



The Arbitration Foundation of Southern Africa

An introduction to

ADMINISTERED ARBITRATIONS

and

MEDIATIONS

Why opt for arbitration?

Disputing parties can choose a system that holds the promise of a quick, fair, and private resolution, one that takes place at a venue of their choosing and in circumstances most suited to their commercial needs. These are the prospects and promises that an effective arbitration procedure offers.

The decision to opt out of the litigation process carries with it certain responsibilities: it is left to the parties to construct the rules with which they will proceed, an arbitrator must be elected, and, once appointed, must be kept to his or her mark. Should either party lose enthusiasm when the case begins to sour, consensus fades, resulting in extreme frustration for the other party. AFSA offers disputants the security of an administered system with carefully drafted Rules for Arbitration.

Why opt for mediation?

If it is in the disputing parties' interests to maintain and preserve their relationship, mediation, or any of its hybrids, is the recommended route. A mediator, chosen by agreement with the parties, or appointed at the parties' request by the AFSA Secretariat, can assist the parties in speedily resolving their dispute. Mediation is not a legal process, however once the parties have reached agreement on the outcome, such agreement becomes binding on the parties by way of a written contract. Mediation does not have rules – ground rules are established by agreement with the parties and the mediator once the process begins.

The process is simple: once the mediator has heard both sides' positions, he or she helps the parties find common ground and steers them to a mutual agreement. The mediator expresses no view, takes no sides and does not act as a decision-maker. The beauty of mediation is that the parties arrive at a win-win solution, as opposed to a win-lose result as found in adversarial and judicial processes.

About AFSA

The Arbitration Foundation of Southern Africa was founded as a non-profit Section 21 company in a joint venture between the all Bars, the leading attorney and accounting firms and the South African Chamber of Business to provide administered arbitrations and mediations. AFSA operates from a purpose-built facility in Sandton, with branches throughout the country.

The Rules for Arbitration

These Rules were compiled by a Committee headed by Adv S A Cilliers SC., a leader of the Johannesburg Bar; working in conjunction with his brother, Prof. A C Cilliers, B.A.LL.B (Stell.) MA (Oxon), LL.D (SA) formerly Professor of Law in the University of Port Elizabeth, the author of "Law of Costs" and co-author of the third edition of Herbstein and Van Winsen's "Civil Practice of the Superior Courts in South Africa". They were assisted in their work by members of the Johannesburg and Pretoria Bars and by leading attorneys including Des Williams of Werksmans; Norman Barlow of Webber Wentzel, and Tony Canny of Routledges. Those who drafted the Rules chose from a bewildering array of international precedents that they sought to bring into harmony with concepts familiar to South African lawyers. Working within the constraints of the 1965 Arbitration Act, the Committee has taken into account the local legislation that could impact on their work. They have produced a set of Rules that embody precepts of fundamental importance. The first is that the aim of the Rules is to bring the parties to a resolution of their dispute as quickly and simply as possible. This is done, as the Rules will show, by scheduling a meeting with the arbitrator immediately the parties have put up their contentions, requiring the arbitrator at that stage to take the decisions which will without delay tailor-make the hearing to the issues. The second key element is the notion that the parties should pay as they go. From beginning to end the parties are called upon to pay in advance for the next step. Bearing in mind that many an arbitration is

settled once the parties get to grips with the issues, it is therefore right and proper that costs be compartmentalised from step to step. You will find in these Rules, as well, provision for things that can go wrong. All too often the complexities of the procedure are not envisaged at the outset and factors ranging from the incapacity of the arbitrator to the default of a party are not regulated in advance. These Rules recognise many such contingencies so that the system will not fail its users at the crucial moment.

The Rules underpin administered arbitration in one critical respect. The AFSA Secretariat does so in another. Arbitrations arranged by the parties for and by themselves require each to police the other and in general leave both parties helpless if the arbitrator does not do his or her work as expected. The informal system, until now the only system available to those who wished to arbitrate, depended on the enduring goodwill and co-operation of all the participants. Hence it was easily manipulated. It is the job of the AFSA Secretariat, above any of their other duties, to see to it that each arbitration moves to its resolution according to its predetermined path. At the core of the Secretariat is the Registrar's office, which sees to the effective administration of each matter, dispensing with ADR advice, whether it be the analysis of a dispute or advice on process. It is there to participate actively in every case. It is the Secretariat, as the Rules provide, that will deal with each party to ensure that that party understands the next step in the process and keeps to the time constraints. The Secretariat addresses the party which fails to comply with the Rules and, if necessary, to report the matter to the arbitrator for sterner action. The Secretariat assists where necessary in the selection of arbitrators, both by way of supplying information to the parties in the course of their selection or, if necessary, to choose the arbitrator.

Mediation

AFSA provides panels of highly experienced mediators with extensive experience in commercial, construction, family and labour matters. South Africa has demonstrably been at the forefront of labour and community mediation since the early '80s. From its grassroots origins, mediation is now a norm in the early settlement of disputes and frequently serves as a precursor to arbitration in commercial med-arb agreements. Court-annexed mediation was introduced some years ago to minimise the trauma and delays experienced with divorce.

Arising out of South Africa's unique and complex history, our mediators have built up a vast array of experience. AFSA is fortunate that most of these mediators serve on our panels.

Panels of Specialists

The other attributes of administered arbitration and mediation which is embodied in the AFSA structure is the creation of specialised panels of arbitrators and mediators. Gone are the days when it was thought that only an advocate, a lawyer or an engineer was qualified for one or other adjudicative task in dispute resolution. There are specialists in all the disciplines and the wider the choice the better. The AFSA panellists available for selection as arbitrators or mediators constitute an unrivalled pool of expertise. AFSA is proud to number amongst its panellists eminent former and retired Judges; academics, attorneys, labour lawyers and many businesspeople. All arbitrators subscribe to the AFSA Code of Conduct and are subject to the AFSA Ethics Committee convened by Judge Ray Leon. The range available means that the parties can select an arbitrator or mediator whose remuneration fits their budget. Small matters should call for properly qualified arbitrators and mediators, who are in the junior ranks of their profession. The more complex matters will usually carry the bigger stake and justify a more senior appointment. This is all a function of cost. AFSA provides a plentiful choice and sees to it that the tariffs charged relate to the size of the dispute. The panels and details of the panellists are all available from the Secretariat and you should not hesitate to seek guidance in that regard.

The option for an appeal against an arbitrator's decision

AFSA offers the option to carry the matter to an appeal hearing. AFSA has constructed a standing Appeal Panel numbering in the vicinity of 150 members. If the participants choose an appeal option, they can request the selection of the appeal panel, which is supervised by the Secretariat at the same time as the *a quo* hearing. This means that the parties will proceed from first instance to second instance in the shortest possible time whether a matter of days or weeks. Since appeals can be scheduled for hearing over weekends and since the choice of appeal arbitrators is wide, AFSA can offer this option without introducing unacceptable delays in the process and while still maintaining the cost effective basis upon which the process rests.

I invite you, then, to offer the AFSA administered ADR procedures to your clients: processes that will maintain and enhance our legal system of which they are an integral part.

MICHAEL KUPER



The Arbitration Foundation of Southern Africa

**RULES OF THE ARBITRATION FOUNDATION
OF SOUTHERN AFRICA**

COMMERCIAL ARBITRATIONS

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ARTICLE 1: Definitions

1.1 1.1.1 Words in the singular shall, where applicable, include the plural, and the feature that in some instances express references are made to the plural, or to the singular and plural, will not detract from the foregoing.

1.1.2 References to the male gender shall include references to the female gender and to the neuter.

1.2 Unless the context otherwise indicates the following words and phrases shall bear the following meanings.

"arbitration agreement": a written agreement providing for the reference to arbitration of an existing dispute or a future dispute, whether or not an arbitrator is named or designated therein;

"the court": a Magistrates Court or the Supreme Court of South Africa, or any court established or recognised by section 166 of the Constitution of the Republic of South Africa, 1996, as the context may indicate; and the "Supreme Court" includes any successor in title to the Supreme Court;

"deliver": to deliver or send copies to all parties as provided for in these Rules, and to file the original to the Registrar; and "delivery" has a corresponding meaning; but "physically deliver" shall mean physically deliver to the party indicated by the context;

"pleading": includes documents comprising a Request for Arbitration, a statement of defence, a counter-claim and a statement of defence to a counter-claim;

"the Act": the Arbitration Act, 1965;

"the Foundation": the Arbitration Foundation of Southern Africa, being the name under which the Arbitration Foundation of Southern Africa ("AFSA") conducts its activities of providing the administrative means for the conduct of arbitration proceedings.

"the Registrar": the officer appointed by AFSA under that title to perform the administrative functions conferred upon him under these Rules for the Foundation;

"the Secretariat": the body of persons appointed by AFSA to perform the functions conferred upon it under these Rules;

"writing": includes typewriting and the record of transmission by telex, telefax or other means of telecommunication; and "written" has a corresponding meaning.

