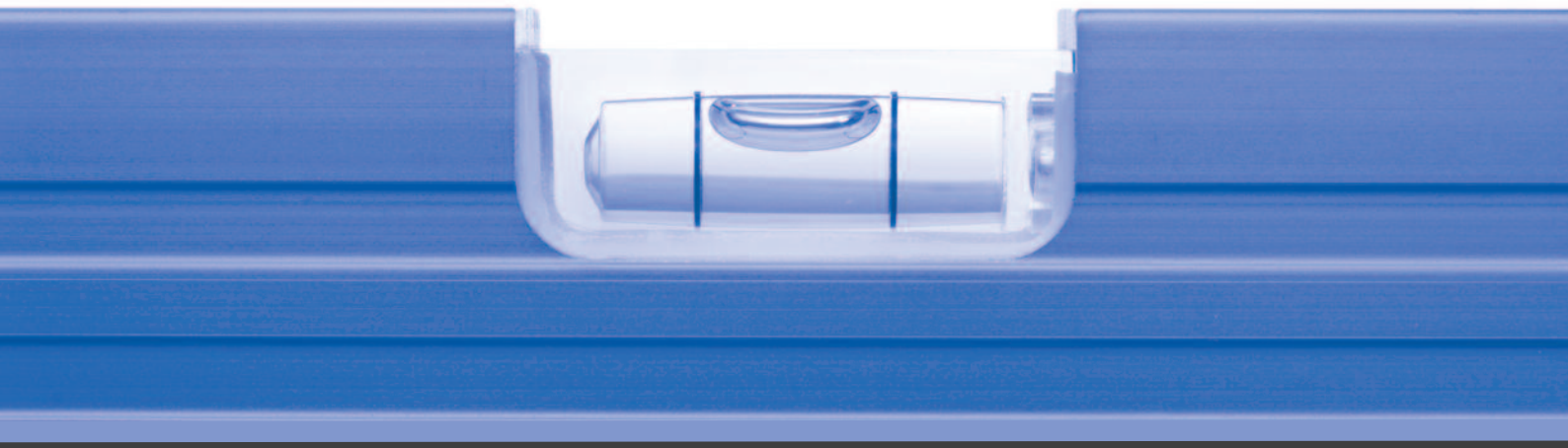

ICLG

The International Comparative Legal Guide to:

International Arbitration 2014

11th Edition

A practical cross-border insight into international arbitration work

Published by Global Legal Group, in association with CDR, with contributions from:

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London SE1 3PL, UK
Tel: +44 20 7367 0720
Fax: +44 20 7407 5255
Email: info@glgroup.co.uk
URL: www.glgroup.co.uk

GLG Cover Design
F&F Studio Design

GLG Cover Image Source
iStockphoto

Printed by
Ashford Colour Press Ltd
July 2014

ISBN 978-1-910083-09-3
ISSN 1741-4970

Strategic Partners

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Chapter 55

South Africa

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1 Arbitration Agreements

1.1 What, if any, are the legal requirements of an arbitration agreement under the laws of South Africa?

In terms of Section 1 of the Arbitration Act 1965 ("the Act"), an "arbitration agreement" is defined as meaning "a written agreement providing for the reference to arbitration of an existing dispute or any future dispute relating to a matter specified in the agreement, whether an arbitrator is named or designated therein or not".

Although an oral arbitration agreement is not invalid, such agreements are regulated by common law and not by the Act. In practice, most commercial arbitration agreements are in writing and are regulated by the Act.

Although an "arbitration agreement" under the Act is required to be in writing, it is not necessary for the agreement to be signed by the parties or to be contained in one document. A written arbitration agreement may, for example, be concluded by an exchange of letters between the parties.

A distinction must be drawn between the arbitration agreement and the submission to arbitration in terms of that agreement. The submission to arbitration is not required by the Act to be in writing.

1.2 What other elements ought to be incorporated in an arbitration agreement?

The definition of "arbitration agreement" in the Act refers to a written agreement "providing for the reference to arbitration of any existing dispute or any future dispute relating to a matter specified in the agreement, whether an arbitrator is named or designated therein or not".

The arbitration agreement should therefore identify the existing dispute or future dispute relating to a matter specified in the agreement. The arbitrator is not required to be named or designated in the arbitration agreement.

It has been held that where parties have appointed two valuers to value property for the purposes of an agreement of sale or a lease and the valuers are unable to agree on their valuation, their disagreement is not a dispute for purposes of the definition, but a method of valuation which has failed.

Although an arbitration agreement is only required to provide for the reference to arbitration of any existing dispute or any future dispute relating to a matter specified in the agreement, in practice arbitration agreements will usually provide for the submission of the dispute to arbitration in accordance with the rules of a specified arbitration organisation, such as the International Court of Arbitration of the International Chamber of Commerce ("ICC"), the London Court of International Arbitration ("LCIA") or the Arbitration Foundation of Southern Africa ("AFSA").

1.3 What has been the approach of the national courts to the enforcement of arbitration agreements?

The party seeking to avoid arbitration bears an onus which is not easily discharged.

Although there are a number of factors which may be taken into account by the court in the exercise of its discretion and which may, individually or cumulatively, be sufficient to discharge the onus, the courts will generally refer to the following factors to justify exercising their discretion so as to allow arbitration:

- The importance of enforcing the arbitration agreement reached between the parties, in accordance with the *maxim pacta servanda sunt*.
- The fact that the alleged disadvantages of arbitration were foreseeable when the parties concluded the arbitration agreement.
- The fact that the arbitrator would be able to use his expert knowledge to dispense with expert evidence which would be necessary to qualify the court, thereby saving time and costs.

2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration proceedings in South Africa?

In terms of Section 31(1) of the Act, an arbitration award may, on the application to a court of competent jurisdiction by any party to the reference after due notice to the other party or parties, be made an order of court. An award which has been made an order of court may be enforced in the same manner as any judgment or order to the same effect.

