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The Doctrine of Competence-Competence and the Botswana Arbitration Act of 1959: The Need for Reform

Baboki Dambe*

ABSTRACT

The summative intent of this article is to offer an assessment of the conformity or otherwise of the Botswana Arbitration Act of 1959 to the requirements of modern international commercial arbitration. The article indicates that the Botswana Arbitration Act (the Act) is archaic and unsuited for arbitration to the extent that it presents numerous opportunities for the court to interfere in arbitral proceedings and does not confer the arbitral tribunal with sufficient powers to effectively conduct its proceedings. Whereas the article encapsulates some of the major shortfalls of the Act in relation to the balance of power between the national courts and the arbitral tribunal, the article shall focus on the failure of the Act to provide for the doctrine of competence-competence and the principle of separability of the arbitration clause. Consequently, the article shall assess the doctrine of competence-competence as encompassed by the UNCITRAL Model Law on International Commercial Arbitration 1985 and the 1996 English Arbitration Act with a view of making a recommendation of the position that ought to be adopted by Botswana to bring its laws to international standards and make itself an attractive and conducive venue for arbitration. Moreover, the article also draws from South African jurisprudence since they have an Arbitration Act akin to Botswana's and their case law is frequently relied upon by Botswana courts as persuasive authority.

1. FROZEN IN TIME: THE BOTSWANA ARBITRATION ACT OF 1959

The need for a country to have arbitration legislation that is up to the modern international standard and suited to the needs of international commerce cannot be overstated.[1] Such is based on "the urge to obtain much needed investment,

* LLB (UB), LLM (Edinburgh), Attorney, High Court of Botswana

1 R. H. Christie, "Arbitration: Party Autonomy or Curial Intervention II: International Commercial Arbitrations", 111 *South African Law Journal* (1994) 360 at p. 367.

to facilitate international trade and, most importantly, to host international arbitrations”.[2]

The Botswana Arbitration Act of 1959[3] is based on the England Arbitration Act of 1950[4] and is also largely influenced by the 1889 English Arbitration Act. It has thus been classified as first generation arbitration law.[5] Like most African States that were under colonial rule, the Act was enacted by the colonial administrators and only applicable to domestic arbitration. As Assouzo observes, such legislations were “scanty in their substantive provisions and allowed the court considerable influence in the arbitration process”.[6] The Act as it stands is a colonial relic that is not suitable for modern arbitration.[7] Needless to say, since 1959 there have been major developments in the international arbitration law landscape, particularly the UNCITRAL Model Law of 1985 which sought to redress the balance between party autonomy and court intervention and harmonise arbitration laws. It is therefore hard to comprehend why Botswana and other African states still remain stuck with arbitration laws of colonial times which are clearly not suited to the demands of modern international arbitration.[8]

Commenting on the South African Arbitration Act of 1965, the South African Law Commission made the following observations which are equally applicable to the Botswana Arbitration Act by virtue of it being of “an older and inferior vintage”[9]:

> “...the Act was designed with domestic arbitration in mind and has no provisions at all expressly dealing with international arbitrations. By present day standards, the Act is characterised by excessive opportunities for parties to involve the court as a tactic for delaying arbitration process, inadequate powers for the arbitral tribunal to conduct the arbitration in a cost effective and expeditious manner and

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2 A.A. Assouzo, *International Commercial Arbitration and African States*, Cambridge, CUP, (2001) at p. 175.

3 Chapter 06:01.

4 R J V Cole, “Botswana’s Arbitration Legislation: The Path for Future Reform”, 5 *University of Botswana Law Journal* (2007), p. 83.

5 D. Butler, “The State of International Commercial Arbitration in Southern Africa: Tangible yet Tantalising Progress”, 21(2) Journal *of International Arbitration* (2004), p. 171.

6 A. Assouzo, *supra* at pp. 121.

7 S. Asante, “The Perspectives of African Countries on International Commercial Arbitration”, 6 *Leiden Journal of International Law* (1993), p. 338.

8 A. Assouzo, *supra* at pp. 123.

9 D. Butler, *supra* at pp. 199.

insufficient respect for party autonomy."[10]

The Botswana Arbitration Act does not contain a specific provision giving the arbitrator power to decide on his own jurisdiction. Moreover, the arbitrator has no statutory powers to grant interim measures, call witnesses on his own motion or order security for costs.[11] The absence of these powers then means that the arbitral tribunal relies heavily on the courts.

By way example, According to Section 30 of the 1959 Act the court is empowered to direct the arbitral tribunal to submit a question of law to it for its determination. This is premised on the reasoning that questions of law are best decided by the courts and it undoubtedly has the potential of delaying the arbitration proceedings.[12] The provision could have possibly served a central purpose in the past where most arbitrators were lay man not knowledgeable in the law. It is submitted that the same does not hold true today and as such the provision in its current form permits unnecessary court intervention in arbitration. Although I came across no reported case where the provision was invoked, there is ample evidence of the utilisation of its equivalent in South Africa.[13] This power of the court has been abandoned in modern international commercial arbitration laws and where it is retained it is with necessary safeguards.[14] For example, in the Scotland Arbitration Act 2010 point of law referrals can only be made either with the consent of both parties or where the tribunal itself deems it appropriate and even then the court would still have to be satisfied that its determination of the question will produce substantial saving in expenses.[15] This is also the position under the 1996 English Arbitration Act.[16]

The English models that the Botswana laws was based on and the ones prior to 1996 were principally amended in order to curtail the extent to which the courts may interfere with arbitration so as to make England an attractive venue

10 South African Law Commission, Arbitration: Report on an International Arbitration Act for South Africa, Project 94 July 1998 .

11 D. Butler, *supra* at p. 209.

12 R. J. V. Cole, *supra* at pp. 82-83.

13 *Dorman Long Swan Hunter (Pty)* v Karibib *Visseye Ltd* (1984) (2) SA 462; *Administraise van Transvaal* v Oosthhuizen *en n'Ander* 1990 (3) SA 387; *Administrator Transvaal* v *Kildruiumy Holdings* (Pty) Ltd (1978) (2) SA 124; *Government of the Republic of South Africa* v *Midkon (Pty) Ltd* (1984) (3) SA 552.

14 A. Asouzo, *supra* at pp. 171.

15 2010 Scotland Arbitration Act, Rule 40.

16 Section 45 (2) of the 1996 English Arbitration Act.

for arbitration.[17] As Lord Neill QC notes;

> "If some Machiavelli were to ask me to advise on the best methods of driving international arbitration away from England I think that I would say that the best way would be to reintroduce all the court interference that was swept away."[18]

Unfortunately, the Botswana Arbitration Act was never amended and remains riddled by instances of excessive court interference that Lord Neill alludes to.

Case law also indicates that the Botswana courts are also keen to exercise their jurisdiction irrespective of the consequences that such may have on arbitration. By way of example, in the case of *Silverstone (Pty) Ltd and Another v Lobatse Clay Works (Pty) Ltd*[19] the parties had entered into an arbitration agreement and when a dispute arose between them the Respondent approached the court seeking an order for attachment to confirm jurisdiction. The Applicant opposed the order on the basis that an arbitration agreement existed between the parties and as such any disputes between them had to be properly resolved through arbitration. Be that as it may, the court held that it had inherent and unlimited jurisdiction and was by virtue thereof entitled to grant the attachment.[20] A combination of the permissive nature of the Act and such reasoning from the court renders arbitration in Botswana "highly judicialised."[21]

2. ARBITRATION WITHIN THE NATIONAL COURT SYSTEM: KEEPING COURT INTERVENTION TO A MINIMUM

The discussion above indicates that the Botswana Arbitration Act permits a lot of court intervention in arbitration. It is apposite at this stage to briefly examine the manner in which arbitration relates with the national courts system with a view of achieving the ideal of minimal court intervention.

