

South Africa

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TYPES OF DISPUTE RESOLUTION

1. Please give a brief overview of the main dispute resolution methods used in your jurisdiction to settle large commercial disputes, identifying any recent trends.

The High Court of South Africa (High Court) is the primary forum for adjudicating large commercial disputes. South African common law principles are applied and, being precedent-based, a vast body of sophisticated legal analysis is used in resolving disputes. South African case law is often cited in foreign judgments, primarily but not exclusively in common law jurisdictions and foreign judgments are considered, and often cited, with approval in South Africa.

Various forums of alternative dispute resolution (ADR) are used outside or as an adjunct to formal court proceedings. Mediation and arbitration are the most common. ADR has become popular because of perceived benefits such as confidentiality, expedited and cost-effective proceedings, and the ability to choose the mediator or arbitrator. This has led to the establishment of several ADR bodies such as the Association of Arbitrators and the Arbitration Foundation of South Africa (AFSA).

It has been proposed that the provisions of the Arbitration Act 42 of 1965 (1965 Act) which govern arbitrations be replaced by two new Arbitration Acts (see *Question 36*).

COURT LITIGATION - GENERAL

2. What limitation periods apply to bringing a claim and what triggers a limitation period? Please briefly set out any different rules for particular areas of law relevant to large commercial disputes, for example contract, tort and land disputes.

The procedures and limitation periods are the same for commercial contract, tort and land disputes. The limitation periods are determined by the Prescription Act 68 of 1969. On expiry of the limitation period, the claim becomes extinguished (prescribed) by the operation of law.

Money claims must be brought within three years from the date on which the debt became due or the cause of action arose (*Prescription Act*). There are certain exceptions to this general rule, most of which relate to transactions concluded with the government of South Africa. The running of a time period is interrupted by the valid issue and service of a summons or other court process.

3. Please give a brief overview of the structure of the court where large commercial disputes are usually brought. Are certain types of dispute allocated to particular divisions of this court (for example, IP, competition or maritime disputes)?

Large commercial disputes are usually heard in the appropriate division of the High Court. There are 13 divisions in major commercial centres such as Johannesburg, Pretoria, Durban and Cape Town. They include:

- The Constitutional Court in Johannesburg, which is used only to rule on issues involving the application and interpretation of provisions of the Constitution.
- The Supreme Court of Appeal in Bloemfontein, which is the highest appellate court for commercial disputes where no constitutional issues are involved.
- The Admiralty division to deal with maritime disputes.

Although not formally separate divisions of the High Court, the following hear some specific disputes:

- The Commissioner of Patents. The Commissioner of Patents is a High Court judge who has been designated as a Commissioner of Patents to hear patent disputes under the Patents Act.
- The Copyright Tribunal. The Commissioner of Patents also hears copyright licensing disputes in the Copyright Tribunal.
- The Competition Tribunal. This deals with competition issues.

South Africa's 1994 Constitution created a constitutional state, which provides that the Constitution is paramount. All laws must be constitutional and cannot, subject to certain limitations, be inconsistent with the Bill of Rights, which is a part of the Constitution. The courts have the power to nullify unconstitutional legislation. All judgments, except judgments of an interim nature, can be appealed if leave to appeal is granted.

The answers to the following questions relate to procedures that apply in the High Court.

4. Which types of lawyers have rights of audience to conduct cases in courts where large commercial disputes are usually brought and what requirements must they meet? Can foreign lawyers conduct cases in these courts?

The South African legal profession is similar to the English one. It has a split bar consisting of lawyers (solicitors) and advocates (barristers). Advocates cannot accept work directly from the

public and must be briefed by a lawyer who guarantees payment of the advocate's fees. Both lawyers and advocates have a right of audience before the High Court, although lawyers must apply to the Law Society for "right of appearance". In practice, lawyers usually brief advocates to appear.

FEES AND FUNDING

5. What legal fee structures can be used? For example, hourly rates, task-based billing, and conditional or contingency fees? Are fees fixed by law?

