THE RECOGNITION AND ENFORCEMENT OF INTERNATIONAL COMMERCIAL ARBITRATION AWARDS IN A SOUTH AFRICAN CONTEXT

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Opsomming:

Die Erkenning en Afdwinging van Internasionale Kommersiële Arbitrasietoekennings in 'n Suid-Afrikaanse konteks

Internasionale handel het die afgelope tien jaar in Suid-Afrika met rasse skrede toegeneem. Hierdie toename is toe te skryf aan die opheffing van sanksies teen Suid-Afrika sowel as die effek van globalisering.

Verskeie jurisdiksies kan geraak word met 'n enkele internasionale handelstransaksie. Wanneer daar 'n dispuut ontstaan, wend partye hul toenemend tot internasionale kommersiële arbitrasie om sodanige dispuut te besleg. Hierdie wyse van dispuutbeslegting se prosedures is veel buigsamer as die van 'n hof en is dus meer aanvaarbaar vir kommersiële partye. Dit is dan ook vir Suid-Afrika van kardinale belang dat wetgewing in plek moet wees om internasionale kommersiële arbitrasies te akkommodeer.

Verskeie lande se jurisdiksies het elkeen afsonderlike regsreëls, -beginsels en -prosedures waarvolgens beslissings gemaak word. Dit skep 'n probleem wanneer partye binne twee of meer jurisdiksies handel deurdat verskillende reëls wat op dieselfde feite toegepas word, verskillende uitkomste sal hê.

Internasionale konvensies het die lig reeds in 1927 gesien met die Geneefse Konvensie om hierdie probleem aan te spreek. In 1954 is die New York Konvensie daargestel met die doel om internasionale kommersiële arbitrasietoekennings wêreldwyd te erken en af te dwing.

Suid-Afrika het egter eers in 1976 hierdie konvensie onderteken. Wetgewing is ooreenstemmend aangeneem in 1977 deur die promulgering van die *Erkenning en Afdwinging van Buitelandse Toekennings* Wet 40 van 1977. Ongelukkig is hierdie wet defektief en word daar glad nie geslaag in die doel waarvoor die wet oorspronklik aangeneem is nie welke aspek meer volledig behandel word in die inhoud van die skripsie.

Gevolglik word die *Arbitrasie Wet* 42 van 1965 tot 'n beperkte mate toegepas in internasionale kommersiële arbitrasies, aangesien daar nie uitdruklik voorsiening gemaak word vir hierdie wyse van dispuutbeslegting in die wet nie en hoofsaaklik ingestel is op plaaslike arbitrasie. Partye kan ook hierdie wet misbruik in 'n internasionale konteks om die arbitrasieproses te vertraag.

Die Suid-Afrikaanse Regskommissie het hierdie probleem aangespreek deur die Modelwet vir internasionale kommersiële arbitrasie te ondersoek wat opgestel is deur UNCITRAL. 'n Konsepwet wat aangepas is vir Suid-Afrikaanse omstandighede is reeds in 1998 voorgestel spesifiek vir die doel om internasionale kommersiële arbitrasie effektief te administreer en te bevorder.

Uit bostaande is dit duidelik dat huidige wetgewing in Suid-Afrika nie voorsiening vir internasionale kommersiële arbitrasie maak nie. Suid-Afrika speel 'n toemende prominente rol in internasionale handel en die effek van ontoereikende wetgewing kan internasionale rolspelers afskrik.

Deur hierdie studie word dit duidelik geïllustreer dat dit uiters noodsaaklik is dat die Konsepwet gepromulgeer word wat gevolglik voordelig vir die ekonomie sowel as die regstelsel van Suid-Afrika sal wees.

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LIST OF ABBREVIATIONS

AI	*Arbitration International*
Constitution	*Constitution of the Republic of South Africa* 108 of 1996
Draft Bill	Created by the SALC on the basis of the UNCITRAL Model Law in a SA context, 1998
Geneva Convention	Geneva Convention on the Execution of Foreign Arbitral Awards 1927
JIA	*Journal of International Arbitration*
NY Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958
SALC	South African Law Commission
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Model Law	Model Law on International Commercial Arbitration, adopted by UNCITRAL ON 21 June 1985

1 Introduction

International trade has been a matter of increasing importance, particularly in the past ten years in South Africa,[1] due to the abolition of sanctions against South Africa and the effect of globalisation. The upsurge in international trade has naturally resulted also in international commercial disputes that encompass different legal systems. International dispute resolution becomes a relevant and challenging subject to jurists all over the world.

Parties have various choices of dispute resolution methods such as Conventional litigation, alternative mediation, conciliation and arbitration. Usually business enterprises prefer an alternative method of dispute resolution most suitable to the parties and the nature of the dispute. Independent parties, rather than national courts are requested to settle the disputes. The dispute is referred to an individual (arbitrator) or group of individuals (arbitral tribunal) to resolve the dispute. The arbitrator or arbitral tribunal possesses specialised knowledge and experience regarding the issue in dispute. Procedures that are more flexible and international trade norms that are more acceptable to international merchants are applied, rather than national laws that may not cater for their needs. Parties have the choice between institutional and *ad hoc* arbitration. A specialist arbitral institution under its own rules administers institutional arbitration and *ad hoc* arbitration is conducted under rules of procedure, which are adopted for the particular arbitration.[2]

The arbitral tribunal must resolve the dispute in a way, which is fair and reasonable to the parties.[3] When arbitration is used as a method of settling disputes there are numerous advantages for the parties.[4] A few of these

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[1] Practice Note 7 *SARS* 5. It is Stated that since South Africa's re-emergence in the international market, there has been a marked expansion of international trade and commerce.
[2] Butler and Finsen *Arbitration in South Africa* 300.
[3] Butler 1994 *CILSA* 121.
[4] Some of the advantages are: the disputants choose the arbitrator, the arbitrator may be selected for his knowledge in the dispute subject, the issue is determined prior to the arbitration and arbitration is generally held in private. Pretorius *Dispute Resolution* 100 – 101.

advantages are the speed in which the proceedings take place,[5] the choice of parties to appoint arbitrators[6] and the possibility that the parties can determine the procedure.[7] However, each dispute has unique circumstances and consequently the advantages and disadvantages would differ in each case.

As stated above, international commercial arbitration inevitably transcends national boundaries.[8] The encompassing of different legal systems often creates the problem that arbitration awards are not recognised and enforced in a foreign state due to the complexity of each jurisdiction's respective arbitration legislation. If an arbitration award cannot be enforced arbitration is futile. To counter this and other related problems, various international treaties attempt to unify the process of international commercial arbitration.

