

# MEDIATION AND ARBITRATION

## Definition

1. Mediation is a flexible and voluntary process, in which the parties are assisted by an impartial and independent person, the mediator, in a private, confidential and without prejudice setting, to settle their dispute by agreement.<sup>1</sup>
2. Arbitration is an adjudicative process, pursuant to a written agreement between the parties to refer their dispute specified therein to an independent and impartial tribunal, appointed by the parties, or on their behalf according to a method agreed by them, for a final decision which is binding on the parties.<sup>2</sup>
3. Commercial arbitrations in Namibia are regulated by the Arbitration Act 42 of 1965.
4. An arbitration tribunal is neither a court or tribunal mentioned in article 12, nor an administrative tribunal contemplated in article 18, of the Namibian Constitution.<sup>3</sup>
5. Alternative dispute resolution (ADR) refers to any method of resolving disputes other than court litigation. Mediation and arbitration are the main forms of ADR, but are distinguishable from other forms of ADR such as: negotiation, conciliation, adjudication, expert determination, valuation, certification, and the like.

## Advantages and disadvantages

6. The benefits of mediation are:
  - 6.1. One: speed. Mediation should not take longer than a week from commencement to settlement agreement.

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1 Brand, Steadman and Todd, *Commercial Mediation*, (2012), 19-20

2 Butler, *Arbitration*, LAWSA, Vol 2 (3<sup>rd</sup> ed), para 75.

3 *Westcoast Fishing Properties v Gendev Fish Processors Ltd and Another* 2016 (4) NR 1191 (SC) [36]-[42]; *Total Support Management (Pty) Ltd and Another v Diversified Health Systems (SA) (Pty) Ltd and Another* 2002 (4) SA 661 (SCA) [23]-[25].

6.2. Two: cost saving. Normally two days are taken up by a mediation. The parties contribute equally to the fee of the mediator and the venue, and each pays their own costs.

6.3. Three: the success rate. The success rate of a skilled and well-trained mediator should approximate 90%. (The success rate of court-connected mediation in Namibia is on average about 60%. We believe this figure may be improved by better training, moderation and assessment of court-connected mediators for accreditation.)

7. The advantages of arbitration to court litigation are:

7.1. One: arbitration is expeditious, efficient and inexpensive compared to court litigation, which takes long, is burdened by formal inflexible rules rendering the process uneconomical, and is costly. An arbitration properly conducted should not take longer than four months. If nothing goes wrong, court litigation normally takes two years. See the attached calculation comparing the costs of court litigation to the costs of arbitration.

7.2. Two: the parties by agreement appoint the arbitration tribunal. A Court is appointed by the State, which may be unsuitable to adjudicate the dispute in terms of applicable practical experience.

7.3. Three: arbitration is a private process closed to the public. A process open to the public is compulsory in court litigation, save in exceptional circumstances.

8. The disadvantages of arbitration are:

8.1. One: it is final and the review powers of the court are limited to:

8.1.1. irregularities in the proceedings causing a miscarriage of justice;

8.1.2. lack of jurisdiction;

8.1.3. defects in the execution of the arbitrator's mandate;

8.1.4. misconduct by the arbitrator tainted by moral turpitude in the sense of dishonesty, partiality, bad faith and the like.

- 8.2. Two: there is no right of appeal, unless specifically provided for by agreement between the parties.
- 8.3. Three: an arbitration is only as good as its arbitrator. Lawyers and retired judges lacking arbitration training acting as arbitrators tend to conduct arbitrations according a process approximating court litigation, with disastrous consequences in terms of duration and costs. Therefore, the parties must choose their tribunal wisely, and impose a duty on the tribunal to take control of the pace and costs of the arbitration, and to conduct it according to an expeditious, efficient and inexpensive process, commensurate with the nature and extent of the dispute, provided the process is fair and just.

