NATIONAL UNIVERSITY OF LESOTHO

The Efficacy of Commercial Arbitration, Law and Practice in Lesotho

by

'Makabelo R. Thethe-Chitja, 200302579

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Supervisor: Dr Letzadzo Kometsi

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Standard Wording for LL.M Mini Dissertation Declaration:

I, ’Makabelo R. Thethe-Chitja, solemnly declare that this mini dissertation has not been submitted for a qualification in any other institution of higher learning, nor published in any other journal, textbook or other media. The contents of this dissertation entirely reflect my own original research, save for where the work or contributions of others has been accordingly acknowledged.

Name: ’Makabelo Rose Thethe-Chitja

Signature: ’Makabelo Chitja

Date: 29/05/2023

Place: Maseru, Ha Makhoathi

Dedication

I dedicate this work to my parents, Tlhoriso James Thethe, ’Matlalinyane Easter Thethe, and my Sister ’Mangakana Joyce Thethe. Continue to rest in peace**.**

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God, trusted leader, thank You for the guidance, courage and wisdom

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Abstract

The success of commercial arbitration law and practice is achieved as a result of several factors. The purpose of the study was to investigate whether efficacy of commercial arbitration, law and practice in Lesotho is hindered by the legal framework which does not conform to the United Nations Commission Trade Law on International Commercial Arbitration, UNCITRAL Model Law. Examining such other factors as support of the courts and government, the study specifically investigated the impact of lack of education about commercial arbitration for the business community and unregulated arbitrators on the efficacy of the commercial arbitration, law and practice in Lesotho.

With the use of the desk reviews and interviews as data collection methods for this study, the evidence obtained has revealed that efficacy of the commercial arbitration, law and practice in Lesotho is hampered by the law which is outdated and inconsistent with the UNCITRAL Model law. As such, support for the mechanism by the courts has been found to be at stake or adversely affected. Lack of support from the government and that of awareness campaigns about the mechanism for the business community have also been noted for constraining the efficacy of the commercial arbitration, law and practice in the country. Further noticeable from the findings include limited commitment from the legal profession and unregulated arbitrators, both of which could have significantly obstructed the mechanism. The study thus concludes that there is an urgent need for law reforms and concerted commitment from the relevant stakeholders to help towards achieving efficacy of the commercial arbitration, law and practice in Lesotho.

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Acronyms and Abbreviations

UNICITRAL-United Nations International Trade Law

GOL - Government of Lesotho

Chapter 1: An Overview of Study

1.1Introduction

It is common place that one of purposes of the law is to preserve legal arrangements amongst human beings.[1] One way or the other human beings will interact, thus engaging in certain transactions, on some of which they may not be agreeable. With conflicts possibly arising from such transactional engagements, there should be ways of resolving resultant disputes. Human beings interact in many spheres of life, be they, at home, in villages, in work place and during business transactions. In a trade engagement, conflicts are highly likely to ensue. As such, in good trade relationships, any disputes should be resolved in amicably and speedily manner so as to maintain a good spirit of trade.

Commercial arbitration is mostly preferred and encouraged in resolving disputes in the commercial world. Because of its flexibility, simplicity, confidentiality and freedom, such an arbitration could contract parties to be governed by their own rules of procedure when carrying out their contractual duties.[2] Its purpose is to resolve disputes in a speedy way, rather than engaging long processes of courts.[3] Commercial arbitration is clearly identified as one of the best form of alternative dispute resolutions, particularly in dealing with trade-related disputes. With such method of alternative dispute resolution, time, money and maintenance of good relations which are significant for economic expansion are guaranteed.

1.2 Definition of commercial arbitration

There is no general definition of "commercial arbitration".[4] However, the term can be defined by its characteristics, seen here as a process for resolution of conflicts; it is a consensual and private procedure that leads to a final and binding determination of rights and obligations of parties.[5] Commercial arbitration is also

[1] Nina Burokas, 'Purpose of Law' [2022] <https://bizlibretexts.org)> accessed 17/05/2023.
[2]Eric E. Bergsten, 'Arbitration is a private procedure' [2005] Dispute Settlement 1,10 <https://unctad.org/publications-search?[0]=product%3A694> accessed 24th November 2022.
[3]Frederic Bachand, 'Consensual Arbitration in Quebec' [2022] <https://www.mcgill.ca/arbitration/g > accessed 25th November 2022.
[4] Eric E. Bergsten, 'Arbitration is a private procedure' 10 (n 2).
[5] Frederic Bachand, 'Consensual Arbitration in Quebec' (n 3).

described as a mechanism used to resolve disputes that may arise from a contractual relationship.[6]

It is a form of an alternative dispute resolution, resolving disputes that arise from commercial transactions.[7] Commercial arbitration is regarded as the best method of resolving disputes in the commercial world because it does not involve strict court rules of procedures. This is what makes it simple and flexible.[8] Commercial arbitration further gives parties a right to choose their own procedural rules to select arbitrators of their own to preside over their disputes.[9] Its unique character is that of autonomy, which makes it more preferable to the parties concerned.[10] The rules of arbitration specifically provide that both parties would be obliged to respect and abide by the dictates of the award, by subjecting their conflicts to arbitration. Under such rules, parties consent to an expeditious compliance of the award.[11] Parties undertake to be bound by the award or the decision of such an arbitrator. Rarely, can parties refuse to submit to their own chosen rules unless there is a patent violation of the set rules and principles of commercial arbitration law. This explains the speedy nature of this arbitration.

Commercial arbitration is trusted like litigation because it is one of the mechanisms that strongly advocate for equality treatment.[12] It is mandatory that in carrying out the arbitration process parties are given an equal footing at all stages from the inception to the end of the proceedings. It is also preferred because parties feel comfortable that their commercial secrets will not be disclosed to any other person than those that are involved in such proceedings.[13] It is referred to as an article of

[6] Eric Bergsten, 'Arbitration is a private procedure' 5 (n 2).
[7] Frederic Bachand, 'Consensual Arbitration in Quebec' (n 3).
[8] Frederic Bachand, 'Consensual Arbitration in Quebec' (n 3).
[9] Frederic Bachand, 'Consensual Arbitration in Quebec' (n 3).
[10]Frederic Bachand, 'Consensual Arbitration in Quebec' (n 3).
[11]Arbitration Rules 28(6), (International Chamber of Commerce) [2021]< https://ccwbo.org...Rules and Procedures > accessed 28/07/2023.
[12]UNCITRAL Model Law on International Commercial Arbitration (1985) as amended in (2006), Article 18 <https://uncitral.un.org > texts >commercial arbitration >accessed 28/07/2023.
[13] Eric Bergsten, 'Arbitration is a private procedure' 7 (n 2).

faith and private nature of arbitration, also leading to confidentiality.[14] Commercial arbitration is mostly selected because of being speedy and cost-effective in resolving disputes.[15] Faster decisions and lower costs, as compared to litigation in court, have featured the traditional arguments in support of arbitration.[16] This is advantageous to disputants because the business community is so busy as to focus on development of business not on unending disputes.

1.3 Background and legal framework of commercial arbitration

Commercial Arbitration was expanded by the Geneva Protocol on Arbitration Clauses 1923, which provides that contracting states should recognise validity of an arbitration clause by which parties to a contract consent to give in to arbitration, all differences that may arise in connection with such contract relating to commercial matters or any matter which is arbitrable.[17] This happened after the realisation that trade was extending from one state to another, therefore, a means of quicker, amicable settlement of disputes was needed.[18] It is stated that the extent to which business had expanded from state to national, and finally, international boundaries, is equivalent to widening of commercial arbitration.[19] States were then encouraged to domesticate changes in their respective commercial arbitration laws.

The Geneva Convention on Enforcement and Recognition of Arbitral Award 1927 was also introduced. The rationale was to ensure that awards which were made in another contracting state are recognised and enforced without difficulties because

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[14] Eric E. Bergsten, 'Arbitration is a private procedure' 7 (n 2);London Court of International Arbitration Rules[2020] Article 30 https://www.lcia.org>adr-services >accessed on 24th November 2022.
[15] Eric Bergsten, 'Arbitration is a private procedure' 15 (n 2).
[16] Eric Bergsten, 'Arbitration is a private procedure' 15 (n 2).
[17] Dynalex, 'A brief history commercial arbitration' [1912] < https://dynalex.wordoress.com/2012/12/28/a-brief-history-of-commercial-arbitration/ >accessed 20/07/2023; Geneva Protocol on Arbitration Clauses 1923,Article 1 < https://treaties.un.org>pages>LONViewDetails>accessed 21/07/2023.
[18] Jones Sabra A , 'Historical Development of Commercial Arbitration in the United States'[1928] Minnesota Law Review 2296 240 < https://scholarshiplaw.umn.edu/mlr/2296 > accessed on the 08/12/2023.
[19]Jones Sabra, 'Historical Development of Commercial Arbitration in United States' 240 (n 18).

this was considered as a key to successful arbitration.[20] It expanded the Geneva Protocol on Arbitral Clauses 1923, by providing for enforcement and arbitral awards issued outside the nation in which enforcement was sought and that state is a party to the Convention.[21]

Another Convention which dealt with the recognition and enforcement of foreign arbitral awards issued in a foreign state was adopted. It is called the Convention on Recognition and Enforcement of Foreign Arbitral Awards, 1958, known as the New York Convention.[22] The aim of this Convention is to ensure that there is equal treatment between foreign and non-domestic arbitral awards, parties guarantee that such wards are recognised and enforced in their jurisdiction in the same way as their domestic arbitral awards.[23] It also obliges courts of contracting states to give full effect to arbitration agreements by requiring courts to deny the parties access to court where there is violation of an agreement to refer the matter to the arbitral tribunal.[24]

The European Convention on International Commercial Arbitration 1961 also came into place. It was intended to facilitate trade between Western and Eastern European countries.[25] The UNCITRAL Arbitration Rules 1976 were published to provide a broad set of rules for conduct of arbitral proceedings, an appointment of arbitrators, form, effect and interpretation of award.[26]

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[20] Jane L Volz and others, Foreign Arbitral Award: 'Enforcement of award against Recalcitrant Loser Vo21 11- 12 < https://open.mitchellhamline.eduwmlr>Vol21>iss3 >accessed 28/07/2023.
[21] Jane Volz and others, Foreign arbitral award: 'Enforcement of award against Recalcitrant Loser' 11-12 (n 20).
[22] Albert Jan Van Den Berg, The New York Convention: 'An overview' < https://cdn.arbitration-icca.org/s3fs-media_document/media01212588422798 > accessed 21/07/2023.
[23] UNCITRAL Secretariat, 'Convention on Recognition and Enforcement of Foreign Arbitral Awards'[2006] < https://uncitral.un.org/sites/uncitral.un.org/files/media-ducuments/uncitral/en/new-new-york-convention-epdf > accessed 27/07/2023.
[24] UNCITRAL Secretariat, 'Convention on Recognition and Enforcement of Foreign Arbitral Awards' (n23).
[25] Gerold Zeiler and others, 'The European Convention on International Commercial Arbitration' [2019] < https://law-store.wolterskluwer.com/s/product/commentary-on-european-convention-on-intl > accessed 21/07/2023.
[26]United Nations Commission on International Trade Law (1976) <https://uncitral.un.org/en/text/arbitration/contractualtexts/arbitratiom >accessed 27/07/2023.

The United Nations Commission on International Trade Law on Commercial Arbitration 1985, referred to as the UNCITRAL Model law,[27] was also adopted. Its purpose was to regulate international commercial arbitration, with the amendments adopted in 2006. Its aim is to assist states to enact uniformed and modernised laws which could consider certain aspects and demands of the international commercial arbitration. As such, states were advised to make their arbitral rules of the procedure that will respond to the changing demands of the world trade.[28]

Commercial Arbitration is domestically and internationally regulated.[29] Domestic arbitration falls under local regulations, and is used when there are disputes between private persons in the contract who are subject to arbitration within a country or a state.[30] The international commercial arbitration involves disputes arising between states or individual companies and another state in a foreign country.[31] Arbitration that takes place within the state is domestic in that state while the international arbitration involves a transaction in a state other than a place of arbitration and one which takes place in two or more states.[32] Certainly, promulgation of modernised laws by states to govern domestic and international commercial arbitration is significant for efficacy of commercial arbitration practice.

The success of commercial arbitration, law and practice has been realised in countries which have harmonised their domestic laws with the UNCITRAL Model Law. Some of the countries concerned are now a preferred seat for arbitration.[33]

[27]United Nations Commission on International Trade Law (Model Law) on International Commercial Arbitration, United Nations document A/40/17 (1985) annex 1 < https://uncitral.un.org>19-09955_e_book PDF > accessed 28/07/2023.
[28] United Nations,UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006 < https://unicitral.un.org/en/texts/arbitration/modellaw > accessed 21/07/2023.
[29] Eric Bergsten, 'Arbitration is a private procedure' 19 (n 2).
[30] Eric Bergsten, 'Arbitration is a private procedure' 12 (n 2).
[31] Eric Bergsten, 'Arbitration is a private procedure' 12 (n 2).
[32]Eric Bergsten, 'Arbitration is a private procedure' 12 (n 2).
[33]Andre Yeap SC and others, 'The rise of arbitration in the Asia-Pacific' [2023] < https://globalarbitrationreview.com/review/the-asia-pacific-arbitratio-review/ > accessed 21/07/2023.

Singapore and Hong Kong are some of the countries which achieved efficacy and have seen significant success stories in commercial arbitration practices, with their laws in conformity with model law.[34]

1.4 Commercial arbitration in Lesotho

Therefore, worth considering is to layout background of commercial arbitration in Lesotho. In the first place, commercial arbitration came into being for the purpose of ratifying the New York Convention in Lesotho.[35] Arbitration Act[36] was, therefore, promulgated to govern domestic commercial arbitration while international commercial arbitration is regulated under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.

In 2010, the High Court of Lesotho saw a tremendous piling of commercial matters. In the ensuing, the Court established a commercial court, specifically to deal with commercial matters as speedily as possible.[37] It is obtained through the Office of the Registrar of the High Court of Lesotho that the Commercial Court has registered two hundred and nighty four (294) cases from January to December, 2022, during which only 154 cases were delivered as judgements.[38] Such a staggering delivery of judgments indicates how the Court has been struggling to resolve commercial disputes as quickly as it is expected.[39] The maximized use of commercial arbitration in Lesotho could be one of the positive response to the problem faced by the court.

1.5 Problem statement

While it has been inadequately utilised, commercial arbitration is a mechanism available in Lesotho. The efficacy of the commercial arbitration law and practice in

[34]Sreenivisan Narayanan SC and others, 'International Arbitration and the Singapore International Arbitration Centre' [2022] < https://www.klgates.com/International-Arbitration-and-the-Singapore-International-Arbitration-Cen ; Oasis Hu, 'Hong Kong continues to thrive as a leading International Legal Hub'[2023] <https://regional.chinadaily.com.cn/en/2023-05/12/c_869090.htm > accessed 21/07/2023.
[35] New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (1958).
[36] Arbitration Act No.12 of 1980.
[37]US Embassy abroad, Lesotho-Disputes Settlement <https://www.privacyshield.gov/article?id Settlement#: ~:text=A%commercial%20court%was%.... < accessed 07/12/2022.
[38] Report, Assistant Register, Commercial Court of Lesotho [2022].
[39]US Embassy abroad, 'Lesotho Disputes Settlement' (n 37).

