Autonomy and due process in arbitration: recalibrating the balance*

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Abstract

This article considers the legislative framework and the law reform proposals that have gone unimplemented in South African arbitration law. Recent developments in the jurisprudence are discussed and the implications of the cases are mapped out. International trends in the European Union are also noted. Specific mention is made of relevant law reforms in Swiss law, as these are particularly instructive on the inter-relationship of the *compétence-compétence*, waiver and *res judicata* doctrines.

INTRODUCTION

Conflicts of jurisdiction between a state court and an arbitral tribunal could arise in many different scenarios. Two instances occur when: (a) claimant X institutes a court action and the defendant subsequently commences with arbitration or requests to be referred to arbitration (as envisaged by the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards – NYC); and (b) claimant X commences arbitration and the defendant subsequently seizes a national court. X should be able to seek a stay of the parallel litigation on the ground of the existence of a valid agreement to arbitrate the dispute,[1] but the duty on the part of South African courts to do so is not clearly legislated for, nor is it as well-understood as it deserves to be. Various interests have fallen into disharmony in this area of the law.

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1 International Law Association (ILA) 'Final Report of the International Arbitration Committee on *Lis Pendens* and Arbitration' *Report of the Seventy-Second Conference* Toronto (June 2006) 186–204, available at: http://www.ila-hq.org/en/committees/index.cfm/cid/19 (last accessed on 6 December 2009). In general also F Dely & A Sheppard '*Res judicata* and arbitration' 2009 *Arbitration International* 35–66, which is the preceding Interim Report of the International Arbitration Committee of the International Law Association, Berlin Conference, London, 2004, 826–861, available at: http://www.ila-hq.org/en/committees/index.cfm/cid/19 (last accessed on 25 January 2011).

Abuse of process could ensue if an arbitral tribunal were able to proceed completely independently from a supervisory court in particular circumstances. From the viewpoint of safeguarding the time and cost benefits of arbitration as the mode of dispute settlement, it is vital to manage the tensions between procedural guarantees on the one hand, and the autonomy of the arbitration and of the parties to have recourse to arbitration on the other. The judiciary guards procedural guarantees that enable parties to realise other rights, such as access to court and the right to a fair trial, but also needs to balance their protection with arbitral autonomy and party autonomy.[2] Recent jurisprudence illustrates that the focus of the South African judiciary is on procedural guarantees. Despite the iconic status of party autonomy at the intersection between arbitration and litigation in many developed legal systems, it is not optimised in South African law. The point at which judicial intervention starts to resemble court interference with arbitration is difficult to pinpoint, and semantic confusion thrives in this context. Nonetheless, it is evident that arbitral autonomy is being diluted by the multiple layers of protection that safeguard the right of access to court.

Given that accelerated forms of dispute resolution are not open to the same safeguards of the public adjudicatory system, but cannot do away with adequate protections either, the implications of waiving the right of access to court and the contractual right to arbitrate remain significant.[3] If the restriction of the parties' rights corresponds to a legitimate interest and is not disproportionate, accelerated procedures with fewer protections may still be admissible even in the absence of true consent. Nonetheless, constitutional rights are mandatory in nature and many implications remain to be worked out in South African law.

The UNCITRAL Model Law on International Commercial Arbitration tackles the issues associated with the priority and exclusivity in conflicts of jurisdiction between courts and arbitral tribunals directly. It was originally designed for countries lacking in a strong arbitration culture, to signal that court intervention was to be limited to that laid down by the Model Law.[4] Despite the relative popularity of this model as an arbitration framework for Sub-Saharan Africa,[5] South Africa has not pursued suggestions for law

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2 J Lurie 'Court intervention in arbitration: support or interference?' 2010 *Arbitration* 447.

3 T Schultz 'Human rights: a speed bump for arbitral procedures? An exploration of safeguards in the acceleration of justice' 2006 *International Arbitration Law Review* 1, 13.

4 UNCITRAL Report on the work of its 18th session, UN A/40/17, §§ 61–63; F Davidson, H Dundas & D Bartos *Arbitration (Scotland) Act 2010* (2010) 13.

5 Thirty-one contracting parties to the NYC are African States; http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status html (last accessed on 6 December 2010). Nine African states have enacted the UNCITRAL Model Law (Egypt, Kenya, Mauritius, Nigeria, Tunisia, Uganda, Madagascar, Zambia

reform based thereon. South Africa is part of the system based on the NYC,[6] that differs in some respects from the Model Law system. As the Model Law system has not prevailed in South Africa, the devices by which conflicts of competence can be resolved assume importance insofar as they can manage tensions between courts and arbitral tribunals. These devices include concurrent consideration, sequential consideration, time bars and waiver.[7] These procedural devices are bound to intersect with fundamental rights doctrine. In fact, this interface is likely to give shape, meaning and form to the 'new science of conflict of litigation' that McLachlan envisages.[8] The legal implications of curial proceedings meeting with extra-curial proceedings have not been systematically addressed in a transnational African context.[9] The need for systematic research[10] has been highlighted by two recent South African rulings on human rights standards in arbitration proceedings, ie *Telcordia Technologies Inc v Telkom SA Ltd* and *Lufuno Mphaphuli & Associates (Pty) Ltd v Nigel Athol Andrews and Bopanang Construction CC*.[11] These rulings have confused the issue of waiver of the right of access to court by having recourse to arbitration (which is an aspect of party autonomy).

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and Zimbabwe). See UNCITRAL Model Law on International Commercial Arbitration, 1 June (1985) 24 *ILM* 1302. For the 2006 amendments, see: http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf (last accessed on 6 December 2010).

6 South Africa acceded on 3 May 1976; entry into force 1 August 1976. The Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977 was enacted to give effect to South Africa's accession to the NYC in 1976. SADC countries are free to adopt the OHADA Model Law on Arbitration to ensure regional uniformity for international commercial arbitration, but South Africa has not done so.

7 C McLachlan *Lis pendens in international litigation* (2009) 89, 198–203.

8 *Ibid.*

9 The mandate of the African Union Commission on International Law permits it to develop private international law in Africa. See R Frimpong Oppong 'Private international law scholarship in Africa (1884–2009) – a selected bibliography' 2010 *American Journal of Comparative Law* 322.

10 DW Butler 'The desirability of a common arbitration statute for international commercial arbitration in SADC jurisdictions: a comparison between the UNCITRAL Model Law and the OHADA Uniform Act' 1–36 (unpublished paper on file with author); E Onyema 'Regional approaches to enforcement of arbitral awards in Sub-Sahara Africa' paper delivered at the Inaugural Conference of Alumni and Friends of the School of International Arbitration (AFSIA), London, 3 December 2008. Available at: eprints.soas.ac.uk/5996/1/Enforcement_of_Awards_in_Sub-Sahara_Africa.pdf (last accessed on 24 November 2008) 3; C Roodt 'Conflicts of procedure between courts and arbitral tribunals in Africa: an argument for harmonization' 2010 *Tulane European and Civil Law Forum* 65; C Roodt 'Conflicts of procedure between courts and arbitral tribunals with particular reference to the right of access to court' 2011 *African Journal of International and Comparative Law* 236.

11 *Telcordia Technologies Inc v Telkom SA Ltd* 2007 3 SA 266 SCA (order of court *a quo* in *Telkom SA Ltd v Boswood and others* (unreported) 2005 High Court Pretoria set aside); *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another* (CCT 97/07) [2009] ZACC 6 (20 March 2009).

The optimum point of balance between the competing concepts of party autonomy and due process is likely to differ depending on the individual case. Recalibration is possible with reference to a wide array of procedural and jurisdictional tools, including the doctrine of *compétence-compétence*, its negative aspect, *lis pendens* ('pending proceedings'), *res judicata*, a strict approach to waiver or a discretionary approach. These concepts do not carry autonomous or universal meanings; they are context-bound and their implications differ across different jurisdictions. The work that the International Law Association performs is important in promoting an understanding of cultural, semantic, and legal differences.

In its 'Final Report on *Lis Pendens* and Arbitration', the ILA International Commercial Arbitration Committee considered the correct approach to the doctrine of *compétence-compétence* and its negative aspect and endorsed the notion of the positive operation of the doctrine of *compétence-compétence*.[12] In its ordinary and positive sense, *compétence-compétence* requires an arbitral tribunal to proceed with the arbitration and the determination of its own jurisdiction 'regardless of any other proceedings pending before a domestic court'.[13] Other permutations of the doctrine permit it to assume the function of a *prior temporis* mechanism, however. There are differences not only in regard to the positive and negative effects of *compétence-compétence*, but also the definition of the effects shift across jurisdictions. Broadly speaking, however, negative *compétence-compétence* implies that the arbitral tribunal determines the question of jurisdiction, and that state courts should refrain from ruling, in parallel and to the same degree of scrutiny, on the same issue at the outset of the arbitration process.