### **Growth in arbitration**

9. The recent growth in international commercial arbitrations has been described as 'explosive'.<sup>4</sup> The major drivers of the growth are: (i) economic growth and an increase in cross-border trade and commerce; (ii) dissatisfaction with court litigation; and (iii) harmonisation of arbitration laws and procedures.
10. Harmonisation is facilitated by:
- 10.1. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards agreed at the United Nations Conference on International Commercial Arbitration held in 1958 in New York (*"the New York Convention"*).
- 10.2. The Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law (*"UNCITRAL"*) 1985 as amended in 2006.
- 10.3. UNCITRAL Arbitration Rules 1976, revised in 2010, amended by the addition of article 1 paragraph 4 in 2013.
11. The main aim of the New York Convention is to facilitate the recognition and enforcement of foreign arbitration agreements and awards in the same way as domestic arbitration agreements and awards.<sup>5</sup>

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4 Ben Rigby, *The explosive growth of international arbitration*, 22 August 2016, accessed on 20 January 2018 at <https://www.cdr-news.com>.

5 Butler, *Arbitration*, LAWSA, Vol 2, (3<sup>rd</sup> ed), para 149

12. Namibia is a signatory to the New York Convention, but has to accede thereto, and adopt legislation enforcing the Convention locally, for the Convention to apply in Namibia. In this regard Namibia is lagging behind countries like Angola, South African, Botswana, Democratic Republic of Congo, Lesotho, Zambia and Zimbabwe.
13. The UNCITRAL Model Law is designed to assist States in reforming and modernising their laws on arbitral procedure so as to take into account the particular features and needs of international commercial arbitration. It covers all stages of the arbitral process from the arbitration agreement, the composition and jurisdiction of the arbitral tribunal, and the extent of court intervention, through the recognition and enforcement of the arbitral award. It reflects worldwide consensus on key aspects of international arbitration practice having being accepted by States of all regions and the different legal and economic systems of the world.<sup>6</sup>
14. The UNCITRAL Model Rules of Arbitration provide a comprehensive set of procedural rules upon which parties may agree for the conduct of arbitral proceedings arising out of their commercial relationship, and are widely used in private commercial arbitrations as well as arbitrations administered by institutions. The rules cover all aspects of the arbitral process, providing a model arbitration clause, setting out procedural rules regarding the appointment of arbitrators and the conduct of arbitral proceedings, and establishing rules in relation to the form, effect and interpretation of the award.
15. Anecdotal evidence of dissatisfaction among legal practitioners with court litigation in Namibia approximates the contemptuous. The main complaints are: judges lack adequate skills and experience in commercial matters, long delays from commencement to judgment, such high costs as effectively hindering access to justice for the ordinary individual, unproductivity of judges and legal practitioners due to case management, and the like.
16. Predictions are that the next major wave in global economic growth will be in Africa, with the attendant increase in commercial transactions, and cross-border trade and commerce, and the concomitant rise in the demand for domestic and international commercial arbitration. Thus, spending money on the following in Namibia is a good investment:

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6 UNCITRAL accessed on 21 January 2018 at [www.uncitral.org](http://www.uncitral.org).

- 16.1. One: updating arbitration legislation in harmony with global principles, trends and best practices.
- 16.2. Two: training of legal practitioners in arbitration law and practice.
- 16.3. Three: promotion of arbitration as a dispute resolution process among commercial legal practitioners, political leaders, and captains of industry and commerce.

### **Arbitral needs of Namibia**

17. The culture of resorting mainly to court litigation to resolve disputes should be changed to resolving disputes where appropriate by alternative dispute resolution processes — in the main mediation and/or arbitration.
18. Leaders in Government, the commercial legal profession, and commerce and industry, must apply a policy of attempting to resolve disputes by mediation, and where suitable by arbitration, before resorting to court litigation. Mr Tony Blair did that in Britain, which led to enormous savings in legal costs.<sup>7</sup> Locally, Justice Petrus Damaseb introduced court-connected mediation in Namibia, which reportedly caused savings in legal cost in the order of N\$50 million in the first year after introduction.<sup>8</sup>
19. On a practical level, the Government, commercial lawyers drafting contracts, building contractors, professionals in the building industry, property developers and investors, and commercial institutions such as banks, insurance companies, estate agents, must put arbitration clauses in their contracts. Attached hereto is the model arbitration clause of ADR Forum. If the contract relating to the dispute does not have an arbitration clause, the attached model *ad hoc* arbitration agreement of ADR Forum may be used.
20. A critical mass of legal professionals should be trained in the practice of mediation and arbitration to provide the impetus for the required change of culture from court litigation to dispute resolution by mediation and/or arbitration.