South Africa is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and the Recognition and Enforcement of Foreign Arbitral Awards Act 1977 gives effect to the New York Convention. The Foreign Arbitral Awards Act provides that either a provincial or local division of the High Court is competent to make a foreign arbitral award an order of court. A "foreign arbitral award" is an award made outside South Africa, or an award the enforcement of which is not permissible in terms of the Arbitration Act, but which is not in conflict with the provisions of the Foreign Arbitral Awards Act.

There have been no significant changes to legislation governing the enforcement of arbitration proceedings in South Africa during the past year.

2.2 Does the same arbitration law govern both domestic and international arbitration proceedings? If not, how do the laws differ?

No distinction is presently drawn between domestic and international arbitration proceedings in the Act.

2.3 Is the law governing international arbitration based on the UNCITRAL Model Law? Are there significant differences between the governing law and the Model Law?

If the proposals of the Law Commission regarding an International Arbitration Act for South Africa (which are referred to more fully hereunder) are accepted and implemented, the law governing international arbitration will be based on the UNCITRAL Model Law. The present position, however, is that no distinction is drawn between domestic and international arbitration proceedings, and international arbitration proceedings are not based on the UNCITRAL Model Law.

2.4 To what extent are there mandatory rules governing international arbitration proceedings sited in South Africa?

There are no mandatory rules governing international arbitrations in South Africa.

The procedure followed will usually be in terms of the rules of the arbitration organisation administering the arbitration. In the absence of such rules, the parties usually agree on procedure, and the rules of the High Court are often followed.

3 Jurisdiction

3.1 Are there any subject matters that may not be referred to arbitration under the governing law of South Africa? What is the general approach used in determining whether or not a dispute is "arbitrable"?

In terms of Section 2 of the Act, a reference to arbitration shall not be permissible in respect of:

- any matrimonial cause or any matter incidental to any such cause; or
- any matter relating to status.

Under the common law, arbitration may not be used in criminal proceedings. Arbitration is permitted where the only matter in dispute is an allegation of fraud pertaining to a civil claim, but the fact that fraud is alleged is a factor relevant to the court's discretion whether or not to allow a particular dispute to be referred to arbitration.

In terms of the Insurance Act of 1943, notwithstanding any contrary provision of the policy or agreement relating thereto, the owner of a domestic policy is entitled to enforce his rights against the insurer in a court of competent jurisdiction. However, this is subject to the proviso that the policy "may validly provide that the amount of any liability under the policy shall be determined by arbitration in the Republic if the insurer demands that the said amount be so determined". The statutory restriction on the use of arbitration in insurance matters therefore does not extend to disputes relating to *quantum*.

The general approach used in determining whether or not a dispute is arbitrable is that a party to a dispute seeking to refer the matter to arbitration will have to show that there is a valid arbitration agreement and that the dispute falls within the ambit of that agreement. If those requirements are met, and if the dispute is not one in respect of which arbitration is not permissible under the Act or common law, the general approach will be to enforce the arbitration agreement.

3.2 Is an arbitrator permitted to rule on the question of his or her own jurisdiction?

An arbitrator is permitted to rule on the question of his or her own jurisdiction. However, a party may apply to have an award set aside where the arbitrator has exceeded his powers, which would include exceeding his jurisdiction.

Where one of the parties contests the validity of the agreement containing the arbitration agreement and alleges that the arbitrator has no jurisdiction, the arbitrator will proceed with the arbitration if, in his opinion, he clearly has jurisdiction. If, however, he is uncertain, he should decline to proceed with the arbitration and leave it to one of the parties to apply to court for a declaratory order.

3.3 What is the approach of the national courts in South Africa towards a party who commences court proceedings in apparent breach of an arbitration agreement?

Generally, a party to court proceedings who contends that the dispute is arbitrable will raise the arbitration agreement as a plea in bar in the court proceedings. The party seeking to avoid the arbitration agreement may, in terms of section 3(2) of the Act, apply, on good cause shown for an order:

1. setting aside the arbitration agreement;
2. that the particular dispute referred to in the arbitration agreement shall not be referred to arbitration; or
3. that the arbitration agreement shall cease to have effect with reference to any dispute referred.

It has been held that an applicant who applies under section 3 for a matter not to be referred to arbitration bears an equally heavy onus to the plaintiff who resists a plea in bar that the proceedings should be stayed and the matter be referred to arbitration.

3.4 Under what circumstances can a court address the issue of the jurisdiction and competence of the national arbitral tribunal?

The circumstances in which a court can address the issue of jurisdiction and competence of the tribunal include the following:

- Where one of the parties contests the validity of the agreement containing the arbitration agreement and alleges that the arbitrator has no jurisdiction, and the arbitrator declines to proceed with the arbitration, one of the parties may apply to the court for a declaratory order.
- If an arbitrator proceeds with the arbitration in the face of an objection that he lacks jurisdiction, a party may attempt to enforce his objection by seeking an order from the court interdicting the arbitrator from proceeding with the arbitration.
- Where a party applies to court for an order that an award be made an order of court, the application may be opposed on the grounds that the arbitrator did not have jurisdiction.
- In terms of Section 33(1) of the Act, where an arbitration tribunal has exceeded its powers, the court may, on the

application of any party to the reference, make an order setting the award aside.

An arbitrator is permitted to rule on the question of his own jurisdiction. However, a party may apply to have an award set aside where the arbitrator has exceeded his powers, which would include exceeding his jurisdiction.

Where one of the parties contests the validity of the agreement containing the arbitration agreement and alleges that the arbitrator has no jurisdiction, the arbitrator will proceed with the arbitration if, in his opinion, he clearly has jurisdiction. If, however, he is uncertain, he should decline to proceed with the arbitration and leave it to one of the parties to apply to the court for a declaratory order.

3.5 Under what, if any, circumstances does the national law of South Africa allow an arbitral tribunal to assume jurisdiction over individuals or entities which are not themselves party to an agreement to arbitrate?