Lawyer fees are subject to negotiation and are typically based on a rate per day or per hour. There is a "party and party" tariff (see *Question 21*). Contingency fees can be arranged subject to guidelines imposed by the Law Society.

6. How is litigation usually funded? Can third parties fund it? Is insurance available for litigation costs?

Funding

Litigation is usually funded by the parties themselves. Following recent court decisions, third party funding is (on the understanding that the funding party shares in the benefits of a successful claim) is lawful and becoming more frequent.

Insurance

Insurance cover for litigation costs is available through local and foreign insurers.

COURT PROCEEDINGS

7. Are court proceedings confidential or public? If public, are the proceedings or any information kept confidential in certain circumstances?

High Court proceedings are open to the public, while arbitrations and mediations are confidential (see *Question 31*). The High Court has the discretion to order that proceedings are confidential. However, this happens only in limited circumstances, where the presiding officer considers it to be in the interests of the proper administration of justice (that is, a public hearing would materially hamper or make impractical the administration of justice). This discretion is rarely exercised and, in practice, parties should expect cases to be heard in public.

8. Does the court impose any rules on the parties in relation to pre-action conduct? If yes, are there penalties for failing to comply?

There are no pre-action conduct protocols in court proceedings, apart from in the case of claims against the state or any of its organs. In arbitration proceedings, the parties often meet with the arbitrator before the proceedings to attempt to reach an agreement on the manner in which the proceedings are to be conducted. The arbitrator can impose obligations and time constraints on the parties.

9. Please briefly set out the main stages of typical court proceedings, including the time limits (if any) for each stage, any penalties for non-compliance and the role of the courts in progressing the case. In particular:

- How a claim is started.
- How the defendant is given notice of the claim and when the defence must be served.
- Subsequent stages.

Starting proceedings

Proceedings are usually preceded by a letter of demand setting out the claimant's claim. If the defendant does not comply with this demand, the claimant can start civil proceedings either by:

- **Bringing an action.** This procedure is used in matters involving a factual dispute. It involves producing evidence (generally involving witnesses giving oral evidence) and culminates in a trial. The action is begun when a summons (or statement of claim) has been issued out of the High Court and served on the defendant.
- **Using the application procedure.** This procedure is quicker and more efficient. It is used where there is no factual dispute and only the application of the relevant law is in question. It is deemed to have been started once the following have been issued out of the court and served on the defendant:
 - a notice of motion;
 - an accompanying witness statement.

Notice to the defendant

The High Court Rules require that the defendant is given notice of the claim by having a copy of the summons or notice of motion served on it by the sheriff of the High Court (sheriff). The sheriff is a statutory officer and is empowered by legislation to effect service of court processes.

The High Court Rules prescribe how a court process must be served:

- If the defendant is an individual, the sheriff must either:
 - deliver a copy of the court process to the defendant personally at his residence, place of business or place of employment;
 - leave a copy of the court process with a person not younger than 16 years of age and apparently in charge of the defendant's residence, place of business or place of employment.
- If the defendant is a company, the sheriff must deliver a copy of the court process to a responsible employee of the defendant at the defendant's registered address or principal place of business.

In certain circumstances (usually where no qualifying person is present to accept service), the sheriff can effect service by attaching a copy of the court process to the door of the service address.

It is common practice for the parties to large commercial contracts to select an address for the service of court documents, in which case the sheriff can effect service at that address.

