Questions and Answers Panel Session
(3 March 2018, Sandton)

ADV TJAART VAN DER WALT SC

1. Can an arbitrator order absolution from the instance?

1.1. Firstly, what is absolution? In a court of law, it arises where a party who carries the onus fails to make out a prima facie case. Without calling on the other party to present evidence, the court may then grant absolution from the instance. In other words, absolve the other party from the obligation to present its case. That is then the end of the matter. The dispute between the parties remains undecided. The unsuccessful party may try again in a new action.

1.2. In arbitral proceedings, an order of absolution from the instance will mean that no final award is made. The issue referred to the arbitrator will remain undecided.

1.3. That is why an arbitrator should not award absolution from the instance.

1.4. Section 28 of the Arbitration Act 42 of 1965 (the Act) reads as follows:

> *"Unless the arbitration agreement provides otherwise, an award shall … be final …"*

1.5. Levy AJ in *Irish and Co v Kritzas* 1992 (2) SA 623 (W) 633 A expressed the following view:

> *"I should add as well that the finality of an award attributed to it by s28 of the Act argues forcibly against the validity of an award which lacks the essential element of finality."*

1.6. An award of absolution lacks the essential element of finality. It does not determine the dispute.

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1.7. Therefore, as a general proposition, because it lacks finality, an award of absolution is in contravention of section 28 of the Act.

1.8. However, the learned authors of Butler & Finsen *Arbitration in South Africa* at p161 in footnote 298 correctly point out that because section 28 of the Act is subject to the arbitration agreement, the parties may confer the power to grant absolution on the arbitrator in their arbitration agreement. This situation could arise if the parties decide to arbitrate for example under the Uniform Rules of Court, which include rule 39. Uniform Rule 39 provides for absolution.

NOTE: That is one of the reasons why it is undesireable to arbitrate under the Uniform Rules of Court.

1.9. If the arbitration agreement provides that the arbitration shall be conducted under the 2013 Standard Procedure Rules of the Association of Arbitrators (Southern Africa) NPC, an arbitrator is not entitled to award absolution. The Standard Procedure Rules contain no provision for absolution. Article 34.2 of the Standard Procedure Rules determines that the arbitral award shall be final.

1.10. Therefore, as a general proposition, an arbitrator is not entitled to order absolution. She is obliged to bring finality to the dispute referred to her.

2. Is it useful to incorporate the High Court Rules as a procedural guideline in arbitrations?

2.1. The answer is no. It is counter-productive.

2.2. There are arbitration rules specifically designed to facilitate expeditious and cost-effective arbitrations. For example, the 2013 Standard Procedure Rules of the Association of Arbitrators.

2.3. Some of the reasons why it is not useful to conduct an arbitration in terms of the High Court Rules include the following (there are many more):

2.3.1. The High Court Rules are formal and time-consuming. Typical arbitration rules are informal and facilitate expeditious proceedings;

2.3.2. Under the High Court Rules an arbitrator will be bound by the strict rules of evidence. Arbitration rules provide arbitrators with a wide discretion when it comes to the admission of evidence;

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2.3.3. Confidentiality and finality are guaranteed under arbitration rules. The opposite applies under the High Court Rules.

2.3.4. Discovery of documents in terms of the High Court Rules can become a complicated, costly and time-consuming exercise. Arbitration rules typically provide for limited, focussed and expeditious discovery processes. A Redfern Schedule is a prime example of how arbitration rules can streamline discovery;

2.3.5. Lengthy oral evidence and cross-examination are the hallmarks of litigation under the High Court Rules. Arbitration rules typically provide for limited, focused and relevant witness statements with equally limited and focused cross-examination only on relevant disputed topics;

2.3.6. The High Court Rules provide for absolution from the instance. Absolution leads to an unresolved dispute. Arbitration rules prevent this undesirable outcome;

2.3.7. The High Court Rules provide for an appeal procedure. An appeal procedure is inherently foreign to the concept of arbitration. Parties choose to arbitrate because they require finality and certainty;

2.3.8. Under the High Court Rules, judges have limited discretion. Arbitration rules provide arbitrators with wide ranging procedural and evidentiary discretions to facilitate expeditious and cost-effective dispute resolution.

3. When is it useful to exclude the provisions of Section 20 of the Arbitration Act 42 of 1965?

3.1. Section 20 of the Act determines that an arbitrator may on application by a party, and shall if the court so directs on application by a party, at any stage before making a final award, state any question of law arising in the course of the arbitration in the form of a special case [Uniform High Court Rule 33 (4)] for the opinion of the court, or for the opinion of counsel.

3.2. This statutory mechanism can be useful. The arbitrator may for example be an engineer or an architect who knows everything about the technical aspects of the dispute, but a complex legal issue arises concerning for example prescription may arise. The arbitrator might have limited knowledge of the law in this regard. Section 20 of the Act can then be applied to obtain the opinion of a court or the opinion of counsel on the legal issue.

