2011; Baker, 2014; Rantsane, 2020).

Engineering and construction dispute resolution studies are often framed within a historical context as exemplified in Adibfar et al. (2020), Sarhadi et al. (2021) and, more recently, Jagannathan et al. (2022). The present study shows that the finality principle has a broad-reaching impact on the domestic engineering and construction community. For example, legal opinions rendered by the appellant courts have serious financial implications for engineering and construction companies. Thus, this raises the need – at the very least – for valuable and comprehensive insights into the history and future of the finality principle. Furthermore, on the basis of recent findings by Jagannathan et al. (2022) which suggest a low level of legal knowledge among engineering and construction practitioners, this study serves as an avenue to addressing legislative and case law-based knowledge shortfalls that exist within the sector.

The rest of this paper is structured as follows. Following this introduction, in the second section, a review of the influence of Roman-Dutch law on South African arbitration law is undertaken. The third section explores the influence of English law on South African arbitration law. In particular, the 'gap filling' of Roman-Dutch law through colonial-era legislative formalization and the current Arbitration Act 42 of 1965 is reviewed from the perspective of the finality principle. The fourth section explores the drivers for reform of the current Arbitration Act 42 of 1965. Here, particular emphasis is on the 1998 and 2001 reviews and recommendations put forward by the South African Law Commission (SALRC) and the government response to these recommendations. The penultimate section discusses the implications of the government's decision to act on the 1998 report, but not the 2001 report. Here, particular emphasis is laid on the operation of concurrent arbitration schemes, the potential for legislative overlap, the fitness for purpose of a legislation which may be unfit to cater for the modern realities of arbitration, and the constitutional mandate of South African courts. The final section concludes.

Roman-Dutch law influence on South African arbitration law

Meaning

In South Africa, although arbitration is now being employed to resolve numerous disputes within construction, engineering and aligned sectors in a manner similar to other common law jurisdictions, the historical origins of arbitration in South Africa reside within Roman-Dutch law (*Roomsch Hollandsch Recht).* Reference to Roman-Dutch law does not imply reference to the laws of Rome codified in Dutch or a Latin version of Dutch law (Wessels, 1920). It is neither "…*Roman Law in Holland*" nor "…*Dutch Law overlaid with Romanism*" (Lee, 1909). Instead, Roman-Dutch law represents a composite form of law that developed in the sixteenth and seventeenth centuries from a predominant confluence of customary law in the Netherlands (Holland) and Roman civil law within its provinces (Lee, 1909; Williams, 1910).

The adoption of Roman in law in the Netherlands leading to the formation of Roman-Dutch law was neither systematic nor comprehensive (Van Reenen, 1995); rather its adoption seems to have been varied and eclectic. Thus, while extensively adopted in the area of private law, it was of no practical significance to public law. However, its development was arrested by political and economic changes in the Netherlands resulting in a jurisprudence that was not developed further after 1831. This is because, after this time, the law in the Netherlands was replaced by the French civil code (Bissohop, 1908). There are two significant implications to be derived from this replacement. *First*, there are no decided cases on Roman-Dutch law after 1831 (Wessels, 1908). This means that available legal authorities on what may be described as 'classical' Roman-Dutch law are, in fact, no longer the law as practiced in the Netherlands (Williams, 1910). *Second,* the development of what is deemed Roman-Dutch law has only occurred outside the Netherlands (Holland) and, more specifically, in South Africa via application and modification through practice (localization) and legislation (de Smidt, 1999; Van den Bergh, 2012).

Theoretical application

To best understand Roman-Dutch law requires an examination of the works of old authorities such as Johannes Voet (1726), and Hugo De Groot (1767) and Simon van Leeuwen (1886).

However, reference to the work of Simon van Leeuwen (1886) is important to understand arbitration under Roman-Dutch law, particularly between 1652 and 1806 (the period of its maturity).