ARTICLE 2: The Foundation's Secretariat and administration

- 2.1** The Arbitration Foundation of Southern Africa ("the Foundation") is the name under which the Arbitration Foundation of Southern Africa ("AFSA") conducts its activities of providing administrative means for the conduct of arbitration proceedings. Its activities include the appointment of a panel of persons who have agreed to act as arbitrators under the aegis of and according to the Rules of the Foundation, the appointment of an arbitrator or arbitrators for resolution of particular disputes, the provision of the venue and the administrative services for conduct of arbitration proceedings under and in accordance with these Rules for fees covering its administrative services and provision of a venue and the fees and expenses of the arbitrator or arbitrators.
- 2.2**
- 2.2.1** The Foundation's activities in providing the aforesaid arbitration facilities are controlled by a Secretariat, which comprises the persons appointed by AFSA.
- 2.2.2** Any steps to be taken, and any decision to be made, and any directions to be given, by the Foundation in terms of these Rules, shall be taken by the Secretariat. The decision by majority vote of the members of the Secretariat shall be the decision of the Secretariat, and a written communication signed or authorised by the person presiding over any meeting of the Secretariat, shall be *prima facie* proof of the decision of the Secretariat.
- 2.2.3** In matters of urgency, the Chairman or Vice-Chairman of the Secretariat may take any step, decision or give any direction which the Secretariat may have taken or given, and the decision of the Chairman or Vice-Chairman that a matter is one of urgency, shall be decisive of the question whether a matter is one of urgency within the purview of this sub-rule.
- 2.3** In the respects and to the extent delegated by or not actually conducted by the Secretariat under 2.2.1 above, the administration of the Foundation's activities shall be conducted by the Registrar of the Foundation, who is the person appointed by AFSA to that office, assisted by administrative personnel appointed by AFSA.

The Registrar shall be the channel through which parties to administration proceedings communicate with the Foundation, with the Secretariat, and, except during hearings in his or their presence, with the arbitrator or arbitrators.

- 2.4** Communications to AFSA, the Secretariat and the Registrar should be physically delivered to:-

The Registrar
The Arbitration Foundation of Southern Africa
1st Floor, Maisels Chambers
No 4 Protea Place, Sandown

or be addressed to:

**The Registrar
The Arbitration Foundation of Southern Africa**

**P.O. Box 653007
Benmore,
2010**

or Docex 143 Randburg

or fax to (011) 320-0525.

ARTICLE 3: Area of applicability of these Rules

These Rules -

- 3.1** do not apply to disputes on matters in respect of which reference to arbitration is, by law, not permissible;
- 3.2** apply only to commercial arbitrations administered by or under the aegis of the Foundation; provided that, if the Secretariat of the Foundation accepts a Request for Arbitration as provided for in these Rules, such acceptance shall have the effect of the arbitration being deemed to be a commercial arbitration;
- 3.3** supplement any specific provisions of an arbitration agreement to arbitrate under the aegis of or according to the Rules of the Foundation, in so far as such specific provisions are silent on matters provided for in these Rules;
- 3.4** apply subject to any peremptory provisions of law applicable to an arbitration conducted under these Rules.

ARTICLE 4: The request for arbitration and payment of the administration fee

- 4.1** A party wishing to resort to arbitration under the aegis of and according to the Rules of the Foundation, shall submit a written Request for Arbitration to the Secretariat of the Foundation through the office of the Registrar.
- 4.2** The written Request for Arbitration shall include the following:
 - 4.2.1** the names, description, addresses, telephone and fax numbers (if any) of the claimant or claimants and of the party or parties cited as defendant or defendants; the address given for the defendant or defendants shall be an address as envisaged in 20.4.2;

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- 4.2.2** a copy of the written agreement in terms whereof all the parties to the requested arbitration agree to arbitration to be conducted under the aegis of or according to the Rules of the Foundation by one or more arbitrators appointed by the Foundation; (This written agreement is hereinafter referred to as "**the arbitration agreement**");
- 4.2.3** a brief statement indicating that an award in accordance with the claims would fall within the terms of the arbitration agreement;
- 4.2.4** a statement setting out the *locus standi* of each party; the nature of the dispute; all the material facts and contentions relied upon by the claimant so as clearly to establish the circumstances of the case, and the relief claimed; such statement shall annex copies of all documentation relied upon by the claimant in support of such facts and contentions;
- 4.2.5** the claimant's choice of whether there should be one or three arbitrators, and the claimant's choice (if any) of a particular arbitrator or arbitrators listed on the Foundation's panel of arbitrators. If the claimant has no choice of a particular arbitrator or arbitrators, this fact shall be stated in the Request. If the claimant has no choice of a particular arbitrator or arbitrators, but does have a choice that the arbitrator or arbitrators should be appointed by the Foundation, such a choice shall be stated in the Request;
- 4.2.6** the administration fee indicated in paragraph 1 of the annexe, the form of payment whereof is to be acceptable to the Foundation.
- 4.3** The Request for Arbitration shall be accompanied by so many copies thereof as total the number of defendants cited and arbitrators requested.

ARTICLE 5: Acceptance or refusal of the request for arbitration

- 5.** The Secretariat, if satisfied that the dispute is *prima facie*, and that all the claims fall within the terms of the arbitration agreement, and that 4.2 and 4.3 have been complied with, and if it is not otherwise in its free discretion unwilling to accept the Request for Arbitration, shall notify the claimant that it accepts the Request to provide the administrative means for the requested arbitration. If the Secretariat declines to accept the Request for Arbitration, it shall notify the claimant accordingly, and if it so declines solely on the ground that it, in its free discretion is unwilling to accept such Request, it shall refund the administration fee to the claimant.

ARTICLE 6: Response of the defendant

- 6.1** If the Foundation accepts the Request for Arbitration, the Registrar shall forward a copy of the Request for Arbitration to the defendant at the address indicated in the Request for Arbitration, and at the same time in writing notify the defendant that he is, within 21 calendar days of receipt of the Request for Arbitration, required, by delivery to the Registrar and the claimant, to respond -

- 6.1.1** to any choice expressed by the claimant as to whether one or three arbitrators should be appointed;
- 6.1.2** to any choice for a particular arbitrator or arbitrators expressed by the claimant;
- 6.1.3** if he does not agree to either the number or to the choice of the arbitrator or arbitrators proposed by the claimant, by expressing his own choice of the number of arbitrators and of the particular arbitrator or arbitrators.
- 6.1.4** by indicating whether he disputes or admits that the arbitration agreement was concluded by him and is still operative for the purposes of arbitration, and whether he disputes or admits that the claim falls within the terms of the arbitration agreement; and, if he does so dispute any of the foregoing, to set out his grounds for so disputing it;
- 6.1.5** if no such dispute as is referred to in 6.1.4 is raised,

 - 6.1.5.1** by delivering his statement of defence, setting out the material facts and contentions relied upon by him, and indicating which of the claimant's facts and contentions are admitted and which are disputed by him, and which of the claimant's claims for relief are conceded and which are disputed by him, and setting out his prayers for relief; such statement shall annex copies of all documentation relied upon by the defendant in support of such facts and contentions;
 - 6.1.5.2** by delivering any counter-claim, which he seeks to bring, which counter-claim shall *mutatis mutandis* comply with 4.2.1, 4.2.3 and 4.2.4 above.
- 6.1.6** by including with his response so many copies thereof as total the number of claimants and the number of arbitrators requested by the claimant or claimants or the defendant or defendants.
- 6.2** The Registrar's written notification referred to in 6.1 above shall be accompanied by further written notification

 - 6.2.1** that, despite any dispute by the defendant that the arbitration agreement was concluded by him or was or still is valid and operative or that the claim falls within the terms of the arbitration agreement, the Foundation will appoint an arbitrator to consider the issues so disputed and decide whether or not to proceed with the arbitration, and, if he decides to proceed therewith, to do so;
 - 6.2.2** that to the extent that there is no agreement between the claimant or all the claimants and the defendant or all the defendants, as to the number of arbitrators, the choice of arbitrator or arbitrators, or the category from which an arbitrator or arbitrators should be appointed, the Secretariat will make a choice, and will appoint an arbitrator or arbitrators accordingly.

- 6.2.3** that the defendant, or the defendants jointly, as the case may be, is or are required to pay the administration fee in the amount indicated in the annexe, the form of payment whereof is to be acceptable to the Foundation.
- 6.2.4** default by the defendant to respond timeously as required by 6.1, may result in the arbitrator, after giving notice of the time and place of the arbitration proceedings as contemplated in 10.1, making an award without further notification to him.
- 6.3 6.3.1** A defendant may within the said period of 21 calendar days apply in writing to the Secretariat, through the Registrar, for an extension of time to deliver his statement of defence and, where applicable, counter-claim, giving grounds for the requested extension and the period of extension requested. Whether or not a defendant makes such application for an extension of time, and, if he does so, then at the same time as making such application, the defendant or defendants shall nevertheless respond as required by paras. 6.1.1 to 6.1.4 inclusive and 6.1.6 above, and pay the administration fee referred to in 6.2.3 above, and furnish the Registrar with an address for delivery to him of pleadings and receipt of all communications from the Secretariat or the Registrar and from the other party, failing which he will be deemed to have accepted the address furnished to the Secretariat by the claimant as such address.
- 6.3.2** Within the period indicated in 6.1, or the period extended in terms of 6.3.1, the defendant shall deliver his statement as required by 6.1.4 or 6.1.5, as the case may be.
- 6.4** In the event of the delivery of a counter-claim, the claimant shall deliver a statement of defence, complying *mutatis mutandis* with 6.1.5.1 above, within 21 calendar days of the delivery of the counter-claim. The provisions of para. 6.3 in regard to the extension of time will *mutatis mutandis* apply in regard to delivering a statement of defence to a counter-claim.

