The Quest for Effective Arbitration: New Developments in South Africa and Germany

Kai Afflerbach

Thesis presented in the partial fulfilment of the requirements for the degree of Master of Laws at the University of Stellenbosch

Supervisor:

Prof DW Butler

March 2002

I, the undersigned, hereby declare that the work contained in this thesis is my own original work and that I have not previously in its entirety or in parts submitted it at any university for a degree.

Signature:

Date: 3 December 2001

Summary

Arbitration is widely regarded as an important alternative to litigation, particularly for international commercial disputes. However, concern currently exists that arbitration is becoming too slow and too expensive, partly through using procedures too similar to those in the courts. Effective arbitration requires suitable legislation, the support of the parties and their lawyers and appropriate initiatives from the arbitral tribunal. The UNCITRAL Model Law on International Commercial Arbitration of 1985 is the internationally accepted standard against which the quality of a nation's legislation for international commercial arbitration must be measured. A crucial aspect regarding suitable legislation is the role of the courts. This thesis is essentially concerned with steps which have been taken or need to be taken in Germany and South Africa to achieve effective arbitration.

It commences with a brief overview of the sort of delaying tactics which are often encountered in international arbitration practice, including abuse of the court's powers of supervision and intervention. The reception in Germany and South Africa of the UNCITRAL Model Law is then discussed. In Germany it has been adopted for both domestic and international arbitration. The South African Law Commission has recommended its adoption in South Africa for international arbitration. The Law Commission has however recommended a new separate statute for domestic arbitration because of the perceived need for remedial measures to ensure improved arbitration procedures.

The thesis then examines the effect of the court's powers on effective arbitration, particularly prior to the award. The current South African law is discussed as well as the changes proposed by the Law Commission in the context of domestic and international arbitration. The South African position is compared with that in Germany, both before and since the introduction of the UNCITRAL Model Law in 1998. After a general discussion of the powers of the court in the context of arbitration, two aspects are identified for special attention. The first is the power of the tribunal to rule on its own jurisdiction and the interaction between the powers of the court with those of the tribunal in this regard. The second concerns the granting of interim measures in the context of arbitration proceedings, with particular attention to security for costs. In certain circumstances, and depending on the applicable rules and legislation, it may be more appropriate for a party to seek such relief from the tribunal, whereas in slightly different circumstances it may be preferable to seek such relief from the court.

Finally, steps are considered, which can usefully be taken by the arbitral tribunal itself to promote effective arbitration by using the flexibility of the process. The extent to which the tribunal is "master of its procedure" and thereby able to counter delaying tactics effectively is subject to the doctrine of party autonomy. Specific techniques for more effective arbitral procedures are suggested, namely a more interventionist approach, the use of preliminary meetings, imposing timetables, improving the hearing, the effective use of documentary evidence and discovery and finally the possibility of documents-only arbitration.

Opsomming

Arbitrasie word wyd beskou as 'n belangrike alternatief tot litigasie, veral by internasionale handelsgeskille. Kommer bestaan egter tans dat arbitrasie te stadig en te duur word, gedeeltelik deur die gebruik van prosedures wat te veel met dié van die howe ooreenstem. Doeltreffende arbitrasie vereis geskikte wetgewing, die ondersteuning van die partye en hulle regsverteenwoordigers en toepaslike inisiatiewe deur die arbitrasietribunaal. Die "UNCITRAL Model Law on International Commercial Arbitration" van 1985 is die internasionaal aanvaarde standaard waarteen die gehalte van 'n land se wetgewing vir internasionale kommersiële arbitrasie gemeet moet word. 'n Kritieke oorweging by geskikte wetgewing is die rol van die howe. Hierdie tesis behandel die stappe wat in Duitsland en Suid-Afrika reeds geneem is of wat nog geneem moet word om doeltreffende arbitrasie te bewerkstellig.

Dit begin met 'n kort oorsig oor die soort vertragingstaktiek wat dikwels in die internasionale arbitrasiepraktyk raakgeloop word, insluitende misbruik van die hof se bevoegdhede van toesighouding en inmenging. Die ontvangs van die "UNCITRAL Model Law" in Duitsland en Suid-Afrika word bespreek. Die wet is in Duitsland vir sowel binnelandse as internasionale arbitrasie ingevoer. Die Suid-Afrikaanse Regskommissie het sy invoering vir internasionale arbitrasie in Suid-Afrika aanbeveel. Die regskommissie het egter 'n nuwe afsonderlike wet vir binnelandse arbitrasie aanbeveel weens die gewaarde behoefte aan regstellende middele om verbeterde arbitrasieprosedures te verseker.

Die tesis ondersoek daarna die uitwerking van die hof se bevoegdhede op doeltreffende arbitrasie, veral voor die arbitrasietoekenning. Die huidige Suid-Afrikaanse reg en die wysigings, wat deur die Regskommissie vir internasionale en binnelandse arbitrasie voorgestel word, word oorweeg. Die Suid-Afrikaanse posisie word met dié van Duitsland, voor en na die invoering van die "UNCITRAL Model Law" in 1998, vergelyk. Na 'n algemene bespreking van die hof se bevoegdhede in die samehang van arbitrasie word twee sake vir besondere aandag gekies. Die eerste is die bevoegdheid van die arbitrasietribunaal om oor sy eie jurisdiksie te beslis en die wisselwerking tussen die hof se bevoegdhede en dié van die arbitrasietribunaal in hierdie verband. Die tweede het betrekking op die toestaan van tussentydse regshulp in die samehang van arbitrasieverrigtinge, met besondere verwysing na sekuriteit vir koste. In besondere omstandighede, met inagneming van toepaslike reëls en wetgewing, behoort 'n party verkieslik sodanige regshulp by die arbitrasietribunaal aan te vra, terwyl in effens ander omstandighede behoort die party eerder die hof te nader.

Ten slotte word stappe oorweeg wat nuttig deur die arbitrasietribunaal self geneem kan word om doeltreffende arbitrasie aan te moedig deur die buigsaamheid van die arbitrasieproses te benut. Die mate waarin die tribunaal meester van sy prosedure is en daardeur vertragingstaktiek doeltreffend kan bekamp, is onderworpe aan die leerstuk van partyoutonomie. Bepaalde tegnieke word voorgestel om meer doeltreffende arbitrasieprosedures te bevorder, naamlik 'n meer intervensionistiese benadering, die gebruik van reëlingsvergaderings, die oplegging van 'n rooster vir die arbitrasie, verbetering van die verhoorproses, die doeltreffende gebruik van skriftelike getuienis en blootlegging en laastens die moontlikheid van arbitrasie slegs op dokumente.

CONTENTS

Chapter One

General introduction

I. Introduction

Arbitration[1] is increasingly recognised throughout the international legal and business community as an important method of resolving commercial and other disputes, which can help to relieve the pressure on the civil justice system[2] as well as being sometimes the only method for a party to an international commercial dispute to obtain an enforceable decision by an impartial tribunal.[3]

Advantages traditionally claimed for arbitration as opposed to litigation include that it is cheaper and quicker to resolve a dispute by arbitration than to go to court.[4] These advantages legitimise the existence of arbitration as an alternative to litigation. However, in recent years, a growing body of opinion has arisen to the effect that arbitration could lose this status because it is becoming too slow and too expensive.[5]

Historically, international arbitration has followed two streams: public-law arbitration between states and commercial arbitration. Both types of arbitration have been known for many centuries. Arbitration between states was used already by the ancient Greeks.[6] Commercial arbitration was well known to the Romans during the era of their domination of Europe.[7] Due to expanding international trade the nature of international arbitration changed dramatically in the second half of the twentieth century.[8] In common-law jurisdictions like England, the change from court to arbitration was historically and conceptually only a change of forum, not a change in the method of resolving disputes.[9] The same trend occurred in international

---

1 For the purposes of this thesis, arbitration may be defined as a procedure whereby the parties to a dispute, by mutual agreement, refer their dispute to a third party of their choice, known as an arbitrator, for a final decision, after the arbitrator has first impartially received and considered evidence and submissions from the disputants; see Butler, "Expediting Commercial Arbitration Proceedings: Recent Trends" (1994) 6 *SA Merc LJ* 252.

2 SA Law Commission, Report *Domestic Arbitration* (May 2001) viii (Summary of Recommendations).

3 Redfern & Hunter *Law and Practice of International Commercial Arbitration* (3 ed 1999) 23-24; SA Law Commission, Report *A New International Arbitration Act for South Africa* (July 1998) 1.

4 See generally regarding the advantages of arbitration Redfern & Hunter 23-24; Butler & Finsen *Arbitration in South Africa – Law and Practice* (1993) 19-23.

5 See inter alia for this view Uff "Cost-effective Arbitration" (1993) 59 *Arbitration* 31; Mustill "Comments on Fast-Track Arbitration (1993) 10(4) *J of Int Arb* 121-125; Goode "Dispute Resolution in the Twenty-First Century" (1998) 64 *Arbitration* 9; Butler (1994) 6 *SA Merc LJ* 251 254-255.

6 Hammond "Arbitration in Ancient Greece" (1985) 1 *Arbitration International* 188.

7 Redfern & Hunter *International Commercial Arbitration* (2 ed 1991) 476.

8 Mustill 122-124.

9 Nariman "Mediation and the Arbitrators" 1999 *ICC IArb Bull* (Special Supplement) 43.

arbitration. The formerly known forms of "fast-track arbitration" are nowadays often presented as novel exceptions to a procedure which is not, by nature, fast. Arbitration today is "a ritualistic process dominated by lawyers, with a presumption that the time-scale will be measured in years rather than weeks."[10] Factors contributing to this trend are the increasing complexity of commercial relationships, the tendency to use arbitrators who are experienced lawyers but not experts in the field which is the subject-matter of the dispute and above all the increasing domination of arbitral procedures by lawyers.[11] Lawyers have moreover become adept at disrupting the arbitration process by using delaying tactics, where it is in their clients' commercial interests to do so.[12] These problems have stimulated growing interest in ADR[13] as an alternative to arbitration. Whereas ADR should usually be attempted before resorting to arbitration, improved arbitration techniques will in turn increase the chances of successful mediation.[14]

If arbitration is to retain its traditional status as the preferred method of resolving commercial disputes, the process will need to be made more efficient in practice. A respected commentator on international arbitration, Julian Lew, stated in 1985 that truly effective arbitration is dependent on the willing support of the parties, the lawyers representing those parties, the arbitrators and the applicable national laws.[15]

In the last two decades, much has been achieved regarding improved arbitration legislation. In general, the objects of modern arbitration legislation are the resolution of disputes by an independent and impartial tribunal without unnecessary delay and expense; party

---

10 Mustill 123.

11 Mustill 123-125; Goode 11.

12 See para II below.

13 A definition of ADR ("Alternative Dispute Resolution") suggested by a United States lawyer is any method of resolving any dispute that does not require the ultimate decision to be made finally by a judge or by a jury: see Ide quoted by Nariman 43. This definition of ADR includes arbitration. The better view is however that ADR comprises all procedures for dispute resolution other than litigation and arbitration: the role of the third party (who could *inter alia* be described as a mediator or conciliator) is to assist the disputants to achieve a mutually acceptable settlement of their dispute. See Street "The Language of ADR – Its Utility in Resolving International Commercial Disputes –the Role of the Mediator" (1992) 58 (2S) *Arbitration* 17 18; Nariman 44.

14 See Donaldson "Alternative Dispute Resolution" (1992) 58 *Arbitration* 102 104. From a civil-law perspective, De Wiit Wijnen "ADR, the Civil Law Approach" (1995) 61 *Arbitration* 38 41 argues that there is less need for ADR in civil-law jurisdictions as litigation and arbitration have not got so out of hand regarding their duration and expense. A view against any kind of ADR was taken by Fiss "Against Settlement" (1984) 93 *Yale LJ* 1073, who argues that settlement, far from being preferable to judgment, is a form of coercive plea bargaining which owes more to imbalance of power than to fairness and which is best treated as a highly problematic technique for streamlining court dockets. In his opinion, ADR suppresses justice in favour of peace, while public interest values are subordinated to private settlements, which deprive the courts of their power to give authoritative rulings for the benefit of society as a whole. See further ch 3 para I below for a more detailed discussion on ADR in the context of an arbitration agreement.

15 Lew *Contemporary Problems in International Arbitration* (1986) 5. See also Lew "Achieving the Potential of Effective Arbitration" (1999) 65 *Arbitration* 283 and the text at n 27 below.

autonomy;[16] balanced powers for the courts; and adequate powers for the arbitral tribunal to conduct the proceedings effectively.[17] A major contribution to improved arbitration legislation has been made by the UNCITRAL[18] Model Law on International Commercial Arbitration.[19] As discussed below, the Model Law has recently been adopted in Germany and is likely to be applied to international arbitration in South Africa.

Regarding balanced powers for the courts as an important objective of modern arbitration legislation, the Secretary-General of UNCITRAL stated the following at an early stage of the drafting process of the UNCITRAL Model Law:

> "[I]t will be one of the more delicate and complex problems of the preparation of a model law to strike a balance between the interest of the parties to freely determine the procedure to be followed and the interests of the legal system expected to give recognition and effect thereto. This involves, above all, a precise demarcation of the scope of possible intervention and supervision by courts ... ."[20]

Notwithstanding the respectable reputation arbitration generally has, the views on commercial arbitration regarding court control have differed widely.[21] At one end of the spectrum one may find the view that arbitration would turn into an unacceptable theatre if it is not constantly monitored. At the other extreme is the view that arbitration would suffer from any outside interference and that local law barriers or benches must not impede parties or arbitrators.[22] Herrmann argues in favour of a rather restricted system: "Views on the proper role of the courts are often cast in terms of concerns or fears. Such fears about too much court interference and, less frequently, misgivings about too little judicial assistance

---

16 "Party autonomy" is an expression much used in arbitration literature. It has its source in the consensual basis of arbitration, and may be defined as the freedom of the parties to agree how their disputes are to be resolved, subject only to such safeguards as are necessary in the public interest: compare the English Arbitration Act of 1996 s1(b).

17 See SA Law Commission *Domestic Arbitration* 1-3; Butler "South African Arbitration legislation – the Need for Reform" (1994) 27 *CILSA* 118 122.

18 UNCITRAL is the acronym for the United Nations Commission on International Trade Law, which was established in December 1966 and is based in Vienna, Austria. See further Redfern & Hunter (2 ed) 479.

19 See further para III below.

20 See *Report of the Secretary-General: possible features of a model law on international commercial arbitration* (A/CN.9/207 of 14 May 1981) para 21, quoted in Holtzmann & Neuhaus *A Guide to the UNCITRAL Model Law on International Commercial Arbitration* (1989) 219.

21 Particularly English lawyers tended to support an extensive role for the courts in supervising the arbitration process. This has gradually changed since 1979, culminating in the adoption of the Arbitration Act 1996. See the Departmental Advisory Committee on Arbitration Law *Report on the Arbitration Bill* (1996) (usually referred to from the name of the chairman as the Saville Report) paras 20-22 regarding the Arbitration Act s 1(c); Saville "The Arbitration Act 1996 and its effect on International Arbitration in England" (1997) 63 *Arbitration* 104 111. Compare the earlier more conservative English response to the powers of the court in the Model Law of Kerr "Arbitration and the Courts – the UNCITRAL Model Law" (1984) 50 *Arbitration* 3-16.

22 Herrmann "The Role of the Courts under the UNCITRAL Model Law Script" in Lew (ed) *Contemporary Problems in International Arbitration* (1986) 164-165.

are expressed primarily, often exclusively, with regard to foreign countries. Among the reasons for such 'xenophobic' mentality are the more technical difficulties of dealing with the courts abroad and, in particular, the frequent lack of familiarity with the foreign ('strange') legal system." [23] The general trend within a modern approach towards international commercial arbitration is clearly in favour of less court interference.[24]

Regarding the efforts put into the design of modern and effective arbitration legislation, one could argue that, given arbitration's consensual basis, the parties themselves are responsible for the smooth conduct of their arbitration and others, more particularly the state, should not bother about the disputants' private matters. "But the adequacy of dispute resolution procedures is not a purely private matter; it is one profoundly affecting the public good, for to the extent that the procedures are inadequate, time, money and effort are diverted away from activity, which is economically and socially productive."[25] Moreover, regarding it as a purely private matter, which only concerns the parties to the dispute, could also increase the chance of injustice.[26]

In the light of improved arbitration legislation and the continued, and indeed, increased willingness of the business community to use arbitration, two of Lew's four criteria[27] for effective arbitration have been met. In 1999, however, Lew stated that the other two ingredients for achieving effective arbitration, namely lawyers and arbitrators "have not been as pragmatic or proactive" in achieving effective arbitration.[28] He adds that lawyers see arbitration as another playing field on which to exercise litigation skills to beat the other side, with the result that the original twin merits of arbitration, speed and inexpensiveness, have been sacrificed. In Lew's view it is up to the arbitrators to assume a proactive role to manage the process and direct the lawyers' energies so that arbitration does resolve the dispute effectively.[29]

This thesis is in the first place concerned with what has already been achieved in Germany and what is proposed in South Africa by way of improved legislation to promote effective arbitration. As essential background to the discussion, the next section of this chapter sets

---

23 Herrmann 165.

24 Support for this view is provided by the increasing number of jurisdictions adopting the UNCITRAL Model Law. See the SA Law Commission Report *Domestic Arbitration* 11 n 2 and 16-19; Lew (1999) 65 *Arbitration* 283-284.

25 Goode 9.

26 Goode 9.

27 See the text at n 15 above.

28 Lew (1999) 65 *Arbitration* 284.

29 Lew (1999) 65 *Arbitration* 284. He also points out that it is too soon to see whether the statutory duty now imposed on arbitrators in England by the Arbitration Act 1996 s 33(1)(b) to adopt fair procedures which avoid unnecessary delay and expense will achieve the desired result.

out some of the delaying tactics, which can be used in practice to undermine the effectiveness of the arbitration process, particularly in a jurisdiction with defective legislation. The remainder of the chapter is devoted to an overview of the UNCITRAL Model Law,[30] the German response to the Model Law,[31] and the response proposed to it for South Africa by the South African Law Commission.[32]

The second chapter examines the powers of the court in arbitration legislation and the effect of these powers on effective arbitration. The chapter first examines the powers of the court in general under the UNCITRAL Model Law, German law and South African law. This is followed by a more detailed discussion of the powers of the court in relation to two specific issues, namely jurisdictional issues and interim measures.

There are three reasons why South African and German arbitration law have been selected for purposes of comparison, apart from the obvious one that this is a thesis written by a German lawyer presented at a South African university. First, Germany has adopted a different approach to the UNCITRAL Model Law compared to that proposed for South Africa. Germany has adopted the Model Law for both domestic and international arbitration. South Africa currently intends adopting the Model Law for international arbitrations only. Secondly, both Germany and South Africa are desirous of establishing themselves as important regional centres for international arbitration. This essentially requires good arbitration legislation and preferably a culture of effective, modern arbitration practice complying with international standards.[33] Thirdly, arbitration practice in South Africa is based on the (English) common-law adversarial approach whereas German arbitration practice is based on the civil law tradition.[34]

The third chapter of this thesis focuses on the contribution that lawyers and arbitrators can make towards making the arbitral process more effective. The thesis as a whole seeks to confirm the veracity of Lew's proposition that "[t]ruly effective arbitration requires willing participants: businessmen, lawyers, arbitrators and national laws. This necessitates a willingness and desire to overcome the political, legal, economic and cultural differences

---

30 See ch 1 para III below.

31 See ch 1 para III 1 below.

32 See ch 1 para III 2 below.

33 See Uff 31: "The importance of arbitration internationally dictates that the domestic process must also be fostered. No country can flourish internationally without the equivalent home-based institution."

34 To the extent that it deals with the detail of the arbitration process the UNCITRAL Model Law is intended to be suitable for and to harmonise both traditions. See further ch 3 para II.3 below for the distinction between the adversarial and "inquisitorial" traditions.

which divide the nations of the world, and to transcend the national and parochial distinctions between the systems, views and concepts."[35]

35 Lew *Contemporary Problems in International Arbitration* 5.

II. Effective arbitration undermined by delaying tactics

During arbitration proceedings there may be circumstances in which it benefits one party, usually the respondent, if the proceedings are as time-consuming and inefficient as possible. Therefore, that party will try to drag out the process by using dilatory tactics. The claimant will usually want to proceed as promptly as possible, but the respondent, who if the claim is well-founded is enjoying the use of the claimant's money, will want to protract the proceedings, either to delay payment or in the hope that the claimant will abandon or settle the claim.[36]

A good example is a dispute concerning a construction contract. On the one hand, the contractor is interested in getting the dispute settled as quickly as possible because that party is dependent on payment, since it has to pay its suppliers and employees. On the other hand, the employer, as the other party, may benefit if the dispute is not resolved. The dispute could relate to a building, which has not yet been sold or rented out. Therefore the employer is not deriving any income from this building. For this party it would be an advantage to delay payment to the contractor as long as possible. Furthermore, a contractor who claims to have been underpaid may consider that the objective is to reach a decision as quickly and cheaply as possible. However, the employer could be a major public authority, which regularly faces claims by contractors. It may see the objective as ensuring that any such claims are thoroughly and painstakingly investigated in order that the taxpayer's money is spent properly, as well as to deter other contractors from making speculative claims.[37]

Some years ago, Harris, an English lawyer published an article[38] containing a "respondent's guide" to a number of measures, which can be taken by the respondent in order to cause delay. These tactics will now be briefly examined to indicate the sort of tactics on the part of a reluctant respondent which the claimant or arbitrator may have to anticipate. In chapter three possible countermeasures will be discussed.[39]

In analysing causes of delay in arbitration, it is possible to classify these causes in different ways. First, it is important to distinguish between delaying tactics, including court applications, prior to the award and those after the award.[40] Further distinctions should also however be made concerning delays, which are caused by the parties on the one hand, and

---

36 Goode 13.
37 Uff 32.
38 Harris "Abuse of the Arbitration Process - Delaying Tactics and Disruptions: a Respondent's guide" (1992) 9(2) *J of Int Arb* 87.
39 See ch 3 para II below.

on the other hand delays caused by compulsory statutory provisions and arbitration rules, which are applicable to the proceedings.[41] In this context the extent of the court's powers to supervise and intervene in the arbitral process can assume particular importance as too extensive powers can be abused by a respondent with sufficient funds to utilise these provisions.[42] Last, but not least one should distinguish, where appropriate, between domestic arbitration and international arbitration. As will be discussed in more detail below, legislation designed for international arbitral proceedings often differs from that for domestic arbitration in that it is more liberal in supporting party autonomy[43] and achieving a higher degree of freedom for the parties and the arbitral tribunal from court control. In that context the effect of the proposed South African approach of having separate statutes for domestic and international arbitration law will be analysed.[44]

Regarding delaying tactics prior to the award, the respondent could simply refuse to reply to any communications. This could include refusing to appoint an arbitrator or to agree on a sole arbitrator where the arbitration agreement so requires. Harris also refers to the situation, because of such problems, where the court must ultimately appoint the arbitrator, which can be time-consuming, especially in cases where the appointing court and the respondent are in different countries.[45] The applicable legislation may also allow the courts' decision on the appointment of the arbitrator to be taken on appeal, thereby further delaying the arbitration process.[46] In addition, by whatever method the arbitrator is appointed, it is possible to challenge the arbitrator during the arbitration. This, in some jurisdictions, may involve an application to court for the removal of the arbitrator, which can be brought at any time.[47] In cases where the challenge was successful, valuable time is won for the reluctant party, since

---

40 This is the classification used by Harris 88.

41 Arbitral institutions are aware of this problem. The various editions of the LCIA Rules since 1985 have been specifically drafted to counter delaying tactics and to ensure an efficient procedure: see Vigrass "The London Court of International Arbitration" in Uff & Jones (eds) *International and ICC Arbitration* (1990) 270 at 273-274. During the latest revision of its rules which led to the 1998 Rules, the ICC was particularly aware of the need to address causes of delay which were inherent in the rules themselves. See Calvo "The New ICC Rules of Arbitration: Substantive and Procedural Changes" (1997) 14(4) *J of Int Arb* 4-44; Derains & Schwartz *A Guide to the New ICC Rules of Arbitration* (1998) 8-10.

42 See generally Christie (1993) 9 *Arbitration International* 153-165 regarding the dangers of abuse of the court's powers in the current South African Arbitration Act 42 of 1965, compared to the position under the Model Law.

43 See n 16 above for the meaning of party autonomy.

44 See the discussion in ch 2 paras II.1.2 and III.3. Regarding the reasons for having separate statues for domestic and international arbitration see the text at n 116 below.

45 Harris 88. See also SA Law Commission Report *Arbitration: An International Arbitration Act for South Africa* 53-54 and 65. The Commission recommended precisely because of this problem that the power to appoint arbitrators under article 11 of the Model Law where the parties' own mechanism fails should be vested in an appropriate arbitral institution, designated by the Chief Justice, rather than in the court.

46 See ch 3 para II below.

47 Harris 90. Under article 13(2) of the Model Law, the challenging party would first have to utilise any challenge procedure agreed to by the parties (e.g. that contained in article 11 of the ICC Rules) before approaching the court. The grounds for challenge are restricted to those contained in article 12 of the Model Law, the main basis for bringing a challenge being where it is contended that there are justifiable doubts regarding the arbitrator's impartiality or independence.

the appointment and confirmation procedure will start again. And even if the challenge did not lead to the replacement of the arbitrator, in most cases the arbitral proceedings will be delayed.[48]

It has further been suggested that in cases where the arbitration process is based on a time-table,[49] which is agreed between the parties and the arbitrator, the respondent should always and at all stages try to seek as much time as possible. Moreover, in cases where the respondent fails to comply promptly with the stipulated time-limit, the penalties for this non-compliance are often very modest.[50]

After the appointment of the tribunal, a respondent can delay the proceedings, particularly in complex disputes, by submitting as many documents as possible whenever the opportunity arises.[51] The respondent may seek the right to introduce further evidence, including documents, only in the light of the way the case has developed, even during the hearing.[52] Particularly where the English adversarial style procedure is used for the hearing, the hearing can be drawn out by the presentation of irrelevant evidence and by undiscriminating cross-examination, which is difficult for the inexperienced arbitrator to control.[53]

Moreover, even after the tribunal has made its award, the losing party may delay performance of the award, by, for example, refusing to pay the amount awarded. The enforcement of the award by a national court may consume a long period of time as well, if the application for enforcement is opposed. The losing party may even oppress the winning party by offering to pay only part of the amount awarded in full and final settlement. If the winning party does not accept this offer, the other party can threaten time-consuming court proceedings to attempt to set aside the award or to oppose any enforcement proceedings.[54]

In seeking effective countermeasures to delaying tactics, as mentioned above, it is necessary to consider to what extent delay is caused or delaying tactics are facilitated by defects in arbitration legislation. This topic is addressed in Chapter 2, with particular

---

48 For this reason article 13(3) permits the arbitrator to continue with the challenge and make an award pending the court's decision on the challenge. See also ch 3 para II below on the appointment and challenge of an arbitrator.

49 See further regarding the use and advantages of time-tables in arbitration proceedings ch three para II.5 below.

50 Harris 89. Compare however article 25 of the Model Law regarding the tribunal's powers in the event of default.

51 See Butler (1994) 6 *SA Merc LJ* 266-267 regarding the abuse in this way of the discovery process, where the claimant has called on the respondent to disclose relevant documents; Harris 89-90. See further ch 3 paras II.7. and II.8 below.

52 Harris 90. See generally Harris 88-91 for a full range of possible delaying tactics prior to the award.

53 Compare Butler & Finsen 241-242.

54 See generally Harris 91-94 regarding delaying tactics after the award.

reference to delays through the abuse of the statutory powers of the courts to supervise or intervene in the arbitral process. The third chapter will focus more on steps that can be taken by the arbitrator to counter delaying tactics, with or without the cooperation of the lawyers acting for the parties.

III. The UNCITRAL Model Law

In 1976 the UNCITRAL[55] Arbitration Rules were published. They go back to an initiative contained in a special report on "Problems concerning the application and interpretation of existing multilateral conventions on international commercial arbitration and related matters".[56] Their need was more apparent in ad hoc arbitration,[57] where it was thought desirable to regulate the steps to be taken in an arbitration, in order to be reasonably sure of obtaining an award which would be enforceable under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958.[58]

The UNCITRAL Model Law of 1985 owes its origins to a request in 1977 by the Asian-African Legal Consultative Committee (AALCC) for a review of the operation of the New York Convention of 1958, in relation to an apparent lack of uniformity in the approach of national courts to the enforcement of awards. An amendment to the New York Convention was initially suggested by the AALCC but was not proceeded with. The request did however result in a Report of the Secretary-General of UNCITRAL, which finally concluded that the harmonisation of the enforcement practices of arbitral awards and the judicial control of arbitral procedure could be achieved more effectively by the promulgation of a model or uniform law, rather than an attempt to revise the New York Convention.[59] The ultimate goal of a model law was seen as facilitating international commercial arbitration and ensuring its proper functioning and recognition. The practical value of a model law would also largely depend on the extent to which it provided answers to the manifold problems experienced in practice. Thus, in preparing the model law an attempt would have to be made to meet the concerns which have repeatedly been expressed in recent years.[60]
The policy objectives adopted by UNCITRAL in the preparation of the Model Law has been described as follows:[61]

- "the liberalisation of international commercial arbitration by limiting the role of national courts, and by giving affect to the doctrine of 'autonomy of the will', allowing parties freedom to choose how their dispute should be determined;

---

55 See n 18 above.
56 UN Doc A/CN 9/64.
57 An "ad hoc arbitration" is an arbitration conducted under rules of procedure which are adopted by the parties for the purposes of the particular arbitration. The term is used in contrast to an "institutional arbitration" which is an arbitration administered by a specialist arbitral institution under its own rules. See Redfern & Hunter (3 ed) 44.
58 Ibid.
59 Redfern & Hunter (2 ed) 508.
60 UN Doc A/CN 9/207 para 9.
61 Redfern & Hunter (2 ed) 509. See also UN Doc A/CN 9/207 paras 16-24.

- the establishment of a certain defined core of mandatory provisions to ensure fairness and due process;
- the provision of a framework for the conduct of international commercial arbitration so that in the event of the parties being unable to agree on procedural matters the arbitration would nevertheless be capable of being completed; and
- the establishment of other provisions to aid the enforceability of awards and to clarify certain controversial practical issues."

The final text was adopted by UNCITRAL in Vienna in June 1985 after four years of work by a special working group. The outcome may safely be taken as embodying consensus on the provisions that the drafters of international commercial arbitration clauses would like to see in their chosen *lex fori*.[62] The General Assembly of the United Nations adopted a resolution on 11 December 1985,[63] which recommended "that all States give due consideration to the Model Law on International Commercial Arbitration, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice."

The Model Law has had a significant influence in harmonising national laws on international arbitration, even in jurisdictions where it has not been adopted.[64] It was suggested at the outset of the drafting process by the UNCITRAL Secretary-General that probably the most important principle of the Model Law should be the freedom of the parties to enable them to facilitate the functioning of international commercial arbitration according to their expectations.[65] Because of improved arbitration legislation in many jurisdictions, the parties to an arbitration are less likely to be adversely affected by provisions of national law applying to their arbitration. Two points must however be emphasised. First, although the selection of a set of modern arbitration rules may make it unnecessary for the arbitral tribunal or the parties to refer to a national arbitration law for purposes of conducting the arbitration, those rules cannot oust the mandatory provisions of the applicable national law, particularly those concerned with public policy.[66] Secondly, the Model Law is primarily territorial in its operation

---

62 Christie, "Arbitration: Party Autonomy or Crucial Intervention II" (1994) 111 *SALJ* 360, 362.

63 Resolution No. 40/72 of the General Assembly.

64 Perhaps the best-known example is England. In 1989 the Departmental Advisory Committee (DAC) on arbitration law, then chaired by Lord Mustill, rejected the adoption of the Model Law by England in a fairly negative report. (See the text of the report published as "A New Arbitration Act for the United Kingdom? The response of the Departmental Advisory Committee to the UNCITRAL Model Law" in (1990) 6 *Arbitration International* 3 at 29.) The adoption of several provisions of the Model Law resulted from subsequent deliberations of the DAC, under the chairmanship of Lord Steyn who stated that the Model Law was "the single most important influence in the shaping of the [English] Bill". See Uff, "The Bill Tompkins Memorial Lecture 1994" (1995) 61 *Arbitration* 18 at 25. See also n 21 above regarding the further report of the DAC in 1996 which explained the new Arbitration Act of 1996.

65 UN Doc A/CN 9/207 para 17, quoted in Holtzmann & Neuhaus 1195.

66 See Paulsson "Delocalisation of International Commercial Arbitration: When and Why It Matters" (1983) 32 *ICLQ* 53 at 58. Compare too the SA Law Commission's Draft Arbitration Bill for domestic arbitration

and only certain of its provisions apply to an arbitration held at a place outside the boundaries of the relevant state, which has adopted the Model Law.[67]

The efforts of the UNCITRAL Model Law to harmonise national laws of arbitration mark a further stage of a process to liberate international arbitration proceedings from the adverse effects of their ties with national procedural law.[68] This trend was arguably initiated in 1975 when the wording of article 16 of the ICC Rules of 1955 was changed.[69] Formerly the national law of the seat of the arbitration had to be applied in cases where the parties did not agree otherwise. The new article 11 of the 1975 ICC Rules[70] broke that link with the procedural law at the seat of the arbitration proceedings. In terms of the new rule, "only that procedural law is applied which the parties have agreed or the arbitrators have specified and which does not have to be identical with any particular national arbitral law".[71] The arbitration is still however subject to the mandatory rules of the arbitration law of the seat of the arbitration.[72]

The roots of that trend may be found in the fact that prudent parties to international arbitration proceedings had to take considerable trouble to establish the local arbitration law applying at the seat of the proceedings, so as not to be surprised by local pitfalls. It was furthermore often unsatisfactory to allow those provisions of national law governing arbitration proceedings, which had often been designed for domestic arbitration proceedings and which therefore could not fully satisfy the requirements of modern international arbitration, to apply to international arbitration proceedings.[73]

Because of different approaches adopted in Germany and South Africa[74] towards the UNCITRAL Model Law it is necessary to consider briefly its intended scope of application.

The UNCITRAL Model Law is divided into eight separate chapters. After the first chapter of general provisions, it deals in chronological sequence with the arbitration agreement, the

---

s 1(b): "the parties to an arbitration agreement may agree how their disputes are to be resolved, subject only to such safeguards as are necessary in the public interest", which is based on the English Arbitration Act 1996 s 1(b).

67 See article 1(2) of the Model Law, which specifies articles 8, 9, 35 and 36 as having extra-territorial application.

68 Lionnet "The New German Arbitration Act – A User's Perspective" (1998) 14 *Arbitration International* 59.

69 Prior to 1975, article 16 of the 1955 ICC Rules provided that where the rules were silent and the parties had not chosen a law of procedure, the arbitrator had to look to "the law of the country in which the arbitrator holds the proceedings". See Derains & Schwartz 208-209.

70 Article 11 of the 1975 Rules was substantially the same as article 15(1) of the current ICC Rules of 1998.

71 Lionnet 58.

72 See Derains & Schwartz 210.

73 Lionnet 58.

composition of the arbitral tribunal, its jurisdiction, the conduct of the arbitral proceedings, the making of the award and the termination of the proceedings. Its last two chapters deal with recourse against the award and the recognition and enforcement of awards.

This thesis is mainly concerned with those provisions of the Model Law, which deal with the relationship between the tribunal and the courts, particularly prior to the award, the jurisdiction of the tribunal and conduct of the arbitral proceedings. These are the provisions which may be regarded as crucial to prevent abuse of the arbitral process and the delay of the proceedings.

The general or introductory provisions deal inter alia with the scope of the application of the Model Law. It was prepared on the basis that it would apply to "international commercial arbitration".[75] Although the word "arbitration" is not defined in the Model Law,[76] it was not intended to cover non-consensual, non-binding or "free" arbitration. Thus, compulsory arbitration, which does not take place pursuant to an arbitration agreement and proceedings such as the German "*Schiedsgutachten*", the Dutch "*bindend advies*" or the Italian "*arbitrato irrituale*" do not fall within the scope of the Model Law.[77] Also, within the chapter of the general provisions the relationship between the arbitral tribunal and the courts is defined. This crucial relationship will be discussed in detail below.[78]

Regarding chapter IV of the Model Law dealing with the jurisdiction of the arbitral tribunal, the Model Law provides that the arbitral tribunal itself is the determining authority, in the first instance, of a question relating to its own jurisdiction. In this context the autonomy or separability of the arbitration clause is also specifically recognised.[79] The limits of the power of the arbitral tribunal to rule on its own competence (Kompetenz-Kompetenz) will be discussed later.[80] But, it may be stated here already that the UNCITRAL Model Law has recognised a general trend in modern legal systems by adopting the concept of Kompetenz-Kompetenz.

---

74 See the text below for these different approaches towards the Model Law.

75 See Holtzmann & Neuhaus 28, 40; Redfern & Hunter (2 ed) 510.

76 Compare the definition of arbitration for the purposes of this thesis in n 1 above. Art. 2(a) of the Model Law clarifies arbitration for purposes of the Model Law to include "any arbitration, whether or not administered by a permanent arbitral institution". It therefore includes both institutional and *ad hoc* arbitration. See Holtzmann & Neuhaus 150.

77 Redfern & Hunter (2 ed) 510; Holtzmann & Neuhaus 151.

78 See ch 2 para II below regarding article 5 of the Model Law.

79 Redfern & Hunter (2 ed) 515.

80 See ch 2 para III below.

1. The South African approach towards the Model Law

South Africa has recently experienced political, social and economic changes, which gave the impulse for proposing the enactment of new legislation on arbitration. The reasons for having new arbitration legislation are similar to those of Germany.[81]

It was clear that there are certain defects in the current legislation. The Arbitration Act 42 of 1965 was designed for domestic arbitration and has no provisions specifically to deal with the requirements of international arbitration. The South African Law Commission also felt that the 1965 Act is characterised by excessive opportunities for parties to involve the courts as a tactic for delaying the arbitration process and that it fails to pay sufficient respect to the principle of party autonomy.[82] The Commission has since also pointed out specific defects in the 1965 Act relating to the powers of the arbitral tribunal for purposes of effective domestic arbitration. These include the failure to confer a general discretionary power on the arbitral tribunal to decide how to conduct the reference where the parties' agreement is silent. Further, there is no provision regarding the power of the arbitral tribunal to deal with jurisdictional issues. The tribunal also has no power to order interim measures.[83]

Contrary to the German approach, the South African Law Commission in its report of July 1998 recommended adopting the UNCITRAL Model Law, initially at least, for international arbitration proceedings only.[84] It subsequently confirmed its view that the Model Law should only apply to international commercial arbitration and not to domestic arbitration.[85] Although there is no single internationally accepted definition of "international arbitration" the proceedings will be regarded as international if the disputing parties are of different nationalities or, alternatively, if the transaction, which led to the dispute, has an international character. The UNCITRAL Model Law however in article 1(3) combines both these criteria.[86]

Some national legislatures have consciously distinguished between international and domestic arbitration regimes. In some instances, separate statutes govern the two different regimes. However, in others there is only one statute governing both domestic and international arbitration, with certain provisions applying only to either international or

---

81 See para III.2 below.

82 SA Law Commission Report *Arbitration: An International Arbitration Act for South Africa* 1. See also Christie "South Africa as a Venue for International Commercial Arbitration" (1993) 9 *Arbitration International* 153 at 165.