Under Roman-Dutch law, arbitration is a well-recognized and supported "…*extrajudicial means of dispute resolution*" (Moglen, 1983). Its adjudication is generally undertaken by '*arbiters'* or 'good men' (Leeuwen, 1886). Leeuwen (1886) states in §3 (CH. IX) of his treatise that "…*judges by choice or good men, that is arbiters and arbitratore(s)*" (p. 413). He further clarifies the role of these *arbiters and arbitratore(s)* in §4 (CH. IX) as "…*those who are obliged to decide the cases and disputes ln the litigating parties, and pronounce an award according to the requirements of law and custom, and the power conferred upon them by the submission, without departing from or exceeding the same*". To ascertain whether an individual is a *bona fide* arbitrator, in §4 (CH. IX), he opines that "…*reference must be had to the contents and meaning of the deed of submission*". In this context, the deed of submission refers to the agreement to arbitrate (p. 413). In §6 (CH. IX), he observes that, during arbitration proceedings, "…*the law is not much taken into consideration, nor the exact price, but the settlement of that which the parties cannot agree on*" (p. 414). In effect, Leeuwen (1886) points out that the objective of arbitration is not necessarily the articulation or enforcement of legal rights, but the settlement of the dispute.

Leeuwen (1886) also discusses the finality principle by stating in §7 (CH. IX) that "…*we may appeal from the decision both of judges by election and good men, which is called Reduction*" (pp. 414, 415). In effect, under Roman-Dutch law, arbitration awards could be appealed (Stein, 1995; Lukits, 2014). He further states in §7 (CH. IX, p. 415) that appeal of arbitration awards, "…*if commenced within ten days, has the force of appeal and suspension*". Therefore, a major hallmark of arbitration under Roman-Dutch law is that challenges to the final decision of *arbiters* were allowed under the principle of *mandament van reductie*.

The notion of appeals herein is a major distinction between classical Roman law and Roman-Dutch law as, out of practical convenience under the principle of *si aequum arbiter definierit*[1], Roman law did not allow for arbitration appeals.

[1] Meaning, "…*if the arbitrator has determined that it is fair*"; see *Theron en Andere v Ring van Wellington van die NG Sendingkerk in Suid-Afrika en Andere 1976(2) SA 1 (A) [at 22B]*

Reading through Leeuwen (1886; p. 413) and reflecting on the opinion of Brand (2014), Roman-Dutch law does not make any distinction between appeals against arbitration awards and appeals against court judgments. Interestingly, it appears that Leeuwen (1886) in §9 (CH. IX, p. 415), construed arbitration as a *double exequatur* process by stipulating: "*…no awards may be put in execution unless a judgement has first been pronounced thereupon, for judges who are selected by the parties have of themselves no jurisdiction or legal constrains, and consequently their award must be confirmed by a judgement of the daily judge in order that execution may be taken out thereon".*

Adoption in South Africa

Roman-Dutch law became part of the common law of what today is South Africa in 1652 (Van den Bergh, 2012). The view of the academic literature is that the adoption of Roman-Dutch law in South Africa was not systematic (Mackarness, 1906; Erasmus, 1989). Instead, its adoption appears to have expanded across other adjacent territories to The Cape as the influence of the Dutch settlers' rule gradually expanded. For example, it appeared to be quite commonly used in some areas (such as in private law) but in other areas, such as constitutional law, it was absent. In sum, Roman-Dutch law, as is known today is, in reality, a uniquely crafted form of South African law, which is remarkably and fundamentally different from its construction in 1652 up to 1806 when the Dutch settlers lost control of South Africa (Lokin, 2008).

As relates to the application of the principle of arbitration finality to arbitration in South Africa, it appears that between 1652 (when Roman-Dutch law arrived) and in 1910 (the passing of the South Africa Act 1909 and the proclamation of the Union of South Africa), the principle of arbitration finality may not have necessarily been enshrined in South African arbitration jurisprudence. During this period, there seems to be an acceptance in South Africa that arbitration decisions could be appealed to the courts via different mechanisms, including through the principle of *mandament van reductie.* Leeuwen (1886) as noted earlier points out that this principle allowed aggrieved parties to serve the opposing party with a notice of an intention of repudiation via amendment within ten days of an arbitration award being published. However, in *Dutch Reformed Church v Town Council of Cape Town* [at 21], the then Supreme Court of the

Cape of Good Hope observed not only that "…*no case can be found in which the Dutch process of reductie has been resorted to in this colony*", but also that no such cases had been reported in the then Cape Colony "…*since the appointment of English and Scotch judges in 1828 [when] the principle of the finality of awards became firmly established*".