3.3. That is in an ideal world. Often, section 20 is abused by a party who wants to delay the proceedings. Normally that will be a defendant with a hopeless case. Such party will

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then typically either find or create a question of law and approach a court in terms of section 20 to request an opinion. To have a special case for an opinion heard by a court, or determined by counsel, can take months. It will also increase the costs associated with the dispute resolution process for both parties.

3.4. The reason for the parties having chosen arbitration in the first place was to have an expeditious and cost effective process, and to have finality.

3.5. But, if the arbitrator is a legal practitioner or a legally trained person, which is often the case, there is no reason why the arbitrator cannot provide a final opinion on the question of law herself, expeditiously and cost-effectively. That is what legal practitioners do.

3.6. Fellows of the Associations are often experienced practitioners and, by agreement with the parties, they normally exclude section 20 of the Act from their proceedings.

3.7. Therefore, if the arbitrator is a legal practitioner or a legally trained person it can be useful and beneficial, by agreement between the arbitrator and the parties, to exclude the provisions of section 20 of the Act.

4. Does an arbitrator have the right to withhold an award, pending payment of his fees?

4.1. Before commencement of the Act in 1965, it was common practice for arbitrators to withhold their awards, pending full payment of their fees.

4.2. In other words, they exercised a lien over their work just like a building contractor does.

4.3. But, are they entitled to do that?

4.4. Section 25(1) of the Act determines as follows:

> *"The award **shall** be delivered by the arbitration tribunal, the parties or their representatives being present or having been summoned to appear."*

4.5. In other words, on a strict interpretation of section 25(1), once the arbitrator has summoned the parties to deliver his award, he shall deliver the award.

4.6. Section 25(1), unlike many other provisions of the Act, does not contain the phrase "*unless the arbitration agreement otherwise provides*".

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4.7. Read in isolation, it appears *prima facie* to be in contravention of section 25(1) of the Act for an arbitrator to withhold an award pending payment of the arbitrator's fees.

4.8. But, the Act also contains section 35(4). It determines the following:

> *"The arbitrator or arbitrators or an umpire* ***may withhold his or their award pending payment of his or their fees*** *and of any expenses incurred by him or them in connection with the arbitration with the consent of the parties,* ***or pending the giving of security for the payment thereof****."*

4.9. The solution proposed in Butler and Finsen in footnote 83 on page 268 is simply this: When the arbitrator calls upon the parties to appear in terms of section 25(1) for delivery of the award, he may draw their attention to his lien in terms of section 35(4), and advise them of his intention to enforce it.

4.10. It will of course do no harm to expressly include this arrangement upfront in a written agreement between the parties and the arbitrator. It is advisable to do this at the first preliminary meeting.

4.11. Where an arbitration is conducted under the 2013 Standard Procedure Rules of the Association of Arbitrators (Southern Africa) NPC, article 34.8 expressly entitles the arbitrator to withold an award pending payment of all his fees and expenses.

4.12. In addition, nothing prevents an arbitrator from agreeing with the parties on upfront fee deposits as the arbitration proceeds. It would be a wise precaution, before the evidence hearing commences, to request a sufficient deposit to cover the arbitrator's fees for the hearing and for the writing of the award.

5. Is hearsay evidence admissible in arbitral proceedings?

5.1. The answer is yes, but with extreme caution.

5.2. The Act does not prescribe to what extent an arbitrator is bound to apply the ordinary rules of evidence.

5.3. The 2013 Standard Procedure Rules of the Association of Arbitrators (Southern Africa) NPC are more specific. Article 27 of these Rules determines that the arbitrator shall:

> *" … establish the facts of the case by all* ***<u>appropriate means</u>*** *…"*

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and that the arbitrator shall:

> *"… **determine** the **admissibility**, relevance, materiality and weight of the **evidence** offered."*

5.4. The traditional view was that the arbitrator shall determine the admissability of evidence strictly in accordance with the ordinary rules of evidence. In other words, that an arbitrator was required as a matter of law to apply the ordinary rules of evidence in the same manner as a court of law.

5.5. As long ago as 1993 the authors Butler & Finsen on p220, par 6.2.2 suggested that the traditional view was wrong. The learned authors suggested that:

> *"… unless the arbitration agreement provides otherwise, whether expressly or by implication, an arbitrator is **not** as a matter of law obliged to comply with the formal rules of evidence, as long as the procedure which he follows **complies with the rules of natural justice by being fair to both parties**."*

5.6. Twenty years later, in 2014, Butler and Finsen's view was formally accepted by the Supreme Court of Appeal in *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd & Others* [2014] 1 All SA 375 (SCA). Wallis JA stated the current position in South African law to be as follows:

> *"[17] [The traditional view was] that an arbitrator is obliged to apply the rules of evidence in the same way as a court of law … [the traditional view) would more accurately reflect modern arbitral practice if it was restated as saying that, **unless the arbitration agreement otherwise provides, the arbitrator is not obliged to follow the strict rules of evidence, provided the procedure adopted is fair to both parties and conforms to the requirements of natural justice** [the right to a fair hearing / audi alteram partem and the rule against bias / nemo iudex in sua causa]."*

