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USE OF ARBITRATION AND RECENT TRENDS

1. How is commercial arbitration used in your jurisdiction? What proportion of large commercial disputes is settled through arbitration? What are the recent trends? What are the general advantages and disadvantages of arbitration compared to court litigation in your jurisdiction?

Use of commercial arbitration

Arbitration is widely used in resolving commercial disputes, both domestic and international. Arbitration is particularly common for disputes which involve technical or specialist matters and has become the preferred method of resolving construction and engineering disputes, as well as disputes involving complex trade or financial arrangements. It is also popular in resolving many other commercial disputes in the following areas:

- Investment.
- Infrastructure.
- Finance.
- Banking.
- Insurance.
- Retail.
- Telecommunications.
- Mining and oil and gas industries.

Recent trends

There has been an increase in both administered and ad hoc commercial arbitrations in South Africa. Interestingly, this appears to apply to disputes whether they are at the top or lower end of the commercial sphere.

Advantages/disadvantages

The main advantages of arbitration include the following:

- It is a private process and parties often prefer the confidentiality associated with arbitration to the public litigation process.
- Parties can select the arbitrator themselves and/or agree on the arbitrator’s qualifications or expertise, whereas in court litigation, parties have no say in the selection of the judge.
- The arbitral award is generally final and binding, and not subject to appeal.
- Delay is minimised and the process is often more efficient than court litigation. (There are lengthy delays in the allocation of court dates and judicial proceedings can be delayed by litigation tactics.)

The main disadvantages of arbitration are that:

- The parties bear the costs of the arbitrator and the venue, whereas they do not have these costs in court litigation.
- There is no automatic right of joinder of third parties in arbitral proceedings (see Question 8).

ARBITRATION ORGANISATIONS

2. Which arbitration organisations are commonly used to resolve large commercial disputes in your jurisdiction?

Arbitration Foundation of Southern Africa (AFSA)

The AFSA (www.arbitration.co.za) administers all types of ADR including, in particular, arbitration. It maintains panels of experts and offers the parties a choice of rules, depending on the size and complexity of the matter.

The AFSA was founded in 1996, and is a joint venture between organised business, and the legal and accounting professions. It is headquartered in Johannesburg with branches in a number of major centres throughout South Africa.

Association of Arbitrators (Southern Africa)

The Association of Arbitrators (Southern Africa) (www.arbitrators.co.za) was formed in 1979 to:

- Constitute an organisation to promote arbitration as a means of resolving disputes.
- Provide a body of competent and experienced arbitrators and ADR specialists for appointment as required.
- Assist arbitrators and ADR specialists in the efficient discharge of their duties.
- Make arbitration and ADR more effective.

The Association of Arbitrators (Southern Africa) is based in Johannesburg and has several offices throughout the country.

Africa ADR

The establishment and launch in late 2009 of Africa ADR (www.africaadr.com), a regional arbitral authority, is a significant new development. Africa ADR is a non-profit dispute resolution administering authority, which is neutral and independent. It provides comprehensive and complete administrative services in the resolution of regional and international disputes through arbitration, mediation or conciliation.
It is a corporate partnership between the participating African arbitral institutions, businesses and the legal profession that aims to facilitate trade and commercial interaction between countries in the region and those who invest in African countries. Africa ADR offers a modern, faster, cost effective and less abrasive way of resolving commercial disputes across borders.

LEGISLATIVE FRAMEWORK

Applicable legislation

3. What legislation applies to arbitration in your jurisdiction?
   To what extent has your jurisdiction adopted the UNCITRAL Model Law on International Commercial Arbitration 1985 (UNCITRAL Model Law)?


To date, South Africa has not adopted the UNCITRAL Model Law. The Commission has recommended that the UNCITRAL Model Law be adopted by South Africa for international commercial arbitration. While the recommendation is broadly supported by the legal and business communities, it does not seem to be a priority of the new government, and reform is unlikely in the next 12 months.