83 See SA Law Commission Report *Domestic Arbitration* 3 n 19 with reference to s 14(1) of the existing Act. See further ch 2 paras III and IV below.

84 SA Law Commission Report *Arbitration: An International Arbitration Act for South Africa* 3.

85 SA Law Commission Report *Domestic Arbitration* 11-14.

86 See Redfern & Hunter (3 ed) 14; Butler & Finsen 296.

domestic arbitration. There is not necessarily a fundamental distinction between the law applying to the two different fields of arbitration law.[87] One reason for a distinction may be that parties to a domestic arbitration are likely to have closer connection with the law of the place of arbitration.[88] There is moreover a tendency to adopt a more liberal approach in respect of international arbitration by imposing fewer restrictions on the parties and the arbitrator and by limiting the grounds on which a court will decline to enforce an arbitration agreement or the award.[89]

Notwithstanding the reasons referred to below[90] for having a dualistic system, for the sake of conceptual consistency, there is much to be said for having the same rules applying to both situations. An important practical reason for trying to avoid a dualistic approach is the difficulty of defining a clear dividing line between domestic an international proceedings.[91] However strong the reasons for a single set of rules for both regimes may be, the Law Commission's Report on International Arbitration and the subsequent Report on Domestic Arbitration suggest an approach which favours a dualistic system for various reasons.[92]

1.1 The Law Commission's proposals for international arbitration legislation

South Africa aims to become an attractive and well-frequented venue for international arbitration proceedings. It is hoped that in view of recent political and economic developments, South Africa can anticipate greatly increased regional trade and other economic links. As South Africa assumes its natural role as the openly acknowledged regional economic power, it could also develop as a regional centre for international commercial arbitration in respect of disputes involving at least one party in the region.[93] In addition it is also hoped that improved arbitration legislation will have the effect of encouraging urgent necessary foreign investment in South Africa.[94] Contrary to the position in Germany, from a Southern African perspective it is also necessary to have an acceptable venue at least somewhere in the sub-Saharan region. Because of the lack of commonly accepted international arbitration venues in sub-Saharan Africa, disputes involving a (South)

---

87 Butler (1994) 27 *CILSA* 122.

88 See Butler (1994) 27 *CILSA* 122 citing the New Zealand Law Commission *Arbitration* (NZLC R20 1991) paras 46-47.

89 Butler (1994) 27 *CILSA* 123. See also Redfern & Hunter (3 ed) 12-13.

90 See the text below at n 109 as to why the Law Commission rejected the adoption of the Model Law for both international and domestic arbitration.

91 Butler (1994) 27 *CILSA* 123; SA Law Commission Report *Domestic Arbitration* 12.

92 See SA Law Commission Report *Domestic Arbitration* 12-14.

93 Butler (1994) 27 *CILSA* 120.

94 Butler "A New Domestic Arbitration Act for South Africa" (1998) 9 *Stell LR* 3 at 5.
Note that in this respect the Law Commission urged the accession by South Africa to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the Washington or ICSID Convention of 1965) see report of the Law Commission, p. 2

African party arising out of an international commercial contract with an arbitration clause are often referred to Europe under the arbitral law of the place of arbitration.[95] From an African's party perspective foreign arbitrators would dominate the tribunal.[96] Further, the tribunal would have its difficulties to apply what is for most European lawyers an unknown African substantive law, in the somewhat unlikely event that the African party's law is to be applied to the merits of the dispute.[97]

The Law Commission supports the adoption of the Model Law with only a few adaptations, expressly with the view to achieving the goal of the Model Law to promote the harmonisation and thus the uniformity of national laws pertaining to international arbitration procedures. This approach also makes the South African version user-friendly and attractive to foreign parties and their lawyers.[98] An alternative approach could have been to reject the Model Law as a sole basis for the new South African arbitration legislation and to use the English Arbitration Act of 1996 as well. (This alternative approach would have been similar to that ultimately recommended by the Law Commission for domestic arbitration only.)[99] However, the rejection of the Model Law for international arbitration would have delayed the reform process. A detailed review of the current Arbitration Act would have been necessary in order to have a single law for both international and domestic proceedings. As examples of countries which have not adopted the Model Law and have adopted new arbitration legislation applying to both domestic and international arbitration, one could use England, France, the Netherlands and Sweden.[100] But, one should bear in mind that these countries, unlike South Africa, have been established centres for international arbitration for a long time and their arbitration laws are familiar to many lawyers throughout the international arbitration community.[101]

---

95 Support for the statement in the text is provided by the "2000 Statistical Report" in (2001) 12(1) *ICC ICArb Bull* 5-13 regarding ICC arbitrations in 2000. 68 or 4.9% of the parties in cases submitted to the ICC for arbitration in 2000 came from sub-Saharan Africa. No sub-Saharan venue was used and none of the arbitrators came from continental sub-Saharan Africa although one Madagascan was appointed as an arbitrator in 2000.

96 See Okekeifere "Enhancing the Implementation of Economic Projects in the Third World Through Arbitration" (2001) 67 *Arbitration* 240 at 251-252.

97 Butler "The Proposed New International Arbitration Act: A Contribution To The African Renaissance?" unpublished paper delivered at the SLTSA Conference: Bloemfontein, January 1999, 2. Disadvantages of a European seat include the cost of the tribunal, the venue and accommodation, all payable in a hard currency.

98 SA Law Commission Report *Arbitration: An International Arbitration Act for South Africa* 14.

99 See para 1.2 below.

100 Another major international arbitration centre, Switzerland, which has a federal system, adopted federal legislation, the Private International Law Act of 1987 for international arbitration, while the cantons retained their own law for domestic arbitration. The new legislation is not based on the Model Law. See generally Blessing "The New International Arbitration Law in Switzerland: A Significant Step Towards Liberalism" (1988) 5(1) *Journal of International Arbitration* 9-88.

101 See Christie (1994) 111 *SALJ* 372.

Besides recommending the adoption of the Model Law for international arbitration, the Commission made two other main recommendations on international arbitration.[102] The first was the introduction of improved legislation to give effect to South Africa's accession to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958. This is because although South Africa acceded to the New York Convention without reservation in 1976, the legislation to give effect to this accession[103] was considered by the Law Commission to contain serious defects, which could no longer be tolerated.[104] Secondly the Commission recommended that South Africa accept the Convention on the Settlement of Investment Disputes between States and Nationals of other States of 1965 (ICSID).[105]

Section 3 of the Commission's Draft Bill for international arbitration provides that the Arbitration Act 42 of 1965 does not apply to arbitration agreements, arbitral proceedings and awards that are subject to the Draft Bill. It is therefore intended that the current Arbitration Act should not apply to international arbitrations which will fall under the Model Law.[106] This is because the current Act has certain provisions with no equivalent in the Model Law. To the extent that the Commission did not consider it necessary to supplement the Model Law to fill these gaps,[107] it was felt desirable that the Draft Bill should contain all relevant statutory provisions on arbitration and that it should not be necessary for parties to an international arbitration to refer to other arbitration legislation as well.[108]

The reason for the Law Commission in its first report recommending that the Model Law should initially at least be restricted to international arbitration is that it was feared that the reform of the domestic arbitration law would give rise to a lively and time-consuming discussion. Certainly, a main point of this debate would be the extent of the courts' powers of assistance and interference. As in other countries this is always a difficult issue[109] involving as it does the interaction between the powers of the courts in the public interest and the contractual freedom of parties to regulate their own affairs. Controversy regarding domestic arbitration reform was also anticipated because of a perception among some black lawyers in South Africa that some members of the white legal establishment saw arbitration as a way

---

102 SA Law Commission Report *Arbitration: An International Arbitration Act for South Africa* 2.

103 The Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977.

104 SA Law Commission Report *Arbitration: An International Arbitration Act for South Africa* 110. A more detailed discussion is beyond the scope of this thesis.

105 See further SA Law Commission Report *Arbitration: An International Arbitration Act for South Africa* 134-153.

106 SA Law Commission Report *Arbitration: An International Arbitration Act for South Africa* 23.

107 For example, the Commission considered it unnecessary to amplify the Model Law to include the power of the court in s 8 of the 1965 Act to extend contractual time-limits for commencing arbitration proceedings. However the Commission recommended additions to article 31 of the Model Law to deal with costs and interest.

108 SA Law Commission Report *Arbitration: An International Arbitration Act for South Africa* 23.

of avoiding the courts, increasingly staffed by black lawyers.[110] The Law Commission in the light of representations received also considered that the new legislation for international arbitral proceedings was needed urgently and its implementation should therefore not be delayed by the more protracted inquiry required for changes to the legislation on domestic arbitration. The decision as to whether or not the UNCITRAL Model Law was suitable for domestic arbitration in South Africa was therefore left until the next stage of its inquiry dealing specifically with domestic arbitration.[111]

1.2 Domestic arbitration

In its Report on Domestic Arbitration, the Law Commission identified and considered three possible approaches to enacting improved domestic arbitration legislation.[112] The first was that originally suggested by the Association of Arbitrators in 1994,[113] namely to improve the 1965 Act by making the necessary changes to its provisions. The Commission however pointed out that this approach takes insufficient account of the provisions of the UNCITRAL Model Law. Since the Law Commission recommended the adoption of the Model Law for international arbitration proceedings with a minimum of changes, the result would not only be to have a dualistic system, but to have two arbitration statutes being fundamentally different in a number of important aspects. This approach also has insufficient regard for the objectives of a modern arbitration statute.[114]

The second alternative considered was the adoption of the UNCITRAL Model Law for both international and domestic arbitration. The Commission accepted that this approach was possible in principle, inter alia because two developed countries, namely New Zealand and Germany, and four developing countries, namely Kenya, Zimbabwe, India and Uganda had recently followed this route.[115] The Commission however mentioned a number of reasons why this alternative should not be followed by South Africa.[116]

---

109 See Christie (1993) 9 *Arbitration International* 165; Butler (1998) 9 *Stell LR* 8.

110 Butler unpublished paper delivered at the SLTSA Conference: Bloemfontein, January 1999, 3. The Commission took particular care to address these concerns through a thorough consultation process, which included the holding of regional workshops to which all interested parties were invited. See SA Law Commission Report *Arbitration: An International Arbitration Act for South Africa* 12; Report *Domestic Arbitration* 8-10.

111 SA Law Commission Report *Arbitration: An International Arbitration Act for South Africa* 8, 15.

112 SA Law Commission Report *Domestic Arbitration* 5-7. Compare the discussion in Butler (1994) 27 *CILSA* 129-135, who comes to the same conclusion as the Commission.

113 The Association's Draft Bill is contained in annexure B of the Law Commission's Discussion Paper 83 of August 1999 which preceded the report.

114 SA Law Commission Report *Domestic Arbitration* 6. See the text at n 116 below for these objectives.

115 SA Law Commission Report *Domestic Arbitration* 11.

116 See also Butler (1998) 9 *Stell LR* 7-12.

The first reason was that the 1965 Act has worked reasonably well in practice and is familiar to a large number of persons involved in arbitration of whom many are unlikely to become involved in international arbitration. Furthermore, it was stated that the 1965 Act has been interpreted by the courts on numerous occasions, usually with satisfactory results and that the replacement of the 1965 Act by the significantly different Model Law for domestic arbitration would undermine legal certainty.[117] Additionally, it was argued that some of the existing wider powers of the court, which were rejected by the Law Commission as additions to the Model Law for the international arbitration legislation, have been used beneficially for domestic arbitration and should be retained in modified form.[118]

Secondly, the Commission argued in its Report that it was important that the official English text of the Model Law be adopted for international arbitrations with minimum changes. This text should then also be applied by the South African courts in the same way it is applied in other Model Law jurisdictions, which will necessitate thorough reference to foreign jurisprudence. This type of legal exercise is less practical for practitioners involved only in domestic arbitration.[119]

Thirdly, it was pointed out that the Model Law has certain gaps compared to the detailed provisions of the 1965 Act and it would be necessary to fill these gaps for the Model Law to operate effectively in domestic arbitration. This approach would however undermine the goals of uniformity with other jurisdictions which have adopted the Model Law and promoting South Africa as an attractive arbitration venue, which will otherwise be achieved through adopting the Model Law with as few changes as possible. This problem could be avoided by retaining a separate domestic arbitration statute.[120]

The final reason given, particularly important in the context of this thesis, was "the urgent need to take remedial measures" regarding procedures currently used in arbitrations involving more complex disputes. These procedures "often result in the arbitration hearing being far longer and more expensive than it would have been if the parties went to court".

---

117 SA Law Commission Report *Domestic Arbitration* 12.

118 SA Law Commission Report *Domestic Arbitration* 11, with reference to s 8 (power of the court to extend the time fixed in the arbitration agreement for commencing arbitration proceedings) and s 20 ((statement of case for opinion of court or counsel during arbitration proceedings) of the 1965 Act, which have been retained as ss 11 and 39 of the Commission's Draft Bill, with substantial modifications.

119 SA Law Commission Report *Domestic Arbitration* 13.

120 SA Law Commission Report *Domestic Arbitration* 13, citing s 14(1) of the current Act concerning the specific powers of the arbitral tribunal, which is much more detailed than the comparable provision of the Model Law, namely article 19(2).

The Commission, in this context took note of provisions included in the English Arbitration Act of 1996 to achieve the same purpose.[121]

The third approach, and the one ultimately recommended by the Law Commission, is to adopt what is essentially a new arbitration statute. The proposed Draft Bill retains the basic structure of the 1965 Act and those provisions, which have worked well in practice. Additionally it incorporates those features of the Model Law and the English Arbitration Act of 1996, which are in the Commission's view essential to ensure that the objectives of a modern system of arbitration law are achieved.[122] In this regard, four objectives were identified by the Law Commission. These are first, the fair resolution of disputes by an independent and impartial tribunal without unnecessary delay or expense; secondly, the acknowledgement of party autonomy; and, thirdly, balanced powers for the courts.[123] Finally the arbitral tribunal should have adequate powers to be able to continue with the arbitration without avoidable delay by making an award in cases where one of the parties refuses to co-operate or where the parties are unable to agree on a procedure to be followed.[124]

2. The German approach

Similar to South Africa, Germany experienced major changes in the last few years. The reunification of Federal Republic of Germany (FRG) and the German Democratic Republic (GDR) in 1989 had the effect of the integration of the former GDR in the FRG and therefore subject to the latter's arbitration law. And from the early 1990's Germany started to play an important role regarding trade with the former COMECON partners (basically the eastern European states). With these developments it became apparent that German arbitration law had several defects.[125]

---

121 SA Law Commission Report *Domestic Arbitration* 14-16. These provisions include the statutory duties imposed on the arbitral tribunal by ss 33 and 40 (compare ss 28 and 35 of the Draft Bill) and the tribunal's power to cap recoverable costs in s 65 (compare s 56 of the Draft Bill). See also Butler (1998) 9 *Stell LR* 14-19. The Commission also decided to follow s 34(1)(h) of the English Act rather than article 24(1) of the Model Law by empowering the tribunal to decide whether or not there should be an oral hearing unless the parties otherwise agree (see s 33(1) of the Draft Bill and the Commission's Report 148 n 73).

122 SA Law Commission Report *Domestic Arbitration* 7.

123 Compare the statement of general principles in s 2 of the Draft Bill, which is based on s 1 of the English Arbitration Act of 1996.

124 SA Law Commission Report *Domestic Arbitration* 2-3.

125 To mention only a few:
§ 1028 ZPO provided a two-person tribunal as the normal number of arbitrators.
§ 1033 Nr. 1 ZPO provided for the expiry of the arbitration agreement upon the resignation of an arbitrator.
§1033 Nr. 2 ZPO provided for the lapsing of the arbitration agreement in the event of a tie of votes between the members of the two-person tribunal. (See Kreindler & Mahlich "A Foreign Perspective on the New German Arbitration Act" (1998) 14 *Arbitration International* 65 at 69.)

Until 1998 the former German arbitration law was based on the ZPO[126] from 1879, the date when the ZPO was adopted. Although the case law developed and certain modern approaches were later introduced within the structure, it could nevertheless not alter the fact that the concept of German arbitration law was based on principles of the nineteenth century.[127] Moreover, the somewhat archaic concept of the arbitration law was understood by experts to be the main cause for the international reluctance to use Germany as an arbitration venue.[128] Indeed, compared to countries like France, England, the Netherlands, Switzerland and Sweden, Germany was clearly not a popular venue for international arbitration. In cases where Germany was selected as the place of the arbitration, awkward provisions of the ZPO were usually in effect avoided by choosing, for example, the ICC Arbitration Rules for the proceedings, which was possible under the rather liberal German ZPO.[129] In addition to the defects in the arbitration law referred to above, there was a lack of trust among foreigners in Germany as a venue for international arbitration because of perceptions arising from historical factors.[130]

As a specific shortcoming it was mentioned that the German arbitration law had no particular provisions dealing with international proceedings, although the emphasis on international arbitration was growing. Secondly, the former section of the ZPO dealing with arbitration contained provisions which were far removed from the reality of actual arbitration practice.[131] It is also interesting to note that a further point of criticism was that the discretion of the arbitrator on how to conduct the arbitral proceedings was regarded as too extensive[132] and the guidance of the proceedings by compulsory provisions was seen as too weak. It was argued that this legal vacuum should be limited in favour of stricter guidelines and legal certainty and predictability.[133] A final criticism was that the procedure to enforce international arbitration awards was too complicated and contained too many escapes into appeals. The

---

"ZPO" is short for Zivilprozeßordnung. However, some (also German) authors translate this into "Code for Civil Procedure" or "CCP". But to avoid confusion when reading German literature and foreign literature about German law, it seems preferable to use the German "ZPO".

126 See the previous footnote.

127 Meyer-Teschendorf & Hoffmann "Eine neue Balance zwischen rechtsstaatlicher Sicherheit und Optimierung der Justiz" 1998 *ZRP* 134.

128 Submission by the Federal German Government on the draft of the New Arbitration Act in Bundestagsdrucksache (official Bulletin of the German Parliament) 13/5274 of 12 July 1996, 23. See also Böckstiegel "An Introduction to the New German Arbitration Act Based on the UNCITRAL Model Law" (1998) 14 *Arbitration International* 19-20.

129 Kreindler & Mahlich 70-71.

130 Kreindler & Mahlich 75.

131 Bundestagsdrucksache 13/5274 22. For example § 1028 ZPO, which takes a tribunal of two arbitrators as the norm, was regularly excluded by the parties in their arbitration agreement.

132 § 1034 II ZPO.

133 Bundestagsdrucksache 22.

reduction of such appeals was therefore an important criterion for new arbitration legislation.[134]

However, it was felt that the change of the arbitration law and the adoption of the UNCITRAL Model Law by Germany could alter the situation and would have a positive effect to make Germany an attractive venue for international arbitration proceedings, since the Model Law is familiar to lawyers dealing with international arbitration world-wide. The positive effect of the implementation of the Model Law and the "new attractiveness" would be of course firstly an economic one, certainly for German lawyers. But a second important consideration is that German jurisprudence would be able to influence the growing international jurisprudence regarding international arbitration and the interpretation of the UNCITRAL Model Law.

The advantages of the Model Law were seen in the fact that it is based on a world-wide consensus, it is clearly structured and contains a number of provisions, which come into effect if the parties have no agreement about the issue.[135] This was seen as the more practical alternative to the former ZPO approach, where those cases were left to the discretion of the arbitrator.[136]

Apart from a few exceptions the new German Arbitration Act incorporates the complete wording of the Model Law. The implementation of the Model Law was certainly facilitated by the fact that it does not contain any provisions, which would have been regarded as completely contrary to the German understanding of arbitration.[137] The German legislation has taken the harmonisation objective very seriously and included the provisions of the Model Law almost unchanged in terms of form and contents. This reflects the view that it is only possible to achieve the Model Law's aim of contributing to international harmonisation of arbitration law if there is a willingness both with the structure of the law and with regard to terminology and content of the individual provisions to dispense with a purely national point of view in favour of harmonisation.[138]

Finally, Germany also faced the question whether there should be one set of rules for both domestic and international arbitration proceedings or whether the Model Law should deal

---

134 Meyer-Teschendorf & Hoffmann135.

135 These include e.g. the commencement of the arbitral proceedings (article 21 of the Model Law); the appointment of the arbitrator and the challenge of arbitrators (articles 11-13); and the termination of the proceedings (article 32). The former ZPO did not deal with these issues and left some of them to the arbitrator under § 1034 II ZPO.

136 Bundestagsdrucksache 24. See also Böckstiegel 21-22.

137 Bundestagsdrucksache 24.

138 Submission by the Federal German Government on the draft of the New Arbitration Act in Bundestagsdrucksache 27. See also Böckstiegel 21-22.

with international arbitration only. On the one hand, the idea of an almost unchanged ZPO for domestic arbitration and the Model Law for international proceedings was dismissed by the drafters of the legislation on the ground that this would constitute two set of rules which are so different in terms of structure, scope and terminology that the differences would neither be explainable nor tolerable.[139] On the other hand, the revision and updating of the former arbitration provisions of the ZPO into a modern set of rules would result in a high degree of similarity between the revised ZPO and the Model Law, so that two different sets of rules would not have been justified.[140] The vast majority therefore agreed to the proposal of the draft bill to achieve the revision of the ZPO by adopting the UNCITRAL Model Law for both domestic and international arbitration proceedings.[141]

---

139 Bundestagsdrucksache 25.

140 Bundestagsdrucksache 25.

141 Meyer-Teschendorf & Hoffmann 135. Böckstiegel 22 points out that this also makes it unnecessary to deal with the sometimes difficult distinction between national and international arbitrations when applying the new law.

Chapter Two

Court involvement prior to the award and interaction with the powers of the tribunal

I. Introduction

This chapter deals with the involvement of the court in the arbitration process prior to the award and the balance of power between the arbitral tribunal and the courts. In the course of the discussion of certain powers of the court, the relationship between the powers of the court and those of the tribunal will be examined, including their interaction in specific circumstances.

First, with reference to article 5 of the UNCITRAL Model Law the general approach regarding the scope of the court's powers in the context of arbitration proceedings will be investigated. The drafters of the Model Law clearly accepted the need to restrict the court's powers of intervention. The position in South African and German law will then be considered. It will be seen that the powers of the court under the existing South African law are, by modern standards, too wide. The restriction of the court's powers of intervention in terms of the proposals of the South African Law Commission and under German law will then be examined.

In order to be able to evaluate the different approaches one should bear in mind the possible consequences of the court's involvement or power to intervene in the arbitration process prior to the award. The need to limit court involvement was considered by both the drafters of the new German legislation and the South African Law Commission.[1] The limitation and control of court interruption was identified as a crucial factor for improving the efficiency of arbitration process and in avoiding unnecessary delay and disruption.[2] Nevertheless, as will be shown by examples below, the court's assistance can be decisive to enable the arbitral tribunal to make an enforceable award.[3]

After analysing the general provision in article 5 of the Model Law and the South African and German responses, the focus will shift to the issues of Kompetenz-Kompetenz[4] and interim

---

1 See ch 1 para III above.
2 See also the comparison in ch 2 para II.3 below.
3 See particularly the discussion of "interim measures" in ch 2 paras IV.1 and IV.5 below.
4 See ch 2 para III below.

measures.[5] It will be shown that these two issues have a crucial role regarding the question of court involvement in the arbitration process and its possible disruption, and therefore the difference between effective and ineffective arbitration. The development of the principle of Kompetenz-Kompetenz will be analysed as well as the implementation of the principle in German and South African law. The advantages and disadvantages regarding the control and limitation of the court's power to interrupt arbitration proceedings because of jurisdictional issues prior to the award will be evaluated.

In the last part of this chapter the partial dependence of arbitral tribunals on the courts regarding interim measures will be discussed. This dependence makes the issue of interim measures a crucial one, particularly if one bears in mind the practical importance of interim measures concerning the ability of the tribunal to make an effective award in some instances and also the growing frequency of requests for interim measures in arbitration proceedings.

---

5 See ch 2 para IV below.

II. Article 5 of the UNCITRAL Model Law

Article 5 of the Model Law will now be discussed to establish when court involvement in the arbitration process is allowed under the Model Law. As discussed previously, whenever a party seeks to delay arbitration proceedings, it may be worthwhile for that party to attempt to involve the court in those proceedings.[6] The party may for example claim that there are issues in dispute, which are not covered by a valid arbitration agreement, which may therefore not be decided by the arbitral tribunal, with the result that the dispute must be referred to court. To name a few possible bases for this contention, the party may claim that the arbitral tribunal is not competent because there is no arbitration agreement, or that the arbitration agreement is null and void or has lapsed, or that it is not binding on the party against whom the arbitral proceedings have been instituted.[7] Even though the party may not succeed with its objection, substantial delay may be caused.

In each such situation, the question has to be asked whether a court may intervene or not. Article 5 of the Model Law[8] states in this regard:

> "In matters governed by this Law, no court shall intervene except where so provided in this Law."

It has been said that the purpose of article 5 of the Model Law is to oblige the drafters of the Model Law (as well as legislators adopting it) to specify any instances in which court control is envisaged, in order to increase certainty for parties and arbitrators and further the cause of uniformity.[9]

Article 5 should therefore not be understood to express hostility to court intervention or assistance in appropriate circumstances, but only to satisfy the need for certainty as to when court involvement is permissible.[10] It has also been said that article 5 is of the greatest importance in establishing the correct balance between party autonomy on the one hand and

---

6 See ch1 paras 1.I and 1.II above.

7 Gaillard "Laws and Court Decisions in Civil Law Countries" ICCA Congress Series No. 5 (1990) 162. See too Christie (1993) 9 *Arbitration International* 154-160 for the range of delaying tactics currently available under South African law involving court applications prior to the award.

8 See generally on article 5 of the Model Law Holtzmann & Neuhaus 216-219; Christie (1994) 111 *SALJ* 362-365.

9 Holtzmann & Neuhaus 216.

10 Holtzmann & Neuhaus 216. Regarding the *necessity* for court intervention, the British Columbia Court of Appeal has noted the world-wide trend in international commercial arbitration towards restricting the scope of judicial intervention; see *Quintette Coal Limited v. Nippon Steel Corp. et al,* [1991] 1Western Weekly Reports 219, where Quintette sought to set aside the award relying on articles 5 and 34 of the Model Law.

necessary intervention by courts on the other.[11] It appears from the *travaux préparatoires* that it was foreseen by the UNCITRAL Secretariat at the outset of the drafting process that achieving this balance would be one of the more complex problems in the drafting of the Model Law.[12] It was also foreseen that this would require a precise demarcation of the scope of possible intervention and supervision by the court,[13] and recognised that this supervision and control by the courts was not always welcomed by the parties, especially regarding the arbitral tribunal's decision on the merits.[14] Therefore judicial control over the tribunal's decision on the merits needed to be limited to the utmost.[15]

Experience has shown that court involvement can undermine effective arbitration, where an unscrupulous party approaches the court merely as a delaying tactic.[16] This problem of parties using court intervention as a delaying tactic was also known to the drafters of the UNCITRAL Model Law. During the drafting process "it was pointed out that resort to intervention by a court during the arbitral proceedings was often used only as a delaying tactic and was more often a source of abuse of the arbitral proceedings than it was a protection against abuse".[17] Thus, it was important to determine a clear limitation of the court's power and a precise demarcation of the scope of possible intervention and supervision.[18]

The UNCITRAL Model Law was created to be adopted by states as a part of their national legislation. Therefore in determining the extent of court involvement the interpretation of the opening phrase of article 5 "In matters governed by this Law, ..." assumes crucial importance. It must be asked whether the phrase only refers to aspects of arbitration law dealt with in the Model Law itself, or whether it also refers to national arbitration law in general. Article 1 of the Model Law states that the law applies to "... international commercial arbitration". There are however aspects of the law of international commercial arbitration which are not dealt with by the Model Law.[19] On a broader interpretation of the quoted

---

11 See Christie (1994) 111 *SALJ* 362.

12 See the extract from the First Secretariat Note A/CN.9/207 para 21, quoted in ch 1 at n 20 above.

13 A/CN 9/207 para 21, quoted in Holtzmann & Neuhaus 1196. See also Christie (1994) 111 *SALJ* 363.

14 A/CN 9/207 para 10, quoted in Holtzmann & Neuhaus 1193. See also Christie (1994) 111 *SALJ* 363.

15 A/CN 9/207 para 104, quoted in Holtzmann & Neuhaus 924.. See also Christie (1994) 111 *SALJ* 363.

16 See e.g. the extract from SA Law Commission Report *Domestic Arbitration* 17, quoted in ch 3 n 182 below.

17 UN document A/40/17 para 63, quoted in Holtzmann & Neuhaus 238 and Christie (1994) 111 *SALJ* 363.

18 Christie (1994) 111 *SALJ* 363.

19 These include the capacity of parties to enter into the arbitration agreement, the grounds on which a dispute is considered non-arbitrable (compare article 1(5); consolidation of arbitration proceedings, court enforcement of interim measures directed by the arbitral tribunal, costs and interest on awards. See also Holtzmann & Neuhaus 218.

phrase, general or residual powers of the courts to supervise arbitral proceedings as part of national arbitration law could arguably apply.[20]

On a narrower interpretation court intervention would only be possible where permitted by the Model Law. The Model Law envisages court involvement in the following circumstances, namely article 8 (arbitration agreement and substantive claim before court), article 9 (interim measures), article 11 (appointment of arbitrators), article 13 (procedure for challenging arbitrators), article 14 (failure or impossibility of the arbitrator to act), article 16 (competence of the arbitral tribunal to rule on its own jurisdiction), article 27 (court assistance in taking evidence), article 34 (setting aside an award) and articles 35 and 36 (recognition and enforcement of awards).[21] In these named circumstances the court's power to intervene, usually on the request of a party,[22] is beyond doubt. But, article 5 should also have made it clear that those instances were definitive and the courts shall have no residual jurisdiction to intervene.[23]

In fact, the UNCITRAL Commission was aware that the Model Law as a *lex specialis* could not be complete in every respect and that other aspects would be governed by other rules of domestic law.[24] It was also understood, that the introductory words of article 5 "matters governed by this Law" had a meaning, which was narrower than the term "international commercial arbitration" used in article 1. This limited the scope of application of article 5 to those matters, which were in fact governed by or regulated in the Model Law. Article 5 would therefore not exclude court control or assistance in those matters, not dealt with in the Model Law.[25] The suggestion that a more precise definition of the phrase "matters governed by this Law" should be included for the sake of clarifying the drafters' intention about the scope of article 5's application was rejected. It was argued that in the majority of cases, in which this question would be relevant, it should be possible to find the answer by using the normal

---

20 Holtzmann & Neuhaus 216.

21 Holtzmann & Neuhaus 216.

22 Compare articles 34(2)(b) and 36(1)9b) regarding matters which the court can raise on its own initiative.

23 Christie 1994 (111) *SALJ* 363.

24 See UN document A/40/17 para 61 quoted in Holtzman & Neuhaus 238.

25 See UN document A/CN 9/246 para. 188, quoted by Holtzmann & Neuhaus 223 and Christie 1994 (111) *SALJ* 363. The matters specified above where court intervention is permitted are the crucial fields where court support is essential for the whole arbitration process. In other matters, not specified, the need for court involvement is less clear. In the case of *International Civil Aviation Organisation (ICAO) v Tripal Systems Pty.Ltd Recueil de jurisprudence du Quebec (1994) 2560,* the ICAO asked the Superior Court of Quebec to declare that it enjoyed an absolute immunity from judicial process of any kind. The Court granted the motion for dismissal of the declaratory motion, having decided that the arbitral tribunal alone was competent to decide the immunity issue. To this end, the court examined the conditions regulating judicial intervention in the arbitral process (articles 16 and 34 of the Model Law) and concluded that these conditions were not met. The court refused to intervene on the basis of article 5 of the UNCITRAL Model Law; see CLOUT case 182. (CLOUT is the acronym for Case Law on UNCITRAL Texts, collected on UNCITRAL's web site www.un.org.at/uncitral/clout/abstract.)

rules of statutory interpretation, taking into account the principles underlying the text of the Model Law.[26]

As Christie points out, reference to the *travaux préparatoires* as an interpretation aid presents no difficulty in a civil-law jurisdiction like France. The technique has however traditionally not been permitted in common-law jurisdictions, although there has recently been a less strict approach in this regard.[27] Several common-law jurisdictions when adopting the Model Law have dealt with the problem by legislation. For example, the Hong Kong Arbitration Amendment (No 2) Ordinance 1989, which adopted the Model Law, provided in section 2(3):

> "In interpreting and applying the provisions of the UNCITRAL Model Law, regard shall be had to its international origin and to the need for uniformity in its interpretation, and regard may be had to the documents specified in the Sixth Schedule."[28]

By giving this guideline for interpretation and by expressly stating that there should be an interpretation in favour of uniformity of international arbitration, the legislature in Hong Kong sought to prevent all attempts to interpret the arbitration legislation in a way which is contrary to the underlying approach of the Model Law. At least the involvement of courts as a dilatory tactic can be avoided in cases where the Model Law expressly limits the court's power to intervene in favour of a ruling by the tribunal exclusively.

Similar provision for the use of the *travaux préparatoires* as an interpretation aid has been included in Zimbabwe's version of the Model Law and has been recommended for South Africa.[29]

1. The South African approach

1.1. The current law

The following paragraphs do not attempt a full discussion of the powers of the courts under the existing South African arbitration law.[30] The main purpose of the discussion is to illustrate

---

26 UN document A/40/17 para 61 quoted in Holtzmann & Neuhaus 238; Christie 1994 (111) *SALJ* 364.

27 Christie 1994 (111) *SALJ* 364; SA Law Commission Report *Arbitration: An International Arbitration Act for South Africa* 30.

28 The documents specified in the Sixth Schedule are the Report of the Secretary-General of UNCITRAL of 25 March 1985 (A/CN 9/264); the report of UNCITRAL on the work of its eighteenth session (A/40/17) and the report of the Law Reform Commission of Hong Kong on the adoption of the Model Law. See Christie 1994 (111) *SALJ* 364.

29 See SA Law Commission Report *Arbitration: An International Arbitration Act for South Africa* 30-34 and the Draft International Arbitration Bill s 8 and sch 2, which lists the full *travaux préparatoires*.

the important difference in the balance between the powers of the court and party autonomy under the existing arbitration law compared to that under the Model Law. It will be seen that there is significantly greater emphasis on court intervention and less on party autonomy. Although the judge-made powers of the court are less intrusive than those which existed in England prior to 1979,[31] it must nevertheless also be remembered that the powers of the court contained in the Arbitration Act 42 of 1965 are not exclusive and are supplemented by certain powers under the common law.[32]

As stated above, the existing Arbitration Act 42 of 1965 applies to both domestic and international arbitral proceedings, whereas the UNCITRAL Model Law was designed for proceedings with an international character. The Law Commission has proposed the adoption of the UNCITRAL Model Law for international commercial arbitration only and the replacement of the 1965 Act for domestic arbitration by a separate statute, partly based on the Model Law.[33]

Although, under the Arbitration Act 42 of 1965, the parties to an arbitration agreement may have intended their dispute to be settled outside the courts, the effect of the agreement is not to exclude the jurisdiction of the courts in respect of that dispute.[34] The potential for involving the courts as a dilatory tactic under the 1965 Act is therefore a real danger.[35] If the parties to an arbitration agreement consider the powers of the courts to intervene in the arbitral process as too intrusive, thereby greatly increasing the risk of delaying tactics, they may be tempted to seek to restrict these powers in their agreement, on the basis of party autonomy. However, as the provisions regarding the powers of the courts are mandatory, it is submitted that a contractual provision, which attempts to exclude or restrict these powers of the court in relation to the dispute, would be void as being contrary to public policy.[36]

---

30 See Christie (1993) 9 *Arbitration International* 153-165 for a discussion of these powers in the context of international arbitration and Butler (1994) 27 *CILSA* 123-129 and 135-146 for a discussion of the court's powers in the context of domestic arbitration.

31 The power held by English courts, prior to its repeal in 1979, to set aside an award because of an error on the face of that award never applied in South Africa. See Butler (1994) 27 *CILSA* 125-126.

32 See e.g. the court's power to interfere with a procedural ruling of the arbitral tribunal prior to the award, formulated in *Tuesday Industries (Pty) Ltd v Condor Industries (Pty) Ltd* 1978 4 SA 379 (T), where the court was careful to emphasise that the power would only be exercised in exceptional circumstances and on grounds that would justify the review of the award itself (382E-G). This power was recently applied by the court in *Badenhorst-Schnetler v Nel* 2001 3 SA 631 (C).

33 See ch 1 para 1.III.1 above.

34 Butler & Finsen 61, citing *Parekh v Shah Jehan Cinemas (Pty) Ltd* 1980 1 SA 301 (D) at 305F-H.

35 See Christie (1993) 9 *Arbitration International* 165.

36 Compare Butler & Finsen 62 and 210-211. Public policy in this context must be understood as "the final parameter of law that, while it is reflected in and often expressed by statutory and constitutional statements of law, also dictates either consent or constraint, permission or prohibition, when statutes and constitution are silent on a given matter". (See Buchanan "Public Policy and International Commercial Arbitration" (1988) 26 *American Business Law Journal* 513.)

The powers of the court regarding the arbitral process can be classified as powers of assistance, supervisory powers and powers of recognition and enforcement.[37] Under the UNCITRAL Model Law, the court's power to enforce the arbitration agreement can be classified both as a power of assistance and as one of recognition and enforcement, because of the narrow grounds on which recognition of the agreement can be refused.[38] However, given the wide discretion of the court to refuse to recognise the arbitration agreement under the current South African law, this power, depending on the particular circumstances, is arguably more one of supervision than of assistance and recognition. The supervisory nature of this power appears from section 3(2) of the 1965 Act,[39] which provides as follows:

> "The court may at any time on the application of any party to an arbitration agreement , on good cause shown -
> (a) set aside the arbitration agreement; or
> (b) order that any particular dispute referred to in the arbitration agreement shall not be referred to arbitration; or
> (c) order that the arbitration agreement shall cease to have effect with reference to any dispute referred."

By merely alleging to have "good cause" a party may apply to the court for the setting aside of the arbitration agreement under this provision. The court will then examine whether this "good cause" exists. If so, the arbitration agreement will be set aside as stated under section 3(2) and the dispute will be referred to court. In one case, notwithstanding the court's acceptance of the requirement that a very strong case must be made out, the court ordered that the arbitration agreement should cease to have effect "on the surprisingly thin grounds that legal problems and the credibility of witnesses are more properly dealt with by a court of law, and that the one party had misgivings about an architect as arbitrator having to decide on the credibility of a member of his own profession".[40] In any event, even if "good cause"

---

37 Butler & Finsen 61. Examples of the court's powers of assistance are ss 8, 23 and 38 regarding the power to extend certain time limits, s 12 regarding the appointment of an arbitrator, s 20 regarding the court's power to give an opinion on a point of law and s 21 regarding the general powers of the court. Supervisory powers include the power to remove an arbitrator under s 13 and ss 32 and 33 regarding the remittal or setting aside of the award. S 31, which gives the court the power to make an award an order of court, is an example of the power of recognition and enforcement.

38 Under article 8 of the Model Law, the court must refer the parties to arbitration, unless it finds that the arbitration agreement is "null and void, inoperative, or incapable of being performed". See further n 109 below regarding the meaning of this expression.

39 The supervisory nature of the power is less clear in the case of an application under s 6(2) to stay court proceedings so that the dispute can be referred to arbitration. On the face of it the court's power may be classified as one of recognition and enforcement (see Butler & Finsen 61 n 190) but in effect it can be used by the court to supervise which disputes should be referred to arbitration.

