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The International Comparative Legal Guide to:

Litigation & Dispute Resolution 2017

10th Edition

A practical cross-border insight into litigation and dispute resolution work

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

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Email: info@glgroup.co.uk
URL: www.glgroup.co.uk

GLG Cover Design
F&F Studio Design

GLG Cover Image Source
iStockphoto

Printed by
Stephens & George
Print Group
April 2017

ISBN 978-1-911367-44-4
ISSN 1755-1889

Strategic Partners

General Chapter:

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Country Question and Answer Chapters:

EDITORIAL

Welcome to the tenth edition of *The International Comparative Legal Guide to: Litigation & Dispute Resolution*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of litigation and dispute resolution.

It is divided into two main sections:

One general chapter. This chapter provides an overview of Cybersecurity, particularly from a UK perspective.

Country question and answer chapters. These provide a broad overview of common issues in litigation and dispute resolution in 41 jurisdictions, with the USA being sub-divided into 10 separate state-specific chapters.

All chapters are written by leading litigation and dispute resolution lawyers and industry specialists, and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editor Greg Lascelles of Covington & Burling LLP for his invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.com.

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I. LITIGATION

1 Preliminaries

1.1 What type of legal system has your jurisdiction got? Are there any rules that govern civil procedure in your jurisdiction?

The South African system is not codified. South Africa is a common law country where case law, in the form of judicial judgment, is of primary importance.

The South African legal system is a legal hybrid of Roman-Dutch law and English law, where private law is based on Roman-Dutch law and English law is the foundation for company law, the law of evidence and both civil and criminal procedure. There is further a system of legal pluralism where the national legal system runs parallel to customary law.

However, although the legal system comprises a combination of various legal systems, the Constitutional Court, in a judgment during 2000 [2000 (2) SA 674 (CC)], held that the common law "is shaped by the Constitution which is the supreme law, and all law, including the Common Law, derives its force from the Constitution and is subject to constitutional control".

The civil court system in South Africa is adversarial as opposed to inquisitorial in nature. The civil court system is governed by specific rules for each court – Constitutional Court, Supreme Court of Appeal, High Court and Magistrate's Court (Lower Court). Apart from the rules, there are also practice directives which are usually court-specific, and differ in each jurisdiction.

1.2 How is the civil court system in your jurisdiction structured? What are the various levels of appeal and are there any specialist courts?

There are four levels of the civil court system. First, the Lower Court (or Magistrates' Court), with a monetary jurisdiction of up to ZAR400 000. Second, the High Court, presided over by a single judge with unlimited monetary jurisdiction. The Lower Courts and various divisions of the High Court are courts of first instance. Third, the Supreme Court of Appeal, hearing only appeals, which three to five judges presiding over a matter. Lastly, the Constitutional Court, with 11 judges, which is the highest court in South Africa. The common law is developed via judgments given by Superior Courts (High Courts and above).

An appeal is available from the Magistrates' Court to the High Court. A judgment or order handed down by a single judge in the High Court may be appealed to a full bench of the High Court, consisting of three sitting judges. A party can appeal from the High Court to either the Supreme Court of Appeal or the Constitutional Court (in certain instances). The Constitutional Court, being the highest court in the country, is the last and final court that can determine any particular matter.

In the High Court, South Africa has the following specialist courts:

- Land Claims Court.
- Income Tax Appeal Court.
- Competition Appeal Court.
- Patents & Copyright Courts.
- Labour Courts.
- Electoral Courts.
- Equality Courts.

In the Lower Courts, South Africa has the following specialist courts:

- Divorce Court.
- Family Courts.
- Small Claims Courts.
- Courts of Traditional Leaders.
- Community Courts.
- Sexual Offences Courts.

1.3 What are the main stages in civil proceedings in your jurisdiction? What is their underlying timeframe (please include a brief description of any expedited trial procedures)?

Civil proceedings are instituted either by way of an application (motion proceedings) or by way of an action (summons).