Lesotho has been hindered by several factors. These include such contributing factors as the legal framework. Besides, lack of information and education on the mechanism, limited support from the courts, government and legal profession, coupled with unregulated expertise of arbitrators, all of which could be considered to be paramount actors of commercial arbitration.

1.6 Hypothesis

It is assumed that efficacy of the commercial arbitration law and practice in Lesotho is derailed by the outdated law which does not harmonise with the UNCITRAL Model Law. Other barriers involve little knowledge about and lack of advocacy for commercial arbitration. As noted above, limited support from relevant actors and unregulated expertise of arbitrators have also hindered success of commercial arbitration in the country.

1.7 The scope and significance of the study

The study intended to investigate any hindrance to the efficacy of commercial arbitration, law and practice in Lesotho. Specifically, the study set out to assess the impact of identified problems being law which is not modernized and outdated, particularly on certain provisions that are major factors, unavailability of education or advocacy about commercial arbitration, role of other relevant actors in support of this mechanism. And to assess how lack of provisions regulating qualification of arbitrators can impact efficacy. Impact of absence of provisions for jurisdiction and separability as preserving principles of commercial arbitration to advance efficacy will also be examined. The study will not investigate other factors than those mentioned.

It has been instructive to conduct this study because there are many businesses operating in Lesotho. Since the government sign many contracts with service providers, disputes are prone to business transactions, which warrant some of the best alternative means to resolve any impending disputes, lest the country would unlikely see tremendous economic growth. With such a study, it would be necessary to influence efficacy on commercial arbitration, law and practice so as to save the

government's or individual companies' expenditure because the mechanism will be accessible within the country. The efficacy could also influence business community to resort to arbitration rather than litigation, possibly reduces court cases. It could also attract investments into the country.

1.8 Research questions

The research set out to answer several questions such as what is the legal framework governing commercial arbitration in Lesotho? What is the legal frame work and standard of provisions that promote efficacy of commercial arbitration, law and practice? What are the provisions that hinder efficacy? Other questions include whether the law lacks provisions of important principles that help to advance efficacy of commercial arbitration practice, whether the commercial arbitration mechanism is readily available to disputants, whether there is a law that governs or regulates expertise of arbitrators. Finally, another question is whether roles of the courts, government and legal profession can advance efficacy of the mechanism in Lesotho. The study further aimed at investigating how far Lesotho is in promoting commercial arbitration as compared to other countries, internationally and regionally, and still whether an outdated, and not modernised, law affected efficacy. The other question would be how other countries achieved efficacy of commercial arbitration, law and practice. The study has to find out whether there are any lessons to be learned in order to achieve efficacy of commercial arbitration by Lesotho.

1.9 Aims or objectives

There is a need to utilise commercial arbitration as alternative means to resolve commercial matters in a speedy manner. This study sought to critically assess factors influencing efficacy of commercial arbitration practices in the country. Also worth considering was assessing the business community's awareness of mechanisms, the conduct of courts, both through judgements, attitudes of the legal profession and availability of expertise of arbitrators, all of which for the purpose of ensuring efficacy of commercial arbitration in Lesotho.

The aim of the study was to assess efficacy of commercial arbitration law and practice in Lesotho as compared to other countries where efficacy is achieved as a results of updated and modernized laws, rigorous education or advocacy, sufficient support from relevant stakeholders, this also involved influencing commercial arbitration law reforms in regulating qualifications of arbitrators so that people could have confidence in it. The objective of the research was to examine nature and advantages of commercial arbitration; to examine international laws with required standards for commercial arbitration and also examined legal framework that govern commercial arbitration in Lesotho.

1.10 Research methodology

This research adopted desktop methodology. Both primary and secondary sources of information were used to analyse the research questions of the study. These include books, materials, internet, articles, conventions, theses, case law, legislation, reports, lectures, newspapers and speeches. The methodology thus helped the study to investigate what were the international and national legal framework of commercial arbitration to indicate required standards and whether the Lesotho legal framework adopted such required standards. With the desktop methodology, it was instructive to establish how such countries as Singapore, Egypt and Hong Kong achieved efficacy of the commercial arbitration law and practice. Factors contributing towards achieving any such efficacy of commercial arbitration and whether they would be applicable in Lesotho were also considered.

Interviews of relevant stakeholders such as legal officers being responsible officers for drafting government contracts were interviewed. Business community from small market and big commercial industry were also interviewed to establish whether they knew this mechanism. Case law was used to investigate support of the courts through application of the law. With reference to the Commercial Division, The Office of Registrar of the High Court was interviewed to find some cases registered in and completed within that year and after how many months or years since the establishment of the Commercial Court. Other respondents interviewed were legal practitioners both from the private and the Attorney general's offices for

investigating whether there is a need to regulate expertise of arbitration and to determine their eagerness to promote mechanisms.

1.11 Literature review

The literature review highlighted the debates over issues of efficacy of commercial arbitration, law and practice using factors such as unmodernised and outdated law, knowledge of arbitration, support of government, courts, legal profession and expertise of arbitrators as a test for efficacy. Noting the gaps left out by the previous studies, the study intended to indicate the approach adopted by such studies so as to see how the existing knowledge could be augmented in achieving efficacy, particularly in the context of Lesotho.

Some scholars addressed the issue of efficacy of commercial arbitration taking into account the above-mentioned factors. Some approached it from labour and commercial perspectives, while others explored the benefit of effective arbitration from the socioeconomic perspective. The underlying factor is that they all studied how efficacy of arbitration, law and practice can be promoted. However, scholars do not have unified criteria to assess barriers to efficacy of commercial arbitration law and practice.[40]

As mentioned earlier, the common ground is that arbitration is the most preferred alternative form of dispute resolution in business relationships, because it gives parties a freedom to choose their own rules of procedure.[41] The feature was emphasized by courts of law which held that self-autonomy or an ability to regulate ones' own affairs even to one's own detriment is a vital part of dignity.[42] The freedom given to parties makes and ensures compliance with the award flexible. It is therefore necessary for the mechanism to be effective at all costs because it is

[40] Butler Prasad Dharshini and others, 'A study of International Commercial Arbitration in Commonwealth' [2020] < https://production-new-commonwealth-files.s3.eu-w > accessed 04/12/2022.
[41] Sreenivisan Narayanan and others, 'International Arbitration and the Singapore International Centre' (n 34).
[42]Barkhuizen v Napier [2007] 5 (ZACC) SA 323.

used to attract trade investments. It is argued that to stimulate economic development and sustain growth in trade these international disputes will require effective and efficient dispute resolution mechanisms.[43]

In countries such as Lesotho where efficacy of a commercial arbitration practice is at the lowest pick, having awareness campaigns as a tool to promote efficacy is required. The best approach is therefore to first assess if there is enough knowledge about arbitration and its benefits. Some scholars uphold that arbitration is accessible if parties have ample knowledge of how it works and places where the services for arbitration are found, crucial here is the general knowledge of the procedures and systems.[44]

It is indicated that issues relating to lack of familiarity and understanding in national commercial arbitration can be alleviated through a range of awareness campaigns and capacity-building solutions.[45] The indication made was that an in-house counsel is still slow into the section of arbitration because of unfamiliarity.[46] An ability of an arbitrator to arbitrate is crucial. It has been stated further that to restore trust in the process the quality of arbitrators must be critically considered to ensure efficiency.[47] Thus, principal actors presiding over the process should be unquestionably competent and experienced [48]in the field in which they operate.[49]

[43] Butler Dharshini and others, 'Study of International Commercial Arbitration in Common Wealth' 10 (n 40).
[44] Mahapa Mildred and Wantadza Christopher, 'The dark side of arbitration and conciliation in Zimbabwe' [2015] Vol.3 Human Resource Management and Labour Studies (American Research Institute for Policy Development) 6576< URL: https://dx.doi.org/10.5640/shrmls.v3n2a5 > accessed 04/12/2022.
[45] Butler Dharshini and others, 'Study of International Commercial Arbitration in Commonwealth' 34 (n 40).
[46] Butler Dharshini and others, 'Study of International Commercial Arbitration in Commonwealth' 42 (n 40).
[47]Butler Dharshini and others, 'Study of International Commercial Arbitration in Commonwealth 43 (n 40).
[48]Butler Dharshini and others, 'Study of International Commercial Arbitration in Commonwealth' 43 (n 40).
[49]Osborne and Clarke, 'Why arbitration is ideally suited for life science' [2021] < https:// www.osbone and clarke.com>accessed 24th November 2022.

In other jurisdictions, the law clearly stipulates that arbitrators should be lawyers.[50] In other countries, bar associations demand that applicants for an arbitrator should be lawyers of seven years of good standing. Other scholars indicated that ineffective arbitrators can also hinder the overall growth and development of arbitration in a certain jurisdiction where it is still at its early stage.[51]

It is further advocated in other jurisdictions that an arbitration practice is well developed when national courts play an important role in an arbitral process to provide the judicial support and extent of supervisory control.[52]

The literature centres around the importance of knowledge of arbitration by relevant stakeholders. In particular, the focus has been on the support of courts, government, legal profession and competence or expertise of arbitrators as tools used to enhance efficacy of commercial arbitration, law and practice. There is no encouragement that these three aspects should be included in respective states' policies, legislation, regulations as measures to advance efficacy. On this basis, the research would recommend measures to promote efficacy of commercial arbitration, law and practice so as to attain growth of commercial arbitration in Lesotho, and, of course, in any other countries, with similar situations.

In Lesotho little has been done on efficacy of the commercial arbitration, practice and law because the interest in arbitration is still developing. However, it is acknowledged that arbitration is uncommon in Lesotho and this has made the commercial court experience a back log of cases.[53]

Against this backdrop, this study was carried out to investigate barriers to the efficacy of commercial arbitration practice as indicated earlier. The study, thus,

[50] Butler Dharshini and others, 'Study of International Commercial Arbitration in Commonwealth' 43 (n 40).
[51] Mahapa Mildred and Wantadza C, 'The dark of arbitration and conciliation in Zimbabwe' (n 44).
[52] Osborne and Clarke, 'Why arbitration is ideally suited for life science' (n 49).
[53] Nthabeleng Mafisa, 'Enforceability of arbitral awards in Lesotho' [2020] < https://wagner-arbitraion.com >journal >enforceability…>accessed 28/07/2023.

suggests ways in which efficacy of commercial arbitration practice could be ensured in the country.

1.12 Chapter outline

Chapter Two examines certain provisions that influence efficacy, that is important principles of the law serving to promote efficacy and also examines provisions that derail efficacy through cases. Chapter Three assesses major factors that can be used to advance efficacy of commercial arbitration. This examines the role of courts through cases, the government and legal profession in promoting efficacy of commercial arbitration. The focus is on analysing data obtained from interview relating to lack of regulations for arbitrators. Chapter Four compares certain countries on how efficacy of the commercial arbitration practice and law has been achieved. Lastly, Chapter Five presents the findings and recommendations on ways of achieving efficacy of the commercial arbitration law and practice in Lesotho.

Chapter 2: Provisions Influencing Commercial Arbitration

2.1 Introduction

Chapter One has discussed evolution of commercial arbitration by outlining the international instruments that govern the mechanism. It also explained the mechanism together with its advantages. It also discussed the history of the mechanism in Lesotho and to the position where the country is now with the use of commercial arbitration. The chapter has also indicated problems in relation to efficacy of the commercial arbitration, law and practice in Lesotho which need to be investigated. The Act is one of the factors that are to be used to assess efficacy. The focus of this chapter is on particular provisions that assist in promoting efficacy of the commercial arbitration practice in Lesotho. The chapter also pays attention to those provisions which derail efficacy of the commercial arbitration practice in Lesotho. The decided cases will be used to give a picture on how those provisions impact on efficacy. Important principles that need to be incorporated which assist in advancing efficacy will also be discussed.

2.2 Provisions enhancing efficacy of commercial arbitration

Section 4 provides that parties are obliged to obey the dictates of the arbitration agreement and such an agreement cannot be ended or cease to exist unless both parties agreed to its termination.[54] The exception is only through the application before the court by the other party upon justifiable and reasonable grounds that the court can set aside the agreement or terminate it.[55] This provision, in itself, promotes efficacy of a commercial arbitration practice in that it protects the autonomy of parties to the arbitration agreement. The court comes in where there are reasonable grounds that can force it to end or disregard the agreement. This was confirmed in the South African case in applying a similar section under its Arbitration Act in *Zhongli Development Construction Engineering Company Ltd v*

[54] Arbitration Act No. 12 of 1980.
[55]Arbitration Act No. 12 of 1980, Section 4(2).

Kamoto Copper Company SARL,[56] *Gouern, AJA,* held that parties who give in their conflicts to arbitration whether by unquestionable conduct or directly undertake to relinquish their opportunity to seek redress to courts of law in so far as the matter is concerned, by so doing they will be obliged to respect and abide by the outcome of an arbitrator. Once parties' have selected to subject their conflicts to private arbitration on their own volition, courts are duty-bound to adhere to such a decision. Parties are at liberty to choose which conflict will undergo an arbitration process, to select arbitrators of their own choice, the manner in which their arbitration will be conducted, under which rules and law, whether there will be an appeal to an arbitral appeal body and other similar matters. This case has been consistently followed by Lesotho's courts.

The importance of this section was reinforced in a number of decided cases in the courts of Lesotho. The courts have always prioritised the binding effect of an arbitration agreement on parties over any other issue, this is reflected in *Phomolong Investment (Pty)ltd v KEL Properties Company,*[57] parties entered into a sub-lease agreement sometime in 1989. They agreed that the appellant would develop the respondent's land by erecting a building at the cost of M1,700.000.00 on the land. The sub-lease agreement had an arbitration clause which obliged the parties to refer their disputes to arbitration. The respondent sought before court, an order declaring that the appellant is in breach by failing to repair the premises as agreed and that the respondent was entitled to terminate the agreement and that termination be confirmed. Further, to declare that the respondent is entitled to demand rental directly from tenants, to declare that the contemplated review of rentals by a mutual agreement which was to be made after twenty-five (25) years from the initial period, the review of rentals by a mutual agreement is made after twenty (20) years of an expiration date from the initial period of the sub-lease agreement. To declare that the parties were obliged in terms of the clause in a sub-lease agreement to review and determine the rentals by a mutual agreement at the initial expiry period. To

[56] [2014] 4 ALL SA (SCG) 217.
[57] C OF A (CIV)28/2022 [4]- [47].

declare that the respondent by refusing, neglecting to review by a mutual agreement, rental at expiration of initial period of twenty years as unreasonable. To declare that it was unreasonable for the respondent to refuse the submission of the dispute which was that the parties did not reach a mutual agreement of rental as obliged by an arbitration agreement and that such a dispute will be arbitrated in Lesotho.