40 See Christie (1993) 9 *Arbitration International* 156, with reference to *Sera v De Wet* 1974 2 SA 645 (T) 650A, 654F and 655H-656E. He argues that few arbitration agreements could be considered safe

cannot be proved, the application to court will cause a substantial delay to the arbitration process.

Alternatively, a party wishing to have a dispute decided by litigation, notwithstanding the fact that the dispute is covered by a valid arbitration agreement, can do so by referring the dispute to court. The court will not deliver a decision, ruling that there is a binding arbitration agreement and refer the dispute to arbitration of its own motion.[41] If the opposing party wishes to rely on the arbitration agreement, it will be forced to use one of two methods to stay the court proceedings to allow arbitration to proceed. If it fails to raise the arbitration clause by one of these two methods, it will lose its contractual right to arbitration and will be forced into litigation. Therefore, it either must apply for a stay under section 6 of the Arbitration Act or it must file a special plea requesting a stay under the common law.[42]

A party wishing to use section 6 to enforce the arbitration agreement must bring a substantive application complying with the High Court rules. An informal application for a stay is not sufficient. The court *may* stay the court proceedings if the court is satisfied that there is no sufficient reason why the dispute should not be referred to arbitration in terms of the arbitration agreement.[43] Notwithstanding the difference in wording between sections 3(2) and 6, the courts have assumed that the onus borne by the party seeking to avoid arbitration is the same for both sections. A person seeking to avoid arbitration under section 3(2) must, as stated above, show "good cause" as to why the arbitration agreement should be set aside. The respondent to an application under section 6(2) bears the onus of showing that there is "sufficient reason" why the dispute should not be referred to arbitration.[44] A possible difficulty with the wording of section 6(2) is the following. Even if the court is satisfied that there is no good reason why the dispute should be referred to arbitration, it "may" then stay the court proceedings and is not apparently obliged to do so. As yet, this argument does not appear to have been raised successfully in a South African court, but the wording is a further indication of a balance in favour of court control rather than party autonomy.

The general powers of the court under section 21 of the 1965 Act may be characterised as supportive rather than supervisory. Nevertheless, some of the applications sanctioned by

---

against such reasoning, having previously identified the underlying philosophy of ss 3 and 6 as one of "nanny knows best" (155).

41 Compare *Parekh v Shah Jehan Cinemas (Pty) Ltd* above at 305G.

42 Butler & Finsen 63. In *Stocks Construction (OFS) (Pty) Ltd v Metter-Pingon (Pty) Ltd* 1978 4 SA 35 (T) 39A-B, the court held that the wording of s 6 is permissive rather than obligatory, with the result the the party wishing to arbitrate can choose the method by which it wishes to enforce the arbitration agreement.

43 S 6(2); Butler & Finsen 64.

44 Butler & Finsen 64.

this section could be used to interrupt and delay the arbitration proceedings. Certainly applications for security for costs, discovery,[45] and interim interdicts or similar relief require closer investigation.[46] However, some of these supportive powers clearly help the tribunal to come to an effective award within a reasonable period of time, as opposed to being used to interrupt and delay the proceedings. An example is the court's power to make orders for the inspection or the interim custody or the preservation or the sale of goods or property under section 21(1)(e). This power, which is based on the state's sovereign power, can be indispensable in circumstances where the arbitral tribunal itself cannot order such relief effectively.

1.2. The proposed new legislation for international arbitration

In terms of the new legislation proposed for international arbitration in South Africa by the Law Commission, the balance between the powers of the court on the one hand and respect for party autonomy and the powers of the tribunal on the other hand will change significantly. The Law Commission proposed that article 5 of the Model Law should be adopted unchanged.[47] The Law Commission accepted that one of the objects of the Model Law was to limit the involvement of national courts in international arbitration.[48] One of the considerations which motivated the Law Commission to recommend the adoption of article 5 was the desirability of promoting uniformity in Model Law jurisdictions.[49] The Law Commission moreover accepted that the Model Law achieves the desired balance regarding the powers of the court.[50] It was recognised that on the one hand arbitration cannot function effectively without the assistance of the courts. The Law Commission applied this argument to the enforcement of the arbitration agreement and the award by a court order in the absence of voluntary compliance, [51] but it can also be applied to interim measures. The Law Commission was on the other hand acutely aware of the danger that the powers of the court relating to intervention in the arbitral process prior to the award, which as first sight may appear to be intrinsically beneficial, can be abused as a tactical ploy to gain time.[52] Therefore, the adoption of article 5 of the UNCITRAL Model Law should be understood as a

---

45 See paras 1.3 and IV.3.3.1 below regarding the response of the SA Law Commission to s 21(a) and (b), which empower the court to order security for costs and discovery.
46 See the discussion of interim measures in ch 2 paras IV.3.2 and IV.3.3 below.
47 SA Law Commission Report *Arbitration: An International Arbitration Act for South Africa* 51.
48 See the Report 16 and 51.
49 See the Report 51.
50 See the Report 18.
51 See the Report 17.
52 See the Report 17.

severe limitation on "excessive opportunities for parties to involve the court as a tactic for delaying the arbitration process".[53]

Bearing in mind the need for uniformity with other Model Law jurisdictions, the Law Commission decided that the continued availability of the powers of the court regarding matters not dealt with by the Model Law was unnecessary. The Law Commission referred in this regard to section 20 of the Arbitration Act 42 of 1965, which deals with the right of a party to refer a question of law to the court for an opinion during arbitral proceedings and section 8, under which the court has the power to extend the time fixed in the arbitration agreement for commencing arbitration proceedings.[54] Section 3(1) of the Draft International Arbitration Bill therefore provides that:

> "... the Arbitration Act 42 of 1965 shall not apply to an arbitration agreement, reference to arbitration or arbitral award covered by this Act."

With this provision it is acknowledged that either the new arbitration legislation is applicable to an arbitration, or the Arbitration Act 42 of 1965 (or its proposed successor). The parties to an international commercial arbitration in South Africa should moreover have the assurance that the new arbitration statute contains all the relevant statutory provisions[55] and that they should not have to refer to other arbitration legislation as well.[56] Foreign users of South African arbitration law in an international arbitration can therefore know that there will be no hidden pitfalls in terms of the further applicability of the 1965 Act.[57] If the new statute is applicable, the 1965 Act and its successor are excluded. Principles of the common law on arbitration, not dealt with in either statute could still arguably apply,[58] where South African law is the *lex arbitri*.

Finally, the Law Commission recommends that article 8 of the Model Law, regarding the effect of an arbitration agreement on a substantive claim before the court, should be adopted without alteration.[59] This will result in a drastic curtailment of the discretion, which the courts currently enjoy under sections 3 and 6 of the 1965 Act, not to enforce the arbitration agreement.[60] An important argument advanced by the Law Commission for adopting article 8 unchanged was the need to bring South African law pertaining to court enforcement of

---

53 Compare the Report 1.
54 See the Report 51.
55 The Law Commission thereby also avoided the possible problems with the interpretation of the phrase "In matters governed by this Law" in article 5, discussed above.
56 See the Report 23.
57 See the Report 23.
58 Compare Butler & Finsen 4.
59 See the Report 58.
60 See the Report 58. See further the text at n 38 above.

international arbitration agreements into line with generally accepted international standards.[61]

1.3. The proposed new legislation for domestic arbitration

In its report on domestic arbitration the Commission urged the need to rethink the extent of the court's powers. As in the case of international arbitration the emphasis is on the necessity to reduce avoidable delay and expense in the arbitration process due to inappropriate court involvement.[62] The issue, which the Law Commission attempts to address, is not the fear that the courts are incapable of exercising the powers conferred on them by the arbitration legislation, but merely the danger of the court's statutory powers being abused by unscrupulous parties as a delaying tactic.[63] It is accepted that court assistance is vital to arbitration and it is understood that the courts must be entitled to certain supervisory powers as their price for this assistance.[64]

Section 2(c) of the Draft Arbitration Bill therefore contains as one of the three general principles on which the Draft Bill is founded a provision stating that "in matters governed by this Act the court must not intervene except as provided by this Act." This provision is based on article 5 of the Model Law, with substantially identical wording. The powers of the court are therefore not only more restricted than those available under the 1965 Act but are also deliberately aimed at preventing the abuse of applications to court as a delaying tactic.[65] The court's powers are however wider than those in the Model Law for international arbitrations in some respects, in that certain powers of assistance contained in the 1965 Act have been retained in modified form.[66] The circumstances in which the court can be approached to clarify the tribunal's jurisdiction are now regulated by statute.[67] Following the Model Law, the right to take certain decisions of the court, which may be obtained prior to the award, on appeal has been restricted.[68] A good indication of how far the Law Commission was prepared to go in reducing court interference is provided by section 9, which imposes the

---

61 See the Report 58.

62 SA Law Commission Report *Domestic Arbitration* 16-17.

63 SA Law Commission Report *Domestic Arbitration* 17.

64 SA Law Commission Report *Domestic Arbitration* 16.

65 SA Law Commission Report *Domestic Arbitration* 26.

66 See s 11 of the Draft Bill regarding the court's power to extend the time fixed in the arbitration agreement for commencing arbitration proceedings (comparable to s 8 of the current statute) and s 39 regarding the referral of a point of law to the court for an opinion prior to the award (comparable to s 20 of the current statute). The modifications compared to the current provisions are largely aimed at preventing the abuse of these procedures.

67 See s 27 of the Draft Bill and para III.3.3 below.

68 See s 22(6) regarding the decision of the court to remove an arbitrator, s 26(5) regarding the court's review of a preliminary ruling by the tribunal on its jurisdiction and s 40(3) regarding a decision by the court on interim relief or certain procedural assistance.

same strict limits on the court's ability to decline to enforce an arbitration agreement as those contained in article 8 of the Model Law.[69] The court's powers to grant interim relief in support of the arbitration process have been strengthened. Nevertheless, again to prevent the abuse of these powers as a delaying tactic, the conditions under which the court, as opposed to the tribunal, may be approached for such measures, have been carefully circumscribed.[70] The court's powers to intervene in the arbitration process by making procedural rulings have also been curtailed.[71]

2. Germany

2.1 The former German Law

The former provisions of the ZPO comparable with article 5 of the Model Law were §§ 1045 and 1046. They provided a list of cases in which the courts were empowered to act. § 1045 ZPO determined the jurisdiction of the court[72] to decide on the appointment of the arbitrator (§ 1029 II ZPO read with § 1031 ZPO), the challenge of an arbitrator (§ 1032 ZPO), the recognition of the arbitration agreement (§1025 ZPO), and the provision of measures which the arbitrator considered it necessary to take (§1036 ZPO).[73] § 1046 ZPO dealt with court assistance for the enforcement of the award.

§ 1036 ZPO[74] provided that for a measure, which the arbitral tribunal considered as necessary, but to order this measure was beyond its power, a request to the court had to be made by the party requiring such measure. Hence, where the state allows the substitution of its own courts by the arbitral tribunal, it is logical that the tribunal is supported by the inherent power of the courts. The state must take care that the reservation of the monopoly of certain

---

69 See n 38 above regarding these restrictions.

70 See s 40(1)(b) and (e) and (2) of the Draft Bill anad para IV.3.2.1 below.

71 E.g. the power of the court to order discovery of documents in s 21(1)(a) of the Arbitration Act of 1965 has been intentionally omitted from s 40(1) of the Draft Bill, as control of discovery is a matter for the tribunal. See ch 3 para II.7 below.

72 Which court had jurisdiction could depend on the arbitration agreement. Alternatively it was the court which would have had jurisdiction if the claim had been brought directly to court, or the court for the district in which the arbitration commenced.

73 Maier, Münchner Kommentar § 1045 No. 1.

74 The German text of §1036 ZPO read as follows:
"I Eine von den Schiedsrichtern für erforderlich erachtete richterliche Handlung, zu deren Vornahme sie nicht befugt sind, ist auf Antrag einer Partei, sofern der Antrag als zulässig erachtet wird, von dem zuständigen Gericht vorzunehmen.
II Dem Gericht, das die Vernehmung oder Beeidigung eines Zeugen oder eines Sachverständigen angeordnet hat, stehen auch die Entscheidungen zu, die im Falle der Verweigerung des Zeugnisses oder des Gutachtens erforderlich werden."

powers for the court does not disable the tribunal from fulfilling its obligations. The state therefore put the courts at the tribunal's disposal as set out in § 1036 ZPO.

Since § 1036 I ZPO did not set any limitation on the actions which could be requested, the limits were determined by the courts. These were found in the cases, where the courts either came to the conclusion that the request was inadmissible on procedural grounds or that the tribunal had the power to undertake the requested action itself.[75]

However, it must be understood that although the court owed its jurisdiction to the request of the applicant party, not to the arbitral tribunal itself, that request had to be based on the tribunal's findings about the necessity for such a request and could not be brought to the court independently by the applicant.[76] Thus, as a matter of procedure, the tribunal itself could not apply for a court order. But, the arbitrator or the chairperson of the tribunal was entitled to apply for the court order in the name of one of the parties. The power of agency of the tribunal was to be presumed until the presumption was rebutted by one of the parties.[77] The court proceeded by first scrutinising whether the parties validly agreed on a binding arbitration agreement, then whether the tribunal was entitled to order the action itself and, if not, whether the request to the court was admissible. The court did not determine whether the action requested was necessary or reasonable.[78]

§ 1035 ZPO dealt with witnesses and expert witnesses, where assistance by the courts was not necessary. Obviously the tribunal was empowered to interrogate witnesses and to gather evidence. In the exercise of these powers the tribunal was not formally bound to apply the law of civil procedure as laid down by the ZPO.[79] However, there was no legal basis to administer an oath ("Vereidigung") or to order witnesses to appear before the tribunal. The lack of these powers must be interpreted as a consequence of the carefully maintained monopoly over such powers for the courts. The tribunal is merely legitimated by the choice of the parties, based on the principle of freedom of contract, and does not derive its power from the monopoly of state power, as this is reserved for judges under article 97 GG ("Grundgesetz", the German Constitution).

---

75 Schlosser & Stein-Jonas *ZPO Kommentar* § 1036 no. 3.

76 Geimer 1997 § 1036 ZPO No. 1.

77 Geimer 1997 § 1036 ZPO No. 2.

78 Thomas & Putzo, § 1036 ZPO No. 3

79 Thomas & Putzo § 1035 ZPO No. 1. §§ 355 - 494 ZPO deal with evidence and witnesses in procedures before the state court ("Landgericht"), to which the arbitral tribunals are not bound. See further the comparison in ch 2 para III.5 below.

Regarding the listing of the court's powers under §§ 1045 and 1046 ZPO and the restrictive wording of §§ 1035 and 1036 ZPO, one can safely conclude that the powers of the court could not be extended, either by the court, or by the parties, or by the tribunal itself, beyond the cases provided for in these sections.

The limitation of the court's power under the former German arbitration law was characteristic and based on a clear structure regarding the demarcation of the court's and the tribunal's powers during the arbitration. The powers which were available to the courts under the former law were comparable to those of the courts under the Model Law.[80] The former German ZPO therefore reveals a modern approach to the powers of the court, which were restricted to situations where its intervention was needed for the progress of the arbitration proceedings. Extended powers, which would have created the impression of an excessive opportunity to supervise the arbitration proceedings, were not available to the courts under the former German arbitration legislation.

2.2. The new German arbitration law

With § 1026 ZPO Germany adopted article 5 of the UNCITRAL Model Law. § 1026 ZPO provides:

> "In matters governed by sections 1025 to 1061, no court shall intervene except where so provided in this Book."[81]

It is therefore very similar to the wording of article 5 of the Model Law. Obviously, it was intended not only to reproduce the wording, but also the meaning known from the Model Law. A court therefore is only allowed to intervene where the tenth book of the ZPO so provides. In § 1062 I (1) – (4) ZPO (comparable to article 6 of the Model Law) is a partial list of situations where the court is entitled to do so.[82]

The adoption of article 5 of the Model Law by § 1026 ZPO was justified not only because the provision was not something totally new, in a continental-European or German context, but

---

80 Maier *Münchener Kommentar zur ZPO* §1036 no. 1.

81 The German text of § 1026 reads: "Ein Gericht darf in den §§ 1025 bis 1061 geregelten Angelegenheiten nur tätig werden, soweit es dieses Buch vorsieht."

82 The court is the Higher Regional Court ("Oberlandesgericht") designated in the arbitration agreement and failing such designation the Higher Regional Court in whose district the place of arbitration is situated. For purposes of court assistance in obtaining evidence under § 1050 (equivalent to article 27 of the Model Law), the court is the Local Court ("Amtsgericht") (see § 1062 4).

because it was also seen as a further clarification of the demarcation between the powers of the courts and those of the arbitral tribunal.[83]

§ 1050 ZPO (comparable to article 27 of the Model Law) replaces § 1036 ZPO of the previous legislation, referred to above. An important difference and major improvement, compared to the former procedure, is the fact that the involvement of the courts regarding the taking of evidence and other judicial acts, which the tribunal is not entitled to carry out, is now initiated by the arbitral tribunal, or a party with the *approval* of the tribunal. Formerly the request came from a party. The nature of the assistance the tribunal may request is the same as under the former § 1036 and includes the examination of witnesses under oath and the summoning of expert witnesses. In executing the request, the court must follow its "normal" procedure, which does not include every procedure an arbitral tribunal could choose. This logically derives from the fact that a court order could involve an interference with civil liberties. The court is therefore strictly bound to a procedure where control over this interference is provided. Contrary to the former § 1036 ZPO, the current § 1050 now provides that the tribunal is entitled to attend the court sessions and to ask questions. The tribunal must therefore be informed of the date of the court session.[84]

As mentioned above, § 1062 I (1) – (4) ZPO contains a list of situations in which the court is able to intervene, besides § 1050 ZPO, by enumerating the issues on which the Higher Regional Court (Oberlandesgericht, OLG) has jurisdiction. These include decisions on requests regarding the appointment or challenge of arbitrators, a preliminary ruling on jurisdiction by the tribunal, the enforcement of interim measures by the tribunal and the setting aside or enforcement of awards. Although the wording differs, the effect of this provision is very similar to the previous legislation.

To conclude, the new § 1026 ZPO copied not only the wording of article 5 of the Model Law, but also the concept of this provision. The concept behind § 1026 ZPO is, as explained earlier regarding article 5, to establish that, subject to the arbitration agreement, the tribunal has wide powers under the tenth book of the ZPO to conduct the arbitral proceedings effectively.[85] Furthermore, subject to the exceptions expressly stated in § 1062 1 ZPO,[86] there can be no doubt that the way in which the tribunal exercises its powers during the arbitration proceedings cannot be challenged in court until after the award is made. But, as

---

83 Bundestagsdrucksache 13/5274 32.

84 Geimer 1998, § 1050 ZPO No. 2.

85 See especially § 1042 4 ZPO, comparable to article 19(2) of the Model Law.

86 See e.g. §§ 1037-1038 ZPO regarding the challenge of an arbitrator or the termination of the arbitrator's mandate and §1040 3 regarding a preliminary ruling by the tribunal on its jurisdiction.

with article 5 of the Model Law, § 1026 ZPO establishes that the court's supportive powers in the tenth book of the ZPO are still available.

3. Comparison

The adoption of article 5 of the Model Law by Germany and the Law Commission's recommendation that it in effect be adopted for both international and domestic arbitration in South Africa indicates a clear intention in both jurisdictions to limit the court's powers of intervention in the arbitration process, particularly prior to the award. The result should be to encourage the use of arbitration as a vehicle for resolving disputes.

The limitation of the court's powers of intervention may be interpreted as a new confidence towards arbitration. It will hopefully increase a spirit of partnership rather than rivalry and competition between the courts and arbitral tribunals. The practical implications of this new interaction between the court and the tribunal will be discussed in the context of jurisdictional challenges and interim measures below. The role of the court in both jurisdictions will be limited to what is generally recognised as necessary and desirable court support.[87]

The topics selected for detailed discussion in this chapter regarding court involvement in the arbitral process both concern court intervention prior to the tribunal's final award on the merits. The goal of effective arbitration will of course not be achieved if there are excessive opportunities for court involvement after the tribunal has made its final award. Both jurisdictions acknowledge the principle of the finality of the tribunal's award[88] and the grounds on which an award may be taken on review to the courts are restricted to those which are internationally accepted, as set out in article 34 of the Model Law.[89] These relate to situations where there has been a substantial procedural defect or where the award contravenes public policy. It was clearly understood that there should be no possibility of taking the award on appeal to the courts on its merits, whether on fact or law.[90]

---

87 Compare Lew (1999) 65 *Arbitration* 286, regarding the satisfactory balance of court involvement now achieved by the English Arbitration Act of 1996.

88 See regarding Germany §1055 ZPO and regarding South Africa the Arbitration Act 42 of 1965 s 28 and the Draft Arbitration Bill s 48.

89 See regarding Germany § 1059 ZPO and regarding South Africa the Draft International Arbitration Bill sch 1 article 34 and the Draft Arbitration Bill s 52, which is based on article 34.

90 See Christie (1994) 111 *SALJ* 368 citing inter alia UN doc A/CN 9/216, quoted in Holtzmann & Neuhaus 929.

III. Kompetenz-Kompetenz

An issue, which is still highly controversial in some jurisdictions, arises when the arbitral tribunal's jurisdiction to decide a dispute is challenged. The question is then who has the power to decide the issue of jurisdiction?

Under the principle of Kompetenz-Kompetenz[91] one must understand the ability of an arbitral tribunal to rule on its own jurisdiction. It is a principle of fundamental importance in practice, which prevents a party from seriously delaying or disrupting the arbitration simply by alleging lack of jurisdiction on the part of the arbitral tribunal.[92]

It is a question of practical importance whether the decision about jurisdiction of the tribunal in the particular circumstances should be made by the tribunal or by the court. Under many national jurisdictions the power of the tribunal to decide on its jurisdiction was long denied and under some it still is. The acceptance of Kompetenz-Kompetenz is a milestone in international arbitration. In jurisdictions where this principle is still denied, the involvement of the courts prior to the award to determine jurisdiction is often almost inevitable and can be the cause of considerable delays by a party which wants to disrupt the arbitration process. However, against this argument that an early decision by a court on jurisdiction is an undesirable interruption of the arbitration proceedings, it can be said that an early court decision on the question of the tribunal's competence to decide on the disputed matter may have the benefit of avoiding wasted time and money, should the court decide that the tribunal was not competent to decide the issue.

This section investigates how the UNCITRAL Model Law deals with the incisive principle of Kompetenz-Kompetenz. The South African and German treatment of the concept, before and after their response to the Model Law, will then be discussed. First, however, the principle of Kompetenz-Kompetenz itself will be examined.

1. The principle

An arbitral tribunal may only validly determine disputes, which the parties have agreed that it should determine. The authority or competence of the tribunal is rooted in the arbitration agreement between the parties. Due to this agreement the tribunal gains the authority to

---

[91] The German expression Kompetenz-Kompetenz can be literally translated in English as Competence/Competence, and refers to the competence of the arbitral tribunal to decide upon its own competence. See Redfern & Hunter (3 ed) 264.

decide the disputes between the parties, and the tribunal must take care to stay within the terms of this authority.[93]

The question of jurisdiction arises in those cases, where a party to the dispute denies the authority of the arbitral tribunal to decide the dispute and claims that the tribunal has no jurisdiction. Thus, the party may seek to avoid arbitration with a challenge to jurisdiction. This challenge can be partial, when it is claimed that the tribunal in terms of the arbitration agreement has no jurisdiction about certain issues. Or the challenge can be total, for example when it is claimed that the tribunal has no jurisdiction at all because of an invalid arbitration agreement.[94]

The question is then who should decide about the scope of the arbitration agreement and whether the arbitration agreement is valid and therefore whether the tribunal is acting within its jurisdiction. Two points must be made:

First, it is now generally accepted[95] that in a case where the main contract between the disputing parties is invalid for whatever reason, this does not automatically have the effect that the arbitration agreement is invalid, too. This concept is based on the doctrine of separability (or severability).[96] Secondly, even an invalid arbitration agreement does not deprive the tribunal from the competence to come to such a decision.

The doctrine of separability is a generally accepted principle in terms of which the arbitration clause in a contract is autonomous from the main contract. As a result the arbitral tribunal has jurisdiction over the dispute even though the main contract may be invalid, as long as the grounds for nullity do not affect the arbitration clause itself.[97] The prerequisite for the tribunal's competence to decide on the validity of the main contract in terms of an arbitration clause in that contract is the principle of separability. It results in there being no cross-infection of the arbitration clause by the defect in the main contract.[98] Furthermore, the concept of separability enables the tribunal to rule on the merits of the contract, without obliging it automatically to decide on its own jurisdiction.[99]

---

92 Gaillard 163.

93 Redfern & Hunter (3 ed) 260.

94 Redfern & Hunter (3 ed) 261-262.

95 The existence of the doctrine is however disputed in existing South African arbitration law, as will be shown from the discussion of *Wayland v Everite Ltd* 1993 3 SA 946 (W). See further para III 3.1 below.

96 See Redfern & Hunter (3 ed) 263. For a detailed discussion of the theoretical problems with the doctrine, see Schwebel *Arbitration: Three Salient Problems* 1-60.

97 Redfern & Hunter (3 ed) 263; Holtzmann & Neuhaus 480.

98 Veeder "Laws and Court Decisions in Common Law Countries and the UNCITRAL Model Law" ICCA Congress Series No. 5 171.

99 Gross "Competence of Competence: An English View" (1992) 8 *Arbitration International* 207.

Regarding the first point, where the main contract is void, but the arbitration agreement is considered valid, the doctrine of separability empowers the tribunal to decide on the consequences flowing from the invalid main contract.[100]

Regarding the second point, where a party challenges the arbitration agreement and there is no valid arbitration agreement, there would consequently be no arbitral tribunal, which would have the power to decide about anything. The tribunal would have to conclude that it cannot decide the issue, because it has no jurisdiction. And at the end of the day, the tribunal could arguably not even do that, since there should not be a tribunal in the first place. To avoid this logical predicament, it is generally accepted that the examination by an arbitral tribunal of its own jurisdiction in the event of challenge, involves the assumption that it has jurisdiction to make the investigation.[101] This power is inherent in the appointment of an arbitral tribunal. The tribunal must be able to look at the arbitration agreement, the terms of its appointment and other relevant documents in order to decide whether or not to uphold a challenge to its jurisdiction. This is part of the principle of Kompetenz-Kompetenz[102] and this principle allows the tribunal to dismiss the argument that a tribunal whose authority has been contested can only rule on the merits if an external authority has previously confirmed its competence.[103] It is thus argued that the principle is one of placing convenience ahead of logic.[104]

If the question of jurisdiction is raised before a court the principle of Kompetenz-Kompetenz dictates that the judge may only make a *prima facie* assessment of the existence of the arbitration agreement, which apparently indicates that the authority for deciding the jurisdictional issue is the arbitral tribunal. The court may not rule on the merits of the party's claims concerning competence.[105]

Should the tribunal come to the conclusion that it has jurisdiction, it may be asked whether this results in a binding award or whether the decision can be overruled and, if so, in what circumstances. Under some restrictive legal systems the power to decide on the tribunal's jurisdiction is reserved for the national courts, so that the tribunal cannot rule on its own

---

100 Compare *SNE v JOC Oil Ltd* (1990) 15 Yearbook Commercial Arbitration 384. The majority of the Bermudan Court of Appeal upheld the validity of the arbitration clause in a contract for the sale of oil which the arbitral tribunal had found to be invalid. SNE was therefore entitled to enforce the award in which it received compensation for the oil delivered under the invalid sale on the basis of unjustified enrichment.

101 Gross 206.

102 Redfern & Hunter (3 ed) 264.

103 Gaillard 163.

104 Gross 206.

105 Gaillard164.

jurisdiction. On the other hand, a modern approach, using the doctrine of Kompetenz-Kompetenz, grants the tribunal the power to rule on its own jurisdiction. The principle resolves logical difficulties where the jurisdiction of state courts and the jurisdiction of arbitrators under a valid arbitration agreement are mutually exclusive in legal theory.[106]

What the principle of Kompetenz-Kompetenz does not mean is that the tribunal has the last word on its own competence. The position is rather that the tribunal will usually be the first to rule on that question. But neither the tribunal's findings of fact nor its findings of law concerning its own competence in any way bind the judges competent to hear an application for the annulment of the award or a contested application for its enforcement. The fundamental purpose of the doctrine concerns timing; namely to prevent disputes prior to the award regarding the competence of the tribunal, which may be legitimate but are often groundless, from unduly delaying the arbitration.[107] The purpose of the principle of Kompetenz-Kompetenz is therefore purely chronological and not hierarchical.[108]

In drafting arbitration legislation or rules, it was always a highly controversial issue as to the stage at which court control over the tribunal's ruling on its competence should be permitted. It was clear that the challenge of the tribunal's jurisdiction would always give rise to opportunities for abuse by making a purely tactical challenge. Therefore, it was on the one hand necessary to strike a balance between excluding court review as long as possible and respecting the right to protection of the party challenging jurisdiction under the provisions of the *lex arbitri*. On the other hand, it had to be borne in mind that permission for an early review would disrupt the arbitral proceedings and encourage the parties to make jurisdictional challenges. But review only at a late stage after the award, leading to the finding that the tribunal has no jurisdiction would result in a waste of time and money for the parties. The claimant in the arbitration would have accomplished nothing and would have to resolve the dispute on the merits through litigation.

As will be seen below, different approaches have been taken under the various laws and arbitration rules considered in dealing with these issues.

---

106 Veeder 171.
107 Gaillard 163.
108 Gaillard 164

2. The UNCITRAL Model Law

The UNCITRAL Model Law article 16 (1) articulates the principle of Kompetenz-Kompetenz, concerning the arbitral tribunal's competence to rule on its own jurisdiction, by stating:

> "The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement."

As the competence of the tribunal regarding its own competence is dealt with by article 16, it is therefore a "matter governed by this Law" for purposes of article 5 of the Model Law. This means that court control, regarding issues relating to the tribunal's jurisdiction, is limited to that provided in the Model Law, referred to below.

The problem of logic referred to above, that there cannot be any ruling by the tribunal on jurisdiction if there is no valid arbitration agreement does not arise under the Model Law. Under article 16 even a tribunal, which in fact has no jurisdiction over a dispute, may at least rule that it has no jurisdiction.

Jurisdictional issues under the Model Law will normally first be dealt by the tribunal under article 16. However, it is also possible that the jurisdictional issue will first be considered by the court under article 8. Article 8(1) provides that the court shall, at the request of a party, stay any legal proceedings brought before it regarding any matter, which is the subject of an arbitration agreement and refer the matter to arbitration, unless it finds that the agreement is "null and void, inoperative or incapable of being performed".[109] It is however possible that a court faced with a request under article 8 may suspend its proceedings and await the tribunal's decision on its jurisdiction,[110] which is, however, not binding on the court. Conversely, a tribunal, which has doubts as to the validity of the arbitration agreement and

---

109 The phrase "null and void, inoperative or incapable of being performed" comes from Article II of the New York Convention of 1958 and has been retained in the equivalent provision of the Model Law, article 8. The SA Law Commission Report *Domestic Arbitration* 134 explained the phrase as follows:
"It has been suggested that the word 'inoperative' would cover those cases where the arbitration agreement has ceased to have effect. This could occur where, as a result of the parties taking their dispute to court, the issue has become *res judicata*. The words 'incapable of being performed' would apply to cases where the arbitration cannot effectively be set in motion, for example the case where the arbitral clause is too vaguely worded or the situation where the sole arbitrator named in the agreement refuses to accept appointment."

110 This would be appropriate where the jurisdictional issue and the merits are so closely linked that it would be difficult to decide the former issue without also deciding the latter, which is the province of the tribunal. Compare *Harbour Assurance Co (UK) Ltd v Kansa General Insurance Co Ltd* [1992] 1 Lloyd's Rep 81 (Com Ct) 85.

learns of court proceedings, which deal with the issue of the validity or existence of the arbitration agreement, may also suspend its proceedings, pending a decision by the court.[111]

When court proceedings regarding a request under article 8(1) are pending, the arbitral tribunal is authorised by article 8(2) to commence or to continue with arbitration proceedings and even to render an award while the issue of competence is still pending before the court. This provision provoked debate in the UNCITRAL Commission in the light of the policy considerations referred to above.[112] The view ultimately prevailed that in order to contribute to a prompt resolution of the dispute, simultaneous proceedings should be permitted. If it appeared that the arbitration proceedings would end up being unnecessary, the claimant would probably seek to have those proceedings suspended, pending the decision of the court. It is inherent in article 8(2) that the decision whether or not to continue with the arbitration proceedings rests with the tribunal and not with the court.[113]

Under the Model Law the principle of Kompetenz-Kompetenz is mandatory: the parties cannot therefore agree to limit the power of the arbitral tribunal to rule on its jurisdiction.[114] However, the arbitral tribunal's power is neither exclusive nor final. As discussed above regarding article 8(2), the approach of the UNCITRAL Model Law is based on the assumption that simultaneous proceedings regarding the competence of the arbitral tribunal, before both the tribunal and the national court, are possible.[115]

The decision of the tribunal regarding its jurisdiction can therefore be subject to scrutiny by the courts in various circumstances. First, it may be subjected to immediate review by a court under article16 (3), where the arbitral tribunal rules as a preliminary question that it has jurisdiction. Secondly, it may be subject to a later court review under article 34 in an application to set aside the award, where the tribunal only decided on the issue of jurisdiction in its award on the merits of the case. Thirdly, even later review of the tribunal's jurisdiction is possible in an opposed application for recognition and enforcement of the award under article 36.[116]

---

111 Berger *International Economic Arbitration* 328. The court would lack jurisdiction to order a stay if it were to find the arbitration agreement to be invalid, or that the dispute was not subject to the agreement, thereby in effect confirming the tribunal's own lack of jurisdiction regarding the dispute.

112 See para III.1 above.

113 See Holtzmann & Neuhaus 306 citing UN doc A/40/17 paras 91-93, quoted in Holtzmann & Neuhaus 330-331.

114 Holtzmann & Neuhaus 480. This was because of the importance of the principle for international commercial arbitration. Individual states could nevertheless still decide to limit the tribunal's power in this respect when adopting the Model Law. This has been done in the English Arbitration Act of 1996 s 30(1) which makes the tribunal's statutory power to rule on its jurisdiction subject to limits imposed by the agreement of the parties.

115 See also Berger 328.

116 See Holtzmann & Neuhaus 479 and article 36(1)(a)(i) or (iii) or (b)(i).

In the first situation, where there is an application to court for review of the tribunal's preliminary ruling pending, the tribunal is entitled under article 16(3) to continue with the proceedings and render an award notwithstanding the pending court proceedings. It is moreover up to the tribunal to decide whether to rule on its jurisdiction as a preliminary ruling or in an award. This provision has been described as "an innovative and sensible compromise".[117] The provisions on court review as a whole encourage preliminary jurisdictional rulings by the tribunal, while allowing the tribunal to postpone decision of frivolous or dilatory jurisdictional objections, or ones that are difficult to separate from the merits of the dispute.[118] These provisions therefore achieve a sensible balance regarding court control of Kompetenz-Kompetenz in the light of the policy considerations set out above.[119]

3. The South African approach towards Kompetenz-Kompetenz

3.1. The position under the current law

In the following discussion frequent reference is made to English case law and other English authority. This has been a common practice by the South African courts and by writers on South African arbitration law. The reasons are the influence of English legislation on the drafting of the current South African Arbitration Act 42 of 1965 and the abundance of English authority, particularly on points which have not necessarily received detailed consideration by the South African courts.[120]

As a general proposition, the current South African position on Kompetenz-Kompetenz can be stated quite simply. Arbitrators do have the power to rule on their own jurisdiction; but any such ruling is provisional only and can be challenged in the courts.[121] The often quoted judgment of Devlin J *Christopher Brown Ltd. v Genossenschaft Österreichischer Waldbesitzer Holzwirtschaftbetriebe Registrierte Genossenschaft mit beschränkter Haftung*[122] makes the position very clear:

---

117 Holtzmann & Neuhaus 486.

118 Holtzmann & Neuhaus 486.

119 See para III.1 above.

120 See Butler & Finsen 6, who nevertheless stress the need to have regard to certain differences between the South African and English common law (non-statutory law) on arbitration as well as differences in wording between the 1965 Act and the English Arbitration Act of 1950, which had a large influence on the former statute.

121 Gross 207. This amounts to an accurate summary of the longer discussions in Butler & Finsen 176-177 and Jacobs *The Law of Arbitration in South Africa* 30-32.

122 (1953) 2 All ER 1039 at 1042B-G. It is quoted more fully by Jacobs 30-31 and Butler & Finsen 176.

> "The arbitrators cannot determine their own jurisdiction.... They are entitled to enquire into the merits of the issue whether they have jurisdiction or not, not for the purpose of reaching any conclusion which will be binding on the parties, because that they cannot do, but for the purpose of satisfying themselves, as a preliminary matter, whether they ought to go on with the arbitration or not.... They are entitled, in short, to make their own enquiries in order to determine their own course of action, but the result of that enquiry has no effect whatsoever on the rights of the parties."

The judgment in the *Christopher Brown* case can safely be taken as persuasive authority, supporting the general rule on the power of arbitrators to reach provisional decisions on their own jurisdiction.[123] The provisional nature of the decision is a matter of logic, no arbitrator acting under an arbitration agreement can finally decide whether he has jurisdiction to make a binding award, any more than "a man can pull himself up by his own boot-straps".[124]

It is further argued by Jacobs that an arbitral tribunal, however, cannot confer jurisdiction upon itself by deciding *in its own favour* some preliminary point upon which its jurisdiction depends[125]. In one sense the tribunal is deciding the point in its own favour as there is no point in continuing if it is of the view that it does not have jurisdiction. The question of jurisdiction will usually be raised before the tribunal by the respondent, so a finding that the tribunal has jurisdiction is actually one in favour of the claimant rather than the tribunal.

Some years after the *Christopher Brown* case it was held in *Willcock v Pickfords Removals*[126] by Roskill LJ that

> "One thing is clear in this branch of law. It has been clear ever since the decision in *Heyman v Darwins* .... that an arbitrator cannot decide his own jurisdiction. Therefore whenever a question arises whether or not there has been a submission to arbitration, an arbitrator cannot in English law decide that issue. The only tribunal to decide is the Court."