Subsequent stages

The High Court Rules provide time limits for the completion of each stage of the proceedings. The parties do not always adhere to these time limits as they commonly grant each other time extensions within which to fulfil their obligations. These time periods can be further extended by interim applications brought by the parties. The main time limits are as follows:

- **Notice of intention to defend.** After service of the summons, the defendant has ten court (business) days in which to serve a formal confirmation of its intention to defend the action on the claimant's lawyers. Slightly longer time periods are permitted where summons is served outside of the jurisdiction of the court. If the defendant fails to serve its notice within the time limit, the claimant can immediately apply to the registrar of the High Court (registrar) for default judgment on the terms set out in the claimant's summons. The registrar has the discretion to refuse to grant judgment and can request witness statements or other forms of proof in support of the claim.
- **Plea.** After the defendant has served a notice of intention to defend, it must serve a plea (a formal statement of its defence) within 20 court days. If the defendant does not plead with sufficient particularity, the claimant can apply to court for an order directing the defendant to do so. If the defendant fails to deliver a plea, the claimant can apply to the registrar for judgment on the terms set out in its summons. However, the claimant must first serve a notice of a bar on the defendant, giving a further period of five court days within which to deliver a plea. This notice serves as a last opportunity for the defendant to deliver a plea, failing which judgment can be entered against it.
- **Counterclaim.** The defendant can include a counterclaim with the plea (also known as a claim in reconvention), to which the claimant has 20 court days to deliver a plea. The counterclaim must be a claim against the plaintiff (and other persons if necessary and appropriate), but does not need to be limited to the subject matter of the plaintiff's claim.
- **Replication.** If the defendant raises new issues in its plea, the claimant is allowed 15 court days from the date of service of the plea to reply to the plea through a replication. Similarly the plaintiff is afforded 15 court days within which to plead to any counterclaim.
- **Further pleading.** Each party is entitled to a further period of ten court days from the delivery of the replication or plea to the counterclaim to reply to that pleading or any subsequently filed pleading. A reply is only necessary where the other party's pleading raises new issues not previously dealt with.
- **Close of pleadings.** This occurs after the last day allowed for the service of a replication or further pleading has expired.
- **Application for a trial date.** After close of pleadings, either party can apply for a trial date to be allocated by the registrar. On receipt of the date, either party can serve a notice of set-down, formally confirming the date of the trial.

- **Pre-trial procedures.** According to High Court Rules, before the hearing, the parties must complete a number of pre-trial procedures, the most important of which is the exchange of relevant documents between the parties (discovery).

The parties must hold a pre-trial conference at least six weeks before the hearing of the matter, at which they must discuss certain issues with the aim of shortening the hearing. These issues include, among others, the:

- possibility of settlement;
- admissions made by each party;
- onus or duty to begin at the hearing of the matter (that is, the general principle that the party that makes an assertion has the duty to prove that assertion, and a corresponding duty to begin proceedings).

Minutes of the pre-trial conference must be filed with the registrar at least five weeks before the hearing. Either party can file the minutes of the pre-trial conference, but in practice it is the claimant who does so.

If, at any stage, a party does not comply with the High Court Rules, the aggrieved party can apply to court for an order compelling the other party to comply, failing which that party's claim or defence may be dismissed.

INTERIM REMEDIES

10. What actions can a party bring for a case to be dismissed before a full trial (for example, summary judgment or for a claim to be struck out)? On what grounds must such a claim be brought? Please briefly outline the procedure that applies.

Summary judgment

After the defendant has served a notice of intention to defend, a claimant can apply for summary judgment if its claim is one of the following:

- Based on a liquid document (such as a cheque or acknowledgment of debt).
- For a liquidated amount of money (that is, an amount capable of objective determination).
- For the delivery of specified movable property.
- For ejectment (the eviction of a tenant from a property).

To obtain summary judgment, the claimant must satisfy the High Court that the defendant:

- Does not have a bona fide defence to the action.
- Entered a notice of intention to defend solely for the purpose of delay.

The High Court views summary judgment as a harsh remedy and is generally reluctant to grant it unless the claimant has clearly shown the above requirements.

Provisional sentence summons

When suing on a liquid document, a provisional sentence summons may be issued. This compels the defendant to appear

before court to admit or deny liability in relation to the liquid document. If the court is satisfied that the defendant is liable in relation to the liquid document, the debtor both:

- Will be ordered to pay the amount set out in the liquid document.
- Is not permitted to defend the summons until payment has been made.