ARTICLE 7: Notice to claimant in the event of a particular arbitrator or arbitrators agreed upon, not being available

Whenever the Secretariat has not declined to accept the Request for Arbitration as provided for in Article 5, but the service of the particular arbitrator or arbitrators agreed upon in the arbitration agreement or under the procedure set out in 4, 5 and 6, cannot be procured for the particular arbitration, the Secretariat shall -

- 7.1** inform the parties that the services of the particular arbitrator or arbitrators cannot be procured for the particular arbitration;
- 7.2** invite the parties to agree within a stated time, upon another particular arbitrator or other particular arbitrators selected by them from the Foundation's panel of arbitrators, and inform them of the consequences under 7.3.2.1 or 7.3.2.2, as the case may be, of a failure so to agree;
- 7.3 7.3.1** in the case of such agreement, and after it is satisfied as prescribed by 9.1.1, 9.1.2, and 9.1.3, appoint an arbitrator or arbitrators in accordance with such agreement, in which event 9.2 shall apply;

7.3.2 in the case where there is no such agreement

7.3.2.1 where the arbitration agreement permits it, and after it is satisfied as prescribed by 9.1.1, 9.1.2, and 9.1.3, appoint an arbitrator or arbitrators in accordance with the applicable provisions of 9.1, in which event 9.2 shall apply;

7.3.2.1 where the arbitration agreement does not permit it, inform the parties that the requested arbitration cannot proceed under the aegis of the Foundation.

ARTICLE 8: Arbitrator to deal with jurisdictional issues

8.1 Where the Secretariat has accepted a Request for Arbitration, but a party cited as a defendant disputes that he was a party to an arbitration agreement, or that the arbitration agreement is still valid and operative, or that the claim falls within the terms of the arbitration agreement, or a defendant to a counterclaim disputes that the counterclaim falls within the arbitration agreement, an arbitrator shall be appointed in accordance with these Rules, to consider the matters so contested and decide whether or not to proceed with the arbitration, and, if he decides to proceed therewith, to do so.

8.2 Any application to a court of law on any matter so contested, or on any other matter in dispute in arbitration proceedings commenced under the aegis of the Foundation, shall not affect the continuation of the arbitration proceedings, save and to the extent that a court otherwise orders.

8.3 Any party to such arbitration proceedings who is aware of such an application to a court, shall notify the Registrar, who shall inform the arbitrator thereof.

ARTICLE 9: Appointment of Arbitrator

9.1 Where the Secretariat is satisfied -

9.1.1 that a dispute is *prima facie* arbitrable by an arbitrator to be appointed by the Foundation; and

9.1.2 that the defendant is in default timeously to deliver a response as required by 6.1, or that the response as required by 6.1 and, if applicable, as required by 6.4, has or have been delivered; and

9.1.3 that the administration fee as required by 4.2.6 has been paid by the claimant; and that the administration fee as required by 6.2.3 has been paid by the defendant, or, in default of such payment by the defendant, that it has been paid by the claimant;

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the Secretariat shall appoint an arbitrator or arbitrators in accordance with any agreement between the parties, and, to the extent that there is no such agreement on the number of arbitrators, the choice of

arbitrator or arbitrators, in accordance with its own choice; provided that, where there is no agreement on the number of arbitrators to be appointed, the Secretariat shall appoint a single arbitrator; and provided further that, where three arbitrators are appointed, the Secretariat shall appoint one of them as chairman.

9.2 The Registrar shall thereupon

9.2.1 in writing notify the arbitrator or arbitrators of his or their appointment;

9.2.2 in writing notify the parties of the appointment of the arbitrator or arbitrators;

9.2.3 forward the file to the arbitrator or arbitrators, and inform him or them, as the case may be, that the arbitration may, subject to the provisions of 10.2, proceed in accordance with Rule 10.1.

ARTICLE 10: Continuance of the arbitration proceedings

10.1 The arbitrator shall, subject to 10.2, proceed with the arbitration at the place and at the time determined by him and of which reasonable notice has been given to the parties, as follows:-

10.1.1 in cases where the arbitrator is satisfied that the Request for Arbitration and notices referred to in 6.1 and 6.2 have been delivered or sent to the defendant in the manner prescribed in 20.3 and 20.4.2, and that the prescribed time for responding thereto has expired, and that the party cited as defendant is in default of responding as required by 6.1, and has not furnished the arbitrator with good and sufficient cause for such failure, proceed with the arbitration to its final conclusion in the absence of the defaulting party;

10.1.2 in cases where the party cited as defendant disputes that he was a party to the arbitration agreement, or that the arbitration agreement is still valid and binding, or that the claim falls within the terms of the arbitration agreement, (all of which disputes are hereinafter referred to as "*jurisdictional disputes*"), then (unless the party against whom the jurisdictional dispute is raised, informs the arbitrator that he does not wish to proceed until such dispute has been decided by a court) first decide the jurisdictional disputes, and, if he decides them against the party raising any or all of such disputes, then make a ruling for a period for the delivery of a statement of defence (if not already delivered) and counterclaim, if any, in accordance with 6.1.5, and a statement of defence to any counterclaim in accordance with 6.4, and then proceed as set out below;

10.1.3 in all other cases, hear the parties on the most expeditious or least costly procedure to be adopted for the further conduct of the arbitration, and thereafter rule upon such procedure and upon time limits for complying with such procedure;

10.1.4 thereafter, in such manner as he deems appropriate, on the application of a party or *mero motu*, conduct hearings or otherwise deal with any further procedural and interlocutory

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matters, including matters relating to compliance or non-compliance with his procedural rulings;

10.1.5 proceed with the hearing until the final conclusion thereof;

- 10.1.6** thereafter make a written award on all issues in the dispute, including an award on costs;
- 10.1.7** notwithstanding anything provided in 10.1.1 to 10.1.6, combine or dispense with any of the steps provided in 10.1.1 to 10.1.6 if he considers it appropriate for the just, expeditious, economical and final determination of all the disputes raised in the proceedings.
- 10.2 10.2.1** Before devoting any time to any step in the proceedings, the arbitrator shall notify the Secretariat of the nature of such step and of the time which he estimates will be required therefor. The arbitrator shall give a similar notification to the Secretariat before further proceeding with any step which will take more time than he estimated before commencing such step.
- 10.2.2** Upon receipt of such notification from the arbitrator the Secretariat shall notify the parties of the fees payable by each of them in respect of the next step in the proceedings, or in default of timeous payment by any party, may be paid by the other party to ensure the continuance of the next step in the proceedings, and of when such fees are payable.
- 10.2.3** Upon receipt of such payments, the Secretariat shall authorise and instruct the arbitrator to proceed with the arbitration only for the estimated time or further time in respect whereof such fees have been paid; so that at all stages the parties shall be required to pay fees only in respect of the estimated time required for the completion of any current step or the next step in the proceedings, and the arbitrator shall proceed only for such time as advance payment of the required fees has been made.
- 10.2.4** Nothing provided above shall preclude parties or any party to pay to the Secretariat an amount greater than is required for any particular step or steps, and in that event the Secretariat shall notify the arbitrator of the time for which he may proceed with the arbitration without further authorisation and instruction from the Secretariat.
- 10.2.5** The Secretariat may
- 10.2.5.1** in any where an arbitrator appointed by it has nevertheless proceeded with the arbitration beyond the time for which advance payment of the fees has been made, instruct the arbitrator not to proceed with the proceedings until payment for the time spent by the arbitrator and the required advance payment has been made;
- 10.2.5.2** refund to the parties the whole or part of any advance payment of fees where it is satisfied that such advance payment, or part thereof, will, for any reason, constitute an overpayment for the proceedings;
- 10.2.5.3** in any case where a counterclaim materially exceeds the claim, in its discretion require the defendant to pay an additional amount in respect of the administration fee payable by the defendant so that such payment accords with the scale relating to administration fees in the annexe.

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10.2.6

- 10.2.6.1** Save as provided in 10.2.6.2, the arbitrator, after satisfying himself that any notice required to be given to a party in terms of these Rules has been given in the

manner prescribed in 20.3 and 20.4, and that the prescribed time for responding thereto has expired, may regard a party who fails to appear at a time and place of which reasonable notice has been given to the parties, or who fails to comply with any ruling made by him as being in default, and may, after giving the parties reasonable notice of the time when and place where he intends to proceed with the arbitration, proceed with the arbitration in the absence of such defaulting party or without hearing or further hearing such party; provided that a defaulting party who does appear personally or by representative at the said time and place shall be given an opportunity of applying in such manner and within a period prescribed by the arbitrator, to the arbitrator to cure his default, whereupon the arbitrator may either grant such application on such terms and conditions as he deems fit and proceed with the further conduct of the arbitration in the manner ruled upon by him (but subject to these Rules), or refuse such application and proceed with the arbitration without further hearing the defaulting party.

- 10.2.6.2** Where a party has at any time before an award is made, on reasonable notice to all other parties, given the arbitrator good and sufficient cause for his default in timeously complying with these Rules or with any ruling made by the arbitrator, the arbitrator may afford him an opportunity for curing such default, and, if he fails to cure such default within the time stipulated by the arbitrator, the arbitrator may proceed with the arbitration in the absence of, or without further hearing, the defaulting party; to its final conclusion at a time and place of which reasonable notice has been given to all parties, including the defaulting party.