Current state in South Africa

The process of formalizing the suppression of Roman-Dutch law as the primary source of South African arbitration law began with the promulgation of pre-Colonial legislation in 1889. The specific legislations are the Arbitration Act of 1889 (United Kingdom) which applied to the colonies in South Africa until 1898 and the Arbitrations Act, 1898 (Act No. 29 of 1898) of the Cape of Good Hope which operated in the Cape Colony. They also include the Arbitration Act 24 of 1898 (Natal) which operated in the Colony of Natal, and the Transvaal Ordinance Act 24 of 1904 which operated in the Transvaal.

Despite its formal suppression, Roman-Dutch has survived in South African arbitration jurisprudence to the present day (Scott, 1993; van Reenen, 1996; Van Der Merwe, 1998; van der Bergh, 2012). The importance of the role of Roman-Dutch law in South Africa's modern day arbitration jurisprudence can be evinced in three areas.

First, academic literature has not only in the past (see Palley, 1962; Sanders, 1981; De Soysa, 1993; Schulze, 2005; Jacobs, 2006; Gauntlett, 2007; Swanepoel, 2009), but also more recently, continued to explore the application of Roman-Dutch law in arbitration law (Brand, 2014; Levenberg, 2016; Rantsane, 2020). *Second*, there is evidence that engineering- and construction-related arbitration cases heard by the appellant courts in South Africa have relied on Roman-Dutch law in the framing of their judgments. This is evinced in cases such as *Concor Holdings v Minster of Water Affairs and Forestry and VKE Consulting Engineers* which is characterized by its extensive reference to and discussions on Roman-Dutch Law [at 304, 305, 306, 307, 309, 324, 349, 354, 390, 456]. There are also more recent examples of arbitration cases where this trend has continued; examples include *Telcordia Technologies v Telkom* [at 54], *Lufuno v Nigel* [at 85 and 221] and *Cool Ideas 1* [at 20 and 25]. It is observed that in *Cool Ideas 1* [at 17

to 44], the entire dissenting judgment of Mr Justice Nigel Willis of the Supreme Court of Appeal drew inferences from Roman-Dutch law.

Third, under Sections 8(3)(a), 39(2), and 173 of The Constitution of the Republic of South Africa (hereafter 'The Constitution'), South African courts are under a mandate to develop the common law. Furthermore, under Sections 39(1)(b)-(c), 232, and 233 of The Constitution, South African courts are also mandated to interpret legislation in a manner consistent with international law. Roman-Dutch law is a major component of South African common law (Van Der Merwe, 1994; Van Der Merwe, 1998; Levenberg, 2016). It is also part of international law as it forms part of the legal traditions and common law of a number of southern African countries including Botswana (Pain, 1978), Lesotho (Pain, 1978; van Niekerk, 2012), Swaziland (Pain, 1978; van Niekerk, 2012) Namibia (van Niekerk, 2012), South Africa, and Zimbabwe (Van Reenen, 1995; Fombad, 2005; Oppong, 2008; van Niekerk, 2012). The point being made is that Roman-Dutch does not simply serve as a discredited source of "…*historical documents describing and commenting on the law of bygone ages and long gone societies*" (Van Der Merwe, 1998). Despite its lessening importance, it is important as a practical tool in understanding case law by drawing from a 2000-year history of legal discourse (Van Der Merwe, 1994, 1998; van der Bergh, 2012; Levenberg, 2016). Scott (1993) opines that Roman-Dutch law now resides within the lower hierarchy of South Africa law just above unwritten (customary) law.

As noted by the Supreme Court of Appeal in *Telcordia Technologies v Telkom* [at 54] and the Constitutional Court in *Lufuno v Nigel* [at 85], the dominance of a pro-arbitration policy and view on the finality principle within South African domestic commercial only developed following the decline of the impact of Roman-Dutch law which allowed for arbitration appeals. This decline commenced with the arrival of the British in The Cape.

English law influence on South African arbitration law

Arrival

In the same manner that Roman-Dutch law has significantly influenced South African law, the laws of England and Wales have also had a major impact on the development of South African law beginning in 1806 with the ending of Dutch rule in The Cape by the British (Douthwaite, 1960;

Beinart, 1981). Roman-Dutch law was, however, retained as part of the Articles of Capitulation signed on 10 January 1806. The policy of the British on taking over the Cape Colony was to minimize its interference with established local laws to the extent that it was feasible to do so (Craies, 1900). Thus, in the Cape Colony and later, in other parts of South Africa, elements of Roman-Dutch Law were preserved. The British approach was to utilize the laws of England and Wales to gap-fill Roman-Dutch law before more formal adoption (Douthwaite, 1960). This gap-filling was primarily in areas of colonial law where the Roman-Dutch law appeared contradictory, vague, or silent (van der Bergh, 2012).

