The Origin of Arbitration Law in South Africa

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Abstract

This article seeks to trace the historical origin of arbitration as it is currently practised in South Africa. The resort to alternative dispute resolution methods has existed since time immemorial. The practice of arbitration was identified in the Bible when it was practised by King Solomon. South African traditional communities practised arbitration before the arrival of Western nations in South Africa, who brought with them their norms and practices. The community entrusted the responsibility of resolving disputes amicably to the headman, the Chief or the King. The practice of traditional alternative disputes resolution was disrupted by colonialism, which introduced Roman-Dutch law and subsequently English law influences. The aim of the parties under both Roman-Dutch law and English law was to steer their disputes away from courtrooms with their rigid rules and procedures. Hence the resort to arbitration. Through the passage of time, the parties lost respect for arbitration. Judicial intervention became a necessary tool to enforce the agreement to arbitrate or the subsequent award.

A concern was raised in some quarters regarding the South African arbitration legislation that stagnated in 1965 when it was enacted. The sophisticated legal system and the impartial and independent judiciary, provided a strong support to arbitration and its autonomy. The firm judicial support did not detract from the necessity for a complete overhaul of the arbitration prescript, which might position South Africa as the hub of commercial arbitration in Africa and globally. The enactment of the *International Arbitration Act*, 2017 marked a great milestone towards achieving that goal. Arbitration is embedded in the fabric of South African commercial dispute resolution.

Keywords

Arbitration; alternative dispute resolution; *attestatio;* award; merchants; craftsman; *compromissium;* praetor; *infamia;* litigation; Roman law; Roman-Dutch law; common law; arbitration agreements, arbitration clause; English law; party autonomy; judicial intervention; *makgotla*; street committees; people's courts; community courts; *kersluiden.*

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1 Introduction

The primary objective of this article is to explore the history of South African arbitration law in order to expose the source of its dependence on the courts for sustainability. The significance of a historical perspective in the contextualisation of certain issues cannot be over emphasised. As Crabtree stated "… he who controls the past controls the future."[1] It is thus, critical to endeavour to reconstruct the development of arbitration in order to fully understand what brought about its current form.

Arbitration has an ancient history and it is mentioned in both Greek mythology and the Bible.[2] According to Emerson: [3]

> Long before laws were established, or courts were organized, or judges formulated principles of law, men had resorted to arbitration for the resolving of discord, the adjustment of differences, and the settlement of disputes.

King Solomon has been identified in the Bible as one of the earliest arbitrators who applied a procedure which is still applicable in modern day arbitration.[4] The practice of arbitration was observed as far back as 337 BC when Phillip II, father of Alexander the Great, employed it to resolve territorial disputes which emerged during peace treaty negotiations with the Southern States of Greece.[5] However, the actual origin of arbitration cannot be traced.[6]

The historical development of arbitration differs substantially in nature from the history of principles of law. As Wolaver[7] observed:

> The history of arbitration, unlike the history of law, is not an account of the growth and development of principles and doctrines that have come, through a long use, to have a general validity and force. While arbitration probably antedates all the former legal systems, it has not developed any code of substantive principles, but is, with very few exceptions, a matter of free decision, each case being viewed in the light of practical expediency and decided in accord with the ethical or economic norms of some particular

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1 Crabtree 2001 https://gutenberg.edu/2001/02/the-importance-of-history/.
2 Bennett *Arbitration* 9.
3 Emerson 1970 *Clev St L Rev* 155.
4 Emerson 1970 *Clev St L Rev* 155.
5 Xavier *Evolution of Arbitration* 2.
6 Wolaver 1934 *U Pa L Rev* 132.
7 Wolaver 1934 *U Pa L Rev* 132.

> group. One case is not authority for another since the decisions are in terms of persons and practices and not in accord with prescribed rules and doctrines.

Arbitration was historically conceived as a dispute resolution mechanism aimed at settling disputes in a peaceful manner without resorting to force. This view was distinctly articulated by Greenwood, who attributes the conception of arbitration to a fundamentally different purpose than to promote the rule of law.[8] He states that arbitration was conceived as an institution of peace aimed at maintaining harmony amongst people who are meant to live together.[9] The rigidity of the rules and procedures provided by the law played a vital role in promoting the acceptance and enforcement of arbitration agreements entered into by parties to settle their disputes.[10] The motivation for the establishment of arbitration as set out above accords with South African traditional communities' purpose for resorting to alternative dispute resolution methods.[11]

2 Traditional alternative disputes resolution

South African traditional communities have long supplemented formal legal dispute resolution mechanisms.[12] Most traditional and pre-industrial societies in South Africa resolved their disputes within communities.[13] This view was expressed thus by Brand:[14]

> Amicable dispute resolution (ADR) has a long history in South Africa. In traditional African communities a sanction was seldom invoked for a breach of customary law because agreed corrective mechanisms were the primary means of conflict resolution. At the core of traditional African dispute resolution is the concept of 'Ubuntu' in Xhosa and Zulu. In Sotho it is called 'Botho' and in Venda, 'Ubuthu'. In essence, it means 'People are people through other people' and it emphasizes community building, respect, sharing, empathy, tolerance, the common good, acts of kindness and the 'C's' – communication, consultation, compromise, cooperation, camaraderie, conscientiousness and compassion.

Disputes would be resolved at a family, clan or tribal level with the elder, headman, chief or king acting as the presiding officer.[15] There is evidence of a traditional form of dispute resolution being used in Cape Town in 1901.[16] This traditional process was handled by civic associations and the

8 Greenwood 2011 *Arbitration* 435.
9 Greenwood 2011 *Arbitration* 435.
10 Greenwood 2011 *Arbitration* 435.
11 Brand "Amicable Dispute Resolution" 591.
12 Pretorius *Dispute Resolution* 124.
13 Pretorius *Dispute Resolution* 124.
14 Brand "Amicable Dispute Resolution" 591.
15 Pretorius *Dispute Resolution* 124.
16 Aina *Commercial Mediation* 32.

dispute settlement functions which were based in the township of *Uitvlugt*.[17] Other communities followed more private and informal means of resolving disputes such as referring their disputes to the church.[18]

Some communities used more formal and public fora such as street committees,[19] *makgotla*,[20] people's courts[21] and community courts,[22] amongst others.[23] All of these dispute resolution fora constitute a form of "alternative dispute resolution" in that they fall outside the formal legal system.[24] The traditional form of alternative dispute resolution was interrupted by colonialism, which introduced a preference for the Western bias towards adjudicative dispute resolution rather than consensual outcomes.[25] Consequently, litigation and arbitration emerged as the dominant dispute resolution mechanisms "in the civil justice system" in South Africa.[26]

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17 Aina *Commercial Mediation* 32.