Application to strike out

There is no procedure through which the defendant can apply to have the claimant's claim struck out in itself. However, the defendant can in certain circumstances file an exception, through which it can both:

- Object to a defect in the pleading of the claim.
- Request the claimant to amend the claim's wording to remove this defect (for example, where the summons does not disclose a cause of action).

If the claimant does not comply with the defendant's request, the defendant can apply to the High Court for an order compelling the claimant to do so. If the High Court believes that there is merit in the defendant's request, it can grant an order compelling the claimant to remove the defect. If the claimant persists in failing to remove the cause of complaint, the defendant can apply to the High Court for an order dismissing the claim.

An identical procedure is available to the claimant to object to the way in which the defendant's plea is pleaded.

11. Can a defendant apply for an order for the claimant to provide security for its costs? If yes, on what grounds?

If the claimant is foreign, a defendant resident in South Africa can apply to the High Court compelling the foreign claimant to file security for costs. The registrar determines the amount of security, taking into account the party and party (tariff) costs that are involved in the litigation.

Generally, if the claimant is a resident in South Africa, it is not obliged to file security for costs. However, a court can order a corporate claimant to provide security for costs if there is reason to believe that the corporate claimant will be unable to pay the costs of the defendant if successful in its defence.

12. In relation to interim injunctions granted before a full trial:

- Are they available and on what grounds are they granted?
 - Can they be obtained without prior notice to the defendant and on the same day in urgent cases?
 - Are mandatory interim injunctions to compel a party to do something available in addition to prohibitory interim injunctions to stop a party from doing something?
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To preserve the situation before trial, a court can grant an interim injunction to either:

- Prohibit a party from committing a particular act (interdict).

- Compel a party to carry out a particular act (mandamus order).

These can be made on certain grounds, such as:

- There is a serious issue to be tried.
- The balance of convenience favours the grant of an injunction.
- Damages would not be an adequate remedy.

An interdict or mandamus order is applied for by way of the application procedure, under the rules and time periods set out above.

It is usually necessary to notify the defendant of the application. However, the notice requirement is dispensed with if a claimant can demonstrate that notice would prejudice the relief sought. In these cases, relief is granted on an interim basis, providing a "return day" on which the defendant is given the opportunity to prove that the interim relief should not be made final. A defendant can bring the return day forward on notice to the claimant.

In urgent matters the court will permit a deviation from the time periods provided in the court rules. The degree of deviation permitted depends on the degree of urgency. A matter must be very urgent for relief to be granted the same day. Urgent matters are more commonly conducted over the course of a week to two weeks.

13. In relation to interim attachment orders to preserve assets pending judgment or a final order (or equivalent):

- Are they available and on what grounds must they be brought?
 - Can they be obtained without prior notice to the defendant and on the same day in urgent cases?
 - Do the main proceedings have to be in the same jurisdiction?
 - Does attachment create any preferential right or lien in favour of the claimant over the seized assets?
 - Is the claimant liable for damages suffered as a result of the attachment?
 - Does the claimant have to provide security?
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The availability of interim attachment orders depends on the issues involved. Interim attachment orders are often used where:

- Tangible assets are disputed.
- There is a danger of the defendant dissipating monetary assets.
- There is a reasonable basis on to believe that the destruction of evidence may occur.

However, whether the claimant has a right to an attachment order depends on the facts of each particular case.

Application without prior notice to the defendant is permitted in exceptional circumstances and only where it can be shown that giving notice would defeat the purpose of the application. In these cases an interim order is granted. However, there are exceptions such as:

- A Mareva injunction (that is, an order freezing a party's assets).
- An Anton Piller order (an order preserving evidence where there is fear or risk of destruction).

In appropriate cases, this relief is available on the same day. However, if an *ex parte* order is granted, the defendant invariably has the right to be heard and can apply to be heard on an urgent basis.

The main proceedings must be in South Africa for a South African court to grant an interim attachment order. However, it is not essential for the main proceedings to be in the same jurisdiction within South Africa as the court granting an interim attachment order.