Mandatory legislative provisions

4. Are there any mandatory legislative provisions? What is their effect?

Any party to the arbitration can apply to court, on good cause, to set aside the appointment of an arbitrator or to remove him from office (Arbitration Act). “Good cause” includes a failure on the arbitrator’s part to use all reasonable efficiency in entering in and proceeding with the arbitration, and making an award.

Awards can be set aside through review proceedings, if:
   - Any member of the arbitration tribunal has:
     - miscomputed himself or committed any gross irregularity in the conduct of the proceedings; or
     - exceeded his powers.
   - The award has been improperly obtained.

Matrimonial disputes and disputes over any incidental matters, and disputes over status cannot be arbitrated. In addition, certain statutes prohibit arbitration in specific instances (for example, municipalities may not refer a dispute involving a decision on its status, powers or duties or the validity of its actions or bye-laws). Most other disputes are arbitrable.

The Labour Relations Act also provides for compulsory arbitration or mediation to be undertaken before a matter may be heard in court. This has particular application to labour disputes between employers and employees. However, in these cases, the arbitral process is seen as administrative action and not as an adjudicative process, and, as such, is reviewable by a court under administrative law procedures.

The law of limitation

5. Does the law of limitation apply to arbitration proceedings?

The law of limitation applies to arbitrations. The Prescription Act 68 of 1969 (Prescription Act) provides different prescription time periods within which proceedings must be started, depending on the type of debt and, in some cases, the type of debtor. These include:
   - 30 years for:
     - a debt secured by a mortgage bond;
     - a judgment debt; and
     - a debt owed to the state relating to a share of the profits, royalties or other similar consideration payable for the right to mine minerals or other substances.
   - 15 years for a debt owed to the state out of an advance or loan of money, or a sale or lease of land by the state to the debtor, unless a longer period applies (see above).
   - Six years for a debt arising from a bill of exchange or another negotiable instrument, or from a notarial contract, unless a longer period applies (see above).
   - Three years for any other debt, unless an act of parliament provides otherwise.

Generally, prescription starts running as soon as the debt is due, subject to certain exceptions. For example:
   - If a debtor wilfully prevents a creditor from discovering the existence of the debt, the prescription does not start until the creditor becomes aware of the debt’s existence.
   - A debt must not be deemed due until the creditor has knowledge of the debtor’s identity and the basis on which the debt arises, provided that a creditor is deemed to have knowledge if he could have acquired it by exercising reasonable care.

The Prescription Act also provides that the expiry of prescription is delayed in certain circumstances, for example, if the debt is the subject matter of an arbitration, the prescription period lasts until one year after the making of the award.

The running of prescription is interrupted by the debtor’s acknowledgement of liability and runs again from the date of interruption or from a new due date agreed between the debtor and creditor.

In addition, prescription can be interrupted by court. This occurs, for example, by the service on the debtor of the creditor’s claim.
6. What are the requirements for an arbitration agreement to be enforceable?

Substantive/formal requirements
To be valid, an arbitration agreement must (Arbitration Act):
- Be in writing.
- Refer any existing or future dispute to arbitration.
- The dispute must relate to any matter specified in the agreement.

Separate arbitration agreement
An arbitration agreement can be a clause in the underlying agreement between the parties or a separate agreement incorporated into the main agreement by reference to other documents.

Separability
7. Does the applicable legislation recognise the separability of arbitration agreements?

Section 3(1) of the Arbitration Act provides for an Arbitration Agreement to survive the termination of the main agreement but it does not make express provision for the separability of the arbitration agreement. However, the concept of separability is recognised. Subject to the contrary provisions in the underlying agreement, an arbitration agreement is a separate agreement and must be valid and effective, even if the underlying agreement is invalid or did not come into existence.

Joinder of third parties
8. In what circumstances can a third party be joined to an arbitration, or otherwise be bound by an arbitration award?

A third party can only be joined to, or bound by, an arbitration with that third party’s consent.

9. Are there any default provisions in the legislation relating to the number and qualifications/characteristics of arbitrators?