18 Aina *Commercial Mediation* 32.

19 A typical example of street committees existed in Cape Town. See Burman and Schärf 1990 *Law Soc Rev* 706. According to Burman and Schärf, street committees are the main informal courts in a list of various forms of informal courts in the townships. They go further by indicating that: "In certain areas they are known as section committees or headman's committees, but they exist in all the established townships and squatter camps of Cape Town. Street committees serve several streets, with the number of houses or sites covered varying from a score to almost a hundred. Above them are the executive committees, sometimes also rather confusingly known as 'civics'. Both these types of committees are directly elected by adults, and operate at grassroots level to settle disputes and attend to the daily affairs of the township".

20 See Curran and Bonthys 2005 *SAJHR* 634. *Makgotla*, normally referred to as "community courts", were established in some African townships to address the community's needs with regard to the resolution of domestic disputes and criminal offences. The *makgotla* employ a mixture of customary law, common law and some new "self-made" law to resolve disputes. "Procedurally they resemble the informality of traditional courts and aim to reconcile the parties."

21 See Grant and Schwikkard 1991 *SAJHR* 304-305. People's courts are described by Schwikkard as various types of courts that exist outside the formal court system. The definition excludes "uncontrolled mob action or 'self-help' violence". According to Schwikkard: "People's courts arose partly because the present legal system could not meet the needs of ordinary citizens. This inability was not due merely to the content of the substantive law, that frequently was nothing more than a tool for enforcing the ruling party's political agenda, but also because the structure and procedural requirements of the courts meant that many people were denied access to the courts. With the demand for access to justice comes the demand for popular participation in the legal process."

22 The term "community courts" is used interchangeably with the word *makgotla*. A detailed discussion of these two concepts appears in fn 19 of this article and is certainly relevant to this discussion.

23 Aina *Commercial Mediation* 32.

24 Aina *Commercial Mediation* 125.

25 Brand "Amicable Dispute Resolution" 592.

26 Brand "Amicable Dispute Resolution" 592.

3 Roman and Roman-Dutch law development

Arbitration law in South Africa draws from a mixture of the civil and common law influences.[27] The South African Common law is predominantly Roman-Dutch law.[28] The Roman law practices were absorbed into Roman-Dutch law and thence into South African law.[29] Xavier[30] explains how arbitration was introduced to Roman civilization:

> … arbitration owed its beginnings to commercial disputes as it started with trade disputes being resolved by peers as early as the Babylonian days. The Sumerian Code of Hammurabi (c. 2100 BC) was promulgated in Babylon, and under the Code it was the duty of the sovereign to administer justice through arbitration. The Greeks were subsequently influenced by their Egyptian ancestry and continued the use of arbitration. This then moved along with the times into the Roman civilization and was slowly influenced by Roman laws. Such was the move not just within the Roman Empire but also over the countries with which Rome traded.

The Romans certainly practised arbitration. There is evidence of this in the Twelve Tables.[31] Table I specifically evidenced efforts taken by an early Roman State to urge parties to submit their disputes to arbitration.[32] The initial practice of arbitration by the Romans was not very popular. Only random disputes were referred to arbitration.[33] During this early period in Rome, arbitration, not legislation, played a critical role in legalising rights.[34]

Arbitration emerged as the preferred dispute resolution mechanism in Rome towards the end of the Republic.[35] Voet speculated that the popularity of arbitration in Rome was attributable to the fact that it offered parties an opportunity to avoid the high cost of litigation, the delays associated with overburdened court rolls, the public nature of court processes, and the anxiety resulting from the uncertainty of results.[36] Arbitration entitles parties to a dispute to elect an impartial third party or parties to adjudicate their dispute and issue an award on their behalf.

In Roman law, arbitral awards were final in nature and there was no appeal process.[37] This was to prevent arbitration from becoming a precursor to litigation as opposed to an alternative to it. The process of arbitration that

27 Butler and Finsen *Arbitration in South Africa* 4.
28 Du Bois *et al. Wille's Principles of South African Law* 67.
29 Schreiner *Contribution of English Law* 5.
30 Xavier *Evolution of Arbitration* 2.
31 Dorsey 1942 *Am L S Rev* 1484.
32 Dorsey 1942 *Am L S Rev* 1484.
33 Dorsey 1942 *Am L S Rev* 1484.
34 Dorsey 1942 *Am L S Rev* 1484.
35 Stein 1995 *Israel L Rev* 216.
36 McKenzie, McKenzie and Ramsden *McKenzie's Law of Building* 211.
37 Stein 1995 *Israel L Rev* 222.

existed in Rome at the end of the Republic[38] was known as *compromissium*.[39] There has been considerable debate regarding the origin and historical development of the arbiter. The most recent argument holds the view that the term “arbiter” is derived from the "semitic root '-r-b' in the sense of 'mediate as guarantee'".[40] According to Stein:[41]

> This would place the origin of the institution in the relations of merchants of different countries in the Mediterranean, in which the Phoenicians were active. It would have been introduced into Roman vocabulary through commercial dealings between Romans and Carthaginians in the sixth century B.C., to designate a third party acting originally as a mediator in commercial matters and later in private matters.