An attachment order does not usually create any preferential right or lien in favour of the claimant under the attachment itself. If the claimant has obtained an attachment order unlawfully by alleging untrue facts, then it exposes itself to a claim for damages as a consequence. A claimant does not usually have to provide security, as the right to the attachment in the first place must be based on some entitlement.

14. Are any other interim remedies commonly available and obtained? If yes, please give brief details.

Depending on the facts of each particular case, other interim remedies are available such as an:

- Interdict or a mandamus order (that is, a direction to carry out a particular act).
- Anton Piller order (that is, a search order).
- Applications to the High Court to enforce compliance with the High Court Rules relating to, for example, the delivery of pleadings and discovery issues.

See also *Question 13*.

FINAL REMEDIES

15. What remedies are available at the full trial stage (for example, damages and injunctions)? Are damages just compensatory or can they also be punitive?

The remedies available depend on the cause of action (claims arise either in contract or in delict (tort)) and are:

- An order for specific performance.
- Compensatory damages.

Final interdict (that is, a final order prohibiting a party from committing a particular act).

EVIDENCE

16. What documents must the parties disclose to the other parties and/or the court? Are there any detailed rules governing this procedure?

The High Court Rules oblige a party to make a full and prompt disclosure of all documents currently or previously in its possession or in the possession of an agent, that are relevant to the issues (except legally privileged documents (see *Question 17*)).

There are detailed rules governing this procedure that set out the:

- Documents required to be disclosed.
- Stage at which the parties are entitled to request the documents.
- Form in which the documents can be requested.
- Remedies for each party if the documents are not disclosed. These remedies include applying to court to compel the disclosure of documents or to compel further and better disclosure of documents that have been disclosed.

17. Are any documents privileged (that is, they do not need to be shown to the other party)? In particular:

- Would documents written by an in-house lawyer (local or foreign) be privileged in any circumstances?
 - If privilege is not recognised, are there any other rules allowing a party not to disclose a document (for example, confidentiality)?
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Privileged documents

Certain categories of documents are privileged. Communications between a lawyer and his client are strictly privileged. It is likely that an in-house lawyer's legal advice to his company would be regarded as privileged, but the law is not settled on this issue. Documents prepared in contemplation of or in preparation for litigation are also privileged. A document is not privileged merely because it is written and delivered on the basis that it is confidential.

Other non-disclosure situations

Medical records must not be disclosed apart from with the consent of the patient concerned, unless disclosure is required by law. Where a consent to disclose medical records cannot be obtained, a subpoena must be issued and served to procure the documents.

18. Do witnesses of fact give oral evidence or do they just submit written evidence? Is there a right to cross-examine witnesses of fact?

Witnesses of fact invariably give oral evidence and are subject to cross-examination in trial proceedings. However, in application proceedings no oral evidence is given and evidence is placed before the High Court by way of witness statements, in affidavit form.

19. In relation to third party experts:

- **How are they appointed (for example, are they appointed by the court or by the parties)?**
 - **Do they represent the interests of one party or provide independent advice to the court?**
 - **Is there a right to cross-examine (or reply to) expert evidence?**
 - **Who pays the experts' fees?**
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Appointment procedure

The onus for appointing an expert rests on the parties. The courts do not typically appoint experts in commercial disputes. A party wishing to use a third-party expert in court proceedings must deliver a:

- Notice of its intention to do so to the other party at least 15 court days before the hearing of the matter.
- Summary of the expert's opinions and the reasons for those opinions to the other party at least ten days before the hearing of the matter.

Role of experts

A party to litigation usually uses expert evidence in the belief that this will assist its case. However, it is the role of the High Court to determine the value that should be attached to the evidence, and it will not blindly accept expert evidence.

Right of reply

As with all witnesses called in court proceedings, the opposing party can cross-examine an expert witness. In addition, a party wishing to call expert witnesses must serve a notice and summary, to allow the opposing party to:

- Call its own expert witness.
- Counter the evidence.
- Adequately prepare itself to cross-examine the witness (see above, *Appointment procedure*).

