Association of Arbitrators (Southern Africa) NPC

Executive Summary
regarding the 2021 Revision of the
Rules for the Conduct of Arbitrations

BACKGROUND

In 2013 the Association adopted new Standard Procedure Rules closely based on the UNCITRAL Arbitration Rules of 2010. A major reason behind this initiative was to promote the application of international standards and international best practice in domestic arbitrations conducted under the Association's Rules in the various jurisdictions in Southern Africa. The UNCITRAL Arbitration Rules are designed for *ad hoc* arbitration, so they fit well with the *ad hoc* culture of the Association, which it has followed since its formation in 1979. The Summary Procedure Rules in 2013 underwent a name change indicative of their distinguishing characteristic and are now the Restricted Representation Arbitration Rules (RRA Rules).

In 2018, the Standard Procedure Rules were updated to address a particular problem regarding construction industry arbitrations following on an adjudication. Where the employer complies with a decision by the adjudicator ordering the employer to pay money to the contractor, which party bears the onus of proof if the employer files a notice of dissatisfaction and refers the dispute to arbitration? The revised articles 3 and 4 dealt with this problem in general terms by initially referring to the initiating party and the receiving party for purposes of the Notice of Arbitration and the Response to that Notice. Article 3.5 requires the parties to agree on who will be the claimant and respondent respectively in the arbitration. Failing agreement, the matter must be resolved by the arbitral tribunal. The only other amendment in 2018 was the inclusion of the General Rule now contained in article 46 (2018 edition 43).

THE 2021 REVISION

A revised set of Rules for the Conduct of Arbitrations drafted by the Rules Committee has been considered by the Association's Board and approved with effect from 1 November 2021 (the 2021 Rules). The revision was undertaken because of the need to make express provision for remote hearings. At the same time, the opportunity has been taken to update and amend the Rules, having regard to recent new editions of their rules published by other arbitral institutions like the ICC (2021), the LCIA (2020) and ACICA (2021). Therefore, new articles have been added to deal with the disclosure of third-party funding (see article 12) and early determination of claims and defences (see article 25). In addition, because some parties in practice are desirous of having a right of appeal to an arbitral appeal tribunal, a new article 45 has been added to provide a contract-in right of appeal. The RRA Rules have been updated to provide specifically for the possibility of remote hearings (see the new article 3 of the RRA Rules).

The 2021 Standard Procedure Rules still closely follow the UNCITRAL Rules of 2010, as amended from time to time. Changes are restricted to those that are reasonably necessary for the rules to operate effectively in an *ad hoc* arbitration in Southern Africa. Certain amendments have been added to keep the Rules up to date, while bearing in mind the Association's *ad hoc* culture regarding arbitration.

Brief comments on the amendments now follow.

DATE OF COMMENCEMENT

The commencement date for the 2021 Rules is 1 November 2021. Arbitrations commencing on or after this date will be subject to the 2021 Rules, unless the parties agree otherwise (see articles 1.4 and 3.2).

REMOTE HEARINGS

The terms "hearing" and "remote hearing" have both been defined in article 1. The term "hearing" means both an oral hearing in person and a remote hearing. Article 18.3 deals with the preliminary meeting and this has been amended to allow the meeting to be conducted either in person or as a "remote hearing", as defined in article 1. See also article 18.4 and 18.7. As emphasised by the latter provision, particular care is required when the evidentiary hearing takes the form of a remote hearing. Article 19.2 stipulates that a remote hearing is deemed to take place at the juridical seat of the arbitration. Article 30.1 (formerly 28.1) distinguishes between a remote hearing and a hearing in person for purposes of giving notice of the hearing. The former article 28.4 has been deleted from what is now article 30 as being superfluous.

OTHER AMENDMENTS

Article 2: Delivery of Notices

Article 2 has been updated so that notices or other documents may be delivered either physically or by e-mail. Facsimile transmissions have fallen into disuse, and postal delivery, including by registered mail, is no longer reliable.