The term “arbiter” was introduced into Roman law and its development continued. The Romans acknowledged the fragile nature of the relations between law and arbitration.[42] Arbitration was introduced to operate independently from litigation and to avoid disadvantages associated with it. However, the total exclusion of the law from arbitration would render the process ineffective in dispute resolution, while too close an association with the law would make the two processes indistinguishable and negate the possible benefits of arbitration.[43]

Roman law successfully developed arbitration by introducing penal stipulations or bonds to ensure strict compliance with the arbitral award.[44] Arbitration was particularly popular in resolving private matters, except where the issues "raised a delict involving *infamia (delictum famosum)* or an individual's freedom *(causa liberalis*)."[45] Roman arbitration permitted parties to select an arbitrator subject to certain conditions.[46] It was vital that an elected arbitrator be a person in a position to properly accept the reference.[47]

Slaves, women and persons below the age of puberty, the insane, or deaf and dumb were not eligible to be appointed as arbitrators.[48] Any agreements to refer matters to a slave were rendered illegal by the requirement that the arbitrator must be a freeman, either at birth or thereafter. The exclusion of

38 Deutsch 1969 *The Jurist* 274.
39 A term referred to by western people as "the compromise of the parties". See Stein 1995 *Israel L Rev* 217.
40 Stein 1995 *Israel L Rev* 217.
41 Stein 1995 *Israel L Rev* 217.
42 Stein 1995 *Israel L Rev* 218.
43 Stein 1995 *Israel L Rev* 218.
44 Ramsden and Ramsden *Law of Arbitration* 25.
45 Stein 1995 29 *Israel LR* 218.
46 Stein 1995 29 *Israel LR* 220.
47 Stein 1995 29 *Israel LR* 220.
48 Deutsch 1969 *The Jurist* 274.

women and slaves as potential arbitrators was not so much based on their ability to make judgement but on the fact that they were not allowed to perform public functions.[49] Any person with an interest in the matter was also excluded from appointment on the basis that he would be making an award to himself.[50]

The Romans took steps to ensure that a person who accepted a reference delivered an award. These steps included the establishment of a praetorian intervention which appears to have started in the second century BC.[51] The primary objective of these steps was to deal with arbitrators who accepted a reference and later refused to act in accordance with the agreement or who investigated the dispute but refused to make an award.[52] In such cases, the *Praetor*[53] was empowered to compel the arbitrator to issue an award.[54] The *Praetor* was motivated by his particular interest in ensuring that all disputes were finalised either through litigation or arbitration.[55] It was therefore the *Praetor's* view that parties who elected to resolve their disputes through arbitration because of the potential benefits of the process should not be disappointed.[56] The *Praetor* would, however, be willing to terminate a reference to an arbitrator who was unable to proceed due to circumstances beyond his control, which arose after he accepted the reference.[57]

The *Praetor* had a duty to intervene where the parties had elected more than one arbitrator to deal with the dispute and the arbitrators had divergent views. According to Stein:[58]

> The text that discusses this point (D.4.8.17.5) has clearly been interpolated. As it stands, it states that a reference to A and B on terms that if they disagree, they should bring in a third arbitrator is not valid, because they might differ on whom to nominate; but a reference on terms that if A and B differ, they should bring in C is valid. Later the same text says that if A and B disagree, the praetor should compel them to appoint a third arbitrator to settle the matter, which is contrary to the first sentence of the text. It seems probable that the classical jurists disagreed on the matter and that the original discussion, setting out the opposing views, has been badly abbreviated.

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49 Ramsden and Ramsden *Law of Arbitration* 220.
50 Voet *Commentary upon the Pandects* 112.
51 Stein 1995 *Israel L Rev* 219.
52 Stein 1995 *Israel L Rev* 219.
53 See Gane *Selective Voet* 184. "Praetors was a name given to all magistrates, even to the military prefects. In that sense they are said in the passages cited below to be older standing than very consuls. But more particularly the name was given to those who presided (praeerant) over the administration of justice."
54 Stein 1995 *Israel L Rev* 219.
55 Voet *Commentary upon the Pandects* 115.
56 Voet *Commentary upon the Pandects* 115.
57 Voet *Commentary upon the Pandects* 119.
58 Stein 1995 *Israel L Rev* 221.

To counter the apparent challenges where arbitrators disagreed on the appropriate award, Stein refers to the recommendation by Ulpian that reference should be made to an unequal number of persons so that the majority opinion might be binding should they disagree.[59] In the event that three arbitrators were appointed, all three arbitrators had to be present when the award was made in order for the award to be valid.[60] This applied even where the two arbitrators who were present were in agreement as the third arbitrator, who may have differed, could potentially have successfully convinced either or both of the others to change their view to accord with his own.[61]

Unless specified by the parties, the arbitrator could determine the time and place of the arbitration.[62] Once the time and place of the arbitration had been determined, the parties were obliged to comply with the summons to appear. Failure to appear resulted in a penalty being imposed on that party.[63] The penalty could be avoided if the arbitrator had chosen a disreputable place for the arbitration.[64]

The rights and obligations of the arbitrator continued from the date of his appointment until the award was made or the rights and duties of the arbitrator were revoked.[65] Such revocation occurred where the dispute ceased to exist or the parties terminated their dispute by agreement between themselves.[66] The arbitration submission agreement was terminated by the death of either arbitration party, provided the heirs on both sides were bound by the submission agreement.[67]

Roman law regarded arbitration awards as final.[68] Hence, litigation on the same matter was prohibited as this would have exposed the award to an appeal on the merits.[69] No appeal of an arbitral award was permitted.[70] An aggrieved party could reject the award by lodging a protest (*attestatio*) with the arbitrator or his opponent within ten days of the date of the award.[71]

59 Stein 1995 *Israel L Rev* 221.
60 Stein 1995 *Israel L Rev* 219.
61 Stein 1995 *Israel L Rev* 219.
62 Stein 1995 *Israel L Rev* 221.
63 Stein 1995 *Israel L Rev* 221.
64 Stein 1995 *Israel L Rev* 221.
65 Stein 1995 *Israel L Rev* 275.
66 Stein 1995 *Israel L Rev* 275.
67 Ramsden and Ramsden *Law of Arbitration* 34.
68 Stein 1995 *Israel L Rev* 222.
69 Stein 1995 *Israel L Rev* 222.
70 Voet *Commentary upon the Pandects* 123.
71 Voet *Commentary upon the Pandects* 123.

The protest did not constitute an appeal from which it differed materially.[72] An appeal focussed on a reconsideration of the entire suit by a court, whereas, protest was directed towards an alteration of the award.[73] In the absence of any protest, parties were obliged to act in accordance with the award. An award could, however, be deviated from or ignored with impunity where the arbitrator exceeded or failed to abide by his terms of reference.[74]

Jurists were careful to ensure that arbitrators did not deviate from their terms of reference and also that the substance of the award was not interfered with.[75] They would not attempt to amend the award even if it appeared to be unfair[76] because they recognised that the arbitration had been undertaken at the behest of the parties who had appointed the arbitrator(s) and were thus bound to abide by his (their) determination irrespective of whether or not the award pleased them.[77] Thus, parties could not easily impugn the award where the arbitrator(s) had acted within the terms of reference, without any corruption and without bias towards either party.[78] However, the term "arbiter" was not limited to arbitrators and this created scope for review[79] when the arbitrator performed his duties in accordance with a misinterpretation of the terms of reference.