At first sight, this statement may appear to contradict the earlier decision in the *Christopher Brown* case, thus overruling the established principle that an arbitral tribunal may investigate the issue of its jurisdiction, of course with the limitation that it cannot make a decision binding on the parties. Commentators are however agreed that the decisions can be readily

---

123 Gross 209.
124 Veeder 173.
125 Jacobs 31.
126 [1979] 1 Lloyd's Rep 244.

reconciled, mainly on the basis that the reference to "decide his own jurisdiction" in the later case must be read as "finally decide".[127]

In the context of the danger of the abuse of applications to court as a delaying tactic, the question must be asked: "At what stage of the arbitration process should a party be able to approach the court to obtain finality on an arbitral tribunal's ruling on its own jurisdiction?" It is argued that although an early application prior to the award would interrupt the arbitration process, it has the advantage that the issue of jurisdiction would be finalised at an early stage of the arbitration proceedings. The advantage of the reference of the jurisdictional issue to the court only after the arbitral award is that there is no interruption of the arbitration process and thus no opportunity to delay the process. But, if the court finds that the tribunal lacks jurisdiction the whole arbitration would be a waste of time and money. On this issue the English and thus the South Africa law adopted the "safe" approach. In an appropriate case, the court can resolve jurisdictional issues at any time at the request of either party.[128]

From the above it can be concluded that a dissatisfied party may achieve a reversal of the tribunal's ruling on jurisdiction either by obtaining a declaratory order or by successfully resisting an application to make the award an order of court.[129] The party could also apply to court to have the award set aside.[130] A party who wishes to challenge or clarify the jurisdiction of the arbitration tribunal can seek declaratory relief from the court even prior to any decision on the matter by the arbitration tribunal.[131] This view has been upheld and underlined by Steyn J:

> "Only the Court can definitively rule on issues relating to the jurisdiction of arbitrators. And it is possible to obtain a speedy declaratory judgment from the Commercial Court as to the validity of an arbitration agreement before or during the arbitration proceedings."[132]

For providing this range of opportunities for dealing with jurisdictional issues by the court, the law was at one stage widely approved in England for its flexibility.[133] It must be stressed that it is the dissatisfied party, which has the choice of remedy under the current law. The trouble

---

127 Gross 210.
128 Veeder 173.
129 The application would be made under s 31 of the Arbitration Act 42 of 1965.
130 S 33(1)(b).
131 See *South African Transport Services v Wilson NO* 1990 3 SA 333 (W) for an example of an application for a declaratory order on the arbitrator's jurisdiction prior to the award. The application was made with the consent of the tribunal (340B) and brought prior to a ruling by the arbitrator on the jurisdictional point.
132 *Harbour Assurance Co Ltd v Kansa General International Insurance Co Ltd* [1992] 1 Lloyd's Rep 81 at 83.
133 Christie (1994) 111 *SALJ* 367.

with this wide range of remedies for the dissatisfied party is that the danger of delaying tactics and increased costs becomes more real.[134] The former English and current South African approach is certainly different to that of the UNCITRAL Model Law, which provides that a decision as to the jurisdiction of the tribunal will usually be taken, at least in the first instance, by the arbitrators themselves.[135] The Model Law also gives the tribunal control over when the dissatisfied party should be able to approach the court, and the decision is no longer left to that party.[136]

Before discussing the response of the South African Law Commission to the Model Law in the context of Kompetenz-Kompetenz, it is first necessary briefly to consider the current state of South African law regarding the related doctrine of the severability of an arbitration clause from the main contract,[137] particularly when the main contract is alleged to be void.

This point was considered in the decision of *Wayland v Everite Group Ltd.*[138] The court was asked to order that certain disputes regarding the validity of a contract should be referred to arbitration on the basis of an apparently comprehensive arbitration clause in that contract. The court declined to do so on two grounds. First it rejected the availability of the doctrine of severability or separability in the following terms:

> "It seems to me to be eminently reasonable that a clause of a contract must stand or fall with the whole body of the contract and not be declared excisable by the parties or that such declaration should have any validity merely on the ground of the parties having elected to say that the clause itself is severable from the contract."[139]

The court made no reference to the fact that the doctrine of severability had previously been recognised by the South African courts in the context of a voidable main contract.[140] It unfortunately relied entirely on certain older South African and English decisions and made no reference to recent English cases, such as *Paul Smith Ltd v H & S International Holding Inc*[141] and *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd*,[142] which had recently recognised the doctrine in the context of a void main contract, or

---

134 Christie (1994) *SALJ* 367.
135 Gross 211.
136 This is one of the consequences of article 16(3) of the Model Law.
137 See also the text at n 96 above for a discussion of this doctrine.
138 1993 3 SA 946 (W).
139 *Wayland v Everite Ltd* 1993 3 SA 946 (W) 951H-I.
140 See *Van Heerden v Sentrale Kunsmis Korporasie (Edms) Bpk* 1973 1 SA 17 (A); SA Law Commission Report *Domestic Arbitration* 57.
141 [1991] 2 Lloyd's Rep 127.
142 [1992] 1 Lloyd's Rep 81. The decision of the Court of Appeal referred to in n 147 below had not yet been reported at the time the *Wayland* application was heard.

to trends in other jurisdictions. Secondly it accepted that if the agents of the respondent lacked authority to enter into the main contract, it necessarily followed that they lacked authority to enter into the arbitration clause.[143] This is not necessarily the case, with the result that this issue should have been more carefully investigated.[144]

3.2. The proposal for international arbitration

As discussed above, the current South African arbitration law on Kompetenz-Kompetenz has been heavily influenced by English law. It is therefore perhaps useful to consider briefly the relevant provisions of the English Arbitration Act of 1996 on the subject as background to the Law Commission's response to article 16 of the UNCITRAL Model Law. It will be recalled that England decided not to adopt the Model Law, but that the provisions of the Model Law ultimately had a much greater influence on the 1996 Act than was initially envisaged.[145] Its drafters set out to adopt, as far as possible, the scheme and language of the UNCITRAL Model Law and at the same time to preserve as much as possible of the pre-existing English arbitration law.[146] The provisions of article 16 of the Model Law are spread over three sections of the English Arbitration Act. The doctrine of separability, as developed by the English courts,[147] is given statutory recognition in section 7. It was put in a separate section to emphasise that it is a distinct concept from Kompetenz-Kompetenz.[148] The competence of the tribunal to rule on its own jurisdiction is set out comprehensively in section 30(1):

> "Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to -
>
> (a) whether there is a valid arbitration agreement,
>
> (b) whether the tribunal is properly constituted, and
>
> (c) what matters have been submitted to arbitration in accordance with the arbitration agreement."

Unlike article 16(1) of the Model Law, this is a "contract-out" provision.[149]

Arguably the most important change from the current law is contained in section 31, which deals with court control over a tribunal's finding on its own jurisdiction. The tribunal may rule

---

143 *Wayland v Everite Ltd* 1993 3 SA 946 (W) 951J-952A.

144 See Butler (1994) 27 *CILSA* 147-148 and the facts of *SNE v JOC Oil Ltd* (1990) 15 Yearbook Commercial Arbitration 384, referred to in n 100 above.

145 See ch 1 n 64 above.

146 Hunter "The Procedural Powers of Arbitrators under the English 1996 Act" (1997) 13 *Arbitration International* 345 at 346.

147 See particularly *Harbour Assurance Co (UK) Ltd v Kansa General International Assurance Co Ltd* [1993] 3 All ER 897 (CA) for the culmination of this development.

148 See the DAC (Saville) Report of 1996 para 43.

149 See the DAC (Saville) Report of 1996 para 139.

on an objection to its jurisdiction either in a special award[150] on that objection, or in an award on the merits. Unless the parties agree which of these options must be selected, the choice is left to the tribunal. The tribunal must make its choice having due regard to its general duty to adopt fair, cost-effective and expeditious procedures.[151] This effectively prevents an objecting party, through its unilateral action, of being able to use a court challenge of the tribunal's ruling on its jurisdiction prior to the award on the merits as a delaying tactic. The English Arbitration Act also contains a third mechanism for dealing with jurisdictional questions. In certain circumstances the matter may be referred to the court under section 32, which has no counterpart in the Model Law, before the tribunal is required to rule on the jurisdictional issue.[152]

For purposes of international arbitration the South African law Commission recommended that article 16(1) and (2) of the Model Law should be adopted unchanged. This would not only deal adequately with the doctrine of Kompetenz-Kompetenz, but deal with the confusion surrounding the doctrine of severability, created by the *Wayland* case.[153] The Law Commission was also satisfied that article 16(3) of the Model Law,[154] which regulates court control over the tribunal's findings on jurisdiction, achieved the desired degree of court control, while enabling the tribunal to prevent court review of its ruling on jurisdiction being abused as a strategy for delay.[155] The Law Commission makes no express reference to the contents of the English Arbitration Act of 1996 in the context of its discussion of article 16. It presumably considered sections 30-32 but regarded modifications to article 16 in the light of the English statute as inappropriate in view of its declared policy of keeping changes to the official English text of the Model Law to a minimum.[156]

3.3. The proposal for domestic arbitration

Section 26(1) of the South African Law Commission's Draft Arbitration Bill for domestic arbitration provides that "[u]nless the parties otherwise agree a tribunal may at the instance of a party or on its own initiative rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement". Section 26(1) is based on

---

150 The drafters wished to avoid the concept of a ruling as a preliminary question used in article 16(3) of the Model Law. The effect is the same: a special award on jurisdiction can be taken on immediate review to the court under s 67. See See the DAC (Saville) Report of 1996 para 142.

151 See the DAC (Saville) Report of 1996 para 146 and s 33 of the Act.

152 See the DAC (Saville) Report of 1996 para 43. S 32 is discussed in para III.3.3 below.

153 SA Law Commission Report *Arbitration: An International Arbitration Act for South Africa* 72-73. See para III.3.1 above for the *Wayland* case.

154 See para III.2 above.

155 SA Law Commission Report *Arbitration: An International Arbitration Act for South Africa* 73.

156 SA Law Commission Report *Arbitration: An International Arbitration Act for South Africa* 4 and 18.

article 16(1) of the Model Law. However, unlike the Model Law, under influence of the English Arbitration Act of 1996, it expressly provides that the tribunal's statutory power to rule on its own jurisdiction is an opt-out provision, enabling the parties to limit the tribunal's power to rule on its own competence by agreement.[157] Section 26(2) expressly provides that for purposes of section 26(1), an arbitration agreement forming part of a contract must be treated as severable from the other terms of that contract. The rejection of the doctrine of severability in *Wayland v Everite Group Ltd*[158] is thereby overruled in the context of domestic arbitration as well.[159]

Section 26(3) makes it clear that a party is not precluded from raising a plea that the tribunal has no jurisdiction by reason of its participation in the appointment of the tribunal. This provision is based on and consistent with article 16(2) of the Model Law.

Like article 16(3) of the Model Law, section 26 envisages two alternative stages for court control of the tribunal's findings on its jurisdiction. First, section 26(5) provides that if the tribunal decides on a jurisdictional point in a preliminary ruling, a party who is dissatisfied with that ruling may apply to court within 14 days[160] for the court to review the ruling. To limit the use of such applications for review as a delaying tactic, the court's decision is in terms of section 26(7) not subject to any appeal. Furthermore, section 26(6) gives the tribunal the power to continue with the arbitral proceedings and render an award, while the court's decision is pending. Both these provisions are consistent with article 16 of the Model Law.[161] Secondly, if the tribunal elects to make its finding on jurisdiction in an award on the merits, a party dissatisfied with that part of the award can apply to have the award set aside.[162] It appears that it is up to the tribunal, rather than the court, to decide whether the jurisdictional challenge should be decided as a preliminary ruling or in an award.[163]

---

157 SA Law Commission Report *Domestic Arbitration* 57. See the discussion at n 114 and 119 above regarding article 16(1) of the Model Law and s 30 of the English Arbitration Act of 1996.

158 1993 3 SA 946 (W). See the discussion at n 138 above.

159 Report *Domestic Arbitration* 57.

160 The time limit of 30 days in article 16(3) of the Model Law and s 25(5) of the Draft Bill with Discussion Paper 83 was shortened by the Commission to 14 days in its Report as being more appropriate for the needs of domestic arbitration.

161 See the discussion of article 16 at n 117 above. The SA Law Commission rejected a suggestion that *all* jurisdictional challenges should be decided as a preliminary matter for two reasons. First the tribunal must exercise its discretion having regard to its general duty to avoid delay and expense. Secondly, in some cases it is impractical to separate a decision on the jurisdictional issue from a decision on the merits (See Report *Domestic Arbitration* 58).

162 See s 52, especially s 52(2)(a)(i) and (iii) and Report *Domestic Arbitration* 57-8.

163 This is also the position under article 16(3) of the Model Law. See too Report *Domestic Arbitration* 58 para 3.138.

The degree of court control provided in section 26 thus corresponds with that provided by the equivalent provisions of the Draft International Arbitration Bill and the Model Law.[164] However, unlike the Draft International Arbitration Bill, section 27 of the Commission's Draft Arbitration Bill for domestic arbitration empowers the court to determine the tribunal's jurisdiction as a preliminary point in certain circumstances. The Commission explained the need for this provision, which is based on section 32 of the English Arbitration Act of 1996, as follows.[165] A question regarding the jurisdiction of the tribunal may be referred directly to court by virtue of section 9 of the Draft Bill. Section 9 is based on article 8 of the Model Law and replaces section 6 of the 1965 Act. It provides the opportunity for a defendant in court proceedings to apply to the court to stay the court proceedings on the ground that there is an arbitration agreement between the parties.[166] Unlike the 1965 Act, the reason for denying such a stay of the court proceedings is limited to the court finding that there is no valid arbitration agreement or that the agreement is inoperative or incapable of being performed.[167]

On the basis of section 9 the court can thus refuse a stay of the court proceedings on the application of the defendant in those proceedings if it is satisfied, for example, that the tribunal would lack jurisdiction either because the arbitration agreement is void or because it is inoperative.[168] A reason for adopting the principle of Kompetenz-Kompetenz as regulated by article 16 of the Model Law in the Draft International Arbitration Bill was to ensure the avoidance of delay.[169]

However, the Law Commission was also concerned about the situation where the claimant in an arbitration may be aware that the respondent objects to the jurisdiction of the tribunal, without the respondent taking any part in the arbitration.[170] The Commission in this regard quoted the Report of the Saville Committee:

---

164 Report *Domestic Arbitration* 58.

165 Report *Domestic Arbitration* 58-59.

166 Report *Domestic Arbitration* 34-35.

167 The reason for this change was that although the Commission found the that the court under ss 3 and 6 of the 1965 Act had generally been supportive of arbitration in exercising its discretion, there were instances where the court has appeared to be unnecessarily ready to exclude arbitration and to tackle the dispute itself. The Commission referred in this regard to *Sera v De Wet* 1974 2 SA 645 (T). See Report *Domestic Arbitration* 35 and n 40 above.

168 Report *Domestic Arbitration* 58.

169 See Report *Arbitration: An International Arbitration Act for South Africa* 73.

170 Report *Domestic Arbitration* 58. The claimant thereby runs the risk of the respondent opposing a court application for enforcement of the award on the basis that the tribunal had no jurisdiction. Failure to take part in the arbitration at all would not constitute waiver by the respondent of the right to contest the tribunal's jurisdiction.

> "In such circumstances, it might very well be cheaper and quicker for the party wishing to arbitrate to go directly to the Court to seek a favourable ruling on jurisdiction rather than seeking an award (or preliminary ruling on jurisdiction) from the tribunal."[171]

Section 27 now grants the court the power to scrutinise the question of jurisdiction on the application of a party, but subject to stringent conditions designed to ensure that this method of establishing whether or not the tribunal has jurisdiction will only be used in exceptional circumstances. The application requires the consent of all the parties to the arbitration proceedings. Alternatively, the tribunal must consent and the court must be satisfied first, that the determination of the question is likely to produce substantial savings in costs, secondly, that the application was made without delay and thirdly, that there is a good reason why the matter should be heard by the court as opposed to the tribunal.[172] One may safely presume that the burden of proving the named prerequisites is with the applicant. The Commission was nevertheless of the opinion that section 27 is unlikely to be used often.[173]

The Law Commission has thus adopted a reasonably practical approach. It has avoided requiring questions of jurisdiction to be first determined by the tribunal in all situations. A direct approach to the court is permitted in limited circumstances, particularly where it is foreseeable that an award by the tribunal would not be complied with voluntarily but would have to be enforced by the court in the face of opposition because of the tribunal's alleged lack of jurisdiction.

4. Germany

4.1 The former German Law

Under the former German arbitration law it was regarded as logical that the arbitral tribunal could not rule on its own jurisdiction on the basis of an arbitration agreement to the extent that its decision was binding on the state courts.[174] The decision of a tribunal on the validity of an arbitration agreement could not bind the state courts, because they had the jurisidiction

---

171 Report *Domestic Arbitration* 58-59, citing the Saville (DAC) Report of 1996 para 141.

172 S 27(2) and Report *Domestic Arbitration* 59.

173 Report *Domestic Arbitration* 60.

174 Geimer from Zöller, Zivilprozeßordnung 1997, § 1025 No. 57; JZ (Juristen Zeitung) 1989, 201 BGHZ 26.5.1988. The decision of the tribunal was considered as being binding only where the tribunal denied its own jurisdiction. The reasoning was that the arbitration agreement was "consumed" (verbraucht), Schütze, *Handbuch des Schiedsverfahrens* 70.

to decide finally on the issue.[175] Nevertheless, under § 1037 ZPO,[176] the arbitral tribunal could continue with the arbitration without regard to jurisdictional or other objections.[177]

However, a valid objection against a claim in a state court on the basis that an arbitral tribunal had jurisdiction about the issue in question, led not only to the suspension of the court proceedings as in common-law countries, but also to the dismissal of the case as being inadmissible.[178] In such a case the court had no discretion about the issue, and there was no room to decide on a *forum non conveniens* where the court might have regarded the arbitration proceedings as inexpedient.[179] However, in a case where the arbitration agreement was invalid and the tribunal therefore had no jurisdiction about the issue, a decision of a state court would declare the award of the tribunal null and void and not merely rescind or set aside the award.[180]

Similar to the position in common-law jurisdictions and under article 8 of the Model Law, the defendant in court proceedings wishing to raise the arbitration agreement had to rely on § 1027a ZPO, by claiming that the state court had no jurisdiction because of a binding arbitration agreement. The fact that arbitration proceedings may already have commenced did not by itself permit the defence of a lis pendens (Rechtsanhängigkeit) to be raised, as would have been possible if proceedings regarding the same dispute had been pending before another state court. Furthermore, a state court would not declare itself not competent by reason of the arbitration agreement, if no party relied on the agreement.[181]

Nevertheless, the BGH (Bundesgerichtshof für Zivilsachen; Federal High Court of Justice, Civil Division) took a different approach to other German courts. It determined in two important and authoritative decisions that the question of competence was a question of law, which was arbitrable under § 1025 ZPO.[182] The parties could therefore agree (in an arbitration agreement assumed to be separate from the main contract) that the arbitral tribunal had jurisdiction to decide on the validity and scope of the arbitration agreement. In these circumstances, the court could only scrutinise the validity of this Kompetenz-

---

175 Thomas & Putzo Zivilprozeßordnung, § 1041 No. 6.

176 § 1037 ZPO provided that the tribunal could proceed with the arbitration proceedings and render an award even in the case of a claim that the arbitration proceedings are not permitted. The tribunal could do so particularly in the case of a claim that no valid arbitration agreement exists, that the arbitration agreement did not apply to the dispute submitted for resolution, or that one of the arbitrators was not qualified to act in the capacity of arbitrator.

177 Kreindler & Mahlich "A Foreign Perspective on the New German Arbitration Act" (1998) 14 *Arbitration International* 74.

178 Geimer 1997 § 1027a, No. 2.

179 Geimer 1997 § 1027a, No. 2.

180 Geimer 1997 § 1027a, No. 9.

181 Geimer 1997 § 1027a, No. 1.

182 BGHZ 68,356 in a decision from the 5. May 1977 and BGH NJW-RR 1988, 1526.

Kompetenz clause itself, but not the result the tribunal came to by exercising its power to decide the issue.[183] Some authors even went as far as arguing that a Kompetenz-Kompetenz provision is implied in every arbitration agreement.[184] The BGH agreed with this conclusion, upholding the tribunal's Kompetenz-Kompetenz, even if an express agreement to this effect was absent.[185] The principle initiated by the BGH was later justified by the argument that, assuming the doctrine of equality between the courts and the arbitral tribunal, this doctrine would be violated if the tribunal was to be deprived of the competence to rule finally on its jurisdiction.[186]

4.2 The new German arbitration law

The provisions of the new German arbitration law reflect the canon of article 16 of the Model Law although there is at least one minor difference. Both provisions are however based on common ground regarding the principle of Kompetenz-Kompetenz and the acknowledgement of the doctrine of separability. As shown above, these two principles are not new to the German arbitration system and their reapplication by the new legislation was therefore not an innovation.

The doctrine of separability is expressed in § 1040 I 2 ZPO.[187] The arbitration clause is thereby given a different status to other clauses in a contract. Unlike the rule in §139 BGB (Bürgerliches Gesetzbuch, Civil Code), which provides that in the case of an agreement, which is partly void, the whole agreement has to be treated as void, the new § 1040 I 2 ZPO maintains that the arbitration agreement keeps its validity even where the main contract is void.

However, it is particularly regarding Kompetenz-Kompetenz that modifications were made in relation to the former German provisions and the Model Law.

Under § 1040 I ZPO[188] the tribunal is empowered to investigate the issue of competence. In cases where the tribunal concludes that it does have jurisdiction, it must normally rule on the

---

183 JZ 1989, 201 BGHZ 26.5.1988.

184 AA Leiphold ZZP 91, 481 and RIW 82, 283. Supply reference for bibliography.

185 Kreindler & Mahlich 74.

186 Zerbe 188.

187 To be understood as paragraph 1040 subsection one, second sentence.

188 § 1040 ZPO provides:
"I. The arbitral tribunal may rule on its own jurisdiction and in this connection on the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract.
II. A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has

matter by means of a preliminary ruling (Zwischenentscheid).[189] An appeal against the tribunal's finding to a state court can then be launched within one month after notice of the tribunal's finding (§ 1040 III ZPO). While the case is pending before the court, the tribunal is entitled either to proceed with the arbitration and even render an award in order to avoid delay or alternatively to await the decision of the state court about the issue of jurisdiction. Besides having the *power* to investigate its competence, the tribunal is under a *duty* to do so. It is argued that since a void arbitration agreement and therefore the lack of competence of the tribunal is a sufficient reason to set aside an award,[190] it is therefore a matter of fair procedure to indicate the right of objection as set out in § 1040 II ZPO.[191]

Unlike the Model Law, the new provision of §1040 III ZPO provides that where the tribunal considers that it has jurisdiction in the face of a challenge by one of the parties, the tribunal must "in general" rule on the issue of jurisdiction by means of a preliminary ruling. This has the following consequences. First, because the tribunal's decision that it has jurisdiction *should in general* be made at an early stage of the arbitration proceedings, a possible decision by a court about that issue will come at an early stage as well. Operating in the same direction, is the requirement that a plea that the tribunal is acting outside its jurisdiction shall be raised not later than the statement of defence as set out by § 1040 II 1 ZPO. This can be seen as the manifestation of the maxim *venire contra factum proprium*. A foreseeable time frame is thus given to jurisdictional challenges with the result that the sudden raising of the plea that the tribunal has no jurisdiction as an unscheduled disruption during the proceedings is usually not feasible.[192]

Secondly, and probably more importantly, in cases where the tribunal's decision that it has jurisdiction is not taken on appeal to the court within one month as set out in § 1040 III 2 ZPO, the jurisdictional issue cannot later be raised again during court proceedings for the challenge or enforcement of the award, after the arbitration proceedings are over.[193] This

---

appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers that the party has justified the delay.
III. If the arbitral tribunal considers that is has jurisdiction, it rules on a plea referred to in subsection 2 of this section in general by means of a preliminary ruling. In this case, any party may request, within one month after having received written notice of that ruling, the court to decide the matter. While such request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.
(Unofficial translation by the German Institution of Arbitration (DIS) and the German Federal Ministry of Justice Translation as published in (1998) *Arbitration International* 7.)

189 Habscheid, *Das neue Recht der Schiedsgerichtsbarkeit,* 1998 Juristen Zeitung No. 9, p. 448

190 As provided in § 1059 II No. 1a, c, No. 2a ZPO.

191 Geimer 1998, § 1040 No. 2.

192 § 1040 II 4 ZPO, following the Model Law, does allow the tribunal to admit a plea on jurisdiction at a later stage if the objector is able to justify the delay to the tribunal's satisfaction.

193 Bundestagsdrucksache 13/5274 44.

therefore postulates that as soon as a party allows its involvement in arbitration proceedings without objection before or during an early stage of the proceedings, the jurisdiction of the tribunal cannot be challenged later in the event of an unfavourable award for that party.

The argument that the early review of the tribunal's jurisdictional finding by the court is an interruption of the proceedings in any case, which can therefore be abused as a delaying tactic, is valid. However, the wording of § 1040 by providing that the tribunal in finding that it has jurisdiction must do so *in general* by means of a preliminary ruling, leaves sufficient room for the tribunal to act differently if necessary. This will be in exactly those cases where it is obvious that the challenge of jurisdiction has only the purpose to delay the arbitration.[194] Even where the tribunal deals with a jurisdictional challenge in a preliminary ruling, as another countermeasure against delaying tactics, the tribunal is empowered to continue with the arbitration and make an award, while an appeal to the court on the tribunal's preliminary ruling on jurisdiction is pending.[195]

Where the tribunal decides to reserve its finding on jurisdiction to be dealt with in its award, the examination of the question of jurisdiction by the court is then left to be dealt with in proceedings to enforce or challenge the award.

5. Comparison and evaluation

It is noteworthy that under both the new German arbitration law and that proposed for South Africa, it is acknowledged that an important reason for including the principle of Kompetenz-Kompetenz in their new arbitration legislation is a matter of defeating delaying tactics during the arbitral proceedings. The principle basically tries to restrict groundless litigation over the competence of the arbitral tribunal, thereby paralysing the arbitration.[196] Under both systems, Kompetenz-Kompetenz provides freedom from unnecessary court interference. This is the real meaning and effectiveness of the principle of Kompetenz-Kompetenz and it is thus much more than the simple fact that the arbitrators are allowed to continue their work.[197]

The usual practice in an international arbitration is nevertheless for an arbitral tribunal to issue an interim award on jurisdiction,[198] if asked by one of the parties to do so. This enables the parties at an early stage to know where they stand and would save them spending time

194 Bundestagsdrucksache 13/5274 44.
195 See § 1040 III 3 ZPO, which follows article 16(3) of the Model Law.
196 Gaillard164.
197 Gaillard164.

and money on arbitral proceedings which prove to be invalid.[199] If, however the arbitral tribunal realises that the respondent in the arbitration is bringing a suit before the court merely for dilatory purposes, which may be particularly obstructive if the party is determined to fight the dispute on the validity of the arbitration clause through all stages of appeal, the tribunal must have the power to continue with the arbitration.[200] The Model Law deals with this problem by expressly authorising the tribunal to continue with the abritration during the court proceedings and also by providing that the court's decision on jurisdiction is subject to no appeal.[201]

In practice, moreover, a respondent in an international arbitration raising an objection with the tribunal to its jurisdiction as a preliminary issue, must bear in mind the fact that the tribunal rarely will make a ruling, which puts itself totally out of business. But it is not uncommon for the tribunal to steer a middle course under which the tribunal will deny its competence on some but not all issues put forward by the claimant. This is not from any cynical or self-interested desire on the part of individual members of the tribunal but rather to avoid leaving the claimant with no adequate remedy in respect of its claims. Otherwise the claimant may usually be left only with the possibility of suing the respondent in its "home" court.[202]

Nevertheless, however wide the powers of the tribunal may be to determine its own competence, by bringing a challenge before the national courts, where permitted to do so, the party hostile to arbitration necessarily forces the attention of its opponent and the arbitrators away from the arbitration and requires the opponent to concentrate on the court proceedings, at least until the challenge is settled. Gaillard considers it as naive, notwithstanding the arrangement in article 16(3) of the Model Law, to imagine that the arbitration will go forward uninterrupted while elsewhere a judge, who is not necessarily even required to hear the tribunal's own reasons for upholding or rejecting its competence, determines the jurisdictional question.[203]

---

198 In a Model Law jurisdiction, this will involve making a ruling as a preliminary question, rather than an award, under article 16(3).

199 Redfern & Hunter (3 ed) 271.

200 Berger 331.

201 Article 16(3), which has been adopted by the Law Commission in South Africa without amendment. § 1065 I ZPO, read with § 1062 I 2 ZPO does however allow a limited right of appeal to a higher court.

202 Redfern & Hunter (3 ed) 273.

203 Gaillard164.

The German and proposed South African systems can be characterised as systems of restricted concurrent control.[204] It can be said that there are advantages and disadvantages attendant on any approach as to when a review of the tribunal's jurisdictional finding by the court can be made. The main pragmatic argument against concurrent court control is that to allow recourse to the courts during the course of an arbitration is likely to *encourage* delaying tactics on the part of a reluctant respondent.[205] An approach which permits court challenges on jurisdiction only after the final award can also be defended on the dogmatic ground that it minimises interference by local courts with the jurisdiction of the arbitral tribunal. On the other hand, it creates the possibility of injustice, in that if the jurisdictional objection is upheld, the entire arbitration procedure would have been a waste of time and costs.

In addition it can be argued that a reviewing court, when faced with an identical arbitration clause, may be more reluctant to invalidate the award, issued after a full arbitration hearing, than it would be to deny the tribunal jurisdiction under that same clause prior to the arbitration proceedings taking place. Although the reviewing court might be aided in its analysis by the tribunal's own assessment on the issue of competence, it cannot be assumed that the court would be led astray by faulty reasoning or other mistakes made by the tribunal.[206] This could lead to the conclusion that in terms of efficiency, early court control would bear the greater advantages. Nevertheless, one should also bear in mind that cases of lack of jurisdiction and wrong decisions by the tribunal on jurisdictional issues are relatively rare compared to attempts to use applications to court on jurisdictional issues as a delaying tactic. It is therefore clearly preferable, on balance, that court review prior to the award on the merits should be possible only in those cases, where the tribunal is prepared to allow it.

A party's right to bring jurisdictional objections before the tribunal must also be weighed against the need to ensure speedy proceedings and the efficiency of the arbitral process as such.[207] The party, who with full knowledge of the circumstances, behaves as if it accepts the jurisdiction of the tribunal and with it the validity of the arbitration agreement, only to deny

---

204 Redfern & Hunter (3 ed) 269 define "concurrent control" as a system where a national court is involved in a question of jurisdiction before the tribunal has made a final award on the merits.

205 Redfern & Hunter (3 ed) 269. Reiner "Die internationale Schiedsgerichtsbarkeit nach österreichischem und französischem Recht" 1986 *ZRVgl* 201 was of the view that at least 90% of such applications were motivated by delaying tactics.

206 Gaillard 165.

207 Berger 352.

this jurisdiction *after* submitting its defence, violates the principle of *venire contra factum proprium*.[208]

One should also ask why Kompetenz-Kompetenz of the tribunal, *without* the possibility of any court scrutiny, is still excluded. In the above quoted decisions, the courts ruled that arbitrators are not entitled to rule finally on their own competence, "...because that they cannot do".[209] On reflection, it is obvious that there can be no attempt to exclude totally final court control. Why is that so? It may be a lack of confidence in the tribunal, which may be composed of non-lawyers or non-experts regarding arbitration procedure. It may be a lack of confidence that this tribunal is able to come to a correct decision. It then seems that the issue of jurisdiction is too complicated to be dealt with in the final instance by anybody else but judges. Ultimately, however, court support for the arbitration process is subject to essential judicial supervision. Jurisdiction is one of those areas where judicial supervision is deemed essential to ensure confidence in the arbitral process itself, rather than in the particular tribunal.

The South African Law Commission endeavours to justify wider judicial control on jurisdictional issues prior to the final award in the domestic context by stating that this facilitates procedural efficiency in certain narrowly defined circumstances.[210] This does not imply that arbitrators are less competent to decide jurisdictional issues in a domestic context. Nor was the Law Commission motivated by concerns about consumer protection.[211]

It must be conceded that a wrong decision on the question of the tribunal's jurisdiction can lead to serious consequences for the parties. Every subsequent decision by the tribunal, which erroneously claims to be competent to rule on the merits of the case, may lead to a totally different result to the one a court would have reached. First, the tribunal normally has a wider discretion than the court regarding the applicable procedure, as the court is subject to its national law of civil procedure. This difference will be reflected in the way the hearings will be held and evidence admitted. Further, the tribunal could be in a position where it is not obliged to come to a finding on the merits on a strict application of substantive law but may be authorised to act as *amiable compositeur*.[212] This could result in an award than differs significantly from the judgment of a national court in the same dispute. A tribunal's award,

---

208 Berger 353. Compare article 4 of the Model Law (equivalent to § 1027 ZPO) regarding waiver of the right to object.

209 Devlin J in *Christopher Brown Ltd v Genossenschaft Österreichischer Waldbesitzer Holzwirtschaftbetriebe Registrierte Genossenschaft mit beschränkter Haftung* [1953] 2 All ER 1039 at 1042.

210 See para III.3.3 above regarding s 27 of the Draft Arbitration Bill.

211 This is provided for by s 58 of the Draft Bill.

unlike a court judgment is also not subject to review on the merits. Nevertheless, as stated earlier, if the tribunal or a state court denies the jurisdiction of the arbitral tribunal in an international arbitration, the claimant may be left only with the opportunity to sue in the "home" country of the respondent, which may be totally impractical for the claimant.[213]

212 Compare article 28(3) of the Model Law.
213 Compare Redfern & Hunter (3 ed) 285.

IV. Interim measures of protection

Efficient arbitral proceedings or, alternatively, their possible inefficiency caused by extensive court interruptions during the conduct of the arbitration are closely connected with the issue of interim measures. This is because here the connection between the arbitral tribunal and the court and the tribunal's dependence on the court can be characterised as more intense than elsewhere, and is indeed sometimes crucial for the efficacy of the arbitration process. Part of the reason is that the courts will often have to deal with the actual merits of the dispute in more detail, compared to the situation regarding Kompetenz-Kompetenz where the court may have to touch on one aspect only. As will be discussed in more detail below, a decision on the question of interim measures can in effect be a decision on the merits of the case.[214]

Furthermore, where the tribunal is unable to order the interim measures or in a situation where one party applies to the court directly, the tribunal has to cope with a second authority, which interferes with the arbitration. It is obvious that this may initiate severe problems in terms of keeping the duration of the arbitration within a reasonable time scale. One can therefore anticipate different approaches as to when court interference is necessary or justifiable and the situations in which it should preferably be avoided.

In the following discussion the principle of interim measures will be explained and the different approaches will be examined. In addition to a general discussion of the relevant provisions of the Model Law and the South African and German approaches to interim measures in international and domestic arbitration proceedings, the question of security for costs will be scrutinised in more detail.

1. The principle

The final and binding character of the award of an arbitral tribunal is regarded as being just as fundamental to the process as consent.[215] It follows logically from an arbitral tribunal's authority to issue a binding award that, from the inception of the proceedings, it must have

---

214 See for example *Relais Nordik v. Secunda Marine Services Limited* 24 Federal Trial Reporter 256, a judgment on 19 February 1988 by the Federal Court of Canada, Trial Division, from CLOUT, case 182: The Court dismissed the application for an injunction on the grounds that the applicant had not made out a strong *prima facie* case for an injunction. Also, damages would compensate any loss suffered by the applicant. Moreover, the court held that the remedy sought was not an interim measure within article 9 of the Model Law. The applicant was seen as attempting to have the court rather than the arbitrators resolve the substance of the dispute, notwithstanding the respondent's objection pursuant to article 8 of the Model Law to the dispute being decided by the court.

215 Compare the definition of arbitration in ch 1 n 1 above.

the authority to make such orders – including interim measures – as are necessary to preserve its capacity to render a fair and effective award.[216] It is argued that derogation from that general principle, designed to preserve its capacity to render an effective award, or a suggestion that an interim measure might not be binding, but merely precatory is fundamentally incompatible with the arbitral function.[217]

Interim measures address the requirement of a party for immediate and temporary protection of rights or property pending a decision on the merits of the dispute by the arbitral tribunal. The two most common forms of interim relief are attachments and injunctions.[218] Interim measures may include, for example, an order which requires corrective measures in environmental disputes, an order directing advance payment of part of a claim to alleviate hardship, a confidentiality order for the protection of trade secrets and an order directing the appointment of a receiver or liquidator.[219]

The term "interim measures" does not however include measures, which may also be urgent and in a certain sense provisional, but which are procedural as far as their function is concerned. Examples include orders to the parties to clarify their statements of case or to produce documentary evidence held by them or for the appointment of an expert by the tribunal.[220] In general, the nature of genuine interim measures is that their function is not directly connected with the resolution of the dispute, but is either to stabilise the private-law relations between the parties or to prepare for and assure the effective execution of the award.[221] The drawing of a clear distinction between interim relief and procedural rulings is however not always easy. An order for the preservation of evidence can be classified as interim relief, but an order for the production of evidence appears to be more in the nature of a procedural ruling. The distinction can be important, for instance, because under the current South African arbitration law the court has the common-law power to review, prior to the award, a procedural ruling by the arbitral tribunal in exceptional circumstances.[222]

---

216 Donovan "Powers of the Arbitrators to Issue Procedural Orders, Including Interim Measures of Protection, and the Obligation of Parties to Abide by Such Orders" (1999) 10(1) *ICC ICArb Bull* 57 at 65.

217 Donovan 68.

218 See Wagoner "Interim Relief in International Arbitration" (1996) 62 *Arbitration* 131. Attachment may be sought to prevent the dissipation of assets that are the subject of the arbitration. An injuunction may be requested to protect property rights at issue in an arbitration.

219 Wagoner 131; Redfern & Hunter (3 ed) 345-346.

220 Wagoner 131 n 1.

221 Stalev "Interim Measures in the Context of Arbitration" 1994 ICCA Congress Series No. 6, 104.

222 See n 32 above.

In the context of arbitration, one must distinguish between interim measures ordered by a court as a result of a request by a party or the tribunal and interim measures ordered by the tribunal itself. The distinction is important for at least two reasons:

First, the scope of the power of the tribunal, irrespective of any limitations in the applicable law or arbitration agreement, is restricted to those measures which have an *inter partes* effect. The tribunal's interim measures are restricted to those which the parties themselves could have achieved by agreement, thus excluding any measures affecting the rights of third parties.[223]

Secondly, in cases where a party may choose between the court and the tribunal as the authority to order the interim measure required, it must be carefully considered which will be the most effective and expeditious forum in the particular circumstances. The tribunal should nevertheless be satisfied that it does have jurisdiction[224] as the basis and extent of its competence to grant interim measures may be controversial.[225] One can distinguish in this regard between a positive and a negative approach.

Under the negative approach express provisions of the applicable law give exclusive competence to the courts to order interim measures of protection and at least by implication proclaim interim measures ordered by the arbitral tribunal to be excluded. The current South African legislation provides an example of a qualified negative approach.[226]

In many other jurisdictions the positive approach towards the power of the arbitral tribunal to grant interim measures prevails. There is an express provision, for example, in article 17 of the UNCITRAL Model Law, which gives the tribunal the non-mandatory power to order interim measures of protection, that is on a "contract-out" basis.[227] The alternative *positive* approach is to allow the parties by agreement to confer on the arbitral tribunal the power to order interim measures of protection, that is on a "contract-in" basis.[228] This agreement could

---

223 Berger 338; Redfern & Hunter (3 ed) 347. Interim measures in modern arbitration practice may however sometimes indirectly affect the rights of third parties. See the text at n 230 below.

224 See Lew "Commentary on Interim and Conservatory Measures in ICC Arbitration Cases" (2000) 11(1) *ICC ICArb Bull* 23 at 25, who states that the tribunal will have to look in the parties' agreement, the chosen rules and the applicable law. The provisions of the agreement and rules are subject to mandatory provisions of the appllicable law.

225 Compare the text to n 216 above, from which it appears that the tribunal logically does have inherent jurisdiction to grant such measures, subject to restrictions in the applicable law and the arbitration agreement.

226 See ch 2 para IV.3 below. Redfern & Hunter (3 ed) 346 cite the Greek Code of Civil Procedure as an example of the negative approach. The Greek Code article 889 prohibits an arbitral tribunal from granting interim measures.

227 See ch 2 para IV.2 below.

228 To this extent, the current South African approach may also be calssified as a positive approach.

be made explicitly in the arbitration agreement or implicitly by submitting the dispute to the rules of an arbitral institution, which give the tribunal such powers.[229]

However, the general rule is that an arbitral tribunal may only issue mandatory orders directed to the parties. If the orders go beyond that ambit, they must be issued by the competent national or local court.[230] A classic example is where a claimant wishes to obtain an order to freeze sums held in a bank account, of which the respondent is the account holder. Here, the interim measures are sought against the bank at which the account is held.