Differences from Roman-Dutch law

The laws of England and Wales do share similar origins with Roman-Dutch law (Beinart, 1981). In fact, it is shown that Roman law has had an influence on both, although with different degrees of significance (Sherman, 1914; Plucknett, 1939)[2]. However, in arbitration law, a key difference exists between Roman-Dutch law and English law on the question of 'finality'. For example, under Roman-Dutch law, arbitration awards could be appealed using the principle of *mandament van reductie* (Leeuwen, 1886). However, as espoused within the colonial-era Arbitration Act 1889 (Section 11) and the current Arbitration Act 1996 (Section 58 (1)), the laws of England and Wales provide a very limited window for arbitration awards to be challenged and *annulled* or *nullified* (cancelled) or *vacated* (cancelled and replaced).

There are also differences between Roman-Dutch law and the laws of England and Wales in other areas of law apart from arbitration. These differences are observed in areas such as (i) property rights (Schulze, 2005; Freedman, 2015; 2022; Steyn, 2017), (ii) contract law, and (iii) procedural law (Lokin, 2008). A more concise and detailed review and discussion of these differences can be found in Morice (1905).

Development of arbitration legislation in South Africa

[2] Roman law has had a major impact on countries such as Germany, Austria and Spain where it was received almost in full. In countries such as Russia, Scotland and the Netherlands, the reception was selective. In England, the reception was more sparse.

To formalize the gap-filling role of English law relevant to the introduction of arbitration in 1898, the British promulgated three pieces of arbitration legislation in colonial-era South Africa. Next, areas of interest to the finality principle within these South African specific arbitration legislations are briefly reviewed.

The Arbitration Act of 1889 (United Kingdom)

The Arbitration Act 1889 (United Kingdom) contained 30 sections. The finality of arbitration awards is addressed in Section 2 (h) where it states that: "*The award to be made by the arbitrators or Umpire shall be final and binding on the parties and the persons claiming under them respectively*". The Arbitration Act 1889 (United Kingdom) goes on to provide further qualifications of Section 2 (h). For example, in its qualification of 'final' in Section 2 (h), it clarifies that: "*An award must be final as to all matters within the sub- mission of which the arbitrators have notice ever".* It also states in in Section 2 (h) that "…*when an award is that a suit already commenced shall be dismissed, that must be understood that it shall be dismissed and cease for ever"*. *Vacatur* is addressed in Section 11 of the Act where it states that: "*Where an arbitrator or umpire has mis-conducted himself, or an arbitration or award has been improperly procured, the Court may set the award aside*". Generally, reviewing the qualifications of Section 11 of the Act suggests that an appeal to vacate an arbitration award on points of law will not succeed. Neither will an appeal to *vacatur* succeed on the basis that the arbitrator's award being contrary to evidence placed before an arbitrator.

Arbitrations Act, 1898 (Act No. 29 of 1898) of the Cape of Good Hope

In the Cape Colony, the legislative provisions for the settlement of disputes by arbitration were contained in the *Arbitrations Act, 1898 (Act No. 29 of 1898) of the Cape of Good Hope.* It contained 32 sections. *Vacatur* was addressed under Section 17 (2) where it stated (as had been the case in Section 11 of The Arbitration Act 1889 (United Kingdom)) that: "*(2) Where an arbitrator or umpire has misconducted himself, or an arbitration or award has been improperly procured, the court may set the award aside and may award costs against any such arbitrator or umpire personally*". The finality of arbitration awards does not appear to be addressed in the

Arbitrations Act, 1898 (Act No. 29 of 1898) of the Cape of Good Hope in the same manner that it was in The Arbitration Act 1889 (United Kingdom).

The Arbitration Act 24 of 1898 (Natal)

In the Natal Colony, the operative law on arbitration was the *Arbitration Act 24 of 1898 (Natal)*. The Natal Act contained 36 sections. *Vacatur* was addressed in Section 18 in exactly the same wordings employed in Section 11 of The Arbitration Act 1889 (United Kingdom) and Section 17 of the Arbitrations Act, 1898 (Act No. 29 of 1898) of the Cape of Good Hope. It also appears that The Arbitration Act 24 of 1898 (Natal) did not necessary construe arbitration as being subject to the finality principle.

