

December
2016

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Arbitrarily speaking...

Newsletter of the Association of Arbitrators (Southern Africa) NPC



CHAIRMAN'S LETTER

My very best wishes to all members for 2017.

The "flipside to this coin" may well be beneficial to the Association and its Fellows as the number of disputes could increase proportionately. The Association will continue to fulfil its overall objectives by providing a body of competent Arbitrators, Adjudicators and Mediators to assist in the resolution of commercial and construction related disputes.

Update on Activities

The Association's 36th AGM was held on 18 May 2016 at the Old Edwardians Club in Johannesburg. It was well-attended with 116 attendees.

Mr Michael Stephens was our guest-speaker. He is a double amputee, pursuant to a land yacht accident when he was 12 years of age, and has become a motivational speaker for the "Jumping Kids Foundation" which seeks to provide less fortunate children with prosthetic limbs, especially legs. His talk was both illuminating and informative.

Draft International Arbitration Bill¹

On 13 April 2016 Cabinet approved the draft International Arbitration Bill for submission to Parliament for debate and approval. The Bill, together with its explanatory memorandum, was published in the Government Gazette on 28 April 2016. It is hoped that it will shortly be introduced into Parliament to become the highly anticipated International Arbitration Act.

It will govern all international arbitrations (commercial/investment) in South Africa currently regulated by the provisions of the 51 year old Arbitration Act, 42 of 1965. The current Act regulates domestic and international arbitrations. The most fundamental change to be brought about will be that South African law will now distinguish between the law governing one the one hand international arbitrations (through the incorporation of the UNCITRAL Model Law on International Commercial Arbitration, as amended (the Model Law) as part of the Act) and on the other hand domestic arbitrations

(which will still be regulated by the current Arbitration Act).

The International Arbitration Act will align the South African international arbitration law with international best practice and will establish

South Africa as a venue of choice for international arbitrations in Africa. South African courts have played a critical role in promoting arbitrations in South Africa. The courts have not interfered with the sanctity of arbitration agreements and should continue to refrain from doing so by providing the necessary platform and support to ensure international arbitrations are respected and thrive in South Africa.

Highlights of the new regime will include:

- ✓ The Act will be binding on all public bodies;
- ✓ The Model Law (subject to specific exclusions) will have the force of law in South Africa;
- ✓ International commercial arbitrations with public bodies to the extent not prohibited by

**THE ASSOCIATION'S OFFICES
WILL BE CLOSED:**

**FROM: TUESDAY 20 DEC 2016;
TO: MONDAY 2 JAN 2017.**

¹ Written by Jackwell Feris and Jonathan Ripley-Evans, Directors in Cliffe Dekker Hofmeyr's Dispute Resolution Department) 6 May 2016.





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"The richest love is that which submits to the arbitration of time."

Lawrence Durrell

the Protection of Investment Act will be possible and must be distinguished from investor-state arbitrations;

- ✓ Immunity will be granted to arbitrators (and their institutions and representatives) acting in good faith;
- ✓ Arbitrations involving any public body are to be held in public, unless the arbitrator, based on compelling reasons, directs otherwise. There is no presumption as to confidentiality of other proceedings which will be determined by agreement between the parties;
- ✓ Parties to an international arbitration agreement may refer their dispute to conciliation in accordance with the UNCITRAL Conciliation Rules;
- ✓ The Recognition and Enforcement of Foreign Arbitral Awards Act will be replaced by Chapter 3 of the Act giving effect to the New York Convention;
- ✓ Permission of the Minister of Economic Affairs will not be required for the enforcement of certain foreign arbitral awards;
- ✓ A foreign arbitral award must be made an order of court upon application, save for certain exceptions (*inter alia* that the subject matter is not arbitrable in South Africa, the enforcement is against public policy or is in bad faith);
- ✓ Security for costs may no longer be ordered against a foreign party at the commencement of the arbitration proceedings.

Appointment of Arbitrators in Terms of the 2013 Standard Procedure Rules for the Conduct of Arbitrations (7th Edition Rules)

Article 3 [Appointment of Arbitrators] of the 7th Edition Rules has been the cause of many delays around the

nomination of arbitrators.