The Roman concept of arbitration was further developed in Roman-Dutch law. In Roman-Dutch law, arbitrators and arbiters were referred to as elected judges.[80] Elected judges entertained matters referred to them with the full consent of, and in strict compliance with, the wishes of the referring parties.[81] According to van Leeuwen,[82] elected judges were "subdivided into judges by choice or good men, that is arbiters, and arbitrators." Arbiters were expected to decide a dispute between parties and issue awards in accordance with law and custom whilst acting within the powers given to them by the parties in terms of an arbitral agreement.[83]

Arbitrators, or good men, who were called *kersluiden,* were friendlier than the arbiters, and they were preferred for their knowledge and expertise in the field of the subject matter in dispute.[84] They were expected to apply their

72 Voet *Commentary upon the Pandects* 123.
73 Voet *Commentary upon the Pandects* 123.
74 Deutsch 1969 *The Jurist* 275.
75 Stein 1995 *Israel L Rev* 224.
76 Stein 1995 *Israel L Rev* 225.
77 Stein 1995 *Israel L Rev* 225.
78 Stein 1995 *Israel L Rev* 225.
79 Stein 1995 *Israel L Rev* 225.
80 Van Leeuwen *Commentaries on Roman Dutch Law* 413.
81 Van Leeuwen *Commentaries on Roman Dutch Law* 413.
82 Van Leeuwen *Commentaries on Roman Dutch Law* 413.
83 Van Leeuwen *Commentaries on Roman Dutch Law* 413.
84 Van Leeuwen *Commentaries on Roman Dutch Law* 413.

knowledge and judgement without any reference to the law in resolving the dispute.[85] The arbitrator attempted to resolve disputes between the parties amicably without resorting to or applying the law in the process.[86] The deed of submission had to be critically analysed in order to determine whether the person had been appointed as an arbiter or arbitrator. The overriding distinction between the two was the requirement that the arbiter apply the law while an arbitrator had to apply his or her knowledge only.[87] This understanding of the difference between an arbiter and an arbitrator was part of the Roman-Dutch law which influenced the development of the South African common law.

Roman-Dutch law first made its presence felt in South Africa with the arrival of Jan Van Riebeeck at the Cape of Good Hope in 1652.[88] Van Riebeeck's initial mandate was to establish a refreshment post for the Dutch East Indian Company (DEIC).[89] The Dutch quickly developed plans to colonise the Cape and the officials of the DEIC were mandated to apply Roman-Dutch law throughout the colony.[90]

Initially, the Dutch settlers applied Roman-Dutch law only amongst themselves.[91] But gradually the approach to the indigenous population changed[92] and Roman-Dutch law was imposed upon them also.[93] Schreiner[94] had the following to say about the history of South African common law:

> Like other allied systems that arose on the continent of Europe, our law rested on Germanic custom, substantially modified and supplemented by Roman law, as represented for the most part by the compilations of Justinian. Our system was developed during the seventeenth and eighteenth centuries through the writings of practising lawyers and teachers of law and the decisions of the courts in Holland and its associated provinces of the United Netherlands. Jurists from other parts of the Continent contributed their thoughts and from time to time the law was altered or reinforced by legislation, which later became overlaid by comment and was then treated as part of the common law. This legal system of the Netherlands or rather of Holland, the principal province, received wide recognition as a distinct and important branch of the civil law family and acquired the name of *Roomsch-Hollandsche reg,* which we translate as Roman-Dutch law. It was the system brought to South Africa by the early European settlers, the first of whom arrived in 1652. When in the course of the nineteenth century, under the influence in the first

85 Van Leeuwen *Commentaries on Roman Dutch Law* 413.
86 Van Leeuwen *Commentaries on Roman Dutch Law* 413.
87 Van Leeuwen *Commentaries on Roman Dutch Law* 413.
88 Lenel 2002 https://www.lenel.ch/docs/history-of-sa-law-en.pdf.
89 Rautenbach 2008 *EJCL* 2.
90 Van der Merwe and Du Plessis *Introduction to the Law of South Africa* 9.
91 Van der Merwe and Du Plessis *Introduction to the Law of South Africa* 9.
92 Van der Merwe and Du Plessis *Introduction to the Law of South Africa* 9.
93 Van der Merwe and Du Plessis *Introduction to the Law of South Africa* 9.
94 Schreiner *Contribution of English Law* 5.

> place of Napoleon, most European countries introduced general codes, the Netherlands were among the first to fall in with the trend. But in the three Dutch overseas possessions that became British as a result of the Napoleonic wars the old uncodified Roman-Dutch law persisted and remained the foundation of the local common law.

This is relevant to the history of arbitration in South Africa. Arbitration law in South Africa was based on Roman-Dutch law. As adopted from Roman law, arbitration envisaged a peaceful, non-violent means of resolving disputes, presided over by an arbitrator whose integrity was beyond reproach.[95] Dodds'[96] view of Roman arbitration was that:

> *'Arbitration,'* as a principle, is closely connected with Natural Equity. The first requisite for satisfactory arbitration is that an Arbitrator should be chosen who is possessed of competent knowledge, and who is disinterested, and just. In the Middle Ages the Church, sometimes, arbitrated between contending nations. Also many private disputes were settled and law-suits prevented.

The purpose was to avoid unnecessary litigation with potentially disastrous results. These basic principles were subsequently developed in Roman-Dutch law through the writings of such Dutch jurists as Voet and Huber.[97] It should, however, be noted that neither Roman nor Roman-Dutch law boasted a fully developed, complete system of Arbitration law.[98] However, the Dutch jurists' contributions proved a valuable tool in developing the concept. Voet[99] was amongst the most authoritative and accessible writers on the Roman-Dutch law and his interpretation of the Roman-Dutch law of arbitration has been referred to in many judgements.