The Transvaal Ordinance Act 24 of 1904

In the Colony of the Transvaal, the applicable arbitration law was *The Transvaal Ordinance Act 24 of 1904.* The Transvaal Act contained 31 sections. *Vacatur* was addressed in Section 16 in the same manner and form as it is addressed in the Arbitrations Act, 1898 (Act No. 29 of 1898) of the Cape of Good Hope and the Arbitration Act 24 of 1898 (Natal). The Transvaal Ordinance Act 24 of 1904 also does not address the finality of arbitration.

The Arbitration Act 42 of 1965

Modern domestic commercial arbitration law in South Africa is encompassed in *The Arbitration Act 42 of 1965*. The two key provisions of relevance to the finality principle within this legislation are Section 28 and Section 33. It is important to highlight that, apart from Section 28 and Section 33, there are other provisions of relevance to the finality principle within The Arbitration Act 42 of 1965. These include Section 2 (matters which can be subject and not subject to arbitration), Section 3 (the nature of the agreement itself), and Section 13 (termination or setting aside of appointment of arbitrator or umpire). Also relevant is Section 20 which makes provision for arbitrators/arbitral panels to refer to points of law that arise during their proceedings to court.

Section 28 of The Arbitration Act 42 of 1965 stipulates the binding attributes of arbitration awards. However, crucially, it sets a caveat by highlighting that this condition can be challenged

where there are provisions set out within the agreement to arbitrate that allows for appeals. On the other hand, Section 33 cites to justifications for *Setting aside of award*. In effect, The Arbitration Act 42 of 1965 does not address appeals. Instead, its focus is on *vacatur*. There are three reasons set out within Section 33 (1) of The Arbitration Act 42 of 1965 upon which the courts may rely on to (i) impede with the finality principle and (ii) set aside a domestic award. The *first* is where there is evidence of arbitrator misconduct or arbitration panel members (Section 33 (1) (a)). The *second* is where it is found that the arbitral proceedings have been conducted in a grossly irregular manner (Section 33 (1) (b)). The *third* is where it is determined that an arbitral award was not properly obtained (Section 33 (1) (c)). In effect, Section 33 of The Arbitration Act 42 of 1965 provides three grounds as basis for an application for *vacatur*. These are (i) misconduct of the arbitrator or arbitral panel or tribunal, (ii) gross irregularity, or (iii) where an award has been improperly obtained.

Reviewing The Arbitration Act 42 of 1965

Practitioner and academic criticisms

Formal calls for review of The Arbitration Act 42 of 1965 in South Africa commenced with the 1994 petition by the Association of Arbitrators Southern Africa (AASA) to the South African Law Commission ('SALRC'). The AASA's petition was couched in the context of South Africa's emergence from international isolation following the collapse of the '*apartheid*' (racial segregationist) system of government that had been in force in the country between 1948 and 1994. The AASA's petition drew particular attention to South Africa's then isolation and a concern that most of its laws were inadequate and not fit for purpose, particularly in the areas of commerce, trade, and investment.

The focus of the AASA was on domestic arbitration, specifically as relates to arbitration practice as impacted by The Arbitration Act 42 of 1965. Specific areas of interest appeared to touch on the enforceability of arbitration agreements, the main concern being that enforcement of an arbitration award depended on the discretion of the national courts. More specifically, for example under Section 3(2) of The Arbitration Act 42 of 1965, it was permissible on good cause, for a national court to set aside an agreement to subject a dispute to arbitration. National courts