There are no default provisions relating to the characteristics/qualifications of arbitrators. The main requirement is that the arbitrator must be independent and impartial (see Question 10).

Parties are free to determine the number of arbitrators that they wish to use. However, in the absence of an agreement, the number of arbitrators shall be three.

10. Are there any requirements relating to independence and/or impartiality of arbitrators?

Arbitrators are required to be independent and impartial and it is their duty to notify the parties if facts or circumstances arise that are likely to affect their impartiality.

Arbitrators must disclose any circumstances that are likely to give rise to justifiable doubts as to their impartiality or independence.

11. Does the applicable legislation contain default provisions relating to the appointment and/or removal of arbitrators?

Appointment of arbitrators
Generally, if an arbitration agreement provides for an arbitrator to be appointed by the parties jointly or by any one or more of them, and they fail to appoint an arbitrator (or agree on this), then any party can serve the other party with a written notice, requiring it, within seven days after service of that notice (section 12, Arbitration Act), to either:
- Agree to the appointment of an arbitrator.
- Appoint an arbitrator.

If the party does not appoint an arbitrator (or agree to the appointment), the requesting party can apply to court to make the necessary appointment.

Removal of arbitrators
An arbitrator can be removed by the court on a party’s application, subject to good cause being shown (see Question 4).

12. Does the applicable legislation provide default rules governing the commencement of arbitral proceedings?

The court can extend the time specified in the arbitration agreement for starting arbitration proceedings if it considers that undue hardship would otherwise be caused (section 8, Arbitration Act).

13. What procedural rules are arbitrators likely to follow? Can the parties determine the procedural rules that apply? Does the legislation provide any default rules governing procedure?

Applicable procedural rules
The parties can agree the procedural rules and the arbitrators must follow those rules. In domestic arbitrations, the parties generally adopt the APSAs or the Association of Arbitrators’ (Southern Africa) Rules. Following the High Court Rules is also common. The High Court Rules regulate the process, procedure and time periods for the
exchange of pleadings, discovery, requests for further particularity to the pleadings and exchange of expert statements. The High Court Rules are particularly useful if the parties agree to refer or convert ongoing court proceedings into arbitral proceedings. For arbitrations with foreign elements, the Rules of the London Court of International Arbitration (LCIA) and the Rules of the International Chambers of Commerce (ICC) are popular. (Hopefully, the Rules of Africa ADR will become as popular for arbitrations with foreign elements.)

If the parties are unable to agree on the procedural rules, the arbitrator has broad powers to determine the procedure to be adopted. In practice, he makes this determination after receiving the parties’ representations.

Default rules
The legislation does not provide any default rules regulating procedure.

Arbitrator’s powers

14. What procedural powers does the arbitrator have? If there is no express agreement, can the arbitrator order disclosure of documents and attendance of witnesses (factual or expert)?

Unless the arbitration agreement provides otherwise, the arbitrator has wide procedural powers, for example, to (section 14, Arbitration Act):

- Require any party (subject to any legal objection) to disclose documents through an affidavit and to produce the documents for inspection, or to be interrogated on oath.
- Require the parties to deliver pleadings or statements of claim and defence, or require any party to give particulars of his claim or counterclaim.
- Require any party to allow inspection of any goods or property involved in the arbitration, which is in its possession or under its control.
- Determine when and where to hold the proceedings.

The arbitrator cannot order witnesses to attend the arbitration and to give evidence. However, any party can procure the attendance of a witness before an arbitral tribunal, as if the arbitration was a civil action pending in court with jurisdiction in the area in which the arbitral proceedings are held (section 16, Arbitration Act). Therefore, a clerk of the magistrates’ court in the area where arbitration is held can, on a party’s application, summon a witness to give evidence and produce documents for the arbitration tribunal.

EVIDENCE

15. What documents must the parties disclose to the other parties and/or the arbitrator(s)? How, in practice, does the scope of disclosure compare with disclosure in litigation? Can the parties determine the rules on disclosure?