Fees

The party calling the witness usually agrees with that witness to pay his fees. If this party is successful in the main action and is awarded costs, the costs order may include payment of expert fees.

APPEALS

20. In relation to appeals of first instance judgments in large commercial disputes:

- **To which courts can appeals be made?**
 - **What are the grounds for appeal?**
 - **Please briefly outline the typical procedure and timetable.**
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There is no automatic right of appeal in large commercial disputes. A dissatisfied party can appeal a first instance judgment, but must have applied for, and been granted, leave to appeal by the High Court. The application for leave to appeal can be made at the end of the trial or

within 15 days of the granting of the first instance judgment.

The High Court only grants leave to appeal where it believes there is a reasonable prospect of an appeal court reaching a different conclusion. If the High Court grants leave to appeal, it directs the appeal to be heard by a three-judge court of the provincial division, or will grant leave to appeal to the Supreme Court of Appeal in Bloemfontein.

If the High Court refuses to grant leave to appeal, an aggrieved party can petition the Supreme Court of Appeal for leave to appeal.

COSTS

21. Does the unsuccessful party have to pay the successful party's costs and how does the court usually calculate any costs award? What factors does the court consider when awarding costs (for example, any pre-trial offers to settle)?

The High Court has a wide discretion in relation to cost orders. The usual order is that the unsuccessful party is liable to pay the successful party's costs, but only that part of the winner's costs prescribed by the "party and party" tariff (a task-based tariff that determines the amount recoverable from the unsuccessful party). However, the "party and party" tariff is out of line with costs actually incurred on a "lawyer and client" basis, so the winning party ends up paying a substantial part of its own costs. In practice, the successful party rarely recovers more than 30% of actual costs incurred.

A party can offer to settle a claim at any time during the action. This can be done either:

- On a without prejudice basis. This tender is not taken into account when awarding costs.
- Formally, by submitting a written tender of settlement to the court. The party tendering the settlement is then protected from any costs incurred after submission of the tender if the claimant is not awarded a sum above the tendered amount. The amount tendered is not disclosed to the court until after judgment is given.

22. Is interest awarded on costs? If yes, how is it calculated?

Interest is not awarded on costs. However, after a cost award has been made, it constitutes a debt. If a demand is made for payment of the costs awarded and payment is not made, interest accrues at the prescribed rate of interest, which is currently 15.5% per year (simple interest).

ENFORCEMENT

23. What are the procedures to enforce a local judgment in the local courts?

A claimant who has obtained a judgment for a monetary claim is entitled to request the registrar to issue a writ of execution. This allows the claimant to instruct the sheriff to attend the defendant's premises and demand payment of the judgment. If the defendant fails to pay, the sheriff can attach movable property to the value of the judgment. Immovable property can only be attached by a special court order (which is not difficult to obtain). After an attachment is made, the claimant can

instruct the sheriff to sell the property by auction, to raise money up to the value of the judgment. Certain formalities must be complied with before the claimant can instruct the sheriff to make a sale.

If a claimant obtains a judgment for specific performance of a certain act, the claimant instructs the sheriff to serve the court order on the defendant, at which point the defendant must perform or refrain from performing the act.

CROSS-BORDER LITIGATION

24. Do local courts respect the choice of law in a contract (that is, if the parties agree that the law of a foreign jurisdiction will govern the contract)? If yes, are there any areas of law in your jurisdiction that apply to the contract despite the choice of law?

Parties to a contract can state in the contract which law governs it (the chosen law). The chosen law governs most aspects of the contract, such as its validity, effect and interpretation. However, certain issues are excluded from the choice of law as they determine whether a valid contract has been concluded. If these factors are not satisfied then a contract, including the choice of law clause, does not exist. Issues that are not governed by the choice of law include the formation, capacity of the parties, formalities and performance of a contract.

