Conflicts of Procedure Between Courts and Arbitral Tribunals in Africa: An Argument for Harmonization

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I. INTRODUCTION

Harmonized national laws on international arbitration procedures are highly desirable given the needs of international commercial practice. Harmonization can prevent an arbitration clause being considered as valid in one state and as void in another, or the recognition of a judgment

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that declares an arbitral award void in one state but its refusal elsewhere. Orderly and coherent exercise of adjudicatory and enforcement authority is desirable in a plural world. Instituting civil proceedings when an arbitration clause exists increases the risk of delay and irreconcilable judgments. Systematic study of jurisdictional overlap in courts and arbitral tribunals is necessary to harmonized arbitration in Africa.

If arbitration remains a popular dispute resolution mechanism today, the uniform global enforcement standard imposed by the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards[1] (NYC) serves as an important explanation. The NYC provides a measure of harmony to a world where arbitration laws and jurisprudence are hugely diverse. Arbitration regimes that remain isolated or have no clearly defined relationship with international commercial arbitration systems that apply in their own and their trading partners' regions—such as the NYC or the UNCITRAL Model Law[2] adopted by the United Nations Commission on International Trade Law in 1985—are as doomed to fail as those that remain undeveloped and ill-suited to international cases.[3]

Sound arbitration legislation in or of itself is insufficient to render a country an attractive seat for international arbitration.[4] No direct or immediate benefit is associated with local arbitration or accrues to the arbitration community as such. The level of comparability of a state's legislation with the arbitral regimes of major or strategic trading partners, the availability of legal services, and the "unobtrusive efficiency of its supervisory law" that prevents the prolongation of the dispute contribute to the appeal of a particular seat of the arbitration.[5] The local peculiarity of the country where the award was rendered is a real factor in the

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1. Concluded 10 June 1958; 9 USCA §§ 201-208.

2. The United Nations Commission on International Trade Law (UNCITRAL) adopted the 1985 Model Law on International Commercial Arbitration on 21 June 1985. United Nations documents A/40/17, annex I. Significant amendments were effected in 2006 (UNCITRAL's report on the work of its 39th session (UN doc A/61/17 Annex I)), *available at* http://www.uncitral.org (last visited 24 Nov. 2008).

3. Unofficial Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006 §§ 6-7 [hereinafter Explanatory Note].

4. D.W. Butler, The Desirability of a Common Arbitration Statute for International Commercial Arbitration in SADC Jurisdictions: A Comparison Between the UNCITRAL Model Law and the OHADA Uniform Act 6, 27 (unpublished manuscript on file with author).

5. *Premium Nafta Products Limited & Others v Fili Shipping Co. Ltd.* [2007] UKHL 40, § 6.

reliability of an arbitral award.[6] Indeed, its law may impose special rules for a valid award[7] and its courts are more likely to hear an action to vacate the award. If it is not tied into the main arbitration systems, its courts may also fail to offer support for arbitration processes in its territory. Courts that are known to compel arbitration or enforce the discovery orders of the tribunal, are infinitely preferable to courts that are likely to interfere unduly in arbitral proceedings or that are open to being used to cause delays in expensive procedural disputes.

Generally, court involvement in the arbitral reference may occur in any of three stages in the arbitral reference. Before arbitration commences, the court may uphold the arbitration agreement, issue directions on the commencement of the arbitral reference[8] and assist with the appointment or removal of arbitrators or protect the assets from dissipation. After the commencement, the court may assist the parties and the arbitral tribunal in its function of gathering evidence, challenging and removal of arbitrators, granting or enforcing interim measures, or enforcing orders made by the arbitral tribunal. Once the arbitral award has been handed down, the court may be requested to recognize and enforce it, remit it to the arbitral tribunal, or entertain proceedings to nullify it or set it aside.

Complex multi-party transnational disputes are seldom susceptible to solution simply by enforcing an arbitral agreement between two of the parties.[9] An over-expansive pro-arbitration policy that denies a party access to court may well be counterproductive for the interests of arbitration.[10] Striking the right balance in the allocation of powers has a lot to do with maximizing court support for the arbitral process and

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6. Article V(i)(a) and (e) NYC contemplate that the invalidity of an arbitration agreement under the law of the seat constitutes good ground for refusal of the enforcement of the award in other Contracting Parties.

7. *E.g.*, arts. 6 & 34 UNICTRAL Model Law. Also, time limits or a requirement to lodge an award with a court; the language of proceedings; requirements that non-nationals must practice locally or reside there, or restrictions on the choice of arbitrators on grounds of nationality, religion, sex or licence to practise law in *X* where law of *X* applies.

8. English courts do not refer the parties to arbitration but merely stay the proceedings and allow the party who sought and obtained the stay to proceed to arbitration. Another technique to deal with parallel proceedings is the anti-suit injunction, which is an order not to pursue litigation in a foreign court. For a recent example in which a French court enforced a U.S. anti-suit injunction, see *Cour de cassation*, 14 Oct. 2009; G. Cuniberti, French Court Agrees with US Anti-suit Injunction, *available at* http://conflictoflaws.net/2009/French-court-agrees-with-anti-suit-injunction/ (last visited 21 Dec. 2009).

9. A. BELL, FORUM-SHOPPING AND VENUE IN TRANSNATIONAL LITIGATION 282 (2003).

10. S. Brekoulakis, *The Negative Effect of* Compétence-Compétence*: The Verdict Has To Be Negative*, 2009 AUSTRIAN ARB. Y.B. 238, *available at* ssrn.com/abstract=1414325 (with reference to developments in the United States (*sub* IIB)).

protecting arbitration from disruptive interference from the judiciary, and minimizing court interference and controlling opportunities for anti-arbitration injunctions. After all, arbitral tribunals ought not to be shielded against the reasonable intervention of a responsible supervisory court.[11] The simple yet powerful idea of maximizing court support and curbing interference was part of what inspired the adoption of the UNCITRAL Model Law for international commercial arbitrations in Scotland under Lord Dervaird.[12] The understanding that conflicts between arbitration and judicial adjudication needed to be minimized if arbitration is to boost commercial confidence is basic, but it goes to the root of adjudication.

Regardless of whether one accords to the judiciary the authority to determine the jurisdiction of arbitral tribunals, or to arbitral tribunals, the role of the judiciary cannot be ruled out completely. Differences of opinion arise as to the extent to which, and the moment and the manner in which, courts should act when the validity or scope of an arbitration agreement is being challenged. Some would require only that the proceedings were brought under a well-drafted arbitration agreement that is valid *prima facie*; but those who look upon arbitration as a sharp curtailment on the right of free access to a court, require more stringent consideration of an agreement that removes the dispute from the detailed control and correction of the judicial system.[13] It is necessary not only to determine who takes the initial decision on the existence, validity, applicability, effectiveness and scope of an arbitration agreement, but also when early court intervention would be essential. African scholars have started to respond with more systemic treatment of the timing and finality aspects of the subject[14] but conflict scholars show little interest in the jurisdictional battle between national courts and arbitral tribunals, and it is not conclusively settled one way or the other.

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11. C. Partasides, *Solutions Offered by Transnational Rules in Case of Interference by the Courts of the Seat*, 1(2) TRANSNATIONAL DISPUTE MANAGEMENT (2004), *available on* http://www.trasnational-dispute-management.com.

12. Lord Dervaird, *The Resolution of International Trade and Investment Disputes in Africa*, Paper Presented at the International Conference on the Resolution of International Trade and Investment Disputes in Africa in Johannesburg (6-7 Mar. 1997). The most recent Scottish initiative in this regard, the Arbitration (Scotland) Act of 2009, is due to enter into force and to provide a statutory framework for arbitrations.

13. A. BRIGGS, AGREEMENTS ON JURISDICTION AND CHOICE OF LAW §§ 12.01–.04 (2008).

14. E. Onyema, *Regional Approaches to Enforcement of Arbitral Awards in Sub-Sahara Africa*" Paper Delivered at the Inaugural Conference of Alumni and Friends of the School of International Arbitration (AFSIA) London 3 (3 Dec. 2008), *available at* eprints.soas.ac.uk/5996/1/Enforcement_of_Awards_in Sub-Sahara_Africa.pdf; Butler, *supra* note 4, at 5, 10.

It was recently suggested that any systematic programme to promote recourse to arbitration in Africa must include a critical examination of the obstacles to the harmonization of business laws.[15] The obstacles relate to the manifest procedural and other diversity, the effects of restrictive language policy, fear of domination of one legal tradition over another, the difficulty of accommodating various legal traditions,[16] and the different conceptions of the relationship between domestic and harmonized law on the international plane. African states that used to be under French rule would generally allow for the direct application of international law in their domestic spheres in any event,[17] unlike states formerly under British colonial rule whose common law heritage means that such a monist conception of the interrelationship between domestic and international law is ruled out. Easing the conflicts between fora possessed of adjudicatory authority could be one of the levels on which action is needed in Africa to promote harmonization, but a lack of balance in the relationship between arbitration and judicial adjudication is much less obvious and difficult to define. Nonetheless, it is necessary to pose the question. A willingness to fine-tune this balance could unlock new perspectives on the role and function of international commercial arbitration in Africa.

Different frameworks enable arbitration in Sub-Saharan Africa. The OHADA Treaty,[18] the UNCITRAL Model Law and the NYC are discussed under Part II. Three African states, Nigeria, South Africa and Sudan, are selected as case studies for critical examination against the backdrop of these enabling frameworks under Part III. The selection is based on their respective good, poor and non-existent levels of commitment to the frameworks concerned, in order to identify the extent to which the interface between arbitral and juridical proceedings poses a hindrance to harmonized arbitration in Africa.[19]

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15. A. Akinbote, *Strategies for Adopting OHADA Laws in Anglophone African Countries*, Speech Delivered on 24 Feb. 2008, *available at* http://www.meetings.abanet.org/.../ (last visited 24 Nov. 2008).

16. The experience of the European Union in the area of Private International Law attests to a strong weighting of the scales in favour of civilian systems and against the common law systems in the Brussels I Regulation (Regulation 44/2001 concerning Jurisdiction, Recognition and Enforcement of Judgments in Civil and Commercial Matters *OJ* 2001 L12/1).

17. A.A. ASOUZU, INTERNATIONAL COMMERCIAL ARBITRATION AND AFRICAN STATES: PRACTICE, PARTICIPATION AND INSTITUTIONAL DEVELOPMENT 205 (CUP 2001).

18. *Organisation pour l'Harmonisation en Afrique du Droits des Affaires*. The English acronym is OHBLA which stands for Organization for Harmonization of Business Law in Africa, but the French acronym is the more widely used and is preferred for present purposes.

