

January  
2009

## CONTACT DETAILS

3<sup>rd</sup> Floor  
Sandown House  
Norwich Close  
Sandown  
2196  
South Africa

P.O. Box 653141  
Benmore  
2010  
South Africa

**Secretariat:**  
arbitrators@icon.co.za

Tel: +27 (11) 884-9164  
Fax: +27 (11) 884-9167

[www.arbitrators.co.za](http://www.arbitrators.co.za)

**Chairman**  
**Chris Binnington**  
cdb@bca.co.za

**Vice Chairman**  
**Judge Fergus Blackie**  
fcbblackie@telkomsa.net

**Treasurer**  
**Prof Ronnie Schloss**  
schlossy@mweb.co.za

**Editor**  
**Donald Joubert**  
donald@bca.co.za

*Arbitrarily speaking ...*

Newsletter of the Association of Arbitrators (Southern Africa)



## CHAIRMAN'S LETTER

Firstly, my very best wishes to all members for the coming year. Whilst South Africa has, to some extent, been insulated from the global financial meltdown, it is inevitable that we shall increasingly feel the effects of the situation in the months ahead. As far as the Association is concerned this might even be seen to be a beneficial development given that the numbers of disputes are likely to increase. Whatever the impact the Association will continue to fulfil its overall objectives by providing a body of competent Arbitrators, Mediators and Adjudicators to assist in finding commercial resolution of disputes.

The Association was saddened and shocked to hear that Professor Richard (Dick) Christie suffered a serious stroke in December. Dick has been the Hon President and a major contributor to the Association over the years. I know you will all join me in wishing Dick a speedy recovery.

Although Gauteng activities were limited in 2008 the Association has continued to be active. Several meetings of the Rules

Committee have taken place with a view to revising the August 2005 rules for the conduct of arbitrations. This has been necessitated by practical considerations of the import of certain of the Rules together with cognisance having been taken of international

developments in particular from organisations such as the Swiss Association of Arbitrators, who have introduced innovative developments in their own rules. Whilst there is no fixed timetable for the publication of an amended set of Rules it is probable that this will take place in the first half of 2009.

Elsewhere in this newsletter you will find a report on the expert witness course which was run by the Association in Cape Town and Johannesburg. Whilst the turnout for these courses was disappointing, those who did attend were very complimentary in regard to the presentations, their content and the knowledge of the speakers involved. In particular the Association would like to express its thanks to Bruce Brodie the UK Barrister and fellow of this Association, Advocates Patrick Lane SC and Gary Myburgh SC. One of the interesting concepts which emerged during the

courses was the discussion on "hot tubbing", a process by which experts of similar disciplines together with the Arbitrator participate

jointly in an interactive procedure designed to provide the Arbitrator with firsthand knowledge of the respective positions of the experts and to allow constructive debates towards an agreed expert position.

**THE ANNUAL GENERAL MEETING  
WILL BE HELD IN MAY 2009**

January  
2009

*"Gentlemen, I fervently trust that before long the principle of arbitration may win such confidence as to justify its extension to a wider field of international differences."*

**Henry Campbell-Bannerman**

Copies of the papers are available from the Secretariat for a small fee to cover duplication and postage.

Regrettably the Association's attempts to obtain a speaker for a series of presentations on the very topical issue of football stadia while drawing on the expertise of someone who was intimately involved in Arsenal's Emirates Stadium in the United Kingdom, were unsuccessful. With the 2010 world cup just around the corner we feel sure that this is an objective worth pursuing and it is hoped to bring out to South Africa someone with the

appropriate experience to present a series of evening lectures around the country.

As usual the Annual General Meeting will be held in May 2009, the format, content and venue will be disclosed in due course. I look forward to meeting as many of you as possible in the course of the year and in particular wish all those who are involved in the certificate and/or fellowship admission course every success with their studies.

Sincerely,

**CHRIS BINNINGTON**

## A WORD FROM THE VICE CHAIRMAN

Long ago Voet summarised the advantages of arbitration over litigation:

"[I]t is a common thing for arbitrators to be approached with a view to the termination of a dispute and the avoidance of a formal trial. The [reasons for resorting to arbitration] are the fear of the too heavy expenses of lawsuits, the din of legal proceedings, their harassing labours and pernicious delays, and finally the burdensome and weary waiting on the uncertainty of the law"

Recently a member of the Association wrote complaining that arbitrations had become increasingly slow, legalistic and expensive. There is too much delay, too many lawyers, too much law, and the costs are too high. He felt that this was defeating the purpose of arbitration. What is needed in arbitration, he said, are quick, simple, inexpensive answers to business and technical problems. He feels that, as practised, arbitration is not the attractive

alternative to litigation that it should be.

The problem is not new either internationally or in South Africa. Fourteen years ago Butler and Finsen wrote about it in their book Arbitration in South Africa Law and Practice. "Practical experience and a perusal of the arbitration literature prove that two of the main advantages traditionally claimed for arbitration compared to litigation, namely speed and reduction in costs are not achieved in practice, particularly where the procedure emulates the rules of the supreme court".