The most influential treaty is most probably the New York Convention.[9] The New York Convention concerns the recognition and enforcement of international commercial arbitration awards globally and can be applied in the South African context.[10]

To contribute to the unification of the international commercial arbitration process, the United Nations Commission on International Trade Law (UNCITRAL) created a Model Law on Arbitration that has already been approved on 11 December 1985 by the General Assembly of the United Nations.[11] It is developed for states, modernising their arbitration law and it has acceptable criteria which South African law can use to develop and adapt its own laws.[12]

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[5] The efficiency and speed in which proceedings are concluded influence cost to a great extent.
[6] The arbitrators appointed by the parties possess over specialised knowledge regarding the issue in dispute.
[7] Butler and Finsen *Arbitration in South Africa* 20 – 22. The procedure decided upon by the parties has an impact on the cost of the proceedings.
[8] Redfern and Hunter *Arbitration* 15.
[9] Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958.
[10] See par 3 for discussion of NY Convention and Appendix A for a list of the signatory States. All countries however, are not signatories to the NY Convention.
[11] Sanders *UNCITRAL on Arbitration* 23.
[12] See par 5, The UNCITRAL Model Law and Draft Bill here under.

In this study, the question whether South African law is equipped to deal with modern international commercial arbitration is examined. South African legislation should comply with the relevant international treaties concerning the enforcement of international commercial arbitration awards in order to enforce these awards effectively.

To examine the said legal problem, a general summary regarding the recognition and enforcement of international commercial arbitration awards will be given. The South African law on arbitration including the common law, legislation and the *Constitution*[13] as well as international treaties' applicability will also be researched. The New York Convention and the UNCITRAL Model Law on Arbitration are specifically referred to and the English Arbitration law is utilised to illustrate how a foreign law system deals with international commercial arbitration awards. The study offers solutions, which could serve to improve the existing domestic arbitration system.

2 Recognition and Enforcement of Arbitral Awards

2.1 General

When an arbitration award is made, the successful party expects the award to be performed without delay. Once the award has been made, it is an implied term of every arbitration agreement that the parties will carry it out.[14] That is after all the reason why the parties turned to arbitration in the first instance.

The recognition and enforcement of an award in the state, which is the "seat"[15] of arbitration, requires simply the principles of a domestic arbitration process. However, the enforcement of an award, which is regarded as a "foreign" or "international" award, becomes complex as it was made outside the territory of the state in which recognition or enforcement is sought.[16]

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[13] Act 108 of 1996. Hereinafter called the *Constitution.*
[14] Redfern & Hunter *Arbitration* 443.
[15] "Seat" of arbitration refers to the country in which the arbitration proceedings take place.
[16] Redfern and Hunter *Arbitration* 447 – 448.

Despite this fact, statistics show that most foreign arbitral awards are carried out voluntarily, without turning to national courts for enforcement.[17] These statistics however, are not reliable, as arbitration is a private process and secondly there is no way that an arbitral tribunal could know whether or not an award has been enforced.[18]

When dealing with this subject, it is important to note the difference between recognition and enforcement of arbitration awards.[19]

2.2 Recognition

Recognition is the procedure where a court is asked to grant a remedy in respect of a dispute that has been the subject of previous arbitral proceedings. The successful party to the arbitration will argue that the dispute has already been decided.[20] As proof to the court the award would be presented; and the court would be asked to recognise it as valid and binding on the parties.[21]

Recognition without enforcement is however possible. The SALC provides an example to illustrate this possibility:[22] A party (X) can successfully resist the claim of another party (Y) in an arbitration held in a state (A). If Y institutes an action against X in another state (B) on the basis of the claim rejected in the arbitration, X will want the court in B to recognise the award for purposes of establishing the defence of *res judicata.* The successful defendant in arbitration proceedings held in another contracting state will generally request recognition on its own. To only recognise an award can thus be seen as a defence mechanism for the successful party in event of the unsuccessful party still wanting to enforce its claim.

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[17] Lalive 1984 *ICC Arbitration* 318.
[18] Redfern & Hunter *Arbitration* 443.
[19] The NY Convention refers consistently to "recognition *and* enforcement" which can lead to the assumption that these two terms are always inextricably linked. The Geneva Convention of 1927 however refers to "recognition *or* enforcement" and is consequently more precise.
[20] *Res Judicata.*
[21] Redfern and Hunter *Arbitration* 448.
[22] SALC Report 1998 108.

2.3 Enforcement

2.3.1 Non-Judicial

Non-judicial enforcement is the method of applying some form of pressure, commercial or otherwise[23] to persuade the losing party to comply with the requirements of the award. Examples of such measures are boycotting the defaulting party, publishing his name and blacklisting him, expelling him from a business or trade organisation and denying him access to future arbitration.[24] Due to parties' awareness of implications and consequences of such sanctions they usually comply with awards rather than risking loss of valuable business.

2.3.2 Judicial

In the case of the unsuccessful party's failure to comply with the award, the next step is to invoke the powers of the state. These are exercised through its national courts, in order to obtain a hold on the losing party's assets or in some other way to compel performance of the award.[25]

Redfern and Hunter identified four judicial methods of enforcing an arbitral award against a recalcitrant party:[26]

- The award can be deposited or registered with a court and be enforced as if it is a judgment of that court.[27]
- Where the laws of the country of enforcement provide that, with the leave of the court, the award of an arbitral tribunal may be enforced directly without any need for registration.[28]

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[23] Commercial pressure can be applied for example when two parties have a long relationship of business; the unsuccessful party stands the chance of losing profits when not complying with the award.
[24] Sarcevic "The Setting Aside and Enforcement of Arbitral Awards under the UNCITRAL Model Law" *Essays on International Commercial Arbitration* (1989) (ed Sarcevic) 191.
[25] Redfern & Hunter *Arbitration* 444 – 445.
[26] Redfern & Hunter *Arbitration* 444.
[27] Redfern & Hunter *Arbitration* 446.
[28] Redfern & Hunter *Arbitration* 446.

- Where it is necessary to apply to the court for some form of recognition as a preliminary step to enforcement.[29]
- The fourth method, which is to be avoided, unless no other method is available, is to sue on the award as evidence of a debt, on the basis that the arbitration agreement constitutes a contractual obligation to perform the award.[30]

2.4 Setting aside versus refusal to enforce

Although seeming to be closely related, the consequences of setting aside of an arbitral award and those of refusal to enforce an award differ to a great extent. When an award is set aside, the court of the country in which the award is made is exclusively competent to consider such an application. Foreign courts will usually respect that decision, with the result that the setting aside will normally have extra-territorial effect.[31]

In the case where a court refuses to enforce an award, the consequence would be that the successful party in the arbitration proceedings would not have the right to seize the unsuccessful party's assets in the place where enforcement was sought. The award can however be enforced in other jurisdictions where the unsuccessful party has assets.

2.5 Comparison: International Arbitration Awards and Foreign Court Judgments

When comparing international arbitration awards to foreign court judgments it is found that the former are easier to obtain. The reason for this being the fact that the international treaties' provisions are more extensive and better developed than those of foreign judgments.[32]

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[29] Redfern & Hunter *Arbitration* 446.
[30] Redfern & Hunter *Arbitration* 446.
[31] Van den Berg 1986 *AI* 191.
[32] For example the NY Convention discussed in par 3.