National arbitration statutes do not in general provide any details on the preconditions with which the tribunal has to comply when ordering provisional relief even though interim measures of protection have the potential to "cut deep" and thereby affect the rights of the parties to a significant extent.[231] It is nevertheless generally agreed that a basic and indispensable prerequisite for an interim measure of protection by the arbitral tribunal is a request by one party to the tribunal and the *prima facie* competence of the tribunal to hear the underlying dispute.[232] This is so because a provisional measure ordered by the tribunal without a prior request from one of the parties would violate the principle of party autonomy, which governs the proceedings and forms an inherent limitation on the tribunal's procedural powers and discretion.[233]

Furthermore, the more a requested measure affects the rights of the party concerned, the greater the diligence required from the tribunal in ascertaining its competence to grant the measure. This requirement is based on the principle of reasonable conduct and due process, meaning that a possible injury caused by the requested interim measure must not be out of proportion to the advantage which the claimant hopes to derive from it. The severity and urgency of the requested measure should also be a yardstick for the tribunal's decision whether or not to schedule a hearing prior to ordering the interim measure. The

---

229 Stalev 108. Compare Reymond "Security for Costs in International Arbitration" (1994) 110 *LQR* 501 at 504, regarding the position under the 1988 edition of the ICC Rules. Although the rules did not confer the power to grant interim measures on the tribunal expressly, in several ICC arbitrations, it was nevertheless assumed that the tribunal did have such power, by virtue of the provision in article 26, which required the tribunal to make every effort to ensure that the award is enforceable at law.

230 Redfern & Hunter (3 ed) 347.

231 Berger 335.

232 In this context, the case law of the Iran-US Claims Tribunal is of particular significance, as described by Wühler "Zur Bedeutung des Iran-United States Claims Tribunal für die Rechtsfortbildung" from *Rechtsfortbildung durch Internationale Schiedsgerichtsbarkeit* 103.

233 Berger 335.

right to be heard must be weighed up against the requirement of a measure, which may only be effective if it is ordered without advance warning to the affected party.[234]

One commentator has said that a survey of trends in ICC arbitrations has indicated that there are mainly three requirements which must be met before an arbitral tribunal will grant interim measures. First, the tribunal must avoid pre-judging the merits of the case, although the applicant should be able to make out a *prima facie* case on the merits. Secondly, the matter must be urgent: there is no need to grant an interim measure if the relief requested can await the final award. Thirdly, the applicant will have to show irreparable or at least substantial harm if the interim measure is not granted.[235]

As mentioned earlier, it is not unusual in arbitral proceedings, for an interim measure to be ordered by a court. In several jurisdictions it is expressly provided that a request to a court to order interim measures is not incompatible with the existence of an arbitration agreement covering the dispute.[236] The parties, by having entered an arbitration agreement, have not renounced access to court protection, in cases where, by the very urgency of the situation, effective protection otherwise to be obtained from the tribunal would not be available.[237] Furthermore, in some jurisdictions it is the only way for a party to protect its interests, because in these jurisdictions the arbitral tribunal does not have the power to order interim measures at all.

Regarding the prerequisites for an order by a court or the tribunal, there are also different approaches towards granting interim measures in different jurisdictions. France for example, developed a means of interim protection that did not require the element of urgency at all. The so-called *référé-provision* could be ordered in any case where the claim for interim relief was not seriously objectionable. But, in a judgment in 1990 the French *Cour de Cassation* has made clear that the use of this doctrine by the court in arbitration proceedings in effect amounted to disregarding the arbitration agreement if the requirement of urgency was abandoned.[238]

---

234 Berger 337. See the text below at n 273 regarding the *Anton Piller* order, which can be used under South African law for the preservation of evidence.

235 Lew (2000) 11(1) *ICC ICArb Bull* 27-28.

236 See the UNCITRAL Model Law article 9. In England the House of Lords came to this conclusion independently of legislation. When properly used, interim measures from the court reinforce the arbitration agreement, the tribunal's procedural powers and the award and are not intended to bypass them: See *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] 1All ER 664 (HL) 688e-g per Lord Mustill.

237 E.g. if the tribunal has not yet been appointed.

238 See Schlosser (1992) 8 *Arbitration International* 194 citing 1990 *Revue de l' arbitrage* 635.

The request for interim measures, either to a court or to a tribunal, may be abused by a party in order to delay proceedings. Here one must also bear in mind the opportunity which the opponent may have, depending on the circumstances, to appeal against the order, particularly if the tribunal does not proceed with the arbitration while the issue regarding interim measures is dealt with by the court. Therefore, both the tribunal and the court have to take into account that the request for an order for interim measures can often be intended to delay the arbitration proceedings or at least have that effect.[239] One may argue that a request for an interim measure may often come from the claimant, who initiated the arbitration in the first place and who will not be the one to delay the arbitration proceedings. However, the claimant may during the course of the arbitration face a substantial counter-claim by its opponent, which it has to take seriously and which puts it in the position of a respondent. This development could cause the claimant to try to delay pursuing its claim now that it seeks to avoid liability itself.[240]

Moreover, the respondent in arbitration proceedings may request the tribunal or the court to order security for costs. The application may be brought because of genuine concerns about the claimant's financial stability or purely as a delaying tactic.

Both these scenarios illustrate the difficulty of distinguishing in practice between genuine applications intended to protect legitimate rights and the abuse of opportunities provided by the applicable law or rules for interim measures as a delaying tactic. Different approaches in national arbitration statutes towards interim measures from the courts and the tribunal must be evaluated against this background.

2. The UNCITRAL Model Law

In this section the power of the courts and arbitral tribunals under the Model Law to grant interim measures will be analysed in more detail, also with reference to the interaction between the relevant provisions of the Model Law. Furthermore, the important topic of the enforcement of orders for interim measures by the tribunal will be scrutinised.

---

239 In *Delphi Petroleum Inc. v Derin Shipping and Training Ltd* (3 December 1993) the Federal Court of Canada, Trial Division (CLOUT case 68) noted that it had a mandate to render assistance in matters of evidence in arbitration but that it should avoid taking measures conducive to dilatory tactics by the parties.

240 Harris (1992) 9(2) *J of Int Arb* 87.

Article 17 of the UNCITRAL Model Law deals with the power of the arbitral tribunal to order interim measures as follows:

> "Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute. The arbitral tribunal may require any party to provide appropriate security in connection with such measure."

The UNCITRAL Model Law takes the positive approach, referred to above,[241] towards interim measures, by granting the arbitral tribunal the power to order interim measures of protection unless the parties agree that the tribunal should not have this power. Article 17 is related to but also distinct from article 9, which deals with the granting of interim measures by the court. Article 9 provides that it is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for the court to grant such a measure. Both articles 9 and 17 were based on article 26 of the UNCITRAL Arbitration Rules.[242] However, article 9 of the Model law goes further than article 26(3) of the UNCITRAL Arbitration Rules. The latter states merely that the *request* to a court for interim measures is not incompatible with the arbitration agreement.[243] Article 9 adds that the *granting* of such measure by the court is also not incompatible with the arbitration agreement. The addition is logical in that article 9 is also addressed to the court and not merely to the parties and the tribunal.[244]

Article 9 is broader than article 17 in that the latter deals only with the power to take interim measures relating to the subject-matter of the dispute and does not address the other types of measures commonly available nor the enforcement of any measures ordered.[245] However, article 9 does not actually grant any authority to the court to order interim measures but only states the principle that certain orders for interim relief by the court, if permitted under the applicable national law, are not inconsistent with the arbitration agreement.[246]

---

241 See n 227 above.

242 See Holtzmann & Neuhaus 330 and 531. See ch 1 n 56 regarding these rules.

243 It is generally recognised that an arbitration agreement by no means excludes protective provisional orders rendered by a court. Some American courts have nevertheless been reluctant to do so, arguing that the mandatory referral to arbitration pursuant to a valid arbitration agreement (such as is provided for by Article II the 1958 New York Convention) prevents them from ordering protective measures, because the approach to the court for such measures bypasses the arbitration agreement. See Schlosser 194 and compare n 236 above regarding the English *Channel Tunnel* case.

244 Holtzmann & Neuhaus 332.

245 Holtzmann & Neuhaus 333.

246 Holtzmann & Neuhaus 530.

From the parties' perspective article 9 of the Model Law is important where the tribunal is not yet appointed or for other reasons cannot grant effective interim measures in the circumstances. Protective measures ordered by a court normally presuppose a situation of urgency. The court's power therefore derives from the fact that the parties, by having entered into an arbitration agreement, have not renounced access to court protection in cases where, by the urgency of the situation, effective interim protection would not otherwise be available from the arbitral tribunal.[247] Here, as is the justification for interim measures generally, the court should order interim measures when necessary to preserve the capacity of the arbitral tribunal to render an effective award. In this sense the court should support, not substitute the tribunal's authority.[248]

Dogmatically, the need for the tribunal itself to be able to grant interim measures can be justified as follows:

> "The function of [an arbitral] tribunal, once an issue has been brought to it, is to take the necessary steps according to law towards reaching a decision in accordance with the principle of the equality of the parties. This presupposes that the issue brought to it, once committed to the [tribunal], must as far as possible be preserved in that form, free from interference by unilateral action of a party, until the determination made by the [tribunal]. It means also that the principle of equality cannot be disturbed by the superior force available to one party, wherewith to impair or interfere with the subject matter until determination.
>
> It is thus inherent in the authority of a tribunal that ancillary to the power of judgement, it must have the power to issue incidental orders to ensure that the subject matter of the suit is preserved intact until judgement."[249]

Regarding the scope of power granted to the tribunal by article 17 of the Model Law regarding interim measures, it was questioned during the discussions of UNCITRAL's Working Group, what the scope of this power should be and whether it should be more restricted. Examples mentioned which possibly fell within the power included measures to preserve goods such as depositing them with a third person, opening bank letters of credit or preserving evidence until a later stage of the proceedings. It was ultimately agreed that the wording, as quoted above, of "such interim measure of protection as the arbitral tribunal may

---

247 Schlosser 195.

248 Donovan 69.

249 *Bosnia and Herzegovina v Yugoslavia* (1993 ICJ 375 at 376), which concerned the application of the Convention on the Prevention and Punishment of the Crime of Genocide.

consider necessary in respect of the subject-matter of the dispute" was preferable to a more restrictive or specific description.[250]

As stated above,[251] it is generally understood that it follows from party autonomy that one of the parties must request the order for an interim measure and the tribunal cannot take the initiative itself. Article 17 recognises this, and states it explicitly. In this regard the wording of article 17 is clearer than that of article 26 of the UNCITRAL Arbitration Rules. Article 17 empowers the tribunal at the request of a party to order any party to take certain interim measures. Article 26(1) of the Rules states that at the request of either party "the tribunal may take any interim measures it deems necessary" in respect of the subject-matter of the dispute. Under the Model Law the tribunal itself cannot take steps to attach or preserve goods by arranging for packers and storage. It must order the parties to do so. However, because the tribunal requires the cooperation of the parties for interim measures it orders to be effective, the change would seem to have little practical significance.[252]

One may nevertheless ask how specific the request for interim relief should be and to what extent, if at all, the precise form of interim relief should be left in the discretion of the tribunal? It is theoretically possible that party could make a general request that the tribunal should order "such interim measures as the tribunal deems necessary", so that the party will be able to enforce a future award in its favour. Alternatively, the party could request a very specific order, for example, the completion of a certain phase of a construction to prevent irreparable harm, pending an award regarding the dispute.

In the case of a general request, where it is for the arbitral tribunal to choose the necessary order itself, one could argue that this at the end of the day is a measure substantially initiated by the tribunal and not by a party, especially because the scope of the tribunal's order may differ vastly from the measure the party had in mind.

But if it were to be necessary for the party to submit a very detailed request for a very specific order, the arbitral tribunal may come to the conclusion that the measure, which the party applied for, is inappropriate. The tribunal will therefore not render an order at all, unless the party requests a measure which the tribunal considers as necessary and appropriate in the circumstances. Either way it would amount to a measure deemed by the tribunal to be necessary. This does not detract from the requirement that the process must be initiated by

---

250 Holtzmann & Neuhaus 530-531.
251 See n 232 above.
252 Holtzmann & Neuhaus 532-533.

a request from a party, not by the tribunal of its own motion. In practice, the request will have to be properly motivated and supported by argument and the other party will have the right to respond before the request is granted. The applicant can also ask for "alternative relief" besides the specified relief to allow some flexibility during argument. The tribunal will also have to consider the effect of the order requested on the opposing party, as the party which will have to comply with it.

This leads on to a very important issue regarding interim measures, namely the enforceability of the order, which will have to be carefully considered both by the applicant and the tribunal. The UNCITRAL Secretariat during the drafting of the Model Law drafted a sentence for inclusion in what became article 17 to provide that the arbitral tribunal could request a court to render executory assistance. However, the UNCITRAL Working Group subsequently decided not to include this provision because it dealt in an incomplete manner with a question of national procedural law and court competence and would probably be unacceptable to many states.[253] Further complications could arise in a situation where the court is not ready to support the tribunal's view on appropriate interim measures and to execute its order.[254] Thus, the question of execution of interim measures was left to the provisions of national law.

Regarding enforcement of interim measures, Stalev argues that since the arbitral tribunal is empowered by the Model Law to order interim measures, it is logical to assume that they could be enforced *via exequatur* of the court, like the award on the merits of the dispute.[255] One may agree that the tribunal's measure may be enforced *via exequatur*. It is however questionable whether the enforcement of the order for interim measures is based on exactly the same principle as the enforcement of an award on the merits of the case, which is provided for by express provisions of most national statutes, including those enacted to give effect to the New York Convention.

Especially in the light of the need for cross-border enforcement, the enforcement of interim measures under the New York Convention is not without difficulties. This is because the ruling of the tribunal is rendered as an interim measure and not as an award. The order for interim measures by the tribunal is not final. It may happen that the order is subsequently withdrawn or modified by the tribunal in the light of changed circumstances. A prerequisite

253 Holtzmann & Neuhaus 531 citing UN doc A/CN9/245 quoted in Holtzmann & Neuhaus at 539-540. Compare the text below at n 282 regarding the South African response to article 17.

254 Compare the UNCITRAL Commission's report (UN doc A/40/17) paras 168-169, quoted in Holtzmann & Neuhaus 547, where the Commission decided not to incorporate a solution to possible conflicts between interim measures directed by the court and those directed by the tribunal.

for enforcement under the New York Convention is that the tribunal's decision is final and not subject to any appeal.[256] This prerequisite can hardly be met with an interim measure, since the tribunal reserves the right for itself to change the interim order. And if one imagines a situation where the tribunal has withdrawn the earlier order, it may be difficult for the party who complied with the order in the first place, to recover what it paid.

However, if a party fails to comply with the order of an interim measure of protection, the arbitral tribunal (under article 17) could possibly request the assistance of the relevant national court, if sanctioned by the national law of the state when adopting the Model Law. (Under article 9 it is the party itself which is entitled to request assistance from the court.) If the court, by applying its own domestic laws, comes to the conclusion that the conditions for the relevant measure are present, it may order the interim measures of protection requested by the arbitral tribunal.

These problems illustrate the importance in the interests of effective arbitration of the party requiring interim measures making the right initial choice between approaching the tribunal under article 17 or the court under article 9.

The lack of definite court enforcement of the tribunal's order does not necessarily mean that the interim measures of protection ordered by a tribunal are useless or have no obligatory force, so that non-compliance is without any sanction. First, the same sanctions as in case of breach of contract could be applied to non-compliance with the order for interim measures, namely damages. The parties may even empower the tribunal by agreement to impose penalties or punitive damages in order to compel the non-complying party to obey the interim measure of protection. Furthermore, the fear that the tribunal when rendering its award on the merits may look unfavourably on the party that does not comply with the order may also be a strong motivation for a party to fulfil voluntarily the obligation imposed by the arbitral tribunal.[257] An interesting example of possible contractual provisions for sanctions regarding interim measures may be found in article 25(2) of the LCIA Rules on security for costs. The concluding portion of the rule provides:

> "In the event that a claiming or counter-claiming party does not comply with any order to provide security, the Arbitral Tribunal may stay the parties' claims or counterclaims or dismiss them in an award."

---

255 Stalev 106.

256 Compare Article V((1)(e) of the New York Convention and the South African approach discussed in para subsection IV.3.1.2 below.

First, where the order for security for costs is directed against a claimant, who in the majority of cases will be anxious to proceed with the arbitration, the tribunal's direction that it will stay the hearing on the claim pending compliance with the order for security, will effectively encourage such compliance. However, where the claimant is for tactical reasons reluctant to proceed, the staying of its claim may suit it very well, thereby undermining the goal of effective arbitration.

It is nevertheless beyond doubt that the threat to a party of having its claims or counterclaims dismissed is a very strong motivation to comply with the order of the arbitral tribunal on a voluntary basis. This sanction places the tribunal in a stronger position with a better opportunity to enforce its authority. However, one can also argue that to disregard the claims or counterclaims as a sanction against a non-complying party would therefore lead to an award, which disregards the merits of the dispute. Beside doubts about the soundness of this approach in legal theory,[258] it can also be questioned whether the dismissal of claims or counterclaims, not on the merits, but as a sanction for default, will necessarily be upheld by a national court which is requested to recognise the award. Even where the parties have agreed to this sanction by agreeing to use the LCIA Rules, it should only be imposed by the tribunal at the applicant's specific request and after considering alternative sanctions and the likely effect of the sanction on the recognition or enforceability[259] of the award at the probable place where recognition or enforcement may be required.

3. The South African approach

As previously pointed out, from a party's perspective, the effectiveness of the arbitral proceedings may ultimately depend on having taken the correct decision as to which authority to approach for interim measures during those proceedings, namely the court or the tribunal. On the one hand, the order of the tribunal may be rendered in a shorter period

---

257 Stalev 110.

258 In effect, the tribunal abandons its function as a fact-finder and decision-maker on the merits by using this power. Notwithstanding the parties' agreement to use the LCIA Rules, one may doubt that it was truly the parties' desire and aim, when they entered the arbitration agreement, to be denied an arbitration hearing and an award, which is based on the merits, because of a party's non-compliance with an order for interim relief. In the somewhat analogous case of a party failing to attend the hearing after due notice, the tribunal must still base its award on the available evidence and its findings on the merits of the dispute.

259 Recognition of an award,as opposed to enforcement, is usually sought by a successful respondent in an arbitration, which has had the claim against it dismissed. It is possible that where the claim is dismissed under article 25.2 of the LCIA Rules, but the counterclaim granted, the original claimant (respondent regarding the counterclaim) may resist enforcement of the counterclaim on the ground of the alleged lack of due process in the arbitral proceedings through the dismissal of the claim, without the tribunal considering its merits.

of time and probably, because of the greater informality of the procedure, with less expense. On the other hand, if problems with enforcement are anticipated or the element of surprise is required for the success of the measure,[260] the party requiring interim relief would be well advised to apply to court.

Under the current South African legislation the arbitral tribunal lacks the powers to order interim measures, comparable with the powers which the tribunal enjoys under article 17 of the Model Law, unless these powers are conferred on the tribunal by the agreement of the parties.[261] However, under section 21 of the 1965 Act, the courts have the power to order "an interim interdict or similar relief", to secure the amount in dispute and to order security for costs in arbitration proceedings to the same extent that they could have granted equivalent relief in court proceedings.[262]

In this section the new approach proposed by the Law Commission will be discussed. The first part of the discussion will deal with interim measures in general followed by a separate discussion of security for costs. Under the proposed new approach it is necessary to distinguish between measures which can be ordered by the arbitral tribunal and those which can be ordered by the court, as well as between domestic and international arbitration. The discussion commences with interim measures, which can be ordered by the tribunal in the context of domestic arbitration.

3.1. Interim measures ordered by the tribunal

3.1.1 Domestic arbitration

Unlike section 14 of the 1965 Act, which confers no general power on the arbitral tribunal, section 29 of the Law Commission's Draft Arbitration Bill for domestic arbitration commences with a general power: "Unless the parties otherwise agree, the tribunal may conduct the arbitration in such manner as it deems fit". This is one of the provisions intended to give effect to one of the objectives of a modern arbitration statute, namely to ensure that the arbitral tribunal has adequate powers to proceed with the arbitration and complete it without avoidable delay, particularly where the parties cannot agree on the procedure or where one is failing or refusing to cooperate.[263] The general power, as well as the tribunal's specific powers, including those dealing with interim measures discussed below, is subject to the

---

260 See the discussion of *Anton Piller* orders below.

261 Butler (1994) 27 *CILSA* 151, relying on the fact that the list of powers of the arbitrator in s 14(1) of the Arbitration Act 42 of 1965 makes no reference to interim measures. See also *Petz Products (Pty) Ltd v Commercial Elrctrical Contractors (Pty) Ltd* 1990 4 SA 196 (C) 202H, which dealt with security for costs.

262 S 21(1)(a), (f) and (g).

tribunal's general duty. This general duty is twofold. The tribunal must observe the requirements of due process and conduct the arbitration using procedures which avoid unnecessary delay and expense.[264]

Section 29(2) of the Draft Arbitration Bill contains the specific powers of the tribunal,divided into two groups, namely those which can be exercised by the tribunal on its own initiative and those which can only be exercised by the tribunal on the application of a party. This latter group contains two powers relevant to interim measures. All the specific powers apply unless the parties otherwise agree. Section 29(2)(b)(iii) empowers the tribunal on the application of a party to order any party to take such interim measures as the tribunal may consider necessary for the protection of the subject matter of the dispute. This power is comparable to article 17 of the Model Law, discussed above, and to the power the tribunal enjoys under the Draft International Arbitration Bill.[265] In terms of section 29(2)(b)(iv) the tribunal may also on the application of a party order the party to preserve for purposes of the arbitral proceedings any evidence which is in that party's possession or under that party's control.[266]

Although the powers the tribunal would enjoy under the proposed legislation are obviously broader than its powers under the current law, its powers under section 29 are narrower than those conferred on the court by section 40 of the Draft Bill,[267] discussed in below.

Although the tribunal may only exercise its discretionary power to grant interim measures on the application of a party, the tribunal in exercising that discretion, cannot be forced in a direction where the applicant is in effect taking control of the arbitration. If the tribunal regards an application for interim measures to be without merit and merely a tactical manoeuvre, the application can be refused. More difficult is the question as to whether the tribunal is able to refuse an order in cases where the need for an order for interim measures is beyond doubt, but where it is also clear (at least to the tribunal), that the court is in a better position to grant effective relief.

On the one hand the tribunal's power is clearly discretionary and must be exercised with regard to the need for effective arbitration.[268] On the other hand, an indication that the party

---

263 SA Law Commission Report *Domestic Arbitration* 2-3.

264 The general duty is imposed by s 28(1) of the Draft Bill. S 28(2) expressly requires the tribunal to comply with its general duty in s 28(1) when exercising its powers; Report *Domestic Arbitration* 60.

265 Report *Domestic Arbitration* 62 and para IV.3.1.2 below.

266 This power is based on the English Arbitration Act of 1996 s 38(6); see Report *Domestic Arbitration* 62.

267 Report *Domestic Arbitration* 62.

268 See ss 29(1) and (2) and 28(1)(b) and (2) of the Draft Bill.

should rather approach the court would have to be given in such a way that the tribunal's duty to act impartially between the parties is not brought into doubt, by the tribunal creating the perception that it is assisting one party with procedural advice.[269] It would also appear that the tribunal cannot refuse an application for interim relief which is within its powers, purely because the tribunal believes that it would be more appropriate for the applicant to approach the court. In an effort to ensure that court applications under section 40 are not abused as an attempt to review the tribunal's decisions on procedural matters and interim measures where the court and tribunal have concurrent jurisdiction, section 40(2) provides that the court must not grant interim relief where the tribunal, being competent to grant the order, has already determined the matter.[270]

Forms of interim relief which have enjoyed particular attention in England in recent years are *Mareva* injunctions and *Anton Piller* orders. The former has been recognised in South Africa as an anti-dissipation interdict,[271] the purpose of which is to insure that a party will be able to give effect to certain judgments or awards against it. It has nevertheless been said that the applicant should not be free to obtain an injunction merely if it fears that the respondent's legitimate dealings will frustrate the judgment or award. If for example a *Mareva* injunction were available as general "security" for damages or debt, the remedy would operate as the counterpart of security for costs (which, unlike *Mareva* relief, protects defendants against impecunious plaintiffs).[272] An *Anton Piller* order is aimed at the preservation of evidence.[273] This can also operate as a drastic remedy with the result that an English judge has said that "the practice of the court has allowed the balance to swing too much in favour of plaintiffs and that *Anton Piller* orders have been too readily granted with insufficient safeguards for the respondents".[274] *Anton Piller* orders must be considered as a necessary and important procedural tool in common-law procedural systems, when handled by prudent parties. In the wrong hands they have also been called the "nuclear bombs" of civil procedure since a well-

---

269 See s 28(1)(a).

270 The provision was taken from the Draft International Arbitration Bill sch 1 article 9(3), which was intended to deal with competing applications to the court and the tribunal; see SA Law Commission Report *Arbitration: An International Arbitration Act for South Africa* 63.

271 See *Knox D'Arcy Ltd v Jamieson* 1994 3 SA 700 (W) but compare the decision on appeal 1996 4 SA 348 (A) 371I-372C.

272 Compare *Normid Housing Association Ltd v Ralphs* (No. 2) [1989] 1 Lloyd's Rep 274 (CA).

273 It derived its name from *Anton Piller KG v Manufacturing Processes Ltd* [1976] 1 All ER 779 (CA).

274 Scott J in *Columbia Pictures Industries Inc. v Robinson* [1987] Ch 38 at 76. For the requirements currently imposed by the South African courts both for *Anton Piller* orders and anti-dissipation interdicts see *Pohlman v Van Schalkwyk* 20001 1 SA 690 (E). The court has to be especially alert to the danger of abuse in an application for this relief. Because the proceedings are one-sided and the principle of *audi alteram partem* is set aside (see below), the court has an inquisitorial and paternalistic role. See Andrews *Principles of Civil Procedure* (1994) 160.

presented application for such an order to a court will be difficult to turn down and it follows that "the practitioner and not the judge has his finger on the weapon's detonator".[275]

Of particular importance in the context of arbitration proceedings is the fact that anti-dissipation orders and *Anton Piller* orders are usually granted *ex parte*, that is without notice of the proceedings being given to the other party until the application has been heard.[276] As stated above, the Commission has recommended in section 29(2)(b)(iv) of its Draft Bill that the tribunal should, on application, be able to order a party to preserve evidence. The Commission was however firmly of the view that this power should not be exercised on an *ex parte* basis, in view of the tribunal's duty to avoid unilateral communications as part of its duty of impartiality.[277] A party should therefore only apply to the tribunal under this provision where it is reasonably sure that the other party will comply voluntarily with an order made by the tribunal.

The Law Commission, contrary to its recommendations on article 17 of the Model Law for international arbitration,[278] has not recommended specific provisions to facilitate court enforcement of interim measures ordered by the tribunal. This may be because it is easier for a party to approach the court in domestic arbitration. In international arbitration, the court from which interim measures are sought is not necessarily the court at the seat of the arbitration and could be in a different country.[279] Be that as it may, parties may have to consider incorporating contractual sanctions in their arbitration agreement to facilitate compliance.[280]

3.1.2. International arbitration proceedings

The Law Commission has recommended that South Africa should adopt article 17 of the UNCITRAL Model Law for international commercial arbitrations, to enable the arbitral tribunal to grant interim measures of protection.[281] The tribunal has no such power under the

---

275 Scott J in *Columbia Pictures Industries Inc. v Robinson* [1987] Ch. 38 at 75. See also the concerns of Froneman J in *Pohlman v Van Schalkwyk* 20001 1 SA 690 (E) at 698-699.

276 See the DAC (Saville) Report of 1996 para 201; Report *Domestic Arbitration* 62. Combined with the effects such an order has on the proceedings and its economic effect, one should also not "underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events" (*John v Rees* [1970] Ch. 345, 402).

277 Report *Domestic Arbitration* 62. See also the DAC (Saville) Report of 1996 para 201.

278 See para IV.3.1.2 below.

279 See the UNCITRAL Model Law article 1(2), which provides that article 9, dealing with interim measures by the court, is one of those provisions of the Model Law which apply to an arbitration being held in another state.

280 See the discussion in para IV.2 above.

281 SA Law Commission Report *Arbitration: An International Arbitration Act for South Africa* 74-77.

current arbitration law and the introduction of such a provision based on the Model Law and on recent trends all over the world is an important and necessary innovation.

Special attention was paid by the Law Commission to the matter of enforcement of orders for interim measures granted by the tribunal. As discussed above,[282] article 17 of the Model Law does not provide measures for the enforcement of orders made by an arbitral tribunal regarding interim measures. The Commission's Report refers to other jurisdictions, which provided such measures to enable the tribunal's order to be enforced as an award.[283] The discussion concluded with the recommendation that the South African version of article 17 of the UNCITRAL Model Law should have as an additional mandatory provision:

> "(3) The provisions of articles 31, 35 and 36 shall apply to an order under paragraphs (1) and (2) of this article as if such order were an award."[284]

The result of applying article 31 as well as article 35 and 36 is that the order must comply with the formal requirements of an award as stated in article 31 and must especially contain the reasons for the order in terms of article 31(2). The argument set out above[285] that a party will tend to comply with the tribunal's orders in any event, because it would otherwise fear that its non-compliance could influence the tribunal against it when making the final award was obviously not strong enough for the Commission. The Commission expressly stated that the intention was not to turn every interim order into an award. The effect of article 17(3) is that an order for interim measures by the tribunal will be recognised and enforced in South Africa and by the South African courts as if it were an award, subject to the defences in article 36.[286] The intention is not however to make the order an award, but to facilitate enforcement outside South Africa. It will nevertheless no longer be necessary for a party to consider using an application to court for interim measures under article 9 for this purpose.[287]

This modification to article 17 undoubtedly increases the effectiveness of the tribunal's order, keeping in mind the relative speed of the possible enforcement of the order by the courts as an award. Additionally, as articles 35 and 36 have ex-territorial effect, interim measures ordered abroad will be enforceable in this way in South Africa. On the other hand this advance may be partially offset by the requirements the order has to meet under the

---

282 See para IV.2 above.

283 Report *Arbitration: An International Arbitration Act for South Africa* 74. Different jurisdictions chose different ways of making provision for the order to be enforced as an award. Under Scottish law the provision applies automatically, unless the parties contract out; Australia has an "opt-in" provision, whereas New Zealand, like Scotland, has an "opt-out" provision.

284 Report *Arbitration: An International Arbitration Act for South Africa* 75.

285 See para IV.2 above.

286 Report *Arbitration: An International Arbitration Act for South Africa* 75.

287 Report *Arbitration: An International Arbitration Act for South Africa* 64.

proposed article 17(3). However, the knowledge that the enforcement remedy exists certainly encourages parties to apply to the tribunal rather than the court in the first instance and thus supports expeditious and cost-effective arbitration.

3.2 The court's power to order interim measures of protection

3.2.1 International arbitration proceedings

The court's power to order interim measures of protection will change under the Draft International Arbitration Bill proposed by the Law Commission. Under the current law, section 21 of the Arbitration Act 42 of 1965 empowers the court to order interim measures generally as well as security for costs. As mentioned above, the tribunal has no such powers under the existing law.

The Law Commission recommends the adoption of article 9 of the UNCITRAL Model Law, thus confirming the principle that the request to a court for interim measures is not incompatible with the arbitration agreement. However the Commission recommended that the wording of article 9 should be expanded to deal with certain issues in more detail.[288]

First, it was felt that the court's powers under section 21 of the Arbitration Act 42 of 1965 are too wide in terms of creating opportunities for delay and interruption through court involvement.[289] The Commission was nevertheless of the view that there are powers of the court to grant interim measures of protection which are clearly desirable where the matter is urgent and there is a need for effective sanctions to ensure compliance.[290] There was no doubt that the total exclusion of the court regarding interim measures would have been wrong. To understand the range of the court's involvement, the amplified article 9 must be read with article 5, which limits the involvement of the national courts in international commercial arbitration by stating, as set out earlier, that in "matters governed by this Law, no court shall intervene except where so provided in this Law".[291] The court's powers under the common-law,[292] which are not excluded by section 3 of the Draft International Arbitration

---

288 Report *Arbitration: An International Arbitration Act for South Africa* 59-65.

289 Report *Arbitration: An International Arbitration Act for South Africa* 17 and 60.

290 Report *Arbitration: An International Arbitration Act for South Africa* 60.

291 Report *Arbitration: An International Arbitration Act for South Africa* 60. See para II above.

292 The common-law powers include the power to grant a declaratory order or an interdict to prevent an arbitration from proceeding (see Butler & Finsen 61). The Commission referred expressly to the court's power to review a procedural ruling by an arbitral tribunal while the arbitration is still in progess. (See Report *Arbitration: An International Arbitration Act for South Africa* 61which refers to *Tuesday Industries (Pty) Ltd v Condor Industries (Pty) Ltd* 1978 4 SA 379 (T), recently applied in *Badenhorst-Schnetler v Nel* 2001 3 SA 631 (C).)

Bill,[293] are therefore excluded through the wording of article 5, to the extent that they overlap with powers conferred on the court by the Model Law. Besides spelling out the powers regarding interim measures which the court may exercise in the new article 9(2), the Commission nevertheless considered it advisable to reinforce article 5 further, by adding article 9(5), which states expressly that the court has no powers to grant interim measures, other than those contained in article 9.[294]

Article 9(2) of the Law Commission's Draft Bill expressly empowers the court on application to grant an order to prevent the award being rendered ineffectual through the dissipation of assets by the other party. Article 9(2) does not refer to a court order for the preservation of evidence, which is dealt with by an addition to article 27.[295] As article 27 is concerned with court assistance for the *taking* of evidence, court assistance for the preservation of evidence should more logically be dealt with by article 9(2). This would then have the further advantage of making such assistance subject to the procedural safeguards against abuse of the court's powers in article 9(3), discussed below.

On a comparative note, section 44 of the new English Arbitration Act of 1996 also greatly reduces the scope of the court's powers of assistance, compared to the powers formerly available under section 12(6) of the Arbitration Act of 1950, on which section 21 of the South African Arbitration Act of 1965 is based.[296] Section 44(3) of the 1996 Act, for example, provides that the court may, on application, make orders in a case of urgency where the court thinks it is necessary for the purpose of preserving evidence or assets. Otherwise, as set out in section 44(4), in a case which is not urgent, the court shall only act on the application of a party with the permission of the tribunal (and on notice to the other party and the tribunal), or with the agreement in writing of the other party. These provisions are designed to prevent the abuse of *Mareva* injunctions and *Anton Piller* orders in arbitration proceedings.[297]

In amplifying article 9 of the Model Law the Law Commission identified the need to deal with the issue of competing applications for interim measures from the court and the tribunal. It

---

293 S 3 excludes the court's statutory powers under the 1965 Act in international commercial arbitrations.

294 Report *Arbitration: An International Arbitration Act for South Africa* 61. As article 9(5) deals with the court's powers to grant interim measures, it would not exclude the court's power to review a tribunal's procedural ruling during the arbitration. However, article 34 does cover the review of an award on procedural grounds. It is at least arguable that the common-law power is excluded by article 34 read with article 5.

295 Report *Arbitration: An International Arbitration Act for South Africa* 202 and 209.

296 Report Domestic Arbitration 74-75.

297 Compare the discussion in para IV.3.1.1 above.

originally suggested the addition of an article 9(3), which would have dealt with the problem as follows:[298]

> "(3) Where:
> a) a party applies to a court for an interim interdict or other interim order; and
> b) an arbitral tribunal has already ruled on the matter, the court shall treat the ruling or any finding of fact made in the course of the ruling as conclusive for purposes of the application."

The Commission reasoned that the inclusion of article 9(3), which was identical to the Scottish version of article 9(3), would serve to expedite court applications on interim measures of protection, in that the arbitral tribunal's factual findings on the issue would no longer be open to dispute. The court would be bound by those findings. It was also intended to prevent article 9 from being abused as an opportunity for disguised appeals against the arbitral tribunal's rulings on interim measures. It was furthermore intended to be used as an instrument to enforce rulings on interim measures by the arbitral tribunal, albeit indirectly.[299]

Notwithstanding these arguments in support of the above quoted wording, Professor Pieter Sanders expressed the view that article 9(3) in this form could create the opportunity for a party to take the tribunal's order for interim measures on review,[300] although this was clearly not the Commission's intention.

The Commission took heed of the criticism and misunderstanding. It therefore decided to deal with the problem of competing applications for interim measures with one party approaching the arbitral tribunal and the other the court by regulating the circumstances in which the court may exercise its power to grant interim measures in more detail.[301] The wording of article 9(3) as finally recommended is in the form of a qualified prohibition, derived from the Zimbabwean version of the Model Law.[302] The court shall not grant an order for interim measures of protection unless-

> "a) the arbitral tribunal has not yet been appointed and the matter is urgent; or

---

298 Report *Arbitration: An International Arbitration Act for South Africa* 59.

299 Report *Arbitration: An International Arbitration Act for South Africa* 62. Although the report refers to "procedural rulings", it is clear from the context that the Commission was referring to rulings by the tribunal on interim measures.
See Report *Arbitration: An International Arbitration Act for South Africa* 63, which refers to an oral comment by Prof Sanders, the doyen of Dutch arbitration lawyers, at the International Conference on the Resolution of International Trade and Investment Disputes in Africa, held in Johannesburg on 6-7 March 1997.

301 Report *Arbitration: An International Arbitration Act for South Africa* 63.

302 See the (Zimbabwe) Arbitration Act 6 of 1996 sch 1 article 9(3) and compare s 44(3)-(5) of the English Arbitration Act of 1996.

b) the tribunal is not competent to grant the order; or

c) the urgency of the matter makes it impractical to seek such an order from the arbitral tribunal".

Furthermore, the court shall not grant any such order where the tribunal, being competent to grant an order, has already determined the matter. This emphasises that the court cannot review a tribunal's findings on interim measures except as part of an application to set aside the award.

3.2.2 Domestic arbitration

The proposed general powers of the court, comparable to those in section 21 of the Arbitration Act 42 of 1965, are contained in section 40 of the Law Commission's Draft Arbitration Bill for domestic arbitration. The general powers of the court to decide on procedural matters, which are more properly left to the arbitral tribunal, have been restricted.[303] However, the court's powers to grant interim measures to ensure that the arbitral proceedings are ultimately effective have been strengthened. For example, the court may ensure that an award, which may ultimately be made is not rendered ineffective by the dissipation of assets.[304] The court also has a new power under section 40(1)(b) to order preservation of evidence and therefore to grant an *Anton Piller* order in arbitration proceedings.[305] Both these powers are subject to the safeguards imposed by section 40(2) of the Draft Bill, which are based on the Law Commission's proposed addition to article 9 of the Model Law for international arbitration.[306] In this way, the Law Commission tries to ensure that the court's power to order interim measures will be only used in support of effective arbitration and not abused as a delaying tactic.

3.3 Security for costs

Unlike the position in German law, discussed below,[307] both the current and proposed South African arbitration law make express provision for a party (usually the claimant) to be ordered to give security for the other party's costs in the arbitral proceedings, in certain

303 Report *Domestic Arbitration* 74. E.g. the court's existing power to order discovery has been omitted.

304 Report *Arbitration: An International Arbitration Act for South Africa* 75 and the Draft Bill s 40(1)(e).

305 See the text at n 277 above regarding when it may be more appropriate for a party to apply for an order for preservation of evidence from the tribunal rather than from the court.