ARTICLE 11: Powers of the Arbitrator

- 11.1** The arbitrator shall have the widest discretion and powers allowed by law to ensure the just, expeditious, economical, and final determination of all the disputes raised in the proceedings, including the matter of costs.
- 11.2** Without detracting from the generality of the foregoing, the arbitrator shall have the following powers:
- 11.2.1** to determine the language or languages in which the proceedings shall be conducted, and the award made, and which party shall have the duty to provide for the services of an interpreter if required;
 - 11.2.2** to rule on his own jurisdiction, including rulings on any dispute in regard to the existence or validity of the arbitration agreement or the scope thereof;
 - 11.2.3** to strike out or dismiss any claim or defence on the grounds of failure of a party timeously to comply with any ruling or interim award of the arbitrator, or on the ground of delaying conduct on the part of a party so as to give rise to a substantial risk of serious prejudice to the other party or parties;

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- 11.2.4** to proceed with the arbitration in accordance with these Rules, and make an award in the absence of or without hearing any party who is in default as provided for in these Rules, or fails to appear or to comply with any ruling or interim award of the arbitrator;

- 11.2.5** to make any ruling or give any direction mentioned in these Rules or as he otherwise considers necessary or advisable for the just, expeditious, economical and final determination of all the disputes raised in the pleadings, including the matter of costs;
- 11.2.6** to determine, from time to time, the time, date and place of the hearing, and the hours during which the hearing shall take place;
- 11.2.7** to extend before or after their expiry, or abbreviate any time limits provided for in these Rules or by his rulings or directions;
- 11.2.8** to appoint one or more advisors or experts on any matter (including law) to assist in the conduct of the arbitration, but only with the agreement of all parties and of such advisor or experts, and only if the parties and such advisors or experts have agreed on the payment of the fees of such advisors or experts directly by one or more of the parties;
- 11.2.9** to order any party who is a claimant, or claimant under a counterclaim, to furnish security for costs in respect of his claim or counterclaim;
- 11.2.10** to allow (but only with their express written consent) other parties to be joined in the arbitration proceedings, and to make an award on all issues submitted by all parties, including parties so joined, for decision by the arbitrator;
- 11.2.11** to determine the existence or validity of any contract, including any contract containing the arbitration agreement, and to order rectification of such contract;
- 11.2.12** to order the parties to produce or make available for inspection by any other party and by the arbitrator, by any advisors or experts appointed to assist him in terms of 11.2.8, and by any expert engaged by any party, any property or thing under the control of the party or parties against whom such order is made; and to hold inspections in loco; and to make orders for the interim custody or preservation of goods or property, or, where such goods or property would otherwise lose their value, for the realisation of such goods or property and the interim preservation of the proceeds of such realisation;
- 11.2.13** to permit the amendment of any pleading or other document (other than an affidavit) delivered by a party;
- 11.2.14** to make rulings or give interim awards of any matter of onus, admissibility of evidence, and of procedure, including rulings or awards of an interlocutory or interim nature, and rulings or interim awards relating to liability for and payment of costs and implementation of interim or final awards;
- 11.2.15** to receive and take into account such oral or written evidence as he deems relevant, and to make such findings of fact and law as may be required for the purposes of the proceedings and the award;
- 11.2.16** to state, at any stage before making a final award, 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 of counsel.

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This power may be exercised on the application of any party to the reference and shall be exercised if the court on the application of any party so directs. Such opinion shall be final and not subject to appeal and shall be binding on the arbitrator or arbitration tribunal and on the parties to the reference;

- 11.2.17** to express his award in such currency as may be required by the exigency of the situation, unless otherwise agreed by the parties;
 - 11.2.18** to order specific performance of any contract in circumstances in which the Supreme Court of South Africa would have the power to do so;
 - 11.2.19** to make an order as to costs;
 - 11.2.20** conduct the arbitration proceedings at any place, inside or outside the Republic of South Africa, determined by him;
 - 11.2.21** to appoint a commissioner to take the evidence of any person within or outside the Republic of South Africa and forward such evidence to the arbitrator as if he were a commissioner appointed by the court;
 - 11.2.22** to require any party to amend its pleadings so that they are not evasive but are to the point; and, on the application of another party, to strike out from a party's pleadings any averments which are embarrassingly vague, scandalous, vexatious or irrelevant;
 - 11.2.23** to receive evidence given by telephonic or telecasting means, provided that he is satisfied that such means afforded all parties adequate opportunity of examining the witness giving such evidence;
 - 11.2.24** to make an award whereby a party is restrained from any conduct, either as an interim or final basis;
 - 11.2.25** generally to exercise such powers and duties as are allowed to him by any agreement of the parties or by the laws of the Republic of South Africa and as are required for the just, economical and expeditious conduct and conclusion of the proceedings, where these Rules are silent in any respect.
- 11.3** In determining the procedure for the conduct of the arbitration proceedings, and without detracting from the generality of 11.1, the arbitrator may, after hearing the parties thereon, and if he considers it appropriate for the just, economical, expeditious and final determination of the dispute, direct:
- 11.3.1** that the dispute should be determined summarily at an informal hearing attended by all parties;
 - 11.3.2** the summary trial of an issue to decide whether any issue or point raised has no reasonable prospect of success and should therefore be dismissed or struck out;
 - 11.3.3** the summary trial of an issue as to whether an interim award should be made for any sum indisputably due (whether on account of debt or damages or on any other basis);
 - 11.3.4** that any party should furnish more particulars or details of his case on any issue;
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- 11.3.5** that there should be discovery on oath or otherwise of documents and recordings (subject to valid legal objection) either in regard to all relevant matters or in regard to such issues as determined by the arbitrator;
 - 11.3.6** that parties provide each other with a list of the names of witnesses to be called, and with a statement of the substance of each witness' evidence, and that, save with the leave of the

arbitrator, no witness shall be called in respect of whom such name and summary has not been provided;

- 11.3.7** that the hearing should proceed on documents (including written submissions), only, without the presentation of other evidence; and, if the parties so agree, without the presentation of argument.

ARTICLE 12: The Award

- 12.1** The arbitrator shall make his final award as soon as may be practicable, and in any event not later than 60 calendar days after completion of the hearing, unless the parties in writing agree to an extension of this period or, in exceptional circumstances, the Secretariat extends such period.
- 12.2** The final award and all interim awards shall be made in writing, and, unless all the parties in writing agree otherwise, shall set out the reasons upon which the award is based. The award shall be signed and dated by the arbitrator, or, in the case of a tribunal of three arbitrators, by all the members of the arbitration tribunal. If a minority of the members of a tribunal refuses to sign the award, such refusal shall be mentioned in the award but shall not invalidate it.
- 12.3** The arbitrator, the parties or their representatives being present or having been summoned to appear shall deliver the award. The award shall be deemed to have been published to the parties on the date when it is so delivered.
- 12.4** Interim awards may be made on different issues at any time within the period allowed for making a final award.
- 12.5** **12.5.1** If the parties reach a written settlement after the file has been forwarded to the arbitrator, the arbitrator shall, upon being furnished by any party with proof that the parties have in writing agreed thereto, make an award in accordance with such written settlement.
- 12.5.2** If such settlement does not deal with all disputes raised in the arbitration, the arbitrator shall, unless the settlement in its terms precludes it, make an award in accordance with such settlement under 12.5.1, and proceed with the arbitration proceedings in respect of any disputes, including the matter of costs, not dealt with in such settlement.
- 12.6** Where there is more than one arbitrator, the decision of the majority shall be the decision of the arbitration tribunal, provided that, in the absence of a majority on any issue, the decision of the chairman shall determine the issue.

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- 12.7** **12.7.1** A party to arbitration proceedings in respect whereof an award, whether interim or final, has been made under these Rules, may, within 14 calendar days after publication of the award, upon written notice to the arbitrator and all other parties, apply to the arbitrator to correct in the award any clerical or typographical errors, any patent errors arising from any accidental slip or omission, errors in computation, or any errors of a similar nature.
- 12.7.2** The arbitrator shall, if he considers the application for correction to be *prima facie*

warranted, give the other parties an opportunity of making oral or written submissions, as he may determine, on the application for correction, and thereafter and in any event within 30 calendar days of the application, either refuse the application or correct his award, and thereupon the uncorrected award or the corrected award, as the case may be, shall be his award.

- 12.8** **12.8.1** The parties to the arbitration may, within 6 weeks after publication of the award, by writing signed by them, remit any matter which had been referred to the arbitrator, to the arbitrator for reconsideration and for the making of a further award or for a fresh award or for such other purposes and in such manner as they may specify in the said writing.
- 12.8.2** The arbitrator shall dispose of such matter as soon as is practicable, and in any event within three months after the date of the said writing, unless such writing otherwise directs.
- 12.8.3** If the arbitrator has, after making the award, died or become unable or unwilling to deal with the remittal, the award may be remitted to a new arbitrator agreed upon by the parties or appointed, with agreement of the parties, by the Secretariat, which new arbitrator's powers shall include the powers referred to in 14.5.2
- 12.9** Where an award orders the payment of a sum of money, such sum shall, unless the award otherwise provides, carry interest from the date of publication of the award at the same rate as a judgement debt.
- 12.10** Unless the parties have in the arbitration agreement or otherwise agreed that the award shall be subject to appeal, or unless and to the extent that it is remitted as provided in 12.8, an award, or an award as corrected in terms of 12.7, shall, subject to the provisions of the Act or any other law, be final and not subject to appeal, and each party shall abide by and comply with the award in accordance with its terms.
- 12.11** Anything to the contrary in these Rules notwithstanding, the arbitrator may withhold his award until all payments due to the Foundation have been made.