A motion proceeding is a procedure in terms of which an application is brought by way of a notice of motion, supported by affidavits setting out the facts upon which the applicant relies for relief. A notice to oppose the application must be delivered within five days after receipt of the notice of motion. The respondent may file an answering affidavit within 15 days after filing the notice of intention to oppose and the applicant is entitled to file a replying affidavit within 10 days after receipt of the answering affidavit from the respondent. The exchange of affidavits in a normal application should be done within two months but it may take another three months before the application can be enrolled for hearing.

Action proceedings are instituted by way of a simple or a combined summons, citing the defendant(s), but addressed to the Sheriff. The Sheriff is directed to serve the summons on the defendant(s) to inform the defendant that if the defendant wishes to defend the

action, a notice of intention to defend must be filed within 10 days from receipt of the summons. Thereafter, unless summary judgment is applied for, a plea must be filed within 20 days after a notice of intention to defend has been filed. Where the plaintiff issued a simple summons, the plaintiff has to file a declaration in addition to the simple summons and a plea has to be filed within 20 days after service of the declaration upon the defendant. The plaintiff is entitled to file a replication and counterclaim within 15 days after the service of a plea upon the plaintiff. After the filing of a plea the rules make provision for discovery; request for particulars; pre-trial proceedings and an application for a trial date.

Depending on the division of the High Court where the action has been instituted, a party may wait for up to two years from the commencement of the action until a trial date has been allocated by the Registrar of the court.

In urgent applications a court may dispense with certain requirements of the Rules and dispose of the matter within hours or days.

1.4 What is your jurisdiction's local judiciary's approach to exclusive jurisdiction clauses?

The judiciary's approach is to give effect to exclusive jurisdiction clauses in any contract, as agreed between the parties. However, the division must also have jurisdiction in terms of section 21 of the Superior Courts Act, 18 of 2013.

1.5 What are the costs of civil court proceedings in your jurisdiction? Who bears these costs? Are there any rules on costs budgeting?

The "costs follow the event" principle applies and the successful party is usually entitled to costs against the unsuccessful party. Costs are taxed and payable by the losing party upon different scales, the most common being party-and-party costs. For instance, an award of party and party costs will entitle the successful party to tax a bill of costs in accordance with the tariff of court fees, as prescribed in the Rules. In certain circumstances, a court may also order a party to pay costs on the attorney-and-client scale or attorney-and-own-client scale, which are based on higher tariffs and include additional taxable items. Attorney-and-own-client costs is the highest order of costs that can be made by a court and, in most circumstances, is tantamount to a punitive costs order.

There are no rules on cost budgeting.

1.6 Are there any particular rules about funding litigation in your jurisdiction? Are contingency fee/conditional fee arrangements permissible?

There are no court rules with regard to the funding of litigation. The Contingency Fees Act 66 of 1997 regulates contingency fees and a legal practitioner may charge a fee equal to an amount which does not exceed twice the normal fee of the practitioner, subject thereto that this amount may not exceed 25% of the total claim sounding in money. Contingency fee arrangements must be in writing.

1.7 Are there any constraints to assigning a claim or cause of action in your jurisdiction? Is it permissible for a non-party to litigation proceedings to finance those proceedings?

It is possible to cede or assign a claim to another party. Such cession or assignment must have taken place prior to the institution of the action. Champerty is allowed and it is therefore lawful for a non-party to the litigation proceedings to finance those proceedings.

1.8 Can a party obtain security for/a guarantee over its legal costs?

The Rules of Court make provision for a party to demand security for costs. The form of security may be by way of a payment into court or an acceptable form of guarantee. However, more recently, the courts have determined that security can only be demanded from a plaintiff in limited circumstances from a party resident (*incola*) in South Africa. In these circumstances, security can only be demanded should the defendant be able to show that the claim is vexatious, reckless or otherwise amounting to abuse. Foreign entities or persons (*peregrine*) can be requested to furnish security before they proceed with their claims in court.

2 Before Commencing Proceedings

2.1 Is there any particular formality with which you must comply before you initiate proceedings?

In general there is no particular formality to comply with prior to instituting proceedings. It is common practice in South Africa to address a letter of demand to the defending party prior to the institution of proceedings. However, the Legal Proceedings against Certain Organs of State Act 40 of 2002 provides formalities with regard to legal proceedings for recovery of a debt from a state organ. Section 3(1) of the aforesaid Act stipulates that a notice in writing must be sent to the state organ by the creditor, notifying it of its intention to institute legal proceedings, failing which such legal proceedings may be dismissed.

