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The Impact of Arbitration Referrals in South Africa's Petroleum Industry

by

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Declaration of originality

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ABSTRACT

This paper focuses on how effective referrals of disputes resolved through arbitration in the petroleum industry as provided for in section 12B of the Petroleum Products Act 120 of 1977 (PPA) are, and the impact of the court cases associated with section 12B of the PPA on the regulation of contractual disputes between oil companies and retailers in South Africa's petroleum industry. Section 12B of the PPA makes provision for the resolution of disputes between oil companies and retailers through arbitration. Most franchise agreements between oil companies and retailers are such that the oil company supplies petroleum products to the retailer and allows the retailer to use its branding to operate a filling station. Disputes often arise when the oil company or retailer have breached any of the clauses in the franchise agreement, leading to a breakdown in the contractual relationship. Disputes still end up in court, and even with the option of resolution through arbitration, parties approach the court before and after the arbitrator has made the award. The main research question investigated in the dissertation is: How effective are arbitration referrals in resolving disputes in South Africa's petroleum industry by the Controller of Petroleum Products? And can the relevant court judgements assist the Controller of Petroleum Products in making policy changes to improve arbitration laws in the petroleum industry?

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List of Abbreviations

PPA - Petroleum Products Act

POPIA - Protection of Personal Information Act

UNCITRAL - United Nations Commission on International Trade Law

SCA - Supreme Court of Appeal

PAJA - Promotion of Administrative Justice Act

Table of Contents

DECLARATION OF ORIGINALITY	I
ABSTRACT.....	II
ACKNOWLEDGEMENTS.....	III
LIST OF ABBREVIATIONS.....	IV
CHAPTER 1.....	1
1 INTRODUCTION.....	1
1.1 Background on Arbitration	2
1.2 Research Problem	5
1.3 Purpose of The Study.....	5
1.4 Research Question.....	5
1.5 Hypothesis.....	5
1.6 Methodology	6
1.7 Conclusion	6
1.8 Chapter Outline.....	7
CHAPTER 2.....	8
2 ARBITRATION.....	8
2.1 Section 12B Arbitration Referrals in South Africa's Petroleum Industry: Case Law.....	8
2.2 An Analysis of Section 12B Arbitration Cases	8
2.2.1 Mfoza Service Station v Engen Petroleum.....	8
i. Brief facts of the case.....	9
ii. Constitutional Court Judgement.....	9
iii. Analysis of the case	10
2.2.2 Crompton Street Motors v Bright Idea Projects	11
i. Brief facts of the case.....	11
ii. Constitutional Court Judgement.....	12
iii. Analysis of the case	13
2.2.3 Rissik Street One Stop CC t/a Rissik Street Engen v Engen Petroleum Ltd	14
i. Brief facts of the case.....	14
ii. Constitutional Court Judgement.....	15
iii. Analysis of the case	16
2.2.4 Chamdor Service Station CC v Controller of Petroleum Products.....	17
i. Brief facts of the case.....	17
ii. High Court Judgement	18
iii. Analysis of the case	18
2.2.5 Business Zone 1010 CC t/a Emmarentia Convenience Centre v Engen Petroleum Limited.....	19
i. Brief facts of the case.....	20
ii. The court decisions	20

iii.	Analysis of the case	21
2.3	Enforceability of Awards in Commercial Contracts	21
2.4	Conclusion	22
CHAPTER 3		24
3	POLICY CONSIDERATIONS AND RECOMMENDATIONS	24
3.1	Existing Arbitration Legislation in South Africa’s Petroleum Industry	24
3.1.1	The Arbitration Act	25
i.	Section 3: The binding effect of arbitration agreements and power of the court.....	25
ii.	Section 6: Stay of legal proceedings	25
3.1.2	The International Arbitration Act.....	26
i.	Section 7: Matters subject to international commercial arbitration	27
ii.	Section 10: Consolidation of arbitral proceedings and concurrent hearings	28
iii.	Section 11: Confidentiality of arbitral proceedings.....	28
3.1.3	The PPA.....	29
3.1.4	The UNCITRAL Model Law.....	30
3.2	Policy Recommendations.....	32
3.2.1	Recommendation 1: Development of Section 12B Arbitration Regulations	33
3.2.2	Recommendation 2: Amendment of Section 12B of the PPA.....	33
3.2.3	Recommendation 3: Regular updates of arbitration laws and policies	35
3.3	Conclusion	36
CHAPTER 4		37
4	CONCLUSION	37
BIBLIOGRAPHY		1

CHAPTER 1

1 INTRODUCTION

The economic growth of the countries in Sub-Saharan Africa is largely dependent on their petroleum industry; the changes in the oil price significantly affect the supply of petroleum products in such countries.¹ The petroleum industry in South Africa is primarily centred around big oil companies (wholesalers) which are suppliers of petroleum products. Wholesalers enter into franchise agreements with retailers that operate the actual filling stations and petrol stations strategically situated in different areas of the country to supply fuel. Retailers enter into franchise agreements to operate businesses as filling stations, utilising the specific branding of an oil company and purchasing its petroleum products for sale to end users, including motorists.²

Disputes often arise due to breaches of the franchise agreement between the oil company who is the franchisor, and the retailer who is the franchisee. The primary legislation governing this relationship between oil companies and retailers is the Petroleum Products Act (as amended) (PPA).³ The PPA establishes a specific mechanism for resolving disputes between oil companies and retailers in the petroleum industry, namely arbitration. Parties are required to adhere to particular procedures to access this dispute resolution mechanism, as explicitly delineated in the PPA.⁴

Section 12B of the PPA⁵ sets out grounds for a party to approach the Controller of Petroleum Products to have a dispute referred to arbitration for resolution purposes. Many disputes referred to arbitration in accordance with the PPA have ended up in court for judicial review;

¹ WG Mathews 'Opportunities and Challenges for Petroleum and LPG Markets in Sub Saharan Africa' (2014) 64 *Energy Policy* 78.

² Franchising Plus 'The Fuel Industry and Franchising' 19 July 2019, <https://www.franchisingplus.co.za/the-fuel-industry-and-franchising/> (Accessed 11 August 2024).

³The Petroleum Products Act 120 of 1977 as amended by the Petroleum Products Act 58 of 2003 (hereinafter 'PPA').

⁴ DM Pool 'Arbitration in terms of section 12B of the Petroleum Products Amendment Act' 1 May 2021, <https://www.derebus.org.za/tag/arbitration-in-terms-of-s-12b-of-the-petroleum-products-amendment-act> (accessed 17 May 2023).

⁵Section 12B of the PPA (note 3 above).

the judgements in such court cases have significantly impacted arbitration referrals in terms of section 12B of the PPA. In the significant court case of the *Business Zone 1010 CC t/a Emmarentia Convenience Centre v Engen Petroleum Limited*⁶ (*Business Zone*), the Constitutional Court stated the following:

*'Section 12B (1) requires a low discretionary threshold in that the only jurisdictional requirement for the Controller to make a referral under section 12B (1) is an allegation by a licensed retailer that a licensed wholesaler, or vice versa, has committed an unfair or an unreasonable contractual practice. It does not require the "proving", "demonstrating", or "showing" of an unfair or unreasonable contractual practice and the Controller need only satisfy himself to the existence of such an allegation and must accordingly limit his interrogation of the merits of the dispute to the extent required to establish the allegation's existence. The Controller should then refer the matter to arbitration.'*⁷

Business Zone significantly impacted the Controller of Petroleum Products' discretion, as he was restricted from assessing the dispute the parties had in a contract before him and from making any further determinations. Subsequent to this judgement, the Controller of Petroleum Products had to refer any request for arbitration before him without having to 'dig deep' into the allegations made by the requester and the response thereof by the other party against whom the allegations are made. To a certain extent, this court case stripped the Controller of Petroleum Products of the powers accorded to him as per section 12B of the PPA.

This research focuses on the impact of judicial reviews of section 12B of the PPA arbitration cases on regulating contractual disputes between oil companies and retailers in South Africa's petroleum industry. The dissertation explores how effective arbitration is as a dispute resolution method in resolving disputes between the parties in a franchise agreement and how the awards and judicial review thereof can improve policies used to regulate the resolution of disputes in South Africa's petroleum industry.

1.1 Background on Arbitration

History shows us that, in South Africa, communities in rural areas bestowed chiefs with the role of resolving disputes that had risen in a particular community that recognises and practices

⁶*Business Zone 1010 CC t/a Emmarentia Convenience Centre v Engen Petroleum Limited* 2017 ZACC 2 (hereinafter '*Business Zone*').

⁷ *Business Zone* (note 6 above) para 23 & 97.

their tradition and customs. The chiefs in the traditional communities took up the role of arbitrators.⁸ The Colonizers' ways were imposed on South Africans, including those traditional communities in the rural areas who held their cultural practices in high regard. This influence by the West extended to our laws, significantly transforming the South African legal system. Arbitration in South Africa is a recognised dispute resolution method and has elements of Roman-Dutch Law and English Law.⁹

Arbitration in its original African traditional form and its modern form, as influenced by the West, has similar characteristics, and the main objective is resolving disputes.¹⁰ Law scholars in Africa hold different views on whether arbitration is founded on common law or civil law, particularly regarding the element of the privacy of the proceedings.¹¹

There is an alleged racist element of “nonverbal and intercultural” in the South African legal system, and this particular long-lasting element of racism in the legal system has prevented South Africa from being the ‘centre’ for arbitration on the African continent.¹² The common occurrence in arbitration cases in South Africa is that when a ‘black’ arbitrator is appointed to preside over arbitration proceedings, there are often delays, which has led to a certain degree of reluctance to resolve disputes in international commercial matters through arbitration in South Africa.¹³

The PPA and case law regulate arbitration proceedings in South Africa’s petroleum industry. Court judgements in relation to section 12B of the PPA arbitration matters will form a significant part of this research to fully explore the impact of arbitration referrals by the Controller of Petroleum Products in South Africa’s petroleum industry. There are various pieces of legislation that regulate arbitration proceedings in various sectors; however, the Arbitration Act¹⁴ is the primary legislation regulating arbitration procedures in South Africa.

⁸ DP Rantsane ‘The Origin of Arbitration Law in South Africa’ (2020) 23 *PER/PE Law Journal* 1.

⁹ Rantsane (note 8 above) 1.

¹⁰ Rantsane (note 8 above) 1.

¹¹ E Onyema ‘The Role of African Courts and Judges in Arbitration’ in E Onyema *Rethinking the Role of African National Courts in Arbitration* (2018) *Netherlands: Kluwer* 3-37.