also had the power under Section 6(2) of The Arbitration Act 42 of 1965 to order the stay of any arbitration proceedings. The AASA drew attention to the possibility of these provisions being employed to delay enforcement by recalcitrant disputants, thus undermining purported desirable aspects of arbitration over litigation. Scholars have also criticized The Arbitration Act 42 of 1965 in academic literature (Butler, 1994; Du Plessis, 2007; Burrow, 2008; Schulze, 2011; Wilske, 2011; Baker, 2014; Rantsane, 2020). Of particular note, The Arbitration Act 42 of 1965 has been in operation for nearly six decades without major revisions or updates. More specifically, only slight amendments have been made to accommodate the Justice Laws Rationalisation Act 18 of 1996, the General Law Amendment Act 49 of 1996, and the Prevention and Combating of Corrupt Activities Act 12 of 2004. Academic criticism of The Arbitration Act 42 of 1965 appears to focus on the point that it is unlikely that the Act reflects modern aspirations of arbitration in South Africa. Furthermore, there are questions about whether the Act is able to accommodate constitutional provisions which mandate South African courts to develop the common law and interpret legislation in a manner consistent with international law. This point is particularly pertinent when it is taken into consideration that foreign law does acknowledge a range of non-statutory grounds as viable grounds for impeaching the finality principle (AlRaeesi and Ojiako, 2021; Ojiako et al., 2021; Ojiako, 2023a, 2023b, 2023c). These grounds include (i) '*Violation of essence',* (ii) '*Manifest disregard of the law',* (iii) '*Illegality',* (iv) '*Arbitrary and capriciousness',* (v) '*Complete irrationality',* and (vi) '*When the award or procedure is contrary to public policy* or *public order*'.

The Law Commission's review

Although the focus of the petition by the Association of Arbitrators Southern Africa (AASA) for arbitration law reform was on the local application of the Arbitration Act 42 of 1965, the South African Law Commission ('SALRC') found it necessary to commence its review by examining the likely impact of the 1985 United Nations Commission on International Trade Law (UNCITRAL) on South African arbitration law (South African Law Commission, 1998; South African Law Commission, 2001). In order to expedite the program for arbitration law review, the SALRC concluded, among other factors, that any new arbitration law in South Africa should adopt the

UNCITRAL Model Law (UNCITRAL, 1985). However, it also concluded that such adoption should only be applied to international arbitrations.

The rationale of the SALRC was that any reform of domestic arbitration was likely to be controversial and engage a wider range of competing interest groups. For example, among the contentious matters of debate was the actual role of arbitration as pan-African jurisprudence. This concern was important in South Africa because laws promulgated prior to 1994 such as The Arbitration Act 42 of 1965 were seen to have largely ignored African customary (indigenous) law. However, South Africa's post-apartheid Constitution now mandated that: *"(3) The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law."* This is a point reiterated by the Constitutional Court in *Alexkor Ltd v Richtersveld Community*, where it noted [at 51] that: "*While in the past indigenous law was seen through the common law lens, it must now be seen as an integral part of our law. Like all law it depends for its ultimate force and validity on the Constitution. Its validity must now be determined by reference not to common-law, but to the Constitution*".

The issue therefore for the SALRC were opinions raised by some stakeholders that mediation as against arbitration was more in line with pan-African legal jurisprudence and should therefore be accorded legislative footing instead of arbitration which a number of commentators contended was rooted in English national culture.

The Law Commission: Balancing UNCITRAL considerations

In framing its recommendations, the SALRC also had to address the benefits to South Africa in adopting the UNCITRAL Model Law within one unified arbitration law as in the case of other common law African countries such as Kenya, Uganda, and Zimbabwe. However, it rejected this option for a number of reasons. *First*, despite a view that operating one unified arbitration law will minimize any associated complexities, the SALRC expressed concerns that South African lawyers without dual or international experience may be unfamiliar with specific terms set out within the UNCITRAL Model Law. *Second*, it argued that, since the UNCITRAL Model Law was couched in legal law phraseology of England and Wales, promulgating one new arbitration law involved the tedious task of ensuring that the official text of any such new law was, as far as

possible, written in a manner that closely adhered to the UNCITRAL Model Law. Such text may, however, be difficult for a number of South African lawyers who are likely to be unfamiliar with specific terms used under the laws of England and Wales. *Third*, it also argued that, in reality, the Arbitration Act 42 of 1965 had not only worked well in practice but was also supported by a long history of case law which was likely to be undermined by the promulgation of any new arbitration law. *Fourth*, the SALRC also raised concerns that any new law framed within the UNCITRAL Model was unlikely to maintain the same level of powers granted to courts under The Arbitration Act 42 of 1965. On these bases, the SALRC's view was that South Africa will be best served by having separate arbitration laws for domestic and international commercial arbitration. More specifically, the SALRC opined that a dedicated international arbitration law framed within the UNCITRAL Model Law was more likely to benefit South Africa's interest in serving as hub for international arbitration.

Based on these assessments, the SALRC formally put its proposals to the government for the adoption of UNCITRAL Model Law in South Africa, but to be applied only to international arbitration (South African Law Commission, 1998). It is this recommendation that formed the basis of the promulgation of The International Arbitration Act 15 of 2017 (South Africa).