2.2 What limitation periods apply to different classes of claim for the bringing of proceedings before your civil courts? How are they calculated? Are time limits treated as a substantive or procedural law issue?

The Prescription Act of 1969 applies and prescribes different prescription periods for different claims. For example, a debt will prescribe after three years; claims based on judgments and mortgage bonds, prescribe after 30 years; bills of exchange or negotiable instruments prescribe after six years; any debt owed to the State, prescribe only after 15 years.

Prescription commences to run when the debt is due. Exceptions include where the debtor wilfully prevents the creditor from coming to know of the existence of the debt. Further, the debt is not deemed to be due until the creditor has knowledge of the identity of the debtor. For purposes of calculating the time period within which proceedings must be instituted (to prevent a claim prescribing), the first day is excluded and the last day is included in the relevant time period.

Some legislation, for example the Consumer Protection Act of 2008, prescribes prescription periods applicable in respect of specific claims relating to product liability claims.

Prescription of debt is a substantive issue.

3 Commencing Proceedings

3.1 How are civil proceedings commenced (issued and served) in your jurisdiction? What various means of service are there? What is the deemed date of service? How is service effected outside your jurisdiction? Is there a preferred method of service of foreign proceedings in your jurisdiction?

Civil proceedings commence with the issuing of a summons or an application by the Registrar of the court. Service of any process of the court is performed by the sheriff, who must serve the summons or application.

The date which appears on the return of service prepared by the sheriff is the date accepted by the court as the date of service or attempted service should a *nulla bona* return be issued.

Leave of the court is required to serve a process outside South Africa.

Foreign proceedings are served by the sheriff.

In the event of it not being possible to effect service, as aforesaid, then an application may be made to court for substituted service.

3.2 Are any pre-action interim remedies available in your jurisdiction? How do you apply for them? What are the main criteria for obtaining these?

An urgent application for interim relief can be regarded as a pre-action. To succeed with an interim interdict, the court must be satisfied that certain requirements are met, for example:

- the application must be urgent;
- the applicant has established a *prima facie* right;
- if the application is not granted, then there will be irreparable harm;
- there must be no other remedy available to the applicant; and
- the balance of convenience favours the applicant.

Such an interim interdict application will be of a temporary nature pending the outcome of further proceedings.

3.3 What are the main elements of the claimant's pleadings?

The pleading must contain a clean and concise statement of the material facts upon which a party relies for a claim with sufficient particularity to enable the defendant or respondent party to reply thereto, if necessary.

When suing for damages, the summons must set out in such a manner as will enable the defendant to reasonably assess the quantum thereof.

It is only necessary to plead the *facta probanda* (facts to be proved to sustain the cause of action), not the *facta probantia* (the evidence a party will rely on the prove the facts in dispute).

3.4 Can the pleadings be amended? If so, are there any restrictions?

Yes. In terms of the rules a party may amend a pleading or document other than a sworn statement. Notice must be given to the other side of the amendment and the other side is entitled to object to such amendment. An objection to a proposed amendment must state the grounds of the objection. Should the party who intends to amend persist with its amendment, such party will have to bring an application to court for leave to amend.

3.5 Can the pleadings be withdrawn? If so, at what stage and are there any consequences?

Pleadings may be withdrawn at any time before the matter has been set down for trial and thereafter, only by consent of the parties or leave of the court. The party withdrawing the pleadings will have to tender their opponent's party-and-party taxed costs. The withdrawal of pleadings by the plaintiff will be a withdrawal of the action, but not of the claim. The plaintiff may institute the claim again prior to the claim becoming prescribed.

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring counterclaims/ claim or defence of set-off?

A defendant may deliver a plea with or without a counterclaim or an exception with or without an application to strike out averments in the summons, which may be capable of being struck off the pleadings. A defendant must, in the plea, either admit or deny or confess and avoid the material facts alleged in the summons. In High Court actions, every allegation of fact in the summons, which is not denied, shall be deemed to be admitted.