There are no circumstances under which South African law allows an arbitral tribunal to assume jurisdiction over individuals or entities which are not themselves party to an arbitration agreement.

3.6 What laws or rules prescribe limitation periods for the commencement of arbitrations in South Africa and what is the typical length of such periods? Do the national courts of South Africa consider such rules procedural or substantive, i.e., what choice of law rules govern the application of limitation periods?

Claims may be time-barred through the operation of prescription. The Prescription Act of 1969 provides that a contractual claim is extinguished by prescription if the creditor fails to enforce his claim within three years of the date on which the debt became due. The debt is not deemed to be due until the creditor has knowledge of the identity of the debtor or could have acquired such knowledge by the exercise of reasonable care.

The courts consider the rules relating to prescription to be substantive.

3.7 What is the effect in South Africa of pending insolvency proceedings affecting one or more of the parties to ongoing arbitration proceedings?

Where a dispute is referred to arbitration in terms of the common law, and one of the parties is insolvent, the arbitration agreement will not be enforceable against that party's trustee or assignee.

With regard to a submission in terms of the Act, section 5(1) provides that the sequestration of the estate of any party, or the winding-up or placing under judicial management of a corporate body which is a party to an arbitration agreement, will not terminate the arbitration agreement or any appointment of an arbitrator or umpire in terms of the agreement, unless the agreement provides otherwise.

In the event of a party to an arbitration agreement being sequestrated, or in the case of the party being a corporate body which is being wound-up or placed under judicial management, section 5(2) of the Act prescribes that the provisions of any law relating to such procedure shall apply in the same manner as if a reference of a dispute to arbitration under the arbitration agreement were an action or proceeding or civil proceedings or legal proceedings or civil legal proceedings within the meaning of any such law.

4 Choice of Law Rules

4.1 How is the law applicable to the substance of a dispute determined?

Usually the law applicable to the substance of the dispute is agreed by the parties in the arbitration agreement. In the absence of agreement, the law applicable to the substance of the dispute will generally be either the law of the place of the arbitration or the law of the place where the contract is to be performed.

4.2 In what circumstances will mandatory laws (of the seat or of another jurisdiction) prevail over the law chosen by the parties?

There are no circumstances in which mandatory laws of the seat of the arbitration or of the jurisdiction will prevail over the law chosen by the parties.

4.3 What choice of law rules govern the formation, validity, and legality of arbitration agreements?

The rules governing the formation, validity and legality of arbitration agreements will generally be determined by the law of the place where the arbitration is held.

5 Selection of Arbitral Tribunal

5.1 Are there any limits to the parties' autonomy to select arbitrators?

There are no limits to the parties' autonomy to select arbitrators.

5.2 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

The court has the power, in certain circumstances, to appoint an arbitrator in terms of Section 12 of the Act. The circumstances in which such an appointment may be made include the failure of parties to the reference to agree to the appointment of an arbitrator where the arbitration agreement provides for the submission of disputes to a single arbitrator. Various other circumstances arising from the failure of the chosen method for selecting arbitrators are provided for in Section 12 of the Act.

5.3 Can a court intervene in the selection of arbitrators? If so, how?

The court will not intervene in the selection of arbitrators unless the parties' chosen method for selecting arbitrators fails. If the chosen method fails, the court may appoint an arbitrator in the circumstances provided for in Section 12 of the Act.

5.4 What are the requirements (if any) as to arbitrator independence, neutrality and/or impartiality and for disclosure of potential conflicts of interest for arbitrators imposed by law or issued by arbitration institutions within South Africa?

There are no statutory requirements regarding arbitrator independence, neutrality and/or impartiality and for disclosure of potential conflicts of interest for arbitrators imposed by law.

These issues are usually dealt with in the rules of the arbitration organisation administering the arbitration. For example, Article 14 of the Rules of the Arbitration Foundation of Southern Africa ("AFSA") states that a prospective or already appointed arbitrator must disclose in writing to the secretariat any facts and circumstances of which he is aware and which might reasonably give rise to justified doubts as to his independence or impartiality. Many arbitrators will also, in practice, refer to recognised international guidelines, such as the IBA Guidelines on Conflicts of Interest in International Arbitration.

6 Procedural Rules

6.1 Are there laws or rules governing the procedure of arbitration in South Africa? If so, do those laws or rules apply to all arbitral proceedings sited in South Africa?

There are no statutory laws or rules governing the procedure of arbitration. The procedure will usually be in terms of the rules of the arbitration organisation administering the arbitration. In the absence of such rules, the parties usually agree on procedure, and the rules of the High Court are often followed, *mutatis mutandis*.

6.2 In arbitration proceedings conducted in South Africa, are there any particular procedural steps that are required by law?

In the absence of agreed rules which determine the procedural steps in the arbitration, there are no particular procedural steps that are required by law.

6.3 Are there any particular rules that govern the conduct of counsel from South Africa in arbitral proceedings sited in South Africa? If so: (i) do those same rules also govern the conduct of counsel from South Africa in arbitral proceedings sited elsewhere; and (ii) do those same rules also govern the conduct of counsel from countries other than South Africa in arbitral proceedings sited in South Africa?

There are no rules that govern the conduct of an arbitration hearing in the absence of agreed rules. In the absence of agreed rules the procedure is usually the procedure ordinarily adopted in a trial in a court of law.