The same fluidity underlies the other devices. We may ask, therefore, how the most attractive arbitration seats in the world effect and maintain balance. More particularly, it is of great importance to ascertain how the attractive seats deal with waiver and the implications it has for the right of access to court and for *res judicata*.

SOUTH AFRICA: AN UNATTRACTIVE SEAT FOR INTERNATIONAL COMMERCIAL ARBITRATION

Legislative framework based on judicial discretion

Domestic and international arbitrations conducted in South Africa are regulated by the Arbitration Act 42 of 1965, regardless of whether the parties are local or foreign, and provided there is no agreement to the contrary. The Act reflects the position as it stood in English law over forty years ago. The

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12 ILA Final Report on *Lis Pendens* and Arbitration n 1 above; McLachlan n 7 above at 422.

13 *Id* at § [5.13].

old common law showed a measure of diffidence for arbitration, which meant that the balance of power had always tilted in favour of the courts. The most recent statutory reform in England, namely the Arbitration Act 1996, was intended to reduce court intervention in the arbitral process and to increase judicial support. Opinion is mixed as to whether this objective has been realised.[14]

The 1965 Act still presents litigants with many opportunities to resort to the formal court process.[15] Discretion to refuse to enforce an arbitration agreement is safeguarded in sections 3(2) and 6(2), and an application for a stay of the court proceedings may be turned down on good cause shown. Courts take into account a number of factors that, individually or cumulatively, may be sufficient to discharge the onus that rests on the party who is seeking to avoid arbitration.[16] Thus, it is possible for a party to escape from the effects of an arbitral agreement on the jurisdiction of the court.[17] In this regard, the defective implementation of the NYC is evident. Article II(3) of the NYC obliges the court of a contracting state, when seized of an action in a matter in respect of which the parties have entered into an arbitration agreement to refer the parties to arbitration at the request of one of them, unless it finds that the agreement is null and void, inoperative, or incapable of being performed. Its discretionary approach permits the courts to determine jurisdiction, refer a case to arbitration, or to grant a stay of proceedings brought in violation of an arbitration agreement. As such, the absence of a provision that mirrors article II(3) is understandable. In common law courts it is practice to leave it to the parties to pursue arbitration after the court has stayed its proceedings. There is authority for the view that the

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14 *Eg* Lurie n 2 above at 447.

15 PJ Conradie 'A Q & A guide to arbitration in South Africa' available at: http://competition.practicallaw.com/7-381-3144 (last accessed on 13 March 2009).

16 *Eg Nick's Fishmonger Holdings (Pty) Ltd v De Sousa* 2003 2 SA 278 (SECLD) at 282D–283F. These factors include the risk of conflicting decisions if separate proceedings were to be permitted; the importance of enforcing the arbitration agreement reached between the parties; an election to arbitrate despite knowing about potential disadvantages associated with arbitration at the time; and the time and money saved because the arbitrator is able to use his or her expert knowledge to dispense with expert evidence. See *Universiteit van Stellenbosch v JA Louw (Edms) Bpk* 1983 SA 321 (A) at 342E; D Williams 'Arbitration world – South Africa' in Werksmans Inc (eds) available at: http://www.europeanlawyer.co.uk/referencebooks 7 153 html (last accessed 28 November 2009).

17 In *Yorigami Maritime Construction Co Ltd v Nissho-Iwai Co Ltd* 1977 4 SA 682 (C) at 694B–D the court held fast to its discretion not to enforce the arbitration agreement as such an agreement was not considered to be absolutely binding. Arbitration in Japan was provided for but the court refused to stay the action in order to pre-empt a multiplicity of proceedings leading to conflicting decisions. In *Intercontinental Export Co (Pty) Ltd v M V Dien Danielsen* 1982 3 SA 534 (N) and *Polysius (Pty) Ltd v Transvaal Alloys (Pty) Ltd* 1983 (2) SA 630 (W&T) stays were granted on the basis of foreign arbitration elsewhere.

referral by a court pursuant to article II(3) of the NYC is an internationally uniform rule that is mandatory in its operation and supersedes domestic law, that leaves a margin for judicial discretion.[18] This view takes no account of the monist and dualist theories on the relationship between treaties and domestic law; nor does it address the failure of article II(3) to take account of jurisdictions that do not 'refer' parties to arbitration under article II of the NYC. As there is no general treaty rule that differentiates between mandatory and dispositive treaty rules, this interpretation and its *erga omnes* effect is thus open to question.

Domestic legal systems may prefer different analyses – such as a repudiation of contract analysis, or a construction of loss of rights. Indeed, in classical private international law tradition, the legal effect of a choice of one kind of dispute resolution or forum over another may require classification. If the question is how waiver should be classified, questions of conflict of laws methodology and applicable law assert themselves.[19] If the merits are expected to be affected, the applicable law must be identified. An international commercial arbitration tribunal may adopt a comparative approach that considers all potentially applicable conflict rules of the seat and of respective home countries' laws, when faced with the conflict of laws rules of its seat and other conflict rules.[20] Should the proper law of the arbitration agreement be considered relevant?[21] Looked upon as a purely

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18 AJ van den Berg 'The New York Convention of 1958: an overview' 10 at: www.arbitration-icca.org/media/0/12125884227980/new_york_convention_of_1958_overview.pdf (last accessed on 19 August 2010).

19 F Dely 'Conflicts of law in international arbitration: an overview' in F Ferrari & S Kroll (eds) *Conflict of laws in international arbitration* (2011) 5.

20 F Dely n 19 above at 5.

21 The NYC permits a court to refuse to uphold an arbitration agreement if the arbitration agreement was not valid under its governing law. The validity of the incorporation of an arbitration agreement into a contract was governed by the proper law of the contract in *National Navigation Co v Endesa Generacion SA* (2009] EWHC 196 (Comm). Gloster J found that English law was the proper law to apply to the question whether an arbitration agreement had been incorporated into the relevant bill of lading. She concluded that there is 'clear statutory and conventional obligation under English law for an English court to give effect to an arbitration agreement that is valid in accordance with its proper law'" at § 102. In *National Navigation Co v Endesa Generacion SA (The Wadi Sudr)* [2009] EWCA Civ 1397, the Court of Appeal took the view that the judgment of the Spanish court was a decision on the merits that the arbitration agreement was not capable of being enforced. It ruled on the basis that the Spanish judgment had to be recognised in all English proceedings irrespective of the subject matter of those proceedings, basically because it emanated from proceedings that fell within the scope of Regulation (EC) 44/2001, and because the incorporation issue is very closely linked to the merits of the contractual dispute. In *Dallah Real Estate and Tourism Holding Company (Appellant) v The Ministry of Religious Affairs, Government of Pakistan (Respondent)* [2008] EWHC 1901 (Comm) at § 3, the High Court in England refused to enforce the award on the ground that the arbitration agreement was not valid under the

procedural issue, however, the question will be settled with reference to the jurisdictional rules of the forum. If private international law is conceived of as an international system that ensures consistent legal treatment of international disputes, as well as consistency in the mechanisms applied for this purpose, this distinction seems naive. The forum's arbitration system and the quality and standard of incorporation of its treaty obligations ought to determine the issue and the balance. A proper theory of international commercial arbitration that distinguishes clearly between different subsets of conflicts is necessary to resolve such questions.

Nonetheless, the point at which judicial intervention starts to resemble interference is difficult to identify. In addition, semantic confusion tends to thrive in this context.

The bench tends to respect arbitration agreements,[22] but the legislative framework is not synchronised with internationally accepted standards. More importantly, the constitutional framework conditions the residual discretion of the judiciary further, and compounds the safeguarding of the right of access to court at the jurisdiction and award stages.[23] Such over-protection fortifies court intervention in arbitral proceedings and erodes *compétence-compétence*. Arguably, achieving a balance would require a different approach[24] in which it might be helpful to go back to basics. Party autonomy is not all that well protected in South African law. Abitrators may rule on their own jurisdiction to arbitrate the dispute should a party request this. However, the arbitrators may also, in turn, request the parties to obtain a court ruling in this regard. Neither forum has exclusive jurisdiction over this issue. The parties determine which forum enjoys priority. If they do not agree on this issue, their conduct settles the matter. The forum seized first is the one that has jurisdiction. A party may also apply to have an award set aside where the arbitrator has exceeded his or her powers and jurisdiction, or to have a case on which an award had been made re-opened on the merits

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applicable law which was French law (the arbitral tribunal sat and made its award in France). The ruling of the Court of Appeal turned on Art V 1 NYC and s 103 of the Arbitration Act 1996 (*Dallah v Pakistan* [2009] EWCA 755), whereas the UKSC ruled on the basis that enforcement of an arbitral award could be resisted anywhere and not only in the supervisory court in the seat (*Dallah v Pakistan* [2010] UKSC 46). The Pakistani government could not be held bound to a trust established by the Ministry of Religious Affairs and as it was not a party to the arbitration agreement, the enforcement of the award against it was refused.