In so far as arbitration takes place within a country with a court system, the question of the relationship between the courts and arbitral

17 N. Maitara, "Domestic Court Intervention in International Arbitration: The English View", 23(3) Journal *of International Arbitration* (2006), p. 247.
18 Lord Neill QC, "Confidentiality in Arbitration", 12 *International Arbitration* (1996), p. 316.
19 1995 BLR 669 at 682.
20 1995 BLR 669 at 682.
21 R. J. V. Cole, *supra* at pp. 83.

proceedings is always going to be a crucial one. Redfern and Hunter observe that "the relationship between national courts and arbitral tribunals swing between forced cohabitation and true partnership."[22] Lew notes that the involvement of courts in arbitration "is a fact of life as prevalent as the weather".[23]

It has been submitted that when parties opt for arbitration as a mode of dispute resolution, they specifically and intentionally reject the jurisdiction of the national courts.[24] Consequently, the courts have to desist from interfering with arbitration.[25]

Arbitration does not exist in a vacuum and it depends on the courts for its effectiveness.[26] As Lew puts it:

> "One might therefore speak of the international arbitration process as stretching its tentacles down from the domain of international arbitration to the national legal system to forage for legitimacy, support, recognition and effectiveness."[27]

It is essential to have courts playing a supervisory role in arbitration to ensure that arbitration proceedings are conducted properly and effectively.[28] Courts can utilise their coercive powers to issue orders preserving the status *quo* pending arbitration or compelling the discovery of documents. Lord Mustill opines that;

> "There is a plain fact, palatable or not, that it is only a court possessing coercive powers which could rescue the arbitration if it in danger of foundering."[29]

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22 A. Redfern and M. Hunter, *Law and Practice of International Commercial Arbitration* (4th ed.), London, Sweet and Maxwell, (2004).

23 J. D. Lew, "Does National Court Intervention Undermine the International Arbitration Process?" 24 *American University International Law Review* (2009), 489 at p. 489.

24 *ibid* at pp. 491.

25 A. Butcher, "Court Intervention in Arbitration", in R. Lillich and C Brower (eds), *International Commercial Arbitration in the 21st Century: Towards Judicialisation and Uniformity,* Lieden, Martinus Nijhoff, (1994), p. 29

26 J. D. Lew, *supra* at p. 492.

27 *ibid* at pp. 493.

28 S. Sattar, "National Courts and International Arbitration: A Double Edged Sword", 27(1) Journal *of International Arbitration*, (2010), p. 51; M. L. Livingstone, "Party Autonomy in International Commercial Arbitration: Popular Fallacy or Proven Fact?", 25 (5) *Journal of International Arbitration* (2008), p. 534.

29 *Coppee Levalin NV* v Ken-*Ren Fertilisers and Chemicals* (1994) 2 Lloyd's Report 109 at pp. 116, Quoted in S Sattar, *supra* p. 52.

However, courts have to support and not hinder arbitration. Maitra notes that "an assurance that there will be no undue interference from the courts of the seat of the arbitration is vital, as is the value of support for the arbitration from the local court system".[30] In the case of *Soh Beng Tee & Co Pte Ltd v. Fairmount Pte Ltd,* the following sentiments were expressed by the Singapore Court of Appeal regarding court intervention;

> "Aggressive judicial intervention can only result in the prolonging of the arbitral proceedings and encourage myriad unmeritorious challenges to arbitral awards by dissatisfied parties. Left unchallenged, an interventionist approach can lead to indeterminate challenges, cause indeterminate costs to be incurred and lead to indeterminate delays."[31]

There is therefore a strong need to strike a delicate balance between the powers of the court in relation to arbitration. As Moses correctly points out, "there is a wavering line between helpful assistance and unhelpful interference".[32] Most importantly, arbitration legislation has to be couched in such a way that it limits court intervention.

To indicate the unacceptability of court intervention in arbitration, Article 5 of the Model Law provides as follows;

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

The provision was intended to "exclude any general or residual powers given to the courts in a domestic system which are not listed in the Model Law".[33] Moreover, the Article provides clarity and certainty in the law and also served to curtail dilatory tactics.[34] Consequently, most progressive jurisdictions have incorporated the principle of non intervention as one of their arbitration laws' guiding principles.[35]

In addition to court intervention reducing the effectiveness of arbitration, it has been established that if national courts are hostile to international

30 N. Maitra, *supra* p. 248.

31 2007 SGCA 28 at 62.

32 M. L. Moses, *The Principles and Practice of International Commercial Arbitration*, Cambridge, CUP, (2008), p. 85.

33 UNCITRAL Model Law Analytical Commentary A/40/17 at para 63.

34 P. Binder, *International Commercial Arbitration and Conciliation in Uncitral Model Law Jurisdictions* (2nd ed), London, Sweet and Maxwell, (2005), pp. 50-51.

35 Section 1 (c) of the 1996 English Arbitration Act; Section 1(c) of the 2010 Scotland Arbitration Act.

arbitration such could amount to a violation of international law for which state responsibility accrues.[36] Such responsibility emanates from Article 2 of the New York Convention which places an obligation upon states to give effect to arbitration agreements. In the *Saupem* case, the ICSID tribunal held that a state could be responsible at international law if its judiciary wrongfully interferes with arbitral proceedings.[37]

3. OPERATING WITHOUT "PILLARS": THE ABSENCE OF THE COMPETENCE-COMPETENCE DOCTRINE AND SEPARABILITY IN BOTSWANA

The Botswana Arbitration Act does not contain a provision granting the arbitral tribunal power to rule on its jurisdiction. Moreover, the Act does not specifically provide for the separability of the arbitration clause. The purpose of the part is to assess the implication of such omissions as reflected in case law.

3.1 Competence-Competence and Separability as "Pillars" of International Commercial Arbitration

Before I delve into how the doctrines of competence-competence and separability have been approached in Botswana it is essential to define the concepts and highlight the indispensable role they play in arbitration. Separability and competence-competence have been referred to as the "conceptual cornerstones" of international arbitration.[38] This is essentially because they both aid in determining the crucial question of who decides the jurisdiction of the arbitrator and seek to prevent premature judicial intervention in arbitral proceedings.[39]

The principle of separability simply provides that an arbitration agreement is distinct from the main contract and it is not affected by the "nullity,

36 P. Binder, *supra* at pp. 53 and 64; J Paulson, *Denial Justice in International Law* Cambridge, CUP, (2005).

37 Id.

38 R. H. Smit, "Separability and Competence-competence in International Arbitration: Ex Nihilo Nihil Fit? Or Can Something Indeed Come Out of Nothing", 13, (1 – 4) *American Review of international Arbitration,* (2002)

39 O. Susler, "The Jurisdiction of the Arbitral Tribunal: A Transnational Analysis of the Negative of Competence-Competence", 6 *Macquarie Journal of Business Law* (2009), pp. 119-120.

resolution, termination or even its non existence"[40] of the main contract. As Schwebel observes;

> "When the parties to an agreement containing an arbitration clause enter into an agreement, they conclude not one but two agreements, the arbitral twin of which survive any birth defects or acquired disability of the principal agreement."[41]

The principle of separability has been embraced to the extent that it is submitted that it is a general principle of trade law.[42]

On the other hand, the doctrine of competence-competence empowers the arbitral tribunal to decide on its jurisdiction. As Susler observes;

> "The Competence-competence principle enables the tribunal to rule that an arbitration agreement is invalid and to issue an award that it lacks jurisdiction without contradicting itself."[43]

It is worthy to note that competence-competence has two facets; the positive effect and the negative effect. The positive effect, which is less controversial and is almost universally applied, is simply to the effect that the arbitral tribunal shall have the power to decide its jurisdiction.[44] This therefore entitles an arbitral tribunal to proceed to determine jurisdiction without having to seek a court ruling on the matter.[45] On the other hand, the negative effect provides that a court is not permitted to make a ruling on the existence or validity of an arbitration agreement before the arbitral tribunal has rendered an award in relation to its jurisdiction.[46] Different jurisdictions embrace the negative effect of competence-competence in varying degrees and it remains controversial. The negative effect will be more fully discussed in the section dealing with stay of proceedings.

Competence-competence has been described as "one of the most

40 A. Dimolitsa, "Separability and Kompetenz-Kompetenz", *9 ICCA International Arbitration Conference, Congress Series* (1999), p. 218.

41 S. M. Schwebel, *The Severability of the Arbitration Agreement in International Arbitration: Three Salient Problems*, Cambridge, Grotius publications, (1987), p. 5.

