

Arbitrarily speaking ...

What's happening in the world of ADR?



1. Revised Arbitration Rules

It may be of interest to members to note that two new sets of rules for the conduct of arbitrations have recently been published by international arbitration organisations.

The Cairo Regional Centre for International Commercial Arbitration's present CRCICA Arbitration Rules are based upon the new UNCITRAL Arbitration Rules as revised in 2010, with minor modifications emanating mainly from the Centre's role as an arbitral institution and an appointing authority. These rules entered into force as from 1 March 2011 and apply to arbitral proceedings that commenced after this date. Copies of the Rules can be obtained from their website at www.crcica.org.eg

The International Chamber of Commerce (ICC) has launched a much-anticipated revised version of its Rules of arbitration with the aim of better serving the existing and future needs of businesses and governments engaged in international commerce and investment. The new Rules will come into force on 1 January 2012 and take into account current requirements and developments in arbitration practice and procedure, as well as developments in information technology, since they were last revised in 1998.

Members may obtain a copy of the new Rules at www.iccwbo.org.

2. Dispute Settlement Accreditation Council

The Dispute Settlement Accreditation Council (DiSAC) has recently released its standards of accreditation for mediation for public comment.

These standards, benchmarked against the international norms, are a major step towards establishing national professional accreditation standards in South Africa for dispute settlement practitioners, including mediators and arbitrators.

The Association of Arbitrators, through its chairman and executive director has been involved in this process and the Association of Arbitrators is one of the service providers that forms part of the initial executive committee of DiSAC. Other service providers include Conflict Dynamics, Equillore, LEAD SA, The Mandela Institute and Tokiso Dispute Settlement. Any member wishing to have sight of these standards, should contact the Secretariat.

3. Draft Mediation Rules to the High court and Magistrates court

The Rules Board for Courts of Law has released draft Mediation Rules for the high court and the Magistrates court. Essentially, the proposed rules make provision for a pilot project in which every action or application issued out of a magistrates or high court must be referred to mediation first. The Rules Board called for comment to these Rules by 31 October 2011 and the AoA, together with a number of other service providers, provided such comment. Any member wishing to have sight of these draft Rules as well as of the AoA's response thereto, should contact the Secretariat.

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Can an Arbitrator make an award by consent?

By Alastair Hay, Chairman of the Kwazulu Natal branch of the Association of Arbitrators and partner at Cox Yeats Attorneys



Introduction

It frequently happens in arbitrations that parties settle their disputes before the conclusion of the arbitration proceedings.

In these circumstances it has often been the practice for the parties to ask the arbitrator to make an award by consent setting out the terms of the settlement between them.

The question as to whether such a practice is legally competent and gives rise to an award that can be enforced in the normal way recently received the attention of the Supreme Court of Appeal¹.

Arbitration awards are enforced firstly by having the award declared to be an order of court on application to the appropriate High Court having jurisdiction over the parties and secondly by invoking the usual machinery for the enforcement of court orders such as execution proceedings or even contempt proceedings.

The Facts

The three Bidoli brothers, Guido, Fabrizio (since deceased and represented in the proceedings by his wife Barbara) and Romolo, immigrated to South Africa from Italy in the 1950's. For many years they conducted business in partnership in South Africa, Namibia and Italy, mainly in the building contracting field. Their partnership took various guises. In some cases it was a specific joint venture, in other cases it was a company in which they held shares jointly and in other cases and for certain periods of time they operated as a straightforward partnership.

In the 70's the brothers sent money back to Italy for their late father to construct a block of flats on the outskirts of Rome. This was done and an adjoining vacant piece of land acquired, both of which were registered in the joint names of the brothers.

The block of flats was subsequently sold and the proceeds put into a bank account in the joint names of the brothers in Rome.

In 2007 disputes arose between the brothers regarding their financial affairs including what their shares were in the bank account in Rome.

The arbitration agreement provided for the Arbitration Act, 42 of 1965, to govern the arbitration

including the enforcement of the arbitration award. After the parties had filed their respective statements of claim and statements of defence, the hearing was convened for 3 December 2007.

The hearing ran for a few days and then negotiations took place between the parties resulting in a settlement being concluded on Friday 7 December 2007.

