PRESENTATION BY HERMAN STEYN AT THE ICC NAMIBIA ARBITRATION DAY HELD AT WINDHOEK ON 9 MAY 2019 UNDER THE AUSPICES OF THE ICC INTERNATIONAL COURT OF ARBITRATION[1]

Introduction

1. I thank Dr Meyer van den Berg of Koep & Partners for the invitation to speak to:

1.1. The drafting of final arbitral awards.

1.2. The practicalities of arbitration proceedings.

1.3. The appointment of arbitrators.

2. I first run through the formal, substantive and structural requirements of a final award. I then liven things up with guidelines on style and references to some good and bad writing. I am brief on the practicalities of arbitration proceedings, with reference to an exemplary arbitration. Finally, I express a few controversial views on the selection of arbitrators to stimulate debate.

Award writing

3. The paramount obligation of the arbitrator is to write an award at the end of the arbitration proceedings that communicates the decision of the arbitrator, together with the reasons therefore, in an enforceable form. This **communications function** of the award informs most, if not all, its requirements.

4. The trouble with a final award is that it may be wrong on the facts or the law, but nevertheless binding on the parties. Thus, the arbitrator bears the heavy burden of taking care that the award is right, for a wrong award may cause the losing party grave injustice.

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[1] To be posted in due course on the website of ADR Forum at www.adrforumlaw.com.

Formal requirements

5. Compliance with the formal requirements of the final award is a prerequisite for its validity and enforceability. Absent such compliance, the award may be void, voidable or unenforceable.

6. Generally, the formal and procedural requirements of the award are determined by:

6.1. The laws of the seat of the arbitration.

6.2. The arbitration agreement, including any institutional rules governing the arbitration in terms thereof.

6.3. The New York Convention[2], if applicable to the arbitration or the recognition or enforcement of the final award made pursuant thereto.

7. This paper is limited to the requirements of an award by the Namibian Arbitration Act 42 of 1965 (the Arbitration Act), the UNCITRAL Model Law[3] (the Model Law) and UNCITRAL Arbitration Rules[4] (the UNCITRAL Rules).

8. **Writing and signature**. Section 24 of the Arbitration Act provides that the award shall be in writing, and signed by the members of the arbitration tribunal, except if the minority refuse to sign, such refusal shall be mentioned in the award, but shall not invalidate the award. Article 31 paragraph 1 of the Model Law, in addition, requires that the reason for any omitted signature must be stated, as do article 34 paragraphs 2 and 4 of the UNCITRAL Rules.

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2 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958).

3 United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006.

4 UNCITRAL Arbitration Rules (with new article 1, paragraph 4, as adopted in 2013) UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration.

9. **Identification of the parties**. The award must identify the parties by stating their full names, legal capacity and address. This is normally done in the heading and recitals of the award.[5] Unless the parties to which the award applies, are therein identified as legally competent persons, it may be void.

10. **Reasons**. Neither the Arbitration Act nor the Namibian common law requires the arbitrator to give reasons for the award.[6] However, the Model Law and the UNCITRAL Rules provide that the award shall state the reasons upon which it is based, unless the parties agreed otherwise or a settlement is made an award by consent between the parties.[7]

11. **Date**. The award must state the date on which it is made, as opposed to the date on which the award is published to the parties. Section 23 of the Arbitration Act stipulates that the arbitration tribunal shall, unless the arbitration agreement otherwise provides, make its award within four months after the date on which the arbitrator entered on the reference or was by written notice from any party called on to act, whichever is the earlier. An award made out of time in terms of section 23 of the Arbitration Act is void, but may be saved from invalidity by extending the time for its making, before or after it was made, by agreement between the parties or by the Court on good cause shown.[8]

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5 Wong Fook Keong, *The Arbitration Award*, p 6, www.myiem.org.my/assets/download/PMTD-Talk-TheArbitrationAward-121206.pdf, accessed 29 April 2019; Turner, *Arbitration Awards*, 2005, Blackwell Publishing Ltd, p 9.

6 Butler and Finsen, *Arbitration in South Africa Law and Practice*, 1993, p 269.

7 Article 31 paragraphs 2 of the Model Law; Article 34 paragraphs 3 of the UNCITRAL Rules.

8 *Sherwood Eleven Thirty Investments CC v Robridge Construction CC and Another* 2001 (4) SA 741 (W) 746B-747H.

12. The Model Law and the UNCITRAL Rules require the award to state the date on which it is made.[9] The UNCITRAL Rules, in addition, states that all awards shall be made without delay.[10] Interest runs from the date the award is made at the same rate as a judgment debt by virtue of section 29 of the Arbitration Act.