The absence of a developed and complete system of arbitration complicated the contribution of the Dutch jurists who were not *ad idem* with Voet in all respects.[100] The challenges posed by these differences of opinion were resolved in South African law when the three South African provinces enacted arbitration legislation.[101] Thus, although the concept of the "arbitrator" was adopted into South African law from the Roman-Dutch law, modern South African Arbitration law is based almost exclusively on English

95 Ramsden and Ramsden *Law of Arbitration* 13.
96 Ramsden and Ramsden *Law of Arbitration* 13.
97 Butler and Finsen *Arbitration in South Africa* 4.
98 Gauntlett "Legal System of South Africa".
99 Ramsden and Ramsden *Law of Arbitration* 13. See *Bidoli v Bidoli* 2011 5 SA 247 (SCA); Gauntlett, Butler and Finsen all recognised that Voet and Huber made significant contributions to arbitration; see Gauntlett "Legal System of South Africa" 29; Butler and Finsen *Arbitration in South Africa* 4.
100 See Ramsden and Ramsden *Law of Arbitration* 13.
101 *Arbitration Act* 29 of 1898 (Cape of Good Hope); *Arbitration Ordinance* 24 of 1904 (Transvaal); *Arbitration Act* 24 of 1898 (Natal).

law, and for this reason we will now turn to a brief historical overview of the development of arbitration in English law.

4 Development of English arbitration law and its influence on South African law

Arbitration in medieval England survived without judicial support. The arbitration process was mainly used by an association of travelling medieval craftsmen and merchants as a commercial dispute resolution mechanism.[102] It was preferred to litigation because of its ability to dispose of a dispute quickly before the parties could leave the community in which the dispute occurred.[103] The fact that the process was voluntary and was resorted to by parties who depended on one another motivated them to abide by arbitration agreements.[104] Therefore, the community ties that existed between the parties secured the sustainability of arbitration as a dispute resolution mechanism.[105]

Arbitration lost ground due to the industrial revolution, population growth and migration which severed community ties, with the consequence that parties no longer honoured voluntarily concluded arbitration agreements.[106] Parties started to explore possible court challenges to arbitration agreements or awards before courts which held the view that arbitration agreements constituted private arrangements which could not be enforced by the law.[107] The courts manifested a hostile attitude towards arbitration because they believed that arbitrators lacked any authority to bar them from interfering with either an arbitral award or agreement.[108] The *Vyinor's*[109] case, in which the revocable doctrine was made applicable to arbitration agreements,[110] was critical to the later development of arbitration in England.[111]

According to Berger and Sun the modern view of arbitration was not regarded by early English common law as a legitimate form of trial or a way of avoiding trial through negotiations by the parties' representatives.[112] Arbitration was rather treated as a partial substitute for trial achieved through a formal but rescindable concession of power to arbitrators by

102 Carrington and Castle 2004 *LCP* 208.
103 Carrington and Castle 2004 *LCP* 208.
104 Carrington and Castle 2004 *LCP* 208.
105 Bennett *Arbitration* 9.
106 Bennett *Arbitration* 9.
107 Carrington and Castle 2004 *LCP* 208.
108 Berger and Sun 2009 *NYU J L & Bus* 747.
109 *Vynior's Case* 8 Co Rep 81b (1609).
110 Carrington and Castle 2004 *LCP* 208.
111 Carrington and Castle 2004 *LCP* 208.
112 Berger and Sun 2009 *NYU J L & Bus* 747.

submission to the process.[113] When the legislature realised the courts' willingness to interfere with arbitral awards it enacted legislation, between 1698 and 1889, to strengthen arbitration practice and to make arbitral awards and agreements enforceable.[114]

English legislation from this period was influential in South African legal development in the field, as South Africa was occupied by England twice, first in 1795 and again in 1806.[115] The English legal influence followed on the second occupation, and between 1898 and 1904 the *English Arbitration Act*, 1889 and the case authority associated with it proved to be extremely influential in South African legal development.[116]

The provincial statutes and ordinances in Natal,[117] the Cape[118] and the Transvaal[119] were strongly influenced by the *English Arbitration Act*, 1889, the provisions of which were adopted in each province with some adjustments to suit their unique circumstances. The purpose of the statutory intervention was not to repeal the Common law but to facilitate the submission of disputes to arbitration, the conduct of arbitration proceedings and the enforcement of arbitral awards.[120]

4.1 Arbitration in Natal

Arbitration in Natal was regulated by Roman-Dutch law until the enactment of the Natal Arbitration Act in 1898.[121] The enactment of the Act ushered in a new regime which was significantly influenced by English legislation. Unlike the arbitration instruments which were enacted by the other two provinces of South Africa, the Natal Arbitration Act did not expressly deal with the common law, which had previously governed arbitration. It did, however, make provision for various issues ranging *inter alia* from the arbitration procedure to the award and the role of the arbitrator.

The duty of the arbitrator during an arbitration process is similar to that of any presiding officer determining a dispute. The arbitrator must thus be impartial so as to imbue the award with unimpeachable integrity. Section 12

113 Berger and Sun 2009 *NYU J L & Bus* 747.
114 Carrington and Castle 2004 *LCP* 213.
115 Aartsma 2011 https://www.south-africa-tours-and-travel.com/colonial-history-of-south-africa.html.
116 Ramsden and Ramsden *Law of Arbitration* 8.
117 *Arbitration Act* 24 of 1898 (Natal).
118 *Arbitration Act* 29 of 1898 (Cape of Good Hope).
119 *Arbitration Ordinance* 24 of 1904 (Transvaal).
120 Butler and Finsen *Arbitration in South Africa* 4.
121 *Arbitration Act* 24 of 1898 (Natal).

of the Natal Arbitration Act emphasised the significance of the arbitrator's impartiality:

> Every arbitrator and umpire must be, and continue throughout the reference to be disinterested with reference to the matters referred and the parties to the reference, and any party to a reference may require any arbitrator or umpire to make a sworn declaration before beginning, or continuing his duties as such arbitrator or umpire, that he has no interest direct or indirect in the matters referred or in the parties to the reference, and knows of nothing disqualifying him from being impartial and disinterested in the discharge of such duties. Provided always, that any party may expressly waive any right to object to any arbitrator or umpire on the grounds of interest or the like.