42 A. Dimolitsa, *supra* at pp. 220.

43 O. Susler, 'The Jurisdiction of the Arbitral Tribunal: A Transnational Analysis of the Negative of Competence-Competence', 6 *Macquarie Journal of Business Law* (2009), p. 126.

44 *Id.*

45 O. Susler, *supra* at pp. 126; P Binder *supra* at pp. 143.

46 *Id.*

venerable and important principles of arbitration law”.[47] As Binder notes;

> “Modern international commercial arbitration without this principle is unthinkable since the arbitrator’s right to rule on his own jurisdiction is one of the reasons why arbitration has flourished so greatly over the past decades.”[48]

Suffice at this point to note that competence-competence and separability are complimentary to each other.[49] The principle of separability enables the arbitrator to continue with arbitration in the event that the validity of the main contract is called into question. However, if it is the validity of the arbitration agreement itself that is directly called into question then the doctrine of competence-competence is the one that permits the arbitrator to proceed.[50]

3.2 The Absence of the Positive Effect of Competence-Competence in Botswana

Having noted the crucial role played by the doctrine of competence-competence, I now address its non recognition in Botswana.

The implications of the failure of the Act to grant the arbitrator the power to decide on their jurisdiction can be summarised by the following observation by Butler and Finsen commenting in relation to the South African Arbitration Act of 1965;

> “If the arbitrator is uncertain as to whether he has jurisdiction, however, he should decline to proceed with the arbitration and leave it to one of the parties to apply to court for a declaratory order.”

The same position applies in Botswana. This is confirmed by the decision of the High Court in the case of *Fencing Centre (Pty) Ltd* v *Murray and Roberts Construction and Others*. In a very brief judgement with far reaching consequences for the doctrine of competence-competence and indeed the suitability (or otherwise) of Botswana as a venue for arbitration, Kirby J categorically stated that where the validity or existence of the arbitration

47 F. G. De Cossio, ‘The Competence-Competence Principle, Revisited’, 24(3) Journal *of International Arbitration* (2007), p. 232.

48 P. Binder, *supra* at pp. 143-144.

49 F. G. De Cossio, supra at pp. 232; O Susler supra at pp. 119.

50 Fourchard *supra* at pp. 399-400.

agreement itself was in question;

> "...a stay of proceedings had to be refused because it was ***not*** for an arbitrator to determine whether or not the parties agreed to an arbitration clause; *that was the function of the court."* [51] (My emphasis)

This case clearly confirms the unfortunate conclusion that the positive effect of the doctrine of competence-competence which has been hailed as a cornerstone to international arbitration and which is so widely recognised is not so recognised in Botswana. Butler continues to observe that;

> "If the arbitrator proceeds with the arbitration in the face of an objection that he lacks jurisdiction the defendant might attempt to enforce his objection by himself seeking an interdict prohibiting the arbitrator from proceeding with the arbitration."[52]

Elsewhere, Binder notes that the courts will in fact not hesitate to grant an interdict against the arbitrator.[53] This is fortified by the case of *BCL* v *Tengrove NO and Others*[54] wherein one of the parties objected to the jurisdiction of the court on the basis that the contract had been obtained by way of fraud. When the arbitrator chose to continue with the arbitration, the party applied to the court under Article 16(f) of the 1959 Act dealing with court ordered interim measures seeking an order that the arbitration proceedings be stayed pending a determination of the delictual claim by the court. The court held that a party was entitled to utilise Article 16(f) to seek a stay of arbitration and further that the court had the power to order a stay as requested. After assessing the evidence, the court dismissed the application on the basis that the Applicant had not adduced sufficient evidence to convince the court that the issue of the allegedly fraudulent signature was a "material misrepresentation inducing the contracts". The downside of the case is that not only did the court demonstrate its willingness to exercise its powers to stay arbitral proceedings; the principle of separability of the arbitration clause was not considered. Had the Applicant adduced sufficient evidence that the main contract was fraudulently obtained

51 2002 BLR 269 at pp. 270.

52 D. Butler and E. Finsen, *Arbitration in South Africa: Law and Practice,* Cape town, Juta, (1993), p. 177.

53 D. Butler, The State of International Commercial Arbitration in Southern Africa: Tangible Yet Tantalising Progress, *supra* at pp. 199; See also *Intercontinental Finance and Leasing Corporation (Pty) Ltd* v *Stands 56 & 57 Industrial (Pty) Ltd* (1979) (3) SA 740.

54 (2002) (1) BLR 221.

then the court would have stayed the arbitral proceedings and this is not in accord with the principle of separability.

The correct and more appropriate approach to a matter similar to the one above is as was decided in the English case of *Fiona Trust and Holdings Corporation and Others* v *Yuri Privalov and Others*[55] where the court held that even where there were allegations of bribery, or some other wrongdoing that would vitiate the consent in the agreements, the arbitral tribunal was still entitled to proceed with arbitration. This is essentially because the arbitration agreement survives all the defects that affect the main contract. The *Fiona Trust* case also confirmed that where only the validity of the main contract was in dispute the court has no discretion but to refer the matter to arbitration.

4. ASSESSING WAY FORWARD: A COMPETENCE-COMPETENCE AND SEPARABILITY PROVISION

This part examines how the UNCITRAL Model Law as well as the 1996 English Arbitration Act embrace the positive effect of competence-competence in order to note and assess the best position to be adopted by Botswana.

1.1 Competence-Competence Under The Uncitral Model Law

It is essential to assess the manner in which the UNCITRAL Model Law encompasses the principle of competence-competence because it "sets the internationally accepted standards against which the effectiveness of national arbitration statutes is measured".[56] Most progressive jurisdictions have either adopted the Model Law wholesale or have adopted variations thereof. Even those that did not adopt it are heavily influenced thereby. The UN General Assembly made a recommendation that all states should "give due consideration" to the Model Law to attain uniformity and meet the specific needs of international

55 (2007) EWCA Civ 20; *Harbour Insurance* v *Kansa General International Insurance* (1993) QB 701; *Lesotho Highlands Development Authority* v *Impregilo SpA and Others* (2005) 2 Llyod's Reports 310 .

56 D. Butler, The State of International Commercial Arbitration in Southern Africa: Tangible Yet Tantalising Progress, *supra* at pp. 169.

commercial practice.[57]

Consequently, there is "ample anecdotal evidence" indicating that the question of whether a country has adopted the Model Law plays a significant role in deciding the venue for arbitration.[58] It has been correctly stated that

> "The existence of an arbitral tribunal's jurisdiction is a very delicate issue as it decides whether the parties are bound by an arbitral award or not. It is therefore necessary that a provision regulating this distinction has to be sufficiently clear and precise."[59]

The Model Law expressly recognises competence-competence in Article 16(1) which provides as follows;

> "The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement, for that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause."

It is clear from the above that the Model Law makes provision for both the doctrine of competence-competence and the principle of separability under one Article. This approach is adopted in most jurisdictions while some such as the English Act treat them under separate provisions.[60] Practically, treating them as distinct or as a composite does not make a difference.

Article 16(2) of the Model Law calls for a timeous raise of the plea of lack of jurisdiction. Such plea shall be raised "not later than the submission of the statement of defence". In the event that one party is of the view that the arbitral tribunal is exceeding its jurisdiction, objection shall be raised as soon as the alleged matter purported to be in excess of authority is raised during the arbitral proceedings. The arbitral tribunal is however given discretion to condone a delayed objection if it deems such to be justified.[61] Whereas Article

57 General Assembly Resolution 40/74 of 11 December 1985, 16 UNCITRAL Yearbook (1985) at pp. 48-49.
58 P. Binder, *supra* Foreword by J. Sekolec at (v).
59 *ibid* at pp. 148.
60 Sections 7 and 30 of the 1996 Act.
61 Article 16(2) of the UNCITRAL Model Law.