13. **Seat of the arbitration**. The award must give the seat of the arbitration. The law of the seat of the arbitration governs the procedural aspects of the arbitration, for example, it determines the Court which has jurisdiction to deal with certain matters concerning the arbitration.[11]

14. **Publication**. The award takes effect on publication thereof to the parties. Prior thereto the issues referred to arbitration do not become *res judicata* (a matter already adjudicated that cannot be raised again), and the arbitrator does not become *functus officio* (of no further official or legal effect) either. Thus, the arbitrator retains the power and authority to amend the award between the making and the publication thereof to the parties.

15. Section 25(1) of the Arbitration Act stipulates that the award shall be delivered by the arbitrator to the parties being present or having being summoned to appear. It has been held that the parties and the arbitrator may contract out of strict compliance with this mode of publication of the award.[12]

16. The date of publication of the award is significant. Firstly, it creates the right of the winning party to enforce, and the corresponding obligation of the losing party to comply with, the award.[13] Secondly, the time limits for the correction of, clerical, computational or typographical errors[14] in, and the interpretation, of

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9 Article 31 paragraph 3 of the Model Law; Article 34 paragraph 4 of the UNCITRAL Rules.
10 Article 34 paragraph 4 of the UNCITRAL Rules.
11 *Zhongji Development Construction Engineering Co Ltd v Kamoto Copper Co SARL* 2015 (1) SA 345 (SCA) [51].
12 *Buildcure CC v Brews and Others NNO* 2017 (6) SA 562 (GJ) [6]-[29.4].
13 Article 31 paragraph 4 of the Model Law; Article 34 paragraph 2, read with paragraph 6, of the UNCITRAL Rules; Section 25, read with section 28, of the Arbitration Act.
14 Article 33 of the Model Law; Article 38 of the UNCITRAL Rules.

the award starts to run from this date. Thirdly, the time limit for the loser to apply to the Court for the review and setting aside of the award usually commences to run from the date of publication of the award.[15]

Substantive requirements

17. **Cogent**. An award must be founded on, and informed by, convincing, persuasive and consistent reasoning.[16]

18. **Complete**. The arbitrator must in the award decide each and every issue that was referred to arbitration, but no more or less than those.[17] *Voet's* summary is still the best:

> "So on the other hand an arbitrator should also take care not to exceed the bounds of the submission nor to dispose of matters other than those which have been entrusted to his personal discretion, nor to do so in any other way than that indicated by the terms of the submission..."[18]

19. **Certain**. Exactly what the arbitrator decided, must be ascertainable from the award without assistance from material external thereto. It must be clear and consistent, and not vague and ambiguous. Where an employer claims damages from the contractor for defective building work, the arbitrator must say: "I award that the respondent shall immediately pay to the claimant N$100 000.00, plus value-added tax thereon at 15%, together with interest on the total thereof at 20% per annum from the date of this award to the date of payment." Never say: "Accordingly, I have formed the opinion that the respondent ought to pay the claimant's reasonable expenses relating to the defective work." An award that is vague for uncertainty is invalid.[19]

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15 Section 33 of the Arbitration Act; Article 34 paragraph 3 of the Model Law.
16 *Turner* (note 5) p 11.
17 *Harlin Properties (Pty) Ltd v Rush & Tomkins (SA) (Pty) Ltd* 1963 (1) SA 187 (D).
18 Quoted from *Cone Textile (Pvt) Ltd v Ayres and Another* 1980 (4) SA 728 (ZA) 732A-C.
19 Mustill and Boyd, *The Law and Practice of Commercial Arbitration in England*, 2nd ed (1989), 386-387.

20. **Final**. The arbitrator must in the award dispose of all issues himself or herself, and leave no issue for decision later by a third party or by himself or herself, save the quantification of costs which must be expressly reserved with instructions as to how and when it should be resolved. Execution of the award must end the dispute between the parties. An award for the payment of a certain amount of money, or the delivery of a specified thing, does. However, an award that the contractor should rectify the defective building work does not, because disputes may arise as to whether the remedial work was properly done. An award lacking finality is invalid.[20]

21. **Enforceable**. The award must be in an enforceable form. If it is for payment of money, it must state the amount, the currency, by whom to whom it is payable, and the time for payment.[21]

22. **Possible**. The award must be capable of execution. An award for the delivery of a thing that has been lost or destroyed is impossible.