306 Report *Arbitration: An International Arbitration Act for South Africa* 75. See the final version of article 9(3) quoted at the end of the previous section for these safeguards.

307 See para IV.4 below.

circumstances. The reasoning underlying an order for security for costs is the following. The respondent, who must often participate unwillingly in an arbitration to resist a claim made against it, could be put to considerable expense, even if its defence is successful. Although the successful party is usually awarded costs, the respondent may find itself in a position where it is unable to enforce an award ordering costs in its favour, if the unsuccessful claimant has no money or is outside the jurisdiction of the court.[308]

Security for costs in arbitration proceedings has recently been the subject of an intense debate. This debate has however been more concerned with who should have the power to make such order, rather than with the continued availability of the remedy as such. Currently, the power to order security for costs in South African arbitration law is reserved exclusively for the courts[309] unless the parties provide otherwise in their arbitration agreement.[310] However, in the light of English experience, there is grave concern about the wisdom of vesting the power in the court, particularly in the context of an international arbitration. In the following discussion, it will first be explained why it was decided to take the power away from the courts, before the scope of the proposed new power for the arbitral tribunal is discussed.

3.3.1 Security ordered by court

The crucial issue facing the Law Commission regarding security for costs in the new legislation was whether the court should retain its power to order security for costs, which it currently enjoys under section 21(a) of the Arbitration Act 42 of 1965. As pointed out above, the arbitral tribunal has no power under the current law to order a party to give security for costs unless that power is conferred on the tribunal by the agreement of the parties. Moreover, although the parties can do this under the current law, it appears that such action is not a common occurrence in practice, unless it is provided for in specific institutional rules adopted by the parties.[311] In the absence of such an agreement, the only authority able to

---

308 Mustill & Boyd 335.

309 See the Arbitration Act 42 of 1965 s 21(1)(a).

310 See *Petz Products (Pty) Ltd v Commercial Electrical Contractors (Pty) Ltd* 1990 4 SA 196 (C) at 203 H-I: "The powers conferred by the Act upon an arbitration tribunal do not include the power to order parties to furnish security for costs. It may well be that an arbitration agreement may include a submission of a dispute as to security for costs of the arbitration proceedings to the arbitration tribunal, but that was not the case here."

311 Compae Øyre "The Power of an Arbitrator to Grant Interim Relief under the Arbitration Act 1996" (1999) 65 *Arbitration* 113 at 119, who made this statement with regard to parties providing extended procedural powers in general by agreement in England prior to the 1996 Act. A set of rules widely used in construction arbitrations in South Africa, namely the Rules for the Conduct of Arbitrations (4 ed, August 2000) of the Association of Arbitrators (Southern Africa) does not empower the arbitrator to order security for costs (see rule 11).

grant such an order is the court.[312] It has been suggested that the theory behind the tribunal not being able to grant security for costs, unless the parties so agree, was that it is the duty of the tribunal to decide the substantive merits of the dispute referred to it. It is argued that the tribunal would not be performing its duty if it made an order for the provision of security, since the merits of the dispute could be determined without such an order.[313]

The issue of whether the court should be able to order security at all was highlighted by controversy surrounding the exercise of its discretion by the courts in practice. In the often cited case *of Coppée-Lavalin SA/NV v Ken-Ren Chemicals and Fertilizers Ltd (in liq)* (the *Ken-Ren* case)[314] the House of Lords in England directed the claimant in certain arbitration proceedings to provide security for costs. The arbitration was held in London between two foreign parties under the 1988 Rules of the ICC. Shortly after the terms of reference were established, Coppée applied to the Commercial Court in London seeking an order for security for costs. The application was dismissed by the Commercial Court and an appeal to the Court of Appeal was unsuccessful. [315] Contrary to the *Bank Mellat* decision,[316] the House of Lords held that it had the power to order security for costs and that such power is not contrary to the ICC procedure. It was therefore a matter of discretion whether security should be ordered or not.[317]

The 1988 ICC Rules were silent about the matter of security for costs and did not expressly confer the power to grant interim measures on the arbitral tribunal. But from article 8.5 of the former ICC Rules[318] the existence of such power could be inferred, as it provides that an application to court for interim relief should be only made in "exceptional circumstances" once the file has been transmitted to the arbitral tribunal. The wording of article 8.5 therefore

---

312 S 21(1) provides: "For the purposes of and in relation to a reference under an arbitration agreement, the court shall have the same power of making orders in respect of - (a) security for costs...as it has (in respect of) any action or matter in that court."

313 Saville "The Arbitration Act 1996 and its effect on International Arbitration in England" (1997) 63 *Arbitration* 104 at 106. Lord Saville did not subscribe to the theory, which seemed to him to entail a very narrow view of arbitration.

314 [1994] 2 All ER 449.

315 The decisions were based on the authority of *Bank Mellat v. Helleniki Techniki SA* [1984] Q.B.291. Kerr LJ in this case concluded at 309-310: "Since I consider that in an arbitration under the ICC Rules, which has no connection with this country other than that it had been agreed between foreign parties that any such arbitration was to take place here, it would be inappropriate in principle to make an order for security for costs on the ground that the claimant is ordinarily resident abroad, I would also regard it as wrong in principle to make any such order on the ground that the claimant may be unable to pay the other party's costs if the award requires him to do so."

316 See the previous footnote.

317 *Coppée-Lavalin SA/NV v Ken-Ren Chemicals and Fertilizers Ltd (in liq)* [1994] 2 All ER 449 at 461d.

318 Compare article 23.2 of the 1998 Rules

suggested that in ordinary circumstances the arbitral tribunal should be the authority to deal with this matter.[319]

The English 1950 Act section 12(6)(a) provided the same power to the High Court to order security for costs in respect of an arbitration as it has in ordinary litigation, mainly when the plaintiff is ordinarily resident out of the jurisdiction or is a nominal plaintiff.[320]

In the *Ken-Ren* case the only connection with England was that the parties or the institution under the rules of which they have contracted have chosen London as the place of arbitration, precisely because it was for them a neutral venue. From the perspective of international arbitration under the ICC Rules, one may therefore question the logic of the words of Lord Woolf in the *Ken-Ren* judgment, where he states"...if it is not appropriate to make an order in this case, then I have difficulties in envisaging any case in which it would be appropriate to make an order."[321] The change in the law from *Bank Mellat* to *Ken-Ren* was thus not merely on the question of the exercise of the judicial discretion, but the refusal to accept that ICC arbitrations fall, as a matter of principle, into a category in which an order for security for costs by the court has no application.[322]

The court's ruling, reaffirming that the court could decide whether or not the claimant in an international arbitration should provide security for costs, was widely criticised. Lord Saville said of the *Ken-Ren* decision that

> "It was viewed as confirming the widely held suspicion that the English Courts were only too ready to interfere in the arbitral process and to impose their own *dictat* on the parties, notwithstanding the agreement of those parties to arbitrate rather than litigate."[323]

It was also realised that the court ordering a foreign claimant to provide security for costs in an arbitration was not only an interference in the arbitration process but also in effect discriminating against foreigners arbitrating their claims in England.[324] The power to order security for costs in arbitrations was accordingly removed from the courts. It was also

---

319 Reymond "Security for Costs in International Arbitration" (1994) 110 *LQR* 501 at 504, who also relies on article 26 of the former rules which required the tribunal to make every effort that the award is enforceable at law.

320 Reymond 502.

321 *Coppée-Lavalin SA/NV v Ken-Ren Chemicals and Fertilizers Ltd (in liq)* [1994] 2 All ER 449 at 477c. Lord Woolf was very much influenced by the fact that the Ken Ren company was being financed in the arbitration by the government of Kenya, as the controlling shareholder of the insolvent company (476j).

322 Reymond 503.

323 Saville 107.

324 Saville 107.

considered if security for costs should be altogether excluded from arbitrations under the new English Arbitration Act. However, in the end it was agreed that the power to order security for costs was a useful tool, which could help to do justice.[325] As a result, section 38(3) of the English Arbitration Act of 1996 now gives the arbitral tribunal the power to order security for costs, unless that power is excluded in the arbitration agreement.

The response to the *Ken-Ren* judgment by the South Africa Law Commission for international arbitrations was the recommendation to stipulate expressly in the South African version of article 9 of the Model Law that the court *cannot* order security for costs.[326] The relevant portions of article 9(2) as recommended by the Law Commission read:

> "(2) For the purposes of paragraph (1), the High Court shall have the same power as it has for the purposes of proceedings before that court to make
> (a) (....)
> (b) an order securing the amount in dispute but not an order for security for costs".

The same route was recommended for domestic arbitration. Section 40, dealing with the general powers of the courts, empowers the court on application to make an order securing the amount in dispute "but not an order for security for costs".[327] The Law Commission supported its recommendation by referring to the discussion in its Report on international arbitration.[328] The Law Commission's recommendations regarding the provision of a power for the arbitral tribunal to order security for costs are discussed below.

3.3.2 Security ordered by the Tribunal

3.3.2.1 International arbitration

Regarding the ordering of security for costs in international arbitration proceedings, the Law Commission proposes that this power should be vested in the arbitral tribunal. This decision was taken after the Commission had first decided, as explained above, to qualify the powers of the court to order interim measures, specifically to exclude the power to order security for costs.[329] Therefore, it was found necessary to provide the arbitral tribunal itself with such a

---

325 Saville 107.
326 Report *Arbitration: An International Arbitration Act for South Africa* 63.
327 See the Draft Arbitration Bill s 40(1)(c).
328 Report *Domestic Arbitration* 74.
329 See the Draft International Arbitration Bill sch 1 article 9(2)(b).

power, because, as stated above, the tribunal has no such power under the current law, unless the parties confer this power on the tribunal in their arbitration agreement.[330]

The Law Commission's project committee took note of the position under the new English Arbitration Act of 1996, which confers the power on the arbitral tribunal to order security for costs, unless the parties otherwise agree.[331] The project committee was concerned that a "contract-out" power for the tribunal to order security, which is automatically available, could be abused as an instrument to delay the arbitral proceeding by respondents routinely applying for this order. It was therefore initially decided that the power to order security for costs should be granted on a "contract-in" basis only. But it was later realised that the respondent might easily find itself in a position where neither the tribunal nor the court would be able to grant an order for security for costs in a situation where it was highly desirable, because the parties had not agreed to exercise the "contract-in" option. This result was considered to be unacceptable.[332]

Instead of the initial approach it was therefore subsequently agreed to empower the tribunal to order security for costs, unless the parties agree otherwise. The Commission recommended the following addition to article 17 of the Model Law, which deals with the tribunal's powers to award interim measures:

> "(2) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order appropriate security for costs if the arbitral tribunal considers such relief to be fair in the circumstances."

This provision clearly gives the tribunal a discretion to order security at the request of a party ("the arbitral tribunal may"). The tribunal is further not bound to the grounds used by the High Court in court proceedings, as the courts are under the current law.[333] The issue as to whether or not security should be granted is one of procedure rather than substantive law.[334] The tribunal in exercising its discretion is also required to consider whether the granting of the order would be fair in the circumstances and to satisfy itself that the security is appropriate.[335] The tribunal's discretion is therefore sufficiently flexible both to avoid the abuse of the power as a delaying tactic and to ensure the recovery of its costs by a successful respondent in appropriate circumstances. A situation where an order may be

---

330 See para IV.3.3. above.
331 See the Arbitration Act of 1996 s 38(2) and (3).
332 See Report *Arbitration: An International Arbitration Act for South Africa* 76.
333 See s 21 of the current Act; Mustill & Boyd 296 n 1.
334 Butler & Finsen 131.
335 See Report *Arbitration: An International Arbitration Act for South Africa* 76.

made is where a limited company is the claimant and the tribunal has reason to believe that the company will be unable to pay the costs of a successful respondent.[336]

3.3.2.2 Domestic arbitration

The Law Commission recommends the same basic route for domestic arbitration as it had previously recommended for international arbitration regarding security for costs. It therefore proposes that the power should be removed from the court and given exclusively to the arbitral tribunal, but on an opt-out basis.[337] This power is included among the special powers of the tribunal in section 31 of the Draft Arbitration Bill. Unless the parties otherwise agree, the tribunal may, on the application of the respondent, order the claimant[338] to provide appropriate security for costs (including additional security).[339] To facilitate enforcement, it is expressly provided that the tribunal may stay the arbitral proceedings pending compliance with the order.[340]

By implication, the tribunal is not necessarily expected to apply the same criteria as the court when considering an application for security. It is envisaged that arbitration institutions will provide their arbitrators with guidelines as to how the discretion regarding the order of security for costs should be exercised.[341] Security for costs is frequently ordered by the court in court proceedings against a plaintiff, which is a juristic person, where there are reasonable grounds for believing that it will be unable to pay costs if the defendant is successful in its defence. Section 31(3) expressly provides that an arbitral tribunal, when exercising its discretion under section 31(2) may also order security on this basis.[342]

Section 31(4) provides that unless the parties agree otherwise, where the tribunal makes an order for security under section 31(2) without specifying the amount and method of providing security, these matters must be determined by the taxing master of the court. This provision obviously takes account of the fact that arbitrators in a domestic arbitration are not always so familiar with the procedure for determining what security would be appropriate, either

---

336 Mustill & Boyd 296.

337 Report *Domestic Arbitration* 64.

338 "Claimant" is defined in s 1 to include a claimant in reconvention.

339 S 31(2). The security must not only be appropriate, but the granting of the order must also be fair in the circumstances, in view of the tribunal's general duties in s 28. Compare the limitations on the tribunal's discretion in international arbitration, discussed above.

340 The claimant is usually not the party which wishes to delay the arbitration and to that extent the sanction encourages effective arbitration. Security coupled to a stay could still however be requested by the respondent as a delaying tactic.

341 Report *Domestic Arbitration* 64.

342 Report *Domestic Arbitration* 64.

because they are not dealing with the issue of legal costs on a regular basis, or because they are not lawyers. The decision whether or not security for costs should be ordered can therefore be determined by the tribunal on the merits of the application, with the calculation of the amount being left to the taxing master. Properly used, this option can ensure that applications for security are dealt with efficiently and competently, as long as the taxing master is able to deal with the matter expeditiously.

4. Germany

With the implementation of the new § 1041 ZPO the current German legislation copied Article 17 of the UNCITRAL Model Law in its wording and function, although certain additions were made. The new legislation therefore followed the general international trend of empowering the arbitral tribunal to order interim measures of protection. The legislature did not replace the powers of the courts to order interim measures with the new powers of the tribunal but added the one to the other. Under the current German arbitration legislation a party can therefore now choose to apply either to the court or to the tribunal for the required order for interim measures of protection.

In this section, the newly adopted equivalent of article 17 will first be examined. The powers of the court regarding interim measures as they were and as they are under the current law will then be discussed. The issue of security for costs in German arbitration proceedings is also considered. It will become clear from the discussion why a separate section was not devoted to this topic.

4.1 Interim measures ordered by the tribunal

The ZPO and the German arbitration law before 1998 may at one stage have been regarded as relatively liberal by some commentators. However, the desirability of empowering the arbitral tribunal to grant anything resembling interim measures of protection would not have occurred to such commentators. The delegation to or sharing of state power with an arbitral tribunal so that it could order any kind of interim measure, even without being able to enforce this order, was not part of the scheme of arbitration. It was rather understood that the tribunal should act within the powers, which the parties could grant, to resolve the dispute on the merits on the basis of their arbitration agreement. The parties therefore had to apply in

the ordinary way, as in court proceedings, to the court for interim relief under §§ 916 - 945 ZPO, as described in more detail below.[343]

Under the new German Arbitration Law § 1041 I ZPO provides

> "(1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order such interim measures of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute. The arbitral tribunal may require any party to provide appropriate security in connection with such a measure."

By adopting article 17 of the UNCITRAL Model Law, the German legislation follows the positive approach taken by the Model Law of automatically empowering the tribunal to grant orders for interim measures unless otherwise agreed by the parties. The innovation in this provision from a German perspective is that for ordering interim measures, the tribunal does not need the specific agreement of the parties nor powers conferred by institutional rules, like those of the ICC, to which the parties have agreed. Its power to order interim measures is derived directly from the ZPO.[344] Therefore, independently of any express or implied party agreement, the tribunal today has the power to grant interim measures straight from the German arbitration legislation.

§ 1041 I ZPO, following article 17 of the Model Law, only empowers the tribunal to order interim measures and is silent about the power to enforce these measures.[345] The German legislature however amplified article 17 of the Model Law to provide for court enforcement of interim measures ordered by the tribunal. § 1041 II ZPO provides:

> "The court may, at the request of a party, permit enforcement of a measure referred to in subsection (1), unless application for a corresponding interim measure has already been made to a court. It may recast such an order if necessary for the purpose of enforcing the measure."

For the enforcement of the order one must establish whether the order can possibly be enforced by the tribunal itself or whether it needs to be enforced by the court. According to one commentary, three different types of order can be distinguished for this purpose. First, the *request to perform* (Leistungsbegehren) incorporates any measure where one party is under a duty to perform a certain act, which the arbitral tribunal finds to be necessary. If the

---

343 See para IV.4.2 below.
344 Schwab & Walter 191.
345 See n 253 above.

party is reluctant to perform there is obviously no duress, which could be used by the tribunal. The executive power of the courts is needed.[346]

Secondly, the *action for a modification of rights* (Gestaltungsbegehren) comprises the modification or termination of a legal relationship between the parties. A party may request to have a certain legal aspect between the parties altered. But, on the basis of legal certainty the decision about the legal relationship cannot be provisional but must be final. Obviously here the court is also needed.

Thirdly, the *action for a declaratory statement* (Festsellungsbegehren) is also based on the principle of legal certainty and contains the need for one party to have a certain *legal* issue established by the tribunal. The tribunal declares an act or omission of one party to be justified provisionally, pending the award. In this case the enforcement of the order is not dependent on the court.[347]

When making the request for interim measures to the tribunal, the applicant must establish its need to seek such relief (Rechtsschutzbedürfnis). This requirement is not met if the requesting party applies for an order to the tribunal after it has already applied to the court for such order.[348] Regarding the variety of measures which may be granted, the tribunal appears to have greater discretion than the court may have in relation to the same matter, as the tribunal may order a measure "the arbitral tribunal may consider necessary".[349] However, it can be argued that a tribunal should also tailor the measure ordered to the measures available from the court under §§ 916 - 945 ZPO.[350] This may be required by the fact that the tribunal should bear enforceability in mind when making the order. Also, although there is no appeal as such against the tribunal's findings, unlike interim measures ordered by a court,[351] the tribunal should nevertheless bear in mind the court's statutory power to amend the tribunal's order before enforcing it.

Before sanctioning the enforcement of interim measures ordered by the tribunal, the court may amend the tribunal's order.[352] This may be necessary in cases where the tribunal chose a measure, which is outside the measures available to the court under the ZPO. The court will be understandably reluctant to enforce an interim measure which was ordered by a

346 Schwab & Walter 195.
347 Schwab & Walter 195.
348 Geimer 1998, § 1041 No. 2.
349 Compare the narrower wording of § 1033 ZPO on this point, which is the German equivalent of article 9 of the Model Law.
350 Geimer 1998, § 1041 No. 2.
351 Compare § 924 ZPO regarding interim measures ordered by the court.

tribunal, which the court would not be able to order and enforce under the ZPO as its own measure. Alternatively the court could merely decline to make an order to enforce the interim measure ordered by the tribunal.

The next issue to be considered is that of security for costs. § 1041 I 2 ZPO empowers the tribunal to "require any party to provide appropriate security in connection with such measure". The concluding words refer to interim measures in respect of the subject matter of the dispute, which would not include security for costs.[353] The ZPO does not therefore specifically empower the tribunal to order a party to provide security for another party's costs relating to the arbitration proceedings.

Although the ZPO is silent on this matter, one could argue that since the tribunal has the power to conduct the proceedings in such manner as it considers appropriate,[354] the tribunal could order security for costs on that basis, where it considers it to be appropriate. The tribunal's power is only limited by the arbitration agreement and mandatory rules of the arbitration statute. Within the ZPO there are no such mandatory rules, which would prevent the tribunal from ordering security for costs. However, such a restriction could exist because of the Hague Convention on Civil Procedure of 1954, which was based on the previous Hague Convention of 1905.[355]

Article 17 of the Convention provides that a national of one of the signatory states, who has his domicile in one of these states and submits a claim before a court in one of the signatory states cannot be ordered to provide security for costs by that court. Because of the two Conventions, security for costs has more or less disappeared from the daily life of continental lawyers for nearly a century.[356]

But one may nevertheless question whether compliance with this provision, which applies to courts, is obligatory for the arbitral tribunal, thereby preventing it from ordering security for costs.[357] This is particularly the case, where the parties have agreed in their arbitration agreement that the tribunal should have such power. If a request for security by the

---

352 § 1041 II 2.

353 Compare Geimer 1998, § 1041 No. 2, who refers to §§ 936, 921 II 2 ZPO which are restricted to requiring security in relation to the amount of the final award.

354 § 1042 IV ZPO.

355 The 1954 Convention was originally signed by Austria, Belgium, Denmark, Finland, France, Italy, Luxembourg, the Netherlands, Norway, Sweden and Switzerland and has been ratified by 29 states in all, some from outside Europe. However, neither South Africa nor the United Kingdom are amongst them. The Hague Convention has applied in Germany since 1 January 1960.

356 Reymond 504.

357 Compare Reymond 504.

respondent, in an arbitration against a claimant from a signatory country, were to be denied on the basis of the Convention, a respondent from a non-signatory state would be in a disadvantaged position. This is because the claimant would, if it had been the respondent,[358] have been able to request an order for security for costs against its opponent, as that opponent is from a non-signatory state.

However, one may also argue that, assuming the provision in the Convention is not binding on the tribunal, it may not be of much use for the tribunal to order security for costs, because the order may not be enforced, if the claimant is unwilling to provide security voluntarily. The enforceability of interim measures ordered by the tribunal is, as discussed above, governed by § 1041 II ZPO, which provides that a party can make a request to the court to enforce the tribunal's order. The court may enforce the tribunal's order or, where necessary, modify the tribunal's order before sanctioning enforcement. The modification of the tribunal's order is permissible where the court is unable to enforce the order as made by the tribunal. It is arguable that this must apply to the tribunal's order for security for costs. Hence, the court cannot enforce the order because it is bound by the Convention. There is a flaw in this argument. As explained above, the tribunal cannot order security for costs under § 1041 I ZPO, but only under its general powers or because of a provision in the arbitration agreement, with the result that the court's power of enforcement under § 1041 II ZPO has no application. Moreover, because of § 1026 ZPO, corresponding to article 5 of the Model Law, the court has no other power to intervene.

Furthermore, the tribunal's order for security for costs can arguably in any event not be enforced by a German court, because it would offend the German *ordre public*. The rule denying the court the power to order security for costs is based on the Convention of 1905 and is therefore almost as old as the ZPO itself. The rule is based on the principle that no party to a dispute should be deprived of its right to submit a claim against an opponent, where it is necessary for it to do so. Considering the costs of the proceedings, a claimant could be forced to abandon its claim against the opponent if it has to provide security for the opponent's costs.

---

358 The claimant would indeed become the respondent to any counter-claim brought by the original respondent.

4.2 Interim measures ordered by the court

Comparable to article 9 of the UNCITRAL Model Law, the current German Arbitration Law § 1033 ZPO confirms the ability of the courts to order interim measures in the context of arbitration proceedings by stating:

> "It is not incompatible with an arbitration agreement for a court to grant, before or during arbitral proceedings, an interim measure of protection relating to the subject matter of the arbitration upon request of a party."

With this provision the possible negative effect of § 1032 I ZPO regarding the jurisdiction of the court[359] is excluded as regards interim measures. Under § 1033 ZPO the court has its own inherent power to order interim measures of protection, parallel to the power of the tribunal under § 1041 ZPO.[360]

The power of the court to order interim measures was part of the former legislation, and was therefore nothing new. It was however argued in the discussions preceding the new legislation that omitting article 9 would have the effect that, in conjunction with § 1041 ZPO, especially foreign users of the new German arbitration law could think that a request to the courts for interim measures was no longer available. Thus, this inherent power of the court was explicitly maintained under the new law.[361]

As in the case of a request for interim measures to the tribunal, for a request to the court for such measures to be admissible, the requesting party must establish its need to seek judicial relief (Rechtsschutzbedürfnis). This need would not exist if the requesting party has already applied for an order from the tribunal. Therefore, one could argue that a subordinate relationship between the powers of the tribunal and those of the court to grant interim measures is only apparent when there has been a prior request. Then the later request would be subordinate to the earlier one, irrespective of the authority to which the first request was made.

Contrary to that approach, Zerbe argues that the scope of interim measures which could be ordered under § 1033 ZPO flows from the relationship between § 1033 ZPO and § 1041

---

359 § 1032 I ZPO, corresponding to article 8(1) of the Model Law, compels the court to stay court proceedings regarding a dispute subject to an arbitration agreement if the respondent so requires, unless the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed. As appears above (see n 236), article 8 was not intended to exclude the court's power to grant interim measures in arbitration proceedings.

360 Geimer 1998, § 1033 No. 2

361 Bundestagsdrucksache 13/5274 38.

ZPO. In so far as the arbitral tribunal is able to order the measure, the tribunal is the primary authority to order the measure. Only if the tribunal is not able to act, the court's power re-emerges. Therefore he argues in favour of the general subordinate nature of the court's power.[362]

However, the idea that the jurisdiction of the courts to grant interim measures has a general subordinate or subsidiary character to that of the tribunal has been rejected for several reasons, which are similar to those discussed above.[363]

First, it was argued that need for interim measures is often urgent in the period before the tribunal is constituted. Prior to its appointment, the tribunal is not able to assist. Furthermore, one must keep in mind that the prerequisites for granting interim measures by the two authorities are different. The court has to grant the request, if the legal situation does not provide an alternative. Under § 1041 ZPO the tribunal has a discretion whether to order interim measures or not.[364]

Moreover, for the party requesting interim measures, the most important consideration may be that the measures ordered by the tribunal may need to be enforced, whereas orders of the court for interim measures are enforceable as such. This indicates that a direct approach to the court may be the faster procedure.[365] In the context of enforcement, the possibility of enforcement of the tribunal's orders for interim measures is also limited to those with *inter partes* effect.

The two possible interim measures which the court may grant by virtue of § 1033 ZPO are, as under the previous law, attachment (Arrestanspruch) under § 916 ZPO or the (general) provisional measure or injunction (Einstweilige Verfügung) under § 935 ZPO. With the new German arbitration law the measures themselves have not changed, only the way of applying them.

Attachment under § 916 ZPO is available to secure prospective execution of pecuniary claims (Geldforderungen) or claims, which can amount to pecuniary claims. The attachment is ordered when the execution of the final judgment of the court (or award) may be impossible or hardly possible without the requested measure.[366] This is the prerequisite of

---

362 Zerbe 197.
363 See paras IV.3.1, IV.3.2 and IV.4.1 above.
364 Bundestagsdrucksache 13/5274 39.
365 Bundestagsdrucksache 13/5274 39.
366 § 917 ZPO.

urgency, which must be met to justify the measure. In the context of international proceedings, the requirement of urgency is already met if the final judgment or award must be executed in another country.[367]

A request for a general provisional measure (injunction) under § 935 ZPO is admissible if it is likely that the alteration of the present situation will either enable the requesting party to enforce its rights regarding the subject matter or prevent such enforcement. The court thereby has a wide discretion to grant the measure, which it considers appropriate. This may also include an order to the reluctant party to act or to refrain from acting under certain circumstances.

In conclusion, the requesting party will have to consider carefully which authority it will approach for the required interim measures, bearing in mind factors like the measures available from the relevant authority, the time factor and the need for enforceability.

5. Comparison

The new arbitration law in Germany and the legislation proposed for South Africa by the Law Commission differ in important respects on the question of interim measures, but only on points of detail. This is most obvious regarding the effect of the different legal traditions of Germany and South Africa regarding security for costs. In this respect, it is proposed that the South African state and its courts should be virtually excluded from the question of security for costs[368] and that the issue should be left to the arbitral tribunal, subject to restrictions which may be imposed by the parties in their arbitration agreement. The main influence on the Law Commission's thinking in this regard was the reaction to the English *Ken-Ren* decision. Court involvement on this question can seriously disrupt the arbitration process. The possibility of German courts ordering security for costs in arbitration proceedings is prohibited by article 17 of the Hague Convention. As discussed above, this provision will also preclude court assistance for the enforcement of an order of security for costs ordered by the tribunal, to the extent the tribunal may have such power. The primary method proposed to encourage compliance with an order for security for costs by a tribunal in a domestic

---

367 § 917 II ZPO.

368 In domestic arbitration, assistance by the taxing master of the court to give substance to the tribunal's directions must still be given in certain circumstances. See s 31(4) of the Draft Arbitration Bill and para IV.3.3.2.2 above. It is also conceivable that a tribunal's *award* in both international and domestic arbitration proceedings could be reviewed by the court in certain circumstances because of a lack of due process in the tribunal's handling of an application for security for costs.

arbitration in South Africa is a provision that the tribunal may stay the arbitration proceedings, pending compliance by the claimant with its order.[369]

A key issue in the context of interim measures ordered by the arbitral tribunal is that of enforcement in the absence of voluntary compliance. Both Germany, and the South African Law Commission, in the context of international arbitration, therefore made specific provision for court assistance in the enforcement of such measures, but the mechanisms differ. The proposed South African approach is that, providing the tribunal's order complies with the formal requirements for an award in article 31 of the Model Law, the order can be enforced under article 35 as if it was an award, subject to the defences in article 36.[370] The South African approach has both advantages and disadvantages. One of the main advantages of arbitration for international commercial disputes is that an award made in one country will be readily enforceable in another country, if the latter is a party to the New York Convention. As pointed out above, it is not the intention to turn an order by the tribunal for interim measures into an award to facilitate enforcement outside South Africa.[371] The purpose of the provision is to expedite court assistance inside South Africa. The South African court has the discretion to refuse enforcement only if one of the grounds for refusing enforcement of an award in article 36 is established. However, a disadvantage of the proposed approach is that a tribunal, which wants to keep open the possibility of court assistance for the enforcement of its order for interim measures, will have to comply with the formalities of article 31, particularly the giving of reasons. Moreover, if the tribunal exceeds its powers to grant interim measures under article 17, the court will be entitled to refuse enforcement under article 36.[372] There is also no power for the court to adjust the tribunal's order before ordering enforcement. This could result in tribunals in international arbitrations in South Africa being less flexible when ordering interim measures than their German counterparts. Apart from the apparently wide statutory discretion given by § 1041 I ZPO to the tribunal, § 1041 II ZPO, as discussed above, empowers the court to recast the tribunal's order when requested to enforce it.[373] It is possible that these factors will encourage German arbitrators to adopt a more innovative approach when ordering interim measures. This is more in keeping with the spirit of arbitration as a truly flexible alternative to litigation. A possible gap in the South African Law Commission's proposals for domestic arbitration is the absence of

---

369 See s 31(2) of the Draft Arbitration Bill.

370 See the Draft International Arbitration Bill sch 1 article 17(3) and para IV.3.3.2.1 above.

371 See para IV.3.3.2.1 above.

372 Compare article 36(1)(a)(iii). Lack of due process leading to substantial injustice in granting the interim measures will also be a ground for refusing enforcement . See article 36(3)(a) in the Draft International Arbitration Bill, which is a proposed South African clarification of the original text of the Model Law.

373 See para IV.4.1 above.

court assistance for the enforcement of interim measures ordered by a tribunal in a domestic arbitration.[374]

In regard to requests for court orders on interim measures, both the current German provisions and, more explicitly, the proposed provisions on interim measures for international and domestic arbitration in South Africa[375] set out to encourage the use of the tribunal rather than the court, where possible. This is in line with the general international trend of avoiding unnecessary court involvement in the arbitration process. The reasons in this context are, first, as mentioned previously, a court decision on interim measures may involve the court in considering the merits of the dispute, which is more properly a matter for the tribunal in its award. Secondly, the factors on which national courts base their decisions on interim measures, may differ from factors considered material by an arbitral tribunal, particularly in an international arbitration. Nevertheless, in both jurisdictions it is accepted that appropriate interim measures from the court can play a crucial role in the right circumstances.[376]

Certainly in the light of the temptation for a party to use requests for interim measures as a delaying tactic, the tribunal must be considered as the more appropriate authority to handle disruptions of this kind. The tribunal will usually be more familiar with the circumstances of the case and possibly have a better feel for a party's hidden agenda. The tribunal's background knowledge of the case and more informal procedures will also often facilitate a more expeditious ruling on requests for interim measures.

---

374 See para IV.3.3.2.2 above at n 278.

375 See the Draft International Arbitration Bill sch 1 article 9(3) and the Draft Arbitration Bill s 40(2), which are virtually identical.

376 In a South African context, *ex parte* applications to court for the preservation of evidence or an anti-dissipation interdict are obvious examples.

Chapter Three

Practical measures by the arbitral tribunal

I. Introduction

In the previous two chapters of this thesis the reasons why Germany adopted the UNCITRAL Model Law for both international and domestic arbitration and the South African Law Commission recommended that it should have a major role in South African arbitration law were discussed. The approaches in the two jurisdictions to certain more specific issues of arbitration law were considered and evaluated. The reduction in court interference in the arbitral process in South Africa proposed by the Law Commission was also investigated. Moreover, the extent to which a foundation has been laid by improved legislation to reduce the use of delaying tactics prior to the award was examined.[1]

Upon analysis, it appears that Germany and South Africa have sometimes the same and sometimes different approaches to the same legal problem regarding arbitration. At the end of the day improved arbitration legislation is however only one of the requirements for effective arbitration in practice. The question therefore remains as to how the parties to the arbitration, their legal representatives and especially the arbitral tribunal itself should deal with the problem of ensuring that the arbitral procedure is efficient.[2]

Even in a jurisdiction in which the arbitration law is not based on the UNCITRAL Model Law, the obstacles during the arbitration process are similar, as they are sometimes more closely connected not to arbitration law itself, but to the parties using that law. Many authors have stated that arbitration practice is recently developing in a potentially fatal direction and this development must be reversed.[3] To see how this can be done and the defects can be cured one should refer back to the roots from which arbitration evolved.[4]

---

1 See ch 2 para II above.
2 Compare ch 1 n 15 above.
3 See generally ch 1 para 2 above.
4 See Hunter (1997) 13 *Arbitration International* 346, with reference to the philosophy underlying the English Arbitration Act of 1996.

It has been said, that the object of arbitration is to obtain the fair resolution of disputes by an independent and impartial tribunal without unnecessary delay or expense.[5] Arbitration grew out of the desire of commercial persons to have commercially viable dispute resolution procedures, which could cope particularly with those disputes, for which national courts were sometimes unsuitable. In the earlier days of arbitration, the parties in dispute would often have represented themselves, without the assistance of lawyers.[6] But, over the years, the arbitration process has been "hijacked" by lawyers.[7] Now arbitrations may often not turn out as was expected and afterwards the parties who "have embarked upon arbitration emerge sadder, wiser and poorer people".[8] A former chief justice of the United States, Warren Burger, has said:

> "The obligation of the legal profession is, or has long been thought to be, to serve as healers of human conflicts. To fulfil that traditional obligation means that there should be mechanisms that can produce an acceptable result in the shortest possible time, with the least possible expense and with a minimum of stress on the participants. That is what justice is all about."[9]

The aim of arbitration, to be considered efficient, is therefore for the arbitration process to be completed in a short time with a minimum of costs. This closes the circle since this is where arbitration once came from and to where it should be brought back. The efficiency of the arbitration process is clearly essential to the viability of arbitration and it is the efficiency of the procedure used in the arbitration, which ultimately determines whether arbitration remains viable compared to alternative means of dispute resolution.[10] Furthermore, it is suggested, that the future viability of arbitration as a dispute resolution process depends on the continuing development of efficient and innovative procedures.[11] A key factor may be the extent

---

5 Compare the English Arbitration Act of 1996 s 1(a) and the Draft Arbitration Bill of the SA Law Commission for domestic arbitration s 2(a). Whereas the former refers only to an "impartial tribunal", the latter, under the influence of article 18 of the Model Law, requires the tribunal to be both independent and impartial.

6 Compare Mustill 1993 10(4) *J of Int Arb* 122-123.

7 See Croall "Cost Effective Arbitration: Meeting the User's Needs" (1998) 64 *Arbitration* 34 at 39.

8 Harman quoted by Uff (1993) 59 *Arbitration* 31.

9 Burger "Using Arbitration to Achieve Justice" (1985) 40(4) *The Arbitration Journal* 3; Butler (1994) 6 *SA Merc LJ* 270.

10 Uff "The Bill Tompkins Memorial Lecture 1994, Guernsey 9 September 1994" (1995) 61 *Arbitration* 18; Croall 34.

11 In this context there can be a benficial interaction between new arbitration procedures and improved procedures used in the courts. See e.g. Butler (1994) 6 *SA Merc LJ* 256, 268 and 284 regarding the use of innovations in the practice of the Official Referees' Courts in England to cure defects inherent in the traditional adversarial process in arbitration practice. See also Uff (1995) 61 *Arbitration* 19.

to which the arbitral tribunal can impose procedures on the parties against the their wishes and those of their legal advisers.[12]

The main current criticism of arbitration is that this aim is far from being achieved. Arbitrators and the parties' representatives (whether lawyers or lay advocates) in South Africa rest comfortably in an adversarial system, which mirrors the practice in the courts. Lane refers to this as the "sit back and let it happen" syndrome, which includes all the disadvantages of litigation in the courts and none of the advantages of arbitration. He concludes that it allows arbitration by ambush and encourages the "win syndrome" rather than dispute resolution.[13]

What must be changed? First, one may start with the role of the arbitral tribunal in the arbitration process. The arbitral tribunal has a crucial role to play in the arbitration and must exercise its procedural powers in a flexible, and perhaps more importantly, robust way to ensure that the arbitration will proceed in an expeditious and cost-effective manner.[14] In this context, one must distinguish the powers of the tribunal from its duties.

The duties define the minimum, which the tribunal itself must do whereas the powers define the maximum, which it can compel the parties to do. The powers of the tribunal, unlike its duties, are discretionary, for example, it has the discretionary power to order discovery without being obliged to do so.[15] Lane, however, complains that there is amongst arbitrators a lack of leadership qualities, which are urgently needed to dictate to the parties that the tribunal is in control of the proceedings and will remain in control of them.[16]

Regarding the tribunal's powers it had been said that the arbitrator is the master of the procedure to be followed, but these powers are subject to certain limitations. These are first the terms of the arbitration agreement, secondly the provisions of the applicable arbitration statute and thirdly the obligation to observe the rules of natural

---

12 Uff (1995) 61 *Arbitration* 19. See also the discussion in para II.1 below.

13 Lane, P M M "Address to the Association of Arbitrators: (Southern Africa) Cost Effective Arbitration" (1997) 63 *Arbitration* 5; Lew (1999) 65 *Arbitration* 284.