22 IM Rautenbach 'Private arbitrasie en die Handves van Regte' in: (2010) 1 *Tydskrif vir Suid-Afrikaanse Reg* 185, 186.

23 *Res judicata* and the form of estoppel referred to in *Henderson v Henderson* (1843) 3 Hare 100 at 114–115 may have a role to play. The *Henderson* rule applies in South African law by virtue of *Consol Ltd t/a Consol Glass v Twee Jonge Gezellen (Pty) Ltd and Another* (2) 2005 6 SA 23 (C).

24 *Ibid*.

before a civil court. This evokes a 'minimalist approach' to *compétence-compétence*. Unfortunately, the entitlement of the judiciary to intervene in the arbitral proceedings on the application by one or the other party, neutralises the positive effect of *compétence-compétence*. While stays and injunctions are available where proceedings are commenced in the local court in breach of an arbitration agreement, judicial discretion determines whether or not these remedies will be granted.[25] Moreover, the powers of the judiciary go beyond procedural issues in so far as section 20 of the 1965 Act permits a court to determine a question of law arising in the course of a reference to arbitration. This is reminiscent of the controversial 'stated case' procedure in Scots law under the Administration of Justice (Scotland) Act 1972. One finds a much more sensible and tighter regulation of this issue in the recently adopted progressive Scottish legislation. The jurisdiction of the Outer House to settle any point of Scots law arising in the arbitration is a default rule that parties can modify.[26] When a party makes such an application, the consent provisions set out in Rule 42 of the Arbitration (Scotland) Act of 2010 apply, and the arbitral tribunal is free to continue with the arbitration pending determination of the application.[27]

How likely is legislative reform?

The South African Law Reform Commission urged reforms at various points in the last fifteen years.[28] It recommended the statutory incorporation of the UNCITRAL Model Law mainly for the balance it achieves between the powers of the court and the tribunal,[29] the positive effect this has on preventing unnecessary delay and avoiding expense, as well as what this has meant for foreign investment and economic development in the region. These initiatives have been on hold ever since. The current dispensation has many comparative and international shortcomings. Both the legislation and the jurisprudence favour the courts. Not only does the law lag behind other jurisdictions in several respects,[30] but the legislative framework has also fallen out of step with international law. The Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977 was enacted to give effect to South Africa's accession to the NYC in 1976, but it lacks any equivalent to article II (3) of the NYC which minimises undue court interference before the arbitration process gets under way.[31] Arguably a court that exercises its

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25 Section 6 Arbitration Act 42 of 1965.

26 Section 9 and Rule 41 Arbitration (Scotland) Act of 2010.

27 *Per* Rule 42(3) Arbitration (Scotland) Act of 2010.

28 *Eg* Project 107 *Report on an International Arbitration Act for South Africa* (July 1998), in particular the Draft International Arbitration Bill; Project 94 *Report on Domestic Arbitration* (May 2001) § 2.16–2.23.

29 At viii; § 1.10 at 3.

30 At § 2.53.

31 Butler n 10 above at 12; South African Law Commission Project 107 *Report on an International Arbitration Act for South Africa* (July 1998) § 3.56–3.59 and 3.98.

discretion in an international arbitration must take into account that South Africa is in breach of its obligations under international law.[32]

The impetus for modernising the law has been neutralised by a perception that a pro-arbitration stance undermines national courts and that arbitration runs contrary to judicial transformation. Judicial Service Commission appointments have resulted in delays in judgments being delivered, and these delays have sparked a wider recourse to arbitration so as to avoid the courts. Political pressure has been brought to bear on retired judges not to act as arbitrators,[33] and for now at least, political tension continues to dilute the levels of commitment to maintaining and improving the arbitration framework. The unhealthy appropriation of jurisdictional competence to the judiciary in the name of transformation has contributed to the absence of much-needed structural and substantive reform in this sector. If a new science of conflicts of jurisdiction is going to develop, the legislature is not likely to be the main driver.

RECENT SOUTH AFRICAN JURISPRUDENCE: LAW REFORM AT LAST?

Notwithstanding the amenability of the written law to court intervention, the judiciary has always tended to discourage judicial intervention in arbitration in practice.[34] There is authority in South African law for the proposition that an arbitrator may rule on his own jurisdiction, without detracting from the power of the local court to determine jurisdiction by way of declaratory order.[35] The courts guard the litigant's right to invoke an arbitration clause, and consequently the onus on the party seeking to avoid arbitration is a heavy one.[36]

Two rulings provide a fresh impetus for reform in this area. *Telcordia Technologies Inc v Telkom SA Ltd*[37] underscores the importance of limiting the involvement of the courts in the arbitral process,[38] while *Lufuno Mphaphuli & Associates (Pty) Ltd v Nigel Athol Andrews and Bopanang*

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32 Butler n 10 above at 12 refers in this regard to s 233 of the Constitution, which obliges courts to interpret legislation in a manner consistent with international law.

33 The Hlope Report, which was released in February 2005, alleged racism in parts of the South African judiciary and called for retired judges to be prevented from becoming arbitrators. The reasoning seems to be that a well-developed arbitration system erodes confidence in the court system.

34 Rautenbach n 22 above at 186.

35 *Universiteit van Stellenbosch v JA Louw (Edms) Bpk* 1983 SA 321 (A) at 333G–H.

36 *Id* at 334A.

37 *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 SCA (order of court *a quo* in *Telkom SA Ltd v Boswood and others* (unreported) 2005 High Court Pretoria set aside).

38 At 279C and 279I–J.

Construction CC[39] reiterates the need to balance the powers of the courts to scrutinise arbitral awards without enabling unscrupulous litigants to use the courts in order to delay justice.[40] Unfortunately, the apparent awareness of the acute need to balance the powers of the courts and the arbitral tribunals has not prevented the courts from operating on the basis that centralised judicial review of disputes related to arbitration is desirable. This schism has introduced risks for international commercial arbitration.

The conflicts dimension was not prominent in either of these two cases. As such, little guidance can be gleaned on the application of private international law mechanisms designed for conflicts between courts and tribunals, apart from the extent to which they cover waiver. Intriguingly, both rulings turn the spotlight on the relationship between a choice in favour of arbitration as a means of dispute settlement, the right of access to court as guaranteed as part of a fair hearing in article 6 of the ECHR, and waiver as a means to manage conflict of jurisdiction between courts and arbitral tribunals.

Telcordia Technologies Inc v Telkom SA Ltd

Telkom, a state-owned company that provides telecommunications services for South Africa, was dissatisfied with the arbitrator's application of South African law on the point of variations of written contracts in *Telkom SA Ltd v Boswood*.[41] Boswood was a London barrister whose appointment as arbitrator had been made under the rules of the International Chamber of Commerce. Thus his nationality differed from that of the parties. Boswood handed down an arbitral award pursuant to an arbitration clause that stipulated that (a) all disputes between the parties that may arise, including disputes related to interpretation of the agreement, had to be determined by an arbitrator; and (b) the award would be final and binding. The arbitration clause made no provision for any appeal process. Telkom instituted proceedings before the Supreme Court of Appeal (SCA), averring that the arbitrator had exceeded his powers under South African law. Telkom raised (a) its right to rely on material error (which does not feature as a ground of review in the Arbitration Act); and (b) its right of access to court under section 34 of the Constitution.[42]

On the point of review, it was necessary to determine whether the arbitrator, having committed a material error of law, was guilty of misconduct or a reviewable irregularity under section 33(1) of the Arbitration Act of 1965. The case was not directly concerned with bias nor was it originally claimed

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39 *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another* (CCT 97/07) [2009] ZACC 6 (20 March 2009).

40 At § [196]; §§ [222]–[232].

41 (Unreported) 2005 High Court Pretoria.

42 At §§ [44]; [45], 289E–F.

that there had been a breach of standards enshrined in the Bill of Rights on the part of the arbitrator. The SCA gave a decidedly pro-arbitration ruling to the effect that the award was not reviewable. An error of law or fact did not amount to gross irregularity in the eyes of the SCA. Nonetheless, the ruling invited the risk of delays and protracted litigation in setting aside the order given in *Telkom v Boswood*. This aspect necessitates closer investigation.