A defendant may file a counterclaim and may plead that any amount of the counterclaim, in the event of a counterclaim being lesser than the amount claimed, be set-off against the claim against the defendant.

4.2 What is the time limit within which the statement of defence has to be served?

The time limit is 20 court days after the defendant has delivered a notice of intention to defend.

4.3 Is there a mechanism in your civil justice system whereby a defendant can pass on or share liability by bringing an action against a third party?

The rules of the court make provision for a third party procedure. Where the defendant is of the view that a third party, not cited as a co-defendant, is obliged to contribute or indemnify the defendant, the defendant may join such third party as a defendant. Further, in the event of any question or issue in an action being substantially the same as a question or issue which has arisen or will arise between the plaintiff and the third party, this will entitle a party to join a third party to the proceedings.

4.4 What happens if the defendant does not defend the claim?

If the defendant does not defend the claim, then the plaintiff may apply for default judgment against the defendant.

4.5 Can the defendant dispute the court's jurisdiction?

Yes. The delivery of a notice of intention to defend is not a waiver of the right of the defendant to object to the jurisdiction of the court.

5 Joinder & Consolidation

5.1 Is there a mechanism in your civil justice system whereby a third party can be joined into ongoing proceedings in appropriate circumstances? If so, what are those circumstances?

See question 4.3 above.

5.2 Does your civil justice system allow for the consolidation of two sets of proceedings in appropriate circumstances? If so, what are those circumstances?

The consolidation of two sets of proceedings is allowed even where the one matter is in a different jurisdiction. Circumstances to be taken into account will be matters where the same parties are in both sets of proceedings and two trials will result in a duplication of costs. Parties and their witnesses may also have to be cross-examined in two separate trials and may be prejudiced. There is also the possibility of having two trials, dealing basically with the same issues, resulting in different judgments. Therefore, circumstances taken into account for consolidation to take place are convenience and the avoidance of the multiplicity of actions.

5.3 Do you have split trials/bifurcation of proceedings?

Yes. Parties may agree to have the merits of a claim determined first before the quantum of a claim is dealt with. Further, if there is a question of law or fact which may conveniently be decided either before any evidence is led or separately from any other question, the parties can agree to have such question determined separately, failing which a party can apply to court for such separation. This process may shorten the proceedings and save costs.

6 Duties & Powers of the Courts

6.1 Is there any particular case allocation system before the civil courts in your jurisdiction? How are cases allocated?

Parties apply for a hearing date from the Registrar. Cases are allocated to a judge on the day that the matter has been set down for a hearing. All matters set down will be called by a senior judge of that Division and with the assistance of the Registrar of the Court, the cases will be allocated to different judges.

6.2 Do the courts in your jurisdiction have any particular case management powers? What interim applications can the parties make? What are the cost consequences?

Judges in some jurisdictions have case management powers. In such cases, a judge will chair a pre-trial meeting and the judge will determine whether a case is ripe for hearing.

Interim or interlocutory applications may be brought, for example, to compel a party to respond to a request for particulars or to make discovery. Each application may have cost consequences for the losing party. In some instances, a court may rule that a trial judge is better placed to determine the costs of the interlocutory application and argument regarding the costs will then stand over to be dealt with during the trial stage.

6.3 What sanctions are the courts in your jurisdiction empowered to impose on a party that disobeys the court's orders or directions?

Where a party fails to comply with the Rules or with a request made or a notice given pursuant thereto, a party may notify the defaulting party that an application will be made to apply for an order that such rule, notice or request be complied with, failing which a further application can be brought for the dismissal of the claim or the striking out of the defence.

In certain instances, failure to adhere to a court order can result in a party being in contempt of court, which may lead to incarceration.

6.4 Do the courts in your jurisdiction have the power to strike out part of a statement of case or dismiss a case entirely? If so, at what stage and in what circumstances?

Yes. Where a pleading is vague and embarrassing or lacks averments which are necessary to sustain a cause of action or defence and a party was given the opportunity to rectify its pleading, but failed or refused to do so, the other party may file an exception to the pleading. If the exception is upheld, the other party will have to amend its pleadings, failing which such party's claim may be dismissed or defence be struck out.