ARTICLE 13: Costs of the Arbitration

- 13.1** Unless the parties have in writing otherwise agreed, the arbitrator shall in his award deal also with the costs of the arbitration, and decide which parties shall bear the costs of the arbitration or in what proportions the parties shall bear such costs.
- 13.2** **13.2.1** The costs of the arbitration referred to in 13.1 include the fees payable to the Foundation in respect of the administrative charges and the provision of a venue and the arbitrator's fees and any expenses incurred by the arbitrator for the performance of his arbitral duties, the fees and expenses of expert witnesses specifically declared by the arbitrator to be recoverable costs, and the normal legal costs incurred by the parties.
- 13.2.2** The arbitrator shall, when he awards costs, direct the scale on which such costs are to be taxed and be recoverable.
- 13.3** **13.3.1** If an award does not state that there is to be no award as to costs and also omits any provisions in regard to costs, or omits to deal with all aspects of costs required to be dealt with, or omits to direct the scale upon which costs awarded are to be taxed and be recoverable, then any party to the arbitration may, within 14 days of the publication of the award apply, on notice to other parties having an interest therein, to the arbitrator for an order directing by and to whom such costs shall be paid or the scale upon which such costs shall be taxed and be recoverable.
- 13.3.2** The arbitrator to whom an application is made in terms of 13.3.1 shall, after affording all parties having an interest therein an opportunity to be heard, make such award as to costs as he deems fit so as to cure the omission referred to in 13.3.1.
- 13.4** The arbitrator may, in making an award as to costs, declare that such costs shall include the costs incurred in the obtaining of an opinion of the court or the opinion of counsel on a question of law under these Rules or under the provisions of a law.
- 13.5** **13.5.1** A party in whose favour or against whom an order for costs has been made by an arbitrator, shall be entitled to have the amount of such costs taxed according to law, and if neither party so insists, such costs may, if the arbitrator is prepared to do so, be taxed by the arbitrator.
- 13.5.2** If the arbitrator is requested and agrees to settle or tax the amount of costs payable in terms of the award, he shall estimate the time which will be taken up thereby, and notify the Secretariat accordingly. The Secretariat shall thereupon notify the parties of the fee payable by each party; or of the fee payable by one party in the event of default of payment by the other party, and upon receipt of the whole of such fee, the Secretariat shall notify the arbitrator that he may proceed to settle or tax the amount of the costs awarded.
- 13.5.3** The arbitrator shall thereupon give reasonable notice to the parties who have an interest therein, of the time and place of such settlement or taxation of the amount of the costs awarded, and at such time and place so settle or tax the amount of such fees.

- 13.5.4** In settling or taxing the costs the arbitrator may, with the written agreement of the parties and of a taxing consultant, whose fees the parties have in writing undertaken to him to pay, engage the services of such taxing consultant to assist him.
- 13.6** Notwithstanding anything provided in 13.1 to 13.5, an arbitrator may, if he considers that in all the circumstances (not being limited to the degree of success of the parties on the merits of the dispute) it is just to do so, provide in his award for a limit to the amount of costs which may be recovered.

ARTICLE 14: Qualification and disqualification of Arbitrators, termination of appointment of arbitrators, and appointment of substitute arbitrators

- 14.1 14.1.1** A prospective arbitrator shall, before his appointment by the Secretariat, in writing disclose 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 in the eyes of the parties.
- An arbitrator already appointed shall, if any facts or circumstances of which he is aware thereafter arise, which might reasonably give rise to justified doubts as to his independence or impartiality in the eyes of the parties, in writing disclose the same to the Secretariat.
- 14.1.2** Where 14.1.1 is not applicable, an arbitrator shall, on assuming his duties, sign and furnish to the Secretariat a declaration to the effect that he is not aware of any circumstances which might reasonably give rise to justified doubts as to his independence or impartiality to act as arbitrator in the matter, and that he will forthwith disclose such circumstances to the Secretariat if they should arise at any time before the arbitration is concluded.
- 14.2 14.2.1** Upon receipt of any notification as referred to in 14.1.1, the Secretariat shall forthwith provide copies thereof to the parties, and determine when the parties must notify the Secretariat whether or not they wish the arbitrator to be appointed, or continue or cease to act as arbitrator, as the case may be, and, if they or any of them wish the arbitrator not to be appointed, or to cease to act, as the case may be, the grounds for such wish shall be furnished.
- 14.2.2** If the time determined in accordance with 14.2.1 has expired without a party notifying the Secretariat that he does not wish the arbitrator in question to be appointed or continue to act as arbitrator, as the case may be, or if the Secretariat, after affording the parties and the prospective or appointed arbitrator an adequate opportunity to respond in writing to the submissions and comments of each other, decides that there are insufficient grounds for not appointing the arbitrator in question, or for the appointed arbitrator to cease to act as such, it shall notify the parties and the prospective or appointed arbitrator accordingly, and the appointment or proceedings, as the case may be, shall then proceed in accordance with these Rules.

- 14.2.3** If the Secretariat, upon receipt of a notification as referred to in 14.1.1, decides that a

prospective arbitrator should not be appointed, or an appointed arbitrator should cease to act as such, it shall appoint a substitute arbitrator in terms of 14.5.

- 14.3** An arbitrator shall recuse himself when, due to physical, mental, or other disability, he becomes incapable properly to perform his duties, and in circumstances which would require a judicial officer to recuse himself.
- 14.4** The Secretariat shall be entitled, after a written or oral hearing (as directed by the Secretariat) of the parties and the arbitrator, to terminate the appointment of an arbitrator on the grounds that he has become disqualified from acting or continuing to act in terms of these Rules, or his inability or refusal to act, or that he has failed timeously and effectively to perform any of his functions as arbitrator.
- 14.5** **14.5.1** Whenever the Secretariat has decided not to appoint a particular arbitrator, or his appointment has been terminated by the Secretariat, or he is removed from office, or dies, or he recuses himself, or his appointment is in any other way terminated or set aside, the Secretariat may, unless the arbitration agreement provides otherwise, appoint a substitute arbitrator in accordance with the agreement of all the parties, or, failing such agreement, of its own choice.
- 14.5.2** A substitute arbitrator, appointed as aforesaid, shall have the power to act in the arbitration and make an award as if he had been appointed in accordance with the terms of the arbitration agreement, and may avail himself of the evidence recorded in the arbitration proceedings before his appointment, and may, if he thinks fit, recall for further examination the person who has given such evidence.

ARTICLE 15: Law to be applied:

- 15.1** Subject to 15.2,
- 15.1.1** the parties shall be free to agree upon the law to be applied to the merits of the dispute, and the arbitrator shall in that event apply that law;
- 15.1.2** in the absence of such agreement, the arbitrator shall apply the law, which he considers as the applicable law, according, where applicable, to the rule of conflict of laws, which he considers applicable.
- 15.2** **15.2.1** Where the law to be applied is not South African law (hereinafter referred to as "*foreign law*"), the arbitrator shall apply such foreign law only if it can be ascertained by him readily and with sufficient certainty and only to the extent that such foreign law is not opposed to South African principles of public policy or natural justice. Where the arbitrator informs the parties that he is unable to ascertain such foreign law readily and with sufficient certainty, it shall be the duty of the party relying on such foreign law to prove the relevant foreign law by means of evidence. In the absence of such evidence, or where the arbitrator, despite such evidence, is unable to determine such foreign law, he shall apply South African law.

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- 15.2.2** Where the written agreement of all parties require the arbitrator to make his award *ex aequo et bono*, he shall make his award on that basis.

- 15.3** The arbitrator shall apply the South African law of evidence; provided that he may allow a party to present evidence in written form, either as signed statements or in affidavit form, in which event any other party may require the deponent to attend the proceedings for oral examination and cross-examination, and, if the deponent fails to attend and submit to be examined and cross-examined, the arbitrator may exclude such evidence in written form altogether, or may attach such weight to it as he thinks fit.

ARTICLE 16: Representation of parties

- 16.1** Any party may -

16.1.1 in the case of a natural person, represent himself or be represented by any other person or persons authorised by him;

16.1.2 in the case of a juristic person or a representative litigant, be represented by any person or persons authorised by it or him.

- 16.2** The name and address, professional title (if any), telephone number, and fax number (if any) of a person representing a party in the arbitration proceedings shall, forthwith upon receipt of notification that an arbitrator has been appointed, be notified to the arbitrator and to the other parties.

ARTICLE 17: Recording of evidence and record of all proceedings

- 17.1** The oral evidence of witnesses shall be recorded in such manner and to such extent as the parties may agree, or failing such agreement, as the arbitrator from time to time, after consultation with the parties, directs.

- 17.2** In the event of any agreement or directive as referred to in 17.1 at any time not being carried out, the arbitrator shall himself, in such manner as he sees fit, keep a record of the oral evidence of witnesses.

- 17.3** The arbitrator shall retain in the file supplied by the Secretariat, all pleadings and other documents delivered by all parties or submitted to the arbitrator, and all interim and final awards made by him, and all reports furnished to him and by him to the Secretariat, and all notes kept by him of oral evidence or argument which was not otherwise recorded, and of a transcript of evidence and of argument recorded otherwise than by the arbitrator and furnished to the arbitrator by the parties or any of them. Upon conclusion of the arbitration proceedings the arbitrator shall return this file to the Secretariat by delivering it to the Registrar.