14 Butler (1994) 6 *SA Merc LJ* 257; Uff (1993) 59 *Arbitration* 31. See also Goode 14; Lew (1999) 65 *Arbitration* 284.

15 Mustill & Boyd 291-292.

16 Lane 5.

justice.[17] But, within these limitations the arbitral tribunal is free to design the arbitration procedure in the way which it considers will best achieve the efficient resolution of the dispute, and it should do so. To achieve the aim of having resolute and strong arbitrators who are capable of dealing with reluctant parties, arbitrators must be skilled in the practice of arbitration and even where they have some knowledge in this regard, arbitrators should continue to increase their learning.[18]

The second source of improved arbitration practice is through the contribution of the parties' lawyers, first regarding the drafting of a truly appropriate arbitration agreement and secondly during the actual arbitration proceedings.[19] The attorneys ought moreover to feel obliged to explain to their respective clients what options are open to them for resolving the kinds of dispute likely to arise from their agreement. In particular they should consider whether the parties should have the option or even be compelled to use ADR[20] before resorting to arbitration, where this could result in a more cost-effective and expeditious resolution of the dispute.[21]

Goode observes that most disputes involve a breakdown in relationships. Nevertheless, the whole focus of attention in the drafting of contractual dispute resolution clauses tends to be on the dispute rather than on the relationship. He asks correctly:

> "If prevention is better than cure, why is so little thought given to working out in advance procedures designed to give early warning of trouble and to avoid a breakdown of a relationship which may have endured for several years and in which a huge amount of time, expense and personal commitment have been invested? And is it not curious that in the typical dispute resolution clause the parties bind themselves in advance to a single mode of binding dispute determination without at that stage having the slightest idea what will be the underlying causes of the dispute or what form it will take?"[22]

Contracts are often drafted from standard forms, which contain "safe" dispute resolution clauses.[23] But the safe option is, however, not always the best one. The

---

17 Butler (1994) 6 *SA Merc LJ* 258 citing *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corporation Ltd* [1981] AC 909 (HL) at 985, per Lord Diplock; *Anshell v Horwitz* 1916 WLD 65 at 67.

18 Lane 6. See also para II.2 below.

19 See Croall 34, 38-39.

20 See ch 1 n 13 above for the definition of ADR.

21 Croall 34.

22 Goode 10-11.

23 Croall 35.

attorney's primary role in relation to drafting the dispute resolution clause should be to ensure that the correct choices are made, including as mentioned above, the desirability of making appropriate provision for ADR.[24] This may also involve changing the whole culture of dispute resolution from aggression to conciliation and cooperation.[25]

To justify the need to guide the current arbitration culture back to former customs some of the often stated advantages of arbitration compared to both ADR and litigation may be recalled here. First, arbitration is a procedure by which disputes can be finally resolved, subject only to the possibility of subsequent judicial review on limited grounds. ADR with all its different advantages does not insure finality as the resolution of the dispute by ADR generally requires the agreement of the parties.[26] But notwithstanding this lack of finality, within a modern approach to dispute resolution one should always understand arbitration within a context of further or previous application of various ADR measures, such as mediation or conciliation.[27] Moreover, by improving the efficiency and speed of the arbitration proceedings, the disputing parties may make more determined efforts to get a solution of their dispute through mediation. Otherwise the parties might find themselves in an arbitration with the prospect of an imposed solution, because of their failure to take the mediation seriously.[28] And in most cases the arbitration proceedings will cost much more than mediation because of the different nature of the two procedures. The prospect of a successful mediation may even be enhanced where, in the arbitration proceedings, the arbitrator is authorised to decide ex *aequo et bono* or as *amiable compositeur*.[29] Moreover, the modern arbitrator needs to be prepared actively to promote settlement. While in German courts, for example, it is a duty of the judge to attempt settlement before the opening of the trial and during the trial, mediation cannot be part of the judicial process in England.[30] The South African Law Commission wishes to

---

24 Croall 35.

25 Goode12.

26 Butler (1994) 6 *SA Merc LJ* 254.

27 Although attempts are sometimes made to distinguish between mediation and conciliation, the better view is that there is no fundamental difference between the two concepts; see Butler & Finsen 10-11.

28 Compare Donaldson 104.

29 Goode 15. The parties must normally make express provision for this possibility (see e.g. article 28(3) of the UNCITRAL Model Law). However, at least in ICC arbitrations little use is apparently made of this power. Of the 541 requests for arbitration filed with the ICC in 2000, only one explicitly authorised the arbitrator to act as *amiable compositeur*. See "2000 Statistical Report" (2001) 12(1) *ICC ICArb Bull* 5.

30 Hermann "The Draft English Bill: Pulling the Wrong Punches" (1994) 10 *Arbitration International* 185 at 186. See also SA Law Commission Report *Domestic Arbitration* 47-48 and the authorities cited. It should be noted that the powers of the German judge to settle the

encourage the use of mediation prior to arbitration. It was however, fully aware of the dangers of the same person acting as mediator and then as arbitrator, particularly the perceived and actual effect on the arbitrator's impartiality. It therefore recommends that such a possibility requires the agreement of the parties and other appropriate safeguards.[31]

More important than the first advantage in the context of effective dispute resolution is the second. Arbitration, compared to the courts, is subject to very few mandatory rules and is able to offer almost limitless flexibility. This flexibility extends to the choice of the tribunal, which may be selected for its expertise in the subject-matter of the dispute. There is a long tradition of technical arbitrators, particularly in the construction field, using and applying their own expertise, despite the occasional setback.[32] The flexibility of the arbitration process is the single most cogent and most important advantage claimed for arbitration over litigation.[33] It makes tailor-made procedures for every particular case and every dispute possible. As the arbitrator is in principle "master of the procedure"[34] the goal of a flexible and efficient procedure may be achieved in theory by appointing a sole arbitrator pursuant to a private arbitration agreement, which does not specify expressly or by reference any particular procedural rules. The arbitrator is of course required to observe the requirements of due process.[35] In practice, a more detailed arbitration clause is however desirable.[36]

Thirdly, because of the above-mentioned benefit of flexibility, the arbitration process is possibly able, in the context of international disputes, to offer procedures for the resolution of disputes not available in any individual state court. The arbitrator may have even wider powers than a judge by virtue of the express or implied terms of the

---

dispute do not extend to one of the usual powers of the mediator, namely that of being able to meet separately with the parties.

31 See SA Law Commission Report *Arbitration: An International Arbitration Act for South Africa* 40-43 and ss 11 and 12 of the Draft International Arbitration Bill; SA Law Commission Report *Domestic Arbitration* 47-48 and the Draft Arbitration Bill ss 14 and 15. A more detailed discussion of these provisions is beyond the scope of this thesis.

32 Uff (1995) 61 *Arbitration* 20.

33 Thesen "Preliminary Matters (1)" (1987) 53 *Arbitration* 16.

34 See n 17 above.

35 Compare the UNCITRAL Model Law article 19(2), read with articles 18 and 24. Lord Diplock in *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corporation Ltd* [1981] AC 909 at 985 refers in this regard to "the rules of natural justice" but the terms in this context may be regarded as synonymous.

36 See e.g. Croall 35-38, regarding the desirability of an informed choice between ad hoc and institutional arbitration; if the institutional route is chosen, the careful selection of the institution; and choices regarding the composition of the tribunal and the place of arbitration, which determines the law governing the arbitration procedure. Modern institutional rules do not

arbitration agreement.[37] The tribunal could decide that it should read the documents pertaining to the case thoroughly prior to the relevant stage of the oral hearing. This pre-reading covers not only the pleadings and bundles of documents, but also witness statements, expert reports and full written submissions and arguments including legal citations.[38] This use of documents could also extend to a further possible advantage of arbitration over litigation in the context of oral proceedings. Traditionally under the common law, litigation must be conducted orally and in open court except where rules otherwise provide. The arbitrator is entitled to rule on the length of the oral hearing and, may, subject to applicable rules and legislation, even direct that no oral hearing is necessary.[39]

Fourthly as the cumulative result of the second and third advantages referred to above, arbitration proceedings can be cost-effective. The cost-effectiveness of arbitration, particularly in the context of domestic arbitration, may be the reason in some cases why the parties initially chose arbitration in preference to the national courts. But as shown earlier, arbitration all too often is as adversarial as litigation and is merely litigation in a somewhat more relaxed form.[40] Moreover, in some cases arbitration is consensual only in a technical sense, because frequently parties accept arbitration because it is in a trade association contract form.[41] And, far from being cheaper than litigation, arbitration is often more expensive because of the need to pay travel expenses, hire a room for the hearing and to pay the tribunal's and arbitral institution's fees and expenses. While many arbitrations are conducted speedily, others, especially in construction disputes, can drag on interminably,[42] thereby adding to the expense.

Although the arbitrator is the master of procedure in cases where nothing is agreed between the parties, one could apparently expect the parties' attorneys to advise

---

however impose major restrictions on the trbunal's freedom to determine procedure, unless the parties otherwise agree (see the LCIA Rules article 14.1 and ICC Rules article 15.1).

37 Uff (1993) 49 *Arbitration* 31.

38 Uff (1993) 49 *Arbitration* 32 and 35; Uff (1995) 61 *Arbitration* 20. Uff is nevertheless a strong advocate of dividing the oral hearing into logical phases, which may not always be appropriate in an international arbitration.

39 See further on documents-only arbitrations para II.8 below. Although the tribunal is entitled to dispense with an oral hearing under the English Arbitration Act of 1996 s 34(2)(e) and (h) unless the parties otherwise agree, under the Model Law article 24(1) a party is entitled to require that an oral hearing be held unless the parties have agreed on a documents-only arbitration.

40 See the text at n 13 above.

41 Goode 9.

42 Goode 9.

their clients on the right option and procedures to choose.[43] Uff however asks whether the parties' legal representatives can reasonably be expected to devise and adopt cost-effective procedures and answers this question in the negative.[44] The first reason is that the lawyers have a primary duty to protect their clients' interests, and that means that they will seek to retain any procedure that might be used to the advantage of their particular client. Particularly from the perspective of the respondent's lawyer, this could include delaying tactics and increasing costs to put pressure on the claimant. Secondly, most lawyers are familiar with the High Court procedure and will have little experience in cost-saving procedures.[45] It must therefore be the arbitral tribunal, that should seek to achieve the advantages of arbitration by imposing measures to save costs and avoid unnecessary delay.

In this last chapter possible measures to counter the sort of delaying tactics which a party (particularly the claimant) or an arbitrator may typically expect when entering upon an arbitration,[46] will be discussed. The focus is on factors which are crucial to the efficiency of the arbitration. These include the abilities required of the arbitrators and whether they necessarily need to be lawyers;[47] the use of an "inquisitorial" or interventionist approach by the tribunal;[48] the need for preliminary meetings;[49] the preparation for and conduct of the hearing[50] and some of the advantages and disadvantages of "documents-only" arbitrations.[51]

---

43 See Croall 34-35.
44 Uff (1993) 59 *Arbitration* 33. See also Butler (1994) 6 *SA Merc LJ* 263, 269-272.
45 Uff (1993) 59 *Arbitration* 33.
46 See generally Harris (1992) 9(2) *J of Int Arb* 87-95, discussed in ch 1 para II above.
47 See para II.2 below.
48 See para II.3 below.
49 See para II.4 below.
50 See paras II.6 and II.7 below.
51 See para II.8 below.

II. Measures against delay

When considering likely delaying tactics and the measures which can be employed against them, it must be mentioned at the outset that not every delaying tactic can be applied in every arbitration. Moreover, the potential countermeasures will not necessarily be available in the context of a particular arbitration. For example the failure to respond to communications and the refusal to appoint an arbitrator[52] is certainly more problematic in an ad hoc arbitration[53] than in proceedings under the umbrella of an arbitral institution such as the ICC or LCIA.

The ICC for example requires a response to the request for arbitration to be made within thirty days of the receipt of such a request.[54] The rules provide for the arbitration to continue in the event of the failure or refusal of the respondent to reply.[55] The rules also deal with a "refusal" by a party to take part in the drawing up of or to sign the terms of reference.[56] However, in practice the ICC takes great efforts to persuade the absent party to join the arbitration process, even in a later stage of the proceedings, which itself can be a time-consuming process.[57] As a result, refusal or failure to co-operate does cause some delay. Moreover, neither the arbitral institution nor the arbitral tribunal itself can side-step these rules, since this would endanger the enforceability of the final award. However, since the arbitration is created by the agreement of the parties, the powers of the arbitral tribunal flow from that agreement. By agreeing to a system of rules, which expressly empowers the tribunal to proceed to an award in the absence of one of the parties, this absent party cannot later successfully claim that the tribunal exceeded its powers by using the default procedure, so as to endanger the award.[58]

Regarding the challenge of an arbitrator, one must concede that it will almost certainly lead to some delay. But the possibility of the respondent to challenge the arbitrator in order to avoid the whole arbitration proceedings is again limited. In a

---

52 Harris (1992) 9(2) *J of Int Arb* 88.

53 See ch 1 n 57 above for the meaning of an ad hoc arbitration.

54 ICC Rules article 5.1.

55 Article 6.3, which also applies to a failure or refusal by the claimant.

56 Article 18(3).

57 Donahey "Defending the Arbitration against Sabotage" (1996) 13(1) *J of Int Arb* 93 at 97. The article refers to the previous edition of the ICC Rules. An example in support of the statement in the text appears in article 18(3) of the current rules, which only permits the ICC Court to approve the terms of reference where a party has *refused* to take part in drawing up the terms or to sign them. In practice, the tribunal will normally ensure that the respondent has a reasonable opportunity to sign the terms before they are submitted to the ICC Court. A failure to respond will then be treated as a refusal. See Derains & Schwartz 244-245.

study of ICC arbitrations regarding the challenge of arbitrators it was shown that where the challenge, based on an alleged lack of independence, was raised prior to appointment or confirmation of the arbitrator, the arbitrator was not confirmed or appointed in 72% of the cases.[59] In contrast, the challenge of an arbitrator on the same basis following appointment or confirmation was successful in only 9% of the cases.[60]

Challenges after appointment remain one of the most frequently used weapons in the "arbitral saboteur's arsenal".[61] Arbitration institutions examine such belated challenges carefully, requiring a far stronger showing of lack of independence and a strong reason why the challenge could not have been made earlier. Thus, the effectiveness of this tactic has been considerably reduced.[62]

Generally one can imagine that all the delaying tactics mentioned by Harris[63] could be attempted. Regarding delaying tactics after the appointment of the tribunal and prior to the award, their chances of success in causing substantial delay, thereby achieving the respondent's object, will be significantly greater where a weak or inexperienced arbitrator is in charge of the case. Compared to litigation, the respondent in an arbitration before a weak arbitrator can regrettably indulge in blatant delaying tactics, with a resulting increase of costs, which would not be tolerated by a judge.[64]

1. The arbitrator as master of the procedure[65]

It is up to the arbitral tribunal to choose the right procedure for the particular arbitration in order to oppose delaying tactics and ensure a suitable and speedy arbitration process. The tribunal may be given wide freedom by the arbitration agreement for this purpose and it is not necessary for the tribunal to follow the

---

58 Donahey 97.

59 In terms of article 5(1)(d) of the current ICC Rules the respondent can comment on the suitability of an arbitrator nominated by the claimant in the respondent's answer to the request for arbitration.

60 Donahey 104.

61 Donahey 104.

62 Compare too the position under the LCIA Rules. In terms of articles 5.5 and 7, *all* arbitrators are appointed by the LCIA Court, not by the parties, although the parties may make nominations. Both the appointment and challenge procedures are designed so that the appointment or challenge can be dealt with with a minimum of delay (see Vigrass 274-275). Appointments are made by the President or a Vice-President of the Court on its behalf and a challenge is dealt with by a division of three members.

63 See Harris (1992) 9(2) *J of Int Arb* 87-95 and ch 1 para II above.

64 Butler (1994) 6 *SA Merc LJ* 271.

procedure of the High Courts. Even in England the law never required this and it was merely the English legal profession, which transformed the originally informal arbitrations by businesspersons or technical experts into "wigless litigation".[66] Nevertheless, the tendency to follow court procedure resulted in English and South African arbitration practice being infected by what have been called "the three English diseases". These consist of uninformative pleadings, the abuse of the procedure for the discovery of documents and an excessive reliance on oral proceedings.[67]

The effect of the legal profession on the arbitration process has been described as follows:

> "Now the law has come to be recognised as a vehicle for winning cases. Lawyers use legal argument before an arbitrator to overcome the technical shortcomings of their client's case. Expert witnesses write long reports, frequently based on disputed facts. The full disclosure of documents, relevant and irrelevant, is commonplace. Lawyers indulge in protracted openings, and arbitration has become a mirror of court procedure, with the consequent increase in costs. It is not surprising that there is now an increasing advocacy for mediation and conciliation as means of settling disputes."[68]

Even assuming a general obligation to follow the adversarial procedure, a strict compliance with the High Court procedures would not be necessary. The courts have emphasised that arbitrators are the masters of their own procedure and if this proposition has any meaning at all it must permit sensible and fair adaptations of traditional adversarial procedures.[69] Moreover, even where the parties do not agree on a set of arbitration rules, the arbitral tribunal has the power to continue the proceedings and determine how the case will be conducted,[70] subject to the law of the place of arbitration. The English Arbitration Act of 1996 goes further by imposing a new duty on the tribunal. Section 33 (1)(b) requires the tribunal to adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or

---

65 See the text to n 17 above for the origin of this expression.

66 Hermann (1994) 10 *Arbitration International* 186. See too Steyn "England's Response to the UNCITRAL Model Law of Arbitration" (1994) 10 *Arbitration International* 1 at 8-9; compare Bernstein, Tackaberry & Marriott *Handbook of Arbitration Practice* (3 ed) 27.

67 Butler (1994) 6 *SA Merc LJ* 254. See further paras II.6 and II.7 below.

68 By Kenneth Severn, an engineer-arbitrator, as quoted by Uff (1993) 59 *Arbitration* 31.

69 Steyn "Adapting Traditional Arbitration Procedures to make them more Cost-Effective" (1983) 48 *Arbitration* 310 at 312.

70 See the UNCITRAL Notes on Organising Arbitral Proceedings para 16. See the text at n 103 below on the function of the UNCITRAL Notes.

expense.[71] Section 34, dealing with the powers of the tribunal, commences with the proposition that it shall be for the tribunal to decide all procedural and evidential matters, "subject to the right of the parties to agree any matter". It is therefore highly doubtful whether section 34, even when read with section 33(1)(b), gives the tribunal the "last word" on procedural matters, and if so, whether this is can be reconciled with the basic principle of party autonomy.

To answer this, one must acknowledge that the parties can, at any stage of the arbitration, dismiss the tribunal and start a new arbitration.[72] The apparent inconsistency between party autonomy and the duty of the arbitral tribunal to provide an effective arbitration may be resolved in English law (and under the Model Law) by the fact that the tribunal is free to resign.[73]

But neither the dismissal of the tribunal nor its resignation from office seems to be an appropriate tool to ensure an efficient arbitration, since it *may* force the parties to start all over again.[74] In such circumstances, it may well be asked to what extent the tribunal and the parties can afford a disagreement upon the procedure and how far the tribunal can dictate the procedure to be adopted against the wishes of the parties.

One view is based on the premise that the arbitration is consensual and the arbitrator is bound by anything the parties agree upon. These agreements between the parties can certainly include procedural steps and measures about how the arbitration should be conducted.[75] Arbitrators are obliged in terms of their own agreements with the parties to comply with all the terms of the arbitration agreement. This is logical as the terms of the arbitration agreement form the basis of the arbitrators' jurisdiction. Although the agreement between an arbitrator and the parties is separate from the

---

71 See also the LCIA Rules (designed to apply under any system of national arbitration law chosen by the parties) article 14(1)(ii), which imposes an identical duty. A similar duty on the tribunal has been proposed by the SA Law Commission for domestic arbitration in South Africa; see the Draft Arbitration Bill s 28(1)(b).

72 Hunter 347.

73 Hunter 347. This is implicit in s 25, which empowers the court to regulate the financial consequences of the tribunal's resignation. See too Butler (1998) *9 Stell LR* 17 and article 15 of the Model Law.

74 Compare s 27 of the English Arbitration Act, which in the absence of an agreement between the parties allows the reconstituted tribunal to decide whether the previous proceedings (e.g. written submissions and oral evidence) should stand. The position is in effect the same under the UNCITRAL Model Law. See article 15 read with article 19 and Holtzmann & Neuhaus 466.

75 See Steyn (1994) 10 *Arbitration International* 10: "The principle of party autonomy requires the tribunal to respect any agreement of the parties whenever it may be concluded and however informal it may be." Steyn's basic premise regarding the supremacy of party autonomy finds support in the English Arbitration Act of 1996 s 34(1). However, an agreement between the parties to vary the arbitration agreement during the course of the arbitration to restrict the arbitrator's powers would now have to be in writing to be effective (see s 5(1)).

arbitration agreement, it is subject to the terms of the arbitration agreement.[76] It is furthermore possible to argue that, absent a contrary intention, the separate agreement is subject to the arbitration agreement between the parties as the latter agreement may be varied from time to time.

The other view questions how far an agreement between the parties is binding on the arbitral tribunal as regards the extent of its procedural powers. The arbitration agreement itself could include a general provision that the arbitration should be conducted under a certain set of rules, which would grant the arbitrator a wide discretion about procedural matters. Uff contends, however, that the consensual basis of arbitration means only that the parties must initially agree to arbitration as the way to resolve their dispute.[77] He asks why should it be supposed that if the parties agree informally upon a particular mode of procedure and so inform the arbitral tribunal, it should necessarily be bound?[78] He leaves the question unanswered as to what should be understood by "informal". Certainly an informal agreement does not refer to an agreement "in writing", hence writing is not in principle a prerequisite for the validity of this agreement.[79] Thus any valid agreement between the parties, whether formal or not, about procedure should be binding upon the arbitrator. Uff,[80] to demonstrate the limits of the effect of the parties' consent upon the powers and duties of the arbitrator, uses the example of two parties both becoming insolvent during the arbitration. They agreed on a procedure in terms of which the respondent would not offer any defence, which procedure was intended to result in an award in favour of the claimant. The arbitrator suspected that the purpose of the agreement was to obtain an award to be used to deceive a third party. The arbitrator refused to co-operate so the arbitration lapsed. Modern arbitration statutes deal with this situation by providing for an "award on agreed terms".[81]

---

76 See Lionnet "The Arbitrator's Contract" (1999) 15 *Arbitration International* 161 at 165.

77 Uff (1995) 61 *Arbitration* 24.

78 Uff (1995) 61 *Arbitration* 24.

79 Precisely because of the uncertainty which informal agreements between the parties could create as to their effect on the arbitrator's powers, s 5(1) of the English Arbitration Act now requires agreements between the parties to be in writng to be effective (see n 75 above). A similar position has been adopted by the SA Law Commission in relation to the proposed new domestic arbitration statute (see SA Law Commission Report *Domestic Arbitration* 31 and the Draft Arbitration Bill s 6(1)).

80 Uff (1995) 61 *Arbitration* 24.

81 See e.g. the UNCITRAL Model Law article 30. It must appear from the award that it was reached by agreement and the arbitrator is moreover not obliged to make such award. These safeguards are intended to protect the arbitrator against being compelled to issue what appears to be an ordinary award obtained in the usual way which is then used to deceive a third party. Significantly, in Uff's example, the parties did not want a "consent award".

It is doubtful on the facts stated by Uff whether the arbitrator could have been compelled to give an award on the lines of the parties' agreement. The arbitrator could also have resigned. Either way, the example does not provide a sufficient basis to support a general proposition that an arbitrator is entitled to ignore agreements between the parties on matters of procedure.

Uff also asks whether the arbitrator is bound by party agreements about procedural matters, should the parties formally change these procedural rules midway.[82] He contends that the agreement binds the parties, but not the arbitrator. If the arbitrator does not agree to the new rules, that arbitrator is only bound by the rules initially agreed on. "Common sense suggests that he could not be bound without further agreement, in default of which the parties would have to seek to agree to replace the arbitrator."[83]

It is submitted that the former view based on the supremacy of party autonomy is preferable and it is now clearly the view accepted by the English legislature. If the tribunal cannot persuade the parties to conduct the arbitration under its rules, it cannot ignore the party's agreement, but must either follow the rules the parties have agreed on, or resign.[84] In practice, agreements between the parties, which make it impossible for the tribunal to act effectively, are not likely to occur often. It makes no sense for the parties to appoint an arbitral tribunal, partly on the basis of its skill and experience in the conduct of arbitrations, and then to deny it a substantial say in how the proceedings are to be conducted.[85]

2. The professional background of the arbitrator

Regarding the appointment of the arbitrator, the parties may ask what other qualifications the arbitrator should possess apart from "leadership qualities"? An often suggested quality of an arbitrator is expertise in the field of the subject-matter in dispute.[86] This implies that the arbitrator will not be a full-time arbitrator, but rather conducts arbitration on a part-time basis. The advantage of a part-time arbitrator can

---

82 Uff (1995) 61 *Arbitration* 24. Uff supports his contention with some extreme examples, such as an agreement to change the language of the proceedings to one which the arbitrator does not speak, or a change of venue.

83 Uff (1995) 61 *Arbitration* 24.

84 See the DAC (Saville) Report para 96; Butler (1998) 9 *Stell LR* 17.

85 Butler (1998) 9 *Stell LR* 17.

86 Butler & Finsen 74, writing in the context of domestic arbitrations. Compare Refern & Hunter (3 ed) 205-206 for the view that in international commercial arbitrations with a sole arbitrator, it is

be that the expertise of the professional may not be maintained if the arbitrator deserts the field of his or her profession and becomes a full-time arbitrator.[87]

Also in some technical fields the subject-matter of the dispute will require a fair amount of specialised knowledge. The fact that the basis of the arbitrator's expertise is in the same technical field may be helpful, since it will not be necessary to explain basic principles underlying the facts in dispute. Additionally, the appointment of a "technical arbitrator" will be advantageous where the dispute is concerned only with technical issues, like whether the right quality of goods were supplied, where important procedural or legal issues are unlikely to arise.[88] In these cases, an arbitrator who bases his or her knowledge on legal education more than on technical expertise would be inappropriate, since it would be necessary in addition to call experts on the technical questions in dispute. If the arbitral tribunal has the required technical expertise, it may warn the parties that it may disallow the cost of any experts which it finds to be unnecessary having regard to its own expertise.[89]

Finally it is necessary to stress that the arbitrator, whether from a legal or technical background, should be experienced in the law and practice of arbitration, particularly in an international context.[90] It is also vital in the interests of effective arbitration that the arbitrator keep abreast of the latest developments in arbitration law and practice.[91]

3. The "inquisitorial" or interventionist approach

Regardless of whether the arbitrator is a lawyer or a "technical arbitrator", several authors have demanded for many years that the style of arbitration proceedings must move away from the English adversarial approach,[92] towards "inquisitorial" forms of proceedings. Already in 1980 Sir Michael Kerr wrote that arbitrators

---

usual to appoint a lawyer because of the difficult problems of procedure and conflict of laws which are likely to arise.

87 Butler & Finsen 74.

88 Butler & Finsen 75.

89 Uff (1993) 59 *Arbitration* 35.

90 Redfern & Hunter (3 ed) 208; Butler & Finsen 76.

91 Lane 6.

92 Under the adversarial system, the role of the judge or arbitrator is *traditionally* reduced to sitting and ruling on disputed questions as they arise from the presentation of facts by the parties and granting measures properly requested by a party. The adjudicator's function is therefore to decide the dispute on the information presented by the parties. See Borris "Common Law and Civil Law: Fundamental Differences and Their Impact on Arbitration" (1994) 60 *Arbitration* 78-79; Butler & Finsen 168.

> "should not allow themselves to be dominated by English procedures. In long and complex cases the Continental inquisitorial [court] procedure is often more effective than our adversary system. It is often better for the tribunal to limit discovery in the first instance, to appoint its own experts, and then to exercise control over the volume of discovery and the witnesses whom it wants to hear. Our arbitrators will have to be more imaginative than to follow the mirror-image of the procedure in our courts."[93]

The question must be asked as to what is meant by "inquisitorial"? It has been said that "[under] the inquisitorial system the judge conducts his own enquiries into the factual and legal issues, with the assistance of the parties and their lawyers".[94] The role of the adjudicator under the procedure used in civil proceedings in the countries of Western Europe is however not truly inquisitorial in this sense but merely more interventionist than that under the adversarial system. It is still up to the parties to present all the facts in support of their respective cases to the adjudicator. The adjudicator will however assume a more active role in questioning witnesses and may possibly indicate during the hearing if facts have not been proved to the adjudicator's satisfaction, while being careful to avoid creating an impression of partiality by helping one of the parties.[95]

The term "inquisitorial" when used by advocates of the reform of arbitration practice therefore often simply means "intervention by the arbitrator and, to a degree, direction of the course of the proceedings given that they will still be conducted on the basis of each party presenting its case".[96] In this context the tribunal must carefully inquire how far it may intervene in the process, to avoid non-compliance with the requirements of due process, thereby imperilling the enforceability of the award. It is submitted that a return to the "inquisitorial" or interventionist approach formerly used by "technical arbitrators" could result in a renaissance of the understanding of arbitration as a truly alternative way of dispute resolution by an independent tribunal, as opposed to privatised litigation using the High Court procedure.

---

93 Kerr "International Arbitration v Litigation" 1980 *Journal of Business Law* 164 at 180, quoted by Steyn (1983) 48 *Arbitration* 310.

94 See Redfern & Hunter (3 ed) 282.

95 See Borris 79; Butler & Finsen 168.

96 Uff (1995) 61 *Arbitration* 23.

Regarding the extent of the arbitral tribunal's powers under the new English Arbitration Act of 1996, Hunter refers to section 34(1)(g), which, unless the parties otherwise agree, empowers the tribunal to decide "whether and to what extent the tribunal should itself take the initiative in ascertaining the facts and the law".[97] He concludes correctly that this provision confirms the power of the tribunal to act inquisitorially in the true sense of that term, which was according to some authorities only possible under the old legislation if expressly so agreed by the parties.[98] Hunter is nevertheless of the view that this power is unlikely to be exercised in practice where the parties are represented by lawyers.

The power to conduct the arbitration in an interventionist or inquisitorial manner may be regarded as an important tool for the tribunal to ensure cost-effective proceedings. As indicated above, this power does not allow the tribunal to conduct the proceedings as it deems fit. As in civil-law countries, where the interventionist style of arbitration is rather the norm than the exception, the tribunal must observe the requirements of due process. This means that it must give the parties a reasonable opportunity of commenting on the result of any inquisitorial investigation that the tribunal may make.[99]

The earlier mentioned role of the arbitral tribunal as "master of the procedure" clearly includes the power of conducting the arbitration in an interventionist style. This style in particular enables effective intervention by the tribunal to the extent of becoming involved in the planning and the progress of the arbitration, by giving timely directions, which will shape the future course of the proceedings.[100]

4. Utilising preliminary meetings

Whatever the tribunal wants to impose on the parties as appropriate measures in terms of timetables and other procedural directions, it needs to be asked when these measures should be taken. It is generally agreed that this can be done at a

---

97 Hunter 354.

98 In the *Bremer Vulkan* case [1980] 2 WLR 905 at 923 Roskill LJ emphasised that an arbitrator, who, in the absence of an agreement that he should do so, attempts to conduct an arbitration along inquisitorial lines may expose himself to criticism and possible removal. Nevertheless, the difference between the roles of an arbitrator and a judge was acknowledged in the same case by the House of Lords, with specific reference to the fact that the arbitrator is entitled to act on his own initiative. This distinction was, however, made in the context of preliminary directions and not with reference to an arbitrator's powers at a hearing. See Steyn (1983) 48 *Arbitration* 310.

99 Hunter 355.

100 Uff (1995) 61 *Arbitration* 23.

preliminary meeting.[101] In preparing for the preliminary meeting, particularly in the context of an international arbitration, the tribunal would be well advised to refer to the UNCITRAL Notes on Organizing Arbitral Proceedings.[102] The purpose of the Notes is to assist arbitration practitioners by identifying questions on which appropriately timed decisions may facilitate effective arbitration and to provide advice on possible alternative courses of action. The Notes are not intended to be used as rules as this could have undermined the flexibility of the arbitral process.[103] Particularly useful is the "List of Matters for Possible Consideration in Organizing Arbitral Proceedings" provided in the Notes which can be used as a checklist at the preliminary meeting.[104]

In an ad hoc arbitration, with no appointing authority, this preliminary meeting may serve firstly to finalise the terms of appointment of the tribunal. More importantly, in an international arbitration, especially where the legal representatives come from different cultural backgrounds and different legal systems, it can be sensible for the tribunal to convene a preliminary meeting at an early stage of the proceedings. This will ensure that the tribunal and the parties have a common understanding of how the arbitration is to be conducted, and will enable a carefully designed framework for the conduct of the arbitration to be established.[105]

Furthermore, and most significantly in the interests of effective arbitration, the preliminary meeting provides the opportunity for the tribunal to begin to impose its authority on the proceedings and the parties.[106] It is through the mechanism of preliminary meetings that the tribunal is best able to control the hearing, impose its leadership during the arbitration and give procedural directives designed to deal with the dispute in question. Moreover, the discussion of the procedure at a preliminary meeting with the parties before the tribunal gives procedural directives increases the transparency of the process.[107] However, the tribunal may not be in a position at the first procedural meeting to have a proper understanding of what issues are in

---

101 See generally on the preliminary meeting Redfern & Hunter (3 ed) 292-297; Butler (1994) 6 *SA Merc LJ* 265-269; Bernstein, Tackaberry & Marriott 126-130.

102 The text of the UNCITRAL Notes was approved by UNCITRAL in 1996 (see Ceccon "UNCITRAL Notes on Organizing Arbitral proceedings and the Conduct of Evidence" (1997) 14(2) *J of Int Arb* 67-68).

103 See the UNCITRAL Notes paras 1, 3 and 4 and Ceccon 67 and 71.

104 Redfern & Hunter (3 ed) 295.

105 Redfern & Hunter (3 ed) 293. They point out that although modern communication devices enable the "meeting" to be held e.g. by video or telephone conference, which may save costs, there is no substitute for a face-to-face meeting. Compare the UNCITRAL Notes paras 7-9.

106 Butler (1994) 6 *SA Merc LJ* 266.

107 See Ceccon 71 and the UNCITRAL Notes para 5.

dispute, if the case is complex and complicated. Without that understanding it is unable to give the necessary directives as to the procedure to be adopted.[108] This aspect is given further consideration in the text below.

Finally, the preliminary meeting enables the tribunal and the parties or their representatives to review the procedure provided for in the arbitration agreement, and so to seek means of adapting it to the needs of the particular dispute.[109]

The tribunal should ensure that each party is represented at the preliminary meeting not merely by its legal advisers, but also by a senior executive empowered to take decisions.[110] The reasons for this are firstly that the presence of the parties will make it more difficult for the lawyers to reject out of hand suggestions by the tribunal towards shorter and more cost-effective procedures, because they will have to present cogent reasons to their clients for doing so.[111]

Secondly, if a senior executive is involved, it is more likely that he or she will have a broader view of the issues involved and may be more interested in a cost-effective resolution of the dispute and continuing the relationship with the other party than in winning the case by any means. In cases where the parties to the dispute appear without their legal representatives, they are more likely to defer to the tribunal's views about procedure. The lack of legal experience may be such that they are content to leave the whole direction of the proceedings to the tribunal.[112]

Another benefit of involving the parties in the preliminary meeting rather than only their legal representatives relates to defining the issues in dispute. Often the dispute is initially presented to the tribunal by the lawyers, and naturally from a legal point of view. Often both the content of the message and the emphasis are changed from what the client itself would have stressed. Furthermore, the preliminary meeting may be the appropriate venue for the parties to present the issues in dispute to the tribunal in a non-legal manner. Often during the hearing the parties are not allowed

---

108 Lane 6.

109 Butler (1994) 6 *SA Merc LJ* 266.

110 Butler (1994) 6 *SA Merc LJ* 266. Goode 12, writing in the context of settlement negotiations and mediation, rather than arbitration, states that each side should be represented at the negotiations by an executive who has not previously been involved in the dispute and who is senior to, or at least on an equal level with the executive involved in the management of the contract, which gave rise to the dispute. The reason for this is clearly that the former representative will approach the negotiations with a more open mind.

111 Butler (1994) 6 *SA Merc LJ* 266.

112 Uff (1993) 59 *Arbitration* 34.

to speak except to answer questions and these are framed with a view to the relevance of the issue as defined in the pleadings and by rules of evidence. One can imagine that matters which the parties want to be able to voice when they have their "day in court" during the hearing remain unarticulated, either because of the lack of an opportunity to express them or because when they try to do so they are ruled out of order.[113]

Commonly, at the outset of an arbitration, the arbitral tribunal knows practically nothing about the issues, the parties' lawyers know a little and naturally the parties themselves know a great deal. In many cases, where the parties define the issues, the tribunal and the legal representatives could contribute much more to the economic resolution of the dispute by discovering more about the issues in the preliminary meeting.[114] Alternatively, in complex cases it may be wise to define and submit the issues in dispute in writing even before the preliminary meeting, so that the issues, after having been read by the opponents and the tribunal, can be further discussed during the preliminary meeting.[115]

As mentioned previously,[116] court-style pleadings will not always identify the true issues in dispute. Furthermore they will not properly inform the tribunal or the other party of the evidence to be produced to prove the allegations of fact or the legal arguments, which will be advanced in support of the pleader's case. The other party may therefore gather evidence on issues that will never seriously be pressed at the hearing.[117] The tribunal should therefore require written submissions from each party, outlining the issues of the case. These submissions inform the tribunal as to what it must decide in making the award. This is important because an award, which decides either more or less than the matters submitted, is open to attack.[118] A party's submissions are in effect a written statement of its case containing allegations of fact, a summary of evidence in support and its contentions on the legal issues, accompanied by copies of the essential documents on which the party will rely.[119]

The extent to which the preliminary meeting (combined with other modern methods of case management) can have a positive effect on the arbitration regarding cost-

---

113 Goode 11.
114 Uff (1993) 59 *Arbitration* 37.
115 Compare the UNCITRAL Notes para 43.
116 See n 67 above.
117 Butler (1994) 6 *SA Merc LJ* 273-274.
118 Butler (1994) 6 *SA Merc LJ* 272.
119 Mustill & Boyd 318 and 321.

effectiveness and saving time can be illustrated by a comment about an arbitration conducted in London.[120] Before the arbitration commenced the tribunal was told by the parties' lawyers that the hearings were expected to last three months or more. The tribunal considered that three months was far too long for the matter in dispute and that drastic measures were required. After the close of pleadings, the tribunal called for a preliminary meeting with the parties, and put both sides on notice that it wished to explore ways of dealing with the matter more expeditiously. After the preliminary meeting, the tribunal issued directions as to how the arbitration had to be conducted.

These directions included limited discovery to be given by a certain date, the requirement that evidence-in-chief of witnesses and of experts should be adduced by affidavit and that such affidavits should be exchanged on a certain date. Additionally, the so-called rule that a witness's evidence stands unless he or she is cross-examined on every point that is challenged, would not apply. At a further preliminary meeting it was decided that each party would have one week to cross-examine the other party's witnesses and this hearing took place. A further week for oral argument was then scheduled. Although at the time of the comment the final hearing had not yet taken place, it was likely that the hearing would have been reduced to three weeks instead of three months.

As an additional point one should bear in mind that in complex disputes it may not be practical to take final decisions on all matters regarding the arbitral procedure at the initial preliminary meeting. The arbitration could develop in a different direction from that expected in the preliminary meeting, where the decisions about the procedural matters have been made. Therefore, the tribunal could expressly reserve matters like limited discovery of documents and meetings between experts for further consideration at a subsequent preliminary meeting.[121]

5. Imposing timetables

A matter of great concern regarding the conduct of international commercial arbitration is the length of time between the filing of the request for arbitration and the issuing of the award. In cases where the tribunal failed to impose a binding timetable on the parties, the delivery of documents by the parties, including written

120 See Steyn (1983) 48 *Arbitration* 311-312. See also Butler (1994) 6 *SA Merc LJ* 288-290.
121 Butler (1994) 6 *SA Merc LJ* 268.

submissions and witness statements, will probably take place on a reciprocal basis. The exchange may well be conducted in a leisurely fashion, ignoring time limits in any applicable rules, as it may suit the parties and especially their busy lawyers if there is a delay in the delivery of each reply.