¹² S Temkin ‘Racist View hits Arbitration’ (2008) *Business Day (South Africa)* 7-8.

¹³ Temkin (note 12 above).

¹⁴ The Arbitration Act 42 of 1965 (hereinafter, ‘Arbitration Act’).

As influenced by English Law, the Arbitration Act is the primary legislation regulating arbitration in South Africa; it governs arbitration proceedings in domestic and international matters.¹⁵

A large number of African states have started transforming themselves by becoming ‘arbitration-friendly’ regarding disputes that arise in commercial contracts and disputes that arise in international commercial contracts. Arbitration proceedings are of a private nature as opposed to court proceedings, which is one of the main reasons such proceedings are the preferred choice when resolving commercial contractual disputes.¹⁶

One of the fundamental advantages of arbitration as a dispute resolution mechanism is the privacy element; the procedure is private upon disputants agreeing to use this method of dispute resolution and appointing an arbitrator who will facilitate the proceedings.¹⁷ The arbitrator not only establishes the rules that will be followed from the beginning of the proceedings right until the end but also determines the laws that will be applicable in resolving a dispute.¹⁸ Arbitration is a universally preferred dispute resolution method, particularly in resolving disputes arising in ‘commercial contracts.’¹⁹

The six well-known oil companies in South Africa’s petroleum industry that are franchisors that enter into franchise agreements with franchisees operating petrol stations across the country are ‘TOTAL, SHELL, ENGEN, SASOL, BP, and CALTEX.’²⁰

Most franchise agreements between oil companies and retailers are such that the oil company supplies petroleum products to the retailer and allows the retailer to use its branding to operate

¹⁵ B Coutsoudis ‘UNCITRAL Instruments in Southern Africa’ (1999) 30 *De Rebus* 1.

¹⁶ AI Chukwuemerie ‘Arbitration and Human Rights in Africa’ (2007) 7(1) *African Human Rights Journal* 103.

¹⁷ EC Schlemmer ‘Arbitration with the State in South Africa or not?’ (2022) (2) *Journal of South African Law* 310.

¹⁸ Schlemmer (note 17 above) 310.

¹⁹ MA Haqmal *et al* ‘The Need, Development and Benefits of Commercial Arbitration in Afghanistan’ (2024) 3(1) *American Journal of Business and Strategic Management* 1.

²⁰ SA Franchise Brands ‘There are different options to franchise a petrol station in South Africa, but the price will inevitably be dependent on a variety of factors’ 25 April 2022, <https://www.safranchisebrands.co.za/article/how-much-is-a-petrol-station-franchise-in-south-africa/> (accessed 20 September 2024).

a filling station. Disputes often arise when the oil company or retailer have breached any of the clauses in the franchise agreement, leading to a breakdown in the contractual relationship.²¹

Section 12B of the PPA provides a method to resolve disputes between oil companies and retailers in South Africa's petroleum industry. Section 12B referrals have ended up in court, wherein the courts have extensively interpreted the meaning of this provision and the objectives it seeks to achieve.

1.2 Research Problem

The referral of disputes to arbitration by the Controller of Petroleum Products in terms of section 12B of the PPA, between oil companies who are franchisors and retailers who are franchisees in South Africa's petroleum industry does not seem to be effective. The awards by arbitrators are often challenged through judicial review.

1.3 Purpose of The Study

This research is undertaken to establish how effective referrals of disputes resolved through arbitration in the petroleum industry as provided for in section 12B of the PPA are, and the impact of the court cases associated with such section 12B referrals.

1.4 Research Question

How effective are arbitration referrals in resolving disputes in South Africa's petroleum industry by the Controller of Petroleum Products? And can the relevant court judgements assist the Controller of Petroleum Products in making policy changes to improve arbitration laws in the petroleum industry?

1.5 Hypothesis

²¹Pool (note 4 above).

Referrals of disputes to arbitration as provided for in section 12B of the PPA by the Controller of Petroleum Products are not effective and do not contribute to the improvement of policies and laws for regulation purposes.

1.6 Methodology

A doctrinal research method will be used when conducting this study, which will include a collection of data and past research findings. Court judgements and legislation will form a significant part of the data to be collected, and direct observations by the researcher will also be incorporated into the study.

1.7 Conclusion

Arbitration as a dispute resolution technique is not new to Africans, as this method has been employed for years to resolve disputes in traditional communities. Arbitration in its original African traditional form and its modern form, as influenced by the West, has similar characteristics, and the main objective is resolving disputes.²²

It is important to note that the authors quoted above have pointed out that arbitration is often used to resolve disputes in commercial contracts, and one of the main reasons is to restore contractual relationships between parties for the purpose of continuation.

There are frequent breaches of franchise agreements between oil companies and retailers who operate filling stations and supply petroleum products to end users. In these breaches, disputes arise and require arbitration as a mechanism for resolving such disputes.

The PPA makes provision for arbitration referrals by the Controller of Petroleum Products for disputes arising between oil companies and retailers. Whether such arbitration referrals are effective and whether judicial reviews of the arbitral awards handed by arbitrators can influence policy changes that will enable the regulator of the petroleum industry to better regulate and enforce compliance will be determined at the end of this study. Awards handed by arbitrators

²²Rantsane (note 8 above) 1.

in disputes between oil companies and retailers often end up in court for judicial review. Therefore, this warrants a discussion of such cases to achieve this study's objective.

1.8 Chapter Outline

The **first chapter** serves as an introduction chapter and outlines the research objectives, the problem statement, and a brief background of dispute resolution through arbitration in the petroleum industry.

The **second chapter** addresses section 12B Arbitration Referrals in South Africa's Petroleum Industry: Case Law. A comprehensive discussion of relevant court cases regarding arbitration in the petroleum industry in relation to the research problem.

The **third chapter** addresses policy considerations and recommendations. A brief discussion of existing laws and policies regulating arbitration in the petroleum industry and recommendations on policy adjustments in respect of arbitration in the petroleum industry in addressing the research questions.

The **fourth chapter** provides an overview of chapters 1-3 and concludes.

CHAPTER 2

2 ARBITRATION

Arbitration is still considered as the main method of resolving conflict arising from contractual disputes globally. The principles regulating arbitration have swiftly evolved aligning with the global economic growth, from the rules that govern the significant autonomous element of arbitration to the resolution of a dispute without obstacles nationally and internationally.²³ The contractual dispute between the oil company and retailer of a filling station is regulated by section 12B of the PPA in order to ensure fairness and prevent “unequal bargaining power” that may arise from a contract in the form of a franchise agreement.²⁴

It is not only important to discuss the judgements of court cases in relation to section 12B of the PPA, but also to discuss the impact that such judgements have had on arbitration matters relating to franchise agreements in South Africa’s petroleum industry.

2.1 Section 12B Arbitration Referrals in South Africa's Petroleum Industry: Case Law

Many disputes referred to arbitration in relation to section 12B of the PPA have ultimately been brought before the court for judicial review; the decisions made in such court cases have significantly impacted the referrals of arbitration in accordance with section 12B of the PPA.

2.2 An Analysis of Section 12B Arbitration Cases

2.2.1 Mfoza Service Station v Engen Petroleum

In the case of *Mfoza Service Station (Pty) Ltd v Engen Petroleum Ltd*²⁵ (*Mfoza*), the Constitutional Court was tasked with reviewing the judgement of the Supreme Court of Appeal

²³MS Al-Qaaida ‘Arbitration of Oil Contracts of Oil-Producing Arab Countries’ (2020) 9(2) *Journal of Social Sciences* 395.

²⁴Pool (note 4 above).

²⁵*Mfoza Service Station (Pty) Ltd v Engen Petroleum Ltd* 2023 ZACC 3 (hereinafter, ‘*Mfoza*’).

which dismissed the judgement of the High Court upon appeal, and set aside the award by the arbitrator.

i. Brief facts of the case

A lease and franchise agreement existed between Mfoza Service Station (Pty) Ltd (Mfoza) and Engen Petroleum Ltd (Engen), wherein Mfoza retailed petroleum products on the premises leased by Engen. Engen was also the wholesaler supplying Mfoza with petroleum products. Mfoza approached the Controller of Petroleum Products, alleging a breach of contract on the side of Engen and requesting the Controller of Petroleum Products to refer the matter to arbitration. The request to have the dispute referred to arbitration was successful and was accordingly referred. The arbitrator made an award in favour of Mfoza; the award was a monetary compensation to Mfoza and a dismissal of Engen's objections. Engen approached the High Court to have the arbitrator's award reviewed, and the High Court was of the opinion that the arbitrator 'exceeded his powers' as an arbitrator in making such an award.²⁶

The High Court stated that the main objective of section 12B of the PPA was to deal with the prejudice often faced by the retailer in similar circumstances, where the wholesaler is in a more powerful position and that the arbitrator did indeed 'exceed his powers' in awarding monetary damages to Mfoza. The High Court ruled in favour of Engen and further stated that the arbitrator should not have issued an award of monetary claim in favour of Mfoza, as that was beyond the scope of the arbitrator. The High Court further stated that section 12B of the PPA limits the scope of the arbitrator in determining whether there was unfair and unreasonable contractual practice by either party to the contract. Mfoza's leave to appeal was thrown out by the High Court and Supreme Court of Appeal. Mfoza approached the Constitutional Court, stating that the case was in the interest of the public and justice, which Engen objected to. The Constitutional Court found that it does indeed have jurisdiction to preside over the case.²⁷

ii. Constitutional Court Judgement

The Constitutional Court found that the powers of an arbitrator invoked by section 12B of the PPA are to issue an award for 'unfair and unreasonable' contractual practice by either of the

²⁶*Mfoza* (note 25 above) para 2-13.

²⁷*Mfoza* (note 25 above) para 14-15.

parties to the contract. The Constitutional Court was also of the opinion that the arbitrator cannot award damages and compensation but reinstate the relationship between the parties and, therefore, confirmed the judgement by the High Court to set aside the award by the arbitrator.²⁸

iii. Analysis of the case

It is, firstly, important to note that the powers of the arbitrator in terms of section 12B of the PPA were the focal point in this court case. Section 12B of the PPA seeks to grant an aggrieved party in a contract to have their dispute referred to arbitration and resolved accordingly. This provision caters to parties in the petroleum industry who have entered into franchise agreements. It is of great importance to point out that the franchisee is, at most times, the party who is aggrieved and who approaches the Controller of Petroleum Products to have the dispute with the franchisor referred to arbitration, as the franchisee at most times has less power than the franchisor and therefore disadvantaged.

