

## Arbitration Rules

### 1) Definitions

In these Rules, the following words and phrases shall bear the meanings ascribed to them below:

- a) 'The claimant' is the party initiating the recourse to arbitration;
- b) 'The respondent' is the other party to the arbitration and "the respondents" are the other parties to the arbitration if there are several parties to the arbitration;
- c) 'The Institute' means the South African Institute of Intellectual Property Law;
- d) 'The Code of Ethics' means the Code of Ethics published by the South African Institute of Intellectual Property Law as amended from time to time;
- e) 'The Rules' means Arbitration Rules published by the South African Institute of Intellectual Property Law as amended from time to time and any schedule thereto;
- f) 'day' or 'days' means any day other than a Saturday, Sunday or public holiday in the Republic of South Africa;
- g) 'transmit' means the delivery of a document to the Institute or any other party by hand, registered post, courier, facsimile transmission or electronic transfer; provided that, if the document is delivered by facsimile transmission or electronic transfer, the original document [or a copy thereof] is delivered to the Institute or such other party, as applicable, by hand, courier or registered post within ten days of the facsimile transmission or electronic transfer;

### 2) The right of the Institute to delegate its powers in terms of the Rules and to amend the Rules

- a) The Institute shall have the right to delegate any of the powers held by it in terms of these Rules to any person or body of persons, whom it considers suitable, whenever it considers such delegation appropriate. Such delegation may be on such terms as the Institute considers appropriate and may extend to all or any part of the powers held by the Institute in terms of these Rules.
- b) These Rules may be added to or otherwise amended in any way by resolution of the Institute and, as amended and after due notice of the amendment has been given to all those persons on the list of accredited arbitrators

for the Institute, shall become binding upon those persons in its amended form.

### **3) The Commencement of an Arbitration**

#### **3(1) Notice of Arbitration and the Claim**

- a) A claimant shall transmit a notice of arbitration to the Institute and to each respondent.**
- b) The notice of arbitration shall contain:**
  - i) the names, addresses and telephone, telefax, email or other contact details of the parties to the dispute and of the representative of the party filing the notice of arbitration;**
  - ii) a copy of the arbitration agreement or clause committing the parties to arbitration in accordance with the Rules;**
  - iii) a statement in writing that a dispute exists between the parties, the nature of that dispute, the points at issue between the parties in the dispute, the nature of the relief sought by the claimant and the amount of the claim, if any, together with a request to the Institute to refer the dispute to arbitration by an arbitrator in terms of these Rules; and**
  - iv) a founding affidavit or affidavits as to the facts supporting the claimant's case together with such documents as may be necessary to prove the claimant's case.**
- c) The arbitration shall be deemed to have commenced on the date that the notice of arbitration has been submitted to the Institute.**

#### **3(2) The Respondent's Answer to the Notice of Arbitration**

- a) Within 15 days of receiving the claimant's notice of arbitration, each respondent shall transmit to the Institute and the claimant:**
  - i) a reply in writing to the claimant's notice of arbitration, setting out the respondent's reply to the items in the notice of arbitration (the "statement of defence");**
  - ii) any plea to the jurisdiction of the Tribunal; and**
  - iii) any claim of set-off or claim in reconvention.**
- b) The statement of defence and any claim of set-off or in reconvention shall comply, mutatis mutandis, with the particulars required by paragraphs 3.1 ii) and iv).**
- c) A respondent must plead to the jurisdiction of the Tribunal at the time of filing of its statement of defence, failing which such plea shall be barred in the subsequent arbitration proceedings or before any court, save that the arbitrator may, on good cause shown, admit such a plea at a later stage in the proceedings.**
- d) A plea that the Tribunal is exceeding the scope of its authority must be**

taken as soon as possible after the matter alleged to be beyond the scope of the Tribunal has arisen in the proceedings.

### **3(3) The Claimant's Reply to the Answering Affidavit, a Claim for Set-off, Claim in Reconvention or Special Plea**

Within 10 days of receiving a respondent's answering affidavit, claim for set-off, claim in reconvention or any special plea, the claimant shall transmit to the Institute and to each respondent an affidavit setting out its reply to such answer, claims or special plea.

### **3(4) Default by any party**

Where a party to an arbitration is required by these rules to make any answer or reply, as set out in paragraphs 3.2 & 3.3 above, and fails to do so within the period specified, any other party may, on the expiry of that period, apply to the arbitrator, on notice to the defaulting party and any other parties to the arbitration, for the matter to be set down for hearing and for the arbitration to proceed by reason of that default and without that answer or reply.