Acknowledging that waiver is one of the mechanisms by which a conflict of competence can be solved, the court regarded the agreement to arbitrate as a waiver of the parties' right to a judicial decision on the merits of the case. The court eagerly engaged in comparative law analysis,[43] and proceeded on the basis that parties may waive the right of access to court 'unless the waiver is contrary to some other constitutional principle or is otherwise contra bonos mores'.[44] In this regard the court relied on *Suovaniemi v Finland*,[45] an ECtHR ruling of 1999 that to agree to the appointment of an arbitrator who used to represent the counter party in prior legal action, constituted a permissible waiver of the right to a fair trial. The SCA understood this to mean that parties may define what is fair in a private consensual dispute.[46]

On the feasibility of waiver of the right to rely on particular grounds of review in an arbitration context, the *Telcordia* case relied on a dictum taken from a famous American case, *First Options v Kaplan*.[47] American courts may order a full examination of the validity of an arbitration clause at any stage of the arbitral process to determine whether, as a matter of fact and law, the parties have indeed agreed to arbitrate. If a dispute arises at the outset of the arbitration, the courts decide the preliminary questions of existence and validity, and *Kaplan* permits the parties to give arbitrators the final word on some aspects of arbitral power only where the agreement evidences clear and unmistakable terms. This is a high standard that should not be stretched so far as to imply a presumption that the arbitration agreement is invalid. The court makes reference to *Kaplan* to justify the conclusion that, by agreeing on arbitration, the parties 'waive their rights pro tanto'.[48] The parties 'necessarily agree that the fairness of the hearing will be determined by the provisions of the [Arbitration] Act and nothing else. … [T]o waive the right of appeal … means that they waive the right to have the merits of the dispute re-litigated or reconsidered.'[49] The court took account of the freedom of parties to define

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43 At § [48], 290–291.
44 At § [48], 290H.
45 ECHR case 31737/96 (23 February 1999). Quoted at 290D. Compare also *Appel v Leo* 1947 (4) SA 766 (W).
46 At § [47], 290D.
47 514 US 938 (1995).
48 At § [48], 291A.
49 At § [50], 291F.

what is fair for purposes of their private consensual disputes,[50] and the relevance of the Constitution to private arbitration.[51] However, less interventionist and presumptive approaches[52] were not noted, nor was it made clear that the ruling constituted authority, in the context of collective bargaining agreements, for the proposition that arbitration clauses typically invest the arbitrator only with the power to interpret the scope, but not the existence or enforceability, of an arbitration agreement.

The case is laudable for insisting that waiver deserves recognition as a device in conflicts of jurisdiction, but absent any clarification on what exactly constitutes waiver in a system calibrated on judicial discretion and on express exclusion agreements in respect of court review of an award on the merits, it is open to criticism. Constitutional lawyers have been quick to indicate that constitutional rights cannot possibly be waived by way of a private contractual arrangement that is inconsistent with the content of section 34 of the Constitution, as this arrangement would not constitute a justifiable limitation of the right.[53] Arguably, the autonomy of the parties to define the content, exercise and waiver of the right of access to court is what attracts ordinary businessmen to international commercial arbitration in the first place, and to refer to norms and imperatives that inform court adjudication only, is problematical in principle. Greater sensitivity to the doctrine of *compétence-compétence* would be desirable. Also, the standard that a choice in favour of arbitration as a form of dispute resolution would need to meet, requires clarification. Had the court addressed itself to the need for the choice to be voluntary, lawful and unequivocal, the case could have offered firmer guidance on when and to what extent courts may intervene to review or pre-empt the arbitrator's jurisdictional ruling.

Lufuno Mphaphuli & Associates (Pty) Ltd v Nigel Athol Andrews and Bopanang Construction CC

This ruling is a first consideration of the constitutionality of commercial arbitration since the inception of the Constitutional Court.[54] There was no international element to the arbitration that formed the subject-matter of the case. An application was made for leave to appeal to the Constitutional Court

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50 At § [47], 290D–E. In this regard see *Brisley v Drotsky* 2002 (4) SA 1 (SCA) at § [94] and § [95]; *Napier v Barkhuizen* 2007 (5) SA 323 § [12]; S Woolman 'Category mistakes and the waiver of constitutional rights: a response to Deeksha Bhana on Barkhuizen' (2008) 125/1 *South African Law Journal* 10–24 at: http://www.jutalaw.co.za/catalogue/itemdisplay.jsp?item_id=3591 (accessed 15 March 2010]; Rautenbach n 22 above at 193.

51 At § [47], 290D–E.

52 *Eg* as in *Howsam v Dean Witter Reynolds* 537 US 79, 84 (2002).

53 Woolman n 50 above at 20.

54 Rautenbach n 22 above at 185.

against a decision of the SCA[55] that had upheld a judgment of the High Court in Pretoria[56] dismissing an application for the review and setting aside of a quantity surveyor's arbitral award that fixed the amount owed by the respondent for services rendered to the applicant. The application for the review of the arbitrator's award was based on his alleged commission of an error of law or fact on procedural grounds pursuant to section 33 of the 1965 Act. He was alleged to have had secret meetings with the other party, to have failed to provide the applicant with access to correspondence between himself and the respondent, and to have awarded an amount that was more than the amount claimed in the pleadings.[57] The grounds for setting aside an arbitration award are confined to (a) misconduct by an arbitrator; (b) gross irregularity in the conduct of the proceedings; and (c) the fact that an award has been improperly obtained. The SCA also turned down the application.

The court adopted a comparative law approach. The progressive ideas of the UNCITRAL Model Law on the point of the limitation of undue court interference in the arbitration process, found their way into the guidance contained in the ruling. Reference was also made to the recommendations of the Law Commission[58] and the English Arbitration Act 1996.

The application for leave to appeal was granted, which appeal was then dismissed. The Constitutional Court concluded that the interests of justice would be served by granting leave to appeal,[59] but held that the appeal had to fail. The arbitration agreement did not provide for appeal, however, and the 1965 Arbitration Act states that arbitral awards are not subject to appeal unless the parties agree otherwise. The challenge of arbitral awards on the merits is precluded in principle. The SCA may, on appeal, overrule a court order in violation of procedural fairness. It may also review a decision to allow an appeal. In principle these issues may also be vented in the Constitutional Court with all the concomitant adverse implications for the resolution of conflicts of competence this may imply. The constitutional standard of fairness in arbitration is likely to prevail over the statutory framework. Comparative analysis shows that appeal of awards to the courts

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55 *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another* [2007] ZASCA 143.

56 *Bopanong Construction CC v Lufuno Mphaphuli & Associates (Pty) Ltd; Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another*, Case Nos 27225/04 and 33188/2004, North Gauteng High Court, Pretoria, 22 February 2006, unreported.

57 At §§ [18] [19]; [239].

58 Its *Report on Domestic Arbitration* (May 2001) § 2.16 notes that court support for the arbitral process is essential and extends to the enforcement of arbitration agreements and arbitral awards. *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another* [2009] ZACC 6 at § [229].

59 At § [238]. There was no consensus in *Lufuno* on the issue of award review on appeal. Ngcobo J addressed the conflict of procedure at § [281] ff, and held that the application for leave to appeal to the Constitutional Court in this instance had to be dismissed with costs.

is often restricted quite severely where dispute resolution is of a speedier and less formal kind. The arbitration process itself is not necessarily open to proper appeal.[60]

Since the relationship between the right to a fair trail and award review was a point of interest to the Constitutional Court,[61] the issue of voluntary waiver of a constitutional right by referral of issues in dispute to arbitration was addressed. O'Regan, ADJC as she then was, refused to regard the *Suovaniemi* case as authority for the proposition that parties waive the right of access to court when they elect arbitration and rejected unequivocally the conclusion that waiver can be inferred. The point was made that particular rights may not be waived, whether by arbitration agreement or otherwise.[62] A rather illogical conclusion followed:

> If we understand section 34 not to be directly applicable to private arbitration, the effect of a person choosing private arbitration for the resolution of a dispute is not that they have waived their rights under section 34. They have instead chosen not to exercise their right in section 34.[63]

Arbitrators derive their competence from the will of the parties. Parties choose to participate in a private process which must be fairly conducted on the basis that the arbitrator's award will be respected and enforced by the courts,[64] instead of launching proceedings in a national court. Nonetheless, it is unclear from this statement whether parties to private arbitration have rights under section 34. The court stated that the difference between exercising and not exercising their right rendered the language of waiver used in *Telcordia* and *Suovaniemi* inappropriate in the context of constitutional rights.[65] However, if parties contract not to exercise those rights, their agreement will bind them, and a unilateral decision taken subsequently to exercise the right cannot invalidate the original agreement. If the arbitration clause is clearly drafted and the objection timeously made, the waiver has to be effective.[66]

The Constitutional Court insisted that, where private arbitration is at issue, courts construe the grounds for setting aside an arbitral award strictly so as

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60 Schultz n 3 above at 16; HR Dundas 'The finality of arbitration awards and the jurisdiction of the Court of Appeal' 2007 *Arbitration* 127.