23. ***Intra vires***. The award must stay within the scope of the arbitration agreement, meaning the arbitrator must give a decision on the exact matter which the parties referred to him or her for arbitration. The award is invalid to the extent that it exceeds the scope of the arbitration agreement.[22] In *Airports Company South Africa Ltd v ISO Leisure OR Tambo (Pty) Ltd and Another* 2011 (4) SA 642 (GSJ) the court held at [68] that a claim for the review and setting aside of the award of a tender by a state-owned company cannot be referred to arbitration, because it was administrative action, and that the jurisdiction to review administrative action was by section 7(4) of the Promotion of Administrative Justice Act 3 of 2000 reserved exclusively to the High Court and the Constitutional Court. Thus, it is not within the province of

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20 *SA Breweries Ltd v Shoprite Holdings Ltd* 2008 (1) SA 203 (SCA) [22].
21 *Turner*, (note 5), p 12.
22 *Harlin Properties (Pty) Ltd v Rush & Tomkins (SA) (Pty) Ltd* 1963 (1) SA 187 (D) 192F-193E.

an arbitrator to review and set aside administrative action. This may be extended to all constitutional issues.[23]

24. **Legal**. The arbitrator cannot order a party to commit an illegal act. A Court will refuse to sanction an award to that effect. In *Cool Ideas 1186 CC v Hubbard and Another* 2014 (4) SA 474 (CC) the arbitrator awarded that the employer pay to the contractor the balance of the contract price in respect of the construction of the employer's home. The Court refused to enforce the award, because the payment would be against public policy, for being illegal in terms of the Housing Consumers Protection Measures Act 95 of 1998.

Structure

25. The award must take the following structure, which has to be adapted on a case-by-case basis to fit the requirements of each particular case.

26. **Heading**.

In the arbitration between:

Building Co (Pty) Ltd — Claimant

and

Joe Holmes — Respondent

AWARD

[23] Cf articles 12(1)(a), 18 and 25 of the Namibian Constitution.

27. **Parties**. Identify the parties thus:

27.1. The claimant is Building Co (Pty) Ltd, a company duly registered and incorporated according to the laws of the Republic of Namibia, having its principal place of business at 1 First Street, Windhoek.

27.2. The respondent is Joe Holmes, a businessman of majority age, ordinarily residing at 2 Second Street, Windhoek.

28. **Authority of the arbitrator**.

28.1. The arbitration agreement. Identify the contract embedding the arbitration agreement (usually in the form of a dispute resolution clause), and quote the latter in full.

28.2. Arbitrable dispute. Describe the dispute and demonstrate that it falls within the scope of the arbitration agreement.

29. **Appointment**. Show that the arbitrator has been duly appointed and confirm acceptance of the appointment.

30. **Rules**. Identify the arbitration rules governing the arbitration.

31. **Introduction and broad background**.

31.1. Type of contract.

31.2. Scope of work.

31.3. Tension between the parties.

32. **Seat**. State the seat of the arbitration and how it has been established – by agreement between the parties, failing which, as determined by the arbitrator.

33. **Law**. Determine the substantive law which governs the rights and obligations of the parties.

34. **Due process**. Set out concisely, but fully, the procedural history of the arbitration, demonstrating that at no point has a party been denied the opportunity to present its case, and that *audi alteram partem* has always been observed.

35. **Definition of the dispute**.

35.1. Claim and supporting grounds.

35.2. Grounds of defence to the claim.

35.3. Counterclaim and supporting grounds.

35.4. Grounds of defence to the counterclaim.

35.5. Common cause:

35.5.1. Facts admitted.

35.5.2. Facts not disputed, contested or rebutted.

35.5.3. Chronicle only the material relevant facts succinctly, but correctly, omitting irrelevant fats, and facts not material to the resolution of the dispute.

35.6. Disputed facts.

35.7. Legal issues.

36. **Order of deciding the issues**. Some building contracts provide that the contractor may not claim damages caused by the employer's delay, for example, in providing the contractor with access to the site, drawings or instructions, unless the contractor gave written notice to the employer of its intention to do so, within a specified time after the damage causing event had occurred. Therefore, the essential elements of a contractor's claim for damages will normally be:

36.1. One: the conclusion of the contract.

36.2. Two: the term of the contract stipulating that access to the site would be given on or before a certain date.

36.3. Three: the employer in breach of the contract gave access of the site to the contractor late.

36.4. Four: as a result of the breach the contractor suffered damages in an amount mentioned.

36.5. Five: the contractor duly gave notice to the employer of its intention to claim damages.

37. The sequence of deciding these issues will be: One, Two, Five, Three and Four. If the claimant fails on issue One, the remaining issues fall away; and so on with issues Two, Five and Three. The arbitrator does not have to decide the issues falling away, because the reason for ignoring them is provided.