When parties enter into a contract, a relationship is created. Such a contract creates rights and obligations, and any breach of a clause in the contract by a party can cause significant losses to the other party. In this particular case, Mfoza alleged that it suffered damages due to Engen's breach of contract. The arbitrator in this matter issued an award in Mfoza's favour, which Engen was dissatisfied with, and approached the High Court to have the award issued by the arbitrator reviewed.

The High Court's ruling to have the arbitrator's award overturned based on the arbitrator's powers being exceeded, referred to as *ultra vires*, is questionable. In terms of section 12B(4)(a) of the PPA, the arbitrator shall determine –

*'Whether the alleged contractual practices concerned are unfair and unreasonable, and if so, shall make such award as he or she deems necessary to correct such a practice.'*²⁹

This provision stipulates that the arbitrator can issue an award as they deem necessary. As a result of that, if Mfoza alleges that it has suffered damages as a result of Engen's unfair and unreasonable contractual practice, the arbitrator presiding over the proceedings can make a finding that Engen's contractual practice was either unjust and unreasonable or the opposite.

²⁸Mfoza (note 25 above) para 56.

²⁹Section 12B(4)(a) of the PPA (note 3 above).

Suppose the arbitrator, upon assessing all the facts before him, reaches a conclusion that Engen's contractual practice was indeed unfair and unreasonable, and Mfoza suffered a loss in this regard Mfoza is therefore entitled to claim damages. In that case, the arbitrator should have powers to make an award accordingly. Therefore, it can be concluded that the arbitrator decided within his powers and issued the award accordingly.

The judgement in *Mfoza*³⁰ had a significant impact on the powers of the arbitrator in section 12B cases; perhaps the words in section 12B(4) of the PPA, 'the arbitrator shall make a determination whether the alleged contractual practice was unfair and unreasonable,' are restrictive, as both the High Court and Constitutional Court were of the opinion that the arbitrator exceeded his power in issuing an award for damages suffered by Mfoza. An amendment of the section should then be affected, for the arbitrator's powers to be clearly stated with restrictions upon pronouncing a value to damages.

2.2.2 Crompton Street Motors v Bright Idea Projects

The case *Crompton Street Motors v Bright Idea Projects 66 (Pty) Ltd*³¹ (*Crompton*) was a significant contribution to the present argument. In this case, the court had to determine whether a section 12B arbitration referral impacts court proceedings already instituted by the parties in a franchise agreement.

i. Brief facts of the case

Crompton Street Motors (Crompton) entered into a Lease and Franchise agreement with Chevron South Africa (Pty) Ltd (Chevron) to operate a CALTEX service station commencing in February 2003 and ending on 28 February 2018. On or about 27 August 2017, Chevron notified Crompton that the lease and franchise agreement would end in February 2018, as provided in the contract. As a result, Crompton was to evacuate the premises where it was operating a filling station. Crompton responded to the notification of termination by Chevron by refusing to evacuate the relevant premises and informing Chevron that it intends to approach

³⁰*Mfoza* (note 25 above).

³¹*Crompton Street Motors v Bright Idea Projects 66 (Pty) Ltd* 2021 ZACC 24 (hereinafter '*Crompton*').

the Controller of Petroleum Products to have the matter referred to arbitration in terms of section 12B.³²

In February 2018, Chevron approached the High Court for an application to evacuate Crompton from the relevant premises. However, Crompton lodged a counter application to the High Court seeking an order by the court to enter into a further 5-year franchise agreement with Chevron commencing on the 1st of March 2018. During these court proceedings, Crompton approached the Controller to have its dispute with Chevron referred to arbitration in terms of section 12B of the PPA on the grounds that Chevron's contractual practice was unfair and unreasonable by refusing to enter into another franchise agreement. Crompton submitted its defence and filed answering affidavits to have a stay of the court proceedings.³³

The High Court stated that Crompton did not follow procedures according to section 6(1) of the Arbitration Act, as Crompton was supposed to have made its intention to oppose Chevron's court application of evacuation prior to approaching the Court to have proceedings stayed. Therefore, as a result, the High Court refused to have court proceedings stayed on the grounds that the agreement between Chevron and Crompton had expired and therefore staying proceedings would be a waste of time and money. Crompton was accordingly evicted as ordered by the High Court and appealed the judgement. The Supreme Court of Appeal dismissed Crompton's application for leave to appeal. Crompton approached the Constitutional Court and based its argument on the fact that the High Court was not competent in making a ruling relating to the matter, as an application in terms of section 12B of the PPA to have the matter referred to arbitration was lodged with the Controller, and that therefore warranted a stay of court proceedings.³⁴

ii. Constitutional Court Judgement

The Constitutional Court allowed Crompton's appeal; the appeal was, however, dismissed based on the following: Referral to arbitration in accordance with section 12B of the PPA is not the only method to have the dispute between the parties resolved, parties have the option to approach the High Court and therefore the High Court correctly ruled by not having court

³² *Crompton* (note 31 above) para 2-5.

³³ *Crompton* (note 31 above) para 6-8.

³⁴ *Crompton* (note 31 above) para 9-14.

proceedings stayed. The Court importantly pointed out that the lease and franchise agreement had a fixed expiration date, and Crompton should have approached the Controller of Petroleum Products to have the matter referred to arbitration for the determination of fairness during the period of the agreement. Chevron timeously notified Crompton that it would not renew the agreement and that the agreement would be terminated accordingly. Crompton should have approached the Controller of Petroleum Products in terms of section 12B of the PPA during the five months of being notified that the Lease and Franchise agreement would not be renewed but failed to do so and only approached the Controller of Petroleum Products requesting a referral to arbitration six days prior the expiration of the Lease and Franchise agreement.³⁵

iii. Analysis of the case

In this court case, it was important for the courts to determine whether the dispute between Crompton and Chevron should be resolved through arbitration in terms of section 12B as per Crompton's request before the dispute could be referred to the High Court. Crompton wanted to have Chevron's court application of eviction from the premises due to the termination of the lease and franchise agreement suspended until the matter was resolved through arbitration in terms of section 12B of the PPA.

Crompton was correct in approaching the Controller of Petroleum Products, requesting a section 12B of the PPA referral to resolve the dispute through arbitration; however, the time when the request was made was contentious. From the time Chevron notified Crompton that it would not be renewing the lease and franchise agreement, Crompton was supposed to have approached the Controller of Petroleum Products to have the case referred to arbitration in terms of section 12B on the grounds of 'unreasonable and unfair contractual practice' by Chevron. Chevron notified Crompton that it would not renew the lease and franchise agreement five months before the lapsing of the agreement, which is a reasonable period of time for notification. The lease and franchise agreement between Chevron and Crompton stipulated the lapsing date. As a result, Chevron was within its right to approach the High Court to have Crompton evacuated from its premises, which Crompton thought was unreasonable and unfair. This then raises the question of whether the parties included a clause in their lease and franchise

³⁵ *Crompton* (note 31 above) para 49-59.

agreement that provides a method to resolve conflicts that may occur during their contractual relationship. If such a clause had indeed been included in the agreement and the details of the procedures thereof clearly stated, this would have eliminated a lot of unnecessary inconveniences for both parties.

Both the High Court and the Constitutional Court declined to stay court proceedings pending a section 12B request to the Controller of Petroleum Products by Crompton to resolve the dispute through arbitration. Section 12B of the PPA was specifically created to allow parties such as Crompton and Chevron to have their dispute resolved through arbitration as opposed to parties approaching the court. The court is usually approached when either party is dissatisfied with the arbitrator's award, and the court reviews such an award. Had Crompton not waited six days before the lapsing of the lease and franchise agreement to request a referral of the dispute to arbitration but approached the Controller of Petroleum Products five months before the lapsing of the agreement when Chevron served Crompton with the termination notification, there would have been a different turn of events.

2.2.3 Rissik Street One Stop CC t/a Rissik Street Engen v Engen Petroleum Ltd

The court case of *Rissik Street One Stop CC t/a Rissik Street Engen and Another v Engen Petroleum Ltd*³⁶ (*Rissik*) was a significant section 12B of the PPA case.

i. Brief facts of the case

Rissik Street One Stop CC t/a Rissik Street Engen (*Rissik*) entered into an operating lease agreement with Engen Petroleum Ltd (*Engen*) on 30 March 2015 ending 30 June 2018 to operate a filling station. One of the very important terms of the agreement was that *Rissik* would be entitled to sell the business upon a termination notification by *Engen* terminating the operating lease agreement. It was clearly stated in the agreement that if *Engen* had no intentions of renewing the operating lease agreement, then *Engen* should notify *Rissik* a year in advance of such intentions. The agreement also stated that *Engen* cannot unreasonably refuse *Rissik* from selling the business to a buyer of their choice. *Engen* entered into a lease agreement with the owner of the relevant property (landlord) and sublet the leased property where the filling

³⁶*Rissik Street One Stop CC t/a Rissik Street Engen and Another v Engen Petroleum Ltd* 2023 ZACC 4 (hereinafter, '*Rissik*').

station is situated to Rissik. The landlord informed Engen that, in order to renew the lease agreement for a further period, Engen will have to pay the landlord R 3 million. Engen was unable to make a payment of R 3 million to the landlord in respect of the lease agreement and as a result the landlord did not renew the lease with Engen. Engen informed Rissik on 2nd October 2017 that it would not be renewing the operating lease agreement and that such an agreement would lapse at the end of October 2018. Rissik, as stated in the agreement identified a purchaser who was willing to operate the filling station, and this was brought to Engen's attention, which Engen refused to accept without providing reasons for the refusal to accept any of the purchasers proposed by Rissik.³⁷

Rissik approached the Controller of Petroleum Products on 25th July 2018 to have the dispute with Engen referred to arbitration in terms of section 12B of the PPA, claiming unfair and unreasonable contractual practice by Engen due to its refusal to allow Rissik to sell the business to any of their identified purchasers. Rissik's request for arbitration referral to the Controller of Petroleum Products was only responded to a year later, in July 2019. Engen issued an eviction notice to Rissik on 22 January 2019, which Rissik did not abide by.³⁸

Engen subsequently approached the High Court to have Rissik evicted, and Rissik filed a counter application to have court proceedings stayed until the Controller of Petroleum Products finalised the request for referral to arbitration in terms of section 12B of the PPA. The High Court ruled against Engen's eviction application until the arbitration process was finalised and stayed court proceedings. The Court held that Engen should not disrupt Rissik's business operations until the section 12B arbitration process was finalised. Engen appealed against the High Court's decision, and the Supreme Court of Appeal upheld Engen's appeal, set aside the High Court's decision to stay court proceedings, and dismissed Rissik's counter application. Rissik appealed against the Supreme Court of Appeal's decision to the Constitutional Court.³⁹

ii. Constitutional Court Judgement

³⁷ *Rissik* (note 36 above) para 4-9.