16(2) does not indicate what the consequences for failing the raise a plea of lack of jurisdiction are, it has been submitted that the setting of time limits in itself is indicative of that one would be precluded from later raising the objection in setting aside or enforcement proceedings.[62] As Binder posits, "What use would the time limits be if they do not have specific consequences?"[63]

Owing to the fact that the Model law serves as a standard guideline which countries are permitted to add to as long as they do not defeat the essence of the provisions, it is submitted that in order to achieve certainty as to the consequences, it would be advisable for the national laws to specifically provide that if a party fails to raise an objection at the designated time then such serves as a bar from raising it later on. Egypt has made such specific provision in its arbitration laws.[64]

4.2 When Should The Tribunal Decide on its Jurisdiction?

The arbitral tribunal has discretion as to when it may rule on its jurisdiction. Such may either be by way of preliminary award or at the end with the merits.[65] As a matter of principle, the ideal situation would be to have the tribunal determine its jurisdiction by way of a preliminary award. This would curtail possibilities of wasted costs and time on an arbitration which ultimately turns to have been without basis. Be that as it may, it may not always be practical for the tribunal to make such preliminary award owing to the fact that issue of jurisdiction may be intricately interwoven with the merits.[66] In the case of *AOOT Kalmneft v Glencore International*[67] the court held that even where the issue of jurisdiction is intricately tied to the merits, if the arbitrator is of the view that making a preliminary ruling on jurisdiction will be time and cost efficient, he may do so. The mere fact that the issue of jurisdiction and liability are coextensive should not bar a preliminary ruling.[68] It is humbly submitted that the reasoning

62 Working Group A/CN.9/246 para 51.
63 P. Binder, *supra* at pp. 147.
64 *id*; Article 22(2) Republic of Egypt's Law No 27 of 1994, "Promulgating the Law Concerning Arbitration in Civil and Commercial Matters".
65 Article 16(3) of the Model Law; Article 23(3) of the Revised UNCITRAL Arbitration Rules.
66 1996 Departmental Advisory Committee, Saville Report at para 146.
67 (2002) 1 Lloyd's Reports 128.
68 B. Harris, R. Planterose, J. Teck, *The Arbitration Act 1996: A Commentary*, (4th ed), Wiley-

advanced by the case is sound and where this discretion is properly exercised it is bound to have rewarding fruits for arbitration.

Under the Model Law, if the tribunal rules by way of preliminary award then the dissatisfied party may make an application to the court for a final determination within 30 days. In the meantime the arbitral tribunal may proceed with the arbitration.[69]

4.3 Subjecting the Power of the Arbitral Tribunal to the Agreement of the Parties: The 1996 English Arbitration Act Innovation

It is common cause that one of the reasons why parties opt for arbitration is the rule of party autonomy which entitles the parties to have the arbitration proceedings conducted in accordance with their aspirations.[70] It has thus been submitted that due to the level of flexibility that the notion encompasses, it is one of the most attracting notions of arbitration.[71] The true innovation of the English Act in this regard is reflected under Sections 30-32.[72] Unlike Article 16 of the Model Law, Section 30 of the 1996 English Arbitration Act which confers the arbitrator with the power to rule of his jurisdiction is non mandatory.[73] This means that the parties can specifically agree that the arbitrator will have no such power.[74]

Barcello observes that sometimes arbitrators can abuse the discretion that they have and delay their decision on jurisdiction. [75] The English Act addresses this concern by empowering the parties to compel the arbitrator to render a preliminary award on jurisdiction.[76]

A further innovation of the English Act with no comparable provision in the Model law is that pending a determination of the issue of jurisdiction by

Blackwell, (2007) at pp. 159.

69 Article 16(3) of the Model Law.

70 M. L. Livingstone, "Party Autonomy in International Commercial Arbitration: Popular Fallacy or Proven Fact?" 25(5) J*ournal of International Arbitration* (2008), p. 540.

71 *ibid* at pp. 529.

72 J. J. Barcello, "Who Decides the Arbitrator's Jurisdiction? Separability and Competence-Competence in a Transnational Perspective", 36 *Vanderbilt Journal of Transnational Law* (2003), p. 1130.

73 Section 4(2) of the English Arbitration Act of 1996.

74 M. Mustill and S. Boyd, *International Commercial Arbitration*, Butterworths, (2001), p. 302.

75 J. J. Barcello, *supra* at pp. 1126.

76 Section 31(4) of the 1996 Act.

the courts, the parties may agree to compel the arbitrator to stay the arbitral proceedings.[77] Such a provision is particularly useful where the parties wish to avoid wasting time and expenses on an arbitration that the court might ultimately decide that the arbitrator had no jurisdiction.

Moreover, Section 32 empowers the court to make a preliminary determination of the arbitrator's jurisdiction. There are two instances where such may occur. Firstly, where all parties to the arbitration so agree. Secondly, where the application is made with the permission of the arbitral tribunal and the court is satisfied that its determination of the issue is "likely to produce substantial saving in costs, that the application was made without delay and that there is good reason why the matter should be determined by the court".[78] To this end, the application must specifically state the grounds justifying why the matter should be decided by the court.[79] The procedure under Section 32 was intended to be used in exceptional circumstances and it is a "narrowly drawn and limited procedure".[80] It has thus been rarely invoked.[81]

It is submitted that the above innovations as emanating from the 1996 could also be useful in Botswana to the extent of embracing the concept of party autonomy and allowing the parties to decide, where necessary, to refer the issue of jurisdiction to the court. This element of party control is essential in light of arbitration being a consensual process.

4.4 An Arbitral Tribunal's Ruling on Jurisdiction not Final

The principle of competence-competence only entitles the arbitral tribunal to make a ruling on the jurisdiction and such ruling is not a final decision and remains reviewable by the court.[82] As Binder observes;

> "The ultimate court control on the issue of an arbitrator's jurisdiction is...of manifest importance, as it is the only way fraudulent acquisition

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77 Section 31(5) of the 1996 Act; B. Harris, R. Planterose and J. Teck, *supra* p. 165.

78 Section 32 (2) of the 1996 Act.

79 Section 32(3) of the 1996 Act.

80 Harris, Planterose and Teck *supra* p. 163.

81 *Birse Construction Ltd* v *St David* (1999) BLR 194 ; *Ahmad Al Naimi* v *Islamic Press Agency Inc* (2000) Lloyd's Rep. 522; *Esso Exploration & Production UK Ltd* v *Electricity Supply Board* 2004 AER Comm 926.

82 B. Harris, R. Planterose & J. Tecks, *supra* at pp. 151-152.

of a tribunal's power can be undermined."[83]

Commenting on the fact that the arbitral tribunal cannot be the final decider of its jurisdiction, the DAC noted that such would be "a classical case of pulling oneself up by one's own bootstraps".[84]

5. AN ISSUE OF TIMING: WHEN SHOULD THE COURT BE PERMITTED TO REVIEW THE JURISDICTION OF THE ARBITRAL TRIBUNAL?

The question as to the time that the court is permitted to review the jurisdiction of the arbitral tribunal is an important one with significant impact on the doctrine of competence-competence.[85] The desire is to have a mechanism that adequately balances the need to prevent dilatory tactics on the one hand and genuine jurisdiction disputes before the courts on the other.[86] Various legal systems have adopted different approaches which have their advantages and disadvantages. If the courts are allowed to intervene only after the tribunal has rendered its award this curtails intervention but may result in wasted arbitration and wasted cost when it ultimately turns out that the arbitral tribunal never had jurisdiction.[87] On the other hand, if such judicial intervention is allowed during the early stages of arbitration to avoid wasted costs, it will encourage dilatory tactics and have the effect of significantly reducing the efficiency of arbitration and deprive it of some of its benefits.[88]

Moreover, Park observes that if the court is only permitted to entertain matters of jurisdiction after the arbitral tribunal has rendered an award thereon, at the end it might not be necessary for a court challenge as the dispute might be settled or the party resisting arbitration would no longer hold such sentiments.[89] Consequently, the reaching of a settlement obviates the need for judicial review

83 P Binder *supra* at pp. 148.

84 Departmental Advisory Committee on Arbitration Law, Report of the arbitration Bill at para 138.

85 D. Jones, "”Competence-Competence', 75 *Arbitration: The Journal by the Chartered Institute of Arbitrators* (2009), p. 57.