Article 12: Disclosure of Third-Party Funding

Much attention has recently been given to third-party funding in the context of international arbitration. For example it has been the subject of a detailed report, the ICCA-QMUL[1] Report (April 2018), in which the ways in which third-party funding *could* be relevant are discussed in depth. In some common-law jurisdictions, prohibitions on champerty and maintenance have been abolished by statute in the case of arbitration. At this stage, arbitral institutions are increasingly including provisions on third-party funding in their rules, but these are typically restricted to disclosure of the existence and identity of the funder, as opposed to the terms of the arrangement. The purpose of such disclosure is to anticipate and prevent possible conflicts of interest between members of the arbitral tribunal and a third-party funder who has a direct interest in the outcome of the dispute.

In article 12, the definition of a third-party funder is taken from the ICCA-QMUL Report 92, which is intended to exclude BTE insurance and contingency fee arrangements. (The term "legal person" in the definition has been replaced with "juristic person", in line with the terminology in s 8(2) of the SA Constitution of 1996.) Although third-party funding of parties in South African arbitration is less prevalent than in Europe and Asia, it is becoming an issue of which parties and arbitrators need to be aware. An arbitrator is under a continuing duty to disclose possible conflicts of interests. For this reason the duty of disclosure in article 12 is ongoing.

[1] ICCA is the International Council for Commercial Arbitration. The School for International Arbitration at Queen Mary College, University of London, has some highly distinguished persons who combine an academic career with a high profile practice as international arbitrators, on its staff.

Article 18.2: Referral to IBA Rules on the Taking of Evidence in International Arbitration

The 2013 and 2018 Standard Procedure Rules deal with evidential matters like written witness statements, party-appointed expert witnesses and disclosure of documents in considerably less detail than the Association's 6th edition Standard Procedure Rules of 2009. Given that the aim of adopting the UNCITRAL Rules was to promote international standards, the Association decided in 2013 not to issue practice notes on these subjects, as this would have amounted to reintroducing local standards through the back door. Nevertheless, prospective Fellows of the Association, during their training, are given considerable exposure to the IBA Rules. The IBA Rules are also drafted so that the parties may adopt them as rules along with general arbitration rules, *or* so that the arbitral tribunal can consult the IBA Rules when exercising its discretion under less specific general rules in appropriate circumstances. The ACICA 2021 International Arbitration Rules (article 35.2 and 35.3) make express reference to the arbitral tribunal making use of the IBA Rules. The 2021 Rules now contain a new article 18.2, which is a contract-out provision, added to what was formerly article 17. It requires the arbitral tribunal to have regard to the IBA Rules, without being obliged to apply them. The Rules Committee is of the view that this new provision creates more certainty regarding the status of the IBA Rules.

Article 19: Juridical Seat of Arbitration

The South African version of the UNCITRAL Model Law in the International Arbitration Act 15 of 2017 (in Schedule 1, article 20) refers to the "juridical seat" of the arbitration, rather than "place" as the latter can be confused with a physical venue. Article 19 of the 2021 Rules has been amended to align it with the SA version of the Model Law.

Article 20: Language

The word "oral" before "hearing" in article 20.1 has been rendered superfluous by the inclusion of the definition of hearing in article 1.

Article 25: Early Dismissal of Claims and Defences

Recent revisions of arbitral rules of other institutions are making it clear that an arbitral tribunal may deal expeditiously with claims and defences manifestly without merit and jurisdictional challenges that are manifestly without merit. Some of these provisions create uncertainty by being too brief and vague. Article 25 of the 2021 Rules is mainly based on rule 29 of the SIAC Rules of 2016. The power only exists on the application of a party and cannot be exercised by the tribunal on its own initiative, as this could suggest bias and pre-judgment. The tribunal must first decide whether the application should proceed. If the application proceeds, the tribunal must give the parties the opportunity to be heard. It can only exercise the power of early dismissal on the basis of evidence and argument, so this is not a right to summarily dismiss claims or defences that the tribunal regards as lacking in merit. The reasons for the decision may be concise and therefore briefer than reasons under article 36. This new provision has been drafted to contain sufficient safeguards.