19. Onyema's analysis (*supra* note 14) deals with the three major strands of arbitration regimes in Sub-Saharan Africa but her study does not cover South Africa.

II. ARBITRATION REGIMES IN SUB-SAHARAN AFRICA

International commercial arbitration is no homogeneous affair on the African continent. Africa is host to common law,[20] civil law,[21] mixed[22] as well as mixed civil law jurisdictions.[23] OHADA,[24] the NYC,[25] and the UNCITRAL Model Law on International Commercial Arbitration[26] apply in various different parts. The interaction between these frameworks for arbitration and the diverse legal environments in which they operate, present new challenges in determining priority and exclusivity in conflicts of jurisdiction.

The *lex loci arbitri* provides support in cases where the parties failed to determine how the arbitration is to be conducted, but could also restrict party autonomy in instances where the parties went beyond what the state permits. The scope and limits of the supplementary discretion of the arbitral tribunal concerned and the scope and limits of the judicial discretion as determined by local law and the choices exercised by the parties are best studied in conjunction with the differences in the *lex loci arbitri*.

In terms of the *compétence-compétence* principle (*kompetenz-kompetenz* in German), once an arbitral tribunal is formed, it has authority to determine its jurisdiction and rule on motions related thereto, including motions predicated on the (in)validity of the arbitration clause, expiry, nullity and virtually all other preliminary issues.[27] If one of the parties were to bring legal action before a national court alongside arbitration proceedings (after the arbitration procedure itself has commenced, on the basis, for instance, that the arbitration clause is void),

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20. E.g., Ghana, Liberia, Nigeria.

21. E.g., Ivory Coast, Mali, Senegal.

22. E.g., Cameroon, South Africa, Zimbabwe, Namibia, Lesotho, Swaziland, Mauritius, Seychelles.

23. Equatorial Guinea boasts two different civil law systems.

24. Treaty signed on 17 Oct. 1993; http://www.ohada.com/index.php?newlang=English (last visited 24 Nov. 2008).

25. Thirty-one out of 144 contracting parties to the NYC are African States (see Table at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html).

26. The UNCITRAL Model Law has been enacted by nine African states (Egypt, Kenya, Mauritius, Nigeria, Tunisia, Uganda, Madagascar (SADC member), Zambia (SADC member) and Zimbabwe (SADC member)). Altogether, sixteen sub-Saharan African states practice OHADA law (Benin, Burkina Faso, Cameroon, Central African Republic, Comoros, Congo, Ivory Coast, Gabon, Guinea, Guinea-Bissau, Equatorial Guinea, Mali, Niger, Senegal, Chad and Togo). The Democratic Republic of the Congo is the first signatory state outside of the franc economic zone about to accede. The current members are French-speaking except for Equatorial Guinea and Anglophone Cameroon. Membership of several non-French speaking countries (Ghana, Nigeria and Liberia) is under discussion.

27. It constitutes a circular argument but it simplifies matters and saves time.

that particular arbitration process may either be supported or undermined. The *lex loci arbitri* and the rules of procedure that have been agreed or adopted by the parties and the arbitral tribunal would jointly determine this issue. Since the meaning of the *compétence-compétence* principle is variable depending on the jurisdiction concerned, party autonomy can play a decisive part to determine who has jurisdiction.

A. 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards

The NYC constitutes the backbone of the recognition and enforcement regime of arbitral awards in more than twenty African states. Nigeria and South Africa count among those that have signed up but Sudan has not yet ratified it.[28]

The NYC requires the courts of contracting states to give effect to private agreements to arbitrate and to recognize and to enforce arbitration awards made in other contracting states.[29] The NYC aims to promote uniformity in the principles and processes applying to enforcement, irrespective of the country in which enforcement is sought. Each contracting state has the opportunity to establish its own procedure for recognition and enforcement within the confines of Articles III and IV. States are expected to adopt the pro-enforcement bias of the NYC, which allows limited grounds for non-recognition and non-enforcement of foreign arbitral awards.[30] The so-called substantive defences of article V(2) do not focus on the merits of the arbitration award in terms of either the facts or the law, but on the integrity of the process and procedural fairness to the parties. Invalidity of the arbitration agreement under the law of the seat may give good ground for refusal of an award in other member states, but essentially the grounds are permissive and not mandatory.[31]

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28. Table at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last visited 24 Nov. 2008).

29. Art. V(1)(a) and (d) NYC. Under article V(1)(a) and (e) the law of the country in which the award was made has a definite role if the parties have not expressly designated the law governing the arbitration agreement.

30. The defendant bears the burden of proving that the award is invalid under at least one of the grounds that serve as a defence against the recognition and enforcement of an arbitral award. There are procedural defences which the parties may raise as well as substantive defences that either the parties or the enforcing court may raise.

31. *Svenska Petroleum Exploration AB v Lithuania* [2005] 1 Lloyd's Rep. 515 (QB) at 519-20; C. MCLACHLAN, LIS PENDENS IN INTERNATIONAL LITIGATION 250 (2009).

The NYC applies to arbitral awards that were rendered in a state other than where enforcement is sought or that are considered by the enforcing state to be foreign.[32] Its application can be limited by two kinds of reservations. The reciprocity reservation aims to exclude its application to awards rendered in non-member states, whereas the commercial reservation limits its application to foreign arbitral awards arising out of commercial relationships. Contracting States determine the commercial or non-commercial nature of legal relationships with reference to their own domestic law. If no reservation is entered into, the foreign arbitral award is recognized and enforced regardless of where it was rendered, subject only to certain limited defences against recognition and enforcement which the party against whom the award is invoked may rely on.[33] The NYC provides a minimum threshold for the enforcement of arbitration agreements and awards, permitting more favourable rules where they are to be found: in a multilateral or bilateral treaty or in the law of the enforcing state.[34]

B. OHADA

The OHADA Treaty on the harmonization of business law in Africa entered into effect in 1995. Its Member States are committed to promoting regional economic growth and integration and to securing an up-to-date harmonized legal framework for the conduct of business in Africa. The harmonization of the legal framework manifests the desire to improve legal certainty and predictability so as to encourage investment and trade. The constitutive treaty concerns itself with "implementing appropriate judicial procedures" and "promoting recourse to arbitration for the settlement of disputes arising out of contracts". The implementation of arbitration law stabilizes the business environment and the institutions that apply it, working to the benefit of international investors and OHADA nationals within West and Central Africa.

Ever since January 1998, the main means of achieving the objectives laid down in the OHADA treaty has been the elaboration of legislative texts termed "Uniform Acts". Uniform Acts are adopted by a unanimous vote of the Council of Ministers (representing the contracting States) in consultation with the Common Court of Justice and Arbitration

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32. Art. I(1).

33. Art. V(1). The grounds for challenge in the NYC do not prevent the court requested to enforce the award from conducting its own assessment, and enforcing the award regardless.

34. Art. VII(1); N. Pengelly, *The Convention Strikes Back: Enforcement of International Commercial Arbitration Awards Annulled Elsewhere*, 8(2) VINDOBONA J. INT'L COM. L & ARB. 195 2004.

(CCJA).[35] Uniform Acts are directly applicable and mandatory in the Member States. They supersede any previous or subsequent conflicting provision of a Member State's national law and apply without the need for ratification of the legislation by the legislatures of the Member States.[36]

Altogether, sixteen sub-Saharan African states have already joined the treaty.[37] The Member States of the OHADA treaty are overwhelmingly Francophone. Bilingual organisation would have been too costly when OHADA was launched and there has not been much incentive for a bilingual OHADA since. Anglophone Cameroon is the only English-speaking Member State at present. Any member of the African Union wishing to become a member of OHADA is free to do so and thus the scope of the OHADA treaty is not limited to the Franc Zone. It is open also to the membership of any non-member state of the African Union invited to join OHADA, provided all the member states agree. Should Nigeria and other Anglophone common law jurisdictions like Ghana join, OHADA's language policy is likely to come under pressure.[38] No doubt the successful future incorporation of Anglophone states hinges on bilingualism. English translations of the Uniform Acts that are available from OHADA lack accepted Anglo-American legal terminology. Judges and legal practitioners trained in the common law apply OHADA law by sheer approximation. For these reasons, the success of the integration of Common Law jurisdictions remains to be tested.

Neither South Africa nor Sudan has joined the OHADA initiative. Nigeria has a highly ambivalent relationship with OHADA. Mauritius, a mixed jurisdiction, has been earmarked to play a significant role in the future evolution of OHADA,[39] despite having adopted the UNCITRAL Model Law. How it will reconcile its competing commitments under these two instruments remains to be seen.

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35. Set up in Abidjan in terms of article 3 of the OHADA Treaty.

36. T.M. Lauriol, *Enactment of a New Arbitration Law in Africa: Part 2: Insertion of the Arbitration Agreement in the National Law of Contracting States*, 8 INT'L ENERGY L. & TAX'N REV. 207 (2000).

37. OHADA law is practised in Benin, Burkina Faso, Cameroon, Central African Republic, Comoros, Congo, Ivory Coast, Gabon, Guinea, Guinea-Bissau, Equatorial Guinea, Mali, Niger, Senegal, Chad and Togo. The accession of the Democratic Republic of the Congo, the first signatory state outside of the franc economic zone, is now underway. Most of the current members are French-speaking. Equatorial Guinea is the exception. However, membership of non-French speaking countries such as Ghana, Nigeria and Liberia is under discussion.

38. J.A. Penda, The Applicability of OHADA Treaty in Cameroon: The Way Forward, *available at* http://www.ohada.com (last visited 15 Dec. 2008).

39. *Id.*

The fact that arbitration laws are unified in the Member States renders OHADA a viable alternative to the NYC. The OHADA Uniform Arbitration Act of 11 June 1999 (UAA)[40] and the Rules[41] facilitate the implementation of arbitral awards.[42] Articles 14-15 of the UAA give effect to the principle of party autonomy, allowing parties to give shape and form to their own procedure. The Contracting States may also complete some of the provisions in their national legislation.[43]

The recognition and enforcement of awards within the OHADA arbitral area is governed by article 25 of the UAA. A valid arbitral award is considered to be final and binding on the parties with *res judicata* effect and is not susceptible to opposition, appeal, or to appeal on a point of law. It has the same status as a judicial decision in the Member States of OHADA. The influence of French law, where the right of access to arbitration exists alongside the right of access to court,[44] is unmistakable in this respect. If the country concerned subscribes to both OHADA and the NYC, a party may choose the legal regime on which to base his or her application for enforcement of an award. If the country is a Member State of OHADA only, recognition and enforcement must be sought under the provisions of the UAA.[45] The fact that the OHADA treaty takes other applicable international conventions into account renders a conflict of conventions in the OHADA Member States unlikely.[46]

Enforcement requires a competent judge in a Member State to issue an exequatur of the award to establish both the existence of the award and the arbitration agreement,[47] and to enter that as the judgment of the court for enforcement purposes.[48] French translations are required under the OHADA framework whereas this is not necessary in terms of the NYC. The only ground on which enforcement of the arbitral award can be refused is being "manifestly contrary to international public policy in the

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40. The French text of the Uniform Arbitration Act is available at http://www.jurisint.org/ohada/text/text.07.fr.html (last visited 10 Dec. 2009).