The method in which the recognition and enforcement is to be adopted depends in which country the award was made.[33] Another factor would be the particular provisions concerning the domestic law of the country where the intended enforcement would take place.

It is clear to see that international treaties play a major role concerning international commercial arbitration, specifically regarding the recognition and enforcement of the awards. The most influential Convention is probably the New York Convention of 1958.

3 New York Convention

3.1 General

The New York Convention[34] serves as a replacement for the Geneva Convention of 1927 and provides for a more simple and effective method of obtaining recognition and enforcement of foreign awards.[35] It has been described as the most important international treaty relating to international commercial arbitration.[36] The Convention received further accolades by several jurists globally and is characterised as "the most successful international instrument in the field of arbitration".[37]

The Convention does not only refer to the recognition and enforcement of foreign awards, but also the enforcement of arbitration agreements. For the purposes of this study there would however, only be dealt with the recognition and enforcement of arbitration awards.

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[33] It would influence the award for instance if that country is a contracting State of the NY Convention, the award would be recognized as a NY Convention award. See par 3.
[34] Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958. Hereinafter called the NY Convention.
[35] Redfern and Hunter *Arbitration* 455.
[36] Redfern and Hunter *Arbitration* 63.
[37] Mustill 1989 *JIA* 49.

3.2 Scope of Application

The main goals of the New York Convention as it can be derived from its full title are both, the recognition and enforcement of arbitration awards. A State, which is a signatory of the Convention, must respect the binding effect of awards to which the Convention applies as far as recognition is concerned. When there is dealt with the enforcement of an award, the local procedural rules of the State where the enforcement is sought is applicable.[38]

The Convention's provisions commence with the following:

> This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.[39]

This implies that a Contracting State[40] would recognise and enforce an award[41] as long as the basic conditions of the Convention are set out in the award. Even if the State in which the award was made is not a Contracting State, the award can still be recognised and enforced.

3.3 Reservations

3.3.1 General

Two reservations are provided for in article I(3), of the NY Convention, which could narrow the scope of application. In terms of these reservations, parties to the Convention may at either option restrict its applicability in their country. The reservation could either apply on the basis of reciprocity or to disputes considered as commercial.

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[38] Redfern & Hunter *Arbitration* 458. Pursuant Art III of the Convention no more onerous conditions, higher fees or charges may be imposed on a party to which the NY Convention applies, than are imposed on the recognition and enforcement of domestic arbitral awards.
[39] New York Convention Art I.1.
[40] "Contracting State" refers to a signatory of the NY Convention.
[41] The Convention provides in art I.2 that an "arbitral award" includes *ad hoc* as well as institutional proceedings.

3.3.2 Reciprocity reservation

The reciprocity reservation provides that a State may only recognise and enforce awards, which are made in the territory of another Contracting State.[42] This provision affects the Convention enormously and narrows the scope of application, if States wish to do so. The consequences will be that these States would only recognise and enforce Convention awards.

This reservation can be negatively interpreted, but there is currently a vast growing number of States that become signatories, particularly in Africa.[43] Therefore the reservation could become insignificant in the near future.[44]

3.3.3 Commercial relationship reservation

The commercial relationships reservation provides that a signatory state can apply the Convention to differences arising out of legal relationships, whether contractual or not, "which are considered commercial under the national law" of that State.[45]

This reservation narrows the scope of application of the Convention as well. Regarded as "commercial" by one state is not necessarily recognised as the same definition for another state.[46] This can consequently lead to different interpretations of the Convention, even within the same State. Diverse interpretations were clearly illustrated in the state of India.[47]

In *Indian Organic Chemical Limited v Subsidiary 1 (U.S.) Subsidiary 2 (U.S.) and Chemtex Fibres Inc. (Parent Company) (U.S.)*[48] the court determined that a commercial relationship must be determined by a provision of law. The High

[42] Art II.1 and 3 imposes this obligation on a contracting State unless the arbitration agreement is null and void, inoperative or incapable of being performed.
[43] Asouzu *Arbitration and African States* 188.
[44] See Appendix A for the signatory States up to January 2003.
[45] Redfern & Hunter *Arbitration* 457.
[46] Redfern & Hunter *Arbitration* 457. It is also Stated by Redfern & Hunter that by the end of 1998, 38 countries took advantage of the commercial reservation.
[47] The term "commercial" was described in the *Indian Organic* case as "determined by a provision of law" and in the *Union of India* case as "a word of largest import".
[48] 1979 IV Yearbook Commercial Arbitration 271.

Court of Gujarat rejected this decision. In *Union of India and Ors v Lief Hoegh & Co. (Norway) and Ors,*[49] the court granted the stay of legal proceedings. The word commerce was described as:

> A word of the largest import and takes in its sweep all the business and trade transactions in any of their forms, including the transportation, purchase, sale and exchange of commodities between the citizens of different countries.[50]

It appears from these judgements unambiguously how easily the interpretation of the commercial relationship can differ, even within the same national law.

3.4 Formalities for Recognition and Enforcement

The formalities for acquiring recognition and enforcement of awards are set out in article IV of the Convention.

> ... the party applying for recognition and enforcement shall, at the time of the application, supply:
>
> (a) The duly authenticated original award or a duly certified copy thereof;
>
> (b) The original agreement referred to in article II or a duly certified copy thereof.[51]

An application should be accompanied by an authenticated original arbitration award or certified copies.

When the arbitration award is not in an official language of the country in which the recognition and enforcement is sought, the award must be translated into such a language.[52]

3.5 Refusal of Recognition and Enforcement

The grounds for the refusal of recognition and enforcement of an award are governed by article V of the Convention. The party against whom the recognition

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[49] 1984 IX *Yearbook Commercial Arbitration* 405.
[50] *Union of India and Ors v Lief Hoegh & Co. (Norway) and Ors,* 1984 IX *Yearbook Commercial Arbitration* 405 at 407.
[51] New York Convention Article IV(1).
[52] New York Convention Article IV(2).

and enforcement is evoked must prove one of the following to constitute a ground for refusal of recognition and enforcement of an award:[53]

- the parties are under some incapacity;
- proper notice of the proceedings was not given;
- the award does not fall within the scope of arbitration;
- the composition of the arbitral tribunal or authority was not in accordance with the agreement of the parties;
- or the award is not binding on the parties.

It is however important to observe that the Convention deals both with the recognition and enforcement of awards. In order to enforce an award, the court will obviously first have to recognise that award. Recognition without enforcement is however possible.[54]

An application for enforcement can be brought in any country where the respondent has assets. The rejection of the application does not have extra-territorial effect, because the refusal of one national court to recognise or enforce an award does not provide a ground for the refusal of recognition and enforcement of the award by the court in another foreign country.[55]

3.6 Benefits of the New York Convention

The New York Convention is a suitable vehicle to recognise and enforce international commercial arbitration awards. Obliging each contracting state to recognise arbitral awards as binding creates more favourable conditions for enforcement and recognition.