Alternatively, the court finds that the parties are obliged to refer the review and determination of rentals to arbitration, be ordered that the dispute be submitted to an arbitrator appointed by the Law Society from its members who have ten (10) years' experience as an Attorney. The respondent raised the defence of lack of jurisdiction and an argument on the merits that the issue of rentals had prescribed.

The court *aquo* stated that the fact that there is an arbitration clause that does not oust the jurisdiction of the court. It held further that the appellant had failed to follow a procedure laid under Section 7, which is, it must have filed an application for stay of proceedings pending arbitration proceedings that must have been done after an intention to oppose was filed but before the appellant's pleadings were filed. It was held that by filing an answering affidavit, the respondent deprived itself of the right to raise defence of lack of jurisdiction and have recourse of arbitration, that the court will comfortably entertain the merits of the matter despite the presence of the arbitration clause, the court therefore dismissed a special plea of jurisdiction and entertained the merits.

The appellant filed an appeal, the grounds of appeal were that the court *aquo* had erred and misdirected itself in not declining jurisdiction as a result of existence of an arbitration agreement in a sub-lease agreement. The court of appeal held that there was nothing in the language of Sections 4 and 7 or in the scheme of the Arbitration Act, which suggests that a party to an arbitration agreement can resort to court in breach of Section 4, by relying on the remedy of stay. That conclusion destroys the foundation on which the decision of the court *aquo* stood in refusing

to decline jurisdiction as it had. The court held that the stay of proceedings provision implies that if a party goes beyond the notice of appearance to defend or a notice of an intention to oppose, such a party would have appeared to be submitting to the jurisdiction of the court.

The court reiterated that the appellant's special plea should not have been ignored on the basis that the only way to oppose jurisdiction should have been through the filing of an application for stay. The stay application could not have been the only legal tool in the hands of the appellant to challenge the jurisdiction of the court. The respondent had, apparently, unilaterally set aside the arbitration agreement without regard to Section 4 of the Act. The burden should have been placed on the respondent to justify why they ignored terms of the parties' arbitration agreement to go for arbitration, but approached the High Court. The respondent did that in total disregard of the law as provided for under Section 4 of the Act.

The importance of Section 4 in advancing efficacy is indicated by the court. It assisted the court to uphold the autonomy of parties to the arbitration agreement to refer their disputes for arbitration. It discourages an unnecessary intervention of courts. It is applied in a number of cases such as *Kompi Tsokolo & Ors v Government of Lesotho*,[58] the parties entered into an employment contract. The contract had an arbitration agreement which stated that parties will refer their disputes to arbitration which relates to the execution and interpretation of contract. The applicants were refused to enter the government building after refusing to sign for a renewed contract. They filed an application for review with the High Court. Both the High Court and the Court of Appeal held that there is an arbitration clause which states that the parties must go for arbitration to resolve their disputes that relate to a contract. The court held further that the parties must respect the binding effect of an arbitration clause in terms of Sections 4 of the Act and that the stay of proceedings in terms of Section 7 cannot be only the remedy and since a stay was not lodged, an arbitration agreement should be ignored.

[58] Kompi and Ors v Government of Lesotho C of A /43 of 2022 [77], [78].

It is through Section 4 that the courts of Lesotho had played a pivotal role in the promotion of efficacy of the commercial arbitration practice to the extent where it has been to date. However, the section needs amendments which will clearly guide the courts with reasons to set aside the arbitration agreement, to say the court must set aside the agreement on a good cause shown is not enough. The section must be clear; it must explicitly state those reasons so as to prohibit the parties and legal practitioners who unnecessarily bring matters to court despite the existence of an arbitration clause. It is now left in the hands for each court to decide on what forms a good cause.

Section 4 binds parties to respect terms of an arbitration agreement. Section 9,[59] on the other hand, gives flexibility by empowering courts to extend time fixed by parties for commencement of an arbitration process. It provides that where parties have agreed that any claim to be referred to a dispute shall be submitted on a fixed time, the party who does not file a dispute within that fixed time by the agreement shall be barred from doing so if there are no steps taken for commencement of arbitration.[60] But upon an application to the court such a fixed time can be extended where there is justification that non-extension will cause hardships to the matter.[61]

The provision respects parties' autonomy to fix time at which a claim can be brought to arbitration and that party who does not act as agreed will be barred. The issues of time in arbitration is of great importance. A time limit operates as an instrument preventing a person from instituting a claim after a substantially long period of time.[62] This provision promotes efficacy by conditioning the party to

[59] Arbitration Act No. 12 of 1980.
[60] Arbitration Act No. 12 of 1980, Section 9.
[61] Arbitration Act No. 12 of 1980, Section 9.
[62] Arbitration Association, Arbitration Journal : 'Time limits for commencing arbitration' [2020] https://journal-arbitration.ru/analytics/time-limit-for-commencing-arbitration/4 >accessed 12/05/2023.

exercise its right under the arbitration agreement within the time fixed by the parties. This is a control to a party who might take advantage of playing tactics under the pretence that there is an arbitration clause and a deliberate delay to file a claim or a preparation for commencement of arbitration.

Parties will timeously take measures to ensure that arbitration commences because the rationale behind a time limit is to ensure that proceedings would be carried out without any hustle caused by delayed commencement. If the causes of an action were to be permitted to go ahead after a substantial delay it could have a problematic effect on the collection of evidence and administration of arbitration proceedings as it goes to the availability of witnesses and documents.[63] It has been stated that submitting a late claim in arbitration might cost on the whole case.[64]

The whole intension of having this provision is promoting efficacy of the mechanism. The time limit provides a viable means to curb unnecessary long proceedings and ensures that arbitration is conducted efficiently and cost-effectively.[65] Efficiency and costs are often some of the principal reasons why parties choose arbitration over litigation.[66] The provision strikes the balance by giving courts powers to extend a period if there are valid reasons for indicating that the total bar can cause hardships to the party who delayed while it has also taken caution of autonomy of parties to limit time for commencement of proceedings.

It recognises that there might be inadvertent reasons for a delay on the party that is expected to take steps. The court then shall step in to ensure that the other party is not totally barred; some writers acknowledge that time limits can be unrealistic and

[63]Arbitration Association, 'Time limits for commencing arbitration' (n 62).
[64]Arbitration Association, 'Time limits for commencing arbitration' (n 62).
[65] Nathaniel Lai, The use of time limit: 'Help or Hindrance'< https://www.hkiac.org/content/limits-time-help-hinderance accessed 28/07/2023.
[66]Nathaniel Lai, 'The use of time limit in international arbitration' (n 65).

come at the cost of a due process.[67] The weakness of this provision is that there is no time fixed at which parties can apply to court and how long the case can be dealt with once it has been filed with the court. Time limit seeks to strike an effort to balance the interest of all parties and effective administration of case.[68]

2.3Important principles enhancing efficacy

There are principles of commercial arbitration that promote efficacy of commercial arbitration, law and practice because they limit any interference of courts. They are a jurisdiction of an arbitral tribunal and a separability of arbitration clause. Article 16[69] provides for an authority of an arbitral tribunal to make a decision on whether it has power to determine a certain dispute submitted before it. The arbitral tribunal may also have such powers to decide on whether it has an authority to determine any protest concerning enforceability of the arbitration agreement.[70] Article 16 also provides that an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract.[71] Absence of this provision also derail the efficacy if the agreement does not give arbitral tribunal powers to determine its own competence over a certain dispute then the issue will have to go to court to pronounce itself on that issue alone.

This is an important principle in commercial arbitration which promotes party autonomy.[72] It means that an objecting party can always raise it before the tribunal rather than going to court for such an issue. It is essential because it curtails costs of engaging in litigation just for an issue of jurisdiction and it is mindful of time that can be consumed by such an issue alone while that can be dealt with by an

[67]Nathaniel Lai, 'The use of time limit in international arbitration' (n 65).
[68]Nathaniel Lai, 'The use of time limit in international arbitration' (n 65).
[69] UNCITRAL Model Law on International Commercial Arbitration 1985 as amended in 2006.
[70] UNCITRAL Model Law, Article 16 (n 69).
[71] UNCITRAL Model Law (n 69).
[72] Patricia Kamanga, 'The power of arbitration to determine its own jurisdiction in international commercial arbitration' [2006] < https://www.scrip.org/pdf/b/r-202104195041732.pdf < accessed 22/07/2023.

arbitral tribunal. It enhances efficacy because it deals with the issue that an arbitration agreement as separate from a main contract.

The effect of the absence of a provision of separability of an arbitration agreement was seen in the *Principal Secretary Ministry of Agriculture & Ors v Safe Guard Security Cash Management Services(Pty)ltd,*[73] where a party raised an argument that the arbitration clause does not exist as a result of termination of the main contract. The court's reasoning in dismissing the point was that the clause itself stipulates that the arbitration clause will apply in future disputes in relation to the contract as parties agreed. While the court's reasoning is more than good. It would have been best that the court invoked a provision in the Act that clearly would have articulated that an arbitration agreement is separate to the main contract. This would have made the court's business easier.

2.4 Provisions derailing efficacy

Section 7 provides for a stay of proceedings where there is an arbitration clause. It gives a party a right to apply for a stay of proceedings pending an arbitration process where another party had lodged legal proceedings in court against the other in relation to a matter that the parties have agreed to refer to arbitration in case a dispute arises.[74] That party must have filed an intention to oppose or appearance to defend but not filed any pleadings or not taken any further steps in pleadings.[75] This provision has an underlying effect such as an unnecessary intervention by the court or disrespect to autonomy of parties. This was discouraged in South African which is severally followed in this jurisdiction**,** *Aveng (Africa) Ltd (formerly Grinaker-LTA Ltd) t/a Grinaker- LTA Building East v Midros Investments (Pty) Ltd,*[76] Wallis J held that the new technique in drafting arbitration clauses ensures that parties selected terms of an arbitration agreement is in such a way that the resort to courts

[73] CCT/0017/2022 [4]- [18].
[74] Arbitration Act No.12 of 1980.
[75] Arbitration act No.12 of 1980.
[76] 2011 (3) SA (KZN) 631.

of law is reduced. Courts, on the other hand, are no longer resistant to an arbitration process as another means to resolve disputes, but they are supportive and acknowledge that a process should be respected and given assistance by the courts where it is needed.

The provision also has a dilatory effect on resolution of parties' disputes because once any party has filed an application the respondent has to respond by filing an intention to oppose or appear to defend, both parties will exchange affidavits, then parties will have to draft and file heads of argument, it is then that the matter will be set for hearing at a convenient time for court and parties. In order to determine a referral to the tribunal, this procedure is time consuming.

In the case of the *Principal Secretary, Ministry of Agriculture & Ors v Safe Guard Security Cash Management Services(pty)ltd,*[77] the respondent lodged an urgent review application around 24th February 2022, seeking an order to declare termination of the contract for provision of security services by the applicant as unlawful and be set aside. The applicant in the present application filed an intention to oppose and counsel for the applicant raised a point of law of jurisdiction on the basis that the parties have an arbitration agreement, and the parties should be referred to arbitration. The applicants' counsel was warned to invoke Section 7 of the Arbitration Act which provides for a stay of proceedings pending arbitration, not to raise jurisdiction.

The applicants were allowed to file a present application, arguing that there are no sufficient reasons why a dispute cannot be referred to arbitration and that they have always been willing and are ready for preparation and commencement of arbitration. The respondent in stay proceedings filed an opposition alleging that the applicants' application for a stay comes after they have taken further steps in that the applicants' counsel argued urgency and jurisdiction. Therefore, the application should fail. The respondent alleged also that arbitration cannot be a viable process

[77] CCA/0017/2022 [4]- [18] (n 73).

to the respondent as it is more expensive than litigation and further that the parties' contract had been terminated, hence rendering the arbitration clause non-existent. The court granted the applicants a stay of proceedings pending arbitration, with the result that the parties were then referred to arbitration.

Relevance of the above case is to indicate that Section 7 is necessary, but it hinders efficacy of the commercial arbitration practice in Lesotho, because of procedures that the case has to undergo in application for a stay are time-consuming. The facts and decisions were outlined to paint a clear picture that case took almost three months for the issue of a stay to be decided, the parties, particularly the respondent, had incurred costs for another application while the matter could have been dealt with when jurisdiction was raised. Further, it takes a longer route than raising the court's jurisdiction on the basis of existence of an arbitration clause.

The autonomy of the parties to decide on how their issues can be decided is of paramount importance to arbitration, and has to be encouraged by both the law and courts in order to promote efficacy of commercial arbitration practice. The Appeal Court of Lesotho overemphasised this issue in a number of decided cases, some of which had been cited above. The negative impact of this Section was repeated in *Phomolong Investment Company v KEL Properties*,[78] where the court of appeal held that there was nothing in the language of Sections 4 and 7, or indeed, the scheme of the Arbitration Act, which suggests that a party to an arbitration agreement may only resist recourse to court in breach of Section 4 by relying on the remedy of stay. That conclusion destroys the foundation on which the decision of the court *aquo* stood in refusing to decline jurisdiction as had. The court held that a stay application could not have been the only legal tool to challenge the jurisdiction of the court.

[78] C of A (CIV) 28/2022 [77], [78].

In *Hobbs Pandgetee & co (Reins) v Jc Kirkland ltd,*[79] it was held that existence of arbitration is sufficient enough to create a binding agreement. The essence of the case gives the same reasoning made in *Phomolong's case*, that once there is an arbitration clause and another party defending raises an issue of lack of jurisdiction of the court without filing for a stay of proceedings, the court should hear the party in motivation of such a point, and, of course, give the party who lodge a case before the court to defend a jurisdiction with reasons that would, otherwise be advanced in an application for a stay. In any event, the end results of decisions will be the same unless there are different reasons as to why arbitration clause can be ignored.

The court *aquo* in *Phomolong's case* had prioritised the issue of a procedure under Section 7 over the autonomy of the parties. The law of arbitration must be in such a way that it promotes, respect for parties' freedom to contract and less intervention by the courts, in *Barkhuizen v Napier*[80] Ngcobo J held that self-autonomy, or the ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity. The extent to which the contract was freely and voluntarily concluded is clearly a vital factor as it will determine the weight that should be afforded to the values of freedom and dignity. The courts should not be quick to intervene in contractual agreements unless their adherence would be inter alia unfair, contrary to public policy or their being unconstitutional, otherwise, the sanctity of contracts should be respected.

Not only does the section's weaknesses undermine autonomy of parties but also does not stipulate what should happen if there are no steps taken for commencement of arbitration, after the order of stay of proceedings. This means the parties who had applied for stay can just ignore or neglect to participate in preparation for commencement of arbitration. The Section gives no timeframe prescribing how long the stay proceedings should be effective, nor does it give guidance on how

[79] 1969 2 LIOYDS Reo 547,549.
[80] [2007] (ZACC) 5; 2007 (5) SA (CC)323.

proceedings must be resuscitated within a certain period. The stark effect of this Section is that parties might not get justice that will otherwise be available under arbitration. In Lesotho where the parties are not conversant with the process and sometimes they do not know what to do after a stay had been granted or they no longer have funds for arbitration while some funds were exhausted by multiple applications in litigation. This turns out to give an impression that arbitration is expensive and not time-effective.