38. **Factual findings and the reasons therefore**. In *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others* 2003 (1) SA 11 (SCA) the Court set out exactly how a factual dispute should be decided:

> "[5] On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So, too, on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on *(a)* the credibility of the various factual witnesses; *(b)* their reliability; and *(c)* the probabilities. As to *(a)*, the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to *(b)*, a witness' reliability will depend, apart from the factors mentioned under *(a)*(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to *(c)*, this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of *(a)*, *(b)* and *(c)* the court will then, as a final step, determine whether the party burdened with the *onus* of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail."

39. **Legal findings**. Hold what the applicable law is. This must be limited to the legal principles necessary to decide the issues. Restrict references to one apex authority per legal principle.

40. **Apply the law to the facts**. In *Bremer Handelsgesellschaft GmbH v Westzucker GmbH* (No 2) [1981] 2 Lloyd's Rep 130 (CA) Donaldson LJ in the English Court of Appeal held at 132-133:

> "All that is necessary is that the arbitrators should set out what, on their view of the evidence, did or did not happen and should explain succinctly why, in the light of what happened, they have reached their decision and what that decision is. This is all that is meant by a 'reasoned award.'"

41. **Conclusion**. Give a concise summary of the outcome of the case.

42. **Costs**. Generally, the loser pays the winner's costs, unless there are special circumstances which justify depriving the winner of the whole or part of its costs.

43. **Award/Order**.

43.1. Capital.

43.2. VAT.

43.3. Interest.

43.4. Arbitrator's costs, and the costs of recording, transcription of the record, venue and the like.

43.5. Winning party's cost, together with the method of quantifying it.

43.6. Qualifying fees of experts.

Style

44. When we express our thoughts orally, we all sound differently, because we each have our own voice, that identifies us. It is no different when we put our thoughts in writing. We leave our fingerprints, as it were, all over our writings. This is why final awards and love letters have much in common – they tell you a lot about the author.

45. Thus, there is no one way of writing an award. But it is wise to follow guidelines.

46. First: Realise that the award is a **communications exercise**. The arbitrator's duty is to convey his or her decision, and the reasons founding it, to the potential readers of the award, in language that is so clear, plain and simple, that they understand, on the first reading thereof, why the decision went the way it did.

47. The losing party needs to know that the case was correctly and fairly decided, and that its point of view was duly considered by an impartial adjudicator, even if the loser is not entirely happy with the outcome. In this sense the reasoning in the award is written for the benefit of the loser.

48. The winning party requires to understand and enforce the award, as does the Court to which the winner resorts to make it an order of court. Therefore, the operative part of the award is primarily written for the benefit of the winner.

49. The Court will specify as compulsory that the operative part of the award clearly records the rights and obligations of the parties, before sanctioning its execution by the force of a court order. In addition, the Court will need to be convinced that the operative part of the award is the result of a due process. Thus, the procedural history is predominantly for the Court's purposes.

50. Second: Learn from those who write well. Lord Denning wrote so well, because he applied Shakespeare:

> "I try to make my judgments live – so that it can be readily understood – by the parties in particular: and by others who hear it… I start my judgment, as it were, with a prologue – as the chorus does in one of Shakespeare's plays – to introduce the story. Then I go on from act to act as Shakespeare does – each with its scenes – drawn from real life… But I do it by dividing my judgment up into main headings (corresponding to the acts) and sub-paragraphs (corresponding to the scenes) – each with a caption – so as to catch the eye. I draw the characters as they truly are – using their real names – so that I never get them mixed up… In telling the story I set out the merits – I rely on them – I do not scorn them. Because the merits go to show where justice lies… … I avoid long sentences like the plague: because they lead to obscurity. It is no

> good if the hearer cannot follow them. I strive at all costs to be clear… I refer sometimes to previous authorities because I know that people are prone not to accept my views unless they have support from the books. But never at such length. Only a sentence or two. I avoid all reference to pleadings and orders… They are mere lawyer's stuff. They are unintelligible to anyone else. I finish with a conclusion – an epilogue – again as the chorus does in Shakespeare. In it I gather the threads together and give the result. I never say "I regret having to come to this conclusion but I have no option!" There is always a way around. There is always an option – in my philosophy – by which justice can be done."[24]