41. Adopted by the Council of Ministers on 18 April 1996.

42. K. Douajni, *The Recognition and Enforcement of Arbitral Awards in OHADA Member States*, 20 J. INT'L ARB. 205 (2003).

43. Lauriol, *supra* note 36, at 208-09.

44. J.-L. DELVOLVÉ, G. POINTON & J. ROUCHE FRENCH, ARBITRATION LAW AND PRACTICE: A DYNAMIC CIVIL LAW APPROACH TO INTERNATIONAL ARBITRATION §§ xvii, 83 (2d ed. 2009).

45. Onyema, *supra* note 14, at 4.

46. Article 34 UAA preserves the obligations of its Member States to other conventions.

47. Under article 2.1 of the Rules, the agreement may be expressed in an arbitration clause intended to cover a future dispute or an arbitration compromise in the event of a current dispute.

48. Onyema, *supra* note 14, at 4.

Member States",[49] which refers to a regional public policy affecting all the Member States of OHADA.

The functions of the CCJA relate both to the common OHADA business law and the UAA, for it advises on the uniform application and interpretation of the business law and reviews decisions rendered by national courts of appeal of Member States in cases involving the application or interpretation of OHADA texts (including uniform acts). As such it assumes a judicial function when required to enforce an award or to decide on the validity of an award. When the CCJA does not act to settle the commercial dispute itself, it may take administrative decisions for the implementation and support of arbitration proceedings (such as appointing or confirming the arbitrators). It may also examine draft awards as part of its administrative review function.[50] The CCJA may administer arbitrations conducted under its auspices, similar to undertaking an institutional arbitration, in terms of article 4 and articles 21-26 of the Treaty. When an institutional CCJA arbitration is held in accordance with articles 4 and 26 of the OHADA Treaty and the Rules of the CCJA[51] the chief clerk of the CCJA assumes the functions of Secretary-General of the arbitration institution. In this role, the functions of the CCJA are similar to those attributed to the International Court of Arbitration of the International Chamber of Commerce.[52]

C. UNCITRAL Model Law on International Commercial Arbitration

The UNCITRAL Model Law on International Commercial Arbitration has been enacted by eight African states.[53] Significant amendments were effected in 2006[54] but these do not apply automatically in the enacting jurisdictions. Moreover, the mandatory and non-mandatory provisions recommended by the Model Law carry no express binding obligation on states to enact these into national laws. The United Nations, through General Assembly Resolutions, nonetheless encourages member states to do so.[55]

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49. Art. 31 § 4.

50. Art. 21 § 2.

51. T.M. Lauriol, *Enactment of a New Arbitration Law in Africa: Part 1: Creation of a New Arbitration Centre*, 7 INT'L ENERGY L. & TAX'N REV. 173 (2000); Butler, *supra* note 4, at 5.

52. Lauriol, *supra* note 51, at 174; Butler *supra* note 4, at 4.

53. Egypt, Kenya, Mauritius, Nigeria, Tunisia, Madagascar, Zambia, and Zimbabwe (the latter three states are SADC states).

54. For the text of the amendments, see UNCITRAL's report on the work of its 39th session (UN doc A/61/17 App 1), *available at* http://www.uncitral.org (last visited 24 Nov. 2008).

55. GA Res. 40/72 (1985); GA Res. 61/33 (2006).

The UNCITRAL Model Law contains many of the same provisions as the NYC, but it also supplements the regime of recognition and enforcement created by the NYC, e.g. with regard to the demarcation line drawn between "international" and "non-international" awards instead of the traditional line between "foreign" and "domestic" awards.[56]

The Model Law constitutes a liberal harmonized enabling framework for the arbitration of international commercial disputes.[57] It covers all stages of the arbitral process—from the arbitration agreement to the recognition and enforcement of the arbitral award—and reflects a wide consensus on the principles and important issues of international arbitration practice.[58] It applies to arbitrations conducted on the territory of a state that has adopted it. Provisions relating to the enforcement of the arbitration agreements by the court, court enforcement of interim measures granted by the arbitral tribunal, interim measures granted by the court and enforcement of an arbitral award by the court apply both territorially and extraterritorially.[59]

The Model Law is a sound basis for the desired harmonization and improvement of national laws on international arbitration procedures. Since it relies on default rules and does not impose rules and procedures, it is flexible enough to be used in common law and civil law settings. Moreover, practitioners on both sides are familiar with its provisions. This aspect gives it a distinct edge over OHADA's UAA.[60]

Other highly desirable features of this framework are the extent to which the Model Law gives effect to the principle of party autonomy[61] and the near complete treatment given to the roles of courts and arbitral tribunals. To the extent that legislation based on the Model Law follows suit, one expects to find these features in Nigerian legislation but to be absent from South African and Sudanese legislation. Whether this assessment holds water is investigated in the next Part.

III. CASE STUDIES

The parties to an arbitration agreement may be free to determine various aspects of the arbitration proceedings, but the law and the attitude

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56. Explanatory Note, *supra* note 3, § 46.

57. "International" is defined in article 1(3). "Commercial" is intended to be given a wide meaning.

58. Explanatory Note, *supra* note 3, § 2.

59. Arts. 1(2), 8, 9, 17H, 17I, 17J, 35 and 36.

60. Butler, *supra* note 4, at 26.

61. Article 28(1), for example, of the UNCITRAL Model Law (*renvoi* is expressly excluded). Parties may vary the legal provisions by agreement and are usually held to their implied promise to abide by the award.

of the seat in relation to international arbitration remain highly relevant. Each of the case studies, Nigeria, South Africa and Sudan, has at least one viable arbitration institution.[62] Nigeria is a common law jurisdiction characterized by vigorous and ongoing attempts to modernize its arbitration legislation. Nigeria belongs to the group of states that subscribe to a number of international arbitration systems, but certain niggling problems remain and its relationship with OHADA is not clearly defined. Awareness-raising with regard to OHADA has commenced in the private and public sectors, but at this stage, "Ohada Nigeria" is nothing other than a company limited by guarantee with legal personality to promote harmonized arbitration laws in Africa. Membership of the company is open to all stakeholders involved in cross-border transactions, including businessmen, financial and banking sector operators, lawyers, insurers, oil and gas operators.[63] South Africa is a mixed jurisdiction that plays a leading role within the Southern African Development Community (SADC). It displays a relatively low level commitment to the arbitral frameworks that operate on the African continent. A systematic explanation of the reasons for this phenomenon is needed. While geographically removed from West and Central Africa, it still dilutes the collective potential for harmonization among civil law, common law and mixed jurisdictions across the continent.

Sudan is the largest country in Africa and recently overhauled its arbitration legislation in 2005. Sudan has not committed to any of the arbitral streams discussed in this paper and seems disinclined to commit to the harmonization of international commercial arbitration.

A. Nigeria

Arbitration legislation exists in Nigeria in the form of the Arbitration and Conciliation Act of 1988, which was amended in 1990 and re-enacted in 2004 as the Arbitration and Conciliation Act Cap A18 Laws of the Federation of Nigeria 2004 (ACA). This Act consists mainly of the provisions of the UNCITRAL Model Law on International Commercial Arbitration. Nigeria is the first country in Africa to have passed the Model Law into a statutory enactment. The NYC has also been signed, ratified and incorporated into Nigerian domestic law as the

62. Institutions that assist in the administration of domestic and international arbitrations in South Africa are the Southern Africa Association of Arbitrators, the Commission for Conciliation, Mediation and Arbitration and the Arbitration Foundation of Southern Africa. In Sudan the principal body is the Khartoum Centre for Arbitration. In Nigeria the Lagos Regional Centre for International Commercial Arbitration fulfils this role.

63. Akinbote, *supra* note 15.

second Schedule to the Arbitration and Conciliation Act of 1990.[64] The Act excludes the application of the NYC to awards rendered in a Member State that lacks reciprocal legislation. A party seeking recognition and enforcement of its Convention award in Nigeria will proceed under article IV of the NYC, whereas other international arbitration awards will be enforced under sections 51 and 55 of the ACA.

With regard to the balance in the relationship between arbitration and judicial adjudication, it is noteworthy that the ACA identifies various stages at which the courts become involved with the arbitral process. Section 4 of the ACA provides that the court *shall* stay proceedings while section 5(2) provides the court *may* stay proceedings brought in violation of an arbitration agreement in apparently the same circumstances.[65] A historical appraisal of these sections reveals that section 4 applies to international arbitration whereas section 5 applies to domestic arbitration. The bench is not always sufficiently sensitive to the history of legislative principles, however, and this basic confusion bedevils the certainty that international arbitration agreements will be enforced in Nigeria.[66]

Nigerian courts generally allow ouster clauses in arbitration agreements, although clauses that seek to oust the jurisdiction of the court in admiralty actions are null and void.[67] Section 12(4) of the ACA does not provide for the continuation of the arbitral proceedings while proceedings to review the arbitrator's decision on jurisdiction are pending in court.[68] The potential for delaying tactics is hereby introduced.

Local courts will intervene to assist arbitration proceedings. Intervention has to be in accordance with section 34 ACA, otherwise courts will decline jurisdiction. Interim measures of protection issued by the arbitration panel in the form of an interim award under section 13 ACA will be enforced by the court in the same manner as a final award.

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64. Section 54(1) of the Arbitration and Conciliation Act (ACA), Chapter 19 Laws of the Federation of Nigeria vol. 1 (1990) 393. In general, *International Comparative Legal Guide Series* "International Arbitration" Chapter 6, *available at* http://www.iclg.co.uk/index.php?area=4&show_chapter=3023&ifocus=1&kh_publications_id=111 (last visited 24 Nov. 2009).

65. *See* Outline of Proposals for Reform of Nigeria's Arbitration and Conciliation Act § 40-41 [hereinafter Proposals], *available at* http://www.alukooyebode.com (last visited 12 Feb. 2008).

66. *Id.* § 46. The English Arbitration Act of 1975 allowed judicial discretion in domestic arbitration but stays were mandatory for international arbitration cases.