- ✓ Appointment of an arbitrator by the Association may **only become 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";
- ✓ Dispute(s) under such circumstances must be settled in accordance with the Association's 7th Edition Rules "subject to such modification as the parties may agree in writing";
- ✓ Unless otherwise agreed by the parties, the 7th Edition Rules shall apply to any arbitrations on or after the date of the parties' agreement;
- ✓ The 7th Edition Rules shall govern except where:
 - ✓ Any Rule is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail;
 - ✓ The parties' intention is to not use the Rules, which intention 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";
 - ✓ The parties are free to amend the Rules or to decide to use other Rules or a combination thereof at the preliminary meeting;
 - ✓ The party initiating recourse to arbitration shall communicate to the other party/ies (Respondent) a "notice of arbitration";²
 - ✓ The Respondent must respond to the notice of arbitration;³
 - ✓ The party/ies making the request to the Association must supply to the Association:

DATE FOR THE 2017 AGM TO BE ANNOUNCED SOON!

REFER TO THE ASSOCIATION'S WEBSITE:

- ✓ **7th Edition Rules:**
<http://arbitrators.co.za/wp-content/uploads/2014/10/AoA-7th-edition-rules.pdf>;
- ✓ **Practice Note:**
<http://www.arbitrators.co.za/wp-content/uploads/2016/11/AoA-Practice-note-Art-3-7th-Ed-Rules.pdf>.

² Refer to Article 3.1 of the 7th Edition Rules and 2.2 of the Practice Note for the full requirements of the notice of arbitration.
³ Refer to 2.3 of the Practice Note for the full requirements of the Respondent's response.





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"Due to my remarkable negotiation skills, I always get my way."

somecards.com

- ✓ The notice of arbitration;
- ✓ Any responses to this notice.

Note: Refer to 4 of the Practice Note for a list of required documentation to be received by the Association prior to it appointing an arbitrator.

It is imperative that the said Practice Note (which has been drafted as a consequence of the 7th Edition Rules) before the Association is able to

comply with any applications for the nominations of arbitrators in circumstances where the arbitration agreement refers to it being conducted in accordance with the Association's Rules current at the time! Current at the time means "at the time that the dispute arises" and not at the time of the conclusion of the agreement.

Sincerely,
SHAUN MITCHELL

A WORD FROM THE VICE CHAIRMAN

The KwaZulu-Natal Branch of the Association had another successful year in 2016.

The profile of the Association was maintained through the branch's annual Construction Conundrums presentation on 11 August 2016.

The presentation was held at the Suncoast Casino conference venue in Durban and was attended by approximately 180 delegates.

In addition to that, the presentation was made available via webinar through the offices of the Construction Communication Network resulting in 51 delegates participating remotely from various locations throughout the country.

Contractors and developers in KwaZulu-Natal have in recent times been bedeviled by organisations who invade sites and demand employment.

One of the topics at the presentation dealt with *force majeure* and what if any relief the standard form contracts afford contractors in such circumstances. Another topic addressed was what countermeasures contractors and developers can take in the face of such disruptions.

In September I represented the branch in delivering a presentation on some of the topics for the benefit of Cape Town members and interested parties which was well received.

The KwaZulu-Natal branch has been financially self-sustaining for some years and its financial position continues to be sound.

Sincerely,
ALASTAIR HAY

A WORD FROM THE WESTERN CAPE BRANCH

The Western Cape Branch holds Practical Workshops for Members and Students and these are held approximately every 6 to 8 weeks.

We also hold Evening Lectures and scheduled for next year we have some interesting topics which include:

- ✓ The Conventional Penalties Act;
- ✓ The Electronic Communications Act;
- ✓ Damages;

- ✓ Amendments to the Sectional Titles Act;
- ✓ Taxation and the Cost of Litigation;
- ✓ The implication of dealing with Trusts;
- ✓ The Consumer Protection Act; and
- ✓ Liquidations and Sequestrations of a Party.