51. Lord Denning was a master of the opening line:

> "When I was young, a sandwich-man wearing a top-hat used to parade outside these courts with his boards back and front, proclaiming 'Arbitrate, don't litigate'. It was very good advice so long as arbitrations were conducted speedily: as many still are in the City of London. But it is not so good when arbitrations drag on for ever."[25]

52. Third: Apply George Orwell's six rules for writing:

> "i. Never use a metaphor, simile or other figure of speech which you are used to seeing in print.
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> ii. Never use a long word where a short one will do.
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> iii. If it is possible to cut a word out, always cut it out.
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> iv. Never use the passive where you can use the active.
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> v. Never use a foreign phrase, a scientific word or a jargon word if you can think of an everyday English equivalent.
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> vi. Break any of these rules sooner than say anything outright barbarous."[26]
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> And I add:
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> vii. Use short sentences.

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24 Lord Denning's autobiography, *The Family Story*, (London: Butterworth) 1981, p 207.

25 *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corporation Gregg and others v Raytheon Ltd* [1980] 1 All ER 420 (CA) 425.

26 Orwell, George. 1968. *Politics and the English language: In The collected essays, journalism and letters of George Orwell,* ed. Sonia Orwell and Ian Angos, vol 4, ed 1, 127-140. New York: Harcourt, Brace, Javanovich at p 139.

viii. Do not pack to many ideas into one sentence.

53. **A memorable statement:** few can articulate elusive concepts as memorable as Toon van den Heever, an award winning poet, who retired as an Appellate Division judge of South Africa:

> "The concept of the *bonus paterfamilias* is not that of a timorous faintheart always in trepidation lest he or others suffer some injury; on the contrary, he ventures out into the world, engages in affairs and takes reasonable chances. He takes reasonable precautions to protect his person and property and expects others to do likewise."[27]

54. **Hard to understand:**

> "[151] I conclude, therefore, that the Bill of Rights should not always be seen as establishing independent normative regimes operating in isolation from each other, each with exclusive sway over a defined realm of public and private activity. The disparate textual protections are unified by the values immanent in all of them. The relationship between the separately protected rights should thus be regarded as osmotic rather than hermetic. Seepage should be understood not as a form of analytical blurring to be avoided, but rather as a desirable mechanism for ensuring that constitutional interests in appropriate cases are properly protected, and constitutional justice fully achieved. And hybridity should be recognised for what it is, the coexistence and interpenetration of more than one guaranteed right in a particular factual and legal situation. Instead of seeking to put asunder what human affairs naturally and inevitably join together, we should, in these circumstances, develop an appropriate analytical methodology that eschews formal pigeonholing and relies more on integrated reasoning."[28]

55. The same thing could have been said thus: the normative values implied in the separate fundamental human rights contained in the Bill of Rights, should not be considered in isolation, but together, to establish their content, because they overlap, give extended meaning to, or limit, one another.

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27 *Herschel v Mrupe* 1954 (3) SA 464 (A) 490E-G.

28 Reference omitted to save that author embarrassment, and this author censure.

56. **In conclusion** on this point, follow the gospel of the 'judicial trinity':

> "Brevity, simplicity and clarity. These are the hallmarks of good judgment writing. But the greatest of these is clarity."[29]

Practical advice

57. I offer practical advice in the following selection of areas in the hope of improving arbitration practice therein:

58. Bad influence of court litigation rules.

59. Structure of an arbitration.

60. Discovery.

Court litigation rules

61. "Lawyers, in particular, have a habit of equating fairness with the proceedings provided for in the Uniform Rules of Court. Were this approach to be adopted, the value of arbitration as a speedy and cost-effective process would be undermined. It is now well recognised in jurisdictions around the world that arbitrations may be conducted according to procedures determined by the parties. As such the proceedings may be adversarial or investigative, and may dispense with pleadings, with oral evidence, and even oral argument." (footnote omitted) [30]

62. Lawyers presiding as arbitrators often fall back on court litigation rules. This undermines the purpose of arbitration for the reasons that follow.

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[29] Kirby J, President of the New South Wales Court of Appeal, Australia, Text of a paper on which was based a lecture to the First Conference on Literature and the Law held at the University of Sydney, April 20-22, 1990 on the initiative of the Department of English in the University of Sydney and the Faculty of Law of Monash University, Melbourne.

[30] *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another* 2009 (4) SA 529 (CC) 594C-*in fin*.

63. Firstly, the standard best practice is to use arbitration rules specifically designed to facilitate the expeditious, efficient and cost-effective resolution of disputes such as the ICC Arbitration Rules[31] and in Namibia the ADR Forum Arbitration Rules[32] which is an adoption of the UNCITRAL Rules with minor adaptions.