Section 12 was included to ensure that issues were decided on the facts alone. The Act thus, demonstrated an uncompromising attitude towards the protection and promotion of the independence of the arbitration process.

The provisions of section 4 were also aimed at promoting the autonomy of arbitration by providing that once parties had agreed to submit their dispute to arbitration, they could not withdraw from the agreement at will in favour of litigation. Withdrawal from the agreement was possible only with the leave of the court[122] or by agreement of both parties. In circumstances where a party ignored the deed of submission and commenced legal proceedings, he/she could be compelled by the other party, in terms of section 7 of the Act, to stay the proceedings.[123]

The party who brought the application to stay the proceedings would be required to prove his/her willingness to abide by the agreement to arbitrate, both at the commencement of the court proceedings and at the time of making the application.[124] The court would then satisfy itself that there was no compelling reason not to refer the matter to arbitration and make an order staying the proceedings. The matter would then proceed to arbitration in terms of the Act. The Act did not sufficiently restrict court intervention in the process or explicitly affirm the final and binding nature of arbitral awards. This enabled the courts to interfere with the award.

Section 13 set out the grounds upon which an arbitrator could be removed. The provision was not explicit; it simply indicated that the arbitrator could be

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122 Section 4 of the *Arbitration Act* 24 of 1898 (Natal) authorised the court to decide whether or not the submission to arbitration was revocable. The fact that the section granted courts the authority to decide upon the revocability of the submission without citing the ground for the decision provided wide discretion to the courts to determine the survival of the process which was regarded as a threat to litigation. This was an indication that the legislature remained sceptical regarding whether arbitration could survive autonomously from the court system.

123 Section 7 of the *Arbitration Act* 24 of 1898 (Natal) was a reproduction of s 4 of the *Arbitration Act*, 1889 (England). Also see Winship *Law and Practice of Arbitration* 6.

124 See s 7 of *Arbitration Act* 24 of 1898 (Natal).

removed if he/she had committed an act of misconduct in connection with the subject matter of the reference. It was left to the courts to decide what misconduct would justify removal and what would constitute just grounds for the recusal of the arbitrator.

The same vague concept of "misconduct" was again used in section 18, that dealt with the setting aside of the appointment of the arbitrator or an arbitral award.[125] The section allowed the appointment to be set aside if the arbitrator was guilty of misconduct or the award had been improperly obtained. The Act did not define "misconduct" or what constituted an improperly obtained award. These matters were left to the discretion of the court. The court in *Clark*[126] provided some guidance on what acts by the arbitrator might constitute misconduct and affect the integrity of the arbitral award for the purposes of setting it aside. According to the court:

> An arbitrator must carry out his duties in a judicial manner. He need not necessarily observe the precision and forms of a Court of Law, but he must proceed in such a way as to ensure a fair administration of justice between the parties. If, therefore, an arbitrator has misconducted himself, has been corrupt, has heard one party and refused to hear the other, the Court will interfere and set aside his award.[127]

In the absence of any challenge in terms of section 18, the award was made an order of the court and enforced in the same manner as any judgement.[128] Closer scrutiny of this legislation revealed shortcomings which, if not addressed, would completely undermine the fundamental principles of arbitration.

4.2 Cape Arbitration Act 29 of 1898

The *Cape Arbitration Act* of 1898 was the first piece of legislation enacted in the Cape solely for the purpose of regulating arbitration. Its primary objective was to create well-structured rules and regulations to facilitate arbitration. The Act promoted arbitration and ensured strict compliance with the arbitral agreement by both parties who consented to arbitration as a dispute resolution mechanism. Section 3 declared the submission irrevocable, subject only to the consent of all the parties or the leave of the court or a judge.

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125 The grounds for setting aside awards were not as clear as they are in the modern arbitration legislation. See s 33 of the *Arbitration Act* 42 of 1965.

126 *Clark v African Guarantee and Indemnity Co Ltd* 1915 CPD 68 (hereinafter the *Clark* case).

127 The *Clark* case 68.

128 See s 19 of the *Arbitration Act* 29 of 1898 (Cape of Good Hope).

The significant role that arbitration was meant to play in the area of dispute resolution was reiterated in section 6, which was designed to prevent a party to a submission from ignoring the terms of the agreement and initiating legal proceedings. The court was empowered to stay the legal proceedings provided there was an application brought by one of the parties to compel such a stay. The section effectively limited court interference and demonstrated that arbitration was a legally recognised method of dispute resolution, independent from the court system.

Nevertheless, the autonomy of arbitration was still a dream as considerable judicial hostility towards arbitration had been inherited from the English law. The common English ancestry of the Natal and Cape legislation was easily identifiable in that both statutes contained similar provisions. For example, section 10 of the *Cape Act* which guaranteed the impartiality of the arbitrator was identical to section 12 of the *Natal Act* and section 4 of the *English Arbitration Act*, 1889.

The Act was uncompromising as regards the character and qualifications of the arbitrator.[129] It provided parties in the submission with remedies to deal with an award that had been improperly obtained and/or an arbitrator suspected of misconduct or lacking impartiality.[130] An arbitrator could be removed if misconduct was proven or a just ground for recusal was established.[131]

In the absence of any challenge to the award, it was made an order of court and was granted the status of a court order capable of enforcement like any other court order.[132]

4.3 The Transvaal Arbitration Ordinance 24 of 1904

The Transvaal enacted an ordinance to regulate arbitration. This ordinance, like the statutes of the Cape Province and Natal, was also modelled on the *English Arbitration Act,* and its provisions were thus similar to those of the legislation discussed above. Section 3 entrenched the irrevocable nature of the agreement to submit a dispute to arbitration, save where the parties agreed to terminate the agreement to submit or a court or judge granted leave to terminate the agreement.

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129 See s 17(1) of the *Arbitration Act* 29 of 1898 (Cape of Good Hope).

130 See s 17(2) of the *Arbitration Act* 29 of 1898 (Cape of Good Hope).

131 See s 11 of *Cape Arbitration Act* 29 of 1898; s 17(1) reiterated the grounds for removal described in s 11 while s 17(2) stated that the award could be set aside if the arbitrator was guilty of misconduct or the award had been improperly obtained.