6.4 What powers and duties does the national law of South Africa impose upon arbitrators?

The powers of an arbitration tribunal are derived from the Act, common law and the terms of the submission. The arbitration tribunal may, unless the arbitration agreement otherwise provides:

- On the application of any party to a reference, require any party to the reference, subject to any legal objection, to make discovery of documents by way of affidavit or by answering interrogatories on oath and to produce such documents for inspection.
- On the application of any party to a reference, require any party to the reference to allow inspection of any goods or property involved in the reference, which is in his possession or under his control.
- On the application of any party to a reference, appoint a commissioner to take the evidence of any person in South Africa and to forward such evidence to the tribunal in the same way as if he were a commissioner appointed by the court.
- On the application of any party to a reference, from time to time determine the time when and place where the arbitration proceedings shall be held or be proceeded with.
- Administer oaths to, or take the affirmations of, the parties and witnesses appearing to give evidence.
- Subject to any legal objection, examine the parties appearing to give evidence in relation to matters in dispute and require them to produce before the tribunal all books, documents or things within their possession or power which may be required or called for and the production of which could be compelled on the trial of an action.
- Subject to any legal objection, examine any person who has been summoned to give evidence and require the production of any book, document or thing which such person has been summoned to produce.
- Inspect any goods or property involved in the reference. Make an interim award at any time within the period allowed for making an award.

The rules of evidence as observed in a court of law should be followed as far as possible, but the arbitrator may deviate from them provided that in so doing he does not disregard the substance of justice.

An arbitration tribunal may, in fixing its award, fix a time within which it is to be carried out and may award the payment of a fine for any contravention of the terms of the award.

An arbitration tribunal has the power to award interest.

An arbitration tribunal is entitled to make an award expressed in a foreign currency.

An arbitrator, who is appointed because of his knowledge and experience of the trade, is entitled to fix damages without hearing expert evidence.

Where the terms of the reference clearly empower the arbitrator to make an award otherwise than in accordance with the ordinary rules of law, he is entitled to do so.

An arbitration tribunal is not strictly bound always to decide according to narrow legal principles, but is competent at times to settle matters in a common sense and practical way.

An arbitration tribunal may correct in any award any clerical mistake or patent error arising from any accidental slip or omission.

The duties of an arbitration tribunal are similarly derived from the Act, common law and the terms of the submission, and include the duty:

- To act fairly.
- To give a decision.
- To give the award in the presence of both parties.
- To attend all proceedings.
- To give his award at the proper place.
- To give his award within the time fixed in the submission.
- To dispose of every question submitted.
- Not to exceed the submission.
- To give an award which is final.
- To make an award which is certain.
- To make an award which can be performed and which is legal.
- To decide the question of costs.
- Where the award is made by more than one arbitrator, for all arbitrators to execute the award together at the same time and place and in the presence of each other.
- Not to hear one party or his witnesses in the absence of the other party or his representative.
- To give notice of proceedings.
- Unless the submission specifically authorises the contrary, to make an award in accordance with the ordinary law.

- Not to receive secret information from one side.
- To receive all the evidence.
- To keep a record.
- Not to depart from a stated intention.

6.5 Are there rules restricting the appearance of lawyers from other jurisdictions in legal matters in South Africa and, if so, is it clear that such restrictions do not apply to arbitration proceedings sited in South Africa?

There are professional law society rules restricting the appearance of lawyers from other jurisdictions in legal matters in South Africa. It is not clear that such restrictions do not apply to arbitration proceedings in South Africa.

6.6 To what extent are there laws or rules in South Africa providing for arbitrator immunity?

There are no laws or rules in South Africa providing for arbitrator immunity. There have been no South African cases in which an aggrieved party has succeeded in claiming damages from an arbitrator.

6.7 Do the national courts have jurisdiction to deal with procedural issues arising during an arbitration?

In terms of Section 21 of the Act, for the purpose of and in relation to a reference under an arbitration agreement, the court has the same power of making orders in respect of matters specified in the Section that it has for the purposes of and in relation to any action or matter in that court.

The matters specified include the following:

- Security for costs.
- Discovery of documents and interrogatories.
- The examination of any witness before a commissioner in the Republic or in the territory or abroad and the issue of a commission or a request for such examination.
- The giving of evidence by affidavit.
- Securing the amount in dispute in the reference.
- Substituted service of notice required by the Act or of summonses.
- The appointment of a receiver.

In terms of Section 20 of the Act an arbitration tribunal may, on the application of any party to the reference and shall, if the court, on the application of any such party, so directs, or if the parties to the reference so agree, at any stage before making a final award, state any question of law arising in the course of the reference in the form of a special case for the opinion of the court or for the opinion of counsel. Any such opinion is final and not subject to appeal, and is binding on the arbitration tribunal and on the parties to the reference. Clearly, the court's power in terms of Section 20 goes beyond procedural issues, as the court has the power finally to determine a question of law arising in the course of the reference.

7 Preliminary Relief and Interim Measures

7.1 Under the governing law, is an arbitrator permitted to award preliminary or interim relief? If so, what types of relief? Must an arbitrator seek the assistance of a court to do so?

In terms of Section 26 of the Act, unless the arbitration agreement provides otherwise, an arbitration tribunal may make an interim award at any time within the period allowed for making an award. The arbitrator is therefore not required to seek the assistance of the court to make such an interim award.

7.2 Is a court entitled to grant preliminary or interim relief in proceedings subject to arbitration? In what circumstances? Can a party's request to a court for relief have any effect on the jurisdiction of the arbitration tribunal?

In terms of Section 21 of the Act (referred to in question 5.4 above), the matters in respect of which the court has the same power of making orders as it has for the purpose of and in relation to any action or matter in that court, also include the following forms of interim relief:

- The inspection, interim custody, or the preservation or sale of goods or property.
- An interim interdict or similar relief.

7.3 In practice, what is the approach of the national courts to requests for interim relief by parties to arbitration agreements?

In practice, the courts do make orders in terms of Section 21 of the Act in arbitration proceedings. The court must be satisfied that the matter in respect of which interim relief is sought is a matter specified on Section 21 of the Act, and that the order made is one which the court would have the power to make for the purposes of and in relation to a matter in that court. Examples of such matters include:

- an anti-dissipation interdict (which is similar to the well-known Mareva injunction in English law), which is used to prevent the disposal of the defendant's property in a way that will affect any ultimate right that the claimant may have to levy execution upon that property; and
- the right of an *incola* defendant to obtain security from a peregrine claimant in respect of costs.

