



Arbitration v Litigation

WHAT YOU NEED TO KNOW



LAW SOCIETY
OF SOUTH AFRICA



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Purpose of this brochure

This brochure is aimed at briefly comparing the key aspects of arbitration and litigation and to identify the key features that you should consider, where possible, in deciding on a preferred dispute resolution mechanism.

This brochure is not aimed at expressing a preference on either arbitration or litigation. The decision should be made based on the unique contextual considerations. We recommend that you consult a legal practitioner to advise you on a suitable dispute resolution mechanism.

What is arbitration?

Arbitration is a dispute resolution mechanism agreed on by parties, which involves the appointment of one or more arbitrators to preside over and to make a final decision on a dispute between two or more parties – instead of approaching a court of law to resolve the dispute. The Arbitration Act 42 of 1965 (the Arbitration Act) defines an arbitration agreement as 'a written agreement providing for the reference to arbitration of any existing dispute or any future dispute relating to a matter specified in the agreement...'. The arbitration agreement can allow for formal or informal arbitration proceedings.

What is litigation?

Litigation means approaching a court of law to settle a dispute between two or more parties where a judicial officer (judge or magistrate) presides over the matter according to predefined procedures and issues a judgment after having considered the facts, evidence and arguments. Litigation is usually the default option to resolve disputes if the parties have not entered into an arbitration agreement.

Is there always a choice between the two options?

No, it is not always possible for the parties to choose between the two. For example, the Arbitration Act does not allow matrimonial disputes to be referred for arbitration. The law is currently under review. Also, our labour legislation provides for specific conciliation and arbitration proceedings with reference to labour disputes.



ARBITRATION V LITIGATION

If I agree to arbitration does it mean I cannot also go to court?

The general principle is that parties who have agreed on arbitration, cannot approach the courts to resolve their disputes. However, even when parties have agreed to resolve a dispute through arbitration, the courts may have to be approached to enforce an arbitration award as arbitrators do not have powers to enforce an arbitration award. Also, a party may for example approach the courts to determine the validity of an arbitration agreement or to review an arbitration award made by the arbitrator.

ARBITRATION	LITIGATION
THE PROCEDURES	
The arbitration procedures are usually contained within the underlying agreement between the parties. This allows for significant flexibility. Some procedures are more detailed compared to others. This must, appropriately, be read with the Arbitration Act which empowers, for example, the arbitrator(s) 'to examine the parties appearing to give evidence in relation to the matters in dispute and require them to produce before the tribunal all books, documents or things within their possession or power'. Section 14(2) of the Arbitration Act empowers the arbitrator, amongst other, to determine the time period for the delivery by the parties of pleadings, discovery, calling of witnesses, including expert witnesses, agreement (if any) on the issues in dispute, etcetera.	Litigation involves detailed court rules, which provide for detailed steps aimed at allowing the parties to present their facts, evidence and arguments before the court, including: The initial issuing of documents, the forms to be used, the timeframes for the filing of the court documents; inspection and production of documents, etcetera. Compliance with rules (or the lack thereof) may lead to further procedural disputes.

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THE PRESIDING OFFICER	
The parties may in the arbitration agreement decide on the identity of the arbitrator or if they cannot agree on the identity, which is more likely to happen, identify which independent body must appoint or nominate the arbitrator and what requirements, if any, the arbitrator must comply with. The arbitration agreement may, for example, state that only an attorney with at least ten years' experience in the field of engineering law is eligible for appointment or nomination.	The parties cannot agree to the appointment of a judicial officer, the court appoints the judicial officer. The eligibility criteria is embedded with the selection process of judicial officers. The Constitutional Court has confirmed that: 'Our judicial appointment processes are able to attract and result in the selection of the best possible candidates to serve as judges.'
THE TIMEFRAME OF PROCEEDINGS	
The parties may in the arbitration agreement agree to a timeframe for the arbitration. This may not always be possible as the appointment and availability of the arbitrator will be dependent upon the factors prevailing at the time of the dispute. Usually, arbitration proceedings are finalised faster than litigation.	Litigation is usually a longer process, because of the detailed procedural requirements. The hearing of a matter, once ready to be heard in court, depends on the roll of the court and the availability of the presiding officer. In exceptional instances, a party may approach the court on an urgent basis.
THE COSTS OF PROCEEDINGS	
The cost of arbitration usually involves the arbitrator's fee and related costs, namely, the costs of experts, legal practitioners the venue and catering, where applicable. The parties can agree on how the costs of the arbitration proceedings will be settled. The arbitrator's fees are usually agreed upon between the arbitrator and the parties. The Arbitration Act provides that, unless the arbitration agreement otherwise provides, the award of costs shall be in the discretion of the arbitrator if he or she awards costs.	The litigation costs usually involve the payment of fees for advocates, attorneys, the sheriff and additional disbursements. The parties are not responsible for the payment of the judicial officer, the preparation of the judgment or the venue. The judicial officer has the discretion to grant a costs order against the unsuccessful party.

ARBITRATION	LITIGATION
THE PUBLIC NATURE OF PROCEEDINGS	
Arbitration proceedings are ordinarily dealt with on a private basis and are not disclosed to the general public.	The public usually can attend court proceedings and judgments can generally be accessed by the public. Judicial officers may, in certain instances, allow for the non-publication of the identities of parties and other persons.
THE OUTCOMES OF PROCEEDINGS	
Arbitration proceedings are not subject to appeal but are in limited instances subject to review. This is a higher standard compared to litigation and generally means that you cannot just review the arbitration award because you disagree with it.	Litigation caters for an appeal process. Judgments in the lower courts may be overturned on appeal.

Views of practitioners

We have asked legal practitioners who are respectively involved in arbitration and litigation for the views on the different processes.

• Affordability

A litigating practitioner expressed the view that arbitration is generally more expensive compared to litigation. This is because the arbitrator is likely to be an expert in his or her field who will require appropriate payment. The ability of the parties to afford the arbitration proceedings is therefore an important consideration.

An arbitration practitioner commented that fee guidelines should also apply to arbitrators, irrespective of their expertise. An arbitrator is usually appointed by the parties or, if they cannot agree, by an independent body. In either case, the parties and the arbitrator will have to agree to the fee payable to the arbitrator.

• Participation

The arbitration process can only be followed if the parties

agree to such process. An unwilling party cannot be forced to participate in the arbitration process, unless the law provides for such arbitration, for example, labour disputes.

Litigation is better suited to drag an unwilling party into court to determine a dispute.

• Expertise

Depending on the agreement, the appointed arbitrator, may not necessarily be an expert in a particular field, but can potentially call an expert as a witness for an agreed fee, to deal with the technical aspects of the matter. The arbitration agreement may lay down the eligibility criteria for the arbitrator.

Judicial officers undergo a rigorous selection and appointment process to ensure that they exceed minimum standards of competency, diligence and ethics. The parties cannot decide which judicial officer will preside over the dispute.

• Duration

The big advantage of arbitration is the speed at which a matter can be finalised. The arbitrator's experience in time management the field of law is therefore important in minimising delays, which can in turn increase costs.

South African courts have, in terms of the Rules of Court, implemented judicial case management with the aim of accelerating the litigation process.



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