61 At § [194].

62 At 5. O'Regan quotes the relevant passage at § [205].

63 At § [216].

64 C Pamboukis 'On arbitrability: the arbitrator as a problem solver' in: LA Mistelis & SL Brekoulakis (eds) *Arbitrability: international and comparative perspectives* (2009) 121 § 7.33.

65 At § [216]. Rautenbach n 22 above at 194 describes this as an emotional reaction rather than a response based on legal principle.

66 Rautenbach n 22 above at 193.

not to extend judicial powers of scrutiny imprudently.[67] O'Regan ADJC, as she then was, gave the principle of party autonomy its due. In her view, courts need to be slow to conclude that the arbitrator conducted the proceedings unfairly or that a fault in the procedure was unfair or grossly irregular within the meaning of section 33(1).[68] The approach was very similar to what is now found in the modern Arbitration (Scotland) Act of 2010, which constrains the grounds upon which a court may hear challenges to an arbitral award.[69] Considering how problematic court interference can be in disputes that do not concern the existence and validity of an arbitration agreement, legal certainty is promoted by disallowing appeals. If the merits of the award are engaged all the way to constitutional court level, while the arbitration agreement in issue did not provide for appeal, the implications for finality, timing and cost are decidedly negative.

The *Lufuno* case recognised the need for minimising undue court interference in the arbitration process, took account of what the law ought to be as the Law Commission recommended, and mapped out guidelines for a sensible relationship between due process and arbitral autonomy.[70] It breathed new life into procedural jurisdiction at a point when legislative overhaul is being inordinately delayed. In the absence of an appropriate legislative policy, a judicial policy has to fill the void. In both the US and France, courts were able to develop such a policy, and this raises the question whether the South African bench will assume a legislative function to limit its own discretion and enable waiver. The fundamentals of the science of jurisdictional conflict need to be set out. The odds against the enforcement of arbitral agreements and awards are simply compounded if waiver is neglected. What effect ought the right of access to court to have on waiver and *res judicata* in South African law?

The 'language' of waiver

The *Telcordia* case permitted waiver to assert itself and Harms JA maintained that the language of waiver is apt in determining competence. The SCA was

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67 At § [235].

68 At § [236].

69 Article 13 Arbitration (Scotland) Act read with Part 8 of the Rules refers to serious irregularity that has or is likely to cause substantial injustice to the parties; are contrary to public policy or have been obtained by fraud. There are Rules in the ASA that permit the issue of jurisdiction to delay the arbitral proceedings twice over. This may potentially work against boosting international commercial arbitration in Scotland. Rule 21 safeguards the right of parties to file an objection against the tribunal's ruling on jurisdiction to the Outer House provided that this is done within two weeks; Rule 67 permits parties to challenge an award on the basis of a lack of jurisdiction on the part of the tribunal that made it.

70 At § [238]; Rautenbach n 22 above at 187 *ff* gives a critical discussion of these guidelines.

equally comfortable with the notion of waiver of the right to have the merits of a dispute re-litigated or reconsidered when the matter in *Lufuno* served before it.[71] Concerns over semantics prevented the Constitutional Court from counting waiver among the means by which to manage the conflict of jurisdiction between courts and arbitral tribunals. It simply declared the language of waiver inappropriate in a constitutional rights context.

Waiver by implication

The iconic status of party autonomy[72] at the intersection between arbitration and litigation underscores the constitutional right to subject disputes to private arbitration.[73] But what if a party proceeds to a foreign court? Would that mean its right to invoke an arbitration agreement has been waived? It is submitted that the content and the scope of rights derived from party autonomy depend on the hue that *compétence-compétence* takes on in the particular context in which it functions. If the prism of *compétence-compétence* is taken account of, and the subtle influence of its status, form and shape is clear, the validity and effect of waiver becomes predictable in both a commercial and a constitutional context.[74]

In the *Telcordia* case, the conclusion was drawn that the right to rely on particular grounds of review may be waived by implication.[75] Earlier interpretations of section 3(2) of the 1965 Act and the relationship between *compétence-compétence* and waiver were not taken on board. Of course, only if negative *compétence-compétence* is adopted as a baseline, will an agreement to arbitrate be tantamount to a waiver of the parties' right to a judicial decision on the merits of the case. Perhaps, if the *Telcordia* ruling had dealt with a clear conflict of jurisdiction between national courts of the place of referral and the tribunal, this might have been more evident.[76]

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71 *Lufuno Mphaphuli & Associates (Pty) Ltd) v Andrews and Another* [2007] ZASCA 143 (RSA) at § [14], where Ponnan JA relied on *Telcordia* § [50].

72 *Per* Mance L in *Grimaldi Compagnia di Navigazione SpA v Sekihyo Lines Ltd* [1999] 1 WLR 708.

73 Rautenbach n 22 above at 198–199 discusses this aspect.

74 *Contra* P Gillies & A Dahdal 'Waiver of a right to arbitrate by resort to litigation, in the context of international commercial arbitration' (2007) 2/4 *Journal of International Commercial Law and Technology* 221–230 at 229. They draw attention to the policies underlying principles that claim application.

75 At § [51], 292A–B.

76 SL Brekoulakis 'Law applicable to arbitrability: revisiting the revisited *lex fori*' in Mistelis & Brekoulakis (eds) *Arbitrability: international and comparative perspectives* (2009) 99 § 6.25. If a clear conflict of jurisdiction exists, the *lex fori* is relevant because the national law of the place of referral is relevant. National courts will apply the *lex fori* to safeguard their exclusive jurisdiction over a dispute.

The quest for balance: restoring waiver to its proper place

Waiver is a logical consequence and a function of party autonomy. Nonetheless, it is also conditioned by the default and mandatory provisions of the legislation that apply in the seat, prevailing conceptions of the constitutional context concerned, and the residual discretion of the court. The judiciary may favour a strict rule on waiver whereas the legislative or constitutional framework may not.

It has been stated that constitutional values must be used to strike out the 'excesses of contractual freedom' on the one hand, and on the other, to permit the dignity of regulating one's affairs on the basis of contractual autonomy.[77] The context of this statement did not have anything in common with efforts to prevent a competition between party autonomy, arbitral autonomy, and fundamental rights. In this competitive game, fundamental rights and freedoms will win the competition at every turn, and proper balancing of autonomy will be impossible. Due process rights are not easily compromised where parties are allowed to raise issues that were not, but ought to have been raised in earlier proceedings at both jurisdiction and award stages; may freely invoke the jurisdiction of a national court on the matter of validity or effectiveness of the arbitration agreement; no or minimal *compétence-compétence* applies so that courts decide whether and when the arbitral tribunal gets to decide on its own jurisdiction; and appeals are allowed despite their exclusion in the arbitration agreement and the Arbitration Act of 1965.

It has been argued that the need to justify the limitation of constitutional guarantees is greater whenever private arbitration is chosen in order to avoid shortcomings in adjudication.[78] Were this view to govern international commercial arbitration, waiver becomes a mere trigger for scrutiny of the motive for preferring arbitration to litigation. Worse, it then provides a new justification for court intervention in arbitral proceedings.

The difficulty lies with the discretionary approach of the court on the point of whether or not to refer parties to arbitration where the wider agreement includes an arbitration clause. In the *Telcordia* case, Harms JA readily admitted to consent as a jurisdictional basis for arbitration without raising the basic incompatibility between a discretionary referencing system and a strict rule on waiver. The Constitutional Court, on the other hand, threw but a sideways glance in the direction of waiver. The majority ruling left the discretionary referencing system unchallenged and the guidelines give no

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77 In *Brisley v Drotsky* 2002 4 SA 1 (SCA) at § [94], Cameron J stated that the constitutional framework within which the forum functions requires the court to exercise 'perceptive restraint' when deciding to limit the freedom that underlies contractual autonomy.

78 Rautenbach n 22 above at 200.

indication at all that the interplay between waiver and *compétence-compétence* counts for anything in the exercise of judicial discretion.[79]

In fact, the guidelines are distinctly anti-waiver. Their commitment was to the constitutional and human rights framework of the forum which, in the primary human rights dimension of private international law, conditions all the pillars of private international law. Human rights law applies conflicts of jurisdiction and the court was quick to do so, but the guidelines raise a number of uncomfortable questions for international commercial arbitration.

The closest the Constitutional Court comes to effecting a balance, is where it is stated that 'litigation before ordinary courts can be a rigid, costly and time-consuming process and … it is not inconsistent with our constitutional values to permit parties to seek a quicker and cheaper mechanism for the resolution of disputes'.[80] The potential of waiver to mould *compétence-compétence* into negative *compétence-compétence* remains unacknowledged.