67. Section 20 of the Admiralty Jurisdiction Act of 1991.

68. Proposals, *supra* note 65, §§ 61-66.

An application to the court for interim relief will not be deemed to be a waiver of, or incompatible with, the agreement to arbitrate.[69]

An action commenced before the court in breach of an arbitration agreement can be stayed by the court on the application of one of the parties.[70] To obtain a stay of proceedings, the party making the application must not have taken any steps to defend the matter other than entering an appearance.[71] The court will order a stay if it is satisfied that the applicant is ready and willing to arbitrate and there is no reason why the matter should not be referred to arbitration.

The concept of *compétence-compétence* is recognized in the ACA. Arbitrators can rule on their jurisdiction and on any objections regarding the existence or validity of an arbitration agreement.[72] Such a plea should be raised either in the statement of defence or the reply to a counterclaim, and be determined, if possible, as a preliminary question.[73] The arbitration panel and the courts have co-existent jurisdiction to determine issues of jurisdiction, as an award can be set aside on the ground of lack of jurisdiction. The arbitration may proceed in the face of such a challenge unless the court takes additional steps to restrain the arbitration.[74]

"Misconduct of the arbitrator", improper procurement of the award and "error of law on the face of the award" are included among the grounds for judicial review of arbitration in sections 29 and 30 of the ACA. Nigerian lawyers often ascribe an error of law to an arbitral award, thereby triggering litigation that can take anything up to twelve years to be settled.[75]

There is no right of appeal under the ACA, but a party may apply to the court to set aside an arbitral award or seek to resist the enforcement of the award on the grounds listed in that Act. The losing party is free to seek to set aside the arbitral award if a matter is outside the scope of the arbitration agreement or affects the conduct of the arbitral proceedings, without the need to wait for the claimant to apply for recognition and enforcement. The court may extend the time limit and allow the application where an application to set aside an award on the ground of excess of jurisdiction is brought outside the three-month time limit

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69. Funke Adekoya, Arbitration: Nigeria, *available at* http://crossborder.practicallaw.com/1-385-8475?qp=&qo=&q (last visited 3 Dec. 2009).

70. §§ 4-5 ACA.

71. *Id.* § 5.

72. *Id.* § 12(1).

73. Art. 21, Arbitration Rules.

74. Adekoya, *supra* note 69.

75. Proposals, *supra* note 65, §§ 78-79.

referred to in section 29. Moreover, since rights of appeal are entrenched in the 1999 Constitution, it is inevitable that arbitration proceedings are often frustrated by unregulated appeals.

Arbitration law reform is the responsibility of the National Committee on the Reform and Harmonization of Arbitration and ADR Law in Nigeria, which was inaugurated in 2005.[76] Its report states unequivocally that the ACA has not achieved its aims, but has failed to implement Nigeria's treaty obligations under the NYC, incorporate the basic concepts of the Model Law and minimize judicial intervention in the arbitral process:

> In a number of significant respects the standards for recognition and enforcement of international arbitration agreements and arbitral awards fall short of the standards prescribed by the UNCITRAL Model Law. Inelegantly drafted provisions have created confusion and generated conflicting or retrogressive judicial decisions. Outmoded concepts and definitions have prevented the arbitral process from keeping pace with contemporary trends in international trade and commerce. Above all, experience shows that the ACA has failed . . . to minimise judicial intervention in the arbitral process. In Nigeria, arbitration is often perceived as the first step to litigation, and the arbitral process often becomes entangled in the extremely protracted and cumbersome process of Nigerian litigation. The judicial process itself presently lacks the capacity to give efficient support to the arbitral process.[77]

With regard to appeals, the Report recommends a general review of the concept of constitutionally entrenched rights of appeal in selected areas or provisions enabling the National Assembly and the State Houses of Assembly to make laws restricting or regulating the exercise of rights of appeal. The Report also proposes that special rules of procedure must govern applications for court intervention on federal and state levels to enable courts to cope with high case load.[78] These may include front loading of evidence and written submissions, fast tracking and case management mechanisms applicable at the trial and appellate stages, severe consequences for dilatory conduct or tactics, and cost penalties.

Various bills amending the ACA are pending at the federal level. Legislative action is needed to remove the internal blocks to arbitration, and the external dimension clarified in as far as its commitment to

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76. It convened in September of 2005.
77. Proposals, *supra* note 65, § 8.
78. *Id.* §§ 55-57, 96.

OHADA is concerned. Many of the remaining hindrances to arbitration in Nigeria could be resolved by focusing on finding a balance between arbitration and judicial adjudication.

B. South Africa

South African arbitration procedure and the relationship between arbitration and judicial adjudication are regulated by the Arbitration Act 42 of 1965. The Act reflects the position as it stood in English law over forty years ago. Clearly there is an urgent need to modernize its arbitration legislation to comply with internationally accepted standards.[79] Since this Act does not differentiate between international and domestic arbitrations, its provisions apply to both types of arbitration conducted in the South African jurisdiction in the absence of an agreement to the contrary, irrespective of whether the parties to the issue are local or foreign. The recognition and enforcement of foreign arbitral awards is regulated by the Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977. This legislation was enacted to give effect to South Africa's accession to the NYC in 1976,[80] but implementation has been defective. For instance, article II(3) of the NYC obliges the court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an arbitration agreement, to refer the parties to arbitration at the request of one of the parties,[81] unless it finds that the said agreement is null and void, inoperative or incapable of being performed. However, the South African legislative framework contains no equivalent provision to minimize undue court interference in the arbitration process.[82]

SADC countries are free to adopt the OHADA Model Law on Arbitration and ensure regional uniformity for international commercial arbitration while allowing individual states to regulate their domestic arbitration in the way they choose.[83] Nonetheless, South Africa has not done so. The incorporation of OHADA's commercial, corporate or bankruptcy laws would present problems of incompatibility with its legal tradition and framework.

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79. *See* Butler, *supra* note 4, at 10; D.W. Butler, *The State of International Commercial Arbitration in Southern Africa: Tangible Yet Tantalizing Progress*, (21) J. INT'L ARB. 169, 171 (2004).

80. South Africa acceded on 3 May 1976; entry into force 1 Aug. 1976.

81. The referral is dependent on a party request and thus a court cannot *suo motu* decline jurisdiction on the basis that the dispute is subject to an arbitration agreement.

82. Butler, *supra* note 4, at 12; South African Law Commission Project 107, *Report on an International Arbitration Act for South Africa* §§ 3.56-.59, .98 (July 1998); *see infra* Part IV.

83. Butler, *supra* note 4, at 27.

South Africa has not enacted the UNCITRAL Model Law on International Commercial Arbitration of 1985. The South African Law Commission[84] recommended its adoption more than a decade ago in its *Report on an International Arbitration Act for South Africa* of July 1998.[85] At the time, the SALC recommended the statutory incorporation of the Model Law to encourage foreign investment and further economic development in the region. Its report noted that "the Model Law achieves the desired balance regarding the powers of the court .... Significant departures from the Model Law in this regard would adversely affect South Africa's chances of developing into an important regional centre for international commercial arbitrations".[86] Its *Report on International Arbitration* confirmed that the country's system and jurisprudence were lagging behind compared to other jurisdictions.[87] Despite the International Arbitration Bill having passed successfully through all the stages necessary to permit it to serve before Parliament for its approval, South Africa is still without an International Arbitration Act.

In its earlier *Report on Domestic Arbitration*[88] the SALC recommended that arbitration is to be recognized as an important dispute resolution method "which can help to relieve the pressure on the civil justice system" and that it ought to be supported by "appropriate legislation".[89] It also put on record the danger that black members of the legal profession may come to perceive white professionals resorting to "privatised litigation" to enable them and their corporate clients to avoid courts which increasingly comprise black judicial officers.[90] Subsequently, the Judge President of the Cape Provincial Division of the South African High Court suggested that arbitration is inimical to judicial transformation in South Africa.[91] The Hlope Report alleged

84. Then the SALC; now the South African Law Reform Commission.

85. South African Law Commission Project 107, *supra* note 82, in particular the Draft International Arbitration Bill; South African Law Commission Project 94, *Report on Domestic Arbitration* (May 2001).

86. South Africa Law Commission Project 107, *supra* note 82, § 2.12, 39.

87. *Id.* § 2.53. The Commission refers to the importance of refraining from modifications to the model in §§ 1.8, 1.13, 2.13.

88. The Report did not advocate the adoption of the UNCITRAL Model Law for domestic and international arbitration, but recommended that the best features of the UNCITRAL Model Law and the English Arbitration Act of 1996 be combined with successful provisions of the existing law.

89. At viii; § 2.19, at 17.

90. § 2.18, at 17; ARBITRATION WORLD–SOUTH AFRICA (D. Williams & Werksmans Inc. eds.), *available at* http://www.europeanlawyer.co.uk/referencebooks_7_153.html (last visited 28 Nov. 2009).

91. Report submitted in February 2005.

racism in parts of the South African judiciary and called for retired judges to be prevented from becoming arbitrators. Thus the logical force of the SALC's recommendations is frustrated by the flawed assumption and fear that a well-developed arbitration system necessarily erodes confidence in the court system. The perception that arbitration competes with and runs contrary to judicial transformation blocks further developments in this area.

In its *Report on Domestic Arbitration* the SALC emphasized the need for a statutory duty for arbitral tribunals to adopt procedures that will avoid unnecessary delay and expense.[92] It highlighted also the need to balance the powers of arbitral tribunals and national courts.[93] By the time the SALC issued proposals for the consolidation of legislation pertaining to international cooperation in civil matters,[94] its report on the reform of arbitration law had been prepared and it found comfort in the fact that the Arbitration Bill had entered the Parliamentary Committee stage. Consequently, the scope of Project 121 was narrowed down to exclude the enforcement of foreign arbitral awards.[95] Soon thereafter, however, the development of South African law in relation to arbitration was suspended. The Hlope Report did nothing to promote arbitration as an integral part of the prevailing adjudicatory and dispute resolution system. The calls for a reconsideration of the SALC Report[96] and for the establishment of a regional arbitration centre for cross-border commercial disputes in the SADC[97] have grown more urgent but political controversy prevents the promulgation of a modern arbitration statute. Butler has suggested that SADC should establish a common court of justice for the Southern African region, with appellate jurisdiction in respect of domestic court decisions on arbitral matters to ensure consistent application of the Model Law.[98] Regrettably, there is no detectable movement in this direction.[99]

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92. At viii; § 1.10, at 3.

93. At § 2.20, at 17.

94. Issue Paper 21 Project 121 2003 and Discussion Document 106 Project 121 (2004).

95. Discussion Document 4 § 1.12.

96. *Werksmans Sees Starring Role for Country in Arbitration*, BUSINESS DAY, 21 Feb. 2008.