64. Secondly, court rules are formal, time-consuming and costly. Arbitration rules impose a duty on the arbitrator to adopt procedures tailored to suit the requirements of the case.

65. Thirdly, court litigation rules require strict compliance with the law of evidence. By contrast, arbitrators should be free to adopt rules of procedure that they consider appropriate to ensure the just, expeditious, efficient and economical determination of the dispute.[33]

66. Fourthly, discovery according to court litigation rules may be complicated, time-consuming and costly. They are often abused, and compel the discovery of documents that can make no material contribution to the outcome of the case. On the other hand, in arbitration the arbitrator may limit discovery to documents strictly relevant to the issues and material to the resolution of the dispute. By the use of a Redfern schedule costly opposed interlocutory proceedings on discovery can be avoided.[34]

67. Fifthly, long trials and extensive cross-examination is the rule in court litigation. In arbitration the arbitrator can limit the hearing of evidence and oral argument to those factual and legal issues, which the arbitrator considers necessary to be able to decide the case.

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31 Available at https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/
32 Available at adrforumlaw.com/arbitration/rules-of-arbitration/
33 *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd and Others* 2013 (6) SA 520 (SCA) [20].
34 See the attached specimen of a Redfern schedule

68. Sixthly, court rules provide for absolution from the instance, where the plaintiff fails to adduce evidence on which a court could decide the case in its favour. The plaintiff may then institute fresh proceedings for the same claim. Not so in arbitration, which requires finality. Accordingly, where a court will grant absolution to a plaintiff, an arbitrator has to dismiss the claimant's claim, unless the arbitration agreement provides otherwise.[35]

Structure of an arbitration

		Accumulating Weeks
69.	Arbitrator accepts appointment and convenes the preliminary meeting by a letter accompanied by:	
69.1.	Letter of appointment containing arbitrator's terms and conditions.	
69.2.	Declaration by arbitrator of:	
69.2.1.	independence and impartiality	
69.2.2.	availability to complete the arbitration in a maximum of 8 months	
69.3.	Agenda for preliminary meeting	1
69.4.	Preliminary meeting	2
69.5.	Statement of claim	4
69.6.	Statements of defence and counterclaim	6
69.7.	Statements of defence to the counterclaim and replication.	8
70.	Statement of replication	10
71.	The statements must be accompanied by the documents supporting the allegations therein.	
72.	The arbitrator's summary of the issues emerging from the pleadings and documents, and proposal on the hearing of oral evidence and argument	12
73.	Pre-arbitration meeting	14
74.	Hearing	18
75.	Final award	20
		(5 months)

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[35] Section 28 of the Arbitration Act; *Irish Co Inc (now Irish & Menell Rosenberg Inc) v Kritzas* 1992 (2) SA 623 (W) 631H-632C.

76. In 2018 56% of awards in arbitrations done under the expedited rules of The Arbitration Institute of the Stockholm Chamber of Commerce were rendered within 3 months, and 97% within 6 months.[36]

77. In 2005 I acted for the claimant, a logistics company, in an arbitration under the UNCITRAL Rules. The respondent contracted them to transport by rail bulk cargo of maize from Maputo Harbour, Mozambique, to Harare, Zimbabwe. The waybills provided on the reverse side that the respondent would certify shortages in Harare, and deduct them at the agreed rate from amounts payable to the claimant. The claimant claimed the outstanding balance amounting to some USD20 million caused by the deductions, denying the shortages. The respondent countered that its certification of the shortages was conclusive. The claimant retorted that the enforcement of the waybill agreement to that effect was against public policy, explaining:

78. Maputo had no weighbridges. Accordingly, the difference between the gross and tara weights on the side plates of the railway trucks was entered on the waybills. The cargo was welded shut in Maputo to prevent theft along the way, and cut open by gas flame in Harare. Harare had a weighbridge. Thus, the exact weight of the cargo could be measured there. Evidence revealed that the train trucks were calibrated for sugar, which is heavier than maize, whence the ostensible shortages in Harare.

79. The claimant appointed Van Dijkhorst J, and the respondent Kriegler J, and they appointed Smalberger JA.[37] Pleadings, documents and witness statements were exchanged from December to February. They amounted to 36 lever arch files. In March the tribunal wrote the parties a two page letter to the effect:

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36 *Efficiency vs Due Process Paranoia* published 23 January 2019 on the website of The Arbitration Institute of the Stockholm Chamber of Commerce accessed on 6 May 2019 at https://sccinsitute.com/about-the-scc/news/2019/efficiency-vs-due-process-paranoia/

37 Retired judges of the High Court, Constitutional Court, and Supreme Court of Appeal, of South Africa, respectively.

> "1. We will hear you in that week in May on these four issues:
>
> (a list of the issues were tabulated)
>
> 2. The rest is arithmetic."