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ARTICLE 18: Summoning of witnesses

The attendance of any witness to give evidence and to produce books, documents or things to the arbitrator may be secured by invoking the provisions of any law, and the arbitrator shall render such assistance to a party as he may require to invoke such provisions.

ARTICLE 19: Offers of settlement

- 19.1** Any party against whom a claim is made may at any time prior to publication of the arbitrator's award tender, without admission of liability and as an offer of settlement, to pay or perform the whole or part of the claim made, and such tender may be accompanied by a tender to pay all or part of the costs of the arbitration of the party to whom the tender is made.
- 19.2** Such tender shall be in the form of a written notice, given to the claimant but not to the Registrar nor to the arbitrator, and shall specify:
- 19.2.1** the claim or counterclaim, or the particular part thereof, in respect of which the tender is made;
 - 19.2.2** the precise payment, or undertaking to do or not to do something, which is tendered;
 - 19.2.3** any tender made in respect of the costs of the arbitration.
- 19.3** The party to whom the tender is made shall be entitled, for a period of 10 calendar days from the receipt of the notice containing the tender, by written notice to the party making the tender, to accept the tender, failing which he shall be deemed to have rejected the tender.
- 19.4** **19.4.1** If the tender is accepted in terms of 19.3, the party accepting the tender shall be entitled to disclose the tender and the acceptance thereof to the arbitrator and, upon notice to the party who made the tender and all other parties, apply to the arbitrator for an award in terms of the accepted tender. To the extent that the tender does not extend to costs of the arbitration, the party applying for an award in terms of the accepted tender may, if the terms of the tender did not preclude it, apply to the arbitrator also for a costs award.
- 19.4.2** The arbitrator shall, upon notification of an application for an award in terms of 19.3, make an award in terms of the accepted tender, and, if the accepted tender does not cover the issue of costs, hear the parties on the issue of costs and thereafter make such award as to costs as he deems just.

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- 19.5** If the tender is not accepted in terms of 19.3, the fact of the tender and of its non-acceptance shall not be brought to the knowledge of the arbitrator until he has made his award on all issues in dispute in the arbitration, other than costs, whereafter those facts may be made known to the arbitrator and shall then be taken into account by him in making an award as to costs; provided that, if the arbitrator has made an award as to costs before acquiring knowledge of the tender and its non-acceptance, the party

who made the tender shall be entitled to have the costs award reconsidered and, if the arbitrator deems it just, varied by the arbitrator in the light of the facts of the tender and non-acceptance thereof brought to his knowledge.

ARTICLE 20: Manner of time periods for delivery of pleadings, documents and other notifications

20.1 All pleadings and other documents and notifications, complete with annexes, shall be delivered in typed form with an original for the Secretariat, and a sufficient number of copies to provide one copy for each party and one copy for the arbitrator or each of the arbitrators.

20.2 All pleadings, documents and notifications required to be delivered, shall, save where the Rules otherwise provide, be physically delivered to the Registrar and sent to other parties by the Registrar, and all communications of parties with the Secretariat shall, save where the Rules otherwise provide, be communicated through the Registrar.

20.3 All notices or communications from the Secretariat or the Registrar or the arbitrator to a party shall be copied to all other parties, and shall be deemed to have been validly given or effected if they are physically delivered, or sent by registered post or sent by facsimile transmission, telex, telegram, or other recorded form of transmission providing a record.

20.4 **20.4.1** The address to which all pleadings, documents, and other notifications to a claimant may be physically delivered or sent, shall be the address furnished by him in the Request for Arbitration, or such other address as he may thereafter in writing notify to the Registrar and all parties.

20.4.2 **20.4.2.1** Subject to 20.4.2.2, the manner in which all pleadings, documents, and other notifications to a defendant, or a third party who has in the manner prescribed in these Rules consented to be joined in the arbitration proceedings, may be physically delivered or sent, shall be the following:

(a) by physically delivering it to him personally; provided that if he is a minor or a person under legal disability, it may be physically delivered or sent to his guardian, curator, tutor or a person in a similar legal relationship to him (hereinafter referred to as his "**guardian**"); or

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(b) by physically delivering it at or sending it to his or his guardian's residence or place of business; or

(c) by physically delivering it at or sending it to his place of employment;
or

(d) if he has chosen a *domicilium citandi*, by physically delivering it at or

sending it to the address given as such *domicilium citandi*; or

- (e) in the case of a corporation or company, by physically delivering it at or sending it to the registered office or to the principal place of business of such corporation or company; or
- (f) by physically delivering it to or sending it to any agent who is authorised in writing to accept it on behalf of the party to whom it is addressed; or
- (g) where the defendant or third party is a firm, a partnership or a voluntary association, by physically delivering it or sending it to its place of business or to the proprietor of the firm, a partner of the partnership, or the chairman or secretary of the committee or managing body of the voluntary association in the manner referred to in (a), (b), (c), (d) or (f); or
- (h) if more than one person is cited jointly as defendant or third party in their representative capacities, by physically delivering or sending it to each of them in any manner provided for in this Article; or
- (i) where the defendant or third party is a central or provincial government or a local government body, or a statutory body, by physically delivering it or sending it to the nominal executive head of that government or local government body or statutory body, or in any manner provided for by law.

20.4.2.3 Where a claimant, defendant, or third party who has in the manner prescribed in these Rules consented to be joined in the arbitration proceedings, furnished to the Registrar an address for the purposes of the delivery or sending of pleadings, documents, or other notification, they may be physically delivered or sent to that address or such other address of which he has in writing notified the Registrar and all other parties.

20.5 Delivery or notification or communication of any pleading, document, or other notification from the Secretariat or the Registrar, and from a party to another party, shall be deemed to have been effected on the day when such delivery or notification or communication was actually received, or if made in accordance with 20.3 to an address referred to in 20.4, should in the ordinary course have been received by the party to whom it was addressed or his representative or a person at that address who would ordinarily be expected to have brought it to his attention.

20.6 Periods of time specified in these Rules or by the arbitrator shall commence on the day following the day on which a pleading or notification is deemed to have been delivered or sent as provided above, or, as the case may be, the order of the arbitrator was made or other event occurred whereafter a party is required to take any step or perform any act within a certain period; provided that, if the first or last day (but not intervening days) of such period is a Saturday or Sunday or official holiday, the period in question shall commence or expire, or both commence or expire, on the first working day thereafter.

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20.7 Whenever, in terms of these Rules, it is required that notice be given of any step or proceeding by or to the Secretariat, the Registrar, or any party, the period of such notice shall, unless otherwise provided herein, be 7 calendar days.

ARTICLE 21: General

21.1 FEES PAYABLE PRO RATA

The fees payable to the Secretariat shall, as provided herein, be payable in equal shares by the claimant and by the defendant; provided that, if there is more than one claimant or defendant, such claimants or defendants shall pro rata to their numbers be liable to pay their share of the fee; and provided further that, if any party defaults in paying his share of such fee, any other party may pay the defaulting party's share to enable the arbitration to proceed, and may at any stage of the proceedings apply for an order for costs to recover the other party's share so paid. The arbitrator may make such order as to costs on such application as he deems just.

21.2 ARBITRATION TO BE PRIVATE

21.2.1 The arbitration proceedings shall be conducted in private, and a party shall be entitled to require the arbitrator to exclude therefrom any person whose presence is not reasonably required by another party.

21.2.2 Save as is required by law, or for the exercise of a party's rights in a court of law, the Secretariat and the Registrar shall, unless the parties in writing notify the Secretariat otherwise, maintain confidentiality in regard to any matter being dealt with or dealt with by the Foundation.

21.3 NON-LIABILITY OF FOUNDATION AND ARBITRATOR

The Foundation shall not be liable to any party for any act or omission relating to an arbitration conducted under its aegis, and shall have no liability or responsibility towards the parties or to any arbitrator in respect of any arbitration commenced under the aegis of the Foundation but not completed according to these Rules. An arbitrator appointed by the Foundation shall not be liable for any act or omission relating to an arbitration in which he was the arbitrator, except for deliberate misconduct by him.

21.4 DECISIONS BY MAJORITY

Where three arbitrators have been appointed, the decision of the majority shall on all matters prevail; provided that where there is no majority on any issue or matter, ruling, decision, or award, the decision of the chairman shall prevail.

Wherever a matter relating to the procedure of an arbitration is, according to these Rules, not within the power of an arbitrator to rule upon or decide, the Secretariat shall have the residual power to decide such issue, and the parties shall be bound by such decision.