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<sup>7</sup> Brand *et al*, op cit (note 1) 5.

<sup>8</sup> Report on mediation in the High Court 5 March 2015.

21. The available mediation and arbitration courses are expensive though:
  - 21.1. Mediation training: Conflict Dynamics offers a 40 hour course over a week to say 18 trainees for approximately N\$300 000.00, excluding the venue. Successful completion of the course gives accreditation as mediator at Conflict Dynamics, and on request with an additional assessment fee at Centre for Effective Dispute Resolution (“CEDR”) in the UK.
  - 21.2. Arbitration training: the Association of Arbitrators (Southern Africa) NPC offers a one year correspondence course for legal practitioners, which may give successful candidates fellowship status at the Chartered Institute of Arbitrators in the UK, provided Award Writing is passed by at least 70%, at a cost of about N\$40 000.00.
22. The long term solution for Namibia may be to develop in co-operation with UNAM or NUTS an online inexpensive course divided in modules, which busy legal practitioners can successfully complete in and at their own time and pace.

## **ADR Forum**

23. ADR Forum provides mediation and arbitration services. It has its own rules and panel of neutrals (View at [adrforumlaw.com](http://adrforumlaw.com)). The rules are based on the UNCITRAL Model Rules of Mediation and Arbitration, which provides the following benefits:
  - 23.1. One: they comply with global standards, forms and best practices, and are therefore user friendly to foreign investors.
  - 23.2. Two: uncertainty in the interpretation and application thereof is minimised, because there is a wealth of jurisprudence in which they have already been authoritatively interpreted and applied.<sup>9</sup>
  - 23.3. Three: some 90 countries have already adopted the UNCITRAL Model Law on International Commercial Arbitration.<sup>10</sup>

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9 Case Law on UNCITRAL Texts (CLOUT) accessed on 23 January 2018 at [www.uncitral.org](http://www.uncitral.org).

10 UNCITRAL accessed on 24 January 2018 at [www.uncitral.org](http://www.uncitral.org).

24. A significant feature of the ADR Forum rules of arbitration is this: article 18 paragraph 1 thereof imposes a duty on the arbitrator to take control of the pace and costs of the arbitration, after consulting the parties, and taking into account the requirements of the case.

### **ADR Forum training fund**

25. ADR Forum has established a fund for the provision of mediation training to legal practitioners in Namibian, and the development of an online course in arbitration.

26. Donations to the fund may be paid into the following trust account:

Name of account holder: Kruger, Van Vuuren & Co  
Bank: First National Bank  
Prosperita Branch  
Branch code: 280679  
Account number: 620 445 141 24  
Reference: ADR Forum Training Fund

27. If you make donations to the fund, it is essential that you provide us at [herman@adrforum.com](mailto:herman@adrforum.com) with the following particulars:

Name of donor:  
Email:  
Tel:  
Cell:

The following details of the bank account from which the payment is made:

Name of account holder:  
Bank:  
Branch code:  
Account number:

“17. **Dispute resolution**

- 17.1 Should any dispute, disagreement or claim arise between the parties connected to, relating to or concerning this agreement, including but not limited to its validity or voidability (“the dispute”), the parties agree to attempt resolving the dispute according to the ADR Forum rules of mediation.
- 17.2 If the dispute has not been resolved within 7 days of the notice of desire to mediate, any party may terminate the mediation.
- 17.3 If the dispute has not been resolved by mediation, the dispute shall be resolved by arbitration according to the ADR Forum rules of arbitration.
- 17.4 Notwithstanding anything to the contrary contained in this agreement, the **[insert client’s name]** shall in its sole discretion be entitled to institute legal proceedings in a court of law of competent jurisdiction to resolve the dispute.
- 17.5 If the **[insert client’s name]** has instituted legal proceedings in a court of law as contemplated in the preceding subclause, and such legal proceedings are defended or opposed, the **[insert client’s name]** reserves the right to refer the dispute to mediation and/or arbitration according to this dispute resolution clause.”