³⁸ *Rissik* (note 36 above) para 10-14.

³⁹ *Rissik* (note 36 above) para 18-36.

The Court held that section 6(1) of the Arbitration Act⁴⁰ to stay court proceedings is irrelevant in this case, and section 12B referral in terms of the PPA is a statutory requirement and not a result of a clause in the agreement between Rissik and Engen. The Court further held that Rissik's evacuation from the premises would limit its chances of selling the business and getting the goodwill of the business it built for 20 years. The Court stated that in accordance with section 173 of the Constitution, the High Court has the authority to stay court proceedings for the conclusion of other related proceedings in the same matter, and in this case, arbitration proceedings. It was further held that the Controller of Petroleum Products' delay in referring the matter to arbitration defeated the transformative objective that Section 12B seeks to achieve. The Constitutional Court upheld Rissik's appeal.⁴¹

iii. Analysis of the case

It is very important first to discuss the terms of the contract between Rissik and Engen, which clearly stated that Rissik would be entitled to facilitate the sale of the business when Engen issues a termination notice terminating the lease and operating agreement. Engen was required to inform Rissik that it intends to terminate the lease operating agreement a year in advance as agreed by both parties. The agreement also stated that Engen could not unreasonably refuse Rissik from selling the business to a buyer of their choice, which Engen did. Engen was in breach of the contract by refusing Rissik to sell the business upon termination of the operating lease agreement. The High Court was correct by ruling against the eviction order brought by Engen and staying court proceedings in favour of Rissik. Rissik also correctly approached the Controller of Petroleum Products to have the dispute with Engen referred to arbitration in terms of section 12B of the PPA. The Controller of Petroleum Products failed Rissik by delaying the referral of the dispute to arbitration, despite the fact that section 12B of the PPA was specifically created to balance the unequal bargaining power between big oil companies and retailers who enter into franchise agreements. Rissik as a franchisee, has a lesser bargaining chance than Engen, which is the franchisor.

In the above cases that have been discussed, it is evident that oil companies include terms and conditions in the franchise agreement that are more advantageous to them and disadvantage

⁴⁰Section 6(1) of the Arbitration Act (note 14 above).

⁴¹*Rissik* (note 36 above) para 52-89.

retailers who wish to operate filling stations using their brands. Unfortunately, these circumstances have existed in the petroleum industry for decades, and little has been done to rectify the state of affairs. Section 12B of the PPA was created to attempt to rectify these circumstances; however, it has failed to do so. Section 12B of the PPA was created to allow franchisors and franchisees to have any dispute that may arise between them on the grounds of ‘unfair and unreasonable contractual practices’ to arbitration instead of directly opting for litigation. Disputes still end up in court even with the option of resolution through arbitration, as parties approach the court before and after the arbitrator has made the award. The following question then comes to the forefront: 1) what impact do referrals of disputes to arbitration by the Controller of Petroleum Products have in the petroleum industry? 2) Is section 12B serving the purpose that it is supposed to serve? 3) How can legislators intervene to close loopholes in legislation to enforce compliance in the petroleum industry?

2.2.4 Chamdor Service Station CC v Controller of Petroleum Products

The Case of *Chamdor Service Station CC v Controller of Petroleum Products of the Department of Mineral Resources and Energy and Others*⁴² (*Chamdor*) is a recently decided court case that shines the spotlight on arbitration as a mechanism for resolving disputes in the petroleum industry.

i. Brief facts of the case

Chamdor Service Station CC (Chamdor) had initially entered into a franchise and lease agreement with one of the big oil companies in South Africa’s petroleum industry, Caltex, for a 15-year period, which commenced on 01 August 2001. A clause in the agreement stated that should disagreements arise between the parties and parties are unable to successfully resolve their differences, then such disagreements shall be resolved through arbitration by an arbitrator approved and appointed by the Arbitration Foundation of Southern Africa. Caltex, later known as Chevron transferred its rights and responsibilities vested in the franchise and lease agreement with Chamdor to a company named Future Phambili Petroleum (Pty) Ltd (Phambili) in September 2012. Phambili was now Chamdor’s wholesaler, which supplies the latter with

⁴²*Chamdor Service Station CC v Controller of Petroleum Products of the Department of Mineral Resources and Energy and Others* 2021 ZAGPPHC 504 (hereinafter ‘*Chamdor*’).

petroleum products, Phambili was also Chamdor's landlord of the property where the filling station is situated.⁴³

Phambili terminated the franchise and lease agreement, which Chamdor initially concluded with Caltex in April 2015. In terminating the agreement, Phambili instructed Chamdor to vacate the relevant property and lodged a court application to that effect. Chamdor naturally opposed such an application, as it had approached the Controller of Petroleum Products to resolve the dispute with Phambili through arbitration as provided in section 12B of the PPA. The North Gauteng High Court dismissed Chamdor's application to have eviction proceedings instituted by Phambili stayed and ordered that Chamdor evacuate the property leased by Phambili. Chamdor based its section 12B request to the Controller of Petroleum Products on the grounds that Phambili was unfair and unreasonable by stopping the supply of fuel, which resulted in its inability to continue retailing and running the filling station.⁴⁴

ii. High Court Judgement

The North Gauteng High Court dismissed Chamdor's application to have eviction proceedings instituted by Phambili stayed and also dismissed Chamdor's application to have the arbitration proceedings by the Arbitration Foundation of Southern Africa stayed until the finalisation of the section 12B arbitration process. The court ordered Chamdor to evacuate the property leased by Phambili within 30 days from the date of the order.⁴⁵

iii. Analysis of the case

The court case again shines the spotlight on section 12B of the PPA. It should, however, be pointed out that in this case, the contract concluded by the parties dictated a resolution of dispute through arbitration in accordance with the Arbitration Foundation of Southern Africa processes and not those of section 12B of the PPA. When Phambili approached the High Court to resolve the dispute with Chamdor through arbitration as provided for in the franchise and lease agreement, Chamdor opposed the court application and approached the Controller of

⁴³ *Chamdor* (note 42 above) para 7-9.

⁴⁴ *Chamdor* (note 42 above) para 11-15.

⁴⁵ *Chamdor* (note 42 above) para 62-64.

Petroleum Products instead, for the dispute to be referred to arbitration in terms of section 12B of the PPA.

Due to the fact that, the contract between the parties explicitly stated that should a dispute arise, such a dispute should be resolved through arbitration in accordance with the Arbitration Foundation of Southern Africa processes, Chamdor was to a certain extent in breach of the franchise and lease agreement, as it did not want to adhere to the dispute resolution clause in the contract

By dismissing Chamdor's application to stay the arbitration proceedings in respect of the Arbitration Foundation of Southern Africa as provided for in the franchise and lease agreement, the High Court validated the dispute resolution contractual clause in the franchise and lease agreement between Chamdor and Phambili. The High Court also indicated that section 12B arbitration referral application to the Controller of Petroleum Products by Chamdor did not take precedence in this case. While parties in any commercial contract are entitled to insert any dispute resolution clause that should apply to their contract, parties to such contracts should also consider the relevant laws governing the industry in which they operate, more particularly, the laws relating to dispute resolution.

The parties in this particular case are in the petroleum industry, and the dispute resolution clause in their contract should have incorporated section 12B of the PPA, as the provision is especially created to address disputes that may arise between parties in a contract. The decision by the arbitrator presiding over arbitration proceedings, referred to as an award, is enforceable as provided for in the law.

2.2.5 Business Zone 1010 CC t/a Emmarentia Convenience Centre v Engen Petroleum Limited

In the *Business Zone 1010 CC t/a Emmarentia Convenience Centre v Engen Petroleum Limited (Business Zone)*⁴⁶ case, the interpretation and application of section 12B of the PPA was the main focus, the powers and jurisdiction of the Controller of Petroleum Products were carefully assessed by the court. The Promotion of Administrative Justice Act⁴⁷ (PAJA) was assessed in

⁴⁶*Business Zone* (note 6 above).

⁴⁷ The Promotion of Administrative Justice Act 3 of 2000.

relation to section 12B in the interests of achieving justice when applying and implementing section 12B.

i. Brief facts of the case

Engen Petroleum Ltd (Engen) being the wholesaler and the Business Zone 1010 CC t/a Emmarentia Convenience Centre (Business Zone) being the retailer concluded a lease and service agreement of a filling station in 2005 and renewed such a contract in 2008. Engen had committed to making some improvements at the site where Business Zone was operating a filling station, as provided for in the agreement. In 2010, Business Zone made some improvements to the relevant site and informed Engen prior to such improvements. However, Engen failed to respond to Business Zone's notification. Engen later wrote a letter to Business Zone stating that there was a breach of the contract, as Business Zone made improvements to the site without obtaining permission accordingly. Therefore, the breach by Business Zone warrants a termination of the lease and service agreement. Business Zone was of the opinion that Engen's termination of the agreement was unfair and unreasonable, and requested the Controller of Petroleum Products to refer the matter to arbitration in terms of section 12B. The Controller of Petroleum Products refused Business Zone's request for referral on the grounds that the contract between Business Zone and Engen had been terminated, and due to the fact that a contract no longer exists between the parties, the dispute between the parties cannot be referred to arbitration⁴⁸

ii. The court decisions

Business Zone approached the High Court to have the Controller of Petroleum Products' decision not to refer their dispute with Engen in terms of section 12B reviewed. The High Court ruled in Business Zone's favour. It indicated that the Controller of Petroleum Products has 'a low discretionary threshold' when it comes to the powers and jurisdiction in terms of section 12B. As a result, the Controller of Petroleum Products was supposed to have referred the dispute between Business Zone and Engen to arbitration. Engen appealed the High Court decision in the Supreme Court of Appeal, and the appeal was upheld. Business Zone approached the Constitutional Court to have the Supreme Court of Appeal's decision reviewed,

⁴⁸ *Business Zone* (note 6 above) para 3-19.

and the Constitutional Court ruled in *Business Zone*'s favour that the dispute be referred to arbitration in terms of section 12B of the PPA.⁴⁹

iii. Analysis of the case

*Business Zone*⁵⁰ was a pertinent case, as it changed the dynamics of how the Controller of Petroleum Products implemented section 12B of the PPA. The Constitutional Court, like the High Court, stated that the Controller has a 'low discretionary threshold' when deciding whether there should be a referral to arbitration. This is, in my opinion, a correct interpretation of the provision due to the fact that section 12B⁵¹ clearly states that '*the Controller of Petroleum Products may, on request by a licenced retailer, alleging unfair and unreasonable contractual practice by a licenced wholesaler or vice versa, require, by notice in writing to the parties concerned, that the parties submit the matter to arbitration.*' Section 12B does not state the extent and limitations of the powers of the Controller of Petroleum Products in referring disputes to arbitration.