7.4 Under what circumstances will a national court of South Africa issue an anti-suit injunction in aid of an arbitration?

There are no reported cases in which a South African court has issued an anti-suit injunction in aid of arbitration. There are diverging opinions as to whether a South African court would have jurisdiction to grant an interdict prohibiting a party from instituting proceedings in a non-South African jurisdiction. One view suggests that a South African court could grant such an interdict where the respondent is an *incola* and the judgment can effectively be enforced. However, the question remains undecided.

7.5 Does the national law allow for the national court and/or arbitral tribunal to order security for costs?

In terms of Section 21(1) of the Act, for the purpose of and in relation to a reference under an arbitration agreement, the court has the same power of making orders in respect of matters specified in the section as it has for the purposes of and in relation to any action or matter in that court. The matters specified include security for costs.

8 Evidentiary Matters

8.1 What rules of evidence (if any) apply to arbitral proceedings in South Africa?

The provisions of the Act regarding arbitration proceedings are contained in Sections 14 to 22 of the Act. Generally, the rules of evidence as observed in a court of law are followed as far as possible, although an arbitrator may deviate from those rules provided that in so doing he does not disregard the substance of justice.

8.2 Are there limits on the scope of an arbitrator's authority to order the disclosure of documents and other disclosure of discovery (including third party disclosure)?

In terms of Section 14 (1) of the Act the arbitrator may:

- on the application of any party to a reference, unless the arbitration otherwise provides, require any party to the reference, subject to any legal objection, to make discovery of documents by way of affidavit or by answering interrogatories on oath and to produce such documents for inspection; and
- unless the arbitration agreement otherwise provides:
  - subject to any legal objection, examine the parties appearing to give evidence in relation to the matters in dispute and require them to produce before the tribunal all books, documents or things within their possession or power which may be required or called for and the production of which could be compelled at the trial of an action; and/or
  - subject to any legal objection, examine any person who has been summoned to give evidence and require the production of any book, document or thing which such person has been summoned to produce.

Section 16 of the Act provides for the summoning of witnesses. The issue of a summons to compel any person to attend before an arbitration tribunal to give evidence and to produce books, documents or things to an arbitration tribunal, may be procured by any party to a reference in the same manner and subject to the same conditions as if the reference were a civil action pending in the court which has jurisdiction in the area in which the arbitration proceedings are being or are about to be held. No person may be compelled by such a summons to produce any book, document or thing – the production of which would not be compellable on trial of an action.

The effect of Sections 15 and 16 of the Act is that the arbitrator generally has the same authority to order the disclosure of documents, and other things, as the court would have, if the arbitration were a civil action pending in the court.

8.3 Under what circumstances, if any, is a court able to intervene in matters of disclosure/discovery?

In terms of Section 21(1) of the Act, for the purposes of and in relation to a reference under an arbitration agreement, one of the matters in respect of which the court has the same power of making orders as it has for the purposes of and in relation to any action or matter in that court is the discovery of documents. The arbitrator has the same power in terms of Sections 14 and 16 of the Act. The most usual circumstance in which the parties will approach the court in matters of discovery or disclosure is when third party disclosure is sought and the third party fails to produce the documents specified in the summons issued in terms of Section 16 of the Act. A court order will then be sought compelling such disclosure by the third party.

8.4 What, if any, laws, regulations or professional rules apply to the production of written and/or oral witness testimony? For example, must witnesses be sworn in before the tribunal? Is cross-examination allowed?

There are no laws, regulations or professional rules which apply to the production of written and/or oral witness testimony. There is no requirement that witnesses must be sworn in before the tribunal. The usual (but not invariable) practice is that witnesses are sworn in. Cross-examination is always allowed.

8.5 What is the scope of the privilege rules under the law of South Africa? For example, do all communications with outside counsel and/or in-house counsel attract privilege? In what circumstances is privilege deemed to have been waived?

The issues of privilege that arise in arbitration proceedings are similar to those that arise in litigation, and, in commercial arbitrations, arise mainly in the following contexts:

- Legal professional privilege, which is based on the general rule that communications between a legal advisor and his/her client are privileged if the legal advisor was acting in a professional capacity at the time, the advisor was consulted in confidence, the communication was made for the purpose of obtaining legal advice and the advice does not facilitate the commission of a crime or fraud.
- Litigation privilege, which is the privilege attaching to materials obtained in anticipation of litigation, and which serves to protect from disclosure communications between the client or the legal advisor and third parties, if those communications were made for the legal advisors information for the purpose of pending or contemplated litigation.
- The "negotiations privilege", which is the privilege relating to statements made expressly or impliedly without prejudice in the course of *bona fide* negotiations for the settlement of a dispute.

Privilege may be waived expressly or by implication. Privilege must be claimed either by the client, his agent, or his legal representative on his behalf. It is the legal advisor's duty to claim privilege, but when he does so (or when he waives the privilege) he is acting for the client and not in his own right.

In determining whether privilege has been impliedly waived, the courts will have regard to the requirements of fairness and consistency. A finding of waiver will only be made where the privilege holder has full knowledge of the right and has conducted himself in such a manner that, objectively speaking, it can be inferred that he intended to abandon those rights.

9 Making an Award

9.1 What, if any, are the legal requirements of an arbitral award? For example, is there any requirement under the law of South Africa that the Award contain reasons or that the arbitrators sign every page?

The formal requirements for an award made in terms of the Act are the following:

- In terms of Section 24(1), the award must be in writing and signed by all the members of the arbitration tribunal.

- In terms of Section 23, the award must be made within the period prescribed by the Act or the arbitration agreement or within any extended period allowed by the parties or the court.
- In terms of Section 25, the award is required to be delivered by the arbitration tribunal, the parties or their representatives being present or having been summoned to appear.

There is no requirement, under the Act, that the award contain reasons or that the arbitrators sign every page. However, in practice, the award will almost always contain reasons.