The next Branch Committee Meeting is scheduled for January 2017.

Sincerely,
JONATHAN MITCHELL

CIARB RECOGNITION/ACCREDITATION

The Association's primary objective to gain full comprehensive recognition/accreditation with the Chartered Institute of Arbitration – United Kingdom (CI Arb-UK) as a Recognised Course Provider (RCP) until 2020, has been successfully achieved. Further to this, full recognition was also awarded for the

Association's training Modules 1 to 4 (in 2011 only 2 modules were recognised) and a full range of membership entry options has been granted to current and future students.

Students who successfully completed Modules 1 and 2 between 2011 and 2016 will be entitled to register





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*“When will
mankind be
convinced and
agree to settle their
difficulties by
arbitration?”*

Benjamin Franklin

with the CI Arb at a Membership level.

Students who successfully complete Modules 1 to 4 from 2017 will be entitled to register with the CI Arb at Fellowship level.

Registration 2017

Registration closes on 28 February 2017.

The Association extends its sincere appreciation to Jim (James) Garner⁴ who donated 3 copies of his book, entitled “JBCC 2014 and All That, a Practical Interpretation” (the only textbook presently available on this series of agreements), to the Association’s Quail Library.

The book contains:

- ✓ A clause by clause review of the 3 JBCC 2014 Agreements and related Contract Data, plus the MBSA 2014 Domestic Subcontract Agreement;
- ✓ Copies of all these documents;

Since collaborating with Jonathan Dingle (218 Strand London) in 2014, several successful Internationally Accredited Mediation Training courses have taken place in Johannesburg and Cape Town. We have trained over 100 newly qualified Mediators.

These Mediators can now add “QDR” as a post-nominal to their names. QDR stands for “Qualified Dispute Resolver (Mediator)”.

In order for these Mediators to retain their “QDR”, they are required to undertake 6 hours of recognised CPD (Continuing Professional Development) annually. This principle is in line with the Civil Mediation Council (CMC) in the United Kingdom, which principle was adopted in 2009 and has been followed worldwide. It is empirical rather than evidence-based but is generally recognised to provide sufficient continuity to justify continuing accreditation.

Some testimonials received from the Sep 2016 course:

- ✓ It has certainly expanded my skill set and completely transformed my view (positively)

Please contact our Course Co-ordinator,

Nombu Tikolo:

Email: coursecoordinator@arbitrators.co.za

Tel.: **+27 11 884 9164/5**

for more information and Registration Forms.

SPECIAL THANKS

- ✓ Possible solutions to problems related to various clauses;
- ✓ Flow charts;
- ✓ Examples of poor and unreasonable amendments to JBCC clauses;
- ✓ 71 standard letters;
- ✓ Notes on JBCC and CIDB.

Jim’s book can be purchased at takealot.com (search for JBCC) for R850.00, or collected (by arrangement) from the Master Builders Association Western Cape for R800.00.

SCHOOL OF MEDIATION, LONDON

on what mediation is and how it should be conducted;

- ✓ An intense, exciting and practical course. I now feel confident to embark on mediation;
- ✓ I have benefited enormously – the course has been life changing;
- ✓ This has been a learning curve that has taught me so much which I know will be beneficial in all aspects of my business in future;
- ✓ An extremely satisfied customer!
- ✓ Role play, hands-on training was very effective;
- ✓ Very useful as you get to both make mistakes and watch mistakes;
- ✓ Excellent, it is clear they have enormous experience in mediation;
- ✓ I thoroughly enjoyed the humour and demeanor of the tutors in passing on their wealth of knowledge;
- ✓ I value the experience shared with us on what works in practice;
- ✓ Everyone who does mediation needs to go through this course.

Thank you to the Association’s staff (Happiness, Raquel, Mandisa and Nombu) who put in a huge

⁴ Since 2008 Jim has been a very active member of the JBCC Technical Committee that has produced the JBCC Edition 6.1 2014 Agreements. He has also written the MBSA Domestic Subcontract 2014, for use with the JBCC Edition 6.1 Agreements, for Master Builders South Africa.