In *Business Zone*,⁵² the court pointed out that further improvements and developments in legislation and policies that regulate the petroleum industry need to be effected. It is evident that section 12B of the PPA has some loopholes pertaining to the role of the Controller of Petroleum Products in referring disputes to arbitration, as was revealed in the court decision of *Business Zone*. The enforceability of the arbitrator's award is also an important factor that forms a significant part of the whole arbitration process.

2.3 Enforceability of Awards in Commercial Contracts

Arbitration as an alternative dispute resolution mechanism has gained significant popularity in a number of commercial sectors such as petroleum, construction, insurance and many more. This dispute-resolution method gained popularity due to its unique nature of mitigating risks in international business transactions.⁵³ An award is a resolution by an arbitrator in arbitration

⁴⁹ *Business Zone* (note 6 above) para 21-29.

⁵⁰ *Business Zone* (note 6 above) para 97.

⁵¹ Section 12B (1) of the PPA (note 3 above).

⁵² *Business Zone* (note 6 above) para 60-65.

⁵³ BN Luki & NJ Abubakar 'Dispute Settlement in the Oil and Gas Industry: Why is International Arbitration Important?' (2016) 6(4) *Journal of Energy and Technologies Policy* 30.

proceedings. It can either be enforced by the parties involved by complying with the award as issued by the arbitrator, or it can be enforced through a judicial review wherein a court gets involved. The laws of arbitration must emphasise the enforceability of arbitral awards in order to give foreign investors' confidence in a State's legal system, which will attract foreign investment.⁵⁴ In order for arbitral awards in a State to have an impact, there has to be an assessment and improvement of the investment laws of a State.⁵⁵

The laws that regulate any industry need to protect both the investor and the invested in order to attract investment in a country, particularly industries that significantly impact a country's economy. The PPA, along with its Regulations, is the main tool used to regulate South Africa's petroleum industry, and case law is also important in regulating the industry. Section 12B of the PPA was specifically developed to ensure that justice is achieved when a party to a contract is aggrieved and alleges unfair or unreasonable contractual practice by the other party to a contract. This warrants a detailed evaluation and discussion of the laws and policies regulating South Africa's petroleum industry, particularly pertaining to arbitration as a method of resolving disputes in commercial contracts.

2.4 Conclusion

The laws that govern any commercial sector in South Africa should be aligned with the model law set out in the International Arbitration Act⁵⁶ to attract foreign investment and bring stability to the economy. Case law, like any other source of law in South Africa's legal system, is quintessential in the development of the law. It was, therefore, necessary to review several court cases concerning arbitration referrals in terms of section 12B of the PPA. Judgements of such court cases have a direct impact on arbitration referrals by the Controller of Petroleum Products. In reviewing the above court cases, it came to light that section 12B of the PPA does not have the impact that the legislator intended it to have.

⁵⁴ HA Mohammed et al 'Legal Issues in the Laws Governing the Enforcement of Foreign Arbitration in Petroleum Disputes in Iraq' (2023) 8(1) *BiLD Law Journal* 168.

⁵⁵ B Dermirkol 'Enforcement of International Arbitration Agreements and Awards in Investment Treaty Arbitration; (2015) 30(1) *ICSID Review- Foreign Investment Law Journal* 56.

⁵⁶ International Arbitration Act 15 of 2017 (hereinafter, 'International Arbitration Act').

In *Business Zone*⁵⁷, the court held that the Controller of Petroleum Products should have a “low discretionary role” when considering requests for arbitration referrals by a party alleging unfair and unreasonable contractual practice by another party in a contract. This judgement significantly affected the regulation of arbitration referral requests by the Controller of Petroleum Products; if the Controller tasked with regulating the country’s petroleum industry is limited and restricted in the powers conferred to him by legislation, this will undoubtedly impact the regulation of such an industry.

The *Chamdor Case*⁵⁸ demonstrated that an arbitration process in accordance with the Arbitration Foundation of Southern Africa took precedence over a section 12B arbitration process due to the fact that such an arbitration process was provided for in the parties’ franchise and lease agreement. This is evidence of the courts’ continued undermining of section 12B of the PPA. The legislator should consider making significant amendments to the governing legislation and policies to allow proper regulation of the petroleum industry.

⁵⁷ *Business Zone* (note 6 above) para 60.

⁵⁸ *Chamdor* (note 42 above) para 62.

CHAPTER 3

3 POLICY CONSIDERATIONS AND RECOMMENDATIONS

The Arbitration Act,⁵⁹ created in 1965, was developed to regulate arbitration in South Africa, which was an indication of the acceptance and independence of arbitration in the South African legal system. Even though there were some concerns about the Arbitration Act, it was still adopted into the South African legal system and is still valid.⁶⁰ The Arbitration Act has some significant elements of English law and is used to regulate arbitration domestically and internationally.⁶¹

It is evident that arbitration was accepted and adopted into the South African legal system for several years. The need to create legislation that specifically deals with arbitration was a clear recognition of this method of dispute resolution. What is also evident is that the law of arbitration has developed over the years but is not as advanced as the other areas of law in the South African legal system. This warrants an evaluation of the existing laws and policies regarding arbitration, especially arbitration concerning South Africa's petroleum industry.

An evaluation of the existing laws and policies that regulate arbitration in South Africa's petroleum industry is necessary to determine where the loopholes are and which areas in the relevant legislation need development and amendments. This assessment of the relevant laws will assist in making some significant recommendations regarding legislation and policy improvements.

3.1 Existing Arbitration Legislation in South Africa's Petroleum Industry.

The enactment of the International Arbitration Act⁶² aligned South Africa globally with laws regulating arbitration; it is particularly applicable in international arbitration matters. It is

⁵⁹ The Arbitration Act (note 14 above).

⁶⁰ Rantsane (note 8 above) 1.

⁶¹ Coutsoudis (note 15 above).

⁶² The International Arbitration Act (note 56 above).

important to point out that the Arbitration Act⁶³ remains relevant and applicable in arbitration matters in South Africa.⁶⁴

The following pieces of legislation regulate arbitration domestically and internationally and should always be considered and applied in all arbitration matters. The following provisions are relevant and applicable in arbitration matters in South Africa's petroleum industry.

3.1.1 The Arbitration Act⁶⁵

i. Section 3: The binding effect of arbitration agreements and power of the court

Section 3⁶⁶ indicates that arbitration as an alternative method of dispute resolution was recognised all those years ago. The fact that the courts enforce arbitration agreements, and their binding effect reinforces party autonomy. Parties who wish to include an arbitration clause in their commercial contract or conclude an arbitration agreement which will regulate a dispute that should arise must take note of section 3 of the Arbitration Act. The 'binding effect' of such a contract has significant implications that will have an impact on a contractual relationship in the long run.

ii. Section 6: Stay of legal proceedings

Section 6⁶⁷ of the Arbitration Act is especially important in contractual disputes that arise in cases referred to arbitration by the Controller of Petroleum Products in accordance with section 12B of the PPA. The issue of staying legal proceedings to conclude the arbitration process has come up in several cases submitted to arbitration by the Controller. The point of contention in these matters is always whether court proceedings should be put on hold until the conclusion of section 12B arbitration proceedings.

The starting point in such cases is the arbitration agreement; a proper assessment of the dispute resolution clause in the agreement is very important. There are circumstances wherein parties'

⁶³The Arbitration Act (note 14 above).

⁶⁴ TK Twala 'An evaluation of International Commercial Arbitration Theory and Practice in South Africa' Unpublished Master's Thesis, University of Pretoria, 2022.

⁶⁵The Arbitration Act (note 14 above).

⁶⁶Section 3 of the Arbitration Act (note 14 above).

⁶⁷Section 6 of the Arbitration Act (note 14 above).

resort to litigation before the conclusion of arbitration proceedings, which tends to complicate matters, particularly when trying to resolve the dispute amicably. Litigation should be the last resort when an existing arbitration agreement or clause exists. When any party in an arbitration agreement approaches the court in terms of section 6 above to have legal proceedings stayed until arbitration proceedings are concluded, dispute resolution through arbitration should prevail.

The fact that the Arbitration Act⁶⁸ is still applicable today and applied in arbitration matters, indicates that it is a good piece of legislation. It is important to point out that society has certainly evolved since 1965, and with such evolution, the dynamics of arbitration cases have become much more complex. Laws that govern societies must evolve with such societies to maintain order; a principle also applicable in commercial contracts. The Arbitration Act,⁶⁹ though a good piece of legislation, requires some amendments to align with today's society's dynamics.

3.1.2 The International Arbitration Act⁷⁰

The International Arbitration Act⁷¹ indicates that South African lawmakers heeded the calls to align the law regulating arbitration in the country with international standards and model law. The improvements that came with the International Arbitration Act⁷² meant that issues such as, where proceedings will take place, and the awards issued by arbitrators were more flexible and aligned with international standards.⁷³ The changes that have been brought about by the creation of the International Arbitration Act⁷⁴ are quite significant, particularly when it comes to South Africa's standing in international arbitration. This Act has raised the chances of South Africa being a seat of choice in international arbitration proceedings concerning disputes in commercial transactions.⁷⁵

⁶⁸The Arbitration Act (note 14 above).

⁶⁹ As above.

⁷⁰ The International Arbitration Act (note 56 above).

⁷¹ As above.

⁷² As above.

⁷³ V Chetty 'The International Arbitration Act 15 of 2017- Genesis and Legal Impact' Unpublished Master's Thesis, University of Johannesburg, 2018 40.

⁷⁴ The International Arbitration Act (note 56 above).

⁷⁵ M Wethmar-Lemmar 'The Recognition and Enforcement of Foreign Arbitral Awards Under the International Arbitration Act 15 of 2017' (2019) 31(3) *SA Mercantile Law Journal* 378.