Considerations like these like these led the ICC in the latest edition of its rules to impose the duty on the arbitral tribunal to draw up a provisional timetable for the arbitration, either simultaneously with the terms of reference or as soon as possible thereafter.[122] The timetable must be communicated to the ICC Court and to the parties. The rules thereby "oblige both the arbitrators and parties to look beyond the immediate next steps in the arbitration and to focus as concretely as possible on the needs of the [arbitral process] as a whole".[123] This timetable should be prepared in consultation with the parties and is provisional, in that the tribunal, again in consultation with the parties, may modify it if circumstances so require.[124] In arbitrations not conducted under the ICC Rules, the logical time to draw up the timetable is at the preliminary meeting.

By imposing a timetable, which binds the parties as to the dates by which they have to submit documents like submissions and witness statements, and by setting the date and duration of the hearing, both the parties and the tribunal can foresee how much time the arbitration will consume.[125] Particularly the claimant will now have some idea as to when payment may be received from the respondent. The imposition of a timetable, after consultation with the parties, is particularly desirable in international commercial arbitrations, where the participants may be accustomed to different styles of conducting arbitral proceedings. Without such guidelines, a party may find aspects of the proceedings unpredictable and difficult to prepare for, which may lead to misunderstandings, delays and increased costs.[126]

But, the coin of strict time limits has another side. The tribunal has to weigh the need for efficiency and expeditious procedure against each party's entitlement to an adequate hearing of the merits.

> "The arbitrator's concern to respect procedural due process should not be permitted to lead to untoward delay, particularly at the instance of a dilatory

---

122 Article 18.4.
123 Derains & Schwartz 246.
124 Derains & Schwartz 246.
125 Butler (1994) 6 *SA Merc LJ* 267.
126 Compare the UNCITRAL Notes paras 4-5.

> litigant for whom delay may be viewed as an objective in itself. In practice it would appear that, for every legitimate criticism that a given arbitration procedure risks jeopardising the rights of a party, there are ten legitimate complaints that the procedure adopted by arbitral tribunals are too time-consuming and do not provide a schedule to move the dispute to resolution in the shortest time-frame consistent with due process."[127]

An excessive fear of the challenge of the award on grounds of lack of due process or unfair arbitral hearings may result in an immensely delayed award instigated by subversive parties and acceded to by arbitral tribunals in the name of natural justice or due process.

On the one hand one could also argue that it should be on the duty of the legal representatives to establish a chronological schedule which would serve the interests of their clients by avoiding time-consuming and thus costly procedures.[128] The reason that the lawyers themselves do not suggest a strict timetable is firstly, that most practitioners are not familiar with the procedure. Secondly, because of pressure of work, the practitioner concerned tends to look at the dispute simply in terms of the next step. The result is that a proper investigation of the issues is postponed until just before the hearing.[129] The opportunity to establish a timetable, which is suitable for the dispute in question and which is not just a copy of the High Court procedure will have been lost by that stage.

On the other hand, if the parties are aware of the issues and the fact that time is precious and expensive, it is possible for them to impose time-limits on the arbitral tribunal in the arbitration agreement regarding the periods within which various stages of the arbitration are to be completed and the period within the tribunal is to deliver its award.[130]

---

127 See Donahey 106. The comment was made regarding the position under the previous edition of the ICC Rules.

128 Compare the duty imposed on the parties (and by implication on their legal representatives) by the English Arbitration Act of 1996 s 40.

129 Butler (1994) 6 *SA Merc LJ* 270.

130 Butler (1994) 6 *SA Merc* LJ 262.

6. The hearing

During the course of an arbitration it is likely that the hearing itself will be the most expensive part of the proceedings.[131] This is particularly evident in international commercial arbitration where the place of the hearing is usually different from the domicile of at least some of the parties and arbitrators. The costs of the hearing would include the travelling expenses to and from the place of the hearing of the parties, their legal representatives, the arbitrators, witnesses and experts. Furthermore, in cases with lengthy hearings, accommodation is required for most if not all the persons involved.

It is therefore a prerequisite for cost-effective proceedings not to expand the hearing beyond what is actually required through unnecessary procedural tactics. It is also generally accepted that hearings in arbitration have become unacceptably lengthy and costly.[132] The arbitral tribunal moreover has the power to control the length of the hearing.[133] But to conduct an efficient hearing can be a challenging task to achieve. Traditionally under the adversarial approach, there is too much talking at arbitration hearings as regards counsel's opening and closing speeches, the examination and cross-examination of witnesses and reading from documents. Nevertheless, one should "avoid a too drastic swing of the pendulum away from the undoubted advantages of an oral hearing."[134] For example, effective cross-examination can be vital for exposing the truth, whereas the cogency of written evidence may ultimately depend more on the skills of the drafter.[135]

However, opinions as to what is a reasonable length of time for a hearing differ widely. In English practice, hearings can last for many weeks. By contrast, arbitral tribunals, which are dominated by arbitrators from civil-law countries will regard any hearing that takes more than three days as a long one, and would probably be unwilling to allocate more than at the most five days consecutively to any case.[136]

---

131 Butler (1994) 6 *SA Merc* LJ 281.
132 Steyn (1983) 48 *Arbitration* 310
133 Uff (1995) 61 *Arbitration* 20.
134 Butler (1994) 6 *SA Merc* LJ 281.
135 Butler (1994) 6 *SA Merc* LJ 281.
136 Redfern & Hunter (3 ed) 334.

In the absence of an agreement excluding such right, each party to an arbitration is entitled to insist on a "full" oral hearing.[137] But there is no requirement that the tribunal must afford the parties an unlimited hearing. Where the parties disagree about the length of hearing required, there can be little doubt that the tribunal will act properly and within its powers by determining that some designated length of hearing is appropriate.[138] The tribunal must nevertheless observe the fundamental requirement of due process whereby each party must be given a reasonable opportunity to present evidence and argument and to test the case against it.[139]

Regarding the management of the hearing of a large complex multi-issue case, the last thing the arbitral tribunal should ordinarily countenance is to set down the whole case for hearing at one time.[140] It may be wise to arrange a splitting of the hearing in order to deal with certain connected issues at a time and finalise these issues with an interim award,[141] before proceeding to hear the next issue.

A further "modern" suggestion to reduce the length of costly adversarial hearings is to present the relevant documents to the tribunal for pre-reading, in advance of the hearing.[142] Reading all documents in open session to the tribunal is very a time consuming and costly exercise. Those same documents could be read in less than half the time in private. "The traditional system of a full scale oral hearing on every matter in issue may be the finest way of arriving at the correct answer but it is often not cost effective, notably in relation to subsidiary issues which do not greatly affect the final outcome".[143] A further advantage of a hearing based on pre-reading is that the tribunal is furnished with a written opening statement. This will facilitate firstly the understanding of the other documents made available before the hearing and secondly the ability of the tribunal to prepare itself for the hearing. An important if somewhat controversial application of the pre-reading of documents concerns the possibility of the tribunal requiring the exchange of written witness statements by

---

137 See the UNCITRAL Model Law articles 18 and 24(1), but compare the English Arbitration Act of 1996 s 34(2)(h) and the SA Law Commission's proposed Draft Arbitration Bill for domestic arbitration s 33(1).

138 Uff (1995) 61 *Arbitration* 20.

139 Uff (1993) 59 *Arbitration* 33. The requirement in article 18 of the Model Law that each party must be given "a full opportunity" of presenting its case must obviously be read subject to the requirement of reasonableness.

140 Uff (1995) 61 *Arbitration* 23. See too Butler & Finsen 204-205 and compare the UNCITRAL Notes para 76.

141 An interim award, as the expression is understood in South Africa, deals with only some of the substantive issues in dispute and is final on the issues that it decides. See SA Law Commission Report *Domestic Arbitration* 79 n 317.

142 Compare the UNCITRAL Notes para 61 regarding written witness statements and Uff (1995) 61 *Arbitration* 20.

witnesses of fact. These statements would then also be available for pre-reading by the tribunal and facilitate the questioning of the witness by the tribunal during the hearing and effective cross-examination.[144]

7. Documentary evidence and limited discovery

Another of the principal causes of unnecessary delay and expense in modern arbitration has been the greater tendency on the part of today's commercial and professional persons to generate documents. If the flood of documents potentially involved in a complex arbitration is unleashed by the floodgates of discovery, it is hard to get it under control again. The extent of discovery will usually be a material factor in the extent of the investigation, which the parties can conduct, and therefore the amount of the client's money, which will be spent, directly and indirectly.[145]

An order for discovery obliges the party concerned to disclose documents which are or have been in its possession, custody or control relating to any matter in issue and which contain information which may advance the adversary's case or damage its own.[146] Although discovery may be an essential characteristic of the adversarial system, it is unknown to the European Continent and its civil-law system. Particularly in international arbitration, where one party is from a civil-law background and the legal representative is unfamiliar with discovery, the danger exists, that the parties may not be equally thorough, which could result in grave injustice.[147] The civil-law parties may be surprised by a system, which requires them to produce documents passing within their own organisation, which were never intended for general distribution.[148]

In general it is doubtful whether the full discovery of documents is helpful in an international commercial arbitration.[149] The principle that it is safer to copy and

---

143 Steyn (1983) 48 *Arbitration* 310.

144 See generally on written witness statements the UNCITRAL Notes paras 61 and 62; the IBA Rules on the Taking of Evidence in International Commercial Arbitration (1999) ("the IBA Rules of Evidence") article 4.4-4.5, which gives the tribunal the discretionary power to order the exchange of witness statements; Bühler & Dorgan "Witness Testimony Pursuant to the 1999 IBA Rules of Evidence in International Commercial Arbitration" (2000) 17(1) *J of Int Arb* 3 12-16; Butler (1994) 6 *SA Merc LJ* 283-285.

145 Uff (1993) 59 *Arbitration* 34; Butler (1994) 6 *SA Merc LJ* 276.

146 Butler & Finsen 143.

147 Butler (1994) 6 *SA Merc LJ* 277.

148 Mustill & Boyd 325.

149 See Griffin "Recent Trends in the Conduct of International Arbitration" (2000) 17(2) *J of Int Arb* 19 at 20-21 for the view that many parties regard the common-law procedure of full discovery as "excessive, costly and burdensome". He suggests that the tribunal and the parties should

include rather then to omit, leaving the sifting process to be done not earlier than at the actual hearing is counterproductive. But through a careful exercise of its discretion, the tribunal can do much to ensure that the benefits of discovery are available, without being offset by the disadvantages.[150] The tribunal should direct full discovery only in exceptional circumstances; normally only limited discovery should be ordered. This could involve the tribunal ordering discovery in accordance with requests for specific documents or categories, with disputes in this regard being resolved by the tribunal as and when they arise.[151] A positive consequence of this approach is that it makes clear to the parties that they are not denied the opportunity of making later requests, which will encourage the moderation of their initial demands. In the context of encouraging a cost-effective procedure, it may calm the appetite of lawyers for full discovery if the tribunal makes it clear that there is no automatic right to recover the costs of such discovery if the applicant is successful in the arbitration. This could possibly be achieved by the threat that the relevant costs will be disallowed, if the documents are later shown to be unnecessary for the case.[152]

From a practical perspective, the following three-stage procedure is suggested as a useful general approach.[153] First, the parties must produce the documents upon which they rely. Secondly, the parties request each other to produce additional documents, or categories of documents. Those requests must be limited to documents related to the issues raised in the statements of the case and must be identified with sufficient particularity. Only in the third stage, if either party refuses to produce any requested documents, may an application be made to the tribunal to make such order. The tribunal could also encourage compliance by indicating that a party which refuses to comply with an obviously reasonable direction to produce risks an adverse finding of fact.[154]

Under the current South African legislation both the arbitral tribunal and the court have the power to order discovery on the application of a party.[155] A party therefore has no automatic right to require full discovery unless the arbitration agreement

---

aim for a workable compromise between the common-law and civil-law systems on this point, based on article 3 of the IBA Rules of Evidence.

150 Butler (1994) 6 SA *Merc LJ* 278.

151 Uff (1995) 61 *Arbitration* 21.

152 Uff (1995) 61 *Arbitration* 21.

153 Hunter 350.

154 Hunter 350.

155 See the Arbitration Act 42 of 1965 ss 14(1)(a)(i) and 21(1)(b).

provides otherwise.[156] A party dissatisfied with the tribunal's rejection of an application for discovery could however possibly use the court's statutory power to order discovery as a method for attempting to upset the tribunal's ruling and delaying the arbitration while the issue is determined by the court.[157] Under the proposed International Arbitration Act, the tribunal is empowered to conduct the arbitration in a manner it considers appropriate, unless the parties otherwise agree.[158] This general power includes the taking of evidence and ordering disclosure of documents. Article 27 regulates court assistance in taking evidence. The court can only be approached by the tribunal, or by a party with the approval of the tribunal. The approval of the tribunal is required to give the tribunal greater control over evidential matters[159] and diminishes the possibility of a reluctant party involving the court as a delaying tactic. In the Law Commission's proposals for new domestic arbitration legislation, the tribunal retains its power to order discovery on the application of a party. The Law Commission takes the view that discovery in arbitration proceedings is not a matter for the courts, with the result that the courts' power to order discovery has been intentionally omitted.[160]

Also under English law, the rules of court regarding discovery do not apply to arbitration. Consequently, there is no *automatic* discovery in English arbitration proceedings. Discovery forms part of arbitration proceedings only where the parties so agree or where the tribunal so orders in the exercise of its discretion.[161]

It appears from the above discussion that control of discovery and judicious pre-reading of relevant documents[162] are able to give the whole arbitration process a new character in terms of efficiency.

8. Documents-only arbitration[163]

The importance of the pre-reading of relevant documents before the hearing has been referred to above.[164] In a documents-only arbitration there is no hearing and

---

156 Butler (1994) 6 *SA Merc LJ* 278.
157 Butler (1994) 27 *CILSA* 142.
158 Sch 1 article 19.
159 See SA Law Commission Report *Arbitration: An International Arbitration Act for South Africa* 83.
160 See SA Law Commission Report *Domestic Arbitration* 74 and the Draft Arbitration Bill ss 29(2)(b)(i) and 40(1).
161 Hunter 350. See too the English Arbitration Act of 1996 s 34(2)(d).
162 See para II.6 above.
163 See generally on documents-only arbitrations Butler & Finsen 197-201; Harris "Maritime Arbitrations" in Bernstein, Tackaberry & Marriott 318-319.

the dispute is decided on documents only. It has been said many times that the only thing wrong with "documents-only" arbitrations is that there are not enough of them.[165]

Whether an arbitrator has the power to dispense with a hearing will depend on the applicable arbitration agreement, rules and legislation. Usually, a party is entitled to require an oral hearing, unless the parties have agreed that the arbitration is to be conducted on documents only.[166] However, section 34(2)(h) of the English Arbitration Act of 1996[167] reverses the usual position in providing that unless the parties otherwise agree, it is up to the tribunal to decide "whether and to what extent there should be oral or written evidence or submissions". The tribunal thus has full discretion to dispense with oral proceedings if this seems to be appropriate.[168] Documents-only arbitration has a significant advantage over litigation, since the latter must be conducted orally and in open court. Significantly, an eminent English jurist, Lord Griffiths, has stated, when reflecting on his earlier long career as a trial judge, that he could recall no more than a handful of cases where the result might have been different if he had been called upon to decide on the basis of the pleadings and documents, which he had read prior to the start of the hearing.[169]

Obviously, the "documents-only" arbitration has some considerable advantages compared to arbitration conducted with hearings.[170] The greatest one surely is its cost-efficiency. The earlier mentioned travel and accommodation expenses, the cost of the venue and other costs of a formal hearing are avoided. The saving in time for the parties, their lawyers and the arbitrators is another significant advantage. But one must bear in mind that "documents-only" proceedings are not suitable for every type of dispute. The procedure is most appropriate in less complex cases where oral testimony can add little to what can be ascertained from contemporaneous

---

164 See para II.6 above.

165 Redfern & Hunter (3 ed) 329; Hunter 357. Nevertheless, Harris in Bernstein, Tackaberry & Marriott 318 claims that notwithstanding the additional complexity of maritime disputes today, perhaps as much as 80% of maritime arbitrations are still decided on documents only.

166 See e.g. the UNCITRAL Model Law article 24(1); LCIA Rules article 19.1.

167 See too the similar provision proposed by the SA Law Commission for domestic arbitration in the Draft Arbitration Bill s 33(1).

168 See Hunter 357, who also states that the power is likely to be used very sparingly where any party objects to a documents-only arbitration.

169 Lord Griffiths during a conference in Brussels 1995, quoted by Hunter 357. See too Harris "The Importance of Documents in Maritime Arbitration" (1998) 64 *Arbitration* 253-256 regarding the value of contemporaneous documents for assessing the credibility of parties' submissions in support of their case.

170 See Butler & Finsen 198-199.

documents.[171] In complex cases a preliminary meeting may be necessary to help the tribunal to understand the disputed issues in the first place, before continuing with an arbitration hearing.

171 Butler & Finsen 197.

III. Conclusion

The discussion above and in particular chapter three illustrates that although the legislature in Germany and the Law Commission in South Africa have sometimes chosen the same approach and sometimes a differing approach to cope with the various problems of modern arbitration, at the end of the day, efficient arbitration will be the result of a conscious effort by the arbitral tribunal, hopefully with the assistance of the parties.

The need for more efficient arbitration proceedings cannot be doubted. But, who should be the one to introduce and safeguard such proceedings? One could argue that the principle of party autonomy implies that it should be the parties themselves, who must ensure a procedure, which is suitable for the matter in dispute. If they are not willing to place the necessary emphasis on a procedure, which ensures the saving of their own money, who should?

But instead one could preferably reason that a cost-effective arbitration is part of the principle of fairness and justice. A party, who enters into an arbitration agreement and thus into arbitration proceedings should be able to expect not only to obtain an enforceable award, but to obtain that award as a result of an arbitration, which was reasonable in its costs and the time and effort invested.[172] The party must be able to expect proceedings, which are financially justifiable having regard to the issues and amounts in dispute. As part of the concept of justice one must assume that the arbitral tribunal will be able to conduct an arbitration process, which will not be hijacked by reluctant parties aiming to transform the proceedings into an endless battle and the arbitration itself into a costly risk.

An arbitral tribunal which claims to be able to produce a fair and just award must also be judged on its abilities to render its decisions within a reasonable time-limit, which makes the proceedings for the parties bearable. The main reason for the parties to agree on arbitration and the claimant to initiate the proceedings is the belief that arbitration, compared to litigation, is the better way to deal with the matter in dispute. If the tribunal is not able to conduct the arbitration in the expected manner, first, wasted time and money as well as disappointment will result. Secondly, the result

---

172 Compare SA Law Commission Report *Domestic Arbitration* 14-15.

will be that the parties will not easily enter into arbitration agreements again.[173] The approach of the South African Law Commission towards aspects of the proposed legislation for domestic arbitration must be understood in this context. Unnecessary delay by the tribunal, in breach of its proposed statutory duty to adopt procedures which avoid unnecessary delay and expense,[174] is a ground for removal from office.[175] A tribunal, which is compelled by the parties' agreement to adopt procedures which objectively speaking do not avoid unnecessary delay and expense, can therefore resign.[176]

As indicated above, an important feature of best modern arbitration practice is the growing emphasis on "judge management" during the stage prior to the actual hearing. The result is a trend towards a "cards on the table" approach, rather than "trial by ambush".[177] Nevertheless, generally a fundamental problem, when planning for dispute resolution, remains to change the culture of arbitration by identifying cost reduction and saving of time as major objectives to be tackled from the outset. The focus on eliminating avoidable cost and delay should not only take place at the outset but also at regular intervals subsequently.[178] The dispute resolution process needs to be properly planned in the pre-contract stage with the emphasis on restoring relationships through active participation of the principals rather than through pursuit of legal remedies by lawyers on assumption of breakdown.[179] This should be stressed even more, where both parties are economically dependent on the continuance of the relationship in the interest of further trade with each other.

Of course, due regard must be had to the wishes of the parties, but in this context the wishes of the parties are rather too readily identified with those of the lawyers, whose own convenience and pressures of other work are too often allowed to influence negatively the conduct of the arbitration.[180] Moreover, one must still also bear in mind that when conducting an arbitration, the arbitrator must almost certainly invest as much effort in resolving the merits of the dispute as in the matter of "case-management". The arbitrator's fundamental task is to decide the merits of the dispute, albeit in a fair, expeditious and cost-effective manner.

---

173 Compare Croall 34.
174 See the Draft Arbitration Bill s 28(1)(b).
175 S 22(1)(d).
176 SA Law Commission Report *Domestic Arbitration* 56 and the Draft Bill s 23.
177 Butler (1994) 6 *SA Merc LJ* 256.
178 Goode 14. See also Croall 38 on the ongoing role of the parties' attorneys in the process.
179 Goode 12. See also Croall 35.

In future it will be essential for arbitrators to be thoroughly familiar with the extent of their powers and be ready to give consideration to the practical aspects of the use of such powers in the circumstances of particular cases. This applies as much to arbitrators in South Africa with a common-law procedural background, as to arbitrators with a German civil-law background. Nevertheless, regarding the adoption of a more "inquisitorial" approach, this may be easier for arbitrators from civil-law countries, because they are accustomed to taking control of the proceedings from the outset. In contrast, many arbitrators with a common-law background are or have been in the habit of allowing the parties or, more usually, their legal representatives to drive the proceedings and will thus intervene only when asked to determine a procedural dispute.[181]

An arbitrator who claims to be thoroughly prepared to conduct a cost-effective arbitration, must not only have a thorough understanding of the applicable procedural rules like those of the ICC or the LCIA. That arbitrator should also have a sound grasp of relevant national arbitration laws, including the provisions regarding potential court involvement in the arbitration process. In this respect, the implementation of the UNCITRAL Model Law for international commercial arbitration by a growing number of countries must certainly be welcomed by international lawyers and arbitrators as well as by the judges of national courts, because of its harmonising effect and balanced powers for the courts.

Indeed, the viability of the arbitration process ultimately depends upon the willingness of the courts to enforce arbitration agreements and awards. English and South African courts have on the whole been very supportive of the arbitration process and have been increasingly reluctant to interfere with the procedure adopted by an arbitral tribunal, unless that procedure is contrary to the rules of natural justice. This has encouraged some arbitrators to adopt a more active and innovative role in arbitration proceedings.[182]

It is submitted that it will be crucial for the future of arbitration as a sought after dispute resolution process to recognise and uphold the principle that the arbitral

---

180 Goode 14.

181 Hunter 360.

182 Butler (1994) 6 *SA Merc LJ* 255. The SA Law Commission Report *Domestic Arbitration* 17 has stated in 2001: "The issue which requires to be addressed here is not the fear that the courts are incapabable of exercising the powers conferred on them by arbitration legislation. The problem is the danger of the court's statutory powers being abused by unscrupulous parties as a delaying tactic."

procedure can only be fair if it is not unduly prolonged and expensive, having regard to the nature of the particular dispute. One can predict that if this principle is not observed, the reputation of arbitration will be such that it will only be chosen by informed persons as a way of dispute resolution, if nothing better is available, that is to say, as the second worst choice.

However, the international arbitration community is aware of the current defects of arbitration practice and the difficulties they face, and strenuous efforts to improve the situation are being made. In conclusion, it is submitted that modern arbitration statutes and the latest editions of available rules, like those of the ICC and LICA, provide an adequate framework for cost-effective and expeditious arbitration. They incorporate the principle that, subject to party autonomy and due process, the arbitral tribunal is the "master of the procedure", which enables the tribunal in theory to conduct the arbitration in the required way.[183] Taking the proposed South African legislation for domestic arbitration as an example, the tribunal is given not only the powers but is also subject to the duty to conduct the arbitration using procedures which avoid unnecessary delay and expense.[184] As a German lawyer, who has made a comparative study of German and South African arbitration law and who has investigated the needs of disputants in practice, one must express the hope that the South African legislature will speedily implement new arbitration legislation, substantially in the form proposed by the South African Law Commission.

---

183 See the UNCITRAL Model Law articles 18 and 19; the ICC Rules article 15 and the LCIA Rules article 14.

184 See the Draft Arbitration Bill ss 28 and 29.

Bibliography

Books, articles and reports

Andrews N *Principles of Civil Procedure* Sweet & Maxwell London 1994

Bernstein R Tackaberry J & Marriott A L *Handbook of Arbitration Practice* (3 ed Sweet & Maxwell London 1998)

Berger K P *International Economic Arbitration* Kluwer Deventer 1993

Blessing M "The New International Arbitration Law in Switzerland: A Significant Step Towards Liberalism" (1988) 5(1) *Journal of International Arbitration* 9

Böckstiegel K-H "An Introduction to the the New German Arbitration Law Based on the UNCITRAL Model Law" (1998) 14 *Arbitration International* 19

Borris C "Common Law and Civil Law: Fundamental Differences and Their Impact on Arbitration" (1994) 60 *Arbitration* 78

Buchanan M A "Public Policy and International Commercial Arbitration" (1988) 26 *American Business Law Journal* 513

Bühler M & Dorgan C "Witness Testimony Pursuant to the 1999 IBA Rules of Evidence in International Commercial Arbitration" (2000) 17(1) *J of Int Arb* 3

Bundestagsdrucksache 13/5274 *Entwurf eines Gesetzes zur Neuregelung des Schiedsverfahrensgesetzes* (Official draft of a new German arbitration law) Gesetzesentwurf der Bundesregierung vom 12.Juli 1996 (Official Bulletin of the German Parliament)

Burger W E "Using Arbitration to Achieve Justice" (1985) 40(4) *The Arbitration Journal* 3

Butler D W "A New Domestic Arbitration Act for South Africa: What Happens after the Adoption of the UNCITRAL Model Law for International Arbitration? (1998) 9 *Stell LR* 3

Butler D W "Expediting Commercial Arbitration Proceedings: Recent Trends" (1994) 6 *SA Merc LJ* 251

Butler D W "South Africa Arbitration Legislation –The Need for Reform" (1994) 27 *CILSA* 118

Butler D W "The Proposed New International Arbitration Act: A Contribution To The African Renaissance?" unpublished paper delivered at the SLTSA Conference: Bloemfontein, January 1999

Butler D W & Finsen E N *Arbitration in South Africa, Law and Practice* Juta Cape Town 1993

Calvo M A "The New ICC Rules of Arbitration: Substantive and Procedural Changes" (1997) 14(4) *J of Int Arb* 4

Ceccon R "UNCITRAL Notes on Organizing Arbitral Proceedings and the Conduct of Evidence" (1997) 14(2) *J of Int Arb* 67

Christie R H "South Africa as a Venue for International Commercial Arbitration" (1993) 9 *Arbitration International* 153

Christie R H "Arbitration: Party Autonomy or Crucial Intervention II: International Commercial Arbitrations" (1994) 111 *SALJ* 360

Croall P "Cost Effective Arbitration: Meeting the User's Needs" (1998) 64 *Arbitration* 34

Departmental Advisory Committee on Arbitration Law "A New Arbitration Act for the United Kingdom? The response of the Departmental Advisory Committee to the UNCITRAL Model Law" (Mustill Report) in (1990) 6 *Arbitration International* 3

Departmental Advisory Committee on Arbitration Law *Report on the Arbitration Bill (Saville Report)* 1996

Derains Y & Schwartz E A *A Guide to the New ICC Rules of Arbitration* Kluwer The Hague 1998

Deutsches Institut für Schiedsgerichtswesen (DIS)*Übernahme des UNCITRAL Model Gesetzes über die internationale Handelsschiedsgerichtsbarkeit in das Deutsche Recht* DIS Cologne 1989

De Wiit Wijnen O L O "ADR, the Civil Law Approach" (1995) 61 *Arbitration* 38

Donahey M S "Defending the Arbitration against Sabotage" (1996) 13(1) *J of Int Arb* 93

Donaldson J "Alternative Dispute Resolution" (1992) 58 *Arbitration* 102

Donovan D F "Powers of the Arbitrators to Issue Procedural Orders, Including Interim Measures of Protection, and the Obligation of Parties to Abide by Such Orders" (1999) 10(1) *ICC ICArb Bull* 57

Fiss O M "Against Settlement"(1984) 93 *Yale LJ* 1073

Gaillard E "Laws and Decisions in Civil Law Countries" ICCA Congress Series No. 5, Xth International Arbitration Congress Kluwer Deventer 1990 162

Goode R "Dispute Resolution in the Twenty-First Century" (1998) 64 *Arbitration* 9

Griffin P R "Recent Trends in the Conduct of International Arbitration" (2000) 17(2) *J of Int Arb* 19

Gross P "Competence of Competence: An English View" (1992) 8 *Arbitration International* 205

Habscheid W J "Das Neue Recht der Schiedsgerichtsbarkeit" (1998) 9 *Juristen Zeitung* 445

Hammond W "Arbitration in Ancient Greece" (1985) 1 *Arbitration International* 188

Harris B "The Importance of Documents in Maritime Arbitration" (1998) 64 *Arbitration* 253

Harris C "Abuse of the Arbitration Process - Delaying Tactics and Disruptions: a Respondent's Guide" (1992) 9(2) *J of Int Arb* 87

Hermann A H "The Draft English Bill: Pulling the Wrong Punches" (1994) 10 *Arbitration International* 185

Herrmann G "The Role of the Courts under the UNCITRAL Model Law Script" from *Contemporary Problems in International Arbitration* Queen Mary College Centre for Commercial Law Studies London 1986

Holtzmann H M & Neuhaus J E *A Guide to the UNCITRAL Model Law on International Commercial Arbitration* Kluwer Deventer 1989

Hunter M "The Procedural Powers of Arbitrators Under the English 1996 Act" (1997) 13 *Arbitration International* 345

ICC International Court of Arbitration Secretariat "2000 Statistical Report" (2001) 12(1) *ICC ICArb Bull* 5

Jacobs M *The Law of Arbitration in South Africa* Juta Cape Town 1977

Kerr M "International Arbitration v Litigation" 1980 *Journal of Business Law* 164

Kerr M "Arbitration and the Courts – the UNCITRAL Model Law" (1984) 50 *Arbitration* 3

Kreindler R H & Mahlich T "A Foreign Perspective on the New German Arbitration Act" (1998) 14 *Arbitration International* 65

Lane P M M "Address to the Association of Arbitrators: (Southern Africa) Cost Effective Arbitration" (1997) 63 *Arbitration* 5

Lew J D M "Achieving the Potential of Effective Arbitration" (1999) 65 *Arbitration* 283

Lew J D M (editor) *Contemporary Problems in International Arbitration* Queen Mary College Centre for Commercial Law Studies, London 1986

Lew J D M "Commentary on Interim and Conservatory Measures in ICC Arbitration Cases" (2000) 11(1) *ICC ICArb Bull* 23

Lionnet K "The New German Arbitration Act – A User's Perspective" (1998) 14 *Arbitration International* 59

Lionnet K "The Arbitrator's Contract" (1999) 15 *Arbitration International* 161

Marriott A "The Categorical Imperatives of Pateley Bridge" (1999) 65 *Arbitration* 278

Meyer-Teschendorf, K G & Hoffmann H "Eine neue Balance zwischen rechtsstaatlicher Sicherheit und Optimierungder Justiz" 1998 *Zeitschrift für Rechtspolitik* 134

Mustill M J "Comments on Fast-Track Arbitration" 1993 10(4) *J of Int Arb* 121

Mustill M J & Boyd S C *Commercial Arbitration: The Law and Practice of Commercial Arbitration in England* 2 ed Butterworths London 1989

Nariman F S "Mediation and the Arbitrators" 1999 *ICC IArb Bull* (Special Supplement) 43

Okekeifere A I "Enhancing the Implementation of Economic Projects in the Third World Through Arbitration" (2001) 67 *Arbitration* 240

∅yre T "The Power of an Arbitrator to Grant Interim Relief under the Arbitration Act 1996" (1999) 65 *Arbitration* 113

Paulsson J "Delocalisation of International Commercial Arbitration: When and Why It Matters" (1983) 32 *ICLQ* 53

Redfern A & Hunter M *Law and Practice of International Commercial Arbitration* (2 ed) Sweet & Maxwell London 1991

Redfern A & Hunter M *Law and Practice of International Commercial Arbitration* (3 ed) Sweet & Maxwell London 1999

Reiner A "Die internationale Schiedsgerichtsbarkeit nach österreichischem und französischem Recht" 1986 *Zeitschrift f. Rechtsvergleichung* 1986 162

Reymond C "Security for Costs in International Arbitration" (1994) 110 *LQR* 501

Rosenberg L & Schwab K H *Zivilprozeßrecht* (13 ed) C H Beck'sche Verlagsbuchhandlung Munich 1981

SA Law Commission, Report *A New International Arbitration Act for South Africa* (Project 94, July 1998)

SA Law Commission Discussion Paper 83 *Domestic Arbitration* 1999

SA Law Commission, Report *Domestic Arbitration* (Project 94, May 2001)

Saville M "The Arbitration Act 1996 and its effect on International Arbitration in England" (1997) 63 *Arbitration* 104

Sclosser P "The Competence of Arbitrators and of Courts" (1992) 8 *Arbitration International* 195

Schütze R A, Tscherning D & Wais W *Handbuch des Schiedsverfahrens* Walter de Gruyer Berlin 1985

Schwab K H & Walter G *Scheidsgerichtsbarkeit - Systematischer Kommentar* (6 ed) C H Beck'sche Verlagsbuchhandlung Munich 2000

Schwebel S M *Arbitration: Three Salient Problems* Grotius The Hague 1987

Stalev Z "Interim Measures of Protection in the Context of Arbitration" ICCA Congress Series No. 6, Kluwer Deventer 1993, 103

Steyn J "Adapting Traditional Arbitration Procedures to make them more Cost-Effective" (1983) 48 *Arbitration* 310

Steyn J "England's Response to the UNCITRAL Model Law of Arbitration" (1994) 10 *Arbitration International* 1

Street L "The Language of ADR – Its Utility in Resolving International Commercial Disputes –the Role of the Mediator" (1992) 58 (2S) *Arbitration* 17

Thesen D "Preliminary Matters (1)" (1987) 53 *Arbitration* 16

Thomas H & Putzo H *Kommentar zur Zivilprozeßordnung* (20 ed) C H Beck'sche Verlagsbuchhandlung Munich 1997

Uff J "Cost-effective Arbitration" (1993) 59 *Arbitration* 31

Uff J "The Bill Tompkins Memorial Lecture 1994, Guernsey 9 September 1994" (1995) 61 *Arbitration* 18

UNCITRAL *Report of the Secretary-General: Possible Features of a Model Law on International Commercial Arbitration* (UN doc A/CN.9/207) (1981) XII UNCITRAL Yearbook

UNCITRAL *Report of the United Nations Commission on International Trade Law on the Work of its Eighteenth Session* (UN doc A/40/17) (1985) XVI UNCITRAL Yearbook

Veeder, V V "Laws and Court Decisions in Common Law Countries and the UNCITRAL Model Law" ICCA Congress Series No. 5, Xth International Arbitration Congress, Kluwer, Deventer 1990, 169

Vigrass B "The London Court of International Arbitration" in Uff & Jones (eds) *International and ICC Arbitration* (1990) 270

Wagoner D E "Interim Relief in International Arbitration" (1996) 62 *Arbitration* 131

Wühler N "Zur Bedeutung des Iran-United States Claims Tribunal für die Rechtsfortbildung" in Böckstiegel K-H (editor) *Rechtsfortbildung durch Internationale Schiedsgerichtsbarkeit*, DIS Schriftenreihe 93

Zerbe G *Die Reform des deutschen Schiedsver-fahrensrechts auf der Grundlage des UNCITRAL Modelgesetzes über die internationale Handels-schiedsgerichtsbarkeit* Löw & Vorderwülbecke Verlag Badan-Baden 1995

Zöller R *Kommentar zur Zivilprozeßordnung* (20 ed) Verlag Dr Otto Schmidt Cologne 1997

Zöller R *Kommentar zur Zivilprozeßordnung* (21 ed) Verlag Dr Otto Schmidt Cologne 1998

Cases

Anshell v Horwitz 1916 WLD 65

Anton Piller KG v Manufacturing Processes Ltd [1976] 1 All ER 779 (CA)

Badenhorst-Schnetler v Nel 2001 3 SA 631 (C)

BGHZ 68,356 (judgment of 5 May 1977)

BGH NJW-RR 1988, 1526

BGH III ZR 46/87 (OLG Hamm), Judgment of 26 May 1988, 1989 Juristenzeitung 201

Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corporation Ltd [1981] AC 909 (HL)

Brown v Allen 344 US 443 (1953)

Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd [1993] 1All ER 664 (HL)

Christopher Brown Ltd v Genossenschaft Österreichischer Waldbesitzer Holzwirtschaftbetriebe Registrierte Genossenschaft mit beschränkter Haftung [1953] 2 All ER 1039

Coppée-Lavalin SA/NV v Ken-Ren Chemicals and Fertilizers Ltd (in liq) [1994] 2 All ER 449

Columbia Pictures Industries Inc v Robinson [1987] Ch. 38

Delphi Petroleum Inc v Derin Shipping and Trading Ltd, Federal Court of Canada, Trial Division 3 December 1993, cited from CLOUT, case 68

Deutsche Schachtbau- und Tiefbaugesellschaft v R'as al-Khaimah National Oil Co. [1987] 2 Lloyd's Rep 246

Harbour Assurance Co (UK) Ltd v Kansa General Insurance Co Ltd [1992] 1 Lloyd's Rep 81 (Com Ct)

International Civil Aviation Organisation (ICAO) v Tripal Systems Pty Ltd Recueil de jurisprudence du Quebec (1994) 2560, cited from CLOUT, case 182

John v Rees [1970] Ch 345

Knox D'Arcy Ltd v Jamieson 1994 3 SA 700 (W)

Knox D'Arcy Ltd v Jamieson 1996 4 SA 348 (A)

Normid Housing Association Ltd v Ralphs (No. 2) [1989] 1 Lloyd's Rep 274 (CA)

Parekh v Shah Jehan Cinemas (Pty) Ltd 1980 1 SA 301 (D)

Paul Smith Ltd v H & S International Holding Inc 1991 2 Lloyd's Rep 127

Petz Products (Pty) Ltd v Commercial Electrical Contractors (Pty) Ltd 1990 4 SA 196 (C)

Pohlman v Van Schalkwyk 20001 1 SA 690 (E)

Quintette Coal Limited v. Nippon Steel Corp (1991) 1Western Weekly Reports, cited from CLOUT, case 16

Sera v De Wet 1974 2 SA 645 (T)

SNE v JOC Oil Ltd (1990) 15 Yearbook Commercial Arbitration 384

South African Transport Services v Wilson NO 1990 3 SA 333 (W)

Stocks Construction (OFS) (Pty) Ltd v Metter-Pingon (Pty) Ltd 1978 (4) SA 35

Tuesday Industries (Pty) Ltd v Condor Industries (Pty) Ltd 1978 4 SA 379 (T)

Van Heerden v Sentrale Kunsmis Korporasie (Edms) Bpk 1973 1 SA 17 (A)

Wayland v Everite Group Ltd 1993 3 SA 946 (W)

Willcock v Pickfords Removals [1979] 1 Lloyd's Rep. 244