Scope of disclosure
The nature and extent of a parties’ obligation to disclose documents depends on the rules applicable to the particular arbitration. Generally, all relevant documents that are in the parties’ possession must be disclosed and produced. The arbitrator can order any party to produce such documents and the party must produce them.

Normally, the scope of disclosure in arbitration is comparable with that in litigation, unless a particular set of rules has been adopted which prescribes a more limited discovery process.

Parties’ choice
In the absence of a set of rules regulating the arbitration, and which will determine the parties’ disclosure obligations, the parties are free to agree upon the nature and scope of what is being disclosed and the manner of its disclosure. It is not uncommon for the parties to agree to disclose only the “core documents” on which they will rely.

CONFIDENTIALITY

16. Is arbitration confidential?

The Arbitration Act does not expressly state that arbitrations are confidential but they are mainly held in confidence under the common law principles.

Similar considerations apply to the arbitral award. However, any party to the arbitration can apply to a court to make the arbitral award an order of court, in which case the award may become public.

COURTS AND ARBITRATION

17. Will the local courts intervene to assist arbitration proceedings?

The courts can intervene to assist arbitration proceedings where necessary. The courts can make orders in respect of the following (section 21, Arbitration Act):

- Security for costs.
- Discovery of documents and interrogatories.
- The examination of any witness before a commissioner in South Africa or abroad, and the issue of a commission or a request for such examination. A commissioner is a person approved by the court who need not be a judge. For example, he may be a justice of the peace or a commissioner of oaths.
- The giving of evidence by affidavit.
- The inspection, interim custody, preservation, or sale of goods or property.
- An interim interdict or similar relief.
- Securing the amount in dispute in the reference.
- Substituted service of notices (required by the Arbitration Act) or summonses.
- The appointment of a receiver.

18. What is the risk of a local court intervening to frustrate the arbitration? Can a party delay proceedings by frequent court applications?

Risk of court intervention
It is unlikely that a local court will intervene to frustrate the arbitration. Recent jurisprudence has been in favour of arbitration.
However, the Arbitration Act allows a recalcitrant party to try and delay the arbitral proceedings by exploiting the many provisions that allow for court intervention (see Questions 17 and 19).

**Delays proceedings**
See Questions 17 and 19.

**19. What remedies are available when a party starts court proceedings in breach of an arbitration agreement, or initiates arbitration in breach of a valid jurisdiction clause?**

**Court proceedings in breach of an arbitration agreement**
If a party commences court proceedings in breach of an arbitration agreement, the aggrieved party can apply to that court for a stay of proceedings (section 6, Arbitration Act).

Attempts to initiate arbitration in the absence of an arbitration agreement and in breach of a valid jurisdiction clause are of no force or effect.

In addition, the court can at any time, on the application of a party to the arbitration agreement and on good cause being shown:
- Set aside the arbitration agreement.
- Order that any particular dispute referred to in the arbitration agreement not be referred to arbitration.
- Order that the arbitration agreement cease to have effect with reference to any dispute referred.

In practice, good cause has been found to exist where, for example:
- A defendant’s counterclaims affected third parties not bound by the arbitration agreement and in relation to which the arbitrator had no investigatory powers.
- A court was in a better position to adjudicate and conclude all issues in the same process.

**Arbitration in breach of a valid jurisdiction clause**
If an arbitration is in breach of a valid jurisdiction clause, the purported arbitration is defective ab initio. A party cannot be forced to arbitrate absent a written agreement to do so. It would be most unusual for an arbitrator to even accept an appointment without a valid arbitration clause regulating disputes.

**20. Will the local courts grant an injunction to restrain proceedings started overseas in breach of an arbitration agreement?**

The local court can grant such an injunction, subject to its competence and jurisdiction. In practice, however, it is probably better to seek the interdictory relief in the courts in which the overseas proceedings have been commenced.