Articles V and VI of the said Convention provide that the onus is on the defendant to show cause why the award should not be enforced. This is an immense

[53] These grounds of refusal are almost identical to the provisions in the UNCITRAL Model Law governing recognition and enforcement and are discussed more comprehensively in par 6.1.
[54] The distinction between recognition and enforcement is illustrated in par 2.
[55] Van den Berg 1986 *AI* 199.

improvement on the Geneva Convention,[56] which determined that the plaintiff had the onus to prove that the conditions for enforcement had been fulfilled.

4 South African Law

4.1 General

The three pillars of South African law in order of importance are the *Constitution,*[57] statutes and the common law. When statutes do not provide for circumstances, the common law is applicable. The Supreme Court of Appeal governs all common law matters. The *Constitution* is however the highest authority in the country regarding Constitutional issues[58] and any law in contradiction with the *Constitution* is invalid.

In the following paragraphs the common law, South African legislation on arbitration and the *Constitution* will each be discussed in order to understand where and how the enforcement of international commercial arbitration awards fits into South African law.

4.2 The Common Law and the development of arbitration in South Africa

South Africa shares the Roman Dutch common law with several other countries such as Botswana, Sri Lanka and Zimbabwe. The law of arbitration is based on the law of Holland as set out by Johannes Voet.[59] Neither the Roman law nor the Roman Dutch law (which is derived from the Roman law) include a developed and comprehensive arbitration system.[60] South Africa's common law cannot be repealed by legislation,[61] but applies only where legislation does not provide.

As a result of the underdeveloped common law system for arbitration, three of the colonial legislatures in South Africa adopted arbitration statutes based on the

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[56] Convention for the Execution of Foreign Arbitral Awards of 1927,
[57] Act 108 of 1996. Hereinafter called the *Constitution.*
[58] S2 of the *Constitution.*
[59] Christie 1993 *Arbitration International* 153.
[60] Butler and Finsen *Arbitration in SA* 4.
[61] Jacobs *Arbitration* 6.

English Arbitration Act of 1889. Consequently South African arbitration legislation was much influenced by English arbitration. English arbitration was characterised by a close relationship between the courts and the arbitral process and solutions to arbitration problems were provided by the courts and not by theory and writers (as it was in the case of the development of European arbitration law).[62]

The above mentioned colonial legislation was repealed by the present *Arbitration Act.*[63]

4.3 South African Legislation

4.3.1 General

There are two statutes that are presently in force which deal with arbitration, namely the *Arbitration Act*[64] and the *Recognition and Enforcement of Foreign Awards Act.*[65]

4.3.2 Arbitration Act 42 of 1965

The *Arbitration Act* was modelled on the *English Arbitration Act* of 1950.[66] The act is subdivided into eight parts, namely definitions, matters not subject to arbitration, the effect of arbitration agreements, arbitrators and umpires, provisions as to arbitration proceedings, provisions as to awards, remuneration of arbitrators and umpire and costs and miscellaneous provisions. When the act is studied, it is clear to see that it was not designed to deal expressly with international arbitrations.

There are a few defects within the act that make the act inadequate for international commercial arbitration:[67]

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[62] Butler and Finsen *Arbitration in SA* 5.
[63] See 4.3.2, *Arbitration Act* 42 of 1965.
[64] 42 of 1965, hereinafter called the *Arbitration Act.*
[65] 40 of 1977, hereinafter called the *Foreign Awards Act.*
[66] Jacobs *Arbitration* 1.
[67] SALC Report 1998 23.

Firstly, by involving the court, the parties are able to delay the arbitration process.[68] When the court gets involved, a party can use the delaying tactic in order to increase costs that the other party might not be able to afford.

Secondly, the arbitral tribunal has insufficient authority to carry out the arbitration in an expeditious manner.[69] This contributes to increasing costs and stretching the proceedings and subsequently changes the whole character of arbitration.

Thirdly, party autonomy must be extended in order to ensure that the arbitral tribunal's jurisdiction is derived from the parties' agreement to resolve their dispute outside the courts by arbitration.

As stated above, no provisions are made for international commercial arbitration. It is problematic especially for the purposes of this study which deals with the recognition and enforcement of international commercial arbitration. Therefore it can be concluded that the *Arbitration Act* is used to a limited effect when dealing with international commercial arbitration awards.

To overcome this problem, the New York Convention was adopted into the South African law by promulgating the *Foreign Awards Act*.[70]

4.3.3 The Recognition and Enforcement of Foreign Awards Act 40 of 1977

4.3.3.1 General

South Africa has already adopted the New York Convention in 1976 without any reservations.[71] To become a contracting state of this Convention an act must be promulgated to give effect thereto. Consequently the *Foreign Awards Act's* main purpose is to implement the New York Convention in South African law and consequently regulate the enforcement of international commercial arbitration awards.

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[68] E.g. in s 12 of the *Arbitration Act* 42 of 1965 it is the court's authority to appoint an umpire.
[69] The court has the right to set aside the appointment of an arbitrator pursuant s 13.
[70] 40 of 1977.
[71] See Appendix A.

The Arbitration Project Committee of the South SALC identified certain defects in the *Foreign Awards Act*. The four main "serious defects" the SALC identified is discussed and then attention will be given to the minor issues.

4.3.3.2 Main Defects

The first main defect is the act's definition of foreign arbitral award:[72]

> (a) An award made outside the Republic; or
>
> (b) the enforcement of which is not permissible in terms of the Arbitration Act, 1965... but is not in conflict with the provisions of this act.

It is recommended that the definition of a foreign arbitral award should be clarified that it does not extend to "stateless awards".[73] Thus, a foreign arbitral award means an arbitral award made in the territory of a state other than South Africa. As to paragraph (b) of the definition, the SALC commented[74] that it does not serve a useful purpose. In my view it is essential to extend the definition that it does not relate to "stateless awards", as it could be confused with a "stateless award" found in the Washington Convention and be used as an escape route for parties from liability.

Secondly, the omission of a comparable provision in relation to Article II of the New York Convention which provides for the enforcement of arbitration agreements is regarded as "strange".[75] Such a provision is needed to comply with South Africa's treaty obligations.[76] It is evident that this omission would make the *Foreign Awards Act* futile, as it is a compulsory provision to connect the act to the Convention.

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[72] S 1 of the *Foreign Awards Act*.
[73] A "Stateless award" can however be found in the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965 (Washington Convention), which provides a complete self-contained system operating under public international law.
[74] SALC Report 1998 117.
[75] Butler & Finsen *Arbitration in SA* 312.
[76] SALC Report 1998 122.

Thirdly there are problems with the wording of section 4 regarding the grounds on which enforcement of a foreign award may be refused.[77] Section 2(1) of the act provides that:

> Any foreign arbitral award may, subject to the provisions of sections 3 and 4, be made an order of court by any court.