132 Section 18 of the *Arbitration Act* 29 of 1898 (Cape of Good Hope).

Section 6 required parties to the agreement to arbitrate or abide by their agreement and not to abandon it in favour of litigation. It empowered an aggrieved party to apply for a stay of legal proceedings on the basis of a valid, existing agreement to arbitrate future disputes. This section was designed to encourage parties to honour their agreement and subject themselves to the process they elected to utilise in the event that a dispute arose between them.

The ordinance hoped to strengthen business confidence in the process by emphasising the impartiality of the arbitrator.[133] Section 11 permitted the removal of an arbitrator who was guilty of misconduct or where just grounds existed for his/her removal. Likewise, as the integrity of the award was essential, an arbitral award could be set aside where the arbitrator was found guilty of misconduct or the award had been improperly obtained.[134]

The ordinance respected the arbitral award and provided that an award that had been properly procured could be made an order of court and enforced in the same manner as any such order.[135]

The instruments introduced to regulate arbitration in Natal, the Cape and the Transvaal were far from perfect and thus more comprehensive Arbitration law was required.

4.4 The introduction of a single Arbitration Act for South Africa

South Africa needed more comprehensive legislation to regulate arbitration.[136] It found inspiration for this in the *English Arbitration Act*, 1950, which replaced the 1889 *English Arbitration Act*. Not only was the *South African Arbitration Act*, 1965 modelled upon its English counterpart, but the cases dealing with the English legislation were relied upon by the South African courts when faced with complex or confusing arbitration matters. It is worth noting, however, that in drafting the South African legislation, the South African Law Reform Commission (SALRC) (then the South African Law Commission (SALC)) was able to present a more logical and advanced piece of legislation than the arbitration legislation prevailing in other jurisdictions at that time.[137] This was achieved after a thorough analysis of the existing arbitration legislation of the time.[138]

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133 This can be observed from the provisions of s 11 of the *Arbitration Act* 29 of 1898 (Cape of Good Hope).

134 Section 16 of the *Arbitration Act* 29 of 1898 (Cape of Good Hope).

135 Section 17 of the *Arbitration Act* 29 of 1898 (Cape of Good Hope).

136 Ramsden and Ramsden *Law of Arbitration* 22.

137 South African legislation was more advanced than arbitration legislation in other jurisdictions like Israel and New South Wales. See Butler 1994 *CILSA* 118.

138 Ramsden and Ramsden *Law of Arbitration* 22.

Despite the above, a need for substantial amendment to the Act is now apparent. The current *South African Arbitration Act* is criticised for providing the courts with extended powers of intervention in arbitral proceedings. To this end, the SALRC conducted an investigation into how best to develop the South African law in this area.[139] Several possibilities were explored, and the SALRC suggested that the South African legal development should incorporate the best features of the *English Arbitration Act*, 1996 and that the United Nations Commission on International Trade Law Model Law should be adopted.[140] This approach followed the established path of shaping the South African Arbitration law according to English law. The legislature further made great strides towards remedying the shortcomings presented by the current Act with regard to International Arbitration through the enactment of the *International Arbitration Act* 15 of 2017, which came into effect on the 20 December 2017. It is envisaged that the positive attributes of this Act will place the South African legislation on a par with international arbitration best practices.

5 Nature and relevance of arbitration

Arbitration law in South Africa is regulated by the *Arbitration Act,*[141] which was enacted in 1965. The fundamental reason for the existence of this alternative dispute mechanisms in South Africa remained similar to the reason the process was embraced by the global business community, which is to provide an alternative to litigation capable of effectively resolving disputes finally, speedily, privately and cost effectively.[142]

Arbitration is a deep-rooted and popular commercial disputes resolution mechanism in South Africa. It has flourished, despite its existence depending largely on the outdated legislation which persisted unchanged despite the evolution of business practices.[143] The protection of the autonomy of arbitration and its continued growth despite the stagnation of the legislation can be attributed primarily to the courts.

An invaluable jurisprudence of arbitration was developed by the courts through their interpretation of the current *Arbitration Act*[144] over the years. The courts have further played a significant role since 1998 in promoting the

139 SALC *Project 94*.
140 SALC *Project 94* 1.
141 *Arbitration Act* 42 of 1965 (the Act).
142 Butler 1994 *CILSA* 121.
143 Neneh and Van Zyl 2012 *SABR*.
144 *Mphaphuli & Associates (Pty) Ltd v Andrews* 2009 4 SA 529 (CC) para 197, *Du Toit v Minister of Transport* 2006 1 SA 297 (CC*)* para 29; *Telcordia Technologies Inc v Telkom SA Ltd* 2007 3 SA 266 (SCA); *Cool Ideas 1186 CC v Hubbard* 2014 4 SA 474 (CC); *De Lange v Presiding Bishop of the Methodist Church of Southern Africa* 2016 2 SA 1 (CC).

development of the common law of arbitration on matters not covered by the Act.[145] The legitimacy of arbitration was confirmed when it was declared constitutional on several occasions by the courts.[146] Despite the process receiving unwavering support from the courts, the business community and jurists in South Africa have persistently called for the legislative reform of arbitration law in the past few decades.[147]

The modernisation and revamping of arbitration legislation in South Africa is essential to encourage the development of arbitration domestically, in the region and internationally. Significant progress towards the development of arbitration law in South Africa was recorded through the enactment of the *International Arbitration Act*, 2017, and incorporates the *UNCITRAL Model Law on International Commercial Arbitration,* 1985. The move marked a significant boost to the popularity of arbitration in South Africa.

The enactment of the *International Arbitration Act*, 2017 coupled with the existence of a well-equipped judiciary to support arbitration establishes South Africa as a potential centre for international commercial arbitration. Owing to its sophisticated infrastructure and it being the second largest economy on the continent, the country undoubtedly has the potential to be the powerhouse of arbitration in Africa.[148]

The courts continue to play an integral part in the enforcement of arbitral awards. The massive support displayed by the courts for arbitration and the generation of valuable jurisprudence that promotes the practice of arbitration and precedents that affirm the final and binding nature of arbitral awards are a confirmation of the firm position the process holds as a viable alternative dispute resolution mechanism in South Africa.[149] By embracing arbitration the courts address the challenge of over-crowded court rolls and the resulting pressure on them to deal with cases thoroughly and expeditiously.