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“Legislation and adjudication must follow, and conform to, the progress of society.”

Abraham Lincoln

effort to ensure these courses were a success!
See “Confirmed 2017 Training Courses” below for

more information on courses being presented in 2017.

SECRETARIAT

June Conolly has left the Association.
Rochelle Appleton joined the Association in September 2016 as General Manager.

can contribute to make the Association a success.
Please feel free to visit Rochelle at our offices for introductions.

Rochelle will be appreciative of any input members

CONFIRMED 2017 TRAINING COURSES

The following 2017 training courses are confirmed:

- ✓ Internationally Accredited Mediation and Conflict Management Training (5 days):⁵
 - ✓ 27 Feb to 3 Mar: Johannesburg;
 - ✓ 6 to 10 Mar: Cape Town;
 - ✓ 2 to 6 Oct: Johannesburg.
- ✓ Mediation CPD for Existing Mediators (07:30 to 13:30):
 - ✓ 15 Mar: Johannesburg.

- ✓ Marketing Mediation CPD for Lawyers (16:30 to 18:30):
 - ✓ 15 Mar: Johannesburg.

Please contact **Raquel Townsend:**
Email: **raquel@arbitrators.co.za**
Tel.: **+27 11 884 9164/5**

for Brochures and Registration Forms.

We would appreciate any referrals members make for these courses.

2017 FEES/RATES

The Association’s 2017 fees will remain as for 2016 (including VAT):

- ✓ Membership Application Fee: R 860.00;
- ✓ Nomination Fee: R 4 320.00;
- ✓ Associate Membership Fee: R 920.00;
- ✓ Fellow Membership Fee: R 3 100.00;
- ✓ Retired Member Membership Fee: R 200.00;
- ✓ International Associate Membership Fee: R 800.00;
- ✓ International Fellows Membership Fee: R 1 800.00.

Email: **coursecoordinator@arbitrators.co.za**
Tel.: **+27 11 884 9164/5**

for more information and Registration Forms.

Venue hire rates (including coffee, tea and biscuits):

- ✓ ½ day: R 1 000.00;
- ✓ Full day: R 2 000.00.

Please contact our Receptionist, **Happiness Mthembu:**

Email: **happiness@arbitrators.co.za**
Tel.: **+27 11 884 9164/5**

Please contact our Course Co-ordinator, for more information and Booking Forms.

Nombu Tikolob:

SOCIAL MEDIA

Please connect with and follow/like the Association on the following social media websites:

- ✓ **LinkedIn:** <https://www.linkedin.com/company/association-of-arbitrators-southern-africa-npc/>
- ✓ **Facebook:** https://www.facebook.com/adjudicate/?hc_ref=PAGES_TIMELINE.

We would appreciate any relevant contribution to our social media websites, from articles to questions to publications.

⁵ For more information and a Registration Form, please refer to the Association’s website (<http://www.arbitrators.co.za/upcoming-listing/>).





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CHALLENGING MUNICIPAL TENDERS

Introduction

In October last year the Supreme Court of Appeal ("SCA") gave helpful insight into the legislative provisions governing the challenge of municipal tender awards and the pitfalls of doing so.⁷

The Law

The law affords an unsuccessful tenderer three avenues to pursue a challenge of a municipal tender award:

- ✓ Regulations 49 and 50 of the Municipal Supply Chain Management Regulations promulgated under the Local Government: Municipal Finance Management Act, 56 of 2003 ("the Regulations");
- ✓ Section 62 of the Local Government: Municipal Systems Act, 32 of 2000 ("the Systems Act"), which embodies a general appeal provision;

Policy provision for the appointment, by the accounting officer, of an independent and impartial person to assist in the resolution of disputes and to deal with objections and complaints connected with the implementation of the municipality's supply chain management processes.

The Regulation goes on to require such person to strive to resolve disputes and objections.

If the independent person fails to resolve the dispute within 60 days or, as frequently occurs, the municipality does not respond to the objection, the aggrieved party can refer the objection or complaint to firstly the Provincial Treasury and if need be to the National Treasury for resolution.