One of the main objectives of the International Arbitration Act⁷⁶ is that it seeks to encourage international arbitration in South Africa, which can be done by creating a comprehensive legal framework regulating international arbitration concerning jurisdiction. The International Arbitration Act⁷⁷ distinguishes between ‘arbitration, court agreements and jurisdiction clauses.’⁷⁸

By creating this Act, lawmakers recognised not only the evolution of society but also the complexity attached to such an evolution concerning disputes regarding commercial contracts. It was also very important to ensure that South Africa is not left behind regarding the laws regulating the resolution of disputes through arbitration and that they are aligned accordingly with international standards.

Though the International Arbitration Act⁷⁹ is not necessarily a replacement of the Arbitration Act⁸⁰ but an improvement of what already exists. There are important provisions in the International Arbitration Act⁸¹ that are worth noting and discussing, as well as provisions that might apply to the administration of arbitration proceedings in South Africa’s petroleum industry.

i. Section 7⁸²: Matters subject to international commercial arbitration

Section 7 highlights the importance of why a dispute that arises in an international commercial transaction subject to an arbitration agreement would not be resolved through arbitration. This provision makes note of the fact that even though there is an arbitration agreement in place which is concluded accordingly, if the dispute between the parties to the arbitration agreement cannot be determined through arbitration under any of the South African laws or the arbitration agreement between the parties is ‘contrary to public policy’ then such a dispute cannot be resolved through arbitration. This provision also applies to disputes referred to arbitration by the Controller of Petroleum Products in terms of section 12B of the PPA, as there are parties

⁷⁶The International Arbitration Act (note 56 above).

⁷⁷As above.

⁷⁸M Wethmar-Lemmar & E Schoeman ‘The International Arbitration Act 15 of 2017: impetus for the developments on the cross-border commercial front’ (2019) 1 *Journal of South African Law* 127.

⁷⁹The International Arbitration Act (note 56 above).

⁸⁰The Arbitration Act (note 14 above).

⁸¹International Arbitration Act (note 56 above).

⁸²Section 7 of the International Arbitration Act (note 56 above).

in the petroleum industry that conclude international commercial agreements and arbitration agreements.

South Africa's petroleum industry is broad, and the participants thereof extend to other international countries. Naturally, there would be commercial transactions and contracts concluded that involve parties from other countries; we then require laws that can accommodate such commercial transactions and contracts, which is what the International Arbitration Act⁸³ was created for.

In cases where a dispute arises where agreements with arbitration clauses involve parties from other countries, issues such as the laws applicable in arbitration proceedings and where such proceedings will occur always arise. The following provisions in the International Arbitration Act⁸⁴ are an important point of discussion.

ii. Section 10⁸⁵: Consolidation of arbitral proceedings and concurrent hearings

It was vital for law makers to include a provision dealing with the consolidation of hearings or proceedings. It often happens in practice that when a dispute arises between parties who have concluded an arbitration agreement, such parties initiate other dispute resolution proceedings, and this occurs with parties in different parts of the world or the same jurisdiction.

iii. Section 11⁸⁶: Confidentiality of arbitral proceedings

Arbitration proceedings are inherently private as opposed to litigation proceedings; however, section 11 of the International Arbitration Act⁸⁷ makes provision for when one of the parties is a public body. The confidentiality element of arbitration is one of the main reasons it is the preferred method of resolving disputes, both locally and internationally. In the case of international arbitration agreements, the place where proceedings should be held is also of great importance. It is also important to note that arbitration proceedings with respect to section 12B

⁸³International Arbitration Act (note 56 above).

⁸⁴As above.

⁸⁵Section 10 of the International Arbitration Act (note 56 above).

⁸⁶Section 11 of the International Arbitration Act (note 56 above).

⁸⁷As above.

of the PPA are subject to section 11, and confidentiality is a significant element in such proceedings.

3.1.3 The PPA⁸⁸

Section 12B of the PPA⁸⁹ is the most important and relevant provision in respect of this study and will be discussed as it is the only provision in the entire Act specifically dealing with resolving disputes regarding contracts concluded between wholesalers and retailers in South Africa's petroleum industry. The whole section in the PPA⁹⁰ is dedicated to the Controller of Petroleum Products' referral of disputes to arbitration. This section in the PPA⁹¹ makes provision for the following: the request by parties to have a dispute referred to arbitration; the grounds that should exist when a referral request is made by any of the licensed parties to a contract, and including the implications of what an award issued by an arbitrator entails.

Section 12B of the PPA⁹² reminds us once more of the popularity of arbitration as a method of resolving disputes. The lawmakers could have chosen any other dispute resolution mechanism but chose arbitration. Arbitration is seemingly the best method of resolving disputes in commercial transactions, not only in South Africa but globally as well. Lawmakers have made it a point to develop comprehensive legal frameworks regulating arbitration, proving that it is one of the most preferred alternative dispute resolution methods.

It is evident that South Africa's petroleum industry dynamics are complex, particularly regarding the relationship between wholesalers and retailers responsible for ensuring the country has a supply of petroleum products. Any party who wishes to approach the Controller of Petroleum Products, has to be either a licensed wholesaler or a licensed retailer. It is very important to point out that the PPA also makes provision for the licensing processes of wholesalers and retailers who wish to be fuel suppliers to South Africans.

As previously mentioned, a relationship between wholesalers and retailers exists typically because of a particular contract that was concluded between the parties, and such a contractual

⁸⁸The PPA (note 3 above).

⁸⁹Section 12B of the PPA (note 3 above).

⁹⁰As above.

⁹¹As above.

⁹²As above.

relationship exists for as long as parties are fulfilling their obligations, and their rights are not infringed upon.⁹³ Should either of the parties to a contract feel that their right is infringed upon, or the other party is not fulfilling their obligations as provided for in the contract, then such a party can seek due recourse. Section 12B provides for this recourse.

In implementing and administering section 12B in the office of the Controller of Petroleum Products over a couple of years, the researcher observed multiple loopholes. Loopholes that may be rectified by amending current legislation and informing policy development. This necessitates an assessment of policy development that can substantially influence the existing gaps.

3.1.4 The UNCITRAL Model Law⁹⁴

It was essential for South Africa to update the laws regulating arbitration and align such laws with internationally acceptable standards, which has made it more attractive as a seat for international commercial arbitration proceedings. Such adjustments and improvements to legislation and laws regulating arbitration in South Africa have also improved existing legislation and laws regulating arbitration in the country.⁹⁵

UNCITRAL Model Law⁹⁶ have gained popularity not only in Africa but in Latin America, wherein they have been incorporated into the relevant arbitration laws in these regions. This is due to the fact that these laws are the core of arbitration rules and regulations worldwide, and by aligning their arbitration laws with the UNCITRAL Model Law⁹⁷, countries around the world are increasing their investment opportunities, and those who are still reluctant to follow suit and align their arbitration laws with the UNCITRAL Model Law⁹⁸ are at risk of missing out on investment opportunities.⁹⁹

⁹³Refer to Chapter 1 above of this study, under Introduction.

⁹⁴ UNCITRAL Model Law on International Commercial Arbitration, 1985 as amended (hereinafter, 'UNCITRAL Model Law').

⁹⁵ D Venter 'The UNCITRAL Model Law on International Commercial Arbitration as Basis for International and Domestic Arbitration in South Africa' Master's Thesis, North-West University, 2010 3.

⁹⁶UNCITRAL Model Law (note 94 above).

⁹⁷As above.

⁹⁸As above.

⁹⁹ S Ali & E Komolo 'UNCITRAL Engagement in African and Latin American Dispute Resolution Reform' (2019) 35(3) *Ohio State Journal on Dispute Resolution* 302.

The UNCITRAL Model Law¹⁰⁰ seeks to set the basis for arbitration laws by systematising the regulations applicable to international arbitration concerning disputes arising from international commercial agreements. Countries wishing to update, upgrade and develop their arbitration legislation can benefit from aligning their arbitration laws with such a law.¹⁰¹ The UNCITRAL Model Law¹⁰² seeks to achieve the objective of harmonising processes and procedures relating to international commercial arbitration.¹⁰³

The creation of the UNCITRAL Model Law¹⁰⁴ in 1985 inspired the popularity of international arbitration in resolving disputes arising from commercial contracts. This has led to several countries aligning these laws with their arbitration statutes.¹⁰⁵

The UNCITRAL Model Law¹⁰⁶ are the basis for laws governing arbitration, particularly international arbitration. The authors above acknowledge that by developing the International Arbitration Act in 2017, South Africa has also ‘come to the party’ and aligned its arbitration laws with the UNCITRAL Model Law.¹⁰⁷

Article 7(1) of the UNCITRAL Model Law¹⁰⁸ deals specifically with the definition and form of the arbitration agreement. The requirement¹⁰⁹ that an arbitration agreement be in writing, as provided for in Article 7(2) of the UNCITRAL Model Law,¹⁰⁹ is necessary to ensure enforceability and certainty. In a commercial contract, parties must determine the method of dispute resolution they will use to resolve any dispute that may arise between them. By doing that, parties concluding the commercial contract show their commitment that should a dispute

¹⁰⁰UNCITRAL Model Law (note 94 above).

¹⁰¹ MF Hoellering ‘The UNCITRAL Model Law on International Commercial Arbitration’ (1986) 20(1) *International Lawyer* 327.

¹⁰²UNCITRAL Model Law (note 94 above).

¹⁰³ SD Lewis ‘Testing the Harmonisation and Uniformity of the UNCITRAL Model Law on International Commercial Arbitration’ PhD Thesis, University of Leicester, 2015.

¹⁰⁴UNCITRAL Model Law (note 94 above).

¹⁰⁵ MA Benlala ‘Exploring Algeria’s International Commercial Arbitration Legislation in Light of the UNCITRAL Model Law on International Commercial Arbitration: A National View on Investments’ (2023) 3(1) *International Investment Law Journal* 70.

¹⁰⁶UNCITRAL Model Law (note 94 above).

¹⁰⁷As above.

¹⁰⁸Article 7(1) of the UNCITRAL Model Law (note 94 above).

¹⁰⁹Article 7(2) of the UNCITRAL Model Law (note 94 above).

arise, they wish to continue their contractual relationship after resolving such a dispute. Arbitration is the preferred method of dispute resolution in commercial contracts.¹¹⁰

Section 12B of the PPA does not require parties in a contract to have an arbitration clause or agreement in order for the Controller of Petroleum Products to have a dispute referred to arbitration. The aggrieved party wishing to have a dispute resolved through arbitration needs to only indicate that there has been an unreasonable or unfair contractual practice by the other party in the contract and request that the dispute be referred to arbitration. If section 12B of the PPA were to align with Article 7(2) of the UNCITRAL Model Law¹¹¹ by requiring parties to have an arbitration agreement in writing before approaching the Controller of Petroleum Products to have a dispute referred to arbitration, this provision would be much more enforceable and less questionable.