A number of South African laws exclude particular foreign laws that would otherwise apply, due to conflict of laws criteria. For example:

- The Carriage of Goods by Sea Act 1986 provides that the Hague Rules as amended by the Brussels Protocol 1968 (Hague-Visby Rules) must apply to contracts of carriage by sea from a South African port.
- The Employment Act 1997 contains mandatory provisions that an employer must observe irrespective of the choice of law in an employment contract.
- Foreign laws that seriously contravene South African public policy cannot be applied in South Africa.
- Courts do not enforce the revenue laws or the penal laws of another state. To do so would carry out acts of sovereignty on behalf of another state.
- South African law applies to any act that is illegal in South Africa, even if it is legal in the chosen law of the contract under which the act is performed. Therefore, no contract is enforceable to the extent that it contravenes South African law.
- South African law governs all questions of procedure (for example, evidence, the execution of judgments and the taxation of costs, but not measure of damages).

25. Do local courts respect the choice of jurisdiction in a contract (that is, if the parties agree that claims will be brought in the courts of a foreign jurisdiction)? Do local courts claim jurisdiction over a dispute in some circumstances, despite the choice of jurisdiction?

A local court exercises jurisdiction in a contractual dispute if the normal basis for jurisdiction exists, even if the parties have agreed

that claims will be brought in the courts of a foreign jurisdiction.

A number of South African laws set out situations where the local courts have exclusive jurisdiction. For example, the Bills of Exchange Act 1964 gives South African jurisdiction over contracts relating to bills of exchange.

26. If a foreign party obtains permission from its local courts to serve proceedings on a party in your jurisdiction, please briefly outline the procedure to effect service in your jurisdiction. Is your jurisdiction party to any international agreements affecting this process?

In these circumstances, the laws of the foreign court in which the proceedings are heard determines the service of documents. For example, if a foreign court requires service to be effected through the local courts, then service is effected through a sheriff. However, if the foreign court accepts service in any other manner, service can be effected locally along the lines directed by the serving party.

27. Please briefly outline the procedure to take evidence from a witness in your jurisdiction for use in proceedings in another jurisdiction. Is your jurisdiction party to an international convention on this issue?

Evidence can be taken from a witness in South Africa at the request of a foreign court.

South Africa acceded in 1997 to the HCCH Convention on the Taking of Evidence Abroad in Civil and Commercial Matters 1970 (Hague Evidence Convention). However, the Hague Evidence Convention has not been incorporated into South African domestic law. As a result, individuals in South Africa cannot rely on it when seeking to obtain evidence from foreign jurisdictions.

Where a letter of request or commission rogatoire (requesting evidence) is sent to the registrar from a foreign state or court in connection with civil proceedings, the registrar submits the request to a judge in chambers, to give effect to the request (*section 33(1) of the Supreme Court Act 59 of 1959*). Generally, a magistrate is appointed as the commissioner to take the evidence in question.

28. What are the procedures to enforce a foreign judgment in the local courts?

It is possible to enforce foreign civil judgments in South Africa by registering the judgment with a local court under the Enforcement of Foreign Civil Judgments Act 32 1998. However, the scope of this act is extremely narrow. In most cases, a claimant wishing to have a foreign judgment enforced in South Africa must apply to a local court for an order recognising the judgment. Once a local court has recognised the judgment, the claimant can obtain a writ of execution and enforce the judgment.

A local court recognises the foreign judgment provided that the following requirements are met:

- The foreign court which granted the judgment must have “international competency”, which means that the defendant must have been domiciled or resident in the jurisdiction of the foreign court or submitted to its jurisdiction when the action was started.
- The foreign judgment must be final and conclusive.
- The foreign judgment must not be contrary to South African public policy (for example, if it was obtained by fraudulent means or without complying with the principles of natural justice).
- The foreign judgment must comply with section 1(1) of the Protection of Businesses Act of 1978. This provides that the Minister of Trade and Industry must approve the enforcement of certain foreign judgments, such as those relating to the mining, production, importation, exportation, refinement, possession, use or sale of raw materials.