Semantic games on the issue of waiver enable courts to equivocate on the country's treaty obligations under the NYC, and are contrary to that which the UNCITRAL Model Law tries to achieve. One may agree that waiver bears a contractual characterisation as ILA has suggested,[81] but recognition of prior or intervening court judgments and arbitral awards raise *res judicata* issues. Which court gets to decide the argument that another ruling exists to the effect that there is a valid arbitration agreement between the parties (*res judicata*)? The interplay between different approaches to *res judicata* and different manifestations of the doctrine of compétence-compétence, will lead to different results.

A minimalist approach to the doctrine of *compétence-compétence* permits arbitrators to rule on their own jurisdiction, but leaves parties free to apply to a court to rule on the issue before the arbitrator has done so. As such, neither the court nor the arbitral tribunal has exclusive jurisdiction, nor is it

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79 A repudiation of contract approach was not considered either. When repudiation is accepted, the arbitration agreement ends. This requires both the denial of the arbitration agreement by one party and the institution of legal proceedings by the other. J Chitty *Chitty on contracts* (29ed 2004), § 32.041; *National Navigation Co v Endesa Generacion SA* [2009] EWHC 196 (Comm) § 113. An award handed down in concurrent proceedings without the consent of one of the parties is unlikely to have legal effect. In *Midgulf International Ltd v Groupe Chimiche Tunisien* [2010] EWCA Civ 66 the Court of Appeal held that an application to a foreign court for a declaration that the arbitration agreement does not exist, was tantamount to a repudiation of the agreement. However, the court concerned itself with the formation of the main contract and assumed that the fate of the arbitration agreement was bound up with it, which is unconvincing. The case sheds no light on waiver either.

80 At § [197].

81 ILA n 1 above at 28 § 12.

determined which forum comes first. Waiver has scope to operate when jurisdiction runs concurrently. Involvement in proceedings in whatever venue without making a timely objection, will constitute waiver of the right to proceed in the other venue. However, in many states on the continent *compétence-compétence* is seen as a *prior temporis* mechanism, so that waiver would be effective only if parties' involvement in court proceedings rules out the *prior temporis* effect associated with the arbitral proceedings. A 'timely objection' to the jurisdiction of the tribunal can therefore only be an immediate objection, and estoppel could preclude the raising of an issue the could have, but were not, raised in earlier proceedings.

As with the *Telcordia* ruling, the neglect of waiver and *res judicata* may be due to the fact that the matter in issue did not concern a cross-border situation.

The minority ruling in *Lufuno* tackles the issue of waiver satisfactorily. Ngcobo J treated the late objection to jurisdiction as similar to 'statutory waiver'. In his view, where a party had ample time and opportunity to raise objections either before or during the proceedings, late objections ought to be barred. This approach acknowledges the significance of *res judicata.* This point would have been decisive if the NYC had been incorporated properly and the judicial discretion better controlled. A discretionary approach strengthened by fundamental rights theory cannot leave the decision as to the legal effect of a choice of one kind of dispute resolution or forum rather than another, to a foreign court. Thus, in a complex conflict, classification does not provide ready answers.

While the limits imposed by the ECHR can be instructive for third states, *Suovaniemi* does not really change the basic position with regard to the permissibility of waiving the right to an independent and impartial tribunal. Waiver has not been found to be invalid in an arbitration context under the ECHR. In an earlier controversial decision, the ECHR did not require national courts to ensure that arbitration proceedings are consistent with article 6, but in a recent case, the ECtHR held that a non-curial arrangement for dispute resolution is not of itself sufficiently unambiguous to constitute a waiver of the right to a 'tribunal'. The choice needs to meet the standards embodied in the ECHR.[82] Any due process right that has already been violated may be voluntarily waived after the fact by simply failing to take immediate corrective steps.[83] The *Suovaniemi* ruling does not shed much light on waiver of the right to challenge the ruling of the arbitral tribunal during

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[82] *Nordström-Janzen and Nordström-Lehtinen v Netherlands* App 28101/95 (1996) by the now defunct Commission; *Suda v Czech Republic* (App 1643/06) 28 October 2010.

[83] But see D Butler & E Finsen *Arbitration in South Africa – law and practice* (1993) 72–73.

proceedings, or waiver of the right to do so by way of an advance declaration. The possibility of waiver by advance declaration calls for incisive investigation, considering that states are entitled to decide the grounds on which an arbitral award may be challenged even if the standards they employ are less stringent than that set in article 6(1) ECHR. This view coincides with the essentially permissive character of the grounds for non-recognition and non-enforcement of foreign arbitral awards in the NYC, and it is in accordance with the Swiss approach.[84] The *Suovaniemi* case did not discount this approach.

International, regional and comparative trends that prove instructive are canvassed in the section that follows.

INTERNATIONAL TRENDS

The NYC allows courts to refuse jurisdiction over disputes that are within the arbitrator's jurisdiction, and to refuse enforcement of a court judgment that failed to respect the arbitrators' jurisdiction. At this juncture, revision of the NYC is unlikely to win wide support.[85]

Parallel proceedings in the courts of the seat are among the exceptions to the positive operation of the doctrine of *compétence-compétence* considered by the Committee in the 'Final Report on *Lis Pendens* and Arbitration'.[86] Its recommendation reads as follows:

> Where the Parallel Proceedings are pending before a court of the jurisdiction of the seat of the arbitration, in deciding whether to proceed with the Current Arbitration, the arbitral tribunal should be mindful of the law of that jurisdiction, particularly having regard to the possibility of annulment of the award in the event of conflict between the award and the decision of the court.[87]

Where parallel judicial proceedings were taking place in other courts outside the seat, the Committee recommended that the arbitral tribunal should continue, 'unless the party initiating the arbitration has effectively waived its rights under the arbitration agreement or save other exceptional circumstances'.[88] Since the Committee considered a negative *compétence-compétence* rule vis-à-vis the courts of the seat presumptuous, it refrained from advocating such an approach.[89]

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84 *A v B and C* 4 Feb 2005, ATF 131 III 173 (2005).

85 VV Veeder 'Is there a need to revise the NYC?' (2010) *Journal of International Dispute Resolution* 499.

86 Note 1 above.

87 At 26, Recommendation 3.

88 At 26, Recommendation 4.

89 McLachlan n 12 above at 422–423.

ILA's Interim Report highlights the nature of the relationship that exists in a limited number of common law jurisdictions between waiver and an extended version of *res judicata*. The *res judicata* doctrine prevents the same claimant from bringing the same claim against the exact same respondent. It could also prevent the same parties re-arguing an issue that has been determined in earlier proceedings against them. However, in a limited number of common law jurisdictions, it also prevents a party from raising issues in subsequent proceedings against the same respondent that could have been but were not raised in the earlier proceedings.[90] Whereas the minority judgment in the *Lufuno* ruling permitted the doctrine such an extended application, the majority ruling reframed the questions so as to improve their 'logic' and 'helpfulness' in a constitutional context.[91] As such, the definition of *res judicata* was not considered.

What is the take of the 'Final Report on *Lis Pendens* and Arbitration' released by ILA on the underlying pernickety question of the legal effect of litigation in the face of an arbitration agreement? If merely a procedural matter, why should party autonomy and the proper law of the arbitration agreement be considered relevant in determining the effectiveness of an arbitration agreement?[92] The 'Final Report on *Lis Pendens* and Arbitration' requires mindfulness on the part of arbitrators of the legitimate supervisory role of the *lex arbitri* and its likely ability to annul the award in the event of conflict between the award and the decision of the court.[93] If the parties have expressly excluded the jurisdiction of the courts on the issue of the arbitrator's jurisdiction thereby adopting negative *compétence-compétence*, and the *lex arbitri* permits the exclusion, it is sensible to allow party autonomy to prevail.

Developments in the European Union

The West Tankers *furore*

The *Front Comor/West Tankers* ruling[94] gave rise to a raging controversy over the powers of arbitral tribunals and courts in the EU. The ruling outlawed anti-suit injunctions to enforce arbitration agreements between EU member state courts, when issued by courts, and leaves room for such injunctions only if the competing court is in a third state. Whether or not arbitral tribunals seated in England could still grant injunctions to restrain a party from commencing proceedings when the parties conferred this power

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90 ILA, Interim Report n 1 above.

91 At § [194].

92 See text at n 19–21 above.

93 At 26, Recommendation 3.

94 Case C–185/07 *Allianz SpA and Generali Assicurazioni Generali SpA, formerly Riunione Adriatica di Sicurtà SpA* v *West Tankers Inc, The Front Comor* [2009] ECR I–663 (GC); Opinion of Advocate General Kokott 4 September 2008.

on the tribunal, depends on how s 38 of the Arbitration Act 1996 is interpreted. There is authority for the view that careful drafting may still secure this option.[95]

The exclusivity of judicial competence of the courts of the seat and the availability of *lis pendens* to resolve jurisdictional conflict between two courts, but potentially also between a court and an arbitral tribunal, were raw nerves in the debate. The *lis pendens* device is a procedural mechanism designed to preclude the non-recognition of a judgment in the state where recognition is being sought, on account of being irreconcilable with another judgment in the same dispute between the same parties. Conflicting decisions are avoided by this device when the same dispute between the same parties and regarding the same subject-matter or relief (*petitum*) and the same legal grounds *(causa petendi*) is brought to another forum. It has a 'shadow side' as soon as it is applied in international litigation, for it tends to encourage parties to rush to court to be the first to issue proceedings in their forum of choice.