Further, where any pleadings contain averments which are scandalous, vexatious or irrelevant, the opposite party may within the period allowed for any subsequent pleading, apply for the striking out of the matter complained of.

An application to strike out may be accompanied with an application to dismiss the claim or defence simultaneously.

6.5 Can the civil courts in your jurisdiction enter summary judgment?

Yes, a plaintiff may apply for summary judgment after the defendant filed a notice of intention to defend and a court may grant summary judgment in the following circumstances:

- where the claim is based on a liquid document;
- where the claim is for a liquidated amount of money;
- where the claim is for delivery of specified movable property; and
- where the claim is for ejectment,

together with any claim for interest and costs.

6.6 Do the courts in your jurisdiction have any powers to discontinue or stay the proceedings? If so, in what circumstances?

A court may stay the proceedings where the monetary counterclaim of the defendant is higher than the amount of the plaintiff's claim in order to determine the defendant's claim first. Stay of proceedings may also occur pending the outcome of arbitration proceedings.

Where there has been persistent and repeated vexatious proceedings, a court may order the discontinuance of further litigation.

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in your jurisdiction? Is it possible to obtain disclosure pre-action? Are there any classes of documents that do not require disclosure? Are there any special rules concerning the disclosure of electronic documents or acceptable practices for conducting e-disclosure, such a predictive coding?

In South Africa, the discovery process does not include depositions. A party making discovery must make discovery of all relevant documents in its possession within 20 days after receipt of a notice to make discovery. All such documents are listed in a schedule accompanied by an affidavit, confirming that all relevant documents have been discovered.

There are two schedules, one being in respect of documents which are to be provided to the other party and the other schedule, listing documents which are legally privileged.

Discovery is not possible prior to an action being instituted and is only possible after closure of pleadings.

Computer related evidence is regulated by the Electronic Communications and Transactions Act 25 of 2002.

Parties may agree to make discovery by way of e-disclosure and predictive coding. However, a party cannot, in terms of the Rules, be compelled to do so.

7.2 What are the rules on privilege in civil proceedings in your jurisdiction?

In terms of the rules, statements of witnesses taken for the purpose of the proceedings, communications between attorney and client and communications between attorney and counsel will be regarded as privileged documents. Although such privileged documents must be mentioned in the schedule aforesaid, such documents do not have to be made available to the other side. Confidential documents are not necessarily legally privileged.

7.3 What are the rules in your jurisdiction with respect to disclosure by third parties?

Unless a person has been joined as a third party defendant to proceedings, a third party cannot be forced to make discovery. Documents in possession of a third party can only be obtained with the service of a *subpoena duces tecum*.

7.4 What is the court's role in disclosure in civil proceedings in your jurisdiction?

The court does not play a role in the discovery process unless there is a dispute as to whether a party is entitled to further documents or whether a document is indeed legally privileged. A court will then rule as to whether such documents have to be discovered and provided to the other side.

7.5 Are there any restrictions on the use of documents obtained by disclosure in your jurisdiction?

No, there are not.

8 Evidence

8.1 What are the basic rules of evidence in your jurisdiction?

The basic rules of evidence are English law orientated. The Civil Proceedings Evidence Act No 25 of 1965 and the Law of Evidence Act No 45 of 1988 (as amended), and the Constitution govern various aspects of the law of evidence.

8.2 What types of evidence are admissible, which ones are not? What about expert evidence in particular?

Factual evidence which is relevant is admissible. Relevant means that the evidence can put a fact in issue out of dispute or it renders a fact more or less probable. As a general rule, evidence that is inadmissible due to lack of probative value includes hearsay evidence, previous inconsistent statements, character evidence and similar fact evidence. However, there are exceptions to these general rules.

In urgent applications, a party may rely on hearsay evidence in certain circumstances, for example, due to the urgency of the matter, a party could not obtain the evidence of a specific witness.

Unconstitutionally obtained evidence is inadmissible even if it is relevant. However, the exclusionary rule is qualified on the basis that the administration of justice could require such evidence to be admitted.

A party calling an expert as a witness may only do so if a summary of the expert evidence has been provided to the opposing party 10 days prior to the hearing date.

8.3 Are there any particular rules regarding the calling of witnesses of fact? The making of witness statements or depositions?