The definition of an arbitration agreement under the Act is another factor hindering efficacy of the commercial arbitration law and practice because it leaves some important aspects which the New York Convention on Recognition and Enforcement of Foreign Arbitral Award and the UNCITRAL Model Law on International Commercial Arbitration give guidance to. The purpose of alignment of national laws with these instruments is given to ensure uniformity and familiarity, hence minor challenges of foreign awards.

The arbitration Act defines an arbitration agreement as a written agreement which provides that a dispute whether existing, or future disputes must be referred to arbitration, particularly if they are in relation to the arbitration agreement entered into by the parties.[81] In terms of Article II(1), contracting states are obliged to refer parties to arbitration where the parties have agreed that a matter in an agreement should be submitted to arbitration on issues that have arisen or may arise in future.[82]

The matter will only be submitted to arbitration where there is a valid agreement. Some writers confirmed that a valid agreement is a cornerstone of any arbitration proceeding.[83] It is explained further that contracting parties of the New York

[81] Arbitration Act No. 12 of 1980, Section 2.
[82] UNCITRAL Model Law on International Commercial Arbitration 1985.
[83] Sacracho Aguine Jesus, 'Validity of Arbitration Agreement' [2023] < jus mundi.com/en/document/publication/en-validity -of -the -arbitration-agreement-ground to-refuse- > accessed 15/05/2023.

Convention 1958 which Lesotho is a party to recognise an arbitration agreement when the agreement is in writing. It deals with existing or future disputes in connection with defined legal relationships whether contractual or not, concerning the matter capable of a settlement, parties to arbitration have legal capacity and agreement is valid before the chosen law by the parties.[84] Article 7(1)-(6)[85] defines an arbitration agreement as an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether a contractual form of a separate agreement, shall be in writing.

Model Law explains that a written arbitration agreement is when its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.[86] It explains further that the writing requirement can also be in an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference.[87] Electronic communication as a means of any communication that the parties make by means of data messages; "data message," meaning information generated, sent, received or stored by electronic, magnetic, optical or similar means, but not limited to, an electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.[88]

Furthermore, an arbitration agreement is in writing if it is contained in an exchange of statements of the claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.[89] The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement

[84] Sacracho Jesus, 'Validity of arbitration agreement' (n 83).
[85] UNCITRAL Model Law on International Commercial Arbitration 1985.
[86] UNCITRAL Model Law on International Commercial Arbitration 1985.
[87] UNCITRAL Model Law on International Commercial Arbitration 1985, Article 7(5).
[88] UNCITRAL Model Law on International Commercial Arbitrtaion1985, Article 7(5).
[89] UNCITRAL Model Law on International Commercial Arbitration, Article 7(6).

in writing, provided that the reference is such as to make that clause an agreement.[90] The Arbitration Act of Lesotho does not specifically state that legal capacity and all other essentials of contract are required and further that the agreement will be valid under such law as it may be chosen by parties. Neither does the Act have this broad definition which is in line with international trade practices.

Article II(2) provides that an arbitral clause in a contract or in an arbitration agreement signed by parties or contained in an exchange of letters, existing telegrams for future disputes in connection with a legal relationship is referred to as a written agreement.[91] The manner in which the Arbitration Act defines an arbitration agreement does not include or explain what is meant by an written agreement; it refers to a contract that is signed by the parties; this is so limiting; it does not consider other means of communication used in international mercantile community and laws must be at par with those advanced modes of communication.

Article II (3) provides that an arbitration agreement shall not be recognised or enforced if it is found to be null and void, inoperative and incapable of being performed and is against public policy. [92]The convention has explicitly stated reasons that cause an agreement to be unrecognised. The Act provides that the court can grant a stay of proceedings pending arbitration proceedings if it is satisfied that there is no sufficient reason why the dispute cannot be referred to arbitration in accordance with agreement, the court may make an order for staying the proceedings subject to such proceedings and subject to terms and conditions it may consider just.[93]

[90] UNCITRAL Model Law on International Commercial Arbitration, Article 7(7).
[91] New Yolk Convention on Recognition and Enforcement of Foreign Arbitral Award 1958.
[92] New Yolk Convention on Recognition and Enforcement of Foreign Arbitral Award 1958.
[93] Arbitration Act No.12 of 1980, Section 7(2).

While the wording of provision is properly put, the law should have also expressly stated reasons why an arbitration agreement cannot be recognised just like in Article II (3) cited above. The essence of this section is that the court may ignore the arbitration agreement and not refer the dispute for arbitration if there are sufficient reasons to do so; the important questions would be, what are those sufficient reasons? The Act should be able to answer such a question without unnecessarily involving the court's interpretation even if the court finds itself in a position to entertain such application; it must derive a legal authority from the Act not to get into trouble of referring to the authorities of other jurisdiction or conventions which are persuasive in nature. This is so because the New Yolk Convention 1958 that Lesotho is a party to has set a tone on how similar sections should be drafted.

Section 10[94] provides that the party or parties may appoint an arbitrator where the appointed arbitrator refuses to work, dies or is removed. Generally, the section regulates powers of the parties to appoint an arbitrator and also the power of the court to appoint an arbitrator. It does not prescribe for the obligations and qualities of arbitrators. Arbitrators are an important pilot of arbitration; their quality determines the quality of the award granted by such arbitrators. It is critical that this Act has the provision that specifically prescribes obligations and the ethics of arbitrators.

Some scholars explained that the quality and success of arbitration is as good as quality of the arbitrators involved in it. One of the fundamental principles of arbitration is impartiality, coupled with independence of arbitrator during an arbitral process.[95] It is also emphasised that the quality of arbitrator is very much dependent on a host of other elements such as characteristics and personalities of arbitrators, the compatibility of a tripartite arbitral tribunal, the age, gender, experience and

[94] Arbitration Act No.12 of 1980.
[95] Daruk Sundra Rajoo, Contemporary Asia Arbitration : 'Importance of Arbitrators' Ethics and Integrity in Ensuring Quality of Arbitrators' [2023] Journal,Vol 6 No.2 329-347 <https://paper.ssrn.com/30l3/papers.cfm?_id=2397659>accessed 26/03/2023.

qualifications of arbitrators.[96] It has always been reiterated that arbitrators' quality and credibility is, therefore, crucial for maintaining the parties' faith in the overall arbitration process.[97]

The Act provides that a party or parties may appoint an arbitrator if the appointed arbitrator refuses to work, dies or is removed.[98] Generally, the Act in this part regulates powers of parties to appoint arbitrators or umpires and also the power of the court to appoint an arbitrator. It does not, however, prescribe the obligations and qualities of arbitrators. Arbitrators are an important pilot of arbitration; their quality determines the quality of the award granted by such arbitrators. It is critical that this Act has the provisions that specifically regulate obligations and prescribe the ethics of arbitrators. As it has been indicated that the quality of a process rests on the arbitrators, it is important that there is a provision that guides on how to conduct themselves, what kind of behaviour is expected of them. The absence of all these factors shows that a section does not promote efficacy of a commercial arbitration practice.

Section 24[99] deals with the awards and that the arbitration is complete when there is an award. The tribunal is bound by law to make an award within six months after the date of the initiation of arbitral proceedings.[100] The law prescribes that the award should be in writing and be publicised.[101] The award is binding and cannot be subjected to any appeal.[102] The following process is to make it an order of court. However, it can be set aside on the grounds of irregularities by an arbitrator. The arbitrator exceeded his powers by disrespecting the principles of natural justice

[96] Daruk Rajoo, 'Importance of Arbitrators' 330 (n 95).
[97] Daruk Rajoo, 'Importance of Arbitrators' 330 (n 95).
[98] Arbitration Act No.12 of 1980, Section 12(1).
[99] Arbitration Act No.12 of 1980.
[100]Arbitration Act No.12 of 1980, Section 29).
[101] Arbitration Act No. 12 of 1980, Section 34.
[102] Arbitration Act No. 12 of 1980, Section 34(1)(a).

adhered to .[103] These are the grounds for setting aside the award under the Act and not to be enforceable.

In terms of Article 36 (i)-(iv),[104] the award cannot be recognised and enforced if the party to the agreement did not have any legal capacity to contract. The agreement was not valid before the country in which the award was to be enforced or law of seat. The party was not given a proper notice for an appointment of an arbitrator. If the subject matter was not contemplated in the agreement, because of irregularities of an arbitral tribunal, where recognition and enforcement will be against a public policy and that a subject matter is not capable of a settlement by arbitration under the law of state. The Act is silent about a public policy as being a ground for setting aside the award. However, the High Court added a public policy, violations of the constitution and procurement and financial management laws as ground of invalidity of an agreement in the *Attorney General v Fraser Solar GMBN & 2 Ors*,[105] where the agreement was found to be against a public policy, invalid and violated the Constitution, principles of rule of law and rights of the Basotho people. This was a self-review case where the Government of Lesotho, which will be used interchangeably as the GoL had entered into a Supply Agreement with the 1st respondent on behalf of the 2nd respondent, a company incorporated under the laws of Germany. The agreement was to install in the GoL offices, infrastructure solar heaters, photolytic systems and lights emitting Diode (LED) in all the GoL buildings.

The obligation of the GoL under the agreement was to borrow money in the amount of €100 Million (Hundred Million Euros) from German Financial Institutions. The then Minister in the Prime Minister's Office accepted the proposal which had been made by the 1st respondent. The then Minister did this alone without following proper legal channels. The1st respondent found it important that the Minister of

[103] Arbitration Act No. 12 of 1980, Section 24(1)(b).
[104] UNCITRAL Model Law on International Commercial Arbitration 1985.
[105] LSHC [2022] 284

Finance had to be involved because he understood that since there is also a loan agreement then Ministry of Finance would be responsible for the payment of such a loan.

The then Minister in Prime Minister's Office, Mr Tšolo, passed the proposal and the memorandum of understanding on to the Minister of Finance, Dr Majoro, at the time. The proposal had been made without approval by another arm of the government responsible for that being in terms of the constitution, the Cabinet. Dr Majoro refused to sign such a memorandum on the basis that the engagement of the 1st and 2nd respondents had not followed the procurement laws of the country, nor had it been approved by the Cabinet.

However, then Minister Tšolo, signed the memorandum of behalf of the GoL without involving any relevant authority and regardless of refusal of Dr Majoro. Everything was concluded with an agreement standing to be implemented. The agreement had an arbitration clause in it which stipulated that if there are existing or future disputes in relation to the contract that will be submitted for arbitration in South Africa, the applicable law will be the South African Arbitration Act, an arbitrator will be from South Africa, appointed by the President of South African Bar Council, a decision of arbitrators will be binding, the seat of arbitration will be South Africa, the rules applicable will be of the South African Association of Arbitrators. The parties also consented to the jurisdiction of the High Court of South Africa, Gauteng Local Division in Johannesburg. The 1st and 2nd respondents filed arbitration proceedings on allegations of a breach by the GoL for failing to make a roll out of product without a delay, by acts and omissions constituting a delay for the project to start, by refusing to sign a loan agreement prior to execution of the project, by failing to provide access of the Prime Minister, the Minister and other government officials relevant for starting the project.

While the GoL was served with papers, they did not attend the arbitration hearing. The award was, therefore, granted in default against the GoL for liquidation damages and interest of €5O Million. The GoL's property was to be attached as a result of a default award, that is when the whole issue came into the knowledge of the GoL. Then application for self-review was filed with the Lesotho High Court, (Constitutional Division) where the award was to be enforced.

In deciding in favour of the applicant, the court held that the arbitration clause was unlawfully concluded as the Supply Agreement which is the main contract concluded in violation of the procumbent laws of the country and the Constitution of the country as Minister Tšolo signed and concluded it without a proper authority in terms of the law. It was held that actually the GoL did not consent to the agreement. Therefore, an arbitration clause was not consensual, and as such, it becomes invalid itself. It was held further that the agreement was against the public policy as it was concluded in violation of the Constitution of the country to the detriment of the financial state of Lesotho which will affect fundamental rights of the Basotho such as a right to health and food security. The review was therefore granted.

This means the award cannot be recognised and enforceable. The logic is that if an agreement is invalid on such grounds, the award will also be set aside as a result. The Act should expressly have this grounds so that the courts are able to take the authority from the national law. When the law is clear parties will know whether they have recourse or not and awards will not easily be challenged. It is stated that absence of legislative provisions may cause difficulties simply by leaving unanswered many procedural issues relevant in arbitration and not always settled by the arbitration agreement[106]. It is, therefore, necessary that the Act has these similar provisions to promote efficacy of the mechanism.

[106] UNCITRAL Secretariat on Model Law on International Commercial Arbitration of 1985 as amended in 2006.

2.5 Conclusion

In conclusion, it is highlighted that the Act has provisions that help to enhance efficacy of the commercial arbitration law and practice which need some amendment to harmonise with international trade practices. The provisions that hinder efficacy of the commercial arbitration practice were also examined using case law. It is identified that they lack important aspects which are in line with international recent trade practices, the feature which defeats the speedy nature of commercial arbitration. Chapter 4 will reveal how a standard similar provisions are drafted. The Act could also be seen as having no essential principles which every arbitration law should have in assistance of advancing efficacy. The impact and benefits of the provisions were highlighted. Ways in which the provisions should be drafted have been indicated, thereby providing reasons or justifications for such a proposition. Having examined the legal framework, the next chapter investigates other factors hampering efficacy as indicated.

Chapter 3: Factors Influencing Efficacy of Commercial Arbitration, Law and Practice

3.1 Introduction

Chapter Two examined the provisions that contribute to efficacy of commercial arbitration and practice in Lesotho. The authorities through case law applied provisions which are the centre to investigation. The chapter also discussed important principles underlying commercial arbitration. Since they play a major role in promoting efficacy of commercial practice, such principles should be incorporated into the Act. Provisions that hinder success of efficacy have also examined through the use of case law. The good, bad or old, the law, alone, cannot influence efficacy of the commercial arbitration practice. This chapter discusses other significant factors influencing efficacy of the commercial arbitration practice. These include knowledge about commercial arbitration by business community, support by courts, government and legal profession, as well as regulations for arbitrators.

3.2 The business community's knowledge about commercial arbitration

An interview was conducted as one of the methods for data collection on knowledge of arbitration by business community. Interviews were conducted in relation to two categories, small- and medium-sized businesses such as catering companies, bars, suppliers. In total, they were fifteen businesses in three districts, seven of whom are based in Maseru, three in Leribe, three in Butha-Buthe and two in Qacha's Nek.

The important questions asked were whether they knew commercial arbitration as an alternative dispute resolution, its availability and the law governing the mechanism, its extent and what they could recommend. Out of fifteen, only six businesses confirmed through their representatives their appreciation of the mechanism and that there had not been any education about it. Noting that the owners have claimed to have known this only from experience though without necessarily understanding its applicability and accessibility. None of them knew

that the mechanism is regulated by the Act. Eleven businesses do not know anything about the mechanism.