97. C. Roodt, *The Recognition and Enforcement of Foreign Judgments, Maintenance Orders and Arbitral Awards: A Proposal for Structural Reform*, 45(2) CODICILLUS 64, 70 (2004).

98. Butler, *supra* note 4, at 36.

99. Commercial cross-border issues have not featured in any of the cases that were brought before the tribunal to date. In *Albert Fungai Mutize v Mike Campbell (Pvt) Ltd.* (2008:4) (SADC Tribunal not competent to adjudicate in disputes involving only natural or juristic persons). O.C. Ruppel & F.X. Bangamwabo, *The SADC Tribunal: A Legal Analysis of Its Mandate and Role in Regional Integration*, *in* MONITORING REGIONAL INTEGRATION IN SOUTHERN AFRICA YEARBOOK 10, 37 (2008).

Numerous opportunities exist within the framework of the 1965 Arbitration Act for a party to resort to the formal court process.[100] Although the Act permits contracting parties to make a choice of law, a choice of procedure and choice of arbitrator, it reserves the entitlement of the judiciary to intervene in the arbitral proceedings on the application by one or other of the parties to the arbitration. The local court may appoint an arbitrator or set an appointment aside on good cause shown. Remedies are available where proceedings are started in the local court in breach of an arbitration agreement. A party who has been forced to court can, at any time after entering an appearance but before delivery of any pleadings or taking any steps in the proceedings, apply to court for a stay of such proceedings.[101] The local courts may also grant an injunction to restrain proceedings started overseas in breach of an arbitration agreement. Under sections 7 and 8 of the 1965 Arbitration Act they may order that a dispute be determined by interpleader proceedings or that interpleader issues be determined by arbitration, or extend the time fixed in arbitration agreements for starting arbitration proceedings. Courts also have powers that go beyond procedural issues. For instance, a court may determine a question of law arising in the course of a reference to arbitration in terms of section 20. A review of the award for purely procedural grounds is possible pursuant to section 33(1), which provides three grounds for setting aside an arbitration award: misconduct by an arbitrator, gross irregularity in the conduct of the proceedings, and the fact that an award has been improperly obtained.

If a party requested an arbitrator to rule on his jurisdiction to arbitrate the dispute, the arbitrator would be permitted to rule on the question. A party may also apply to have an award set aside where the arbitrator has exceeded his or her powers and jurisdiction. Moreover, the arbitrator could request that the parties obtain a court ruling in this regard. Arbitral awards rendered pursuant to the 1965 Arbitration Act are final and not subject to any appeal unless the parties agree otherwise.

Sections 3(2) and 6(2) of the Arbitration Act 42 of 1965 combine to create discretion for the judiciary to decline the enforcement of an arbitration agreement and refuse to order a stay of proceedings on good cause shown by a party seeking to avoid arbitration. In their exercise of judicial discretion, courts take into account a number of factors that may, individually or cumulatively, be sufficient to discharge the onus that rests

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100. P.J. CONRADIE, A Q & A GUIDE TO ARBITRATION IN SOUTH AFRICA (Cliffe Dekker Hofmeyr Inc.), *available at* http://competition.practicallaw.com/7-381-3144 (last visited 13 Mar. 2009).

101. Section 6, Arbitration Act 42 of 1965.

on the party seeking to avoid arbitration.[102] The courts guard against frustration of the litigant's right to invoke an arbitration clause and thus the onus is a heavy one.[103] Considerations that could play a rule include the risk of conflicting decisions if separate proceedings were to be permitted, the importance of enforcing the arbitration agreement reached between the parties; the parties' choice in favour of arbitration despite their awareness of the potential disadvantages at the time; the time and money saved because the arbitrator is able to use his or her expert knowledge to dispense with expert evidence.[104] However heavy the onus may be, the fact remains that the legislative framework renders discretionary the reference to arbitration and the granting of a stay of the proceedings.

It has happened that parties who are dissatisfied with the decision of an arbitrator re-open the merits of the dispute before a civil court.[105] Moreover, the Supreme Court of Appeals and, in certain circumstances, the Constitutional Court, could overrule the order made by the court *a quo* on appeal on procedural fairness grounds. They have also shown their willingness to review a decision to allow an appeal.

The lack of any counterpart for article II(3) NYC has prompted Butler to argue that a court that exercises its discretion in an international arbitration must take into account that South Africa is in breach of its obligations under international law.[106] This has not happened. *Telcordia Technologies Inc v Telkom SA Ltd.*[107] concerned an arbitral award handed down under the rules of the International Chamber of Commerce. Conscious of the importance of limiting the involvement of the courts in the arbitral process,[108] Harms J relied on comparative law and analysis,[109]

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102. *E.g.*, *Nick's Fishmonger Holdings (Pty) Ltd v De Sousa* 2003 (2) SA 278 (SECLD) at 282D-283F.

103. *Universiteit van Stellenbosch v JA Louw (Edms) Bpk* 1983 SA 321 (A) at 334A.

104. *Id.* at 342E; ARBITRATION WORLD—SOUTH AFRICA, *supra* note 90.

105. *Yorigami Mar. Constr. Co. Ltd. v Nissho-Iwai Co. Ltd.* 1977 4 SA 682 (C) at 694B-D (court has a discretion whether or not to enforce the arbitration agreement as it is not absolutely binding; stay of action refused where arbitration in Japan was provided for in order to pre-empt a multiplicity of proceedings leading to conflicting decisions). *Intercontinental Export Co. (Pty) Ltd. v M V Dien Danielsen* 1982(3) SA 534(N) and *Polysius (Pty) Ltd. v Transvaal Alloys (Pty) Ltd.* 1983(2) SA 630(W & T) (stays granted on basis of foreign arbitration elsewhere); *Telkom SA Ltd. v Boswood & Others* (unreported) (arbitral award further to an arbitration clause without an appeal process reviewed and set aside, creating the risk of delays and protracted litigation).

106. Butler, *supra* note 4, at 12, makes this argument with reference to Section 233 of the Constitution, which obliges courts to interpret legislation in a manner consistent with international law. *See also infra* note 158.

107. 2007 (3) SA 266 SCA (order of court *a quo* in *Telkom SA Ltd. v Boswood & Others* (unreported) 2005 High Court Pretoria set aside).

108. At 279C and 279I-J.

109. *Telcordia Techs. Inc v Telkom SA Ltd.* 2007 (3) SA 266 SCA at 290-91.

but declared an agreement to arbitrate as tantamount to waiver of the parties' right to a judicial decision on the merits of the case.[110] His approach is out of line with earlier interpretations of section 3(2) of the 1965 Act, and in the landmark case *Lufuno Mphaphuli & Associates (Pty) Ltd. v Nigel Athol Andrews & Bopanang Construction CC*[111] the Constitutional Court rejected it unequivocally. The Constitutional Court was tasked, for the first time since its inception, with determining whether parties may voluntarily waive their constitutional right and refer issues in dispute between them to arbitration. Writing for the majority, O'Regan ADCJ held that persons who choose to arbitrate do not waive their constitutional rights under Section 34 of the Constitution but choose, instead of exercising their right of access to court, to participate in a private process which must be fairly conducted on the basis that the arbitrator's award will be respected and enforced by the courts.[112] The majority came to the conclusion that the Constitution would require a court to construe the grounds for setting aside an arbitral award as set out in Section 33(1) strictly, so as not to enlarge judicial powers of scrutiny imprudently.[113] The application for leave to appeal was granted and the appeal was dismissed. The High Court insisted on viewing the review application before it as an impermissible attempt to appeal against the arbitration award because it also engaged on aspects which otherwise had a bearing on the merits of the award. The minority ruling rejected this argument[114] and the majority based its ruling on questions that it reframed so as to improve their "logic" and "helpfulness" in a constitutional context.[115] O'Regan ADCJ declared:

> The application of these principles to the facts of this case, even if arguably not concerning a constitutional issue itself, concerns a matter connected to a decision on a constitutional issue which it is in the interests of justice to decide. In so doing, we will avoid the piecemeal determination of the case and provide an application of the principles set out above which will hopefully elucidate those principles in a helpful manner. I would therefore grant the application for leave to appeal.

Ngcobo J dissented on the issue of award review on appeal and held that the application for leave to appeal to the Constitutional Court in this instance had to be dismissed with costs.[116] He spoke directly to the

110. At 291A.
111. (CCT 97/07) [2009] ZACC 6 20 Mar. 2009.
112. At § [216].
113. At § [235].
114. At § [138].
115. At § [194].
116. At § [281] ff.

original question, before it was recast, and which concerned the extent in which the courts are entitled and required to exercise some control over arbitration awards before adopting them as their own and making them orders of court. He identified the danger of allowing the constitutional standard of fairness in private arbitrations to be raised for the first time before the Constitutional Court, just to get the court's ear. Not only does this tactic force the Constitutional Court to act in first and in last instance,[117] but it also undermines both the principle of finality of litigation and the role of the Supreme Court of Appeals.[118]

While it is an over-simplification to say that South African courts continue to show a high degree of deference for awards of arbitral tribunals,[119] the need to minimize undue court interference in the arbitration process has now been recognized. Perhaps this recognition does not yet flow from a full understanding of procedural jurisdiction, but it is respectful of the progressive ideas of the Model Law, and may hasten the realization of pertinent obligations under international law. The Law Commission has already urged reform in 1998 and 2001[120] but the politicization of arbitration has delayed the implementation of its recommendation to overhaul the outdated Arbitration Act of 1965. Furthermore, the majority ruling in the *Lufuno Mphaphuli* case has blazed a trail for modernizing South African legislation. From the perspective of procedural jurisdiction, however, it is necessary to probe the finding that an appeal serves the interests of justice. The arbitration agreement did not provide for an appeal and yet the court permitted aspects that bear on the merits to be engaged of the award all the way up to constitutional court level. Failing to adopt the most skilful approach to defining the contours of arbitral power and establishing guidelines for when and to what extent courts may intervene to review or to pre-empt the arbitrator's jurisdictional ruling has huge time and cost implications.

C. Sudan

The English colonial government enacted the first Civil Justice Ordinance in 1929 and arbitration has taken place in Sudan ever since. Under the old law, the judiciary exerted considerable influence over

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117. At § [295].

118. At § [299].

119. K. EL SHALAKANY, INTERNATIONAL AND COMPARATIVE LEGAL GUIDE TO INTERNATIONAL ARBITRATION ch. 48 Middle East Overview (Global Legal Group 2009), *available at* http://www.iclg.co.uk/khadmin/Publications/pdf/3023.pdf; ARBITRATION WORLD—SOUTH AFRICA, *supra* note 90.

