



Association of Arbitrators (Southern Africa) NPC

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Dear Sir/Madam

PRACTICE NOTE:

APPOINTMENT OF ARBITRATORS IN TERMS OF THE 2013 STANDARD PROCEDURE RULES FOR THE CONDUCT OF ARBITRATIONS:

Kindly be advised that any reference in this Practice Note (including references in the footnotes) to *the Rules* is a reference to the **Standard Procedure Rules for the Conduct of Arbitrations** (7th Edition) (to which we refer as the 7th Edition Rules) and which came into effect on **1 January 2013**.

This Practice Note has been prepared by the Chairman of the Association of Arbitrators (Southern Africa) ("the Association") in order to advise how the procedure for the appointment of **arbitrators** (including the additional procedural requirements for the appointment of **sole arbitrators**) has been revised by the Association **in order to comply with the Rules**. It is also intended to inform our Associate Members and Fellows as well as those who seek from the Association the appointment of an arbitrator how such appointments will be made (ie the procedural requirements necessary for the appointment by the Association of an arbitrator). This Practice Note does not impact on or affect the appointment of adjudicators.

An important distinction requires immediate mention. The appointment by the Association of an arbitrator in compliance with the procedure established in *the Rules* **only becomes applicable where the parties have agreed in writing that dispute(s) between them shall be referred to arbitration under the Association's Rules for the Conduct of Arbitration**. It is in such circumstances that dispute(s) must be settled in accordance with the Association's 7th Edition *Rules subject to such modification as the parties may agree in writing*. For example, whereas the dispute resolution clause in the 2014 JBCC Principal Building Agreement (PBA) is silent in this regard, clause 40(4) of the 2007 JBCC (PBA) provides:

*".... Where nobody is stated or where the stated body is unable or unwilling to act, the appointment shall be made by the chairman for the time being of the Association of Arbitrators (Southern Africa). **The appropriate rules current at the time when the dispute is declared shall apply.**"* (my emphasis).



The cumbersome procedure for the appointment by the Association of an arbitrator in terms of the 7th Edition Rules would be applicable to a dispute which arises in respect of the 2007 JBCC PBA but would not be applicable in respect of the appointment of an arbitrator under the 2014 JBCC PBA.

This practice note therefore deals only with the appointment by the Association of an arbitrator where the 7th Edition Rules are triggered/applicable.

1. The binding nature of the Rules:

1.1 Where parties have agreed in writing that disputes between them in respect of a defined legal relationship, whether contractual or not, shall be **referred to arbitration under the Association's Rules for the Conduct of Arbitration**, **such disputes shall be settled in accordance with the Rules¹**.

1.2 Unless the parties have agreed otherwise, these Rules **shall apply to any arbitration** which is commenced **on or after that date.²**

1.3 These Rules shall govern the arbitration **except** that where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail.³

1.3.1 The **intention of the parties not to use the Rules** must either be **clear from the contract** which contains the written arbitration clause **or the parties must provide the Association with a document in which they have agreed not to use the Rules;**

1.3.2 The parties are free to amend the Rules or to decide to use other Rules or a combination thereof **at the preliminary meeting**. However, for purposes of this Practice Note dealing with the appointment of **an arbitrator**, there would not yet have been a preliminary meeting.

2. Procedural compliance with the Rules by the parties **prior to** a request for the appointment of an arbitrator:

¹ Article 1(1) of the Rules

² Article 1(4) of the Rules

³ Article 1(5) of the Rules



2.1 The party or parties **initiating** recourse to **arbitration** (hereinafter called the “claimant”) shall communicate to the other party or parties (hereinafter called the “respondent”) **a notice of arbitration**⁴

2.2 The **notice of arbitration** shall contain:

2.2.1 *a demand that the dispute be referred to arbitration;*

2.2.2 *the names and contact details of the parties;*

2.2.3 *the name and contact details of any arbitrator already agreed upon by the parties;*

2.2.4 *identification of the arbitration agreement that is invoked;*

2.2.5 *identification of any contract or other legal instrument out of or in relation to which the dispute arises or, in the absence of such contract or instrument, a brief description of the relevant relationship;*

2.2.6 *a brief description of the claim and an indication of the amount involved, if any;*

2.2.7 *the relief or remedy sought;*

2.2.8 *a proposal as to the number of arbitrators, language and place of arbitration, if the parties have not previously agreed thereon.*⁵

2.3 The respondent must communicate to the claimant **a response to the notice of arbitration** *within 30 days of the receipt of the notice of arbitration* which **notice of response** shall include:

2.3.1 *The name and contact details of each respondent; and*

2.3.2 *A response to the information set forth in the notice of arbitration referred to in 2.2.1.- 2.2.8 above.*⁶

3. **The powers and duties of the Association (as appointing authority):**

3.1 Where the Association is requested **to appoint an arbitrator** pursuant to articles 8, 9, 10 or 14 of the Rules, *the party making the request shall send to the Association copies of:*

3.1.1 **the notice of arbitration;** and

⁴ Article 3 (1) of the Rules

⁵ Article 3(3) of the Rules

⁶ Article 4 of the Rules



3.1.2 *If it exists, **any response to the notice of arbitration.***

3.2 Thereafter the Association shall have regard to ***such considerations as are likely to secure the appointment of an independent and impartial arbitrator.***⁷

3.2.1 Where the arbitral tribunal is to comprise only **one arbitrator**:

3.2.1.1 *If within 30 days of the receipt of the **notice of arbitration** the parties have not agreed on **the arbitrator**, a sole arbitrator may, **at the request of a party**, be appointed by the Association.*

4. Summary regarding the appointment of a **sole arbitrator**:

4.1 Prior to making the appointment of a **sole arbitrator** and **after the effluxion of a period of 30 days from the receipt of the notice of arbitration** the Association must be furnished with:

4.1.1 *a duly completed pro forma application form for the appointment of an arbitrator which is available upon request from the Association;*

4.1.2 *a copy of the **notice of arbitration** including the information which must be contained therein (see 2.2.1 – 2.2.8 above),*

4.1.3 *any response thereto (see 2.3.1 – 2.3.2 above);*

4.1.4 *a statement to the effect that the parties are unable to agree on the identity of an arbitrator;*

4.1.5 *a request that the Association appoint a sole arbitrator; and*

4.1.6 *proof of payment of the applicable fee (determined by the Association from time to time).*

4.2 A word of caution needs to be expressed here: A party wishing the appointment of a **sole arbitrator** will have to furnish proof to the Association that:

4.2.1 *the **notice of arbitration** has been received by the other party; and*

⁷ Articles 6(1) and (2) of the Rules



4.2.2 There has been no agreement between the parties as to the identity of the arbitrator (or, put otherwise, that agreement as regards the identity of the arbitrator has not been reached between the parties).

Regards

ADV SHAUN MITCHELL
CHAIRMAN