The other category was of the big companies, private security companies, guest houses and hotels, construction companies and factory companies and property investors. The interview conducted with around ten businesses, three in this category said that they know about the mechanism but they know it as having been explained by their lawyers when they were engaged in litigation relating to contractual disputes that have arbitration clauses. They also said there was never any education about it and they do not fully understand its importance like they do with courts of law. The other seven businesses disclosed that they do not know anything about commercial arbitration, but only litigation as a means of resolving disputes. Even all this last category is unfamiliar with regulatory law.

It is clear from these interviews that majority of businesses from small, medium to large businesses do not know about the mechanism. Those that do, have just a fraction of the knowledge, and therefore cannot utilise it because of its inaccessibility. As a result of this lack of knowledge, the commercial arbitration law and practice efficacy cannot easily be achieved.

3.3 Support of courts

The judiciary in any jurisdiction plays an essential role in creating an environment that encourages and facilitates the use of arbitration.[107] International arbitration users often need to rely on national courts to support the arbitration proceedings and guarantee that party autonomy will be respected.[108] On the other hand, an excessively interventionist court risks damaging the users' trust in arbitration.[109]

[107] Emelia Onyema, ´Re thinking the role of African Courts and Judges in Arbitration' [2018]< Rethinking the Role of African National Courts in Arbitration: Emilia Onyema: 9789041190420: Amazon.com: Books> accessed 27/04/2023.
[108] Emelia Onyema, 'Rethinking the role of African courts and Judges in Arbitration' (n 107).
[109] Emelia Onyema, 'Rethinking the role of African courts and Judges in Arbitration' (n 107).

Chapter Two highlighted the position of the courts of Lesotho through decided cases with regard to efficacy of the commercial arbitration, law and practice. Those cases reflect strong support of the courts which it has in promoting and advancing the efficacy. The strain was caused by an application of Section 7 by court *aquo* in *Phomolong Investment Company v KEL Properties,*[110] as discussed in Chapter 2. The court entertained the merits of the case while there was an arbitration clause, for the reason that the respondent or the appellant in this appeal did not file an application for a stay of proceedings pending arbitration proceedings as per Section 7(1)[111] and had also taken further steps by filing an answering affidavit against dictates of the above provision and pleaded jurisdiction in that answering affidavit. The court *aquo* held that the respondent had taken a step further and that an arbitration clause does not oust the jurisdiction of the court.

While the honourable court applied Section 7, it did so without consideration that the respondent had raised defence of jurisdiction, an issue that had to be dealt with before hearing anything in relation to that matter. This had always been the existing principle of the law, and the purpose of Section 7 is not to override that principle. That is why in other jurisdictions the wording of a similar section clearly indicated that an application for a stay can be made where the party had not entered a plea of jurisdiction.[112]

The importance of the issue of jurisdiction is strongly indicated in *Motlatsi Pelesa v Ngaka Mohlouoa,*[113] the court quoted the decision in *Motor Vessel "Lillians" v Caltex Oil (Kenya) Limited,*[114] where it was held that jurisdiction is everything ,without it, the court has no power to make one more step. There would be no basis

[110] C of A (CIV) 34/2022 [33].
[111] Arbitration Act of Lesotho No.12 of 1980.
[112] Singapore Arbitration Act 2001, Section 6.
[113] C of A (CIV) No.36/2020 [38].
[114] (1989) KCR 19.

for a continuation of proceedings. It was also emphasised in *Shale v. Shale and Others,*[115] that once an authority of court to determine the issue is raised, the court must dispose of it first before entering into any further questions that are in the case. The court *aquo* in *Phomolong 's case* continued with the whole case. It did not first deal with an issue of its authority to entertain the matter where there is an arbitration clause and deliver its judgement which determines whether to go into the merits or not. It dealt with the matter holistically. The respondent had actually made arguments only on that defence on its heads of an argument with the understanding that the issue of jurisdiction has to be dealt with first then if it is declined, the court will allow the respondent to make arguments on the merits.

This approach caused the parties to incur expenses to engage legal practitioners to lodge an appeal; the parties' time to engage in long litigation was consumed, thereby possibly bringing sour relationships. All these go against the main objectives of commercial arbitration as an alternative resolution of disputes. The similar approach was taken by the Commercial Court in the *Principal Secretary, Ministry of Agriculture & Ors v Safe Guard Cash Management Services,*[116] where the applicants raised defence of jurisdiction because of the existence of an arbitration agreement. They were directed to file an application for a stay of proceedings in terms of Section 7,[117] which they did, hence present application. It was after a stay of proceedings that the court referred parties to arbitration on the basis that an agreement is not inoperative, incapable of being performed and is not against the public policy, while it could have entertained an issue of jurisdiction and referred parties to arbitration without letting them incur expenses of another application and also it could have considered that the process will be time-consuming to both parties. These two cases were not discussed to critique the decision of the court but to indicate that the manner in which Section 7 is couched

[115] C of A (CIV) NO.35/2019 [8].
[116] CCA/0017/2022 [8].
[117] Arbitration Act No.12 of 1980.

changes the position of the law in relation to the jurisdiction where it has been challenged, that it has to be determined first without entering into any question.

However, that was a setback which the Court of Appeal dealt with. The courts are now following the decision in *Phomolong's case*. In the recently decided case of *Moipone Fleet Leasing Services (PTY)LTD v Pulane Kolisang & Ors,*[118] the issue of jurisdiction was raised for the first time on the 1st respondent's heads of argument, on the basis that the parties have an arbitration clause in their contract. The court held that a jurisdiction is a threshold issue because it speaks of competency of the court to determine the matter. It, therefore, dismissed the matter on the basis that existence of an arbitration clause disqualifies the court to entertain the matter.

The courts of Lesotho have generally played an important role in promoting efficacy of the commercial arbitration, law and practice. Several cases which will be analysed below reflect that the autonomy of parties is highly respected by courts. The recent leading case which made good precedence that is consistently followed by the courts of Lesotho is *Bataung Chabeli Construction v Road Fund*.[119] The respondent in this case invited a tender for renewal of tolls infrastructure in Maseru, Maputsoe and Caledonespoort Border Posts. The parties had also agreed that any disputes that may arise in relation to the contract will be resolved by arbitration. The respondent became dissatisfied with the performance of the appellant in that it will not complete the construction within an agreed time. The respondent then terminated the contract and invited new tenderers.

The appellant lodged an application with the court seeking review of the decision to terminate the contract and an order stopping the re-tendering of the work and

[118] CCA/O115/2022[5], [6].
[119] C of A (CIV) /34/2020 [5], [7], [19].

allowing an applicant to continue with the contract. The respondent raised the defence of jurisdiction because of the existence of the parties' arbitration agreement in a contract. The court *aquo* held that indeed the parties should go for arbitration to resolve the issues since it relates to the contract. The appellant filed an appeal against the decision of the court *aquo* on the grounds that it erred and misdirected itself in declining a jurisdiction and many other grounds but the Court of Appeal made determination on the issue of jurisdiction first.

In confirming the decision of the court *aquo,* the Appeal Court held that the courts must respect the parties' autonomy as they have chosen how their dispute should be dealt with in terms of Section 4,[120] and further that where arbitration agreements exist, courts should not be quick to intervene unless it can be proved that the agreement is against the public policy. Otherwise, courts are obliged to respect the sanctity of contracts. The court further held that where any party had not challenged the arbitration as a way to settle their dispute and contract remained standing, the appellant cannot change the agreed method of resolving their dispute and resorted to conventional litigation. The decision of the High Court to decline a jurisdiction was therefore upheld.

That marked courts of Lesotho's unwavering support in the promotion of efficacy of the commercial arbitration, law and practice. This serves as a caution to legal practitioners who bring matters which have arbitration agreements in court without valid reasons. The following cases where the defence of jurisdiction was raised because of the existence of an arbitration clause are *Kompi and Ors v Government of Lesotho & Ors,* the facts are fully outlined in Chapter Two. The Court of Appeal in confirming the decision of the High Court strongly emphasised the principle that sanctity of the contract of parties to arbitrate must be respected by the courts.[121] Also, in *Phomolong v KEL Properties Company,*[122] the Appeal Court in overturning

[120] Arbitration Act No.12 of 1980.
[121] C of A (CIV) 43B/2021 [76].
[122] C of A (CIV) 28/2022 [43].

the decision of the Commercial Court, held that the appellant's special plea of jurisdiction because of existence of arbitration clause should not have been overlooked on the basis that the appellant ought to have filed an application for a stay of proceedings pending arbitration proceedings instead of raising the issue of jurisdiction. The court held that there are other legal avenues than a stay application to challenge the court's competence to hear the matter. It held further that courts should respect the autonomy of the parties to decide how their issues should be dealt with and that is protected by Section 4. The court emphasised that non-filing of a stay of proceedings cannot override the parties' freedom as provided under Section 4. The appeal was therefore upheld, and the parties were ordered to go for arbitration.

The recent decision of Commercial Court is in *Golden Rewards Civil Engineering Company v Principal Secretary, Ministry of Local Government & Ors,*[123] where the parties entered into a contract to repair the roads in Hlotse and Liphofung. The parties agreed that the project would start around November 2022 before the end of the Government financial year so that the funds could not be returned to the funder at the end of the financial year. Applicant delivered machine to the place where the project was to take place. Few months parties signed a contract, the respondent informed the applicant to wait because they were assessing whether they would be able to pay in terms of the contract. The parties' contract had an arbitration clause to refer to arbitration any disputes that may arise and are in relation to the contract. The applicant filed a review application to set aside the decision to discontinue with the work. Respondents raised defence of jurisdiction on the basis of existing arbitration agreement.

In declining a jurisdiction, the Commercial Court followed the decision in *Bataung Chabeli Construction*[124] and held that courts should not take part in the parties'

[123]CCA/0018/2023 [2], [5], [21].
[124] C of A (CIV) 35/2019 [30].

selected mode of resolving conflicts. The parties' devotion to the contract should be given a special consideration except that the very same agreement violates the public policy. The court further held strongly that lower courts are bound by the decision of the Apex Court and they should follow its decision. The court, therefore, referred the dispute for arbitration.

The Courts of Lesotho agreed with some scholars who strongly stated that success of efficacy of the commercial arbitration, law and practice not only depends on the arbitrators and arbitration practitioners, but the whole process must be well supported by arbitral institutions, and importantly the courts.[125]

3.4 The role of legal profession

The position played by the legal profession in arbitration practices is important because they are the immediate voice for the public. Some legal practitioners that have been interviewed stated that they know and understand the importance of arbitration, and thus encourage their clients to have an arbitration clause in their contracts. Yet they are not actually keen to thoroughly do any further research about it because people believe in courts as the only reliable mechanism to resolve disputes. This confirms that the legal profession may prefer litigation through local courts, though being unmindful to pursue an alternative career path in international commercial arbitration.[126]

Some legal practitioners also confirmed that they use an arbitration agreement to fight their cases in courts not actually for any other reason. They said it is probably because of non-existence of the body which will be responsible for ensuring that efficacy of commercial arbitration practice in Lesotho is attained and that work as a point where they can always refer clients to. They added that it becomes difficult to convince clients to find services of commercial arbitration in the absence of a

[125] Emelia Onyema, 'Rethinking the role of African Courts and Judges in Arbitration' (n 107).
[126] Emelia Onyema, 'Rethinking the role of African Courts and Judges in Arbitration' (n 107).

referral point. However, they admitted that it is not fair to clients because they would just take cases to court while there is an arbitration clause to try a luck only to have their cases dismissed on the basis of jurisdiction. That again has financial negative implications to clients so much that they end up abandoning seeking justice. Some members who were in the Law Society Council said that they know about the mechanism; others were appointed as arbitrators some years ago. This is an indication that legal practitioners have not played any significant role in efficacy of commercial arbitration, law and practice except through defending their matters in court.

3.5 Part played by government

The role of government in promoting efficacy of commercial arbitration, law and practice is assessed by looking at three factors which are, the government response towards the existing law governing commercial arbitration, contracts that government enter into and capacity building by government about the mechanism.

States are always encouraged to take measures in ensuring that their domestic laws governing commercial arbitration are aligned with the UNCITRAL Model Law on International Commercial Arbitration, so that they become uniform with the laws in other jurisdictions on laws of arbitral procedures, and are in conformity with the specific needs of international commercial arbitration practices.[127] It is confirmed that Singapore has almost reached the stage of being called the commercial arbitration hub because of its fascinating geographical position, rein enforced by a legal regime and legislative framework that is arbitration-friendly and observant of the rule of law.[128] Lesotho needs such a kind of law to promote efficacy of commercial arbitration practice.

[127] Secretariat on Model Law on International Commercial Law 'Commercial Arbitration and other Alternative Dispute Resolution Method < www.sice.oas.org/dispute/comarb/unicitral/icomarbe3.asp>accessed 16/04/2023.
[128]Maxwell Chambers, 'Singapore ready to become global Arbitration Hub' [2021]>https://www.inhousecommunity.com/article/singapore-ready-become-global-arbitartion-hub/> accessed 27/04/2023 26-27.

The Arbitration Act of Lesotho[129] had been promulgated by 1980. That was before adoption of the UNCITRAL Model Law on International Commercial Arbitration of 1985. The government has never made any attempt to amend the law in order to domesticate Model Law, and domestic commercial arbitration is regulated under the Act, while international commercial arbitration is governed under the Convention.[130] This indicates that there is no support of government in promoting efficacy of the commercial arbitrations, law and practice in the country.

Research maintains that the ways in which governments can show support for arbitration is by promulgating the best domestic and international legal framework.[131] It was also re-emphasized that African Governments can support arbitration by deliberately pursuing the enactments of laws that support arbitration; they can standardize arbitration and make practice less tedious for parties, thus, many African countries are already doing this.[132] Lesotho should also join the force.

The second aspect is in relation to contracts that the Government of Lesotho enter into with mostly big international companies, whose contracts have arbitration agreements. The Government agrees to choose other countries as the seat of arbitration, with law applicable being usually one of the foreign countries and the arbitrators, while there are some experienced local arbitrators, known to the government who can be part of arbitrators appointed by government. Even if the seat is outside the country, in that way the government will be promoting efficacy by giving Lesotho arbitrators an international exposure, thereby contributing to the development of the local arbitrators. It may just make an economic and practical sense to choose a foreign arbitrator who lives a train-ride away from the venue and to instruct the counsel who are just a few blocks away from the arbitration centre,

[129]Arbitration Act No.12 of 1980.
[130]New Yolk Convention on the Recognition and Enforcement of Foreign Arbitral Award 1958.
[131] Adebayo Adenipekun , 'The Role of the government in support of African arbitration [2019] >https://www.iarbafrica.com/en/new-Role-of-government-in-support-of-African –arbitration> accessed 09/05/2023.
[132] Emelia Onyema, 'Rethinking the role African Courts and Judges in Arbitration' (n 107).

to the detriment of local arbitrators and counsel, the practice which merits a need for a rethink.[133]

For Lesotho, this consideration should not be used because the country needs to take each opportunity to develop their local arbitrators. Such is an investment for the future. As noted above, a typical example is the arbitration agreement that the Government of Lesotho entered into with the Fraser Solar.[134] The parties in the arbitration agreement choose the rules of the South African Association of Arbitrators to govern their disputes; that is South Africa as the seat for arbitration, that they subjected and consented to the jurisdiction of the High Court in Gauteng, South Africa, that President of Johannesburg Bar will appoint an arbitrator.