**21. What remedies are available where one party denies that the tribunal has jurisdiction to determine the dispute(s)? Does your jurisdiction recognise the concept of kompetenz-kompetenz? Does the tribunal or the local court determine issues of jurisdiction?**

Generally, the aggrieved party can request an arbitrator to determine his own jurisdiction and the arbitrator can rule on whether he has jurisdiction to proceed with the arbitration. However, the rules regulating the arbitration may provide the contrary and the arbitrator can then request that the parties obtain a court ruling relating to this matter. If this happens, the arbitration is stayed pending the court’s decision on the jurisdictional issue.

**REMEDIES**

**22. What interim remedies are available from the tribunal?**

An arbitration tribunal can make an interim award at any time during the period allowed for making an award (section 26, Arbitration Act).

**Security for costs**
An arbitration tribunal cannot award security for costs; this power is vested in courts (section 21, Arbitration Act). However, if an arbitration is conducted under the rules of one, or the main, South African arbitration institutions (see Question 2), the arbitrator can order security for costs (AFSA Rules, Article 11.2.9; 6th Edition of the Rules for the conduct of arbitrations of the Association of Arbitrators, Rule 23; and Africa ADR Rules, Article 26.1).

**Security or other interim measures**
Other interim measures which are available from tribunals include any temporary measure by which the arbitrator orders a party to:
- Maintain or restore the status quo pending determination of the dispute.
- Provide a means of preserving assets out of which a subsequent award may be satisfied.
- Preserve evidence that may be relevant and material to the resolution of the dispute.

**23. What final remedies are available from the tribunal?**

The tribunal can award the following:
- Damages.
- Injunctions.
- Declarations.
- Specific performance.
- Costs and interest. Interest on the amount awarded applies from the date of the award (section 29, Arbitration Act). The interest applies at the rate agreed by the parties in the underlying contract. Failing the parties’ agreement, the rate set out in the Prescribed Rate of Interest Act 55 of 1975, as amended from time to time, applies. The prescribed rate of interest is currently 15.5% per annum.
24. Can arbitration proceedings and awards be appealed or challenged in the local courts? What are the grounds and procedure? Can the parties effectively exclude any rights of appeal?

Rights of appeal/challenge

Arbitral proceedings and awards cannot be appealed in court. The awards are final and binding (section 28, Arbitration Act).

The awards can, however, be challenged in courts through review proceedings.

Grounds and procedure

The grounds for review are narrow. A court can only make an order setting aside an award if (section 33, Arbitration Act):

- Any member of an arbitration tribunal has misconducted himself in relation to his duties as arbitrator.
- An arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers.
- An award has been improperly obtained.

Excluding rights of appeal

The rules of some of the arbitral institutions exclude any rights of review. For example, under Africa ADR Rules, parties irrevocably waive their rights to any form of appeal, review or recourse to any state court or other judicial authority, to the extent this waiver can be validly made (Article 34.3).

COSTS

25. What legal fee structures can be used? Are fees fixed by law?

Arbitrators normally charge on an hourly or daily rate basis. The arbitrator's fees are determined either:

- By agreement between him and the parties.
- In accordance with the rules of the relevant arbitration institution.

Legal practitioners generally charge hourly rates, as agreed with their clients.

Fees are not fixed by law.

26. Does the unsuccessful party have to pay the successful party's costs? How does the tribunal usually calculate any costs award and what factors does it consider?

Cost allocation

The award of costs is in the tribunal's discretion. If the tribunal awards costs, it must give directions as to the scale on which the costs must be taxed and can direct to whom and by whom, and in what manner, the costs, or any part of those, shall be paid (Arbitration Act).

Normally, costs correlate to the outcome so the unsuccessful party pays the successful party's costs.

Cost calculation

If a party is awarded costs, it can usually recover its costs based on a party and party tariff or scale. The tariff has not kept pace with the actual legal costs, so a successful party is unlikely to recover more than 50% of his actual costs.

Factors considered

If a party behaved in a way that displeases the tribunal, the tribunal may sanction that party by awarding costs against it on a more punitive scale.