Regulation 50 specifically states however that it does not detract from a person's right to approach a court at any time.

The Systems Act

Section 62 of the Systems Act provides that any person whose rights are affected by a decision taken by a municipality may appeal against that decision by giving written notice of appeal and reasons to the municipal manager within 21 days of the date of notification of the decision.

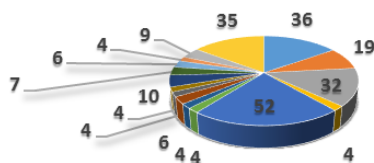
The municipal manager must promptly submit the appeal to the appropriate appeal authority. Depending on the circumstances, the appeal authority will be the municipal manager, the executive committee or executive mayor of the municipality, failing which the council of the municipality.

The section confers on the appeal authority the power to confirm, vary or revoke the decision involved, provided that no such variation or revocation may detract from any rights that may have accrued as a result of the decision. In other words, if the tender award has already been made or a formal contract entered into with the successful tenderer, an appeal under section 62 is not available.

PAJA

Section 6 of PAJA provides that any person is entitled to institute proceedings in a court for the judicial review of an administrative action.

CATEGORIES OF FELLOWS (AS AT 9 NOV 2016)



- 1 Advocates
- 2 Architects
- 3 Attorneys
- 4 Barristers
- 5 Civil Engineers
- 6 Commercial
- 7 Construction
- 8 Contractors
- 9 Directors
- 10 Electrical Engineers
- 11 Engineers
- 12 Judges
- 13 Legal
- 14 Managing Directors
- 15 Project Managers
- 16 Quantity Surveyors

and

- ✓ Judicial review of a tender award in terms of the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA").

The Regulations

Regulation 49 provides that the Supply Chain Management Policy of a municipality must allow persons aggrieved by decisions of the municipality to lodge an objection or complaint with respect to the decision concerned.

Regulation 50 requires a municipality to incorporate into its Supply Chain Management

⁶ Produced by Alastair Hay, Cox Yeats Attorneys.

⁷ *DDP Valuers (Pty) Ltd v Madibeng Local Municipality* [2015] ZASCA 146 (1 October 2015).





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The award of a tender by a municipality is an administrative action.

The section sets out the various grounds for the review of administrative action which include that the action was procedurally unfair, unconstitutional or unlawful.

The right to institute review proceedings is however qualified by section 7(2) of PAJA which states that:

"(a) ... no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted."

The Facts

In 2013 the Madibeng Local Municipality wished to appoint a service provider to compile a new general and supplementary valuation roll for the period 2014 to 2018. It issued the necessary invitation to

✓ On degree of responsiveness instead of on the preference points system contemplated in terms of the Preferential Procurement Policy Framework Act, 2000.

The municipality ignored the letter of objection which resulted in DDP Valuers applying to the Pretoria High Court for the award to be reviewed and set aside.

The municipality raised a technical legal defence to the application. It argued that DDP Valuers had failed to exhaust its internal remedy provided in the Regulations and that in terms of section 7(2) of PAJA its application should be dismissed. Presumably the irony of this approach, in the light of the municipality having frustrated the process by not implementing the Regulations, escaped it. Nonetheless, the High Court judge was enamoured with the argument, and on that ground dismissed DDP Valuers' review application with costs. That resulted in the appeal to the SCA.

SCA Decision

The SCA had to analyse Regulations 49 and 50 in the context of what the law considers to be an internal remedy.

An internal remedy connotes an administrative appeal, usually on the merits, to an official or tribunal within the same administrative hierarchy as the original decision-maker. The appeal tribunal must have the power to confirm, substitute or vary the decision of the initial decision-maker on the merits⁸.