The arbitration agreement and award must be proved for purposes of the application for enforcement[78] and section 4 of the said act contains the exclusive list of grounds on which enforcement may be refused by a court. According to the SALC section 2(1) is intended to give effect to article III of the New York Convention,[79] but it creates the impression that South African courts have a discretion whether or not to recognise the award.[80] The New York Convention, on the other hand, states that the court is compelled to recognise an award as binding, subject to Articles V and VI.[81]

The final main defect is the inadequate provisions of section 2(2) on the enforcement of awards in a foreign currency. Section 2(2) determines that where an award expressed in a foreign currency is made an order of court under the act, the award is to be converted into rands at the exchange rate prevailing at the date of award, not the date of payment.

There is not a similar provision in the New York Convention and its effect is that it undermines the effect of an arbitral award in a foreign currency, if there is a substantial period between the date of the award and payment.[82] Another disadvantage of this provision is that when the foreign currency is converted into rands at the date of the award, instead of the date of payment, it could indirectly affect the arbitral tribunal's award of interest to the benefit of one party and the

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[77] Asouzu *Arbitration and African States* 203.
[78] S 3 of the *Foreign Awards Act* 40 of 1977.
[79] This provision determines that the contracting States shall recognise arbitral awards as binding and enforce them.
[80] SALC Report 1998 124.
[81] See par 2 for the grounds for the refusal of recognition and enforcement of an award.
[82] SALC Report 1998 129.

detriment of the other.[83] It is evident from the statements above that section 2(2) is an unnecessary provision. The conversion of foreign currency could rather be governed by the arbitration award.

4.3.3.3 Minor Defects

Firstly, the failure to make express provision for the recognition of foreign arbitral awards as opposed to their enforcement constitutes a defect.[84] The short and long titles of the act state only the "recognition" of awards and "enforcement" is not even mentioned, though the body of the act deals only with the enforcement of awards.[85]

The wording of the legislation could create the impression that the grounds on which enforcement of an award may be refused in the legislation are not exhaustive and that the court therefore has a general discretion to refuse enforcement.[86]

The promulgation of the *Foreign Awards Act* was an attempt to incorporate the New York Convention into South African legislation. There are however too many defects, making the act practically futile. The main purpose for which the act was promulgated cannot be executed and one is in essence in the same position than before the promulgation of the act.

4.4 The influence of the Constitution

4.4.1 General

The enforcement of international commercial arbitration awards in a South African jurisdiction will ultimately be influenced by the *Constitution*. The *Constitution* is the highest authority concerning Constitutional matters in South

[83] Butler & Finsen *Arbitration in SA* 318.
[84] To distinguish between recognition and enforcement of awards see par 2.2 – 2.3.
[85] Asouzu *Arbitration and African States* 203.
[86] SALC 1998 110.

Africa.[87] This section states further that any law or conduct inconsistent with it is invalid. It is evident that all arbitration awards should be consistent with the *Constitution.*

Two issues emerge when considering the influence of the *Constitution* on foreign awards. Firstly, the procedure for promulgating international agreements to become domestic law must be examined. Secondly, the position must be considered in the case if the foreign award is contrary to public policy.

4.4.2 Promulgating International Agreements

International agreements, such as the New York Convention are governed by section 231 of the *Constitution.* An international agreement can only be binding on the Republic after it has been approved by resolution in both the National Assembly and the National Council of Provinces.[88] This subsection is however subject to section 231(3)[89] which determines that an agreement that does not require ratification or accession binds the Republic without the approval by the National Assembly or the National Council of Provinces. These kind of agreements must however be tabled in the Assembly and the Council within a reasonable time.

An International agreement becomes law when it is enacted into law by national legislation. A self executing provision of an agreement approved by Parliament would be considered law, unless it is inconsistent with the *Constitution* or act.[90] Section 231(5) determines that although the *Constitution* was promulgated in 1996 and the treaties were enacted before this date, the Republic would be held bound by international agreements which were binding on the Republic when the *Constitution* took effect.

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[87] S2 of the *Constitution of the Republic of South Africa Act* 108 of 1996.
[88] S 231 of the *Constitution of the Republic of South Africa Act* 108 of 1996 .
[89] *Constitution of the Republic of South Africa Act* 108 of 1996.
[90] S 231(4) of the *Constitution of the Republic of South Africa Act* 108 of 1996.

When the above mentioned principles are applied to this study, the following conclusions can be drawn:

- The *Foreign Awards Act*[91] is an example of an international agreement (New York Convention) that becomes law when it is enacted into law by National legislation.
- The Republic is bound to the New York Convention, although the *Constitution* took effect only in 1996.[92]

4.4.3 Public Policy

Strictly spoken, an award which is opposing public policy cannot be recognised or enforced. In the event of such an award, a party should be entitled to appeal to a court after the award has been made.[93] The English arbitration law deals with this issue in similar fashion.[94] However the national courts in England are reluctant to excuse an award from enforcement on grounds of public policy.[95] The UNCITRAL Model Law[96] provides also that the recognition or enforcement of an award can be refused if the award is against public policy of the state.[97] However each case must be judged on its merits.

In *Jones v Krok*[98] it was held that although an award of damages is made on a basis not recognised in South Africa, it does not necessarily make the award contrary to public policy. This decision demonstrates that the courts are quite capable of dealing with the enforcement of foreign judgments and arbitral awards on the basis of public policy.

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[91] See discussion in par 4.2.2.
[92] S 231(5) of the *Constitution of the Republic of South Africa Act* 108 of 1996.
[93] S 165(1) of the *Constitution of the Republic of South Africa Act* 108 of 1996 states that the judicial authority of the Republic is vested in the courts.
[94] See par 5.2 *English Arbitration Act* of 1996.
[95] Redfern & Hunter *Arbitration* 471.
[96] See par 6.1 UNCITRAL Model Law.
[97] A 36(1)(b)(ii) of the UNCITRAL Model Law.
[98] 1995 (1) SA 677 (A).

5 English Arbitration Law

5.1 General

English arbitration law is a classic example of a jurisdiction competent to deal with international commercial arbitration awards. It is governed by both common law and statute. The common law provides that an action can be instituted based on the arbitration agreement. The party instituting the action can obtain judgment on the award.[99] However, the statute that currently governs arbitration in England, the *Arbitration Act* of 1996 is the core foundation of present-day arbitration.

5.2 English Arbitration Act of 1996

On 1 January 1997 the *Arbitration Act* of 1996 came into force in England.[100] This act applies to domestic as well as international awards. The event which ultimately led to the 1996 *Arbitration Act* was the initiative of the UNCITRAL Model Law.[101]

Part III of this act provides for the recognition and enforcement of New York Convention awards. A New York Convention award is defined as an award made in the territory of a state that is a party to the New York Convention.[102]

Section 58 determines that an award is final and binding on both the parties and on any person claiming through or under them. Therefore the award is immediately enforceable, subject to the agreement of the parties and the right of the losing party to challenge it.[103]

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[99] Cole *International Commercial Arbitration* 45.
[100] Rutherford & Sims *Practical Guide – Arbitration Act 1996* 15.
[101] Tackaberry & Marriott *Bernstein's Handbook of Arbitration* 30.
[102] S 100(1) of the *English Arbitration Act* of 1996. See Appendix A for confirmation that the UK and Northern Ireland have adopted the New York Convention with the reciprocity reservation in 1977.
[103] Rutherford & Sims *Practical Guide – Arbitration Act 1996* 183.