86 O. Susler, *supra* at pp. 124.

87 *ibid* at pp. 127; F. G. De Crosio, *supra* at pp. 244.

88 *ibid* at pp. 128; D Jones *supra* at pp. 59.

89 W. W. Park, 'The Arbitrator's Jurisdiction to Determine Jurisdiction', 13 *ICCA International Arbitration Conference, Congress Series* (2006), p. 42.

and such conserves government resources.[90]

6. STAY OF LEGAL PROCEEDINGS: THE NEGATIVE EFFECT OF COMPETENCE-COMPETENCE

One of the ways that the courts give effect to the doctrine of competence-competence is to stay their legal proceedings. Such has been dubbed as an "essential function" of the courts.[91] The obligation on the courts to stay their legal proceedings in encapsulated in Article II (3) of the New York Convention as well as Article 8 of the UNCITRAL Model Law. Dimolitsa notes that "competence-competence has become almost universally accepted due above all to the UNCITRAL Model Law; however flaws still do exist in its implementation".[92] This is essentially because the national legal systems "always allow their courts the power to rule on the jurisdiction of the arbitral tribunal at any moment, be it before or during the arbitration proceedings".[93] This manifests itself in that the laws remain vague in relation to both the time that the courts might intervene and the extent of such intervention.[94] The divergence of approach to the negative effect of competence-competence range from the American approach where courts are permitted to intervene at any stage to the French approach where courts are only entitled to review jurisdiction after the arbitral tribunal has rendered its award.[95] France has been hailed as having the most clear and predictable provision relating to the negative effect of competence-competence. It is perhaps worthy to briefly deal with the French provision.

6.1 A Strict Negative Effect of Competence-Competence: The Example of France

Article 1458 of the French New Code of Civil Procedure provides that whenever a dispute submitted to an arbitral tribunal by virtue of an arbitration agreement

90 *ibid* at pp. 44.
91 M. Ball, 'The Essential Judge: The Role of the Courts in a System of National and International Commercial Arbitration', *22 Arbitration International* (2006) at pp. 75.
92 A. Dimolitsa, *supra* pp. 230.
93 *ibid* at pp. 233.
94 *ibid* at pp. 234.
95 W. W. Park, *supra* at pp. 14.

is brought before the court of a state, such court shall decline jurisdiction. If the arbitral tribunal has not yet been seized of the matter, the court should also decline jurisdiction unless the arbitration agreement is manifestly null.

It is clear from the provision that when the arbitral tribunal is ceased with a matter, the court has no discretion but to decline jurisdiction. It has been submitted that the provision allows for a greater scrutiny before the commencement of arbitration since a party instituting a court case at that point is likely to be doing so out of good faith and with legitimate concern. Moreover, it is to be emphasised that even then, the extent of examination permitted is only *prima facie*.[96]

It is to be noted that France adopts a very strict approach to competence-competence and this position has been "consistently and unambiguously" confirmed by French Courts in a plethora of cases.[97] This is because in practice it is very rare for the courts to deny the arbitral tribunal the opportunity to first rule on their jurisdiction and will only do so where the absence of a valid arbitration agreement is manifest.[98] The nullity of the arbitration agreement has to be clear.[99]

Even the Model Law does not apply competence-competence as strictly as the French approach.[100] As will be seen below, the Model Law adopts a compromise between permitting court applications early and deferring them to after an award has been made.[101]

96 J. J .Barcello *supra* at pp. 1125.

97 E. Gaillard and Y. Banifatemi, " Negative Effect of Competence-Competence: The Rule of Priority in favour of Arbitrators", in *Enforcement of Arbitration Agreements in International Awards: The New York Convention,* E. Gaillard and D. Di Petro (eds), (2008), p. 260; *American Bureau of Shipping* v *Corpropriete Maritime Jule Verne* (2001) (3) Rev. Arb 529 Paris Court of Appeal; *O.U.P* v *B.P France et al* Rev. Arb (2006) 480 Civ 28 November 2006; *Steinweg Handelsween BV* v *General France Assurances* (2006) Civ IV; *Societe V 2000* v *Societe Project XJ 220 ITD* Rev Arb (1996) 254; *The Zanzi* Case Rev Arb (1999) 260.

98 J. Delvolve, J. Rouche and G. H. Pointon, *French Arbitration Law and Practice*, Kluwer law International (2003); D. Joseph, *Jurisdiction and Arbitration Agreements and their Enforcement*, London, Sweet and Maxwell, (2005), p. 293.

99 *SARI* v *Metu System France* Cass 1re Civ, December 1999.

100 O. Susler *supra*, p. 128.

101 D. Jones *supra*, p. 59; O. Susler *supra*, p. 129.

6.2 Should The Court Engage in a *Prima Facie* or Full Examination of the Existence and Validity of the Arbitration Agreement?

Another fundamental question that has direct implications on the doctrine of competence-competence is the extent to which a court is entitled to review the existence or validity of the arbitration agreement.[102] Dimolitsa observes that a comparative study of case law from various jurisdictions indicate that, irrespective of the time that court proceedings are initiated, be it before or after the commencement of arbitral proceedings, courts still engage in an in depth examination of the validity of the arbitration agreement before declining jurisdiction.[103]

Neither the Model Law nor the New York Convention provides a definitive answer to the question. It has been submitted, in relation to the New York Convention, that a full examination should only be permitted in "manifest" cases.[104] Commenting on the Model Law, Holtzman and Neuhaus recall that during the drafting phase there were suggestions to include the word "manifestly" in Article 8 but the suggestion was rejected.[105] Had it been adopted, it would have made it clear that the standard of review is only *prima facie*. It may be submitted that the fact that the suggestion was rejected is indicative of an intention that the review should be full. Be that as it may, the preponderant view is that the underlying principles of the Model Law dictate that only a *prima facie* review be conducted.[106] To this end, the court would refer the parties to arbitration where there is simply likelihood that the party instituting court proceedings has breached the arbitration agreement.[107] This is indeed the position that has been adopted by national courts in countries that have adopted the Model Law

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102 E. Gaillard and Y. Banifatemi, supra, p. 258.

103 A. Dimolitsa, *supra* at pp. 233.

104 A. J. Van Den Berg, *The New York Convention of 1958: Towards a Uniform Judicial Interpretation, (*1998), p. 155.

105 H. M. Holtzman and J. E. Neuhaus, *A Guide to the UNCITRAL Model Law on Commercial Arbitration: Legislative History and Commentary,* Kluwer Law and taxation Publishers, (1989) 303.

106 F. Bachand, "Does Article 8 of the Model Law Call for a Full or Prima Facie Review of the Arbitral Tribunal's Jurisdiction?", 22 *Arbitration International* (2006), p. 465; E. Gaillard and J . Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration,* Kluwer Law International, (1999), p. 401; E. Gaillard, "Prima Facie Review of Existence, Validity of Arbitration Agreement", 3 *New York Journal* (2005), p. 3.

107 F. Bachand, *supra* p. 463; M. L. Moses, *supra* p. 86.

such as Hong Kong,[108] Canada[109] as well as India.[110] In Switzerland the position is that for those arbitrations where Switzerland is the seat only a *prima facie* examination is permitted and in the event that Switzerland is not the seat then the court ought to engage in a full examination.[111] The reasoning behind the position is that if Switzerland is the seat then the court would get an opportunity to engage in a full review after the arbitrator has made his ruling.

Some commentators submit that a full review should be preferred as it would eliminate the possibility of wasted cost emanating from improper arbitrations.[112] In the case of *Law Debenture Trust Corporation Plc* v *Electric Finance B.V*[113] Mann J noted that a full review was the "only cost effective thing to do" and that to refer the matter back to arbitration with the possibility of it being brought back to court by way of appeal "hardly seems sensible".[114]

It is submitted that the position of a *prima facie* review is the more appropriate one as it is most in accord with the doctrine of competence-competence. Moreover, it serves as a disincentive for parties who would otherwise approach the court as a way of engaging in dilatory and obstructionist tactics.[115] Permitting a court to engage in a full examination of the validity or existence of the arbitration agreement would deprive the doctrine of its essence and permit the very situations that the doctrine serves to protect against.