The substantive requirements of an arbitral award are that the award should be certain, final, possible, lawful, and *intra vires*.

10 Appeal of an Award

10.1 On what bases, if any, are parties entitled to challenge an arbitral award made in South Africa?

In terms of Section 28 of the Act, unless the arbitration agreement provides otherwise, an award shall, subject to the provisions of the Act, be final and not subject to appeal. The parties are therefore only entitled to appeal if the arbitration agreement provides for an appeal.

However, a distinction must be drawn between appeal and review. An award may be set aside in terms of Section 33 of the Act where:

- any member of the arbitration tribunal has misconducted himself in relation to his duties as arbitrator or umpire;
- an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceeds;
- an arbitration tribunal has exceeded its powers; and
- an award has been improperly obtained.

10.2 Can parties agree to exclude any basis of appeal or challenge against an arbitral award that would otherwise apply as a matter of law?

As appears in question 10.1 above, parties are only entitled to appeal if the arbitration agreement provides for an appeal. However, a distinction must be drawn between appeal and review. Parties are not entitled to exclude the right to challenge an award on the grounds set out in Section 33 of the Act.

10.3 Can parties agree to expand the scope of appeal of an arbitral award beyond the grounds available in relevant national laws?

If the arbitration agreement provides for an appeal, the parties could, by agreement, expand the scope of the appeal. However, arbitration agreements that provide for an appeal generally do not expand the scope of appeal beyond the grounds applicable in appeals from the High Court to the Supreme Court of Appeal.

10.4 What is the procedure for appealing an arbitral award in South Africa?

As mentioned in question 10.1 above, parties are only entitled to appeal if the arbitration agreement provides for an appeal. Where the arbitration agreement provides for an appeal, the procedure will be determined by the agreement or by the rules of the arbitration organisation administering the arbitration.

11 Enforcement of an Award

11.1 Has South Africa signed and/or ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Has it entered any reservations? What is the relevant national legislation?

South Africa has ratified the New York Convention, without reservation. The Recognition and Enforcement of Foreign Arbitral Awards Act 1977 was enacted to give effect to the New York Convention.

The court may, on its own initiative, refuse to grant an application for the recognition of a foreign arbitral award if the court finds that:

- a reference to arbitration is not permissible in South Africa in respect of the subject matter of the dispute; or
- the enforcement of the award would be contrary to public policy in South Africa.

The other defences which may be raised by the party against whom the enforcement of the award is sought are as follows:

- That the parties to the arbitration agreement concerned had, under the law applicable to them, no capacity to contract, or if the agreement is invalid under the law to which the parties subjected it or of the country in which the award was made.
- That the party did not receive the required notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise not able to present his case.
- That the award deals with a dispute outside the provision of the reference to arbitration or contains decision on matters beyond the scope of the reference.
- That the constitution of the arbitration tribunal or the arbitration proceedings was not in accordance with the relevant arbitration agreement or with the law of the country in which the arbitration took place.
- That the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made.

Unless one of the defences referred to above is established, the foreign arbitral award may be made an order of court and is then enforced in the same manner as a judgment of the court.

11.2 Has South Africa signed and/or ratified any regional Conventions concerning the recognition and enforcement of arbitral awards?

South Africa has not signed any Conventions concerning the recognition and enforcement of arbitral awards other than the New York Convention.

11.3 What is the approach of the national courts in South Africa towards the recognition and enforcement of arbitration awards in practice? What steps are parties required to take?

The court will recognise and enforce an arbitration award, in terms of Section 31(1) and (3) of the Act, if it is proved that the dispute was submitted to arbitration in terms of an arbitration agreement, and that an arbitrator was appointed and that there was a valid award in terms of the reference.

A foreign arbitral award will similarly be recognised and enforced, provided that the requirements of the Recognition and Enforcement of Foreign Arbitral Awards Act are met. An application for a foreign arbitral award to be made an order of court is required to be

accompanied by the original foreign arbitral award and the original arbitration agreement in terms of which the award was made, duly authenticated, or certified copies of that award and the agreement.

11.4 What is the effect of an arbitration award in terms of *res judicata* in South Africa? Does the fact that certain issues have been finally determined by an arbitral tribunal preclude those issues from being re-heard in a national court and, if so, in what circumstances?

The fact that certain issues have been finally determined by an arbitral tribunal precludes those issues from being reheard, between the same parties, in a national court. The issues determined in the arbitration are *res judicata* between the parties in the arbitration.

11.5 What is the standard for refusing enforcement of an arbitral award on the grounds of public policy?

The courts will not easily declare an arbitral award to be contrary to public policy.

In terms of Section 4(1)(a)(ii) of the Recognition and Enforcement of Foreign Arbitral Awards Act 1977, a court may refuse to grant an application for a foreign arbitral award to be made an order of court if the court finds that the enforcement of the award concerned would be contrary to public policy in the Republic.

Where it is evident from the face of the award and the arbitration agreement that the award is contrary to public policy, the court will refuse to recognise such an award.

12 Confidentiality

12.1 Are arbitral proceedings sited in South Africa confidential? In what circumstances, if any, are proceedings not protected by confidentiality? What, if any, law governs confidentiality?

The Act does not provide for the confidentiality of arbitration proceedings. However, even if the arbitration agreement does not expressly provide that the arbitration proceedings are confidential, such a term will be implied.

Arbitration proceedings are not protected by confidentiality in court proceedings arising from the arbitration.

A further difficulty is that witnesses are not bound by any implied term of confidentiality, and are therefore, not obliged to respect the confidentiality of arbitration proceedings.

In South Africa, in principle, relevant evidence remains admissible, even if illegally obtained. If a transcript of arbitration proceedings is obtained without the consent of the parties, it may still be admissible in evidence in other proceedings even if improperly obtained.