Significant amendments and improvements are needed in the legislation regulating arbitration referrals in South Africa's petroleum industry, particularly section 12B of the PPA. Some policies and Regulations need to be developed to ensure the correct implementation of section 12B of the PPA, and such policies must be aligned with the UNCITRAL Model Law,¹¹² this will ensure the improvement of the relevant legislation. A significant number of disputes, if not all, would be resolved through arbitration without the parties having to resort to litigation, and the practicability and applicability of section 12B of the PPA would be enhanced. It is important to outline the necessary recommended policy amendments to improve the regulation of arbitration referrals in South Africa's petroleum industry.

3.2 Policy Recommendations

The court cases regarding section 12B of the PPA discussed in chapter two have significantly impacted the Controller's considerations of referral requests to arbitration. The judgements of these cases have influenced the implementation of section 12B. One court case that particularly

¹¹⁰Haqmal *et al* (note 19 above) 1.

¹¹¹Article 7(2) of the UNCITRAL Model Law (note 94 above).

¹¹²UNCITRAL Model Law (note 94 above).

stands out is *Business Zone*¹¹³ that changed how the Controller administers arbitration requests in terms of section 12B of the PPA.

3.2.1 Recommendation 1: Development of Section 12B Arbitration Regulations

The fact that there is no document in the form of a regulation that sets out how section 12B of the PPA should be applied and implemented is the first problem. It becomes evident when section 12B arbitration referrals by the Controller of Petroleum Products end up in court, and the court starts ‘punching holes’ in the very applicability and implementation of the provision. *Business Zone*¹¹⁴ is one such court case where the Constitutional Court was of the opinion that the Controller should have a ‘low discretionary threshold’ when considering arbitration referral requests in terms of section 12B of the PPA.

The recommended Regulation should set out the following:

- a) *The Controller’s discretion in respect of arbitration referral should be clearly outlined.*
- b) *The period within which the Controller should consider the arbitration request referral and finalize such a request should be clearly stated.*
- c) *Outline what the grounds “unreasonable and unfair contractual practice” entail.*
- d) *The arbitration proceedings should align with the UNCITRAL Model Law arbitration proceedings.*
- e) *The detailed steps the requester requesting the arbitration referral from the Controller of Petroleum Products should be fully outlined.*

3.2.2 Recommendation 2: Amendment of Section 12B of the PPA

The PPA is the main legislation governing arbitration referrals by the Controller of Petroleum Products in the petroleum industry and should, therefore, be well aligned with the UNCITRAL Model Law¹¹⁵ accordingly. The PPA’s alignment with these laws will encourage investment in South Africa’s petroleum industry and ensure security. Another important amendment to the PPA that will be necessary, is ensuring that the important court judgements, more particularly the Constitutional Court judgements, are incorporated into the PPA and its Regulations, as this will ensure that the legislation remains relevant and applicable.

¹¹³ *Business Zone* (note 6).

¹¹⁴ *Business Zone* (note 6).

¹¹⁵ UNCITRAL Model Law (note 94 above).

Section 12B should align with Article 7(2) of the UNCITRAL Model Law¹¹⁶ and include the requirement of ‘a written arbitration agreement or clause’ by the parties wishing to have their dispute referred to arbitration by the Controller of Petroleum Products. This requirement will remove much of the confusion relating to the existence of an arbitration agreement. Often, when section 12B arbitration cases end up in court, the question of whether an arbitration agreement or clause between the parties exists or not comes up, more particularly when the other party has decided to abruptly terminate the franchise agreement. With the inclusion of the arbitration clause or agreement requirement, parties can request the Controller of Petroleum Products to refer the dispute to arbitration despite the other party's termination of the franchise agreement.

The Controller of Petroleum Products has to ensure adherence and compliance with provisions of the International Arbitration Act¹¹⁷ when dealing with arbitration matters and one such provision is section 7 which states the following:

Section 7(1) of the International Arbitration Act provides that –

‘Any international commercial dispute which the parties have agreed to submit to arbitration under an arbitration agreement which relates to a matter which the parties are entitled to dispose of by agreement may be determined by arbitration, unless - (a) such a dispute is not capable of determination by arbitration under any law of the Republic; or (b) the arbitration agreement is contrary to the public policy of the Republic.’¹¹⁸

Section 12B requires that the party approaching the Controller of Petroleum Products wishing to have a dispute referred to arbitration need only prove “unfair and unreasonable contractual practice” by the other party and nothing more.¹¹⁹ Section 7(1) of the International Arbitration Act¹²⁰ is a clear indication that not all disputes are capable of being resolved through arbitration and that an arbitration agreement between the parties might be “contrary to the public policy of the Republic.” The Controller of Petroleum Products should comply with this provision at all times when dealing with arbitration referral requests.

¹¹⁶Article 7(2) of the UNCITRAL Model Law (note 94 above)

¹¹⁷International Arbitration Act (note 56 above).

¹¹⁸Section 7(1) of the International Arbitration Act (note 56 above).

¹¹⁹Section 12B(1) of The PPA (note 3 above).

¹²⁰Section 7(1) of the International Arbitration Act (note 56 above).

Section 10¹²¹ of the International Arbitration Act deals with consolidating hearings. The legislator took into consideration that it often happens that despite the parties having concluded an arbitration agreement to have disputes resolved through arbitration, there can be other proceedings concerning the contract concluded by the parties. Such proceedings have to be conducted to ensure the continued relationship between the parties, and require a hearing to take place. Therefore, consolidating the arbitration proceedings with other proceedings will ensure no unnecessary delays that could potentially negatively affect the parties to a contract. When the Controller of Petroleum Products is faced with an arbitration referral matter, where other similar proceedings have been instituted elsewhere, he should apply section 10 of the International Arbitration Act¹²² along with section 12B of the PPA. This will ensure the harmonisation and applicability of the relevant legislations.

3.2.3 Recommendation 3: Regular updates of arbitration laws and policies

Regularly updating laws and policies regulating any industry is extremely important. For laws to be capable of being enforced, they must be relevant to the dynamics of today's society. Arbitration laws regulating South Africa's petroleum industry should be updated regularly to ensure applicability and enforceability. To constantly update the relevant laws and policies in the petroleum industry, the Regulator of the industry must have a good 'Research and Policy Team' to ensure that he/she is kept abreast with the challenges facing the industry. Laws and policies regulating arbitration in the petroleum industry should align accordingly with the dynamics of the industry; court judgements of cases relating to arbitration would be a very good starting point.

The judiciary not only applies the law but also interprets it. Interpreting the law to apply it to the facts means that a thorough assessment is needed, and officers of the court are tasked with precisely that. A large number of court cases discussed in chapter two of this research have ended up in the Constitutional Court, which, therefore, means that such judgements form precedence and are sources of law. The Regulator must regularly and continuously update laws and policies that align with the relevant court judgements.

¹²¹Section 10 of the International Arbitration Act (note 56 above).

¹²²As above.

In *Mfoza*¹²³ the powers of the arbitrator were the point of contention, and both the High Court and Constitutional Court were of the opinion that the arbitrator exceeded his power in issuing an award for damages suffered by Mfoza. The powers of the arbitrator, as stipulated in section 12B of the PPA, are limited and should therefore be expanded. That is one good example of why regularly updating arbitration laws and policies is extremely important.

3.3 Conclusion

Laws and policies need to be consistently reviewed, improved, and updated if required, to keep up with the forever-evolving societal dynamics. The provisions regulating arbitration in the relevant legislation must be reviewed and amended accordingly. The Controller of Petroleum Products as the Regulator of the petroleum industry should consider the above recommendations to regulate arbitration referral requests, he receives and processes. This will perhaps reduce the raised questions and doubts against the provisions regulating arbitration in South Africa's petroleum industry and in this case, that provision is section 12B of the PPA.

¹²³ *Mfoza* (note 25) para 40.

CHAPTER 4

4 CONCLUSION

The main objective of this study was to establish how effective referrals of disputes resolved through arbitration in the petroleum industry, as provided for in section 12B of the PPA are, and the impact of the court cases associated with such section 12B referrals. How the relevant court judgements can assist in improving the policies and laws regulating arbitration in the petroleum industry.¹²⁴

The fact that lawmakers who developed the section 12B provision selected arbitration as a method of dispute resolution amongst other various alternative dispute resolution mechanisms that exist is a testament to the popularity of this dispute resolution method. The authors above have emphasised the evolution of arbitration and why it is the preferred method of resolving disputes arising in commercial contracts.¹²⁵

Arbitration is an effective mechanism for settling disputes, as the decisions taken by the arbitrator are binding and enforceable. The significant elements of privacy and expertise make arbitration a method of resolving disputes more attractive than parties resorting to litigation. Those who are responsible for developing policies and laws should promote the use of arbitration and mediation as mechanisms of settling disputes by ensuring that these methods promote justice and fairness.¹²⁶ Arbitration has several significant elements that make it attractive, but the confidentiality element makes it even more popular than court proceedings, which are more public.¹²⁷ The methods of resolving disputes regarding commercial transactions and contracts have evolved over a period of time. With such evident evolution,

¹²⁴Refer to Chapter 1 above of this study, which sets out the Purpose of the Study.

¹²⁵Refer to Chapter 3 above of this study, which discusses the PPA.

¹²⁶J Pablo 'The Effectiveness of Mediation and Arbitration as Alternative Dispute Resolution Methods in Mexico' (2024) 4(1) *Journal of Conflict Management* 38-47.

¹²⁷A Tanielian 'Arbitration Still Best Road to Binding Dispute Resolution' (2013) 5(2) *Journal of Legal Affairs and Dispute Resolution in Engineering and Construction* 6.

litigation as a dispute resolution method has proven ineffective in that it does more harm than good.¹²⁸

Disputants still prefer to refer their disputes to a court of law instead of referring a dispute to arbitration to be resolved by an arbitrator. As noted above by several authors, courts are not efficient in resolving disputes and maintaining contractual relationships after a dispute is resolved. Arbitration is concerned with dispute resolution and maintaining contractual relationships for continuity purposes, which is an essential part of contractual relationships. A dispute typically arises when parties are still in the process of fulfilling their contractual obligations and responsibilities; for this reason, after the dispute is resolved, parties can maintain their contractual relationship. One of the most essential elements of a franchise contract is the long-term relationship between parties who have concluded such an agreement.