120. *E.g.*, South African Law Commission Project 94, *supra* note 85, §§ 2.16-.23.

referral of a dispute to arbitration. Referral was a discretionary decision on the part of the court and parties could not refer their disputes to arbitration without depositing the agreement to the court. The court could not stay the proceedings if it had reached a stage sufficiently advanced to render a stay unfair and contrary to principle.[121]

Sudan overhauled its arbitration framework in 2005. Under section 6 of the 2005 Arbitration Act, the arbitral tribunal must first hear challenges to its jurisdiction before it is entitled to make a decision on the merits of the dispute. A court has to stay the proceedings if the defendant requests this on the basis of the existence of an arbitration agreement, and this applies even if an agreement to arbitrate is reached in the course of the proceedings.[122] While this is considered to be a significant improvement on the position under the old law, the supervisory powers of Sudanese courts in respect of arbitration also remain intact. For instance, a court may issue an interlocutory order during the arbitration proceedings.[123] The situs of assets plays a role in rendering a particular court competent to entertain arbitration related applications.[124] The Act does not clarify the position if a party agreement were to exclude all possibility of court intervention, nor is the court required to await, or insist on, the completion of the arbitration proceedings. Whether or not a party could apply to court to hear a case notwithstanding a valid arbitration clause is not regulated. The reason is likely to be that national courts do not have jurisdiction to hear proceedings instituted with the direct purpose to contest the validity of the arbitration agreement, as is the position in the French tradition of arbitration. French courts have no power to examine the validity or the scope of an arbitration agreement once the dispute has been brought before an arbitration tribunal, and only limited power to undertake a *prima facie* review of the jurisdiction of a tribunal before the arbitration proceedings get under way.[125] Moreover, French courts lack jurisdiction to decide the merits of the dispute once it has been referred to the arbitral tribunal, even if one party were to allege that the arbitration agreement is manifestly null and void. It is for the arbitral tribunal alone to decide this point.[126]

The legal position is clearer in respect of applications to vacate an award. Arbitral awards are executed automatically under section 40 of

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121. Section 164 of the Civil Justice Ordinance of 1929.

122. Sections 9 and 10 of the Arbitration Act 2005.

123. Section 11 of the Arbitration Act 2005.

124. Onyema, *supra* note 14, at 3.

125. Section 1458 and 1466 New Civil Procedure Code (DALLOZ, NOUVEAU CODE DE PROCÉDURE CIVILE (97th ed. 2005); DELVOLVÉ, POINTON & ROUCHE, *supra* note 44, §§ 172-173.

126. DELVOLVÉ, POINTON & ROUCHE, *supra* note 44, § 139.

the Sudanese Arbitration Act and if not, the winning party shall make a written request to the competent court for execution. To execute an international arbitral award in Sudan, the winning party has to satisfy the court that the award was made in compliance with the arbitration rules or law to which it was subject, had become final under the arbitration rule or law mentioned above, is not inconsistent with any judgment of the courts of Sudan and is not contrary to the public policy of Sudan. In addition; it must be shown that the other party has been put on notice and that the country from which the award originated maintains a reciprocity agreement for the execution of judgments with Sudan.[127] The opposing party is able to contest the request for execution by showing that any of the grounds listed has not been proved by the party seeking execution.[128] The reciprocity requirement limits the number of foreign awards for which enforcement will be sought and ensures that the system remains bilateral at best.

The new Arbitration Act of 2005 remains entirely separate from OHADA and there are no links between the Sudanese arbitration system and either the NYC or the UNCITRAL Model Law.[129] Sudan is not party to the NYC. The chances of enforcing any foreign award in Sudan appear to be remote. The splendid isolation within which the Sudanese Arbitration Act operates renders the law anti-arbitration.[130]

Section 29 bears upon the supplementary discretion of the arbitral tribunal. Where a matter that falls outside of the arbitral tribunal's jurisdiction, is presented during the conduct of the arbitration, or "a paper, to which it was produced has been contested as forged, and an information has been opened with respect thereto", the arbitral tribunal may continue with the proceedings where it is of the opinion that the matter need not be determined for the purposes of determining the dispute. If it deems otherwise, the proceedings must be stayed pending the passing of a final judgment in the matter.

The new Act clearly leaves ample scope for improvement of clarity and drafting style. Its lack of alignment with any arbitration system means not only that its arbitral system is bilateral in effect, but also that the supplementary discretion of the judiciary remains undetermined.

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127. Section 46 of the Arbitration Act 2005.
128. Onyema, *supra* note 14, at 6-7.
129. *Id.* at 2.
130. *Id.*

IV. BACK TO BASIC CONCEPTS: MEANING AND IMPLICATIONS

A harmonized understanding of what constitutes interference and what amounts to reasonable intervention in arbitration proceedings is possible only if there is a common understanding with regard to the principles of party autonomy and *compétence-compétence*. These doctrinal concepts have much to teach concerning the issue of "who decides" on jurisdiction first.

The principle of party autonomy is subject to theoretical and practical limits. It can pull in a direction opposite to the duty of a court to ensure that an award was obtained in a manner that was procedurally fair.[131] Arbitration is subject to judicial control in order to safeguard the fairness of the arbitral process and to guard a basic respect for the interests of those involved. The promotion of harmonization and uniformity in respect of institutional arbitration rules could further restrict party autonomy.

The doctrine of *compétence-compétence* embodies the power of a tribunal to decide on its own jurisdiction. The doctrine is aimed at empowering tribunals and as such, it brings the jurisdiction of arbitral tribunals into focus without impacting on the jurisdiction of national courts. However, the doctrine of *compétence-compétence* exists in a variety of different forms and functions differently from country to country. Variations result on account of disparate implementations of the principle and due to divergent views on what a "jurisdictional question" entails.[132]

The doctrine is open to very different baseline interpretations: a minimalist and a continental *pro arbitrandum* interpretation. Our baseline is the extreme that denies arbitrators any right whatsoever to rule on their own authority and disallows arbitration to proceed in the face of a jurisdictional challenge. When questions are raised about the validity or scope of a particular arbitration clause, the arbitration must stop until a court has clarified matters. A minimalist approach would permit arbitrators to rule on their own jurisdiction (or offer an opinion on the limits of their own authority), but a party may also apply to court for ruling before the arbitrator has ruled upon the question. The continental tradition relies on priority in time and allows arbitrators to have the first word on jurisdiction, be it by way of interim or final order, before courts

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131. *E.g.*, *per* Kroon A.J. in *Lufuno Mphaphuli & Associates (Pty) Ltd. v Andrews & Another* (CCT 97/07) [2009] ZACC 6 20 Mar. 2009 § [28] (minority judgment).

132. W.W. Park, *The Arbitrator's Jurisdiction to Determine Jurisdiction*, 13 ICCA CONGRESS SERIES 55 (10ICCA Congress, Montréal 2006).

are permitted to review jurisdiction.[133] Arbitrators need not adjourn the hearing on the merits to await the result of the jurisdictional challenge. The extreme position found furthest away from the baseline requires that courts defer completely to an arbitrator's decision about his or her own authority. The arbitrator has both the last and the first word. Such a result requires that judges first determine that the parties did in fact agree to such finality.[134]

If exclusive jurisdiction is granted to arbitral tribunals to examine the validity of an arbitration agreement and the power of national courts to review the jurisdiction of a tribunal is curtailed until the enforcement of the award is challenged, the effect of the doctrine is negative (at least from the perspective of the judiciary).[135] This so-called negative effect may result in an erosion of the legitimacy of the very principle. Where it is permitted to work in favour of recognizing a presumption of validity of the arbitration agreement in question, the effect is nefarious, for a vacuum is then created that enables an arbitral tribunal to elude the reasonable intervention of a responsible supervisory court.[136] The negative effects of *compétence-compétence* could ruin all prospect of balance. Balance would need to be restored whenever the very rules intended to insulate arbitral tribunals from unreasonable interference of the judicial organs of a party to arbitration provide refuge to a runaway tribunal seeking to elude the reasonable intervention of a responsible supervisory court.[137]

Different jurisdictions implement different aspects of the arbitration streams discussed.[138] A fuller appreciation of the contextual application of basic terms would minimize the tendency for competition between the fora or conflict in the areas in contention. For instance, Sudanese law adopts a continental approach to *compétence-compétence* with a strong leaning in the direction of the extreme French tradition. Nigerian and South African law are best described as hybrids. In South African law, *compétence-compétence* does not detract from the power of the local

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133. C.H. Petrus, *Spanish Perspectives on the Doctrines of* Kompetenz-Kompetenz *and Separability: A Comparative Analysis of Spain's 1988 Arbitration Act*, 11 AM. REV. INT'L ARB. 397, 402-03 (2000).

134. Park, *supra* note 132, at 24. French law is the paradigm example.

135. Brekoulakis, *supra* note 10, sub. II; J.J. Barceló III, *Who Decides the Arbitrators' Jurisdiction? Separability and Competence-Competence in Transnational Perspective*, 36 VAND. J. TRANSNAT'L L. 1115 24 (2003).

136. Brekoulakis, *supra* note 10, sub. II.

137. Partasides, *supra* note 11.

138. *E.g.*, §§ 1032(1) and 1040 *ZPO* implement articles 8 and 16 of the UNCITRAL Model Law in German law.

court to determine jurisdiction by way of declaratory order.[139] While the confusion that reigns cannot be cured by harmonized conceptualizations, little stands to be achieved without reaching a common understanding on what a jurisdictional question is and when controlled court intervention in arbitration should be permissible.[140]

The allocation of priority between arbitral and judicial fora is facilitated by clear grounds for when an arbitral award needs to be remitted or set aside, but the legislative framework needs to indicate also whether arbitration proceedings may continue in the face of a challenge that an arbitration agreement is void or lacks validity. As the discussion below indicates, the approaches of the NYC, the UNICTRAL Model Law and OHADA are not fully harmonized on the point of the extent, moment and manner in which courts may step forward to play a role.

A. 1958 New York Convention

The validity of an arbitration agreement is a condition for the enforcement of the arbitral award that has been rendered in the dispute covered by the arbitration agreement. A valid arbitration agreement also excludes the jurisdiction of ordinary courts of law on the dispute covered by the arbitration agreement. In terms of article II(3) of the NYC, the court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an arbitration agreement, must refer the parties to arbitration at the request of one of the parties, unless it finds that the said agreement is null and void, inoperative or incapable of being performed. Courts in common law jurisdictions do not refer the parties to arbitration but merely stay the proceedings and allow the party who sought and obtained the stay to proceed to arbitration. This provision is not limited to agreements that provide for arbitration within the enacting state. Moreover, it does not grant exclusive jurisdiction to courts that are requested to enforce the award, and to this extent the concurrent jurisdiction of national courts and arbitral fora is inevitable.