### **3(5) Amendments to Claims or Defences**

- a) Unless the parties have otherwise agreed, any party may, on notice to each other party and with the consent of the arbitrator, amend or supplement its claim, defence, claim for set-off or in reconvention or any reply to any such claim, at any time after those documents have been filed and during the hearing of the arbitration.
- b) The arbitrator shall not consent to any such amendment or supplementation if he or she considers it to be inappropriate having regard to its nature, the delay in presentation or prejudice to any other party.

## **4) The Composition and Establishment of the Arbitration Tribunal**

### **4(1) The appointment of an arbitrator**

- a) The Tribunal shall consist of a sole arbitrator, who shall be appointed by agreement between by the parties.
- b) If for any reason the arbitrator agreed upon by the parties cannot or does not accept an invitation to arbitrate, then the parties may agree on another arbitrator.
- c) If, within 10 days of the notice of arbitration, the parties have failed to agree on the arbitrator or the arbitrator has not accepted the invitation to arbitrate, then any party may ask the President of the Institute (the "President") to submit to each party an identical list of names of potential arbitrators. Each of the potential arbitrators suggested by the President shall be an arbitrator accredited by the Institute.
- d) Each party shall have 5 days from the date on which that party receives the list referred to in paragraph c) to cross off from that list any names to which that party objects, to number the remaining names in order of preference and return the list to the President. If a party does not return the list within the time specified, all of the persons named therein shall be deemed acceptable as potential arbitrators.

- f) The President shall then, having regard to the designated order of preference of the parties in the lists returned to him, suggest to them in writing the name of an arbitrator from among the potential arbitrators who have been approved on the returned lists.
- g) If the parties fail to agree on the President's written suggestion referred to in paragraph e) above; or if the suggested arbitrator refuses or is unable to act; or if, for any reason, an appointment cannot be made from the submitted lists, the President shall appoint an arbitrator, without the submission of any further lists but with regard to the lists submitted in terms of paragraph d) above and taking into account the technical nature and complexity of the dispute to be determined.
- h) Notwithstanding any other provision of these Rules, should the Institute fail, refuse or be unable to implement the provisions of this Rule and the parties are unable to agree on an arbitrator, then any party may apply to court for the appointment of an arbitrator in terms of section 12(2) of the Arbitration Act, 1965, as amended.
- i) The prospective arbitrator, however appointed, shall give notice, in writing, to the parties and the Institute of his or her acceptance of the appointment as arbitrator.
- j) Upon receipt the arbitrator's acceptance of his or her appointment, the Institute shall send the arbitrator the relevant file of papers for the arbitration.

#### **4(2) The duties of an arbitrator**

- a) An arbitrator, by accepting appointment as such, binds himself or herself to abide by the Rules and the Code of Ethics and in particular, those provisions relating to:
  - i) his or her impartiality, independence and the undertaking to make available sufficient time to enable the arbitration to be conducted and concluded expeditiously;
  - ii) ensuring that all parties are treated equally and fairly and that each party is given a fair opportunity to present its case; and
  - iii) that the arbitration proceedings are conducted and concluded expeditiously and within the provisions of these Rules.
- b) An arbitrator shall, wherever reasonably possible, make his or her award within 60 days from the date of the commencement of the arbitration, unless the parties have agreed otherwise in writing.
- c) An arbitrator shall decide the substance of the dispute between the parties in accordance with the law chosen by the parties. In the absence of agreement between the parties on this subject, the applicable substantive law shall be that of the place of the arbitration.

#### **4(3) Challenges to an arbitrator**

- a) Subject to clause (b) below, any party to an arbitration may challenge the appointment of the arbitrator, on notice in writing to the Institute and every

other party to the arbitration, if that party believes that circumstances exist which give rise to a justifiable doubt as to the arbitrator's impartiality or independence.

- b) Where a party has concurred in the appointment of an arbitrator, it may only challenge that arbitrator for reasons of which it became aware after the appointment had been made.
- c) The notice of challenge must be filed within seven days of being notified of the arbitrator's appointment or becoming aware of the circumstances which give rise to the challenge and shall contain detailed reasons for the challenge. Notice of such challenge must be given to the Institute and to every party to the arbitration
- d) Every other party to the arbitration shall have the right to reply to the notice of challenge and to oppose the challenge.
- e) A party wishing to oppose the challenge must, within seven days of receipt of the notice of challenge by it, file with the Institute a notice of opposition to the challenge giving reasons for the opposition and serve copies of such notice on the Institute and every other party to the arbitration.
- f) Unless the challenge is withdrawn or the arbitrator voluntarily resigns, the Institute shall determine the challenge as soon as possible. Such decision shall be final and the Institute shall not be required to give reasons for its decision.
- g) Pending the determination of the challenge, the Institute shall direct whether the arbitration proceedings will continue or be suspended pending the determination of the challenge.