Article 33: Closure of Proceedings

The original UNCITRAL wording, in what was formerly article 31, refers to "hearings". It does not deal with documents-only arbitration proceedings or the common situation where written argument is presented after the conclusion of an oral evidentiary hearing. The revised article 33 follows the example of other institutions which adopted the UNCITRAL Rules and promotes greater clarity.

Article 36.5 has been amended accordingly to align it with the amended article 33.

Article 43: Allocation of Costs

Article 43 (formerly article 41) is primarily intended for domestic arbitrations in South Africa, to which s 35 of the Arbitration Act 42 of 1965 will apply. Typically, in a domestic arbitration, the tribunal will award costs in general terms without settling the specific amount payable (i.e. it will not tax the bill of the party awarded costs). The wording of article 43.3 and 43.4 have been clarified and made consistent. When the tribunal employs a taxing consultant to settle the amount, the latter assists the tribunal, which must still make the final decision. It is accepted that the taxing consultant would usually apply the High Court scale as the scale with which the taxing consultant is most familiar. The equivalent article 41.4 of the 2018 Rules might be open to an interpretation that it provides for an impermissible delegation of authority.

In international arbitrations, the practice is for the tribunal to award the specific amount of legal costs recoverable. A foreign party does not choose South Africa as the juridical seat so that recoverable costs can be settled on the High Court scale. Thus, where the tribunal is required to fix the amount, it must do so on the reasonable basis that it deems appropriate (article 43.3) and for that purpose is not obliged to apply the scale of any state court (article 43.6).

Where the tribunal is obliged to fix the amount, it may, with the assistance of a taxing consultant, use the High Court scale, if this is what the parties require. However, article 43.3 and 43.6 make it clear that it is not obliged to do so, particularly if the parties prefer a different basis. The amendments make it clear that the recoverable amount awarded should be reasonable but, since the judgment in *Leadtrain* (2013 5 SA 84 SCA), such an award remains reviewable only on the grounds contained in s 33 of the Act.

Article 45: Appeals

The Standard Procedure Rules provided for a contract-in right of appeal from the 3rd edition (1997) to the 6th edition (2009). Article 45 of the 2021 Rules is based on the provision in the 6th edition, but has been modernised. Article 45.1 makes it clear that the (more expensive and protracted) appeal remedy should not be used in circumstances where the tribunal itself can fix the problem under articles 39 to 41 (formerly 37 to 39). The provision has no application where the parties agree to an unreasoned award or to a consent award. The time for bringing an appeal has been fixed at 20 days, having regard to the basis for calculating this period in article 2.6. The time limits imposed by the article apply to the parties or to the appeal tribunal, but deliberately refrain from requiring the Association to undertake the specified action within a set period.

RRA Rules, article 3: Remote Hearings

Article 2 of the RRA Rules incorporates certain provisions of the Standard Procedure Rules into the RRA Rules by reference. The purpose is to keep the text of the RRA Rules as brief as possible. The Rules Committee determined that the issue of Remote Hearings needs to be addressed in the text of the RRA Rules, rather than expecting the tribunal and the parties to hunt through the Standard Procedure Rules for this purpose. Remote hearings are dealt with in the new article 3 of the RRA Rules, and the other provisions, where necessary, incorporate references to article 3 of the RRA Rules.

CONCLUDING COMMENT

The revision has taken longer than originally hoped, but it has been thorough and comprehensive. Other topics have also been considered. For example, rules for administered arbitration increasingly provide for a so-called "emergency arbitrator", who can grant interim measures, while the administrating institution is still appointing the arbitral tribunal, to save the need to approach a national court. Such a provision is out of line with an *ad hoc* arbitration and was therefore deliberately not included in the 2021 Rules.

David Butler

Stellenbosch