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145 *See North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* 2013 5 SA 1 (SCA) paras 8, 9 and 10; *Radon Projects (Pty) Ltd v N V Properties (Pty) Ltd* 2013 6 SA 345 (SCA) paras 27, 28 and 29; *Zhongji Development Construction Engineering Company Limited v Kamoto Copper Company Sarl* 2015 1 SA 345 (SCA) paras 35, 36 and 53. Courts in these cases developed the common law to incorporate principles of separability and competence-competence which were not catered for by the Act.

146 *Mphaphuli & Associates (Pty) Ltd v Andrews* 2009 4 SA 529 (CC) para 197; *Du Toit v Minister of Transport* 2006 1 SA 297 (CC) para 29; *Telcordia Technologies Inc v Telkom SA Ltd* 2007 3 SA 266 (SCA) para 44.

147 Sarkodie 2014 *GAR* 1; Butler 1994 *CILSA* 118; Gauntlett "Legal System of South Africa" 29.

148 Sarkodie 2014 *GAR* 1.

149 *Mphaphuli & Associates (Pty) Ltd v Andrews* 2009 4 SA 529 (CC) para 219; *Telcordia Technologies Inc v Telkom SA Ltd* 2007 3 SA 266 (SCA) para 44.

6 Conclusion

Alternative dispute resolution existed in South Africa even before the introduction of the Roman-Dutch and English law models. However, the origin of arbitration remains uncertain. As Wolaver[150] stated:

> At what time or place man first decided to submit to his chief or to his friends for a decision and a settlement with his adversary, instead of resorting to violence and self-help, or to the public legal machinery available, is not known; and any inquiry of this sort would belong more properly in the history of social growth and ethics than in either law or economics.

In a traditional South African community, chiefs, headmen and kings played a vital role in arbitrating disputes between parties within a clan. This traditional method of resolving disputes amicably in the community was displaced by colonialism, and South Africa adopted a Western approach to arbitration. An analysis of the South African Arbitration law that developed from English and Roman-Dutch law influences reveals that it was established as an alternative to litigation. The process was preferred for its ability to grant parties speedy finalisation of their disputes.

Under English law, community ties formed the basis for the voluntary compliance of merchants and craftsmen with the agreement to arbitrate and the resultant award. Merchants were elected as arbitrators and this fostered parties' confidence in the impartiality of the arbitrators.[151] Evolution diluted the strong community ties that sustained the practice of arbitration between merchants and craftsmen without the intervention of the courts. Therefore, parties turned to courts for support.

English law recognised penal bonds as another method that could be utilised to enforce compliance with the agreement to arbitrate or the arbitral award.[152] The enforcement of arbitration agreements through penal bonds existed until the decision of *Vynior* whereby the Statute Against Fines precluded the recovery of penalties emanating from the failure to abide by an agreement to arbitrate.[153] The major setback that arbitration suffered as a result of *Vynior* was rectified by the *English Arbitration Act*, 1889 which gave full effect to the agreement to refer existing and future disputes to arbitration, subject to the limited supervisory powers of the courts.[154]

150 Wolaver 1934 *U Pa L Rev* 132.
151 Carrington and Castle 2004 *LCP* 210.
152 Wolaver 1934 *U Pa L Rev* 139.
153 Wolaver 1934 *U Pa L Rev* 139.
154 Lorenzen 1934 *Yale L J* 717.

The 1889 *English Act* influenced legislation in the three South African colonies of Natal, the Cape and the Transvaal.[155] These pieces of legislation were replaced by a single statute, the *Arbitration Act* 42 of 1965, which regulated arbitration throughout the country. The 1965 Act was strongly influenced by the *English Arbitration Act* of 1950. The *Arbitration Act* 42 of 1965 presented some shortcomings with regard to international arbitration which were effectively remedied by the enactment of the *International Arbitration Act* 15 of 2017.

The legislative development of South African arbitration law stagnated after the promulgation of the 1965 Act, which was never amended despite a changing environment and a growing interest in arbitration, which demands constant updating of the applicable law. The need for constant development of arbitration is suggested by Bennett,[156] who states that:

> Although arbitration is not a panacea, the history of arbitration is still being written. Judges, legislators, practitioners and academics are increasingly paying attention to the potential value of arbitration.

What is apparent from the above overview of the historical development of South African arbitration law, influenced as it was by Roman, Roman-Dutch and English law, is that initially parties respected arbitration agreements and subsequent awards without the intervention of the courts. However, in time, the attitude of parties changed and courts were forced to intervene. The intervention of the courts was to preserve the autonomy of arbitration from violation by the very parties who elected this form of dispute resolution mechanism. Courts were empowered to intervene prior to the commencement of the proceedings to hold the parties to their voluntary agreement to arbitrate, and later to legitimise the award. According to Redfern and Hunter:[157]

> The relationship between national courts and arbitral tribunals swings between forced cohabitation and true partnership. In spite of protestation of 'party autonomy', arbitration is wholly dependent on the underlying support of the courts, who alone have the power to rescue the system when one party seeks to sabotage it.

The involvement of the courts was specifically aimed at complementing rather than impeding the arbitration process.[158] Therefore, judicial intervention in arbitration is a necessary evil to preserve its sustainability.

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155 Ramsden and Ramsden *Law of Arbitration* 13.
156 Bennett *Arbitration* 9.
157 Redfern and Hunter *Law and Practice of International Commercial Arbitration* 595.
158 Lew 2009 *Am U Int'l L Rev* 490

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List of Abbreviations

ADR	Alternative Dispute Resolution
Am L S Rev	American Law School Review
Am U Int'l L Rev	American University International Law Review
CILSA	Comparative and International Law Journal of Southern Africa
Clev St L Rev	Cleveland State Law Review
DEIC	Dutch East Indian Company
EJCL	Electronic Journal of Comparative Law
FAA	Federal Arbitration Act
GAR	Global Arbitration Review
Israel L Rev	Israel Law Review

Law Soc Rev	Law and Society Review
LCP	Law and Contemporary Problems
NYU J L & Bus	New York University Journal of Law and Business
SABR	Southern African Business Review
SADC	Southern African Development Community
SAJHR	South African Journal on Human Rights
SALC	South African Law Commission
SALRC	South African Law Reform Commission
U Pa L Rev	University of Pennsylvania Law Review
Yale L J	Yale Law Journal