#### **4(4) The Replacement of an Arbitrator**

- a) Whenever it is necessary to replace or substitute an arbitrator, the new arbitrator shall be appointed by the same procedure that was applicable to the arbitrator being replaced, save that the 10-day period referred to in paragraph 4(1)(c) above shall commence upon the date upon which the existing arbitrator ceases to act as arbitrator of the dispute.
- b) Pending the replacement of an arbitrator the arbitration proceedings shall be suspended.
- c) After the appointment of a replacement arbitrator, the replacement arbitrator shall begin the arbitration de novo, unless agreed otherwise by the parties in writing.

#### **4(5) The release of an arbitrator**

- a) An arbitrator shall be released from his or her appointment as arbitrator upon being replaced or substituted in terms of these Rules or on finally determining the dispute between the parties for which he or she was appointed arbitrator.
- b) Subject to paragraph (a) above, the Institute may only release an arbitrator from his or her appointment as arbitrator before final determination of the dispute with the written consent of the parties.

## 5) The Arbitration Hearing

### 5(1) Preparatory Conference

Upon receipt of the Institute's file of papers for the arbitration, the arbitrator may call the parties to a preparatory conference for the purpose of clarifying and settling the issues to be determined in the arbitration and for organising and scheduling the proceedings. At that meeting the arbitrator, with the consent of the parties, may investigate the possibility of settling the dispute or any part of the dispute between the parties that is before him or her.

### 5(2) The Hearing

- h) The parties may be represented or assisted through all stages of the arbitration by persons of their own choice.
- i) The parties shall supply the Institute and the arbitrator with the names, addresses and contact details of their representatives or the persons assisting them.
- j) Each party shall ensure that its representative has sufficient time available to enable the hearing of the arbitration to proceed expeditiously.
- k) Unless the parties have agreed otherwise or the arbitrator directs to the contrary either on his or her own motion or on good cause shown, the hearing of the arbitration shall:
  - i) be conducted on the basis of the documents and other materials filed by the parties and the oral argument by their representatives;
  - ii) commence within 30 days of the receipt of the statement of defence or, if there is a claim for set-off or in reconvention, then within 30 days of receipt of the reply to such claim and be closed within 90 days of receipt of such statement of defence or reply, as applicable; and
  - iii) be completed within 3 days.
- l) If the arbitration has not commenced or the proceedings not been closed within the periods set out above the arbitrator shall send to the Institute, with a copy to each party, a report on the status of the arbitration and he or she shall similarly send further reports at the end of each 30 days until the proceedings have been closed.

### 5(3) The general powers of the Arbitrator

- a) Subject to the provisions of these Rules, the Code of Ethics and the rules of natural justice, the arbitrator shall conduct the arbitration in such manner as he or she considers appropriate.
- b) Subject to any agreement otherwise between the parties and to consultation with the parties, the arbitrator may conduct the proceedings at any place that he or she considers appropriate.
- c) The arbitrator shall have the power, on his or her own initiative and with the agreement of the parties, or, in exceptional circumstances, without the agreement of the parties but after hearing the parties, to extend the

periods of time provided for in these Rules.