In light of the fact that in the absence of a clear statutory provision stipulating that the review has to only be *prima facie*, a court may exercise its discretion to conduct a full review, it is submitted that it would be better to have a clear provision in the law. The reasons why the drafters of the Model law rejected insertion of the word "manifestly" are not entirely clear. In the regard,

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108 *New Sound Industries Ltd* v Meliga (HK) 2005 1 HKC 41 CA; *Pacific Crown Engineering Ltd* v Hyundai *Engineering Construction Co Ltd* (2003) 3 HKC 659; *Pacific International Lines* v *Tsinlien Metals and Co.* 18 Yearbook of International Arbitration 180 at pp. 185-185; S.C.H.K 1992); *Rio Algom Ltd* v *Sammi Steel Co* 18 Yearbook of International Arbitration 166, at pp. 170-171.

109 *Gulf Canada Resources* v Arochem *International Ltd* (1992) 66 BCLR 2d. 114; *Dalimpex* v *Canicki* (2003) OJC (Quick Law) No 2094 (Ontario Canada).

110 *Shin-Etsu* v *Aksh Optifibre* (2005) 7 Supreme Court 234.

111 *Foundation M* v Banque ATF 122 II 139, 29 April 1996; *Compagne de Navigation et Transports SA v* MSC *Mediterranean Shipping Company* SA ATF 121 III 38, 16 January 1995.

112 A. Samuel, *Jurisdictional Problems in International Commercial Arbitration: A Study of Dutch, English, French, Swedish, Swiss and West Germany Law*, Schulthess, (1989), p. 186.

113 (2005) EWCH 1412.

114 At para 63.

115 M. L. Moses, *supra* p. 86

inspiration can be drawn from the French legislation which provides that the court will only be entitled to proceed with the case in "manifest" cases only and as such making it clear that the standard of review is *prima facie*.[116]

7. STAY OF PROCEEDINGS IN BOTSWANA: AN ANALYSIS OF SECTION 6 OF THE 1959 ARBITRATION ACT

In Botswana, stay of proceedings is provided for under Section 6 of the Arbitration Act which provides as follows;

> "If any party to a submission, ... commences any legal proceedings in any court against any other party to the submission, ... any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that court to stay the proceedings, and that court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time of when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings, subject to such terms and conditions as may be just."

It is to be noted that the position that obtains in the Model Law and the New York Convention is that stay of proceedings is mandatory as reflected by the use of the word "shall". Moreover, the only reason under which a court will refuse to grant stay is if it finds the agreement to be ***"null and void, inoperative or incapable of being performed".***[117] The operative words indicate a very narrow discretion to the court and it is only where it is clear that there is no agreement to arbitrate that the court will entertain the matter.[118] Contrastingly, Section 6 of the Botswana Arbitration Act only makes stay discretionary. Furthermore, the court is entitled to refuse to grant a stay if there is "sufficient reason" not to and

116 Article 1458 of the French New Code of Civil Procedure; *American Bureau of Shipping* v *Corpropriete Maritime Jule Verne* (2001) (3) Rev Arb 529

117 Article 8 of the UNCITRAL Model Law; Article II (3) of the New York Convention; Section 9 (4) of the 1996 English Arbitration Act.

118 E. Gaillard and J. Savage (eds), supra, p. 400.

the applicant would have to prove that he/she is ready and willing to continue with the arbitration. It becomes immediately apparent that the discretion that is given to the court is very wide. One cannot determine with any certainty what exactly qualifies as "sufficient reason". The Act does not give any indication of what factors would constitute "sufficient reason". Suffice to point out that in modern arbitration laws, a stay should only be refused where there is clearly no arbitration agreement. However, the "sufficient reason" standard embraced by the Botswana Act would also include reasons that have nothing to with the validity of the arbitration agreement.

7.1 The Absence of a "Dispute" As Sufficient Ground to Refuse Stay

The position in Botswana is that where the court is satisfied that the defendant has no defence, the court will hold that there is no dispute to refer to arbitration and it would therefore refuse to grant a stay and proceed to enter summary judgment. This is confirmed by the case of *Glendinning Botswana (Pty) Ltd* v *Portion 122 Millenium (Pty) Ltd*[119] wherein Justice Dow noted that the defendant had failed to make "the tiniest thread of evidence" to indicate what his defence was and consequently refused to grant stay on the basis that there was no dispute.

This is the position that obtained in England prior to the 1996 Act.[120] The English Arbitration Acts of 1950 and 1975 required the court to stay its proceedings and refer the matter to arbitration "unless satisfied that the arbitration agreement is null and void... *or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred"*.[121] The application for stay and the summary judgement request were treaded simultaneously as being "reverse sides of the same coin."[122] However, the phrase relating to the existence of a dispute was omitted in the 1996 Act upon the recommendation of the Saville Committee who noted that it was "confusing and unnecessary for reasons given in *Hayter* v *Nelson"*.[123] In the *Hayter* v *Nelson* case the court held

119 (2005)(1) BLR 282.

120 B. Harris, R. Planterose and J. Teck, *supra* p. 68.

121 1950 Act Section 4(2) and Section 1(1) of the 1975 Arbitration Act.

122 *Sethia Ltd* v *India Trading Corporation* 1986 1 WLR 1398 at pp. 1401; *Ellis* v *Wates Construction* 1978 1 Llyod Reports 33.

123 Departmental Advisory Committee, Report on the Arbitration Bill, February 1996 .

that the word dispute should be given its ordinary meaning and that "if the courts are to decide whether or not a claim is disputable, they are doing precisely what the parties have agreed should be done by the private tribunal".[124] As confirmed in the case of *Haiki Shipping Corporation* v *Sopex Oil Ltd*[125] the position under the 1996 Act is that "there is a dispute until the defendant admits that the sum is due and payable". This position has also been embraced by courts in Singapore where it has been held unless the defendant unequivocally admits a claim, there is a dispute and the court must grant a stay.[126]

Harris submits that it is not for the court to make determinations whether the other party has a defence because "the arbitrator has sufficient armoury to deal with such obvious cases on a speedy basis".[127] It is therefore submitted that the position adopted by the court in Botswana to refuse to stay its proceedings on the basis that the defendant had no defence to the main action is untenable and not in accord with the dictates of modern standards in relation to the extent to which the court can entertain matters agreed to be referred to arbitration.

7.2 "Ready and Willing": The Divergence of Judicial Interpretation

Furthermore, the requirement that the applicant has to demonstrate that he is ready and willing to proceed with the arbitration is a very subjective one and there is no set criteria of what evidence would be sufficient to substantiate such readiness and willingness. Such is left to the discretion of the courts and unfortunately the courts have not been consistent as to what suffices for that purpose. In the case of *B. M Packaging (Pty) Ltd* v *PPC Botswana (Pty) Ltd*[128] where the party seeking to have the matter referred to arbitration had entered a special plea contesting that the matter should be referred to arbitration in accordance with the arbitration agreement, the court held that the "filing of the special plea by the defendant unequivocally constituted the expression of willingness and ability on the part of the defendant to arbitrate the dispute."[129]

124 1990 2 Lloyd's Report 265 at pp. 269-270, Per Saville J.
125 1997 Adj Law Reports 1219; See also *Ellerine Bro Ltd* v Klinger 1982 1 WLR 1375 at 1383.
126 *Jiangsu Hantong Ship Heavy Industry Co Ltd and Another* v *Sevan Holding Pte Ltd* (2009) SGHC 288; *The Dai Yun Shan* (1992) 2 SLR 508; *Coop International Pte* v *Ebel* SA 1998 3 SLR 670.
127 B. Harris, R. Planterose and J. Tecks, *supra* at pp. 69.
128 1999 BLR 309.
129 *ibid* p. 310.

However, in the case of *Glendinning Botswana (Pty) Ltd* v *Portion 122 Millenium (Pty) Ltd*[130] Justice Unity Dow made the following observation in relation to this requirement;

> "It seems to me that demonstrating that one is committed to the arbitration process is more than just asserting so. Demonstration of commitment must involve placing before the court all material facts that would assist the court in reaching a decision on the matter."