The NYC permits overlapping jurisdiction of arbitral tribunals and national courts, and multiple simultaneous proceedings that address the same substantive challenges to an arbitral award.[141] It also allows

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

140. Park, *supra* note 132. This will clarify the relationship between anti-arbitration injunctions and the principle that arbitrators determine their own jurisdiction. Depending on what version of *compétence-compétence* principles are taken as a standard baseline, an injunction could violate the principle or leave it intact.

141. Brekoulakis, *supra* note 10, sub. III, sets out the theoretical, practical and policy arguments in support of this.

concurrent enforcement and annulment actions in different NYC States. In *KBC v Pertamina*,[142] actions were brought in seven different countries. The case gave rise to three separate applications for anti-foreign suit injunctions—two in the United States, namely the courts in Texas and New York (each sought by KBC), and one in Indonesia (sought by Pertamina).[143] The New York Federal Court considered itself free to enforce the award under the NYC on the basis that the Indonesian court order had local application only. No sooner were all the final appeals in the United States exhausted when Pertamina set its sights on proceeding in the Cayman Islands on the basis of alleged fraud affecting both the contract and the arbitration award. At this point the U.S. District Court considered an anti-suit injunction justified.[144] Foreign litigation brought in bad faith may be enjoined where a previously rendered federal judgment has been granted on the same issues and involving the same parties.

B. OHADA

The overlap between the OHADA rules and national laws engenders structural difficulties and needs to be approached carefully. In disputes that involve both OHADA rules and domestic laws, the judiciary often faces a choice between the application of OHADA law or national law. Judges may tend to favour domestic law if their nationals stand to benefit. The identification of the competent court can be difficult in these instances. Given that decisions of the Court of Appeals are enforceable, recourse to the Common Court of Justice and Arbitration (CCJA) can come too late.[145]

The merged capacities of the CCJA are a problematic feature of the OHADA arbitration regime.[146] In arbitration proceedings before a

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142. *Karaha Bodas Co., LLC v Pertamina* (Preliminary Award of 30 Sept. 1999) (UNCITRAL, Derains, Bernadini and El-Kosheri) (2001) 16 No 3 Mealey's Int Arb Rep C-17; (Final Award of 18 December 2000), (2001) 16 No 3 Mealey's Int Arb Rep C-2; 335 F.3d 357 (5th Cir. 2003); 465 F. Supp. 2d 283 (S.D.N.Y. 2006).

143. Dugan et al., *Second Circuit Clarifies Rule on Foreign Anti-Suit Injunctions*, STAY CURRENT, 2007, at 2-3, *available at* http://www.paulhastings.com/assets/publications/781.pdf?wt.mc_ID=781.pdf.

144. *Karaha Bodas Co. v. Pertamina*, 465 F. Supp. 2d 283 (S.D.N.Y. 2006); *see* MCLACHLAN, *supra* note 31, at 248; E.M. Spiro, *Anti-Suit Injunctions in Aid of Arbitration*, 22 N.Y. JOURNAL 237 (2007).

145. http://www.nortonrose.com/knowledge/publications/2008/pub13916.aspx?page=080206150723&lang=en-gb (last visited 15 Dec. 2008).

146. Kruger, Regional Organisations and Dispute Settlement: Court and Arbitration Institution at the Same Time?, *available at* http://www.ialsnet.org/meetings/business/KrugerThalia-SouthAfrica.pdf (last visited 21 Mar. 2009).

national court in terms of the UAA, the CCJA is the final interpreter and may be likely to grant enforcement of an award. In an institutional CCJA arbitration, parties can request neither a declaration for enforcement nor an annulment. The CCJA may review only the *prima facie* existence or form of draft awards. Only the administrative duties of the CCJA performed in conformity with the Rules have *res judicata* authority in the territories of the signatories.

The UAA displays predominantly, but not exclusively, French influence. The arbitration tribunal has general competence to examine its own jurisdiction, including the validity of the arbitration agreement, for reasons of public order. It may consider its jurisdiction before it determines the merits or thereafter. The arbitral tribunal may rule on its own jurisdiction either in the award on the merits or in a partial award on jurisdiction. The award may be challenged by recourse for nullity in both instances.[147] Where the arbitral tribunal erroneously decides that a particular issue is inarbitrable, judicial recourse is possible. However, there is no express provision that enables the tribunal to continue with the arbitration. Consequently, if recourse was taken to a court to review a partial award that was given on the basis that the tribunal had jurisdiction, the tribunal is by implication unable to continue.[148]

If the arbitration agreement meets all the requirements for validity but the tribunal has not been constituted, the court must declare itself competent. If the court is seized after the tribunal has been constituted, the court must declare itself incompetent if one of the parties so requests.[149] Arguably, this arrangement gives way to party autonomy more than to negative *compétence-compétence*.

The UAA does not allow the arbitral tribunal to rule on the challenge of arbitrator and challenges should be referred directly to a court. The decision of the judge is not subject to appeal, thus preventing recourse to the court from being used as a delaying tactic. Parties may exclude a challenge being made to a court, and appeals are specifically excluded in this case also.[150] This arrangement also gives way to party autonomy.

The parties may consent to have recourse to arbitration under the auspices of the CCJA even when a case is pending before a national court, or they may object to the jurisdiction of the arbitration tribunal

147. Art. 11 UAA read with arts. 25-27; Butler, *supra* note 4, at 15.
148. Butler, *supra* note 4, at 15.
149. Art. 13 UAA; Butler, *supra* note 4, at 13.
150. Art. 7 UAA; Butler, *supra* note 4, at 14.

either for the whole or for a part of the dispute concerned.[151] Either the respondent or the claimant is entitled to raise the matter of jurisdiction of the arbitral tribunal outside the responses and counterclaim applications. On the question of the validity of the arbitration agreement the CCJA is precluded from examining the merits of the question but for the *prima facie* existence thereof.[152] If the arbitrator considers the arbitration agreement valid, but the main contract is null or void, the arbitrator has jurisdiction to rule on any requests.

C. UNCITRAL Model Law on International Commercial Arbitration

The Explanatory Report seeks the justification for the trend to limit and define court involvement in international commercial arbitration in the conscious decision which the parties to an arbitration agreement make to exclude the jurisdiction of the courts in preference to the finality and expediency of the arbitral process.[153] Legislation based on the Model Law has to limit judicial intervention by way of according respect to party autonomy, the doctrine of severability of the arbitration clause, and the competence of arbitral tribunals to rule on their own jurisdiction, including in the first instance, questions concerning the existence and validity of the arbitral agreement.[154] Article 5 guarantees that all instances of possible court intervention are found in the legislation that enacts the Model Law, except for matters it does not regulate, such as consolidation of arbitral proceedings, the contractual relationship between arbitrators and parties or arbitral institutions, damages, interest and the fixing of costs and fees.

The UNCITRAL Model Law expressly permits court proceedings in instances within two groups. A first group includes the appointment, challenge and termination of the mandate of an arbitrator (articles 11, 13 and 14), the jurisdiction of the arbitral tribunal (article 16), and the setting aside of the arbitral award (article 34). These issues are best entrusted to a specially designated court, an arbitral instrument or a chamber of commerce for the sake of centralization, specialization and efficiency.[155] With regard to a challenge of an arbitrator, the arbitral tribunal decides in the first instance in the absence of an agreement to the contrary. Should this challenge be unsuccessful, the challenging party is

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151. Lauriol, *supra* note 51, at 174, 176.

152. As with the International Court of Arbitration of the ICC; *cf.* Lauriol, *supra* note 51, at 175.

153. Explanatory Note, *supra* note 3, § 15, 27.

154. Art. 16(1)-(2) Model Law; Butler, *supra* note 4, at 6, 19.

155. Art. 6.

entitled to refer the matter to a court. No appeal is possible and the arbitral tribunal may continue while court proceedings are pending.

The Model Law advances the cause of uniformity, but its puts a unique interpretation on the timing of judicial review. Article 16 represents a near complete regulation of the tension between protecting arbitration from obstruction and preserving the right to have access to court in legitimate disputes over arbitrator jurisdiction. The arbitral tribunal has the right to determine its own jurisdiction, subject to challenge upon request from a party within 30 days. The arbitral tribunal is empowered to deal with jurisdictional challenges either as a partial or a final award, and the jurisdiction of the arbitrator could be determined by the courts only in narrowly defined cases. This provision guards against the employment of a court review of a finding that the tribunal has jurisdiction as a delaying tactic and is sufficiently mindful of the expenditure of time, effort and money.[156]

The second group regulates applications of a party to a competent court for interim protection or relief. Recognition of the arbitration agreement, including its compatibility with court-ordered interim measures, are closely regulated in articles 8 and 9. Court-ordered interim measures, recognition and enforcement of interim measures and arbitral awards,[157] as well as issues of court assistance in taking evidence are regulated in separate provisions. Both articles 8 and 9 apply to an arbitration held outside the state where enforcement of interim measures or of the award is sought. While article 8 is not sufficiently flexible to accommodate common law jurisdictions,[158] it is modeled on article II(3) of the NYC and thus it does not affect the functions of the arbitral tribunal. It places a court under an obligation to refer the parties to arbitration if the court is seized with a claim on the same subject matter unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed. The referral is dependent on a request which a party may make not later than when submitting its first statement on the substance of the dispute. This seems to imply that national courts may engage in either a full review or a *prima facie*

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156. Butler, *supra* note 4, at 15; Petrus, *supra* note 133, at 404.

157. Respectively art. 17 J; arts. 17 H and 17 I; arts. 35 and 36; and art. 27; Butler, *supra* note 4, at 15.

158. An amendment to the effect that court proceedings are to be stayed in order to enforce the arbitration agreement is required. English courts prevent a party from taking recourse to civil proceedings if one party objects to such proceedings. If there is an application to stay the proceedings under section 9 of the Arbitration Act 1996, the court is obliged to grant it. *See also* M. JAMES, LITIGATION WITH A FOREIGN ASPECT: A PRACTICAL GUIDE § 13.20 (OUP 2009). Also Butler, *supra* note 4, at 30, with reference to the law of Zimbabwe; discussion *supra* note 106.

examination of the validity as well as the scope of an arbitration agreement in the pre-award stage unless the arbitration clause appears to be void on its face.[159] This provision is by its nature binding only on the courts of the State enacting the Model Law, but since article 8 is not limited in scope to agreements providing for arbitration to take place in the enacting State, it promotes the universal recognition and effect of international commercial arbitration agreements.[160] The Model Law does not prevent courts from finding an arbitration clause to be void in the context of a judicial action on the substantive merits of the case, provided that judicial jurisdiction exists over the relevant parties and/or dispute.