- d) **The arbitrator shall have the power, on good cause shown, to condone any party's non-compliance with any time periods set out in these Rules or any further or other time periods determined by the arbitrator or by agreement between the Parties.**
- e) **If the arbitrator considers it necessary for the proper determination of the dispute before him or her, he or she may direct that, on a specified issue or issues, a party, deponent or other person appear before him or her to give oral evidence on the issue or issues and to be examined and cross-examined on that evidence.**
- f) **The arbitrator shall determine the admissibility, relevance, materiality and weight of any evidence.**
- g) **The arbitrator shall have the power to hear and determine, either as a preliminary question or as part of his or her final award, objections to the jurisdiction of the arbitrator, pleas that he or she is exceeding his or her jurisdiction, or as to the existence or validity of any contract of which the arbitration agreement forms part or to which it relates.**
- h) **The arbitrator may, at any time during the arbitration and on his or her own initiative, order a party to discover under oath and produce such documents and such other evidence, as he or she considers necessary or appropriate for him or her to make an award.**
- i) **The arbitrator shall make any monetary award in the currency agreed by the parties. In the absence of agreement, the award may be expressed in any currency that the arbitrator considers appropriate.**
- j) **The arbitrator may make an award for the payment of either simple or compound interest, at a rate that he or she considers appropriate, on any monetary award made by him or her and shall be free to determine the terms upon and the period for which and in which the interest shall be paid.**
- k) **The arbitrator may, with the consent of the parties, explore the possibility of settlement with them, at any time considered by him or her to be appropriate.**
- l) **Should the arbitrator act as mediator between the parties at any time before finally determining the dispute or prior to being released as arbitrator, then the arbitrator shall not meet with the parties separately but shall mediate the dispute in the presence of all of the parties or their representatives.**
- m) **If, before the making of the award, the parties reach settlement of their dispute, the arbitrator may, with the consent of the parties and without giving reasons, record the settlement in the form of a consent award.**
- n) **In making any award, an arbitrator may make such award as to fees and costs as are permitted in terms of these Rules and as may be considered by him or her to be appropriate.**

#### **5(4) Default**

- a) If the claimant, without showing good cause, fails to submit its notice of arbitration in the form and manner required by these Rules, the Institute shall inform the claimant of its failure but shall not be required to take any further action in respect of the notice of arbitration until the failure has been rectified.**
- b) If a respondent, without showing good cause, fails to submit that respondent's statement of defence in the form and manner required by these Rules, the Institute shall inform the claimant of that respondent's failure and the arbitrator may nevertheless proceed with the arbitration and make his or her award, but only after notifying that party of the arbitrator's intention to proceed with the arbitration and after giving that party a reasonable opportunity to be heard.**
- c) If any party fails, without good cause, to present its case within the period of time set by the arbitrator for the presentation of such case, the arbitrator may nevertheless proceed with the arbitration and make his or her award, but only after notifying that party of the arbitrator's intention to proceed with the arbitration and after giving that party a reasonable opportunity to be heard.**
- d) If a party, without good cause, fails to comply with any provision of these Rules or any direction given to it by the arbitrator, the arbitrator may draw any inference from that failure as the arbitrator determines is appropriate.**

#### **5(5) Waiver**

**A party, which knows that any provision of, or requirement under, these Rules, or any direction given by the arbitrator, has not been complied with and permits the arbitration to proceed without objecting to the non-compliance, shall be deemed to have waived its right to object to that non-compliance.**

#### **5(6) Closure of the proceedings**

- a) The arbitrator shall declare the proceedings closed when he or she is satisfied that the parties have had adequate opportunity to present their submissions.**
- b) The arbitrator may, in exceptional circumstances, either on his or her own initiative or on application by a party to the proceedings, and before the award has been made, re-open any proceedings, which have been declared to be closed.**

#### **5(7) Termination of the arbitration**

**If, before the award is made, the continuation of the arbitration becomes unnecessary or impossible for any reason whatsoever, the arbitrator shall, either with the consent of the parties or in the absence of any party showing reasonable grounds for not doing so, terminate the arbitration and issue an order to that effect.**

### **6) The Award**

- a) An arbitrator may make preliminary, interim, interlocutory, partial, or final**

awards.

- b) Any award shall be in writing and signed by the arbitrator and shall state the date on which and the place at which the award was made.
- c) Any award shall state the reasons on which it is based unless the parties have agreed in writing that no reasons need be stated.
- d) The arbitrator shall send his or her award to the Institute together with sufficient signed copies for each party to be supplied with one such copy and the Institute shall formally send a signed copy to each party.
- e) The Institute shall make and certify such additional copies of the award as may be requested by any party. The Institute shall be entitled to recover from that party the cost of making and certifying such copies.
- f) The arbitrator shall render his or her final award within 21 days of the close of the arbitration hearing, unless the parties agree otherwise in writing.

## 6) Awards as to costs

### 6(1) The arbitration costs

Before the commencement of the hearing of the arbitration, the arbitrator shall:

- a) fix the estimated daily costs of the arbitration, which costs shall include:
  - i) the arbitrator's fees together with his or her personal travel, accommodation and other necessary personal expenses; and
  - ii) all other expenses necessary to the arbitrator for conduct of the arbitration, such as the cost of meeting and hearing facilities; and
- b) direct the parties to pay to the Institute in advance of the hearing, those estimated daily costs in such proportion between the parties as may be agreed between them or, failing agreement, as directed by the arbitrator, the total of such estimated costs to cover the estimated period of the arbitration, or on such other basis as may be agreed between the arbitrator and the parties or, failing such agreement, as directed by the arbitrator.