The problem seems to be still with us today. The question is what, if anything can be done about it.

**WHAT IS NEEDED IN ARBITRATION ARE QUICK, SIMPLE, INEXPENSIVE ANSWERS TO BUSINESS AND TECHNICAL PROBLEMS.**

A great deal of work is being done internationally and in sophisticated (mainly western) legal jurisdictions. Those of you who attended the symposium on the specialist witness in

arbitration (arranged by the Association and reviewed later in this newsletter) will have heard about the work that has been done through revised legislation and rules to improve the quality and delivery in arbitration elsewhere and the role that the various arbitration associations have played in improving procedures and delivery.

to revive and promote the proposed acts.

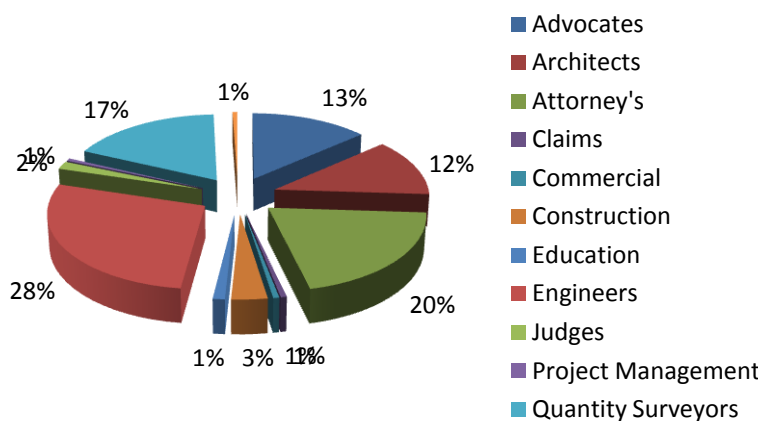
Nevertheless, there is a responsibility on any arbitration association to do what it can to actively promote the best use of arbitration as a means of resolving disputes.

This Association has a committee looking at the rules which will make recommendations for amendments hopefully incorporating as much of the new and improved practice developed elsewhere as possible and taking out some of the kinks in the existing rules that have become apparent with use.

Ultimately, however, an important part of the solution to the problems of cost, delay and technicality will depend on the quality of the Association's arbitrators and the way in which they deal with their arbitrations. We must look again at our initial training, our continuing educational programmes and the discipline of our members to make sure that all members are aware of their responsibility and are confident in the discharge of that responsibility. Hopefully in the course of the coming year we can deal with these matters with members in lectures and workshops and make progress in minimising the problems.

Sincerely,  
**JUDGE FERGUS BLACKIE**

### COMPOSITION OF FELLOWS



Unfortunately, in South Africa, the proposed new South African Arbitration Acts covering both domestic and international arbitration and aimed at bringing our legislation into line with common and improved practice elsewhere in the world seems to be buried and lost at the bottom of Government priorities. The Association, with others, is actively trying

### THE EXPERT WITNESS CONFERENCE

On the 4th and 6th November 2008, the Association hosted, successively in Cape Town and Johannesburg, two one day conferences on The Expert Witness in Arbitration and

Litigation. The idea for the conference came from the Chairman of the Association, Chris Binnington.



*"To give a satisfactory decision as to the truth it is necessary to be rather an arbitrator than a party to the dispute."*

Aristotle

The conferences had two major objectives. The first was to improve and develop the knowledge and understanding of the purpose, value, role and ethics of an expert witness among arbitrators and practitioners dealing with and presenting such evidence together with expert witnesses themselves. The second was to introduce participants at the conference to current and developing practice in the presentation and treatment of such evidence internationally and in South Africa.

Four speakers were involved in the conferences – Bruce Brodie, a South African born member of the London Bar and experienced arbitrator in England and internationally; Advocates Pat Lane and Gary Myburgh, both Silks practicing respectively at the Johannesburg and Cape Bars and both very experienced in arbitration, together with Chris Binnington, who in addition to being Chairman of the Association, is a well known and respected practitioner in arbitration.

The speakers chose their own methods of presentation but the main method was by

by a workshop dealing with a problem arising from the preceding lecture. The standard of presentations and the delivery from the speakers was very high.

At the end of the conferences, the Association expressed its thanks to the speakers for the quality of their presentations and for the time and trouble that they had taken to make the subjects discussed clear and interesting. Those thanks are repeated here.

**IMPROVE AND DEVELOP THE KNOWLEDGE AND UNDERSTANDING OF THE PURPOSE, VALUE, ROLE AND ETHICS OF AN EXPERT WITNESS**

The topics covered in the course were identical on each day.

They started with two sessions on, firstly, the general position and recent developments

concerning the expert witness in South Africa, in England and internationally together with the more important rules of evidence in South Africa in litigation and the distinguishing evidential features of arbitration and expert evidence.

The next session covered the expert witness himself – the definition, the purpose and role of the expert witness together with his responsibility in regard to ethics, impartiality, accuracy and reliability.