On Monday 10 December 2007, Romolo expressed dissatisfaction with the settlement on the grounds that he felt that the amount that he had agreed to pay Guido was more than it should be. However, despite this, the arbitrator, on the application of Guido and Barbara, made an award in accordance with the terms of the settlement agreement *inter alia* dealing with how the money in the Rome bank account was to be divided up.

The question as to whether such a practice is legally competent and gives rise to an award that can be enforced in the normal way recently received the attention of the Supreme Court of Appeal¹.

When Guido applied to the Western Cape High Court to have the arbitration award made an order of court, Romolo opposed the application and counter-applied for the arbitration award to be declared void and ineffective. One of the arguments raised by Romolo was that once the parties had settled their dispute, the arbitrator's mandate terminated automatically and as such he never had any legal standing or jurisdiction to make the award that he had made.

The Cape High Court judge found favour with this argument and set aside the award. Guido, not content with this outcome, appealed to the Supreme Court of Appeal in Bloemfontein.

The Decision

The SCA pointed to the fact that:

- the English Arbitration Act specifically provides for the arbitrator to issue an award recording the terms of a settlement between the parties;
- as long ago as May 2001 the South African Law Commission recommended a new Arbitration

Act which contains a provision permitting an arbitrator to record any settlement in the form of an award on agreed terms;

- the hallmark of arbitration is that it is a dispute resolution process flowing from the consent of the parties who define the powers of the arbitrator and are equally free to modify or withdraw those powers by way of further agreement.

The SCA said it was clear that the parties intended their arbitration to come to an end with the issue by the arbitrator of an arbitral award on agreed terms.

The court held that there was nothing in the South African common law which precluded such an arrangement which was consistent with the rules of various international arbitration tribunals including the Association of Arbitrators (Southern Africa) Rules which specifically provide for this.

Romolo argued that an essential ingredient of an arbitration is that there must be a dispute between the parties. If there is no dispute, there can be no arbitration. Whilst the SCA agreed with this proposition, it said that there had been a dispute between the parties, the arbitration had run for a number of days and the parties had agreed to their settlement agreement being made an award so that it could if need be be enforced by the process provided for in the Arbitration Act.

Romolo had two other arguments aimed at undermining the arbitrator's award, namely:

- part of the award issued by the arbitrator comprised a declaration of the parties' rights which Romolo argued was not legally competent for an arbitrator to do; and
- part of the award related to matters falling outside the court's territorial jurisdiction, namely in Italy.

The court held that an arbitrator is fully entitled to make an award in whatever format is appropriate including an award which declares the rights of the parties such as a ruling on the existence or meaning of a contract. As to the second point, the SCA stated that Romolo was resident in South Africa and as such the award if made an order of court could be enforced against him if only via contempt of court proceedings.

Conclusion

In the result the court upheld Guido's appeal, made the arbitrator's award an order of court and directed Romolo to pay the costs of all of the proceedings. •

¹ GB Bidoli v BL Bidoli and R Bidoli, Case No 436/10, judgment delivered 27 May 2011

*International Arbitration Conferences 2012**

Organisation	Dates	Topic	Venue
SIAC	21 January	To be advised	New Delhi
CI Arb	3 - 8 February	7 th ICC Mediation Competition	Paris
LCIA	February TBC	Latin American & Caribbean Council Symposium	Rio
LCIA	8 March	Young International Arbitrators Group Symposium	Sweden
IBA	9 March	International Arbitration Day	Sweden
LCIA	10 March	European User Council Symposium	Sweden
CI Arb	19 - 22 April	CLA Regional Law Conference	Sydney
IBA	22 - 25 April	Biennial Conference on the section of energy, environment, natural resources and Infrastructure law	Chile
LCIA	11 May	Young International Arbitrators Group Symposium	UK
LCIA	11 - 13 May	European User Council Symposium	UK
CI Arb	13 - 19 May	International Congress of Maritime Arbitrators	Vancouver
LCIA	09 June	Asia Pacific User Council Symposium	Singapore
ICCA	10 - 13 June	21 st ICCA Congress	Singapore
LCIA	29 September	European User Council Symposium	Ireland

*The AoA does not warrant this to be a complete list of all international arbitration conferences taking place around the world.

*We wish all our members well over the festive season.
We hope that 2012 brings with it much prosperity for you.*



The Association of Arbitrators (Southern Africa)

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