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ARTICLE 22: Appeals

- 22.1** Where the parties have, whether in terms of the arbitration agreement or otherwise, in writing agreed that an interim award or the final award of an arbitrator or arbitrators shall be subject to a right of appeal the following rules shall, save to the extent otherwise agreed by them in writing, apply.
- 22.2** A notice of appeal shall be delivered by the appellant, within 7 calendar days of publication of the award, failing which the interim award or final award shall not be appealable. If there is a cross-appeal, a notice of cross-appeal shall be delivered within 7 calendar days of delivery of the notice of appeal, failing which a cross-appeal shall be precluded.
- 22.3** The notice of appeal and notice of cross-appeal, if any, shall state whether the whole or part only of the award or interim award is appealed against, and, if only part thereof is appealed, it shall state which part, and shall further specify the findings of fact and rulings of law appealed and the grounds upon which the appeal or cross-appeal is founded.
- 22.4** **22.4.1** Upon delivery of a notice of appeal, the Secretariat shall obtain from the arbitrator or chairman of the arbitrators, as the case may be, an estimate of the time which will reasonably be required for the appeal tribunal to study the record, hear the appeal and cross-appeal, if any, and make an award thereon.
- 22.4.2** Thereafter the Secretariat shall, through the Registrar, notify the parties of the fees payable by each of them in respect of the appeal, cross-appeal, if any, and of the date by which such fees are payable, and that, if any party fails to pay his share of such fees, the other party is entitled within 10 calendar days of being notified by the Secretariat of such failure, to pay also the fee of the defaulting party to ensure the continuance of the appeal.
- 22.5** Upon receipt of the fees payable for the appeal, and cross-appeal, if any, the Secretariat shall appoint the appeal arbitrator or arbitrators agreed upon in writing by the parties, or the number of appeal arbitrators from the category of arbitrators agreed upon in writing by the parties, or, failing agreement upon the number of appeal arbitrators, a single appeal arbitrator, and, failing agreement on the said category, from a category of its choice.
- 22.6** The appeal arbitrator or appeal arbitrators, as the case may be, shall then, after hearing the parties, direct the party by whom, the manner in which, extent to which, and the time within which the record for the appeal and cross-appeal, if any, shall be prepared and the place where and the time when the appeal and cross-appeal, if any, shall be heard.
- 22.7** If any party is in default of timeously paying his share of the fees for the appeal and cross-appeal, and the other party does not timeously as provided in 22.4.2 pay also the share of fees payable by the defaulting party, or if the directions referred to in 22.6 are not complied with, the appeal or cross-appeal, as the case may be, shall lapse.

- 22.8** The nature of the appeal and cross-appeal, and the powers of the appeal arbitrator or arbitrators shall, save to the extent that the written agreement between the parties or this article 22 provides otherwise, be the same as if it were a civil appeal and cross-appeal to the Appellate Division of the Supreme Court of South Africa.

ARTICLE 23: Arbitrations to be held urgently by consent of the parties

- 23.1** If all parties to a dispute agree in writing that, at a time and place agreed upon, and according to a procedure agreed upon or expressly stated to be decided by the arbitrator, an arbitration should be conducted as a matter of urgency, they may jointly apply in writing to the Secretariat for such an arbitration to be conducted by an arbitrator of their choice or to be appointed from a particular category in the annexe, by the Secretariat.
- 23.2** The Secretariat shall notify the parties whether such an urgent arbitration can be held, and, if so, of the administration and venue fee and the further daily fees therefor, and, upon payment of such administration fee and the first daily fee, appoint such arbitrator.
- 23.3** The arbitrator shall then and only for so long as the fees payable for each day after the first day of the hearing have been paid by not later than noon of the previous day, at the time and place agreed upon, and according to the procedure agreed upon, or, if expressly left to him for decision, decided upon by him, conduct such arbitration to its conclusion and make an award.
- 23.4** Save as set out in 23.1, 23.2 and 23.3, other provisions of these Rules shall apply *mutatis mutandis* to such urgent arbitrations.

ARTICLE 24: Amendment of these Rules

- 24.** These Rules may at any time be amended by the Secretariat, and will be available on request made to the Registrar. Such amendments shall be applicable to all future and current, including part-heard, arbitrations, save to the extent that the arbitrator may, in the interests of a just determination of the dispute, rule otherwise. It shall be the duty of the parties at all times to ascertain such amendments from the Registrar.

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ANNEXE

- 1_ **Administration fee payable in terms of Rule 4.2.6**

1.1 **Payable by claimant in arbitrations in which the claim is or claims are expressed in money.**

R1000.00 per R100 000.00 up to R1.5 million +.1% exceeding R1.5 million + VAT. This fee is not refundable.

1.2 **Payable by claimant in arbitrations in which the claim is not expressed in money.**

Discuss with the Registrar. This fee is not refundable.

2_ **Administration fee payable in terms of Rule 6.2.3 by defendant (or, failing payment by the defendant, by the claimant in terms of Rule 9.1.3) in arbitrations in which the claim is expressed in money.**

R1000.00 per R100 000.00 up to R1.5 million +.1% exceeding R1.5 million + VAT. This fee is not refundable.

3_ **Fees payable, after appointment of arbitrator, for continuance of arbitration proceedings in terms of Rule 10**

NOTE 1 These fees comprise *first*, the administration fee, and, *secondly* the fee payable per day to the arbitrator. Should a venue at the Foundation be reserved for the purposes of the hearing, the parties will be charged by the Foundation on a pro rata basis. The arbitrator will charge an hourly rate for preparation of awards and attendance at meetings with the parties. The daily venue fees, and the arbitrator's daily fees, will be multiplied by the number of days which it is estimated every next step in the arbitration proceedings will require, and the product thereof will be payable in terms of Rule 10.2.2 as to 50% by the claimant (or claimants pro rata to their number) and 50% by the defendant (or defendants pro rata to their number), or, in default of payment by any party, by the other party if he wishes to ensure the continuance of the next step in the arbitration proceedings. Any extraordinary administration or venue expenses incurred, or expenses incurred by the arbitrator, will be added to the aforesaid daily fees.

The fee for an Appeal arbitrator or arbitrators: A fee determined by the Secretariat in terms of Rule 22.4.2

The fees quoted do not include the arbitrator's travel costs where applicable. Where an arbitrator has reserved dates and the matter is settled the Secretariat will retain an appropriate amount by way of the arbitrator's collapse fee..**All fees quoted exclude V.A.T.**

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NOTE 2 The parties may, in liaison with the arbitrator and the Registrar, agree that the arbitrator determine that a particular arbitration venue of the Foundation be used for a specified number of days. Failing such agreement, the arbitrator determines the venue where the next step in the arbitration takes place. Recording and

Catering transcription fees, if required, are not included and are subject to quotation.
facilities are also available subject to prior arrangement.



REQUEST FOR ARBITRATION

To the Registrar,
AFSA Secretariat,
Maisels Chambers
4 Protea Place
Sandown
PO Box 653007 Benmore 2010
Docex 143 Randburg
Fax (011) 320 0533

Dear Madam,

On behalf of the undermentioned claimant/s, for whom I have authority to act⁽¹⁾, I request the Secretariat of the Foundation to accept this request for arbitration under its Rules.

Herewith the necessary information⁽²⁾:

1.a Name of Claimant/s⁽³⁾

.....
.....

b Description (ie natural person; company; cc, etc.)

.....

c Address⁽⁴⁾

.....

d Telephone No

e Fax No.

f E-mail address:

2.a Name of Defendant/s⁽³⁾

b Description (ie natural person; company; cc, etc.)

.....

- c Address⁽⁴⁾
- d Telephone No.
- e Fax No.
- f E-mail address:

3. I attach hereto (delete (i) or (ii) if inapplicable):

- (i) A copy of the Order of Court directing the appointment of an AFSA arbitrator; and/or
- (ii) A copy of the written agreement⁽⁵⁾ in which all the parties agree to arbitration;

and which I have marked "A". I am satisfied that an award made by the arbitrator in accordance with the claims made by the Claimant (and which form part of the statement attached hereto marked "B") will fall within the terms of the Arbitration Agreement/Court Order.

- 4. I attach hereto a statement marked "B" setting out the Claimant/s right to sue (*locus standi*); the nature of the dispute, the material facts and contentions of the Claimant/s; the relief claimed and all the documentation⁽⁶⁾ relied upon.
- 5. Fill out 5(i) where the choice of arbitrator has been agreed or made by the Court and 5(ii) and 5(iii) or 5(iv) in all other cases.

(i) The parties have agreed the identity of an arbitrator/the Court has appointed an arbitrator (delete what is inapplicable) who is -

- (a) Name of arbitrator
- (b) Address
- (c) Telephone No.
- (d) Fax No.
- (e) E-mail address

(ii) The Claimant/s suggests in regard to the selection of an appropriate number of arbitrator/s that:

The matter should be heard in the first instance by

_____ or _____
one or three arbitrators

(mark preference with a tick)

(iii) The Claimant/s suggests that the following person/s should be considered for appointment as arbitrator/s:

(a) Name/s
.....

(b) Address/es
.....
.....

(c) Telephone number/s
.....

(iv) The Claimant does not wish it to suggest an arbitrator but asks the Registrar to appoint an AFSA arbitrator:

who is an

advocate	attorney	accountant	legal adviser
_____	_____	_____	_____
businessperson	retired Judge	architect	
_____	_____	_____	
quantity surveyor	engineer	other	(specify)
_____	_____	_____	

(b) The Claimant further requests that the arbitrator be proficient in

English Afrikaans Zulu

Xhosa Sotho Other (specify) ⁽⁸⁾

6. The Claimant does/does not wish to incorporate the AFSA appeal procedure⁽⁹⁾ as part of this arbitration (delete the option to be rejected).
7. I attach payment of the administration fee⁽¹⁰⁾ in the sum of R.....