The Government does not make it a priority to promote efficacy of commercial arbitration practice in Lesotho so that it becomes a preferred venue for arbitration. Research has reported an outcry that African governments have exported scores of arbitrations by choosing non-African arbitration centres, accepting foreign law jurisdiction clauses and agreeing to foreign venue of arbitration provisions to the detriment of the arbitration growth in their respective countries.[135] This is a practice that the Government of Lesotho should abandon and build itself on commercial arbitration. Another example is *Swissbough Diamond Mines(Pty)Limited & Ors v The Kingdom of Lesotho's* case,[136] which is still under arbitration in Singapore. There is no Lesotho's arbitrator nor counsel, even officers from the Attorney General's Office. This is reflected by a certain African writer that in some instances an African state party submitted to a reference before a panel in which none of its nationals was present.[137] Such an act Lesotho should be avoided, particularly in situations where rules are not prohibitive.

[133] Emelia Onyema, 'Rethinking the role of African Courts and Judges in Arbitration' (n 107).
[134] Attorney General v Fraser Solar GMBA and Ors CIV/APN/332/2021.
[135] Emelia Onyema, 'Rethinking the role of African Courts and Judges in Arbitration' (n 107).
[136] PCA Case No.2013-29(First Class < Swissbough Diamond Mines (Pty) Limited, Josias Van Zyl, The Josias Van Zyl Family Trust and others v. The Kingdom of Lesotho, PCA Case No. 2013-29 (First Case) | italaw > accessed 04//5/2023.
[137] Emelia Onyema, 'Rethinking the role of African Courts and Judges in Arbitration' (n 107).

The Government of Lesotho is the institution that enters into a commercial agreement with companies more than any other institutions or companies in the country. Most of the contracts have standard arbitration clauses which are usually not well drafted, thus posing problems when there are disputes. It is discovered through interviews conducted in relation to legal officers in the government ministries and at the office of the Attorney General that they do not go for training in relation to commercial arbitration. Some have disclosed that the contracts that they draft on behalf of the government are standard; they edit and give those that have to sign, without knowing how to draft arbitration clauses. They mentioned that they do not know the impact of not well drafted arbitration clauses in a contract.

They added that contracts which have an arbitration clause that is well drafted, which included important aspects, are mostly drafted by lawyers of parties that they would be entering into a contract with. The practitioners at the office of the Attorney General also stated that they only know arbitration through the research they conduct for purposes of defending cases during litigation. They also indicated that they have never been sent to any training workshops involving the mechanism. They confirmed that the government does not take any measures to assist through scholarships, to assist the practitioners, legal officers, to acquire arbitral skills so that they could advise and arbitrate skilfully on issues of arbitration.

3.6 Regulation of arbitrators

The Commercial Arbitration has been unpopular amongst the business community, the potential users, who have registered disbelief in it in Lesotho. Therefore, regular litigation is the only predominant legal route to the resolution of disputes. Regulation of arbitrators is one of the factors that will assist in ensuring that the public have confidence in the mechanism. At present, there is no code of conduct

for arbitrators, nor are there no provisions of the law or rules obliging arbitrators to behave in a manner that will make any party unsuspicious of bias. In order to have confidence in the mechanism, the public should be assured that arbitrators are regulated by law in adjudicating on disputes in a fair and unbiased manner. Such public confidence can only be achieved by regulating conduct of arbitrators.

The role of arbitrators in arbitration proceedings is a big one, without which arbitration proceedings cannot proceed. Section 2[138] defines an arbitral tribunal as an arbitrator or arbitrators in terms of the agreement. This is a proof that an arbitrator constitutes a tribunal. The regulation of conduct of arbitrators is therefore critical for efficacy of the commercial arbitration, law and practice. Any conduct of an arbitrator likely to cast doubt of bias can call for a party to challenge such proceedings and become grounds for setting aside the awards.[139] The International Bar Association has made rules which are not binding to states, serving only as guidelines on how to make rules for arbitrators. The fundamental rule provides that in conducting their work, arbitrators must do so with diligence, care and efficiency to afford parties a just, fair and trusted process to resolve their disputes without any suspicion of bias.[140] It stipulates further that a prospective arbitrator shall accept an appointment only if he or she is fully satisfied that he or she is able to discharge such duties without any bias.[141] This is the kind of assurance that the business community from in and out of Lesotho would like to hear, and also to have confidence in this process.

[138]Arbitration Act No.12 of 1980.
[139] UNCITRAL Model Law on International Commercial Arbitration, Article 12.
[140] International Bar Association, 'Rules of Ethics for International Arbitrators' [1987] <https://www.trans-lex.org/701100/-/iba-rules-of-ethics-for-international-arbitrators-1987/ >accessed 03/08/2023.
[141] International Bar Association, 'Rules of Ethics of International Arbitrators' (n 140).

Model Law[142] places an obligation on a person approached for appointment of an arbitrator to disclose any circumstances that can cast a justifiable doubt about his impartiality and independence. This obligation extends throughout the proceedings of arbitration. This extends to where any party suspects bias on the part of the arbitrator while proceedings are in progress unless parties knew about such circumstances.[143] It further provides that an arbitration tribunal that is not constituted in terms of the parties' arbitration agreement makes it a ground for setting aside of arbitral awards and a refusal of enforcement of an award.[144] It is, therefore, important that there is a regulation to advance efficacy of the commercial arbitration, law and practice. One of the fundamental principles of arbitration is impartiality, ethics and independence during an arbitral process, therefore, the quality and success of arbitration is as good as a quality of the arbitrators involved in it.[145] The relevance of these references is to strongly indicate that quality should not be compromised.

3.7 Conclusion

In conclusion, this chapter has highlighted that there is unwavering support of courts to promote efficacy of the commercial arbitration, law and practice, which is indicated through decided cases. The reflection of provisions of the Act which causes courts to take what can be interpreted as interference is also made. Also, the chapter has highlighted lack of public awareness about the mechanism, the feature which could help to promote efficacy. Not only has the government reportedly overlooked ways of promoting efficacy of the commercial arbitration, law and practice, but it has made no attempts at reforming arbitration law. Further noted is lack of capacity building of its officers and local arbitration professionals, coupled with limited support from legal practitioners. The chapter has then discussed the

[142] UNCITRAL Model Law on International Commercial Arbitration, Article 12(1).
[143] UNCITRAL Model Law on International Commercial Arbitration, Article 12(2)).
[144] UNCITRAL Model Law on International Commercial Arbitration, Article 34(iv) and Article 36(iv).
[145] Daruk Sundra Rajoo, Contemporary Asia Arbitration Journal 329-347 (n 95).

unavailability of arbitrators' regulation, thereby stressing the impact of such paucity. It is clear that to attain efficacy of the commercial arbitration, law and practice there must be collectively concerted and reciprocal efforts from all these relevant actors as discussed.

Chapter 4: Comparative Analysis

4.1Introduction

The previous chapters examined provisions of the law that advance efficacy of the commercial arbitration practice. Provisions which derail efficacy and their application through cases have also been discussed, focusing on the negative impact of the law which does not harmonise with Model Law. Also discussed in the previous chapter issues of lack of support by the government and legal practitioners as well as impact of unregulated arbitrators of efficacy. This chapter discusses ways in which some selected countries domesticated Model Law have achieved efficacy of the commercial arbitration practice. The chapter also assesses how support of courts, government, legal practitioners, awareness about the mechanism and regulated arbitrators have contributed to efficacy in certain countries. Considering Singapore, Hong Kong and Egypt in turn, the chapter makes a comparative analysis, in terms of their commercial arbitration achievements, hence the reportedly preferred arbitration seats the world over.

4.2 Singapore

Lesotho is compared with Singapore to see how its statutes and efforts of relevant actors have contributed to efficacy in the commercial arbitration law and practice. The Ministry of Law in Singapore reported that Singapore's top standing resulted from efforts over several years in providing an arbitration-friendly legal framework where legislation is regularly reviewed and updated.[146] Singapore has two pieces of legislation governing both domestic[147] and international[148] commercial arbitration. This is a reflection that Singapore's growth is attributed to many factors such as the best arbitration laws, government efforts and support of the mechanism by courts. A comparison, in so far as a legal framework is concerned, will focus on provisions

[146]K. Vijayan, 'Clinches top spot as preferred arbitration hub for the first time' [2021] <https://www.straitstimes.com/singapore-courts-crime/singapore-ch=linches-tp-spot-as-preffered-arbitration>accessed 29/04/2023.
[147] Arbitration Act of 2001.
[148]International Arbitration Act 1994.

of domestic law similar to those discussed in Chapter 2. Lesotho has no legislation regulating the International Commercial Arbitration. However, Singapore International Arbitration Act has similar provisions which study focuses on, with its Domestic law, as a result it cannot be discussed separately.

The definition of an arbitration agreement in Lesotho's Act,[149] is to a certain extent, similar to that provided in the Singapore's Act. They both explain it as a written agreement by the parties to refer to their existing or future disputes that may ensue as a result of the contract that they entered into. However, there are substantial differences between these two provisions. For instance, the Singaporean Act[150] has gone a millage further to explain a written agreement, clarifying how it is formed and what the requirements of an arbitration clause are.

Here the contract is explained as a form of a clause attached to the main agreement or a stand-alone in a single document.[151] It states that a written agreement is accepted in any form such as electronic communication made by a data message.[152] An agreement is also accepted as such when it is alleged during legal proceedings or in any document but the other party fails to deny it.[153] It further provides that an agreement exists when it is in a bill of lading or other documents that can contain it.[154] It is also a written agreement if it is contained or communicated electronically through an electronic mail, a telegram, a telex or a telecopy electronically made.[155]

Lesotho and Singapore statutes provide for a stay of proceedings which is a procedure available to a party in an arbitration agreement where the other party had lodged legal proceedings with the court relating to any dispute that falls within the

[149]Arbitration Act No. 12 of 1980.
[150]Arbitration Act of 2001.
[151]Arbitration Act of 2001, Section 4(2).
[152]Arbitration Act of 2001, Section 4(5).
[153]Arbitration Act of 2001, Section 4(6).
[154]Arbitration Act of 2001, Section 4(8).
[155]Arbitration Act of 2001, Section 4(9).

scope of arbitration clause.[156] The provisions empower the party against whom court proceedings are lodged to make an application for a stay of proceedings pending arbitration proceedings. That party must do so after it has filed an intention to oppose but not taking any step further.[157]

There is a significant difference identified between these two Acts on the same provisions. In terms of the Singaporean Act,[158] a party whom the court proceedings are lodged against can apply for a stay of proceedings after filing an intention to oppose but before delivering any pleadings other than pleadings raising the defense of lack of jurisdiction by the court. It also empowers the court where necessary to protect the parties' rights by issuing interim reliefs in relation to property which may be a subject matter. It also has a provision which strikes balance of the parties' right to litigate and also a party's liberty to arbitrate. It gives the court a right to act on its own volition to discontinue the proceedings if no steps to initiate arbitration proceedings have not been taken by any party within two years. The provision obliges the court to respect the liberty of any party to apply for reinstatement of discontinued proceedings. The provision does not leave the initiator of court proceedings in limbo, but it gives options as what should be done after a stay of proceedings. It also stipulates the time at which arbitration proceedings are expected to initiate.

The Singaporean Act also has an important provision which gives a tribunal the authority to decide on disputes brought before it.[159] The same provision provides that an arbitration agreement is a self-contained agreement which cannot be affected by existence of the main contract which came to an end.[160] The Lesotho Act does not have any provisions of these important principles as envisaged in Model Law.

[156]Arbitration Act No 12 of 1980, Section 7; Arbitration Act of 2001, Section 8.
[157]Arbitration Act of 2001, Section 8; Arbitration Act No. 12 of 1980, Section 7.
[158]Arbitration Act of 2001, Section 6(1).
[159]Arbitration Act of 2001, Section 21.
[160]Arbitration Act of 2001, Section 21.

It means that the courts will still intervene to decide on an issue of authority of a tribunal where the parties did not agree that the tribunal could have powers to decide its powers on a certain dispute brought before it such as whether a contract has come into life and is an enforceable contract.

In terms of the Singapore Act, the parties must appoint arbitrators in terms of the agreement.[161] It provides further that where appointments were not made in terms of an agreement or the parties do not reach an agreement in relation to appointment or an arbitral tribunal also fails to appoint an arbitrator, any party can apply to the appointing authority for such an appointment.[162] An appointing authority is obliged to be mindful of qualifications required of arbitrators and also to ensure that required impartiality and independence are considered.[163]

This Act further obliges the arbitrator intended to be appointed to liaise any possible conditions that can cast doubts about impartiality and independence.[164] It is also obligatory for an appointed arbitrator to communicate the possibility of those circumstances throughout the engagement of an arbitration process.[165] The provision also states that if the arbitrator can go against all the obligations and it can also be discovered that he or she lacks required qualifications, a party concerned can challenge such an appointment at any time.[166]

While the Arbitration Act of Lesotho also provides for appointment of an arbitrator[167] like the Singapore Act, it differs from the latter. The Arbitration Act of Lesotho does not put obligations on arbitrators to act with diligence without bias as

[161] Arbitration Act of 2001, Section 13(1).
[162] Arbitration Act of 2001, Section 13(2).
[163] Arbitration Act of 2001, Section 13(5)(e) and (f).
[164] Arbitration Act of 2001, Section 14(1).
[165] Arbitration Act of 2001, Section 14(2).
[166] Arbitration Act of 2001, Section 14(3).
[167] Arbitration Act No. 12 of 1980, Section 34(1).

indicated in the above provisions; neither does it provide grounds for a protest of an arbitrator's appointment.

In relation to grounds of setting aside of the arbitral award, both Acts provide that an award can be set aside on the grounds of corruption.[168] The Singapore Act is substantially different on the same provision. It has a number of grounds for setting aside of the award clearly explained, which are incapacity of a party entering into an arbitration agreement, invalidity of an arbitration agreement under the law which the parties agreed to be governed by or under the law of Singapore in cases where there is no choice of law, a limited time of arbitrators' appointment to the other party and denial of the other party's opportunity to present the case. When the award is in relation to a dispute that does not fall within the disputes to be submitted to arbitration and stretched out of the scope of disputes which are for a settlement through the mechanism.

The award can be set aside because of an improper constitution of the tribunal; or in the way the parties had agreed about on it, except when the agreement is against the dictates of the Act, denying the other party an opportunity to present its dispute or when the matter in dispute does not fall within the list of those that can be settled through the mechanism, and the award which is contrary to the public policy. [169] As indicated in Chapter 3, Singapore did not achieve efficacy of the commercial arbitration, law and practice because of good law alone, factors mentioned in Chapter 3 played a major part, as discussed in the following paragraphs.