EU instruments of private international law[96] rely on the *lis pendens* device to prevent concurrent jurisdiction and the risk of conflicting judgments where courts in the EU exercise parallel adjudicatory authority. Regulation (EC) 44/2001 manages the power and duty to stay proceedings in the EU on this basis. Article 27 sets out what *lis pendens* entails for courts first and second seized. If the court first seized finds it has jurisdiction, the court second seized must decline jurisdiction; if the court first seized finds it has no jurisdiction, the court second seized resumes its hearing of the case.[97] The resulting judgment of the court first seized is enforceable throughout the member states under Chapter III of that instrument. As a result, *lis pendens* applies in an unconditioned form in parallel litigation between two courts when an arbitral tribunal is involved in the EU, conferring a right on the court first seized to establish jurisdiction and adjudicate on the merits first.[98] *Lis pendens* does not propose to clarify when an arbitral award acquires *res*

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95 N Byford & A Sarwar 'Arbitration clauses after West Tankers' 2009 *IntALR* 29.

96 Article 21 of the Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 30 October 2007; arts 27–28 of Regulation (EC) 44/2001; art 19 of the Brussels IIa Regulation (Council Regulation (EC) 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) 1347/2000.

97 Article 27(3) Regulation (EC) 44/2001.

98 *National Navigation Co v Endesa Generacion SA (The Wadi Sudr)* [2009] EWCA Civ 1397; P Stevenson 'London arbitration under threat' (2010) 1/6 *International Trade and Transport Law Newsletter* 4–5; *Youell and Others v La Réunion Aerièn*ne [2009] All ER (D) 112 All ER (D) 112.

judicata effect and when judicial action is required to establish this effect.[99] Nonetheless, *lis pendens* can anticipate and reserve the *res judicata* effect for the forum whose ruling will be recognised or enforced. This ruling prevents the subject-matter of the judgment or award from being re-litigated.

Nothing prevents *lis pendens* from being used to resolve conflicts between fora that are deemed to be of equal standing, but in as far as the ruling appeared to reserve the power to rule on jurisdiction solely for the courts, and arbitral tribunals cannot ignore such rulings,[100] it cast a shadow over the position of arbitration agreements. Commentators who read the ruling as permission given to the court first seized to have exclusive jurisdiction to determine jurisdiction with regard to the validity and applicability of the arbitration agreement have shown strong reaction, but the ruling is also amenable to the milder interpretation that the validity of the arbitration agreement falls within the scope of the Regulation 44/2001 only as a preliminary matter because the court has to assess its jurisdiction under the Regulation.[101] As such, the issue was whether a ruling on this point ought to be amenable to recognition and enforcement in EU member states, and even more fundamentally, whether a judgment that settles only the validity of an arbitration agreement be regarded as coming within the purview of Regulation (EC) 44/2001 at all.[102]

To the extent that the *Front Comor/West Tankers* ruling does not recognise the right of the arbitral tribunal to determine jurisdiction first and ignores the implications of an arbitral tribunal continuing to hear a dispute despite parallel proceedings being on foot elsewhere and a party presenting the award for enforcement, *compétence-compétence* is unable to aid or protect arbitration clauses. To the extent that the ruling leaves intact the basic competence of arbitral tribunals to decide on their own jurisdiction and the resulting award being enforced under the NYC, the main gist of the critique shifts to its inability to prevent conflicting judgments. The difficulty is in defending the ruling against attacks from both sides.

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99 WW Park 'The arbitrator's jurisdiction to determine jurisdiction' 13 ICCA Congress Series 55 (2006) 1, 4; ILA Interim Report n 1 above; Roodt n 10 above at 244.

100 At § [29].

101 A Mourre & A Vagenheim 'The Arbitration Exclusion in Regulation 44/2001 after West Tankers' (2009) 12/5 *International Arbitration Law Review* 75, 76.

102 A notable difference of opinion has existed post-*Marc Rich* (Case C–190/89 *Marc Rich & Co v Società Italiana Impianti PA* [1991] ECR I–3855) and was ventilated once again in *National Navigation Co v Endesa Generacion SA* [2009] EWHC 196 (Comm) and *National Navigation Co v Endesa Generacion SA (The Wadi Sudr)* [2009] EWCA Civ 1397.

Does the recast proposal improve the arbitration environment?

Several meetings of arbitration experts and arbitrators' associations took place in late 2010 with a view to improving the interface between arbitration and litigation. Some supported the active promotion of arbitration agreements by avoiding parallel proceedings and abusive litigation tactics; others preferred a broader exclusion of arbitration from the scope of the Regulation. The recent Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (recast proposal)[103] is intended to enhance the effectiveness of arbitration agreements in Europe, prevent parallel court and arbitration proceedings and eliminate the incentive for underhand litigation tactics.[104] A court seized of a dispute in an EU Member State is now obliged to stay proceedings if its jurisdiction is contested on the basis of an arbitration agreement and court proceedings relating to the arbitration agreement have been commenced in the Member State of the seat of the arbitration. The same applies if an arbitral tribunal has been seized for purposes of determining the existence, validity or effects of an arbitration agreement, whether as a preliminary issue or as a main object.[105] The *lis pendens* mechanism is retained to preclude the non-recognition of a judgment in the state where recognition is being sought, on account of being irreconcilable with another judgment in the same dispute between the same parties if that judgment precedes in time. Its shape is altered in one respect, however. When the validity of an arbitration agreement is in issue, *lis pendens* extends specifically to the court of the seat and the arbitral tribunal that is first seized.

To the extent that non-seat courts are precluded from determining validity once the arbitral tribunal is seized of the case, the recast proposal accommodates negative *compétence-compétence*. The fact that the court in the seat[106] may still go ahead with proceedings waters down the negative effect, however. It could happen, therefore, that a party may proceed right up to award stage before a non-seat court, before the opponent invokes *lis pendens* in the court of the seat or in the arbitral tribunal. In terms of the recast proposal, the judgment issued at the seat would qualify to be recognised. If the seat of the arbitration is outside the EU or is unspecified, a court in an EU Member State may still proceed to deal with a challenge to the validity of the arbitration agreement. Thus, a party may need to challenge the validity of an arbitration agreement before the court of the seat as well as

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103 COM (2010) 748 final (Recast).

104 Explanatory Memorandum 6.

105 Draft art 29(4); Draft art 33(3).

106 The recast proposal defines the seat as 'the seat selected by the parties or the seat designated by an arbitral tribunal, by an arbitral institution or by any other authority directly or indirectly chosen by the parties' (Draft Recital 20).

before a court in an EU Member State. The party who relies on the arbitration agreement and who obtained a favourable award would need to obtain a declaratory judgment as early as possible and enforce it ahead of a conflicting judgment.

LIS PENDENS AND PROCEDURAL PUBLIC POLICY IN THE SWISS MODEL

The quality of the codification of Swiss law and practice on arbitration in Chapter 12 of the Federal Private International Law Act 1987 (PILA) contributes to Switzerland's reputation in commercial arbitration. The Swiss model is finely attuned to the NYC and offers respect for arbitral autonomy. When the hidden tensions between courts and arbitral tribunals were brought to the fore,[107] law reform quickly followed. The Swiss model now gives firm direction not only in respect of the requirements for the application of the *lis pendens* principle (which is based on *prior temporis* or a first past the post rule), but also distinguishes the different forms of *compétence-compétence* and how their operation is affected by the timely submission of an objection to jurisdiction, or by waiver. In fact, the reform has potential to guide future law reform initiatives in South Africa.

The relationship between *lis pendens* and the doctrine of *compétence-compétence* in Swiss law is instructive for South Africa. *Lis pendens* does not apply under South African law, but the interaction between the negative effect of *compétence-compétence* and procedural public policy is highly topical for the future of commercial arbitration.