An award may be enforced by leave of the court, in the same manner as a judgment.[104] This provision applies whether or not the seat of arbitration is within or outside England.[105] If leave is given to enforce the award, section 66(2) provides that it may be entered or registered as a judgment. The advantage of registering an award as a judgment is that it can be enforced outside England as a foreign judgment.[106]

The court's role is to support the arbitration process, rather than to interfere, which can frustrate it.[107] Although section 69[108] gives the parties a right of appeal to a court on a question of law arising from an award, the appeal may only be made after the award is rendered.[109] The right of appeal may be excluded by agreement of the parties.[110]

6 The UNCITRAL Model Law and Draft Bill

6.1 UNCITRAL Model Law

6.1.1 General

UNCITRAL made international commercial arbitration and dispute resolution more accessible across the world. The Model Law, adopted in 1985, was the third major contribution that UNCITRAL made to develop international dispute resolution.[111] The other two contributions were the UNCITRAL Arbitration rules in 1976 and in 1980 the UNCITRAL Conciliation rules.[112]

The Model Law is a blue print legislation which it is hoped, if adopted by states will unify national arbitration laws.[113] As a result, it will remove differences in

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[104] S 66(1) of the *English Arbitration Act* of 1996.
[105] S 2 of the *Arbitration Act* of 1996.
[106] Cole *International Commercial Arbitration* 45.
[107] Rutherford & Sims *Practical Guide – Arbitration Act 1996* 18.
[108] *English Arbitration Act* of 1996.
[109] Rutherford & Sims *Practical Guide – Arbitration Act 1996* 213.
[110] It is my submission that the right to appeal to a court of law frustrates and upsets the whole principle of arbitration proceedings, and should therefore be excluded as a rule.
[111] Herrmann *UNCITRAL Model Law* 3.
[112] Herrmann 1984 *PLR* 537 – 539.
[113] Cole *International Commercial Arbitration* 33.

national laws relating to the enforcement of international awards, as well as obstacles caused by varying interpretations given to Conventions by domestic courts.

6.1.2 Objectives

The policy objectives underlying the Model Law are:[114]

- the liberalisation of international arbitration by limiting the role of national courts and allowing the parties the autonomy to decide how the disputes should be resolved;
- the founding of a defined core of compulsory provisions to ensure fairness and due process;
- to complete arbitration even when parties did not agree on procedural matters by providing a framework for conducting an international commercial arbitration; and
- the integration of provisions to assist the enforcement of awards and to clarify certain controversial practical issues.

Although these objectives are all relevant in achieving the unification of national arbitration laws, this study is contained to issues regarding the recognition and enforcement of awards.

6.1.3 Recognition and Enforcement of Awards

6.1.3.1 General

The Model Law determines that an arbitral award shall be recognised as binding and upon application in writing to the competent court, shall be enforced subject to the provisions of the present article.[115] Article 35(2)[116] is simply procedural and prescribes the documents required in support of an application for enforcement. Similar to the New York Convention, an authenticated original of

[114] Butler & Finsen *Arbitration in SA* 299. See also SALC Report 37.
[115] A 35(1) of the Model Law.
[116] Model Law.

the award and arbitration agreement or certified copies must be produced. If these requirements are complied with, it appears that the court should enforce the award, subject to article 36.[117]

Article 36,[118] which is similar to article V of the New York Convention,[119] contains a list of grounds upon which enforcement may be refused.

The list of grounds enclosed in the article is: the incapacity of a party to the agreement, improper notice to a party, matters beyond the scope of arbitration, the composition of the arbitral tribunal or the procedure was not in accordance with the agreement of the parties or the recognition or enforcement of the award would be contrary to the public policy of the state.

6.1.3.2 Incapacity of a Party[120]

The incapacity of a party to enter into an arbitration agreement is illustrated in *Fougerolle SA (France) v Ministry of Defence of the Syrian Arab Republic*[121] where the Administrative Tribunal of Damascus refused enforcement of two ICC[122] awards. The Tribunal determined that the awards were "non-existent" as the preliminary advice on the referral of the dispute to arbitration, which must be given by the competent committee to legalise the awards was not fulfilled.

6.1.3.3 Improper Notice[123]

Improper notice of appointment of an arbitrator or of the proceedings is probably the most important ground for refusal of recognition and enforcement of an award. The purpose of this provision is to ensure that the parties are given a fair hearing.

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[117] Cole *International Commercial Arbitration* 37.
[118] Model Law.
[119] See par 3 NY Convention.
[120] A 36(1)(a)(i) of the UNCITRAL Model Law.
[121] (1990) XV *Yearbook Commercial Arbitration*, 515.
[122] International Chamber of Commerce.
[123] A 36(1)(a)(ii) of the UNCITRAL Model Law.

In order to have confidence in arbitration as a method of dispute resolution, the proceedings should be conducted in a fair manner.[124] When a court should establish whether proper notice was given to a party, its function should not be to judge the award on its merit, but only determine whether there has been a fair hearing.

6.1.3.4 Matters Beyond the Scope of Arbitration[125]

The third ground deals with the circumstances where a party alleges that the arbitral tribunal has acted in excess of its authority. This ground is predominantly rejected by courts and not recommended to parties.[126]

6.1.3.5 Composition of the Arbitral Tribunal[127]

The fourth ground for refusal is when a party alleges that the composition of the tribunal procedure was not in accordance with the arbitration agreement or the relevant law. This is once again very difficult to prove as there are many variables that play a role in different circumstances.[128]

6.1.3.6 Public Policy[129]

Finally, a court can refuse enforcement if the award has not yet become binding on the parties or has been set aside or suspended by a court of the country where it was made or under the law of which it was made. This implies that an award which would be contrary to public policy of the state where recognition or enforcement could be refused.

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[124] Redfern & Hunter *Arbitration* 463 – 464.
[125] A 36(1)(a)(iii) of the UNCITRAL Model Law.
[126] Redfern & Hunter *Arbitration* 465.
[127] A 36(1)(a)(iv) of the UNCITRAL Model Law.
[128] See *China Nanhai Oil Joint Service Cpn v Gee Tai Holdings Co Ltd* (1995) XX *Yearbook Commercial Arbitration* 671
[129] A 36(1)(b)(ii) of the UNCITRAL Model Law.

6.2 The Draft Bill

6.2.1 General

The SALC investigated the applicability of the Model Law in a South African context, keeping current legislation in mind. After examination, a draft international arbitration bill was created. This proposed bill incorporates all South African legislation on international arbitration in a single statute.