The final session dealt with the expert witnesses report – its preparation and presentation together with cross examination of expert witnesses.

It is not possible here to go into the full detail of each presentation but there was some extremely interesting information on streamlining and improving the efficiency of the arbitration proceedings

**Nomination Application Statistics**

<b>2004</b>	<b>71</b>
<b>2005</b>	<b>96</b>
<b>2006</b>	<b>114</b>
<b>2007</b>	<b>131</b>
<b>2008</b>	<b>172</b>

lecture (with or without power point assistance). Each lecture session was followed

*"Wars will remain while human nature remains. I believe in my soul in cooperation, in arbitration; but the soldier's occupation we cannot say is gone until human nature is gone."*

Rutherford B. Hayes

and the presentation of the evidence of expert witnesses. In regard to expert witness evidence, the early exchange of experts' reports, pre-hearing meetings between the experts of the opposing sides and what was called 'hot-tubbing' (a procedure whereby the experts presented themselves before the tribunal members – with or without their legal representatives – to discuss their reports and differences with the tribunal members) were some of the areas covered.

There was one disappointing feature of the conferences – only a few members attended. Those who did attend learned a great deal. For that reason, it would be valuable to run a similar conference in the future but this time aim for a wider audience and publicity.

Sincerely,

**JUDGE FERGUS BLACKIE**

## DEVELOPMENTS REGARDING ARBITRATION LEGISLATION IN THE SADC REGION

### Mauritius

The Mauritian Parliament passed a new International Arbitration Act on 25 November 2008 which apparently commenced on 1 January 2009. The Act has a number of features of interest to those working for the reform of South Africa's arbitration legislation.

The (Mauritian) International Arbitration Act applies only to international arbitration, while a separate regime is retained for domestic arbitration. This was also the route recommended for South Africa by the SA Law Reform Commission in 1998, whereas Zimbabwe and Zambia have adopted the UNCITRAL Model Law on International Commercial Arbitration for both international and domestic arbitration.

Mauritius is the ninth jurisdiction in Africa to adopt the UNCITRAL Model Law, but the first, and to date, only African jurisdiction to include the amendments made by UNCITRAL to the Model Law in 2006. The Mauritian Act is designed to be particularly friendly to foreign

users. There are no restrictions on the use of foreign lawyers as party representatives or arbitrators. Where the parties do not make their own arrangements for the appointment of the arbitral tribunal, appointments are handled by the Permanent Court of Arbitration (PCA) in the Hague. The parties are free to decide on their own procedure for challenging an arbitrator, and where the challenge is unsuccessful, the challenger may refer the challenge to the PCA, instead of the local court.

**THERE ARE AT LEAST SOME INDICATIONS OF SUPPORT FOR ARBITRATION LAW REFORM WITHIN THE STATE SECTOR**

The court with jurisdiction under the Act is the Mauritian Supreme Court and all applications are to be heard by a panel of three judges. An appeal lies as of right to the Privy Council. These provisions are intended to promote confidence in the quality of court support for and supervision of arbitration under the Act. There are also "contract-in" provisions on consolidation and joinder. The Act also gives special attention to the needs of investment arbitration. For this reason it does not contain any provision on the confidentiality of arbitration, which is regarded

*"International arbitration may be defined as the substitution of many burning questions for a smoldering one".*

Ambrose Bierce

as a negative feature of arbitration in the context of investment disputes. The passage of the Act through parliament had the direct personal backing of the Mauritian prime minister.

#### South Africa

The Department of Trade and Industry is in the process of undertaking an investigation into legislation adversely affecting trade and investment in a South African context. It is almost self-evident that South Africa's lack of modern arbitration legislation for international arbitration will be identified as one of the defects. It is therefore probable that the Department of Trade and Industry will shortly start putting pressure on the Department of Justice to take steps for the introduction of the UNCITRAL Model Law for international arbitration only. This will enable parliament to avoid the political sensitivities regarding domestic arbitration. There is as yet no indication of a timeframe for the introduction of legislation on international arbitration. However, there are at least some indications of support for arbitration law reform within the state sector,

as opposed to the antagonism and indifference of recent years.

#### South African Law Reports

**Members are reminded that the Association continues to provide access to the South African Law Reports through Jutastat**

#### Prof Dick Christie QC

Members will be sad to learn that the Honorary President of the Association, Prof Dick Christie, suffered a major stroke in mid-December, 2008. He is currently recovering slowly and is undergoing therapy in hospital. Our thoughts are with Prof Christie, his wife and family at this time.

Sincerely,

**PROF. DAVID BUTLER**

#### Chairman's Lecture

#### "Security for Costs"

*Security for Costs is a problem which arbitrators are regularly required to deal with. There have been some important changes in our law dealing with the entitlement to receiving an order for Security for Costs particularly in cases where there is little prospect of a successful defendant recovering costs.*

*Chris Binnington will review the law in this regard and offer guidance to arbitrators*

**The Pavilion  
Inanda Club  
24 February 2009  
17h00 for 17h30**