A factual witness may be called to testify under oath and will be subjected to cross-examination and re-examination. Factual witnesses may not give expert opinion evidence unless such witness is also declared to be an expert witness on that particular subject.

Depositions do not form part of the South African legal system.

Witness statements are not required in trial proceedings.

8.4 Are there any particular rules regarding instructing expert witnesses, preparing expert reports and giving expert evidence in court? Does the expert owe his/her duties to the client or to the court?

Expert witnesses are testifying on behalf of a party but have a duty to the court to be objective and give guidance to the court. A summary of the expert evidence is prepared by the lawyers after consultation with the expert. There are no particular rules regarding instructions to an expert, except as with any other witness, it would be unlawful to instruct an expert not to be truthful.

9 Judgments & Orders

9.1 What different types of judgments and orders are the civil courts in your jurisdiction empowered to issue and in what circumstances?

The different types of judgments and orders are:

- Judgment by default.
- Summary judgment.
- Provisional sentence.
- Orders of a specific nature, for example, to compel a party to comply with the rules.

9.2 What powers do your local courts have to make rulings on damages/interests/costs of the litigation?

Punitive damages do not form part of the South African system. The courts are bound by the rules relating to the quantum of damages, i.e. a party must prove the damages it claims that it has suffered.

Rulings on interest must take into account any agreement between parties as to the interest rate applicable. In the absence of such agreement or in damages claims, the court will grant interest based on the prevailing interest rate as prescribed by legislation.

In terms of the *in duplum* rule, the running of interest stops when the unpaid interest equals the outstanding capital.

Regarding costs, see question 1.5 above.

9.3 How can a domestic/foreign judgment be recognised and enforced?

Domestic judgments are enforced with the attachment of property by way of a warrant/writ of execution.

Regarding foreign judgments, South Africa is a signatory to the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters and has enacted the Enforcement of Foreign Civil Judgments Act, 1988. The Protection of Business Act, 1978 must also be complied with. A foreign judgment can only be enforced in South Africa by an order of a South African Court.

9.4 What are the rules of appeal against a judgment of a civil court of your jurisdiction?

From the Magistrate Court to the High Court there is an automatic right of appeal. In the High Court a party must apply for leave to appeal. Such application will be heard by the judge who handed down the judgment in the first instance to be appealed against. In the event that leave to appeal is refused, the unsuccessful party has the right to apply for leave to appeal by way of petition to the Supreme Court of Appeal. An unsuccessful party may approach the Constitutional Court for leave to appeal.

10 Settlement

10.1 Are there any formal mechanisms in your jurisdiction by which parties are encouraged to settle claims or which facilitate the settlement process?

There is no formal mechanism by which parties are encouraged to settle claims. A settlement agreement signed by all parties, may be made an order of court by consent of all the parties.

II. ALTERNATIVE DISPUTE RESOLUTION

1 General

1.1 What methods of alternative dispute resolution are available and frequently used in your jurisdiction? Arbitration/Mediation/Expert Determination/Tribunals (or other specialist courts)/Ombudsman? (Please provide a brief overview of each available method.)

Mediation and arbitration are popular methods to resolve disputes in South Africa.

Expert determination is also common, especially in construction agreements where a dispute can be resolved within days by referring the dispute to, for example, an engineer or auditor.

Tribunals are established in terms of legislation and various tribunals exist. For example, the National Consumer Tribunal and the Competition Tribunal. Further, there is also the Provincial Consumer Protection Authority which utilises informal procedures to achieve mediation and conciliation of a dispute.

Various legislation also allows for the appointment of an ombudsman in respect of any particular dispute arising out of certain circumstances. Depending on the type of dispute, such dispute may be dealt with by a tribunal or ombudsman.

1.2 What are the laws or rules governing the different methods of alternative dispute resolution?

Arbitration proceedings are subject to the Arbitration Act, 1965.

There are no laws prescribed for mediations and a mediation is not a pre-requisite in terms of the court rules prior to the commencement of proceedings. Certain legislation encourages mediation before approaching a court to resolve any dispute.

Parties may, in terms of a provision in a commercial agreement, be bound to follow a mediation process, as the first step, prior to the commencement of arbitration as a second step in the alternative dispute resolution process.