The Federal Private International Law Act of 1987 (PILA) grants a 'once-shot appeal' to the Federal Tribunal, the sole appeal body for all challenges to arbitral awards rendered in Switzerland.[108] Article 7 of the PILA provides that Swiss courts must decline jurisdiction if the parties are bound by an arbitration agreement, and gives full effect to negative *compétence-compétence*. A first amendment of article 186 of the PILA was triggered by the *Fomento de Construcciones* case[109] in which the Federal Tribunal set aside an arbitral award for having been rendered in a dispute already pending in Panama. The Federal Tribunal held that there is no priority rule under

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107 See *Fomento de Construccuones y Contratas SA v Colon Container Terminal SA*, 14 May 2001, ATF 127 III 279, [2001] ASA Bulletin 544. Winston & Strawn 'Swiss arbitration update: First Amendments of International Arbitration Law' in: *International arbitration practice* (2006) available at: http://www.winston.com/siteFiles/publications/SwissArbitrationUpdate.pdf (last accessed on 6 November 2010).

108 Article 191 PILA; Winston & Strawn n 107 above at 1, 3.

109 See *Fomento de Construccuones y Contratas SA v Colon Container Terminal SA*, 14 May 2001, ATF 127 III 279, [2001] ASA Bulletin 544. Winston & Strawn n 107 above at 2*ff*; ILA Final Report n 1 above at § 4.5; § 4.36; § 4.37.

Swiss law that would give the arbitral tribunal precedence to decide upon the validity of an arbitration agreement and the tribunal's jurisdiction (ie negative *compétence-compétence*). Because the tribunal had not carried out the examination required by article 9, which addresses the risk of incompatible judgments, the court set aside the tribunal's jurisdiction award. *Lis pendens* was not only held to apply to conflicts between courts and arbitral tribunals, but it was classified as a jurisdictional mechanism and not a procedural one. Failure to apply it to resolve conflicts would infringe public policy.

The ruling was not interpreted as obliging arbitral tribunals to stay arbitration proceedings in every case of prior litigation abroad where the foreign court had accepted jurisdiction, given that the requirements of article 9 of the PILA had to be met.[110] If the requirements have been met but the arbitral tribunal does not stay the arbitration proceedings while an action filed earlier is pending in a foreign court, its award can be set aside. Nonetheless, *Fomento de Construcciones* was widely criticised for undermining the autonomy of arbitration, permitting litigation rules to govern arbitration, and for rendering arbitration vulnerable to tactical manoeuvres in the form of rapid institution of a law suit elsewhere.[111] The vulnerability of Swiss arbitrators to mischievous court filings soon led to the amendment of article 186.[112] The arbitral concept *compétence-compétence* was restored to trump a concept associated with procedural justice in the courts, *litis pendens*.[113] Article 186 (1)(*bis*) of the PILA fully implements the principle of *compétence-compétence* in its positive effect, providing that arbitral tribunals having their seat in Switzerland do not have to await a court ruling as they are competent to decide on their own jurisdiction, and even on the merits, regardless of whether there are parallel court proceedings or arbitral proceedings pending between the same parties on the same matter in Switzerland or abroad, 'unless serious reasons require a stay of the proceedings'.[114]

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[110] The requirements are (i) the court proceedings were filed in a foreign court within the geographical scope of the Brussels/Lugano regimes first; the action has the same subject matter between the same parties; the foreign court's decision is enforceable in Switzerland; and the foreign court's decision is due within reasonable time and no delay is foreseen with the application of a *prima facie* standard of review of the validity of the arbitration agreement. If a summary examination of the arbitration agreement does not permit the court to make a finding on this, it must decline jurisdiction.

[111] This is known as the *Gasser* problem (Case C–116/02 *Erich Gasser v MISAT SRL* 2003 ECR–I 4693); Winston & Strawn n 107 above at 2, 3; L Levy & M Liatowitsch 'The Swiss Private International Law Act 1987 with respect to arbitration: A First Amendment in the offing?' 2006 *International Arbitration Law Review* at 63 raises the issue of the interaction of the reforms with the Lugano regime.

[112] Private International Law Act (Arbitration, Jurisdiction) Amendment of October 6, 2006 (FF 41, 17 October 2006, 7877). It entered into force in 2007.

[113] Winston & Strawn n 107 above at 3.

[114] M Scherer & W Jahnel 'Anti-suit and anti-arbitration injunctions in international arbitration: a Swiss perspective' 2009 *International Arbitration Law Review* 67 call it *negative* effect of *compétence-compétence*, indicating a measure of semantic and

The interface of the *lis pendens* principle and *compétence-compétence* is clearly regulated therefore, and article 9 of the PILA is comprehensive enough also to cover the timely submission of an objection to jurisdiction and waiver. It can be argued that legislative intervention was not strictly necessary. Panama has been a party to NYC since 1985. The judgment of the Panamanian court in proceedings initiated before arbitration was filed in Switzerland would be unenforceable in Switzerland given that a valid arbitration agreement existed for purposes of Swiss law; the Panamanian courts lacked jurisdiction as they were treaty bound to admit the existence of an arbitration agreement and refer parties to arbitration from an NYC perspective. Given that a requirement under article 9 of the PILA had not been met, one of the prerequisites for a stay of arbitration has also not been met, and the arbitration ought to have proceeded.

The only question that remains unsettled in Swiss law is whether Swiss courts may proceed on the basis of negative *compétence-compétence* where the seat of the arbitral tribunal is not in Switzerland and where full examination of validity of arbitration agreement is required by law.

CONCLUSION

Judging from recent rulings, the potential relevance of fundamental rights doctrine to conflicts between courts and arbitrators is well understood in South Africa. However, the classic mechanisms for avoiding a conflict of competence have been overlooked and under-estimated. As a very basic first step, it seems necessary to determine which of the *compétence-compétence* modalities is to hold sway. In addition, the effect of total *compétence-compétence*, namely that arbitrators possess decisional authority over wider agreements and arbitration clauses, must be strengthened by more appropriate definitions of the *res judicata* principle.

The proposed recast of Regulation (EC) 44/2001 now takes account of the stabilising force of channelling all disputes to the arbitral tribunal under total *compétence-compétence*. Further doctrinal research is necessary to establish the full effect of the *lis pendens* device on the various different manifestations of the *compétence-compétence* doctrine across Europe.

Despite the bench showing respect for voluntary arrangements entered into by contractual parties to arbitrate in practice, the discretionary residual judicial powers of the courts to order enforcement of awards and stays and to intervene at several junctures of arbitral proceedings give rise to problems in South African arbitrations. The relationship between the doctrine of *compétence-compétence* and waiver of the right to challenge an arbitral

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conceptual confusion in scholarly work.

tribunal in court or rely on particular grounds of review, requires urgent attention. Recent rulings made much of the need to balance powers, but none of them supplied the support needed by international commercial arbitration. The SCA was willing to recognise the role of waiver and thus of negative *compétence-compétence*, in the *Telcordia* and the *Lufuno* disputes, but unfortunately also neglected the basic incompatibility between a discretionary referencing system and a strict rule on waiver. The commitment of the Constitutional Court to the constitutional and human rights framework of the forum manifested in the guidelines it laid down for arbitration, but it ought to have been much more critical of parties raising issues that could have been raised in the earlier proceedings but were not.

The constitutional framework conditions the discretion of the judiciary in such as way as to confer double protection at both jurisdiction and award stages on due process rights. This compounds the odds against speedy enforcement of arbitral awards and increases the chances that waiver and estoppel will be overlooked as potential means by which to manage conflict of jurisdiction between courts and arbitral tribunals. The primary human rights dimension of private international law is as important as *compétence-compétence*, waiver and *res judicata*, but modernisation requires more than merely imposing constitutional protections onto an outdated legislative framework. The new science of conflict of jurisdiction demands not only a basic respect for fundamental rights, but also, and particularly in jurisdictions that have not predicated their law on the UNCITRAL Model Law, a respect for the procedural devices that private international law offers. Thus one hopes that the trend set by the Constitutional Court will not become the rule for future international commercial cases.

Given the inordinate delays facing legislative overhaul, the bench now needs to assume a legislative function to limit its own discretion and enable the autonomy of parties to set in motion the waiver of certain rights. Clear judicial policy direction is vital with regard to sequential consideration; when courts may intervene; and the possibility of express exclusion of the right of access to court. Both the *res judicata* principle and the contractual basis of the jurisdiction of the arbitral tribunal, require more active support to fortify party autonomy further. This is necessary because (a) procedural public policy has not crystallised so that procedural conflicts can be solved with reference thereto; (b) a clear and detailed *lis pendens* rule does not exist; and (c) parties are free to agree to delegate the power to decide jurisdictional challenges to the arbitrators, give them the chance to do so first, and to enter into an exclusion agreement in respect of a review of the arbitral award on the merits. By the same token, they have the right to increase the likelihood of parallel litigation. If the waiver is valid, the court must decline the review of the arbitrator's jurisdictional ruling or may be required to refrain from having recourse to particular grounds of review, depending on the situation.

Ultimately, the balance between curial and extra-curial dispute resolution is less about the loss or retention of power on the part of courts, than it is about dislodging the misunderstandings that stand in the way of a new science of conflicts of jurisdiction.