The Singapore's initiative is a fairly recent phenomenon of the past 25 years.[170] The success of Singapore can be attributed to such factors as the roles of state and

[168]Arbitration Act No.12 of 1980, Section 34(2).
[169]Arbitration Act of 2001, Section 48(1)(a)(i) -(vii), (b)(i)-(ii).
[170] Elizabeth MacArthur, 'Regulatory competition and the growth of International Arbitration in Singapore' [2018] 165 <https://journals.uvic.ca>appeals>articles>view > accessed 09/05/2023.

judiciary.[171] The courts of Singapore play an important role in creating a supportive environment to arbitration and in striking a balance between intervention and support.[172] The Singapore's courts continuously ensure minimal intervention, the case in point the Court of Appeal, which reported that the past 20 years saw only 20% of the Singapore courts allow a set aside of arbitral awards.[173] The courts of Singapore prioritise the parties' autonomy and uphold the parties' agreement to arbitrate even where it may be ambiguously expressed.[174] The Judiciary thus appoints experienced, skilled judges in commercial law from everywhere in the world.[175]

The Singaporean government also plays a critical frontline role in promotion of efficacy of the commercial arbitration law and practice in Singapore. The government has made every effort to provide arbitration-friendly legislation and infrastructure in an effort to attract arbitration to its jurisdiction.[176] The Singaporean government indicated a strong desire to build arbitration by signing the New Yolk Convention on Recognition and Enforcement of Foreign Arbitral Award 1958, by adopting the UNCITRAL Model Law on International Commercial Arbitration and by ensuring that courts observe the rule of law and have a strong policy of minimal intervention.[177] The Government of Singapore's strategy to respond swiftly to arbitration when they identify a problem which needs government attention like legislative intervention, they do so within six months.[178] They work together with

[171] K Vijayan, 'Clinches top spot as preferred arbitration hub' (n 146).
[172] Michael Pryles, National Law of India Law Review: 'Recent decision on International Arbitration' [2012] Vol 24 No1 [35]-53 <https://www.jstor.org/stable/44283749>accessed 04/05/2023.
[173] Elizabeth MacArthur, 'Regulatory competition and growth of International Arbitration in Singapore' 170 (n 170).
[174] Elizabeth MacArthur, 'Regulatory competition and growth of International Arbitration in Singapore' 170 (n 170).
[175] Lawrence Teh, 'Singapore Ecosystems of arbitration'[2012] < https://dentons.rodyk.com/en/insights/accrt/2022/april/19/singapore-effective-ecosystems>accessed 04/05/2023.
[176] Elizabeth MacArthur, 'Regulatory competition and growth of International Arbitration in Singapore' 165 (n 170).
[177] Elizabeth MacArthur, 'Regulatory competition and growth of International Arbitration in Singapore' 170 (n 170).
[178] Elizabeth MacArthur, 'Regulatory competition and growth of International Arbitration in Singapore' 170 (n 170).

the judiciary to identify problems that need an urgent legislative solution.[179] Singapore also regularly updates its legislative framework to remain relevant.[180] The Attorney General appointed a law reform sub-committee in 1991 to conduct a major review of Singapore's international commercial arbitration law.[181]

Singapore also removed any hindrance to efficacy. The Legal Profession Act of Singapore was amended to allow foreign arbitrators to represent their clients in Singapore as the law had prohibited it before.[182] It is also dedicated to invest in infrastructure as a means to improve arbitration, and the government also engaged in educating the business community about arbitration and developments.[183]

The Law Society of Singapore, on the other hand, engaged in educating the community about commercial arbitration and all the procedures that are involved.[184] The country also make efforts to ensure that arbitrators' technical skills are developed, thereby funding training for arbitrators.[185] Clearly, as a result of all concerted efforts, Singapore is called an arbitration hub. Egypt is also considered as a top country in developing commercial arbitration in Africa. Attributes to its efficacy on commercial arbitration, law and practice are assessed below.

[179] Mr. NG How Yue, 'Ministry of Law Key Note Address on Summit of International Arbitration' [2019] < https://www.minlaw.gov.sews/speech/keynote-adress-ps-ng-how-yue--2019-singapore>accessed 03/05/2023.
[180] Elizabeth MacArthur, 'Regulatory completion and growth of International Arbitration in Singapore 172 (n 170).
[181] Elizabeth MacArthur, 'Regulatory competition and growth of International Arbitration in Singapore' 172 (n 170).
[182] Elizabeth MacArthur, 'Regulatory competition and growth of International Arbitration in Singapore 173 (n 170).
[183] Elizabeth MacArthur, 'Regulatory competition and growth of International Arbitration in Singapore' 173 (n 170).
[184] Law Society of Singapore, 'Understanding arbitration' < https://www.lawsociety.org.sg/our-community/legal-fact-check/understanding –arbitration > accessed 06/05/2023.
[185] Law Society of Singapore, 'Understanding arbitration' (n 184).

4.3 Egypt

The commercial arbitration in Egypt is regulated by the Arbitration Act Law,[186] which governs the proceedings of any arbitration that takes place in Egypt, the seat being in Egypt, including both domestic and international arbitrations. The Act is based on the UNCITRAL Model Law on the International and Commercial Arbitration.[187] The same provisions of Lesotho's Arbitration Act, as discussed in Chapter, 2 is used below for comparison with similar provisions of the Arbitration Act of Egypt.

The definition of Arbitration agreement of Lesotho's Arbitration Act [188] and Egypt Act are also similar only in that they both explain an arbitration agreement as a written agreement by the parties to refer to their existing or future disputes that may ensue as a result of the contract that they have entered into, relating to matters on the agreement. The Egyptian Act,[189] however, differs from the Lesotho's Act. It provides that the arbitration agreement may also be concluded after disputes have arisen, and issues subject to arbitration are indicated.[190] The Act also views an agreement as formed by natural and juristic persons, having legal capacity to conclude the contract.[191] It further provides that a written agreement can be in a document signed by parties, or in an exchange of letters, telegrams and other means of written communication.[192]

[186] Egyptian Arbitration Act (EAL), Law No. 27 of 1994.
[187] Khaled Shalakany, IBA Arbitration Committee: ΄Arbitration Guide [2018] <MediaHandler (ibanet.org)>accessed 04/05/2023.
[188] Arbitration Act No.12 of 1980, Section 2.
[189] Law No.27/1994 Promulgating Law Concerning Arbitration in Civil and commercial Matters("EAL").
[190] Arbitration Act, Law 27 of 1994, Article 10.
[191] Arbitration Act, Law 27 of 1994, Article 11.
[192] Arbitration Act, Law 27 of 1994, Article 12.

The statutes provide for a stay of proceedings pending arbitration proceedings. However, the Egyptian Act clearly stipulates that the action will be held inadmissible by court where the party against whom an action is brought raised an objection before delivery of any demand or defense with regard to the substance of disputes.[193] This means that before the party makes a pleading on the merits, not on a point of law while the Lesotho Act states that a respondent can apply for a stay after filing an intention to oppose but before taking any steps in the proceedings,[194] in essence it meaning all steps available including preliminary issues such as a jurisdiction.

In relation to the appointment of arbitrators, the Egyptian Act provides that an arbitrator cannot be a minor under guardianship, a person whose civil rights are withheld due to a serious crime he had been involved in or any means of judicial systems or any wrong doing which reflects dishonesty or because of being declared bankrupt.[195] It also obliges a person to be appointed as an arbitrator to communicate any possible conditions that can give an impression that his independence and impartiality can be compromised.[196] Failure to do so will attract a challenge of such an arbitrator's appointment.[197] The Lesotho Act does not have all these provisions which provide for requirements of being an arbitrator, qualities and obligations of a person appointed as an arbitrator.

The Egyptian Act also provides for powers of a tribunal to make a decision on its jurisdiction, thereby providing that an arbitration agreement is separate from other terms of contract, it cannot be affected by termination or invalidity of the

[193] Arbitration Act, Law 27 of 1994, Article 13).
[194]Arbitration Act No. 12 of 1980, Section 7).
[195]Arbitration Act, Law 27 of 1994 Article 16(1)).
[196]Arbitration Act, Law 27 of 1994Article 16 (3).
[197]Arbitration Act, Law 27 of 1994, Article 18(1)).

contract.[198] These two principles are crucial for enhancing efficacy in the commercial arbitration ,law and practice.

Besides, the Egypt's Act has provisions for grounds of challenging an arbitral award. It provides that an award can be set aside if an arbitration agreement is non-existent, is void, voidable or its life has ended, incapacity of a party when concluding a contract.[199] Added are cases where the other party is denied an opportunity to present his case, with another party having not been notified about appointment of an arbitrator, and the date of arbitration not communicated. All these constitute grounds for setting aside of an award.[200] Failure of a tribunal to apply a chosen law by the parties, an improper composition of an arbitral tribunal or an appointment of arbitrators, that is all of which not in accordance with law and agreement, form the grounds for setting aside of the award.[201] Arbitral award which involved a dispute which does not fall within issues agreed on, where an arbitral award or a procedure brought about the award contains a legal violation which nullifies the process and an award that is against the public policy,[202] are also grounds for challenging the award. These provisions are in essence similar to the provisions of the Singapore's Arbitration Act because they both are aligned with the UNCITRAL Model Law. As such, factors that have contributed to Egypt's development in commercial arbitration are examined below.

The Egypt's efficacy on the commercial arbitration, law and practice is influenced by good law and similar factors to Singapore. The courts of Egypt play an important role in efficacy of the commercial arbitration law and practice. They adopted the pro-arbitration policy of recognition and enforcement of arbitral awards, limiting

[198]Arbitration Act, Law 27 of 1994, Articles 22 and 23).
[199] Arbitration Act, Law 27 of 1994, Article 53(a), (b)).
[200] Arbitration Act, Law 27 of 1994, Article 53((c).
[201] Arbitration Act, Law 27 of 1994, Article 53((e).
[202]Arbitration Act, Law 27 of 1994, Article 53(f), (g)).

reasons for setting aside.[203] The government also plays its part so well, having adopted the Model Law in Arbitration Act Law.[204] The Government of Egypt, through its parliament, stretched the list of matters that can be resolved by arbitration, including tax disputes, customs disputes and certain crimes under investment law.[205] Furthermore, the very government directed the ministries, public entities, state-owned companies and companies where the state is involved in any form not to conclude contracts with foreign investors which have an arbitration clause without having them reviewed by the High Committee for Arbitration.[206] The role played by these important stakeholders arbitration is commendable. As the closer neighbour, Hong Kong's achievement, also having been closer to take a status of an arbitration hub, came as a result of many similar factors to both Singapore and Egypt. Of particular reference is law, the provisions of which are examined in the next section.

4.4 Hong Kong

Commercial Arbitration is governed by an Arbitration Ordinance in Hong Kong,[207] which is based on the UNCITRAL Model Law on the International Commercial Arbitration. In Hong Kong, the domestic and international commercial arbitration is governed by the Arbitration Ordinance.

Both Hong Kong law[208] and Lesotho Act have a certain part of definition of an arbitration agreement. They both define it as a written agreement where parties agree to submit their disputes already existing and which are likely to surface in future, relating to a specific issue defined in an agreement. On the contrary, Hong

[203] Mohamed Abdel, Noha Kheled, 'Arbitration in Egypt' [2022] https://practiceguides.chambers.com/practice-guide/international-arb-2022/egypt/trends-and-devil > accessed 06/05/2023.
[204] Mohamed Abdel, N Kheled, 'Arbitration in Egypt' (n 203).
[205] Mohamed Abdel, N Kheled, 'Arbitration in Egypt' (n 203).
[206] Mohamed Abdel, Noha Kheled, 'Arbitration in Egypt' (n 203).
[207] Cap 609 Law of Hong Kong LN 38 of 2011.
[208] Cap 609 Law of Hong Kong LN 38 of 2011, Part 3, Section 19).

Kong's Ordinance explains that an agreement may be a contract or a separate form contract.[209]

The Ordinance Law defines a written arbitration agreement as an agreement whose contents are recorded in any manner regardless of whether it was orally or otherwise concluded.[210] It further provides that such a written requirement is complied with if it is made in the form of a data message being the design information sent received, stored by electronic, magnet, optical or similar means like an electronic data interchange (EDL), an electronic a mail, a telegram, a telex or a telecopy.[211] The agreement is also considered as written where it is alleged by the other party in statements of a claim or defense and there is no denial of its existence.[212] This applies also where there is reference to a document in a contract which has an arbitration clause.[213] The Lesotho Act does not have any provision for this detailed formation of an arbitration agreement.

The Hong Kong Ordinance also has a provision for a stay of proceedings which provides that a party can raise an objection against the proceedings in court relying on the existence of an arbitration clause before filing any statement on the substance of the dispute.[214] The raising of an objection can request the court to refer the parties to arbitration unless the court is satisfied that an arbitration agreement is null and void, inoperative and incapable of being performed.[215] The wording of this provision like it is indicated in the same provisions of statutes in two jurisdictions discussed above, also differs significantly from the provision of the Lesotho's Act. The latter requires the party to file an application for a stay before filing of any pleadings or taking any step further. The court will then refer the matter for

[209] Cap 609 Law of Hong Kong LN 38 of 2011, Section 19(1).
[210]Cap 609 Law of Hong Kong LN 38 of 2011, Section 19(3).
[211]Cap 609 Law of Hong Kong LN 38 of 2011, Section 19(4).
[212]Cap 609 Law of Hong Kong LN 38 of 2011, Section 19(5).
[213]Cap 609 Law of Hong Kong LN 38 of 2011, Section 19(6).
[214]Cap 609 Law of Hong Kong LN 38 of 2011, Section 20(1).
[215]Cap 609 Law of Hong Kong LN 38 of 2011, Section 20 (2).

arbitration after that there are no justifiable reasons not to refer the dispute to arbitration. The Ordinance empowers the court to refer the matter immediately after satisfying itself that an agreement is not inoperative, incapable of being performed, null and void.

On the issue of the conduct of arbitrators, the Hong Kong Ordinance, like the Acts of Singapore and Egypt used above, to which the Lesotho Act is compared, also obliges a person who is to be appointed as an arbitrator to disclose likely conditions that can cast doubts in the mind of the parties that he or she cannot be at some point impartial and independent, and this has to be done throughout the entire proceedings.[216] It provides further that circumstances that raise or prove a possible doubt for impartiality and independence and also if an arbitrator had been dishonest about the required qualifications are grounds for challenging an arbitrator's appointment.[217]

The Ordinance Law of Hong Kong provides for a tribunal's power to interrogate and decide whether it has an authority on the dispute submitted before it and further that an arbitration agreement is not intertwined with the main contract such that it does not cease to exist because of termination or invalidity of the main contract.[218] As it has been indicated, the Lesotho Act does not have provisions in this regard.

The grounds to challenge an arbitral award under the Hong Kong Law are similar to the Acts of Singapore and Egypt. The party still has to prove the incapacity of the other party when a contract was being concluded; validity of an agreement under the law that the parties have agreed to be applicable to their dispute; or the law of Hong Kong if the parties did not choose an applicable law; that the party

[216]Cap 609 Law of Hong Kong LN 38 of 2011, Section 25(1).
[217]Cap 609 Law of Hong Kong LN 38 of 2011, Section 25(2).
[218]Cap 609 Law of Hong Kong LN 38 of 2011, Section 34(1).

challenging an award was not given notice to appoint an arbitrator or a notice of date of the proceedings and was denied an opportunity to be heard.[219]

An award can also be set aside if such an agreement is not in relation to the issues to be dealt with by arbitration as agreed by parties or if the decision involves matters beyond the parameters of the agreement, that the composition of the tribunal and procedure were not as agreed by the parties; further, that the dispute is not included in a listed matters which can be subjected to the arbitration under the law of state, and lastly the agreement is against the public policy.[220] Similarly, other contributing factors as identified in Chapter 3 are assessed below.