80. The arbitration hearing was over by Wednesday of the week in May.

81. The award came in June – 7 months from start to finish. The award was flawless. It discouraged any review thereof. The respondent paid without the need to sanction the award by court order. That is how an arbitration should be done.

82. That case converted me to arbitration.

83. The key to the satisfactory conduct of that arbitration was the quality of the tribunal.

How to select an arbitrator

84. An arbitration is as good as its arbitrator. An arbitration conducted by an incompetent arbitrator almost always ends in dissatisfaction, if not tears. Therefore, the selection of the right arbitrator for the arbitration is key to an expeditious, efficient and cost-effective resolution of the dispute.

85. First: avoid an arbitrator that suffers from 'due process paranoia'.

86. Due process paranoia was described in the 2015 Queen Mary University of London and White & Case survey as:

> "A growing concern in international arbitration is a perceived reluctance by tribunals to act decisively in certain situations for fear of the award being challenged on the basis of a party not having had the chance to present its case fully."

87. Due process paranoia occurs in practice where an arbitrator, due to an unreasonable fear of being taken on review, does the following:

87.1. Grants repeated extensions of time.

87.2. Accepts multiple amendments to a party's written submissions.

87.3. Agrees to the belated introduction of a party's new defences or claims or of fresh evidence.

87.4. Accedes to last minute requests to reschedule oral hearings.

87.5. Allows discovery of documents that are superfluous, of little evidentiary weight, or not material to the outcome of the case.

87.6. Hears and decides interlocutory applications in the context of extension of time, discovery of documents, separation of issues and the like, according to court style opposed motions with a full set of founding, answering and replying affidavits.

87.7. Allows the hearing of evidence, cross-examination and the hearing of oral argument that is unnecessary.

88. Due process paranoia is caused by the arbitrator's perception of the risk that the award might be set aside on review. Statistics have shown that this perceived risk is unjustified. Section 33(1)(a) of the English Arbitration Act 1996 imposes a duty on an arbitrator to give each party a reasonable opportunity of putting its case and dealing with that of its opponent. By 2016 Wolters Kluwer could after 20 years not find *any* case in the English jurisprudence in which an award was set aside for breach of the arbitrator's

duty under section 33(1)(a) of the Arbitration Act 1996.[38] Thus, the root cause of due process paranoia is based on a wrong assumption.[39]

89. Accordingly, select an arbitrator that has the reputation for finding the right balance between efficiency versus expediency.

90. Second: select an arbitrator who has a good track record as a competent trier of fact, an excellent ability to establish the law correctly, and the talent for applying the law to the facts. This comes with experience.

91. How do you find an arbitrator with all the required skills, knowledge and experience? Consult three or four colleagues, whose judgment you can trust. Ask the potential arbitrator for his or her *curriculum vitae* and awards they have written. Consult arbitration institutions such as the ICC in England, AFSA in South Africa and ADR Forum in Namibia.

92. Third: select an arbitrator who does not make a court case of the arbitration by the application of court style rules and procedures. By doing that, all the benefits of arbitration are sacrificed. You might do worse than going to court. Select an arbitrator that takes control of the pace and the costs of the arbitration.[40]

93. Fourth: select an arbitrator that commits to be available to complete the arbitration in 8 months maximum.

94. Fifth: avoid an arbitrator who thinks they have a right to be wrong. The arbitrator's award cannot be set aside on review, merely because the award is wrong on the facts or the law. An arbitrator, by a wrong award, can with

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38 *Due Process Paranoia* published on Kluwer Arbitration Blog accessed on 6 May 2019 at file:///C:/Users/Herman%20Steyn/Documents/ARBITRATION%20AWARD/Due%20Process%20Paranoia%20-%20Kluwer%20Arbitration%20Blog.html

39 Sameer Sharma, *Due Process "Paranoia": Turning Away from Judicial Attitudes and Looking for Answers Within,* Arbitration Volume 84 Issue 4 November 2018, 314.

40 Article 18 paragraph 1 ADR Forum Arbitration Rules.

impunity cause grave injustice, not to mention a great amount of damages, to the parties.