The above sentiments indicate that the onus placed on the Applicant is an onerous one which makes the court's involvement in the matter deeper and at the end of the day a matter that should have been properly determined by the arbitrator in accordance with the doctrine of competence-competence might end up being decided by the court simply because an Applicant failed to discharge this onus.

Furthermore, the two cases clearly illustrate inconsistency in the approach of the court in relation to the evidence required to demonstrate willingness and ability. What was held as being sufficient in one sitting was held as insufficient in the other. This lack of clarity and consistency in the law is not comforting as parties can never know beforehand what is to be expected of them. Both decisions emanate from the High Court and are therefore on equal footing, until the Court of Appeal states the appropriate approach.

7.3 The Power of the Court to Impose Terms and Conditions upon Stay

It is to be noted that Section 6 of the Botswana Arbitration Act gives the court the power to impose conditions upon stay "as may be just". Neither Article II (3) of the New York Convention nor Article 8 of the Model Law envisages such power. Moreover, the power to impose conditions is not provided for in many statutes from other jurisdictions. However, there are countries such as Singapore[131] and Australia[132] which empower the courts to impose conditions.

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130 2005 (1) BLR 282 at 284.

131 Section 6 of the Singapore International Arbitration Act.

132 Section 7 (2) of the Australian International Arbitration Act; See also *Ansett Australia Limited* v Malaysian *Airline System Berhad* (2008) VSC 109.

Mallessons summarises the propriety or otherwise of this discretion as follows;

> "The Theoretical Support For Such Discretion Lies Primarily In The Flexibility It Gives To The Court Imposing Stay To Calibrate The Stay With Specific Or Peculiar Features Of The Dispute. Nevertheless, Such A Discretion Is, On One View, Contrary To Principle, At Least In So Far As It Departs From The Framework Of The New York Convention- And Leaves Open The Potential For Undermining The Effectiveness Of What Would Otherwise Be A Mandatory Stay By Imposing Conditions That Affect The Course Of Arbitration Or The Powers Of The Arbitrator (Depending On The Nature Of What Is Imposed)."[133]

This discretion of the court is unfettered. It appears to be a carte blanche discretion as "just" itself is fluid concept not capable of a certain definition. This therefore increases the level of uncertainty as to what exactly the court is empowered to do and it increases the extent to which the court may get involved in arbitration. Moreover, it widens the already broad discretion that the court is given. A jurisdiction with a somewhat similar power is that of Singapore where Section 6 of the Arbitration Act empowers the court to impose conditions upon stay. This power has been criticised in that it may be abused by the court and the courts may apply it in a manner that interferes with arbitration. Recently in the case of *Drydocks World Singapore Pte Ltd (formerly known as Pan-United Shipyard Pte Ltd)* v *Jurong Port Pte Ltd*[134], a decision of the High Court in Singapore, the court reaffirmed the following guiding principles; that any conditions imposed must be reasonable and appropriate in the circumstances; the discretionary power must be exercised judiciously with the main guiding principle being that the court should be slow to interfere with arbitration and lastly; that the court should not be reluctant to impose terms and conditions where the justice of the case calls for it.[135] The position adopted by the Singapore courts is an indication that where the courts have a pro-arbitration approach then the discretion to impose conditions does not become an obstacle to arbitration

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133 J. S. Mallessons, 'International Arbitration Update', May 2008 at www.mallessons.com/publications/update-combine.cfm?id=1352167 [Last accessed on 15th July 2010].

134 (2010) SGHC 185.

135 See also *The Duden* (2008) SLR 984; *The Xanadu* (1997) 3 SLR 360.

and quite to the contrary it may be a tool that courts utilise to make arbitration more effective.

7.4 Leaving the Arbitration at the Mercy of the Court: Failure of the Act to Empower the Arbitrator to Proceed with Arbitration Pending Court Proceedings

Another shortfall of the Botswana Arbitration Act is its failure to confer powers upon the arbitrator to proceed with arbitration pending the determination of court proceedings. The implications of this as reflected by the case of *BCL* v *Tengrove* discussed above is that the party opposing the jurisdiction of the arbitrator may apply to court to have an interim order staying the arbitration pending the outcome of the court proceedings. This is a highly undesirable position as it heavily interferes with arbitration may cause significant delay as it may take months even years for the court to render its ruling.

When the jurisdiction of the arbitrator is called into question before the courts, he is entitled to proceed with the arbitration. The court may not interdict him from so proceeding unless it is blatantly clear that he has no jurisdiction. This position has been in existence for a very long time and as far back as 1907 Lord Justice-Clerk MacDonald noted that it would be "inexpedient" to interfere with the arbitrator unless he "is exercising or proposing to exercise a jurisdiction which he does not have".[136] More recently, in the case of *Elektrim* v *Vivendi*[137], in an application to restrain arbitration it was held that courts do not have a general supervisory power to intervene in arbitrations before an award was made, "either by injunction or some other method".[138]

The simple recommendation in this regard is for the Act to make specific provision giving the arbitrator discretion to proceed with arbitration pending court proceedings as indeed is the case in modern arbitration laws.[139]

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136 *Licences Insurance Corporation and Guarantee Fund Ltd* v *W and R.B Shearer* 1907 S.C 10 at pp. 16 as quoted in F P Davidson, *Arbitration* (2000) at pp. 187.

137 (2007) EWHC 571 (Comm).

138 P. Friedman, "Anti-Arbitration Injunctions: When Can Courts Intervene?", Commercial *Litigation Journal* (2007).

139 Article 8(2) of the UNCITRAL Model Law

8. A GLIMMER OF HOPE: JUDICIAL INDICATIONS OF A PRO-ARBITRATION APPROACH IN BOTSWANA

The foregoing discussion has highlighted some of the flaws of the Botswana Arbitration Act in relation to limiting court intervention in arbitration. It has also been indicated that courts have in most instances indicated their willingness to explore the loopholes in the Act and indeed intervene in arbitration.

It is to be noted, however, that to say that the Botswana courts have been anti-arbitration would be wrongly painting a gloomy picture. Quite to the contrary, the courts have been inclined towards staying their proceedings in favour of arbitration and to a large extent have been supportive to arbitration. In the case of *Ropace Botswana (Pty) Ltd* v *Dawson and Fraser (Pty) Ltd*[140] Lesetedi J quoted with approval the following passages reflecting the position of the law in South Africa;

> "The court must, of course, decide each case upon its own facts. It will not, however, readily refuse a stay but will exercise its discretion sparingly, the modern tendency being to lean in favour of a stay of the proceedings. The courts have been consistent in their approach in requiring "a very strong case" to be made out by a party seeking to be absolved from a contract to have a dispute referred to arbitration."[141]
> "Moreover, the discretion of the court to bypass the arbitration clause must be judicially exercised and there should be compelling reasons for refusing to hold a party to his agreement to refer disputes to arbitration. In effect, this discretion is seldom exercised."[142]

Consequently, the court stayed its proceedings and referred the parties to arbitration. Moreover, in *B.M Packaging (Pty) Ltd* v *PPC Botswana (Pty) Ltd*[143] in granting a stay of proceedings, the court emphasised that a party to an arbitration agreement could not deprive the other party of the contractual obligation to arbitrate by unilaterally electing to proceed to court.

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140 2001 BLR 479 at 482-483

141 Herbeinstein and Van Winsen, *The Civil Practice of the Supreme Court of South Africa* (4th ed), Juta, (1997) pp. 270-271

142 Joubert, *The Laws of South Africa (First Re-Issue)*, LexisNexisButterworths, Vol. 1, p. 275.

143 1998 BLR 309.

Such sentiments from the court are encouraging and until the Act is amended to bring it in line with international standards, one can only hope that in the mean time the courts will take a pro-arbitration approach in exercising their discretion in a manner that supports rather than hinders arbitration.