The role of the Courts in Hong Kong is also to support arbitration. The Courts repeatedly stress that they will respect the choice of the parties, whose disputes they are made to solve through arbitration.[221] The Hong Kong courts support a commercial arbitration process by giving interim measures to prevent defeat of an arbitral process, to preserve assets which are a subject matter of arbitration. [222]

On the other hand, the role of government in Hong Kong has always encouraged arbitration as a means to resolve disputes.[223] The government efforts have been shown by a recent amendment of the Arbitration Ordinance.[224] It is indicated that the Central Chinese government and Hong Kong government have committed to giving Hong Kong an unwavering support in its race as a leading international arbitration hub,[225] these authorities, together with legal services, have policies to

[219] Cap 609 Law of Hong Kong LN 38 of 2011, Section 81(2)(b)(i)-(iv)
[220] Cap 609 Law of Hong Kong LN 38 of 2011, Section 81(a)(i)-(vii), (b) (i)-(ii)).
[221] KK Chevy and others, 'Simple guide to arbitration in Hong Kong ' [2014] < https://www.deacons.com/assess/images/news%20 and %20inssights/publication/2014/201205-guidet-o > accessed 07/05/2023.
[222] KK Chevy and others, 'Simple guide to arbitration in Hong Kong' (n 221).
[223] KK Chevy and others, 'Simple guide to arbitration in Hong Kong' (n 221).
[224] KK Chevy, and others, 'Simple guide to arbitration in Hong Kong'(n 221).
[225] Dr. David Holloway and others, 'Strengthening Hong Kong's Position as an Arbitration Hub in the Belt and Road Initiative '[2018] <CSHK Policy Paper 8.pdf (cityu.edu.hk)>accessed 09/05/2023.

invest in legal services and related professionals in Hong Kong, attracting more arbitration institutions of diverse cultural backgrounds and clientele to provide services in Hong Kong. [226] The commitment is to vigorously advance training and professional development programmes for the local talent pool, improving collaboration efforts with other continents in promoting Hong Kong's roles as an international legal services hub, increasing Hong Kong's investments in international arbitration events, and improving coordination among local stakeholders.[227] Hong Kong has taken an initiative to ensure that virtual proceedings are effective.[228] The government through the Department of Justice provided financial support under the Anti-epidemic Fund for eligible local legal and dispute resolution service providers to subscribe to the "Hong Kong Legal Cloud".[229]

Hong Kong's efforts to achieve its goal have also been proved by opening an opportunity for foreign legal professionals to continue international legal practice from a base in Hong Kong with ease of obtaining additional local licenses.[230] A person who is not a solicitor or a barrister may be registered as a foreign lawyer to practise the law of the jurisdiction for which he or she is qualified. [231]A foreign-qualified lawyer can even be admitted as a Hong Kong solicitor or a barrister through obtaining an exemption of passing an examination.[232] The government through the policies committed to encourage universities also to play a part in expanding their programmes in arbitration to students.[233] The plan is to enhance an existing collaboration and better communication involving the government with

[226] Dr David Holloway and others, 'Strengthening Hong Kong's position as an Arbitration hub in the Belt and Road Initiative' (n 225).
[227] Dr David Holloway and others, 'Strengthening Hong Kong's position as an Arbitration Hub in the Belt and Road Initiative' (n 225).
[228] Dr David Holloway and others, 'Strengthening Hong Kong's position as an Arbitration Hub in the Belt and Road Initiative' (n 225).
[229]Paul Lam, 'Hong Kong is leveraging its many advantage' [2022] < snews.gov.hk - HK is leveraging its many advantages>accessed 09/05/2023.
[230] Paul Lam, 'Hong Kong is levering its many advantages' (n 229).
[231] Paul Lam, 'Hong Kong is levering its many advantages' (n 229).
[232] Paul Lam, 'Hong Kong is levering its many advantages' (n 229).
[233] Paul Lam, 'Hong Kong is levering its many advantages' (n 229).

various stakeholders within Hong Kong such that the universities, professionals and judiciary, will have effective communication for continuously improving commercial arbitration.[234]

4.5 Conclusion

In conclusion, this chapter highlighted that the Lesotho Act is outdated, compared with the statutes of Singapore, Egypt and Hong Kong, respectively. It has also been confirmed that the success of commercial arbitration, law and practice in the above-mentioned countries was resulted from harmonised commercial arbitration laws with Model Law. The statutes included aspects which conform to the changing international trade practices to avoid challenges of arbitral awards. The chapter established that efficacy of the commercial arbitration, law and practice is attainable if the business community is sensitised to the mechanism, and supported by the courts, government as well as by the legal profession. Such strategic role players have been observed elsewhere as contributing factors towards achieving efficacy. Even most importantly, the study has confirmed that regulation of arbitrators could boost the success of commercial arbitration, as a result of which confidence and trust in the mechanism could be ensured.

[234] Paul Lam, 'Hong Kong is levering its many advantages' (n 229).

Chapter 5: Conclusion and Recommendations of the Study

5.1 Introduction

In the first place, as noted earlier, the study set out to investigate challenges that hinder efficacy of the commercial arbitration, law and practice in Lesotho. The study examined whether legal frame work meet the standards of commercial arbitration law. Lack of education to business community about the mechanism, support of courts and regulation of arbitrators were also areas of investigation. Impact of lack of support from government and legal practitioners was examined. The chapter summarises the main findings of the study that study obtained from research and data employed. Recommendations will then be outlined.

5.2 Conclusion

The study has generally discovered that efficacy of commercial arbitration law and practice is affected by outdated law which does not conform to the UNCITRAL Model Law on International Commercial Arbitration, support of courts which is affected by weaknesses of some of the provisions of the law. The study also discovered that government does not make efforts to enhance efficacy. Also little education for the public and lack of regulation of arbitrators have become the biggest obstacle. The suggestions to avert the problem are articulated in this chapter. These findings are discussed in details in the following paragraph.

Several findings are drawn from this study, of the main relates to the fact that provisions of the law in Lesotho do not cohere with some of the best international standards and practices, thus derailing efficacy of the commercial arbitration practice in the country. The provisions that defines arbitration agreement has important elements that are generally provided for by statutes of jurisdictions stated in Chapter 4 which are aligned with the UNCITRAL Model Law on the International Commercial Arbitration 1985. The definition of arbitration agreement as provided by the Lesotho Act is very narrow. It overlooks important aspects which

include the recent mode of communication. The world has evolved and the use of technology demands that laws should embrace recent international trade practices. Further, the world has moved into an electronic commerce, thus necessitating commercial arbitration laws to regulate all transactions online and offline.

Furthermore, the provision that provide for stay is improperly couched, a stay of proceedings pending arbitration proceedings interferes with the tenet of the jurisdiction. It demands the courts indirectly to assume a jurisdiction where there is an arbitration clause. It forces the respondent in an action before the court to file an application for a stay of proceedings, even where a jurisdiction is raised. Some of the courts interpreted it to mean that a party cannot raise the defence of jurisdiction without filing application for a stay of proceedings even where the arbitration clause is not inoperative, incapable of being performed or against the public policy. This section causes parties to engage in a long route of litigation before they are referred to arbitration, the aspect which the parties were trying to avoid by entering into an arbitration agreement.

The study also discovered that the Act bears no provisions regulating the conduct of arbitrators and the reasons for which arbitrators can be questioned for any suspicious misconduct from the point throughout their engagement in arbitration. The absence of such a provision puts the mechanism at the risk of being undermined and mistrusted. The arbitrators' ethics should be the same as that of the Judges so that the users can have confidence in the mechanism like they would with the courts of law. Arbitrators, on the other hand, should know that there is a law which binds them to conduct themselves in a legally acceptable manner in carrying out their professional duties.

The study revealed that grounds for setting aside the arbitral awards are limited, nor are they fully explained in the Act. The courts refer to other jurisdictions when faced

with determining the same issue. Further void in the law are provisions which give the tribunal powers to determine whether it has authority over a certain dispute submitted before it. The matter has to go to court for determination of a tribunal's power to hear such disputes. Such a practice causes a delay and exacerbates expenses for both parties, an act which defeats the purpose of arbitration. The provisions viewing an arbitration agreement as a stand-alone contract and remaining existent even when the main contract has ended, are not captured in the law.

The study uncovered that good or bad law alone cannot be the only factor that promotes efficacy of the commercial arbitration, law and practice. It has been discovered that it is through vigorous concerted commitment and efforts of all relevant actors that the goal can be achieved, further carefully regulating arbitrators and investment of skilled expertise. The government of Lesotho is a prime actor in the efficacy of commercial arbitration practice but it does not play this important role by ensuring that the new law is promulgated. Also notable is that government sources the services of foreign arbitrators when having disputes to go for arbitration. As part of their responsibility for ensuring local expertise in arbitration practices, the government should have the already available local arbitrators go for training and keep abreast of the twenty-first century developments as noted elsewhere, particularly Southeast Asia and North Africa.

Another discovery is that government legal representatives and legal officers are not being offered training opportunities. In cases where such funding from government has been offered, turned out to be biased towards some senior officials. These officers go outside the country, to South Africa for such training while there is local expertise that can assist in such training. There are no governmental policies in place to conduct awareness campaigns about the mechanism and collaboration with the Lesotho Chamber of Commerce to educate the business community on a regular basis.

Interestingly, the government has been noted for entering into contracts with big foreign companies which have arbitration agreements. However, for the most part, the government would agree to the terms whose applicable laws are foreign thereby rendering the country subject to the seat, arbitrators and rules of foreign countries. With this state of affairs, the government could be viewed as obliged to develop the mechanism in the country to avoid choosing other countries which have good developments of the commercial arbitration, law and practice.

Other observations from the study include limited support for the legal profession regarding the mechanism, with some lawyers unfamiliar with readily available local arbitrators. As such, there is lack of motivation for people to go for arbitration because it is not accessible.

5.2 Recommendations

Like any other studies, this research would conclude with making some recommendations for consideration by the legal fraternity, and any other interest groups, both inside and outside the country. While the study may not necessarily claim generalisability of its findings, it is prudent to recommend that '*urgent'* reforms on law to align it with the UNCITRAL Model Law on International Commercial Arbitration be considered. Two statutes to regulate domestic and international commercial arbitration should be enacted to govern both domestic and international commercial arbitration. The internationally acclaimed success stories of Singapore, Hong Kong and Egypt, regarding their legal efficacy, achievements and practices could help to boost Lesotho's commercial arbitration practices. On this basis, the provisions defining arbitration agreement could be in line with the use of technology and other means of communication.

The updated law will also assist the courts of Lesotho to promote efficacy with more passion than they do. The fact that they have to refer to other jurisdictions causes uncertainty because they may have differing views. Commercial arbitration is intended to assist the courts in the administration of justice. Courts should consistently actively partake in litigation and other ways to advocate commercial arbitration. The Chief Justice, in performing his or her administrative duties, should include strategies that can assist in promoting efficacy of the commercial arbitration, law and practice. Rules of the courts, High Court and Subordinate courts must prioritise matters relating to arbitration. In conducting meetings, trainings, the Chief Justice and his officers must commit themselves to informing the audience about the mechanism, with the magistrates also having to be educated about commercial arbitration in relation to their work including ways of information dissemination.

The Court of Appeal President may stress the importance of arbitration in his or her opening and closing speeches of the Court of Appeal sessions. The echo coming from the Apex Court would be louder and reach almost all the corners of the Lesotho and out to the International community. This would be another fast way of sensitisation.

The provision in relation to a stay of proceedings should be amended to include that the application be filed after filing of an intention to oppose but before filing of pleadings on merits of the case or other points of law except a point of jurisdiction. The reason being that a jurisdiction empowers any court to act on the case so this will prevent an interference because the court will just refer the matter for arbitration after hearing the argument on the point of law of jurisdiction. This will save parties more expenses and time to engage in other litigation processes.

Efficacy of the commercial arbitration practice can only be achieved if people have confidence in the mechanism. The regulation of arbitrators would give assurance to the users that their disputes will be dealt with by unbiased, independent and impartial arbitrators. It is recommended that there should be a regulation in the Act which specifically details arbitrators' obligations and duties throughout the proceedings and a statute should also mandate the Association of Arbitrators to have a code of ethics which will instil discipline and empower the Association to take strict measures against any arbitrators who conduct themselves in an unbecoming manner during and after the proceedings. The citizens of Lesotho know litigation through courts as the only reliable means of resolving disputes. So the conduct of arbitrators must be regulated just like that of the Judges.

Regarding the role of the government of Lesotho, the recommendation is that of establishing the Arbitration Committee which could collaborate with the following organs: The Judiciary, Association of Arbitrators of Lesotho, Chamber of Commerce, Law Society and National University of Lesotho, through the Faculty of Law, to work together addressing all the challenges, and thus considering suggestions and promptly advising the government for implementing workable inputs with urgency. The mandate of the committee should start with facilitating enactment of new legislation. For other challenges arising from any institution represented in the committee, recommendations could be for the committee to have such an institution resolve issues urgently. The newly formed association of arbitrators should chair that committee because it has more vested interest in the efficacy of the commercial arbitration, law and practice than any other institution. Therefore, it will ensure that issues are attended to urgently.

The Government of Lesotho is recommended to use local expertise in its disputes even if it engages foreign arbitrators. This is how local arbitrators will have exposure and grow in arbitration for the benefit of the country. Noting that some of the government legal officers go to South Africa for arbitration training, the

government is further recommended to use local qualified arbitrators to conduct such training workshops or sessions. In this way, the government would also reduce costs for accommodation and per diems while simultaneously empowering its own professionals.

The government can also invest in developing future expertise on arbitration by encouraging young lawyers to enrol for such programmes, for which sponsorship should be granted both locally and internationally, and of course, with a particular focus on specialised areas not being offered locally.

With the proposal for the arbitration be treated as a profession, the Act must have provision that will establish a body of arbitrators. Such establishments could exist as Association of Arbitrators or any other name that will be responsible for issues relating to arbitration just like the Law Society. The body could thus be mandated to make its rules of procedures and code of ethics.

It is further recommended that when entering into contracts with foreign companies which have arbitration clauses, the government must ensure appointing local arbitrators and counsels to team up with arbitrators appointed from other jurisdictions, even if the law and seat are of a foreign country. The government must always negotiate and select a jurisdiction of the courts of Lesotho to which the jurisdiction parties will be subjected, to avoid many expenses of travelling and having to consult foreign arbitrators for a track record of the disputes. On the whole, drawing on the findings of such case studies as this one, and, of course, also considering further research on the phenomena, the Lesotho government and other stakeholders would better advise themselves, particularly on Commercial Arbitration practices so as to keep abreast of the 21st-century practices, as noted elsewhere by this study.

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