6.2.2 SALC Recommendations

The SALC recommends that the Model Law should be adopted with minimum changes to promote harmonisation. The *travaux preparatoires* relating to the Model Law should therefore also be used as an interpretation aid.[130]

The Model Law should be applied to international commercial arbitration. In order to determine whether arbitration would qualify as international the definition of "commercial arbitration" as stipulated in the Model Law should be applied.[131]

The *Foreign Awards Act* should be repealed and replaced by an act dealing with the recognition and enforcement of foreign arbitral awards and subsequently replaces the defects in the act.

Articles 34(5) and 36(3) of Schedule 1 provide clarification of the meaning of public policy, a ground for which recognition and enforcement may be refused in terms of article 36(1)(b)(ii) of the Model Law. An award would be in conflict with the public policy of South Africa if the tribunal breached a duty to act fairly thereby resulting in substantial injustice, or if the making of the award was induced or affected by fraud or corruption.[132]

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[130] S 8 of the Draft Bill.
[131] SALC Report 1998 22.
[132] Cole *International Commercial Arbitration* 39.

Though a party may apply to set aside an award not later than three months after it was received, if the award is tainted with fraud the three months period commences when the fraud is, or ought to have been discovered.[133]

7 Conclusion

The practice of resolving disputes by international commercial arbitration is a practice which increases in popularity each year.[134] Some jurists describe the favouring of arbitration awards as a consequence of the general inclination towards enforcement of awards and an increasing harmonisation of arbitral laws.[135]

The New York Convention and the Model Law for Arbitration of UNCITRAL play a significant role in creating unifying rules for national laws. However, if a country's legislation does not adhere to these international instruments international arbitration can be hindered.

In the case where an arbitration award cannot be recognised or enforced in a country, the whole process of arbitration is futile. It is evident from this study that South African legislation[136] is presently incompetent to deal effectively with international commercial arbitration awards. The consequences are that a foreign trading entity or investor would be hesitant to do business in or with South Africa which limits the prospects of foreign trade.

The SALC also investigated this issue meticulously and came to the same conclusion of insufficient and incompetent legislation.[137] New legislation was proposed in the form of a Draft International Arbitration Bill, based on the highly reputed UNCITRAL Model Law. However, the Bill was proposed in 1998, and no progress has been made since.

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[133] Aa 34(3) and 34(5)(b) of Schedule 1.
[134] Redfern & Hunter *Arbitration* 1.
[135] Hwang & Chang "Enforcement and Setting Aside of Awards" 145.
[136] See par 3.
[137] SALC 1998 23.

It is my submission that in order to establish South Africa as an effective arbitration jurisdiction, the Draft International Arbitration Bill should be promulgated. This would increase foreign trade and be subsequently beneficial to the South African economy.

8 Appendix A

The 1958 New York Convention

Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958

List of Contracting States (January 2003)[138]

State	Ratification	Reservation
Albania	27 June 2001	-
Algeria	7 Feb 1989	1 - 2
Antigua and Barbuda	2 Feb 1989	1 - 2
Argentina	14 Mar 1989	1 - 2
Armenia	29 Dec 1997	1 - 2
Australia	26 Mar 1975	-
Austria	2 May 1961	-
Azerbaijan	29 Feb 2000	-
Bahrain	6 Apr 1988	1 - 2
Bangladesh	6 May 1992	-
Barbados	16 Mar 1993	1 - 2
Belarus	15 Nov 1960	-
Belgium	16 May 1974	-
Bolivia	28 Apr 1995	-
Bosnia and Herzegovina	1 Sep 1993	1 - 2
Botswana	20 Dec 1971	1 - 2
Brazil	7 June 2002	-
Brunei Darussalam	25 July 1996	1
Bulgaria	10 Oct 1961	1
Burkina Faso	23 Mar 1987	-

[138] NY Convention 2003 Contracting States HYPERLINK http://www.chamber.se/arbitration/english/laws/1958NYConvention2003.pdf 15 Sept.

State	Ratification	Reservation
Cambodia	5 Jan 1960	-
Cameroon	19 Feb 1988	-
Canada	12 May 1986	-
Central African Republic	15 Oct 1962	1 - 2
Chile	4 Sep 1975	-
China	22 Jan 1987	1 - 2
Colombia	26 Oct 1987	-
Côte d'Ivoire	1 Feb 1991	-
Croatia	26 July 1993	1 - 2
Cuba	30 Dec 1974	1 - 2
Cyprus	29 Dec 1980	1 - 2
Czech Republic	30 Sep 1993	-
Denmark	22 Dec 1972	1 - 2
Djibouti	14 June 1983	-
Dominica	28 Oct 1988	-
Dominican Republic	11 Apr 2002	-
Ecuador	3 Jan 1962	1 - 2
Egypt	9 Mar 1959	-
El Salvador	26 Feb 1998	-
Estonia	30 Aug 1993	-
Finland	19 Jan 1962	-
France	26 June 1959	1
Georgia	2 June 1994	-
Germany	30 June 1961	1
Ghana	9 Apr 1968	-
Greece	16 July 1962	1 - 2
Guatemala	21 Mar 1984	1 - 2
Guinea	23 Jan 1991	-
Haiti	5 Dec 1983	-
Holy See	14 May 1975	1 - 2

State	Ratification	Reservation
Honduras	3 Oct 2000	-
Hungary	5 Mar 1962	1 - 2
Iceland	24 Jan 2002	-
India	13 July 1960	1 - 2
Indonesia	7 Oct 1981	1 – 2
Iran, Islamic Republic of	15 Oct 2001	1 - 2
Ireland	12 May 1981	1
Israel	5 Jan 1959	-
Italy	31 Jan 1969	-
Jamaica	10 July 2002	1 - 2
Japan	20 June 1961	1
Jordan	15 Nov 1979	-
Kazakhstan	20 Nov 1995	-
Kenya	10 Feb 1989	1
Korea, Republic of	8 Feb 1973	1 - 2
Kuwait	28 Apr 1978	1
Kyrgyzstan	18 Dec 1996	-
Lao People's Democratic Rep	17 June 1998	-
Latvia	14 Apr 1992	-
Lebanon	11 Aug 1998	1
Lesotho	13 June 1989	-
Lithuania	14 Mar 1995	-
Macedonia (the former Yugoslav)	10 Mar 1994	1 - 2
Madagascar	16 July 1962	1 - 2
Malaysia	5 Nov 1985	1 - 2
Mali	8 Sep 1994	-
Malta	22 June 2000	1
Mauritania	30 Jan 1997	-
Mauritius	19 June 1996	1
Mexico	14 Apr 1971	-