Signature of Claimant/s representative

NOTES:

- 1_ No proof of authority to act need be attached. The Secretariat reserves the right to request such proof at any time.
- 2_ The information is that required by Article 4 of the AFSA Rules from which this Form is extracted.
- 3_ The information sought in paragraphs 1 and 2 need be given only once, i.e. either as part of this Form or as part of annexe "B" hereto (the statement of Claimant's material facts and contentions).
- 4_ The address chosen whether for a Claimant or a Defendant must be one to which all the pleadings and documents in the case may be physically delivered or sent and the address here chosen by any party for itself will be the address used by the Secretariat unless and until such party in writing otherwise notifies the Registrar and all other parties. The address given by the Claimant/s or by the Defendant/s should be an appropriate one, i.e. one at which physical or other delivery can be effected and which, in the case of a natural person, is his residence or place of business or in the case of a corporation or company its registered office or principal place of business. Where a *domicilium citandi* has been chosen, such should be stated. Other examples of an appropriate choice of address are to be found in Article 20.4.2 of the AFSA Rules.
- 5_ Where the Agreement is a lengthy one and it is possible to provide extracts that satisfactorily furnish the information here required, then such extracts can be attached. In every case, however, a copy of the signature page must be provided. Where the copy in the possession of the Claimant does not carry the signatures of all parties, then that fact should be stated and Claimant should say why nonetheless he is satisfied that the original document was duly signed.
- 6_ Care should be taken to ensure that all documents upon which reliance will be placed to support the material facts and contentions are attached. Nonetheless a responsible discretion must be exercised to exclude voluminous matter which is not essential but which may nonetheless be used in the arbitration proceeding (i.e. secondary documentary material). The existence of any such secondary documentary material must be disclosed to the arbitrator and the other parties as part of the pre-arbitration hearing envisaged under Article 10.1.3 of the AFSA Rules.
- 7_ The arbitrators on AFSA's panels fees charges range in accordance to their seniority. Information concerning fees and the full list of AFSA arbitrators are available on request from the Registrar.
- 8_ Should parties request an arbitrator to be proficient in a language other than an official South African language, please discuss this with the Registrar.

- 9_ Provided both parties agree, AFSA will administer an appeal procedure in terms of Article 22 of its Rules. It is the AFSA policy to arrange for the possibility of an appeal (where agreed) at the same time as the hearing *a quo* so that the appeal can be disposed of very shortly after the initial award has been given.
- 10_ The administration fee is R1 000 per R100 000 up to R1.5 million, + 0.1% of the sum exceeding R1.5 million. Matters with no financial claim must be discussed with the Registrar. Fees quoted exclude VAT.



REFUSAL OF REQUEST

Dear Sir/Madam,

I refer to your Request for Arbitration dated

I regret to advise that the Secretariat has declined your Request for Arbitration.

The reason for the refusal is that:

- (i) No valid arbitration agreement and/or Court Order was attached; and/or
- (ii) The dispute is not arbitrable in law; and/or
- (iii) You have not paid the administration fee as required; and/or
- (iv) AFSA is unwilling to accept the Request; and/or
- (v) Other (specify)

(Inapplicable reasons to be deleted and deletion to be initialled by the Registrar)

Where the reason for the refusal is solely the unwillingness of AFSA to accept the Request the administration fee will be refunded. In all other cases you are free to correct the defect contained in the Request for Arbitration and to resubmit the same without paying the administration fee again..

Yours faithfully,

REGISTRAR



ACCEPTANCE OF REQUEST

Dear Sir/Madam

I refer to your Request for Arbitration dated

I wish to advise that the Secretariat has accepted the Request, and this matter has been assigned AFSA Reference No. Please use this reference number in all correspondence and pleadings.

I attach a receipt in respect of the payment of the administration fee.

A copy of the Request for Arbitration will now be forwarded by the Secretariat to the Defendant/s in terms of AFSA Article 6 and you will be kept informed of further progress.

Yours faithfully,

REGISTRAR



REGISTRAR'S NOTIFICATION TO THE DEFENDANT

Dear Sir/Madam,

I write to advise that the AFSA Secretariat has received a Request for Arbitration from the Claimant in the matter of and in which you are cited as a/the Defendant.

I enclose a copy of that Request marked "A".

The Secretariat has acceded to that Request as appears from its letter dated being attached marked "B".

Written response

I now advise that you have twenty-one calendar days from date of receipt hereof to deliver to this Office and to the Claimant your written response⁽¹⁾:

- (a) to the Claimant's suggested choice of arbitrator and number of arbitrators in which regard, if you have a different choice to suggest, please supply the same detailed information in respect of your choice as the Claimant has done. If you do not agree with the particular choice suggested by the Claimant but do not yourself have in mind any particular arbitrator, please do not hesitate to indicate your preferences as regards the following:

These are our criteria for the appointment of an arbitrator:

advocate _____	attorney _____	accountant _____	legal adviser _____
businessperson _____	retired Judge _____	architect _____	
quantity surveyor _____	engineer _____	other (specify) _____	

- (b) to the Claimant's statement that you were a party to the Arbitration Agreement and/or Court Order on which the Claimant relies and that the Agreement and/or Court Order is still operative for the purposes of arbitration or whether you dispute any part of that statement in which case you must set out your grounds for so disputing it.
- (c) to the Claimant's statement that the claim falls within the terms of the Arbitration Agreement or Court Order (of course this does not mean that you agree with the claim made but merely indicates whether you accept that such claim, whether good or bad, falls within the terms of your Arbitration Agreement or Court Order).

Statement of defence

If you accept the existence and applicability of the Arbitration Agreement or Court Order and that the claim falls within the terms of such Agreement or Court Order, please then also deliver, at the same time, your statement of defence setting out the material facts and contentions on which you rely, and indicating which of the Claimant's facts and contentions are admitted by you and which are disputed by you and which of the Claimant's claims for relief are conceded and which are disputed. Kindly set out your prayers for relief (e.g. whether the Claimant's claims should be dismissed or reduced and any order for costs you may seek) and you must annex copies of all documentation⁽³⁾ on which you rely in support of your facts and contentions in the same way as the Claimant did.

Counterclaim

Should you wish to raise a counterclaim⁽⁴⁾, then you must do so as part of your statement of defence and in that regard you must say against which of the Claimants (if there are more than one) the counterclaim is brought; you must indicate by way of a brief statement that an award in accordance with the

counterclaim would fall within the terms of the Arbitration Agreement or Court Order, and you must include a statement setting out why you have a right to sue (your *locus standi*), the nature of the dispute which gives rise to the counterclaim and all the material facts and contentions upon which you rely to establish the circumstances of your case and the relief which you claim and you must annex copies of all documentation⁽⁵⁾ on which you rely in support of such facts and contentions.

Rule 6.2 Notice

Please note further that if you dispute that you concluded or were party to the Arbitration Agreement and/or Court Order or that it is still valid or operative or that the claim falls within the terms of the Arbitration Agreement and/or Court Order, AFSA will appoint an arbitrator to consider such issues and to decide whether or not to proceed with the arbitration and if the arbitrator does so decide, then he will be empowered to proceed therewith.

Arbitrator/s

If it should appear that there is no agreement between the parties to the arbitration as to the number of arbitrators or as to the choice of a particular arbitrator or the category from which such arbitrator should be appointed, then the Secretariat will make a choice and will appoint an arbitrator accordingly.

Appeal

Please indicate whether you wish to incorporate the AFSA appeal procedure⁽⁷⁾ as part of the arbitration by completing the following:

*The Defendant does/does not wish to incorporate the AFSA appeal procedure as part of this arbitration.

(Delete the option to be rejected)

Default procedure

Please note further that any failure by you to respond timeously may result in the arbitrator, after giving notice of the time and place of the arbitration proceedings, making an award without further notification to you.

Application for extension of time

Should it be necessary then you may within the given period of twenty-one calendar days apply in writing to the Secretariat through the Registrar at the above address for an extension of time to deliver your statement of defence and/or counterclaim but should you make such a request you must give grounds to justify same and you must suggest the period of the extension required. However even if you do make this request, you must nevertheless respond to the choice expressed by the Claimant as to the number of arbitrators; the choice for a particular arbitrator or arbitrators; your own suggestions in that

regard; and stating whether you dispute or admit that the Arbitration Agreement was concluded by you and is still operative or whether an Order of Court applies and whether in your view the claim falls within the terms of such Agreement or Court Order. You must also in any event pay the administration fee mentioned above. Any request for an extension will be determined by the Arbitrator.

Fee

You must, together with this response, pay the administration fee in an amount of R.....⁽⁶⁾

Yours faithfully,

REGISTRAR

NOTES

1. See the provisions of Article 6 of the AFSA Rules.
2. The AFSA Panel of Arbitrators represents arbitrators of different seniority, specialisation and experience. Information concerning fees and the full list of AFSA arbitrators are available from the Registrar.
3. Care should be taken to ensure that all documents upon which reliance will be placed to support the material facts and contentions are attached. Nonetheless a responsible discretion must be exercised to exclude voluminous matter which is not essential but which may nonetheless be used in the arbitration proceeding (i.e. secondary documentary material). The existence of any such secondary documentary material must be disclosed to the arbitrator and the other parties as part of the pre-arbitration hearing envisaged under Article 10.1.3 of the AFSA Rules.
4. See Article 6.1.5.2 of the AFSA Rules.
5. See Note 3 above.
6. In any case where a counterclaim materially exceeds the claim, the Secretariat may, in its discretion, require the defendant to pay an additional amount in respect of the administration fee payable so that such payment accords with the scale relating to the administration fees in the annexe.
7. Provided both parties agree AFSA will administer an appeal procedure in terms of Article 22 of its Rules. It is the AFSA policy to arrange for the possibility of an appeal (where agreed) at the same time as the hearing *a quo* so that the appeal can be disposed of very shortly after the initial award has been given.