The Model Law envisions the possibility of simultaneous proceedings by courts and arbitrators regarding the competence of the arbitral tribunal. Immediate court review is permitted if the arbitral tribunal rules it has competence as a preliminary question and the tribunal may continue and make an award while the court review is pending. The tribunal should stay the arbitration proceedings only if the parties so agree. The court may rule on the plea only when the arbitral tribunal affirms its own jurisdiction; there is no express reviewing power in respect of rulings that decline jurisdiction. This gap is open to be interpreted in a number of different ways: (a) that court review is precluded, (b) that national legislatures may extend reviewing powers in respect of all rulings, or (c) that parties need to regulate this aspect in their agreement. Park suggests that the *prima facie* approach leaves open the question of the court's decision being subject to re-opening at a later stage.[161]

Interim measures granted by the court in an international arbitration should not be allowed to encroach on the powers of the arbitral tribunal, but rather to reinforce them to render the tribunal's decision on the merits of the dispute more effective. Article 9 disallows interim measures of protection that may be obtained from courts under their procedural law (for example, pre-award attachments) from encroaching on the powers of the arbitral tribunal.[162] It is expressed as "compatibility" between the measure concerned and the arbitration agreement under consideration. It is addressed to the courts of any State, irrespective of the place of arbitration. National courts are required to recognize and enforce interim

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159. Park, *supra* note 132, at 53; MCLACHLAN, *supra* note 31, at 203; Brekoulakis, *supra* note 11, at n.10, who maintains that concurrent jurisdiction on the scope of the arbitration agreement is objectionable as it impedes the functioning of the arbitral tribunal.

160. Explanatory note, *supra* note 3, § 21.

161. Park, *supra* note 132, at 53.

162. Explanatory note, *supra* note 3, § 22; *Channel Tunnel Group Ltd. v Balfour Beatty Constr. Ltd.* [1993] 1 Lloyd's Rep 291 (HL) at 308; Butler, *supra* note 4, at 16.

measures and awards issued by arbitral tribunals provided due application is made. Refusal is acceptable only in particular cases for awards and a review of the substance of the interim measure is precluded in the court that is called upon to determine its acceptability, recognize or enforce it.[163]

D. Evaluation

Compared to OHADA, the relationship between arbitral tribunals and national courts is managed more conscientiously under the NYC and UNCITRAL Model Law. These instruments allow for a full review rather than a *prima facie* examination of the validity and scope of an arbitration agreement in the pre-award stage. The Model Law ranks superior to the UAA with regard to how it regulates (a) the powers of the court in relation to the challenge of an arbitrator, arbitral proceedings and awards, (b) court review of a finding by an arbitral tribunal that it has jurisdiction as a preliminary question, (c) the powers of arbitral tribunals with regard to their proceedings and interim measures, and (d) the balance between civil and common law procedural traditions in the area of court assistance for the production of evidence in arbitration proceedings.[164] The circumstances in which interim relief can be requested and anti-suit injunctions issued, must be as clear as possible, and the risk of a local court intervening to frustrate or prolong the arbitration ought to be minimized. The grounds are to be tailored narrowly in order to prevent unnecessary interference with foreign proceedings.

Reviewability could be spelt out more clearly, but the Model Law avoids the trap of negative *compétence-compétence* where it matters most.[165] Whereas it would be unwise to prevent a party from invoking the jurisdiction of a national court on the matter of validity, it is desirable to do so in respect of issues such as the scope of the agreement.

The issue of timing in parallel proceedings between the different fora on the question of arbitral jurisdiction can be solved by parallel or concurrent consideration, sequential consideration or waiver.[166] Detailed rules would be needed to enable sequential consideration depending on which forum, the court or the tribunal, is seized first.[167] Waiver entails

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163. Arts. 17 I, 36.

164. Butler *supra* note 4, at 10-11, 14-15, 18, 22, 26; South African Law Commission Project 94, *supra* note 85, § 2.21, at 17.

165. Brekoulakis, *supra* note 10, sub. III.C.

166. MCLACHLAN, *supra* note 31, at 198.

167. *E.g.*, the European Convention on International Commercial Arbitration of 1961.

stipulating that the reference to arbitration includes an agreement to refer any jurisdictional issue to the arbitral tribunal first. The implication, that the right to seek prior determination of arbitral jurisdiction from a national court will not be exercised, needs to be rendered clear. For instance, time limits could be set for pleas to the contrary so as to promote legal certainty.[168] The *Lufuno* ruling seems to outlaw this mechanism in South African constitutional practice, but further comparative law research may show that procedural jurisdiction and party autonomy need not compromise the right of access to court. Concurrent jurisdiction of arbitral tribunals and national courts on the existence and validity of arbitration agreements does not raise much concern if the *res judicata* rule is permitted to solve the problems associated with parallel proceedings on the existence and validity of arbitration agreements.[169] The possibility of legal resources being wasted is preferable to precluding a party from having his day in court. Moreover, the possibility of concurrent proceedings mirrors the reality of the uncertainty over validity, which indicates the issue of jurisdiction is still open. In disputes other than those relating to existence and validity, court interference is problematical, and the negative effect of *compétence-compétence* could be more useful in the event of challenges in aspects aside from validity.[170]

V. CONCLUSION

Arbitration evidently admits of an element of competition between arbitral models, between arbitrators and judges, and also between different venues in which it proceeds. The support the judiciary can offer should rise above the tendency to compete. It is necessary, therefore, to keep searching for a balance in the allocation of jurisdictional authority between national courts and arbitral tribunals. The interface between national procedures and the supplementary discretion of the arbitral tribunal concerned requires rules to promote order in this area, and rules are more effective when they are aligned with basic concepts.

Sudanese, Nigerian and South African law accept that an arbitrator may rule on his own jurisdiction, but the effects of an arbitral ruling on

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168. *E.g.*, art. 23.4 of the Rules of the London Court of International Arbitration. MCLACHLAN, *supra* note 31, at 198-200.

169. Articles 8 and 16 of the UNCITRAL Model Law amount to tolerating concurrent consideration for existence and validity without stipulating what the national court is supposed to do. *See also* § 32(4) English Arbitration Act 1996; § 1032(3) ZPO; BRIGGS, *supra* note 13, §§ 12.35, .41.

170. Brekoulakis, *supra* note 10, sub. III.C.

its own jurisdiction are less clear. Sudanese law adopts a continental approach to *compétence-compétence* that stops short of granting the arbitrator the first as well as the last word. Sudanese legislation clarifies the position when a court is asked to vacate an award, but it is silent about the consequences of a court declaring an arbitration agreement invalid or hearing a case notwithstanding a valid arbitration agreement. It resembles an extreme illustration of negative *compétence-compétence* in typical French tradition. The most problematic aspect of the legislative framework is the lack of alignment between Sudanese legislation and the arbitration systems which its neighbours participate in. This gap precludes the promotion of harmonization in international commercial arbitration in Sudan.

Neither Nigerian law nor South African law adheres to negative *compétence-compétence* but court intervention in arbitral proceedings is not particularly well-timed. Both legal systems seem closer to hybrid models than minimalist or continental models. They are not oblivious to the nuance and balance required in this area, but there is scope for improvement in both.

Nigerian arbitration legislation displays a high potential for harmonization if the commitment to international initiatives is any indication. Moreover, Nigeria grapples with the question of balance between adjudicatory fora. This has not been very effective. The 2006 amendments of the UNCITRAL Model Law are still not incorporated into Nigerian law, since legislative amendment is required every time the Model Law changes.[171] Moreover, the ACA has not been brought into alignment with article 16(3) of the Model Law. Article 16 allows arbitral proceedings to continue while proceedings for the review of the arbitrator's decision on jurisdiction are pending in court, but the ACA does not. Consequently, it is not clear what the position would be if the parties were to oust court review of the arbitral tribunal's decision. Higher regard for the principle of party autonomy is required. Several legislative provisions facilitate rather than minimize judicial intervention.[172]

In South Africa, the decision whether to determine a dispute itself or refer it to an arbitral tribunal is left to judicial discretion. The issue of minimizing undue court interference in the arbitration process falls to be decided by the courts themselves. The South African Law Commission has declared the position to be unsatisfactory[173] but the balance of power

171. Table at http://www.uncitral.org (last visited 7 Nov. 2009).
172. Proposals, *supra* note 65, § 9.
173. South African Law Commission Project 94, *supra* note 85, §§ 2.16–.23.

remains stacked in favour of the courts. Arbitration has become a political issue, and for as long as political willfulness overshadows the real issues, the modernization of the outdated Arbitration Act of 1965 will remain on ice. The most recent decisions raise concerns about the treatment given to procedural jurisdiction. In *Telcordia Technologies Inc v Telkom SA Ltd*,[174] an agreement to arbitrate was considered to constitute a waiver of the parties' right to a judicial decision on the merits of the case, without any questions asked about *compétence-compétence* in South African law. In the *Lufuno Mphaphuli* case,[175] the court was so eager to provide guidance on matters of substance that procedural jurisdiction did not receive its due. The need to maintain and nurture the balance between the powers of national courts and arbitral tribunals in matters non-constitutional was not seen to be pressing.

Disappointingly, as with Private International Law, international commercial arbitration features on neither the SADC nor African Union agendas.[176] The White Paper on Economic Policy Issues prepared by the Association of SADC Chambers of Commerce and Industry identified the need for harmonized arbitration systems in business in 2000, but the Southern African region is caught in a time warp. The development of a harmonized system would imply finding functional ways of extending the language policies in Western Central Africa and a willingness to face up to residual fears of domination of one legal tradition over another, and of one mode of dispute resolution over the other. Compliance with the NYC, the UNCITRAL Model Law or OHADA is a first step towards a regional coherence with regard to achieving a situation where agreements and awards are valid and void on the same grounds. Where this level of basic alignment and compliance is not yet the norm (e.g. in Sudan), or where defective implementation of the NYC and the UNICTRAL Model Law requires remedy (e.g. Nigeria and South Africa), action is urgent. Law reform will not be constructive if African states settle for less.

174. 2007 (3) SA 266 SCA.

175. (CCT 97/07) [2009] ZACC 6 20 Mar. 2009.

176. The future trade agenda for the SADC region is regularly considered by the TRALAC Conference, but no mention was made of this issue at its most recent conference (Cape Town, 3-4 Sept. 2009). The post-conference report is *available at* http://www.tralac.org/cause_data/images/1694/tralac_Annual_conference_Report_20091007.pdf (last visited 25 Nov. 2009).