As was pointed out in chapter one of this study, franchise agreements form a significant part of South Africa's petroleum industry. In these agreements, like most other contracts, disputes often arise. An effective mechanism for resolving these disputes is arbitration, which is why the PPA was amended accordingly to include section 12B.¹²⁹ The requirements per section 12B of the PPA that must be met for a dispute to be referred to arbitration are simple and straightforward. However, these requirements have led to disputants resorting to litigation instead of a dispute being solely resolved through arbitration. Section 12B states that there only needs to be an unfair and or unreasonable contractual practice by either of the licenced party for a dispute to be referred to arbitration;¹³⁰ however, it does not elaborate on what an 'unfair or unreasonable contractual practice' entails, and this has led to disputes ending up in court.

Several court cases concerning section 12B of the PPA and the judgements thereof in chapter two above formed a significant part of this study. These court cases are an indication that arbitration, as provided for in section 12B of the PPA, is insufficient to resolve disputes between parties in a contractual relationship. The judgements of the court cases discussed in chapter two can assist in making some notable contributions that can be used in improving and updating laws regulating arbitration as an alternative dispute resolution in South Africa's

¹²⁸ WO Durosaro 'The Role of Arbitration in International Commercial Disputes' (2014) 1(3) *International Journal of Humanities, Social Sciences and Education* 1.

¹²⁹ Refer to Chapter 1 above of this study, under Introduction.

¹³⁰ Section 12B(1) of The PPA (note 3 above).

petroleum industry. It is of great importance for policies and rules to be constantly updated as the need arises. Regulations are imperative as they serve as subordinate legislation and are crucial in implementing Acts of Parliament. The Controller of Petroleum Products, as the Regulator of the petroleum industry, has to ensure that Regulations attached to section 12B of the PPA are developed, as such Regulations will not only be guiding tools in the implementation of section 12B but will ensure the effective implementation of such a provision.¹³¹

Laws regulating the various industries in South Africa have been developed not only to bring order but also for stability purposes, as a stable industry is attractive to investors abroad. The laws created in the country have to be internationally recognised and, therefore, be aligned with international laws and policies. As the authors have noted in chapter three above, the International Arbitration Act regulating arbitration locally and internationally was developed to align accordingly with international standards in the regulation of arbitration. Applying and implementing every piece of legislation that regulates arbitration in South Africa along with the Arbitration Act and International Arbitration Act is imperative, as the Controller of Petroleum Products should also when implementing section 12B of the PPA.¹³²

The authors above have pointed out the importance of aligning laws that regulate arbitration with the internationally recognised UNCITRAL Model Laws, as this will ensure that countries who have aligned accordingly have the potential of being selected as a seat for international commercial arbitration proceedings. The UNCITRAL Model Laws make provisions for written arbitration agreements, which are essential as they will ensure enforceability. Suppose parties have agreed to conclude an arbitration agreement or include an arbitration clause in their commercial agreement, which will ensure that their dispute is resolved through arbitration. In that case, parties are bound by such an agreement.¹³³

The judgements of the court cases discussed in chapter two have exposed the loopholes and flaws that exist in section 12B of the PPA. By interpreting the provision and, most importantly, pointing out the loopholes of the provision, the courts have, to a certain extent, shown the

¹³¹Refer to Chapter 3 above of this study, which discusses Recommendation 3.

¹³²Refer to Chapter 3 above of this study, which discusses the International Arbitration Act.

¹³³ Refer to Chapter 3 above of this study, which discusses which discusses UNCITRAL Model Laws.

ineffectiveness of section 12B. This clearly indicates the need to improve and amend the provision to ensure applicability and practicability. The recommendations presented in chapter three regarding the incorporation of certain court judgements into Section 12B warrant serious consideration by the Controller of Petroleum Products.¹³⁴

It is evident that referrals by the Controller of Petroleum Products per section 12B of the PPA have not been as effective as the legislator had intended. If the legislator intended to have disputants who have concluded contracts in the petroleum industry resolve their dispute through arbitration without having to approach the court, then this objective was not achieved for the following reasons: 1) It is not clear what the grounds ‘unfair and unreasonable contractual practice’ entail when one requests the Controller of Petroleum Products to have their dispute referred to arbitration, 2) the powers of the Controller of Petroleum Products when it comes to referring disputes to arbitration are not detailed, 3) section 12B is not aligned with the relevant legislation regulating arbitration in South Africa and internationally. The recommendations in chapter three of this study will address the loopholes in section 12B of the PPA, resulting in significant improvements to legislation regulating arbitration in South Africa’s petroleum industry.

¹³⁴Refer to Chapter 3 above of this study, which discusses Recommendation 3.

BIBLIOGRAPHY

Journal Articles

Al-Qaaida, MS ‘Arbitration of Oil Contracts of Oil-Producing Arab Countries’ (2020) 9(2) *Journal of Social Sciences* 395.

Ali, S & Komolo, E ‘UNCITRAL Engagement in African and Latin American Dispute Resolution Reform’ (2019) 35 *Ohio State Journal on Dispute Resolution* 302.

Benlala, MA ‘Exploring Algeria’s International Commercial Arbitration Legislation in Light of the UNCITRAL Model Law on International Commercial Arbitration: A National View on Investments’ (2023) 3 *International Investment Law Journal* 60-71.

Chukwuemerie, AI ‘Arbitration and Human Rights in Africa’ (2007) 7 *African Human Rights Journal* 103.

Coutsoudis, B ‘UNCITRAL Instruments in Southern Africa’ (1999) 30 *De Rebus* 1.

Dermirkol, B ‘Enforcement of International Arbitration Agreements and Awards in Investment Treaty Arbitration’ (2015) 30 *ICSID Review-Foreign Investment Law Journal* 56.

Durosaro, WO ‘The Role of Arbitration in International Commercial Disputes’ (2014) 1(3) *International Journal of Humanities, Social Sciences and Education* 1.

Haqmal MA, Hashimi, SA & Zamani, AH ‘The Need, Development and Benefits of Commercial Arbitration in Afghanistan’ (2024) 3 *American Journal of Business and Strategic Management* 1.

Hoellering, MF ‘The UNCITRAL Model Law on International Commercial Arbitration’ (1986) 20 *International Lawyer* 327.

Luki, BN & Abubakar, NJ ‘Dispute Settlement in the Oil and Gas Industry: Why is International Arbitration Important?’ (2016) 6 *Journal of Energy and Technologies Policy* 30.

Mathews, WG ‘Opportunities and Challenges for Petroleum and LPG Markets in Sub Saharan Africa’ (2014) 64 *Energy Policy* 78.

Mohammed, HA ‘Legal Issues in the Laws Governing the Enforcement of Foreign Arbitration in Petroleum Disputes in Iraq’ (2023) 8 *BiLD Law Journal* 168.

Schlemmer, EC ‘Arbitration with the State in South Africa – possible or not?’ (2022) *Journal of South African Law* 310.

Tanielian, A ‘Arbitration Still Best Road to Binding Dispute Resolution’ (2013) 5 *Journal of Legal Affairs and Dispute Resolution in Engineering and Construction* 6.

Temkin, S ‘Racist View hits Arbitration’ (2008) *Business Day* (South Africa) 7-8.

Pablo, J ‘The Effectiveness of Mediation and Arbitration as Alternative Dispute Resolution Methods in Mexico’ (2024) 4 *Journal of Conflict Management* 38-47.

Rantsane, DP ‘The Origin of Arbitration Law in South Africa’ (2020) 23 *PER/PE Law Journal*

Wethmar-Lemmar, M ‘The Recognition and Enforcement of Foreign Arbitral Awards Under the International Arbitration Act 15 of 2017’ (2019) 31 *SA Mercantile Law Journal* 378-398.

Wethmar-Lemmar, M & Schoeman, E ‘The International Arbitration Act 15 of 2017: Impetus for Developments on the Cross-Border Commercial Front’ (2019) *Journal of South African Law* 127-137.

Chapters in Books

Onyema, E ‘The Role of African Courts and Judges in Arbitration’ in E Onyema *Rethinking the Role of African National Courts in Arbitration* (2018) *Netherlands: Kluwer*

Internet Sources

Pool, DM ‘Arbitration in terms of section 12B of the Petroleum Products Amendment Act’ 1 May 2021, <https://www.derebus.org.za/tag/arbitration-in-terms-of-s-12b-of-the-petroleum-products-amendment-act> (accessed 17 May 2023)

Franchising Plus ‘The Fuel Industry and Franchising’ 19 July 2019, <https://www.franchisingplus.co.za/the-fuel-industry-and-franchising/> (accessed 11 August 2024)

SA Franchise Brands ‘There are different options to franchise a petrol station in South Africa, but the price will inevitably be dependent on a variety of factors’ 25 April 2022, <https://www.safranchisebrands.co.za/article/how-much-is-a-petrol-station-franchise-in-south-africa/> (accessed 20 September 2024).

Legislation

The Arbitration Act 42 of 1965

The International Arbitration Act 15 of 2017

The Petroleum Products Amendment Act 120 of 1977 (amended)

The Petroleum Products Act 58 of 2003

The Promotion of Administrative Justice Act 3 of 2000

Case Law

Crompton Street Motors v Bright Idea Projects 66 (Pty) Ltd 2021 ZACC 24

Chamdor Service Station CC v Controller of Petroleum Products of the Department of Mineral Resources and Energy and Others 2021 ZAGPPHC 504

Mfoza Service Station (Pty) Ltd v Engen Petroleum Ltd and Another 2023 ZACC 3

Business Zone 1010 CC t/a Emmerentia Convenience Centre v Engen Petroleum Limited and Others 2017 (2) ZACC

Rissik Street One Stop CC t/a Rissik Street Engen and Another v Engen Petroleum Ltd CCT 196/21 2023 ZACC 4

Thesis

Chetty, V ‘The International Arbitration Act 15 of 2017-Genesis and Legal Impact’ Unpublished Master’s Thesis, University of Johannesburg, 2018

Lewis, SD 'Testing the Harmonisation and Uniformity of the UNCITRAL Model Law on International Commercial Arbitration' PhD Thesis, University of Leicester, 2015

Twala, TK 'An evaluation of International Commercial Arbitration Theory and Practice in South Africa' Unpublished Master's Thesis, University of Pretoria, 2022

Venter, D 'The UNCITRAL Model Law on International Commercial Arbitration as Basis for International and Domestic Arbitration in South Africa' master's Thesis, North-West University, 2010