An agreement to arbitrate must be in writing and the parties may decide which rules will be applicable for the arbitration. It may be the rules of the High Court or rules determined and agreed upon between the parties.

The institutions facilitating mediation and arbitration have their own rules to be followed in the event of a decision being made to appoint a particular institution for purposes of the mediation and/or arbitration.

1.3 Are there any areas of law in your jurisdiction that cannot use Arbitration/Mediation/Expert Determination/Tribunals/Ombudsman as a means of alternative dispute resolution?

Certain areas of the law are excluded from arbitration proceedings. Those are:

- matrimonial matters or any matter incidental to any matrimonial matter; and
- any matter relating to status.

Tribunals and ombudsmen appointed in terms of legislation will be bound by the rules of the specific legislation in terms of which they were appointed to determine whether certain areas of the law have been excluded from their mandate.

1.4 Can local courts provide any assistance to parties that wish to invoke the available methods of alternative dispute resolution? For example, will a court – pre or post the constitution of an arbitral tribunal – issue interim or provisional measures of protection (i.e. holding orders pending the final outcome) in support of arbitration proceedings, will the court force parties to arbitrate when they have so agreed, or will the court order parties to mediate or seek expert determination? Is there anything that is particular to your jurisdiction in this context?

The local courts will only provide assistance to a party where a party who is bound to participate in arbitration proceedings, refuses to do so. A court can stay any litigation proceedings pending the conclusion of mediation/arbitration proceedings where parties have expressly agreed to such procedure.

The court does not have any inherent powers to interfere with mediation and arbitration proceedings or the commencement thereof. For instance, should a party refuse to submit to arbitration, an arbitrator may make an order in such party's absence.

1.5 How binding are the available methods of alternative dispute resolution in nature? For example, are there any rights of appeal from arbitration awards and expert determination decisions, are there any sanctions for refusing to mediate, and do settlement agreements reached at mediation need to be sanctioned by the court? Is there anything that is particular to your jurisdiction in this context?

Mediation rulings are not binding unless the parties agree that same will be binding and enforceable. There are no sanctions for refusing to mediate except that in the event of failure to mediate as the first step, the dispute will automatically be referred to arbitration and all parties are compelled to participate. Settlement agreements reached at mediation, need not be sanctioned by the court but the parties may agree that the settlement agreement be made an order of court.

As indicated above, should a party refuse to submit to arbitration, an arbitrator may make an order in such party's absence. Arbitration awards are binding and, unless the parties have agreed in writing, will not be subject to appeal. Arbitration awards are usually final but can be reviewed on limited grounds.

2 Alternative Dispute Resolution Institutions

2.1 What are the major alternative dispute resolution institutions in your jurisdiction?

The major alternative dispute resolution institutions are:

- Arbitration Foundation of Southern Africa ("AFSA");
- Commission for Conciliation, Mediation and Arbitration ("CCMA");
- Association of Arbitrators ("AOA"); and
- Africa ADR ("AADR").

Pieter Conradie

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Pieter Conradie is an Executive Consultant in our Dispute Resolution practice. Pieter has been the attorney for various large corporations in South Africa representing them in the United States of America, Britain and Europe.

CAREER

Pieter was admitted as an attorney in 1976, after which he joined the Johannesburg Bar, where he practised as an advocate until March 1980 when he joined Hofmeyr (now Cliffe Dekker Hofmeyr).

EXPERIENCE

- Commercial Litigation in the Supreme Court of South Africa, Supreme Court of Appeals and Constitutional Court.
- Arbitrations, mediation, investigations into mining incidents, FCPA (Foreign Corrupt Practices Act), anti-corruption investigations, defamation.