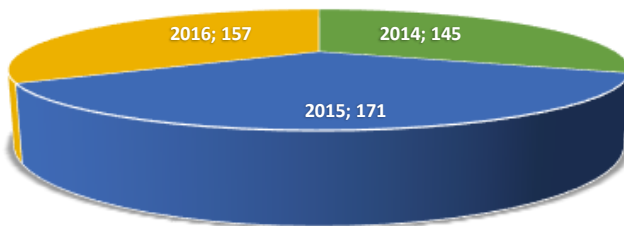
A key consideration is whether the internal remedy is capable of providing effective redress. In South Africa there is no system of administrative appeals. Instead, internal appeal tribunals are created by statute or otherwise on an ad hoc basis.

In the court's view the role of the independent and impartial person contemplated in Regulation 50 is to assist and deal with objections relating to decisions, in this case a tender award. The Regulations are entirely deficient with regard to the process to be followed, and it is clear that the person concerned has no decision-making powers, nor for that matter does the Provincial or National Treasury have any such powers.

The court held that the Regulations do not constitute an internal remedy as contemplated by PAJA which

**ANNUAL APPOINTMENTS
(AS AT 9 NOV 2016)**

■ 2014 ■ 2015 ■ 2016



tender.

DDP Valuers, the municipality's incumbent valuer, and 14 other bidders submitted tenders.

The successful bidder was Dijalo Property Valuers.

On being informed of this, DDP Valuers directed a letter of objection to the municipality requesting relevant information on how the award had come about and requesting that the implementation of the award be suspended.

DDP Valuers' complaint was that the municipality's Bid Evaluation Committee had evaluated tenders:

✓ On criteria in respect of functionality that differed from what was set out in the tender specifications; and

⁸ *Reed and Others v The Master of the High Court and Others* [2005] 2 All SA 429 E.





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provide effective redress. Moreover, it noted that the Regulations themselves record that an affected person may approach a court at any time. In the The SCA confirmed that section 62 of the Systems Act does constitute an internal remedy.

However, in this case the section was not applicable because Dijalo Property Valuers had already been awarded the tender and had signed an agreement with the municipality. As decisions can only be appealed if the outcome of the appeal will not detract from the rights of the successful party, DDP Valuers were not entitled to resort to the appeal procedure concerned.

The only recourse available to them was to apply for judicial review as they had done.

Conclusion

The Regulations are toothless and do not provide any practical remedy to an unsuccessful tenderer.

The appeal process in terms of section 62 of the Systems Act can be easily subverted by the

result the SCA upheld DDP Valuers' appeal and referred the case back to the Pretoria High Court for a decision on the merits.

municipality awarding the tender and signing a contract with the successful bidder. As this will invariably have happened by the time an unsuccessful bidder is informed of the award or is able to lodge an appeal, the section can also be seen as toothless. In almost all cases the only effective remedy to an unsuccessful bidder will be judicial review in terms of PAJA. However, aggrieved tenderers would do well to check with the municipality, assuming they can get the information required, as to whether an award has legally been made and/or a contract concluded with the successful bidder.

It will only be in those cases where municipalities have a fair and transparent appeal system in place that the unsuccessful tenderer will have to appeal before resorting to judicial review.

SOUTH AFRICAN LAW REPORTS

**MEMBERS ARE REMINDED THAT
THE ASSOCIATION CONTINUES TO
PROVIDE ACCESS TO THE
SOUTH AFRICAN LAW REPORTS
THROUGH JUTASTAT.**





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 Rules.**⁹
- 1.2. Unless the parties have agreed otherwise, these Rules **shall apply to any arbitration** which is commenced **on or after that date.**¹⁰
- 1.3. These Rules shall govern the arbitration **except** that where any of these Rules are in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail.¹¹
 - 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.

⁹ Article 1(1) of the Rules.

¹⁰ Article 1(4) of the Rules.

¹¹ Article 1(5) of the Rules.





2. Procedural compliance with the Rules by the parties prior to a request for the appointment of an arbitrator:
 - 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**.¹²
 - 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.*¹³
 - 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.*¹⁴
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*
 - 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.***¹⁵
 - 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);*

¹² Article 3 (1) of the Rules.

¹³ Article 3(3) of the Rules.

¹⁴ Article 4 of the Rules.

¹⁵ Articles 6(1) and (2) of the Rules.





- 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
 - 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