**Ad hoc agreement to arbitrate**

We,

AB of \_\_\_\_\_

and



CD of \_\_\_\_\_

hereby agree that any dispute, disagreement or claim between us:

1. connected to, relating to or concerning the contract between us dated \_\_\_\_\_, a copy of which is attached hereto,

**or**

2. set out in the schedule to this agreement,

shall be resolved according to the ADR Forum rules of arbitration.

**PLAINTIFF'S COSTS OF COURT LITIGATION COMPARED TO CLAIMANT'S COSTS OF  
ARBITRATION IN A CLAIM OF SAY N\$ 5 000 000.00\***

<b>COURT LITIGATION</b>		<b>ARBITRATION</b>	
<b>Cost item</b>	<b>N\$</b>	<b>N\$</b>	<b>Cost item</b>
Take instructions (½ day at N\$18 000 per day)	9 000	9 000	Take instructions (½ day at N\$18 000 per day)
Summons (instructing [N\$9 000] and instructed [N\$18 000] counsel)	27 000	27 000	Statement of claim, together with copies of supporting documents (instructing [N\$9 000] and instructed [N\$18 000] counsel)
		6 000	Filing fee
Court connected mediation (6h at N\$1 800 per hour)	10 800		
Case planning (1h at N\$1 800 per hour)	1 800	4 500	Pre-arbitration meeting (Arbitrator [½ x N\$1 800] plus instructing and instructed counsel (1h at N\$1 800 per hour each])
Summary judgment	20 000		
Plea (reading and considering only) (1h)	1 800	3 600	Statement of defence, together with copies of supporting documents (reading and considering only) (2h)
Case management (1h at N\$1 800 per hour)	1 800		
Discovery and production of documents (3h)	3 600		
Witness statements, together with copies of supporting documents (3 days instructing and instructed counsel)	108 000	108 000	Witness statements, together with copies of supporting documents (3 days instructing and instructed counsel)

Status hearings (1h at N\$1 800 per hour)	1 800		
Interlocutories	20 000		
		18 000	Arbitrator's preparation for arbitration (½ x 2 days at N\$18 000 per day)
Preparation for trial (2 days instructing plus instructed counsel)	72 000	72 000	Preparation for arbitration (2 days instructing plus instructed counsel)
Pre-trial conference (1h instructing plus instructed counsel)	3 600	4 500	Pre-arbitration meeting (Arbitrator (½) plus instructing and instructed counsel) (1h)
Trial (5 days instructing and instructed counsel)	180 000	135 000	Arbitration (Arbitrator (½) plus instructing and instructed counsel) (3 days)
Court building		5 250	Arbitration venue (½) (3 days at N\$3 500 per day)
Recording		1 800	Recording (½) (3 days at N\$1 200 per day)
Transcription (½) (2000 pages at N\$20 per page)	20 000	10 000	Transcription (½) (1000 pages at N\$20 per page)
Heads of argument (2 days instructed counsel)	36 000	36 000	Heads of argument (2 days instructed counsel)
Oral argument (1 day instructing plus instructed counsel)	18 000		
Judgment		18 000	Award (½) (2 days at N\$18 000 per day)
		5 400	Unopposed application to make award an order of court (3h at N\$1 800 per hour)
<b>Total</b>	<b>N\$535 200</b>	<b>N\$464 050</b>	<b>Total</b>

\* This comparison is for illustration purposes only, and shall not be binding on ADR Forum