State	Ratification	Reservation
Moldova, Republic of	18 Sep 1998	1
Monaco	2 June 1982	1 - 2
Mongolia	24 Oct 1994	1 - 2
Morocco	12 Feb 1959	1
Mozambique	11 June 1998	1
Nepal	4 Mar 1998	1 - 2
Netherlands	24 Apr 1964	1
New Zealand	6 Jan 1983	1
Niger	14 Oct 1964	-
Nigeria	17 Mar 1970	1 - 2
Norway	14 Mar 1961	1
Oman	25 Feb 1999	-
Panama	10 Oct 1984	-
Paraguay	8 Oct 1997	-
Peru	7 July 1988	-
Philippines	6 July 1967	1 - 2
Poland	3 Oct 1961	1 - 2
Portugal	18 Oct 1994	1
Quatar	30 Dec 2002	-
Romania	13 Sep 1961	1 - 2
Russian Federation	24 Aug 1960	-
Saint Vincent and the Grenadines	12 Sep 2000	1 - 2
San Marino	17 May 1979	-
Saudi Arabia	19 Apr 1994	1
Senegal	17 Oct 1994	-
Singapore	21 Aug 1986	1
Slovakia	28 May 1993	-
Slovenia	6 July 1992	1 - 2
South Africa	**3 May 1976**	**-**
Spain	12 May 1977	-

State	Ratification	Reservation
Sri Lanka	9 Apr 1962	-
Sweden	28 Jan 1972	-
Switzerland	1 June 1965	-
Syrian Arab Republic	9 Mar 1959	-
Tanzania, United Republic of	13 Oct 1964	1
Thailand	21 Dec 1959	-
Trinidad and Tobago	14 Feb 1966	1 - 2
Tunisia	17 July 1967	1 - 2
Turkey	2 July 1992	1 - 2
Uganda	12 Feb 1992	1
Ukraine	10 Oct 1960	-
United Kingdom of Great Britain and Northern Ireland	24 Sep 1975	1
United States of America	30 Sep 1970	1 - 2
Uruguay	30 Mar 1983	-
Uzbekistan	7 Feb 1996	-
Venezuela	8 Feb 1995	1 - 2
Vietnam	12 Sep 1995	1 - 2
Yugoslavia	12 Mar 2001	1 - 2
Zambia	14 Mar 2002	-
Zimbabwe	29 Sep 1994	-

Reservation:

1. Awards will be recognised and enforced only if made in the territory of another Contracting State (Reciprocity reservation).

2. The Convention applies only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the state making such declaration.

9 Bibliography and references

Books

A

- Asouzu AA *International Commercial Arbitration and African States* 1st ed (Cambridge University Press Cambridge 2001)

B

- Butler D and Finsen E *Arbitration in South Africa Law and Practice* 1st ed (Juta Cape Town 1993)

F

- Forsyth CF *Private International Law* 2nd ed (Juta Cape Town 1995)

J

- Jacobs M *The Law of Arbitration in South Africa* 1st ed (Juta Cape Town 1977)

P

- Pretorius P *Dispute Resolution* 1st ed (Juta & Co Ltd Cape Town 1993)

R

- Redfern A and Hunter M *International Commercial Arbitration* 3rd ed (Sweet & Maxwell London 1999)

- Rutherford M and Sims JHM *Arbitration Act 1996: A Practical Guide* 1st ed (Bell and Bain Glasgow 1996)

S

- Sanders P *The Work of UNCITRAL on Arbitration and Conciliation* 1st ed (Kluwer Law International The Hague 2001)

T

- Tackaberry J and Marriott A *Bernstein's Handbook of Arbitration and Dispute Resolution Practice* 4th ed (Sweet & Maxwell London 2003)

Journal Articles

- Butler D "South African arbitration legislation – the need for reform" 1994 *CILSA* 118 – 163
- Christie RH "South Africa as a Venue for International Commercial Arbitration" 1993 Arbitration International 153 – 165
- Herrmann G "UNCITRAL's work towards a Model Law on international commercial arbitration" 1985 *Pace Law Review* 537 – 565
- Lalive P "Enforcing Awards" 1984 *60 Years of ICC Arbitration: A look at the Future* 315 – 358
- Mustill MJ "Arbitration: History and Background" 1989 *Journal of International Arbitration* 43 – 49
- Van den Berg AJ "Non-domestic Arbitral Awards under the New York Convention" 1986 Arbitration International 191 – 214

Legislation

South Africa

- *Arbitration Act* 42 of 1965
- *Constitution of the Republic of South Africa Act* 108 of 1996
- *Recognition and Enforcement of Foreign Awards Act* 40 of 1977

United Kingdom

- *English Arbitration Act* of 1889

- *English Arbitration Act* of 1950

Table of Cases

South Africa

- *Jones v Krok* 1995 (1) SA 677 (A)
- *Tradex Ocean Transportation SA v MV Silvergate (or Astyanax)* 1994 4 SA 119 (D)

Foreign Cases

- *China Nanhai Oil Joint Service Cpn v Gee Tai Holdings Co Ltd* (1995) XX *Yearbook Commercial Arbitration* 671
- *Fougerolle SA (France) v Ministry of Defence of the Syrian Arab Republic* (1990) XV *Yearbook Commercial Arbitration,* 515
- *Indian Organic Chemical Limited v Subsidiary 1 (U.S.) Subsidiary 2 (U.S.) and Chemtex Fibres Inc. (Parent Company) (U.S.)* (1979) IV Yearbook Commercial Arbitration 271
- *Union of India and Ors v Lief Hoegh & Co. (Norway) and Ors* 1984 IX *Yearbook Commercial Arbitration* 405

International Treaties

- Convention for the Execution of Foreign Arbitral Awards of 1927 (Geneva Convention)
- Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (The New York Convention)
- Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965 (The Washington Convention)

Law Report

- South African Law Commission "Arbitration: An International Arbitration Act for South Africa" Report Project 94 July 1998

Internet

- New York Convention Contracting States [Internet] HYPERLINK http:// www.chamber.se/arbitration/english/laws/1958NYConvention2003.pdf 15 September 2004

Contributions at Conferences

- Hwang M and Chan A "Enforcement and Setting Aside of International Arbitral Awards – The Perspective of Common Law Countries" in *International Arbitration and National Courts: The Never Ending Story* delivered at the International Council for Commercial Arbitration Congress No 10 2 – 4 March 2000 New Delhi 145 – 164

Contributions to a Collective Work

- Herrmann G "The UNCITRAL Model Law on International Commercial Arbitration: Introduction and General Provisions" in Sarcevic P (ed) *Essays on international commercial arbitration* (Graham & Trotman London 1989) 3 – 26

- Sarcevic P "The setting aside and enforcement of arbitral awards under the UNCITRAL Model Law" in Sarcevic P (ed) *Essays on international commercial arbitration* (Graham & Trotman London 1989) 177 – 198

Dissertation

- Cole RJV *Some reflections on International Commercial Arbitration* (LLM dissertation UNISA 2003)

Other

- United Nations Commission on International Trade Law (UNCITRAL), UNCITRAL Model Law on International Commercial Arbitration

- Practice Note 7 *South African Revenue Service* 6 August 1999