9. ADOPTING THE MODEL LAW FOR BOTH DOMESTIC AND INTERNATIONAL ARBITRATION

As noted above the 1959 Arbitration Act does not make a distinction between domestic and international arbitration. Assouzo posits that the failure of arbitration laws in Africa to make a distinction between domestic and international arbitration is because "they were mostly enacted during the colonial era where there was a concentration of economic activities in the metropolises."[144]

The legislation of many jurisdiction makes distinction between the two and the distinction is particularly relevant when it comes to the powers of the court in relation to stay of proceedings pending arbitration. In such instances, the power of the court in relation to the domestic arbitrations is discretionary and mandatory in relation to international arbitrations. This distinction is primarily premised on compliance with Article II (3) of the New York Convention which makes stay mandatory in respect of international arbitration. It is to be noted that Botswana has ratified the New York Convention yet its legislation dealing with arbitration is not in compliance with the requirements of the Convention.

The Model Law was specifically designed for international arbitration. A pertinent question perhaps is whether it would be possible and advisable for Botswana to adopt the Model law in relation to both international and domestic arbitration. It is to be noted that some countries have adopted the Model Law both for domestic and international arbitration and such seem to be operating effectively for them.[145] Moreover, Rogers submits that there is no inherent reason why the Model law cannot be adopted as the sole law for both domestic and international arbitration.[146]

144 A.A. Assouzo, *supra* p. 122.
145 New Zealand, Germany, Zimbabwe, Kenya, Uganda.
146 A. Rogers, 'The UNCITRAL Model Law: An Australian Perspective', *6 Arbitration International* (1990), pp. 348-349.

It is perhaps worthy to note that the reason why the Model Law was not adopted in relation to domestic arbitration in England was, as pointed out by Lord Mustill, because;

> "...whatever advantages there might be in the adoption of the Model law they were greatly outweighed by the disruption which would flow from the replacement of a long established and fully worked out system, upon which many decades of practical experience has been tested, by something entirely new."[147]

Contrastingly, Botswana does not have such established system of arbitration jurisprudence and therefore there is nothing to be lost by making the Model Law applicable to domestic arbitration.[148]

10. CONCLUSION AND RECOMMENDATIONS

Based on the foregoing discussion, it is apparent that the Botswana Arbitration Act is outdated and unsuited for modern international commercial arbitration to the extent that it allows for excessive court intervention in arbitration. The following recommendations are proffered in order to address the shortcomings of the act particularly in relation to the doctrine of competence-competence and the separability of the arbitration clause. In trying to come up with the most suitable approach a country would have to pick the best attributes of various laws. As Barcello notes, a legislative solution would have to;

> "...allow a nuanced and balanced approach, including provisions favouring preliminary awards on jurisdiction, rapid, perhaps non appealable, judicial review of such decisions, and the flexibility seen in the British approach allowing the arbitrators or the parties to call upon judges for assistance in an appropriate case."[149]

By way of example, in adopting the 2010 Scotland Arbitration Act,

147 Domestic Arbitration Law- Proposal for Consolidation, Amendment and Development 1990 56 JCIA 82, p. 87.

148 R. J .V. Cole, *supra* p. 101.

149 J. J. Barcello, "Who Decides the Arbitrator's Jurisdiction? Separability and Competence-Competence in Transnational Perspective", 36 *Vanderbilt Journal of Transnational Law* (2003), p. 1136.

consideration was given to the Uncitral Model Law, the 1996 Act and more than 25 other jurisdictions.[150]

10.1 A Statutory Provision on Jurisdiction and Separability

The article has indicated that the Botswana Arbitration Act does not make provision for the doctrine of competence-competence and the principle of separability of the arbitral clause which are indispensable in modern arbitration. The implications of such as evinced by the case of *Fencing Centre (Pty) Ltd* v *Murray and Roberts Construction and Others*[151] is that where the existence and validity of the arbitration clause is in question then such has to be determined by the court and not the arbitrator. Moreover, the case of *BCL* v *Tengrove NO and Others*[152] confirms that the validity of the main contract may be used as a basis for challenging the jurisdiction of the arbitrator.

To that extent, it is imperative that the Arbitration Act be amended to address this anomaly. It would suffice to have a provision similar to Article 16 of the UNCITRAL Model Law giving the arbitrator power to rule on his jurisdiction as well as stipulating that the arbitration agreement is distinct from the main contract and not affected by defects thereof. A provision encouraging arbitrators to, where possible, make a preliminary ruling on jurisdiction as is the case in Germany would also be a welcome adoption. Moreover, it might be useful to adopt some of the innovations of the 1996 English Arbitration Act is encompassed in Sections 30-32 in order to give the parties greater control.

10.2 Amending the Provision on Stay to Make It Mandatory and Grant the Court Narrower Discretion Proceedings

The article has also examined Section 6 of the 1959 Act to the extent that it embraces the negative effect of competence-competence by providing for a stay of proceedings. The Section was assessed principally in light of Article II (3) of the New York Convention, which Botswana has ratified as well as

150 H. R. Dundas, 'The Arbitration (Scotland) Act 2010: Converting Vision into Reality', 76 Arbitration (2010), p. 8.
151 2002 BLR 269 at 270.
152 2002 (1) BLR 221.

Article 8 of the Model Law. It has been submitted that the discretion granted to the court is too wide to the extent that the provision only requires that a party show "sufficient reason" why the matter should not be referred to arbitration. Moreover, the provision requires an indication that the other party requesting stay is "ready and willing to do all things necessary to the proper conduct of arbitration" and there is a divergence of judicial decisions as to what exactly is required for this purpose. In addition, the court is empowered to impose terms and conditions upon stay. By virtue of the fact that the Section is discretionary and confers very wide discretion to the court it is not in compliance with Article II (3) of the New York Convention in so far as international arbitration is concerned. A provision that makes stay mandatory with the court's discretion only being limited to instances where there is clearly no arbitration agreement is therefore recommended.

10.3 Adopting the "Null And Void, Inoperative and Incapable Of Being Performed" Standard

In order to narrow the discretion accorded to the court in assessing stay of proceedings, it recommended that Botswana adopt a provision that makes stay mandatory as is the case under the New York Convention, the UNCITRAL Model Law countless other jurisdictions. Moreover, it is recommended that it would be advisable to adopt the "null and void, inoperative and incapable of being performed" phrase as used by the New York Convention, the UNCITRAL Model Law and the English Arbitration Act. A similar recommendation was made by the South African Law Commission which correctly pointed out that this would be advantageous because;

> "...the courts will have the benefit of considering foreign case law regarding the application of the phrase to ensure that the court's discretion is exercise in line with international standards."[153]

This is particularly pertinent in light of the fact that Botswana has adopted the New York Convention and it is therefore desirable to attain some consistency in the discretion accorded to the courts.

153 South African Law Commission, Report on Domestic Arbitration, May 2001 at para 3.72.

10.4 Specifying That the Extent of Review Is *Prima Facie*

The article has indicated a divergence of approach and practice in relation to the extent to which court must inquire into the existence and validity of the arbitration agreement. The literature and case law examined favoured a prima facie review. It is submitted that it will be apposite to have a statutory provision that makes such clear. In this respect, Botswana can draw inspiration from Article 1458 of the French Code which includes the word "manifestly" to clarify that the standard of review is *prima facie*.

10.5 A Complete Overhaul: Adopting the Uncitral Model Law

Although the article specifically focused on the doctrine of competence-competence, it cannot be overemphasised that the Botswana Arbitration Act is not suitable to international commercial arbitration and as such is in need of a complete overhaul. Moreover, it would be useful to adopt the UNCITRAL Model Law, with modifications, for both domestic and international arbitration. This would introduce much needed safeguards against curial intervention and will grant the arbitral tribunal the appropriate powers to effectively conduct its proceedings. Such would include the power to order interim measures, call witnesses on its own motion and order security for costs. If the point of law referral provision is to be retained, it would have to be with the necessary safeguards as embraced in the 1996 English Arbitration Act as well as the 2010 Scotland Arbitration Act.

In light of the fact that other jurisdictions are yet to modernise their arbitration laws while others are still in the process of doing so, it is not too late in the day for Botswana to revise its arbitration laws and bring it in line with international standards. Moreover, it is hoped that when Botswana amends its laws it will fully utilise its advantage of hindsight by drawing inspiration from reforms that have been conducted elsewhere.[154]

154 R. J .V. Cole, *supra* p. 101.

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