95. The generally accepted view is that arbitrators are immune from liability for negligently causing loss or damage to the parties by making a wrong decision in the course of the arbitration, or the final award, or otherwise in connection with the arbitration.[41]

96. The rationale for granting immunity to arbitrators is this: Judges enjoy immunity because it is in the public interest that they do. The office of the arbitrator is sufficiently similar to that of a judge. Therefore, arbitrators should have the same immunity as judges.

97. The rationale for affording arbitrators immunity has been questioned on the basis that the office of an arbitrator is sufficiently different to that of a judge to grant immunity to the latter, but not the former. An arbitrator is contracted by the parties to render a professional service. A judge is appointed by the State according to a statute, in which the parties have no say, to dispense justice. Other professionals such as advocates, auditors and architects are held liable for negligently causing loss or damage in rendering services, which are not materially dissimilar to those rendered by arbitrators.[42]

98. Section 29(1)(a) of the English Arbitration Act 1996 limits the arbitrators' liability to anything done or omitted in bad faith in the discharge or purported discharge of their functions as arbitrators, concomitantly proscribing their liability for any other acts or omissions. Both the Arbitration Act and the Model Law are silent on the immunity of the arbitrator.

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41 Butler and Finsen (note 6) 101. *Bremer Vulkan Schiffbau and Mashinenfabrik v South India Shipping Corpraotion, Gregg and others v Raytheon Ltd* [1979] 3 All ER 194 (QB) 201; *Hoffman v Meyer* 1956 (2) SA 752 (C) 756A-F; *Telematrix (Pty) Ltd ta/ Matrix Vehicle Tracking v Advertising Authority SA* 2006 (1) SA 461 (SCA) [20]; *Sutcliffe v Tackrah and others* [1974] 1 All ER 859 (HL).

42 *Arenson v Casson Beckham Rutley & Co* [1975] 3 All ER 901 (HL); Lord Dyson, *The Proper Limits of Arbitrators' Immunity. The Master's Lecture, the Workshipful Company of Arbitrators,* 13 March 2018, Arbitration (2018) 84 (3), 196

99. It has been suggested that in Lithuania the liability of arbitrators should be limited to wilful or gross negligent conduct in the discharge of functions as an arbitrator causing loss or damage to the parties.[43]

100. The UNCITRAL Rules limit the liability of the arbitrator to intentional wrongdoing.[44]

101. In my view, it is arguable that in Namibia an arbitrator may be held liable for causing loss to the parties by ordinary negligence. The contract between the parties, on the one hand and on the other, the arbitrator is a contract of mandate, or a contract of works, or a contract having elements of both. It is an implied term of that contract that the arbitrator performs their liability in terms thereof honestly, with reasonable skill, knowledge and care, without negligence, and in a professional manner.[45]

102. Holding an arbitrator liable for negligence does not mean that they are liable for every wrong decision, but only for mistakes the average arbitrator would not make. An arbitrator accepting an appointment for which they are not qualified is negligent (*imperitia culpae adnumeratur* meaning lack of skill is regarded as negligent).[46]

103. As I see it, holding arbitrators liable for negligently causing damages to the parties, would not deter all lawyers and other professionals from accepting appointments as arbitrators – only those who do not have sufficient confidence in their abilities to take responsibility for their own negligence. It stands to reason that an arbitrator, who insists on a waiver of liability for negligence as a

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43 Tadas Varapnickas, *Arbitrator's civil liability and its boundaries,* Doctoral Thesis at the Vilnius University, 2018, 41, accessed on 6 May 2019 at http://talpykla.elaba.lt/elaba-fedora/objects/elaba:32731966/datastreams/MAIN/content

44 Article 16 of the UNCITRAL Rules.

45 *Bloom's Woollens (Pty) Ltd v Taylor* 1961 (3) SA 248 (N) 253C-254D confirmed on appeal 1962 (2) SA 532 (A)

46 *Durr v Absa Bank Ltd and Another* 1997 (3) SA 448 (SCA) 460F-G.

precondition for accepting an appointment, should be feared more than wild animals and poisonous snakes[47], rather than be trusted with the arbitration.

In conclusion

104. The culture of going to court retards the growth in domestic commercial arbitrations in Namibia. The arbitration of most international commercial disputes arising in Africa is exported elsewhere, due to the perception that Africa lacks professionals with the necessary knowledge and skills in the law and practice of arbitration to conduct those arbitrations here in Africa. Accordingly, I commend the ICC and Koep & Partners for showing the leadership of organising this conference to promote commercial arbitration locally.

I thank you.

Herman Steyn

Chambers, Windhoek
8 May 2019

[47] *Rex v Castignani* 1941 OPD 203 at 211.