5.7. Wallis JA expressed the practical application of the restated view as follows in *Dexgroup*:

> *"[20] … Arbitrators should be free to adopt such procedures as they regard as appropriate for the resolution of the dispute before them, unless the arbitral agreement precludes them from doing so. **They may therefore receive evidence in such form and subject to such***

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> ***restrictions as they may think appropriate to ensure … the just, expeditious, economical and final determination of the dispute**. That accords entirely with what Gardiner J said, nearly a century ago, in Clark v African Guarantee and Indemnity Co Ltd (1915 CPD 68 77) that, **whilst arbitrators must carry out their duties in a judicial manner, that does not mean that they must observe the precision and forms of courts of law**."*

5.8. Wallis JA motivated the restatement of the traditional view, the underlying policy considerations and the object of arbitration as follows in *Dexgroup*:

> *"(20) The advantages of arbitration over litigation, particularly in regard to the expeditious and inexpensive resolution of disputes, are reflected in its growing popularity worldwide. Those advantages are diminished or destroyed entirely if arbitrators are confined in a straitjacket of legal formalism that the parties to the arbitration have sought to escape."*

5.9. But, despite what was said in *Dexgroup*, knowledge of the basic principles of the rules of evidence remains relevant to an arbitrator for a number of reasons. They including the following:

5.9.1. An arbitrator who is aware of why certain evidence is inadmissible in a court of law will be more likely to treat such evidence with caution when he considers the weight to be attributed to it;

5.9.2. An arbitrator with knowledge of the basic rules of evidence will be less likely to act fundamentally unfair, or offend the rules of natural justice.

5.10. In addition, it is necessary for an arbitrator to have the ability to distinguish between the rules of evidence (for example, the hearsay rule) and rules of substantive law (for example, the parol evidence rule). Although he is in terms of *Dexgroup* **not obliged** to apply the **rules of evidence**, he **is obliged** to apply the **rules of substantive law**. A failure to distinguish between the rules of evidence and the rules of substantive law may lead to a denial of the substantive rights of a party, and to a gross irregularity. A gross irregularity may lead to a review and the setting aside of an award (in terms of section 33(1)(b) of the Act).

5.11. Against this background, hearsay evidence requires particular attention. Hearsay evidence is defined in the Law of Evidence Amendment Act 45 of 1988 (the Amendment

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Act) as evidence, whether oral or in writing, of which the probative value depends upon the credibility of any person **other** than the person giving the evidence. For example, witness X testifies that he heard Engineer Smith saying that the foundation of the building is of poor quality. The probative value of the evidence does not depend on the credibility of witness X. It depends on the credibility of Engineer Smith.

5.12. The generally accepted modern justification for the exclusion of hearsay evidence is that it is inherently unreliable because it cannot be tested by cross-examination. One cannot cross-examine witness X to determine whether the evidence of engineer Smith is credible.

5.13. Such evidence may be highly relevant, but inadmissible in a court of law because its probative value is governed by the credibility of a non-witness.

5.14. As a matter of policy, hearsay evidence in a court of law is in principle regarded as inadmissible, unless it falls within the exceptions provided for in section 3(1)(a), (b) and (c) of the Amendment Act. The exceptions are in essence:

5.14.1. If the parties agree to the admission thereof [sec 3(1)(a)];

5.14.2. If the person on whose credibility the probative value thereof depends, subsequently testifies [sec 3(1)(b)]; or

5.14.3. If the presiding officer is of the opinion that such evidence should be admitted in the interests of justice having regard to the considerations in section 3(c)(i) to (vii) including "*any other factor which should … be taken into account*" [sec 3(1)(c)].

5.15. Strictly speaking, in terms of *Dexgroup* and because section 1 of the Amendment Act refers to *civil proceedings*, section 3 thereof is not binding on an arbitrator. At best, section 3 of the Amendment Act constitutes a useful guideline for an arbitrator to decide whether or not to admit hearsay evidence.

5.16. However, because the probative value of hearsay evidence relies on the credibility of a non-witness which cannot be tested under cross-examination, there is a material risk of prejudice to the party against whom such hearsay evidence is tendered. It may affect the procedural rights of such party.

5.17. Therefore, an arbitrator would be well advised to proceed with caution and to give proper consideration to the general prohibition against hearsay evidence, and to the exceptions contained in section 3 of the Amendment Act.

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5.18. The exceptions in section 3(1)(a) to (c) may provide an arbitrator with a basis to admit the evidence, but the evidentiary weight attached thereto ought to be carefully considered against the overriding consideration that it remains untested evidence with a potentially prejudicial effect.

5.19. The overriding consideration to determine the evidentiary weight of untested hearsay evidence, if admitted, should be whether it is corroborated by other evidence.

5.20. In conclusion, if an arbitrator allows hearsay evidence after careful consideration of all relevant factors including the guidelines in section 3 of the Amendment Act, he would be well advised to remember that hearsay evidence is, by its very nature, inherently unreliable. As a general statement, if an abitrator admits hearsay evidence as he is entitled to do, it ought to carry less probative weight than direct evidence.

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