12.2 Can information disclosed in arbitral proceedings be referred to and/or relied on in subsequent proceedings?

A party may not disclose information about the arbitration to an outsider without the consent of the other party to the arbitration, except for the purposes of court proceedings arising from the arbitration. The question whether information disclosed in arbitral proceedings can be referred to and/or relied on in subsequent proceedings between the same parties will therefore depend on whether the subsequent proceedings arise from the arbitration. In practice, however, a party will often be able to obtain information disclosed in arbitration proceedings through the discovery and disclosure procedures which are available in the subsequent proceedings.

13 Remedies / Interests / Costs

13.1 Are there limits on the types of remedies (including damages) that are available in arbitration (e.g., punitive damages)?

The Act does not impose any limits on the types of damages that are available in arbitration. However, one of the requirements for the enforcement of an arbitration award is that the enforcement must not be contrary to public policy. Generally, the policy of South African law and practice is that for both the breach of contract and the assessment of the *quantum* of damages, the injured party is entitled to no more than compensation for the damages actually suffered by him: the award of punitive damages in such instances is alien to the South African legal system. However, it has been held that the mere fact that awards are made on a basis not recognised in South Africa does not entail that they are necessarily contrary to public policy: whether an award is contrary to public policy depends largely on the facts of each case.

In terms of Section 27 of the Act, unless the arbitration agreement provides otherwise, an arbitration tribunal may order specific performance of any contract in any circumstances in which the court would have the power to do so.

13.2 What, if any, interest is available, and how is the rate of interest determined?

In terms of Section 29 of the Act, where an award orders the payment of a sum of money, such sum shall, unless the award provides otherwise, carry interest as from the date of the award and at the same rate as a judgment debt. In South African law more interest is governed by the Prescribed Rate of Interest Act 55 of 1975. The Minister of Justice prescribes a rate of interest for the purposes of the Act from time to time. The current prescribed rate is 15.5% *per annum*.

13.3 Are parties entitled to recover fees and/or costs and, if so, on what basis? What is the general practice with regard to shifting fees and costs between the parties?

In terms of Section 35(1) of the Act, unless the arbitration agreement otherwise provides, the award of costs in connection with the reference and award is in the discretion of the arbitration tribunal which is required, if it awards costs, to give directions as to the scale on which such costs are to be taxed and may direct to and by whom and in what manner such costs or any part thereof are to be paid, and may tax or settle the amount of such costs or any part thereof, and may award costs as between attorney and client.

In terms of Section 35(2) of the Act, if no provision is made in an award with regard to costs, or if no directions have been given as to the scale on which such costs are to be taxed, any party to the reference may apply to the arbitration tribunal for an order directing by and to whom such costs are to be paid or giving directions as to the scale on which such costs are to be taxed, and thereupon the arbitration tribunal is required, after hearing any party who may desire to be heard, to amend the award by adding directions as it may think proper with regard to the payment of costs or the scale on which such costs are to be taxed.

The basic principle in awarding costs is that a party who is substantially successful is entitled to be awarded costs in the absence of special circumstances.

13.4 Is an award subject to tax? If so, in what circumstances and on what basis?

The question whether an award is subject to tax depends on the facts. For example, if the damages award is to compensate the claimant for loss of profits, tax will be payable on the damages awarded if the profits would have been taxable.

13.5 Are there any restrictions on third parties, including lawyers, funding claims under the law of South Africa? Are contingency fees legal under the law of South Africa? Are there any "professional" funders active in the market, either for litigation or arbitration?

The Contingency Fees Act of 1997 provides for two forms of contingency fee arrangements that attorneys and advocates may enter into with their clients. The first is a "no-win, no-fees" agreement, and the second is an agreement in terms of which the legal practitioner is entitled to fees higher that the normal fee if the client is successful. The second type of agreement is subject to limitations. Higher fees may not exceed the normal fees of the legal practitioner more than 100%, and in the case of claims sounding in money, this fee may not exceed 25% of the total amount awarded or any amount obtained by the client in consequence of the proceedings, excluding costs.

In the case of *PricewaterhouseCoopers Inc and others v National Potato Co-operative Limited* 2004 (6) SA 66 (SCA), the Supreme Court of Appeal held that a champertous agreement in terms of which a person provides a litigant with funds to litigate in return for a share of the proceeds of litigation is neither contrary to public policy nor void. The *PricewaterhouseCoopers* case has opened the way to more innovative funding of expensive litigation in South Africa, but has not yet led to the development of any meaningful litigation funding business in South Africa.

14 Investor State Arbitrations

14.1 Has South Africa signed and ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965) (otherwise known as "ICSID")?

South Africa has not signed and ratified the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965).

One of the recommendations made by the South African Law Commission in its Report on Arbitration: An International Arbitration Act for South Africa (July 1998) is that South Africa should follow the example of most other African countries and ratify the Washington Convention, as this would create the necessary legal framework to encourage foreign investment and further economic development in the region.

This recommendation has not yet been adopted.

14.2 How many Bilateral Investment Treaties (BITs) or other multi-party investment treaties (such as the Energy Charter Treaty) is South Africa party to?

Although South Africa has not signed and ratified the Washington Convention, it is party to approximately 40 Bilateral Investment Treaties ("BITs") that provide for arbitration pursuant to the rules of the Additional Facility of ICSID of 1978.

14.3 Does South Africa have any noteworthy language that it uses in its investment treaties (for example in relation to "most favoured nation" or exhaustion of local remedies provisions)? If so, what is the intended significance of that language?

The language used in South Africa's BITs in relation to the settlement of disputes generally provides for the submission of disputes to the contracting parties' court having territorial jurisdiction; or an *ad hoc* arbitration tribunal, in compliance with the UNCITRAL arbitration rules; or an ICSID arbitration if or as soon as both the contracting parties have acceded to the Washington Convention. If both parties have not acceded to the Washington Convention, it is generally provided that each contracting party agrees that the dispute may be submitted to arbitration pursuant to the Rules of the Additional Facility of ICSID, of 1978.