ALTERNATIVE DISPUTE RESOLUTION

29. What are the main alternative dispute resolution (ADR) methods used in your jurisdiction to settle large commercial disputes? Please briefly outline the procedures that are typically followed and any rules that apply.

The following types of ADR are available:

- **Arbitration.** This is an adjudication process under an agreement between the parties to a dispute. It refers that dispute for final determination to an independent and impartial tribunal appointed by or on behalf of the parties. The procedures are very similar to those of a High Court action. The parties are free to agree the rules which apply, such as the rules of any local arbitral body or the High Court Rules.
- **Mediation.** This is a dispute resolution process through which a third party acceptable to all parties helps to bring the parties to an agreed solution. The mediator usually has no decision-making powers and cannot impose a binding conclusion or settlement on the parties.

ADR is most often used when parties desire a quicker, more efficient resolution of a dispute than they would get through the courts. ADR is also perceived to be more cost-effective and has the added benefit of being confidential.

The Arbitration Act 42 of 1965 governs arbitration. If the parties have agreed to arbitration in writing, the Act permits a party to apply to the court to stay legal proceedings instituted in relation to subject matter falling within the scope of the written arbitration agreement. The Act also provides:

- For certain arbitration rules which apply in the absence of agreement to the contrary.
- A mechanism for the enforcement of arbitral awards.

30. Does ADR form part of court procedures or does it only apply if the parties agree? Can courts compel the use of ADR?

ADR does not form part of court procedures and only applies if the parties agree to it. The courts cannot compel the use of ADR.

31. Is ADR confidential?

The arbitration hearing itself is invariably confidential. The award is also confidential, unless a party applies to court to have the arbitral award made an order of the High Court in terms of the Arbitration Act.

32. How is evidence given in ADR? Can documents produced or admissions made during (or for the purposes of) the ADR later be protected from disclosure by privilege?

In arbitration proceedings, evidence is usually given verbally. However, the parties usually agree that the arbitrator can rule on the manner in which evidence can be placed before the arbitrator. This enables evidence to be given by witness statement in certain circumstances.

In mediation proceedings, no evidence is usually given, as the procedure is designed to help the parties to reach an agreement between themselves. Documents produced or admissions made during mediation proceedings are usually privileged, since they form part of a settlement process.

33. How are costs dealt with in ADR?

In arbitration proceedings, costs are typically dealt with in the same way as in the High Court. The unsuccessful party is usually ordered to pay the other party's costs on a party and party basis (see *Question 21*).

34. Is ADR used more in certain industries? If yes, please give examples.

ADR is not used more in certain industries, although the Building Industry Federation of South Africa has its own panel of arbitrators available to its members in the construction industry. Arbitration is likely to play an increasing role in consumer disputes when consumer protection legislation comes into force in mid-2010.

35. Please give brief details of the main bodies that offer ADR services in your jurisdiction.

Many parties use private arbitrators, although AFSA and the Association of Arbitrators are also widely used.

REFORM

36. Please summarise any proposals for dispute resolution reform and state whether they are likely to come into force and, if so, when.

It has been recognised that the 1965 Act (*see Question 1*) does not meet all the needs of an international arbitration. The South African Law Commission (Commission) has therefore proposed two new Arbitration Acts:

- The International Arbitration Act.
- The Domestic Arbitration Act.

The Commission has proposed that the UNCITRAL Model Law on International Commercial Arbitration 1985 (UNCITRAL Model Arbitration Law) be adopted by South Africa for international commercial arbitrations. Unfortunately, the necessary legislation is not yet in force. However, the Commission has proposed that the UNCITRAL Model Arbitration Law should not be adopted for domestic arbitrations in South Africa, but that the existing 1965 Act should be repealed and replaced with a comprehensive new Domestic Arbitration Act. The new Domestic Arbitration Act, when in force, will combine the best features of the UNCITRAL Model Law and the English Arbitration Act of 1996, while retaining certain provisions of the 1965 Act that have worked well in practice.

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