The Law Commission: Balancing domestic and international arbitration

The SALRC's acknowledgment that international arbitration required reform in its 1998 report still left the unanswered question of whether local (domestic) arbitration law also needed to be reformed (South African Law Commission, 1998). The SALRC concluded that there were two avenues for possible reform of domestic arbitration law. The *first* was to amend/ improve aspects of The Arbitration Act 42 of 1965 deemed not to be working, but retain its basic form. The *second* was to recommend a new domestic arbitration law that combined the best attributes of not only the UNCITRAL Model Law but also The Arbitration Act 1996 (United Kingdom). On analysis**,** as there had been substantial changes to arbitration law and practice, most notably in common law jurisdictions such as England and Wales, the SALRC opined that the second option was not viable (South African Law Commission, 2001), recommending "*That the existing Arbitration Act 42 of 1965 should be repealed and replaced with a comprehensive new arbitration statute for domestic*

arbitration". Interestingly, noting the need to maintain the finality principle in arbitration, the SALRC specifically highlighted the need for arbitration agreements to be expressly exempted from any legislation that allowed the courts to void arbitration contracts that were unconscionable, unreasonable, or oppressive.

The Law Commission: Proposals for new draft legislation

The main features related to the finality principle that are contained within the legislation proposed by the SALRC to replace The Arbitration Act 42 of 1965 are briefly described here. The proposed bill contained 60 sections divided across nine chapters. Section 45 stipulated that arbitration awards were final, and were not subject to appeal. On the other hand, *vacatur* was addressed under Section 49. A brief summary comparison of provisions of interest to the finality principle within the current Arbitration Act 42 of 1965 and the draft legislation proposed by the SALRC is shown in Table 1.

Discussion

The current primary legislation for domestic commercial arbitration in South Africa, The Arbitration Act 42 of 1965, has remained in force without any major amendments for nearly six decades despite being almost exclusively framed on the basis of antiquated colonial legislation promulgated between 1889 and 1904. This is despite criticism from practitioners (such as the Association of Arbitrators Southern Africa) and academics (Butler, 1994; Du Plessis, 2007; Burrow, 2008; Schulze, 2011; Wilske, 2011; Baker, 2014; Rantsane, 2020), and calls for its reforms in two reports by the South African Law Commission (1998, 2001). In response to the SALRC's 1998 report on international arbitration, the South African government has promulgated The International Arbitration Act 15 of 2017. However, it has not acted on the SALRC's 2001 report on domestic arbitration which recommended a wholescale amendment of The Arbitration Act 42 of 1965. As observed by Schulze (2011), this is surprising as it will seem that, by 2011, all indications were that the South African government had approved a draft bill for domestic arbitration to be presented to Parliament for enactment. However, without any explanation, this never happened. At the time of writing, this position has not changed.

This creates three problems. The first is that South African commercial arbitration law is now effectively operating two major concurrent arbitration schemes. Domestic commercial arbitration is also impacted by another legislation – that is, Section 13(5) of The Protection of Investment Act 22 of 2015. It is also impacted by specific constitutional provisions set out in Sections 8(3)(a) and Sections 39(1)(b)-(c), 39(2), 173, 232, and 233 of The Constitution. Combined together, as shown in *Lufuno v Nigel (2009)* and *Cool Ideas 2 (2014)*, this creates the potential for legislative overlap. Drawing from Chatterjee (2009), the mechanism for addressing challenges emanating from the ensuing overlap should likewise be a legislative creation.

The second problem that emerges from the government not undertaking a wholescale amendment of The Arbitration Act 42 of 1965 is that, in effect, South Africa is currently operating two major concurrent arbitration legislations with provisions and text couched in fundamentally different legal philosophies, legal history, and language. This is a problem highlighted earlier by the SALRC (South African Law Commission, 1998).