14.4 What is the approach of the national courts in South Africa towards the defence of state immunity regarding jurisdiction and execution?

In April 2001, a Swiss national initiated arbitration proceedings alleging breach of the Switzerland/South Africa Investment Treaty. Those proceedings, however, were initiated under the UNCITRAL Rules of Arbitration.

In January 2007, proceedings were instituted by a group of Italian investors who had interests in South Africa's granite industry through a Luxembourg-based holding company. The case was brought in terms of South Africa's Investment Treaties with Italy, Belgium and Luxembourg. It was claimed that the investors' mineral rights had been expropriated under South Africa's Minerals and Petroleum Resources Development Act ("MPRDA") because their ownership of those rights was "extinguished" and they did not receive "prompt, adequate and effective compensation", as required by the Treaties. This arbitration, which was the first ICSID arbitration to which South Africa was a party, was settled in 2010. As this was the first ICSID arbitration involving South Africa, the issue of enforcement of ICSID awards has not yet arisen in the national courts.

15 General

15.1 Are there noteworthy trends in or current issues affecting the use of arbitration in South Africa (such as pending or proposed legislation)? Are there any trends regarding the type of disputes commonly being referred to arbitration?

Arbitration is an increasingly popular form of dispute resolution in South Africa. Arbitration clauses are found in most commercial agreements, and this has resulted in an increasing number of commercial disputes being submitted to arbitration. Local arbitration organisations are active. Arbitrators are usually appointed from the Bar or from the ranks of retired judges.

South Africa has lagged behind in the development of international arbitration and has not hitherto been regarded as a user-friendly forum for international arbitration. Political developments and changing trade and economic prospects over the past ten years have brought with them increasing pressure for efficient commercial dispute resolution procedures and, in the African context, South

Africa is increasingly seen as the obvious centre for the resolution of commercial disputes affecting parties not only in South Africa, but also in other African countries. It is therefore essential that South African arbitration proceedings should be brought into line with those in other developed countries, thereby stimulating the development of South Africa as an international and regional arbitration centre. This need has been recognised, and in July 1998 the South African Law Commission submitted its report on its investigation into international commercial arbitration. One of the Commission's core recommendations is the compulsory application of the UNCITRAL model law to international commercial arbitration and the embodiment of all South African legislation on international arbitration in a new International Arbitration Act. These recommendations were followed by the Commission's report on domestic arbitration in May 2001, which includes extensive and far-reaching recommendations regarding domestic arbitration. Although the recommendations made by the Commission regarding both international arbitration, and domestic arbitration, have not yet been implemented, it is clear that South Africa is attempting to move towards the implementation of internationally recognised arbitration procedures in the resolution of commercial disputes.

Unfortunately, the popularity of arbitration is a political issue in South Africa. In a report submitted in February 2005, Judge John Hlophe, who is the Judge President of the Cape Provincial division of the South African High Court, concludes that black judges continue to be the victims of real, actual or perceived racism in the South African legal system. One of the targets of Judge Hlophe's report is arbitration and its place in the South African legal system. The report suggests that arbitration is inimical to judicial transformation in South Africa. Judge Hlophe recommends that permission given to retired judges to sit as arbitrators should be withdrawn with immediate effect, and that legislative measures should be introduced to control abuse of the arbitration process. The issue is one which was referred to by the Law Commission in its domestic arbitration report in 2001 in which reference was made to the danger of a perception "particularly among black lawyers, that some white members of the legal profession see arbitration as a form of "privatised litigation", enabling them and their corporate clients to avoid courts which increasingly comprise black judicial officers".

Notwithstanding Judge Hlophe's report, there have been strong indications of support for arbitration by both the Supreme Court of Appeal and the Constitutional Court. In *Telcordia Technologies Inc v Telkom SA Ltd* [2007] 3 SA 266 SCA, the Supreme Court of Appeal upheld the principle of party autonomy in arbitration proceedings, and indicated that South Africa would continue to show a high degree of deference to arbitration awards and that there would be minimal judicial intervention when reviewing international commercial arbitration awards. In *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and another* CCT97/07 [2009] ZACC 6, the Constitutional Court held that section 34 of the Constitution, which provides for a right to a fair public hearing, did not apply to private arbitrations. The Constitutional Court also indicated its strong support for the principle of party autonomy in arbitration proceedings.

15.2 What, if any, recent steps have institutions in South Africa taken to address current issues in arbitration (such as time and costs)?

Domestic arbitration organisations have not recently taken any steps to address current issues in arbitration. However, it is probable that South African arbitration organisations will be influenced by the recently introduced new ICC arbitration rules. At this stage, it is too early to say whether the influence of the new ICC arbitration rules will result in any changes to the rules of South African arbitration organisations.

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Des Williams has been chairman of Werksmans Attorneys since 2005. He has been with the firm since 1974 and headed its Litigation Department from 1994 to 2005.

He is experienced in all fields of commercial litigation and alternative dispute resolution, including international litigation, arbitration and mediation. He has been involved in many of the largest and most complex litigation and arbitration matters in South Africa.

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Des is named in Chambers Global: The World's Leading Lawyers for Business for his expertise in dispute resolution; appearing in the 2014 edition for both dispute resolution and construction. He is named among the world's leading arbitration specialists in The International Who's Who of Commercial Arbitration, 2013. He is also named as a leading lawyer in arbitration and mediation, construction and litigation by Best Lawyers International; in commercial litigation and in arbitration by the International Who's Who Legal; in dispute resolution by the Legal500 and in dispute resolution by PLC Which Lawyer.

Des is the South African member of the Court of Arbitration of the International Chamber of Commerce (ICC), a former co-chair of the Litigation Committee of the International Bar Association (IBA), and a former member of the IBA's Legal Practice Division Council.

He has authored several articles, is a contributor to books, journals, newsletters and reviews and regularly appears as a sought-after speaker at local and international conferences.

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