ENFORCEMENT OF AN AWARD

27. To what extent is an arbitration award made in your jurisdiction enforceable in the local courts?

A party can, after notifying the other party, apply to the court to make an award an order of court (section 31, Arbitration Act). In determining whether an award should be made an order of court, the court cannot reconsider the merits of the case.

An award which has been made an order of court can be enforced in the same manner as any judgment or order to the same effect.

28. To what extent is an arbitration award made in your jurisdiction enforceable in other jurisdictions? Is your jurisdiction party to international treaties relating to this issue such as the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention)?

South Africa has ratified the New York Convention without any reservations. Therefore, an arbitration award made in South Africa must be enforced in any other jurisdiction which is party to the New York Convention.

29. To what extent is a foreign arbitration award enforceable in your jurisdiction?

To give effect to the New York Convention, South Africa has enacted the Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977. Essentially, to successfully apply for the recognition and enforcement of a foreign arbitration award, the application must be accompanied by the following:

- The authenticated original foreign arbitral award and arbitration agreement.
- A certified copy of the award and agreement.
- A translation of the award and agreement (where necessary).

Recognition and enforcement of the foreign award can be refused on the following grounds (Arbitration Act):

- Reference of the subject matter of the award would not be permissible in South Africa.
30. How long do enforcement proceedings in the local court take? Is there any expedited procedure?

If the enforcement proceedings in the local court are not opposed, the process should not take more than a couple of weeks. If the enforcement is opposed, it can take several months.

Urgent enforcement of the award is possible, but the applicant bears a rather heavy onus of establishing:
- The urgency of the matter.
- The reasons why he cannot be afforded substantial redress at an ordinary hearing.

REFORM

31. Is the legal framework in relation to the above likely to change in the next decade?

The Commission has recommended that a new domestic arbitration statute be enacted, which will combine the best features of the UNCITRAL Model Law and the English Arbitration Act, 1996 (see Question 3).

The Commission has also recommended that the UNCITRAL Model Law be adopted by South Africa for international commercial arbitration.

Although this recommendation is largely supported by the legal and business communities, it has not been a priority agenda item for the new government, and it is unknown when this reform will occur. We would like to think that this, or a close variant of it, will come about within the next decade.
Nick Alp
Webber Wentzel
T +27 11 530 5300
F +27 11 530 6300
E nick.alp@webberwentzel.com
W www.webberwentzel.com

Qualified. South Africa, 1993
Areas of practice. Group actions/mass tort litigation; engineering and construction; telecommunications; contractual disputes; general commercial litigation; product liability; arbitration and alternative dispute resolution; multinational disputes.
Recent transactions
- Acting for Armscor in its defence of a ZAR650 million claim by Gobodo.
- Representing Anglo American South Africa in its defence of actions instituted by former gold mine workers who claim to have contracted occupational lung diseases. These actions are considered by the claimants to be test cases, which, if successful, are likely to have a fundamental impact on the mining landscape in South Africa.
- Acting for Mobile Telephone Networks (MTN) in various regulatory challenges.

Stuart McCafferty
Webber Wentzel
T +27 11 530 5300
F +27 11 530 6300
E stuart.mccafferty@webberwentzel.com
W www.webberwentzel.com

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Areas of practice. Group actions/mass tort litigation; engineering and construction; telecommunications; contractual disputes; general commercial litigation; product liability; arbitration and alternative dispute resolution; multinational disputes.
Recent transactions
- Representing MTN in proceedings before the regulatory authorities (ICASA) in relation to complaints that MTN had wilfully refused to inter-connect with Telkom Mobile such that the very commercial existence of that latter entity (recently launched) was put at risk and that this conduct was part of deliberate strategy.
- Representing Anglo American South Africa in its defence of actions instituted by former gold mine workers who claim to have contracted occupational lung diseases. These actions are considered by the claimants to be test cases, which, if successful, are likely to have a fundamental impact on the mining landscape in South Africa.
- Representing Dorbyl in an action against a former executive director for the disgorgement of “secret profits” made pursuant to a series of leveraged buy-outs.
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