The third problem which this study emphasizes is that six decades after its promulgation and two decades after the SALRC recommendations for its amendment, arbitration practice has substantially changed and developed to justify reviewing and updating The Arbitration Act 42 of 1965. All these have to be taken within the context of an increase in construction- and engineering-aligned commercial disputes. While the statistics are not available, it can be inferred from a reported increase in its international caseload by the Arbitration Foundation of Southern Africa (AFSA) that there would be an associated increase in domestic commercial disputes being brought before arbitration. More specifically, the AFSA reported that the number of international arbitration cases that were placed before it for arbitration rose from 20 in 2017 to approximately 55 by the end of May 2019. The AFSA is the premier arbitral institution in South Africa (Onyema, 2020). This arguably, corresponds to the 2022 Governance, Public Safety, and Justice Survey (GPSJS) report published by Statistics South Africa which suggests a rise in proportion of disputes being reported in the country (Statistics South Africa, 2022). In addition, a cursory search of the Southern African Legal Information Institute (http://www.saflii.org/) case database using the search string "*section 33 arbitration*" returned 4224 documents. While the search results do not point to a precise number of disputes before South African courts that have engaged the finality

principle, they suggest – at the very least anecdotally – an interest in challenges to arbitral awards.

This paper contends that South African courts have increasingly matured in exercising their constitutional mandate to develop the common law and to consider and/or explain domestic laws in a way that is consistent with international law. Mindful of these factors, this study recommends that the South African government revisits the proposals first put forward by the SALRC (2001) and considers a review of The Arbitration Act 42 of 1965. As the SALRC had recommended, this review should focus on retaining the Act's basic form but amending/improving key elements of the legislation deemed not to be working.

As this study focuses on the finality principle, it is of interest therefore to improve the framing of finality within The Arbitration Act 42 of 1965. Focusing on the finality aspect of The Arbitration Act 42 of 1965 limits the potential disruption to arbitration practice that can emanate from a complete re-drafting/revision of the entire legislation, a concern that had previously been raised by the SALRC (South African Law Commission, 1998, 2001). Thus, cognisant of the constitutional mandate of South African appellant courts to develop the common law and interpret legislation in line with international law, this paper recommends amending/improving Section 33 of The Arbitration Act 42 of 1965 on the basis of the six judicially construed grounds for arbitration *vacatur* identified in international law (Ojiako, 2023b). These grounds are (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* (Hayford, 1996), (v) '*Complete irrationality'* (Hayford, 1996; 1998a; 1998b), and (vi) '*When the award or procedure is contrary to public policy* or *public order*' (Becker and Kleyn, 1989; Arfazadeh, 2002; Drummonds, 2012; Badah, 2016; AlRaeesi and Ojiako, 2021; Ojiako et al., 2021). This will involve modifying the text of Section 33 through a process that entails one or a combination of (i) textual deletion (ii) insertion of new or alternative text, and/or (iii) inserting new or alternative text within Section 33 of The Arbitration Act 42 of 1965. Table 2 presents a summary comparison of specific provisions addressing finality in Sections 28 and 33 of The Arbitration Act 42 of 1965 is against a draft proposal for an improved framing of the finality principle.

Conclusion

In South Africa, arbitration represents a well-recognized mechanism for resolving commercial disputes within the construction, engineering and other aligned sector. This paper undertook a historical review of the development domestic commercial arbitration legislation in South Africa. Focusing on the finality principle within these laws, the paper has set out the major limitations of the current legislation. It has also suggested improvements that may alleviate these limitations. The finality principle remains contentious in South African arbitration. Given the history of its development and increasing commercial pressures, judicial discourse and criticism from both practitioners and academics is likely to continue into the near future. This study therefore makes three contributions to the field. *First*, the study examined the intellectual foundations of what is clearly an evolving area of law in South Africa. *Second*, it provides the impetus for criticizing the range of alternative legal roadmaps that exist within domestic commercial arbitration in South Africa. *Third*, it serves as a guideline for domestic commercial scholars and practitioners interested in increasing their appreciation of the origins, present state of development, and likely future of domestic commercial arbitration legislation in South Africa.

The proposals for revisions to the finality provisions within the current legislation represent the first step in addressing well acknowledged and overdue reforms which are necessary for the advancement of an evolving arbitration practice within the construction and engineering sector in South Africa. Because of the controversies associated with judicially construed grounds for arbitration *vacatur*, as was highlighted by the High Court in *City of Johannesburg v International Parking Management (2011),* further research needs to address the precise extent to which drafters of any proposed law will be prepared to develop the legislation in line with international law, as well as the nature of such developments. This is timely considering current opposition of the South African Law Commission to the framing of any proposed legislation to adhere to the UNCITRAL Model Law.

Data Availability Statement

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

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