MARKET RECOGNITION

- ***Chambers Global* 2008 to 2016** maintained Pieter's ranking **Band 1** in Dispute Resolution from 2011. Chambers Global 2015 notes Pieter Conradie "*is a very seasoned litigator and arbitrator*". Clients appreciate his commercial approach and the fact that he "*gives tailor-made solutions to complex legal matters*".
- ***The Legal 500 EMEA series* 2010 to 2011** ranks Pieter in Tier 1 for Dispute Resolution. In 2012 to 2016 Pieter is named as one of the recommended lawyers in Dispute Resolution.
- ***Practical Law CompanyPLC Which Lawyer?* 2008 to 2011** endorsed Pieter in Dispute Resolution as a "*general litigator and arbitration practitioner with an international remit, with particular focus on product liability and telecoms*".
- ***Who's Who Legal – The International Who's Who of Business Lawyers* 2007–2014** and ***The International Who's Who of Commercial Litigation and Product Liability Defence Lawyers* 2007–2016** selected Pieter Conradie as being among 336 of the world's leading Litigation and Product Liability Defence lawyers. ***Who's Who Legal – Litigation* 2016** also identified Pieter as an expert.
- ***Expert Guides: Guide to the World's Leading Lawyers* 2008 to 2011** selected Pieter as a pre-eminent practitioner in the fields of Litigation, Product Liability and Emerging Markets.
- ***Best Lawyers International South Africa* (2008–2017)** listed Pieter as a 'best lawyer' in Arbitration and Mediation as well as in Litigation. Pieter was also named Arbitration and Mediation **"*Lawyer of the Year*" 2017**.

Anja Hofmeyr

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Anja Hofmeyr is a Director of our Dispute Resolution practice.

CAREER

Anja began her career with Hofmeyr (now Cliffe Dekker Hofmeyr) in 2002. In 2007 she became a director. Anja specialises in commercial litigation, telecommunications, applications, forensic and regulatory matters.

EXPERIENCE

- Extensive experience in commercial litigation in the telecommunications, energy, chemical, media and tobacco industries.
- Extensive knowledge, including training in the USA regarding defending class action matters.
- Arbitrations, mediation, investigations and representing clients at mining and fatality enquiries.
- Conducted national and international FCPA (Foreign Corrupt Practices Act) and anti-corruption investigations and advised in relation thereto.
- Advised major telecommunications companies on various aspects of regulatory compliance in respect of their business, agreements and licencing issues, as well as regulatory issues in certain African countries.
- Involved in international actions launched in the USA.

MARKET RECOGNITION

- ***The Legal 500 EMEA Series* 2015** lists Anja Hofmeyr as a recommended individual in Dispute Resolution.

PUBLICATIONS

- The International Comparative Legal Guide to: Class & Group Actions 2016, 8th edition.
- International Comparative Legal Guide to Class & Group Actions 2017.

CDH
CLIFFE DEKKER HOFMEYR

Cliffe Dekker Hofmeyr (CDH) is a full service law firm – one of the largest business law firms in South Africa, with more than 350 lawyers and a track record spanning 163 years. We are able to provide experienced legal support and an authentic knowledge-based and cost-effective legal service for clients looking to do business in key markets across Africa. Our Africa practice brings together the resources and expertise of leading business law firms across the continent that have direct experience acting for governments, state agencies and multinational organisations.

This combined experience across the continent produces an extensive African capability. We also partner with other professional disciplines such as audit, business consulting or corporate finance disciplines to provide a seamless and integrated solution for projects that have a multi-disciplinary dimension. We focus on a number of key sectors which are active and thriving in Africa, including mining and minerals, telecommunications, energy, oil and gas, banking and finance, projects and infrastructure, hospitality and leisure and arbitration.

Other titles in the ICLG series include:

- Alternative Investment Funds
- Aviation Law
- Business Crime
- Cartels & Leniency
- Class & Group Actions
- Competition Litigation
- Construction & Engineering Law
- Copyright
- Corporate Governance
- Corporate Immigration
- Corporate Investigations
- Corporate Recovery & Insolvency
- Corporate Tax
- Data Protection
- Employment & Labour Law
- Enforcement of Foreign Judgments
- Environment & Climate Change Law
- Family Law
- Fintech
- Franchise
- Gambling
- Insurance & Reinsurance
- International Arbitration
- Lending & Secured Finance
- Merger Control
- Mergers & Acquisitions
- Mining Law
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- Project Finance
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- Real Estate
- Securitisation
- Shipping Law
- Telecoms, Media & Internet
- Trade Marks
- Vertical Agreements and Dominant Firms

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