### 6(2) Costs between the parties

In his or her award, the arbitrator may, subject to any agreement to the contrary between the parties and in the light of the circumstances and result of the arbitration, award or apportion to any party, on such scale as may be appropriate, the whole or part of the costs incurred by that party against another party in presenting its case, including such fees as have been incurred for representation and in presentation of its evidence.

### 6(3) Correction of the award and additional awards

- a) Any party may, within 10 days of its receipt of the award, by notice to the arbitrator and the every other party, with a copy to the Institute, request the arbitrator to correct any clerical or typographical errors or error in computation in his or her award. In the absence of objection from any party, the arbitrator shall, within 14 days of the request, and if he considers the request to be justified, make such correction claimed.

- b) Any party objecting to the making of the correction claimed must notify the arbitrator of its objection, giving reasons, within 3 days of receipt of notice of request for correction.
- c) The arbitrator shall take into account the objection and the reasons therefore before making any decision whether or not to make the correction claimed and thereafter he shall make his or her decision as to whether the award should be amended within 10 days.
- d) If, after considering the objection, the arbitrator makes the correction claimed, he or she shall thereafter immediately correct his or her award by a separate memorandum and that memorandum shall then become part of the award.
- e) The Institute may, on its own initiative within 10 days of the making of the award, after notice to the arbitrator and the parties and following, *mutatis mutandis*, the procedure for objections set out in paragraphs (a) to (d) above, similarly correct the award.
- f) Any party, claiming that an award does not deal with claims presented in and part of the arbitration proceedings, may within 10 days of the making of the award, on notice to the Institute and the every other party to the arbitration, request the arbitrator to make an additional award incorporating those claims.
- g) In proceeding with this request, the arbitrator shall take into account and follow, *mutatis mutandis*, provisions of paragraphs (a) to (d) above

#### 6(4) The effect of the award

By agreeing to arbitrate under these Rules, the parties:

- a) waive any right to appeal or other right of recourse to a court of law or other judicial authority, insofar as such waiver is valid in terms of law; and
- b) undertake to give effect to the award without delay.

#### 8) Confidentiality

- a) Except to the extent necessary in connection with a court challenge to the arbitration or an action for the enforcement of the award, no information concerning the arbitration may be unilaterally disclosed by a party to a third party unless it is required to do so by a competent regulatory body, and then only:
  - i) by disclosing what is legally required; and,
  - ii) by furnishing the arbitrator and the other party with details of the disclosure and an explanation for it.
- b) Notwithstanding paragraph a) a party may disclose to a third party the names of the party to the arbitration and the relief requested for the purpose of satisfying any obligation of good faith or candour owed to that third party.
- c) Any documents or evidence given by a party or witness in the arbitration

shall be treated as confidential, and to the extent that such evidence describes information that is not in the public domain, shall not be used or disclosed to any third party for any purpose by a party whose access to that information arises exclusively as a result of its participation in the arbitration, without the consent of the parties or order of a court having jurisdiction.

- d) A witness called by a party shall not be considered as a third party. To the extent that a witness is given access to evidence or other information in order to prepare the witness' testimony, the party calling such witness shall be responsible for the maintenance by that witness of the same degree of confidentiality as that required of that party.
- e) The award shall be treated as confidential by the parties and may only be disclosed to a third party if and to the extent that:
  - i) the parties consent;
  - ii) it falls into the public domain as a result of an action before a national court or other competent authority;
  - iii) it must be disclosed in order to comply with a legal requirement imposed on a party or in order to establish or protect a parties legal rights against a third party.
- f) Except in the case of aggregate statistical data published by the Institute, which does not enable the parties or the particular circumstances of the dispute to be identified, the Institute and the arbitrator shall maintain the confidentiality of the arbitration, the award and, to the extent that they describe information that is not in the public domain, any documentary or other evidence disclosed in the arbitration, unless required to do so in a court action relating to the award, or otherwise required by law.

**9) Exclusion of Liability**

Except in respect of deliberate wrongdoing, neither the Institute nor the arbitrator shall be liable to a party for any act or omission in connection with the arbitration.

**10) Waiver of Defamation**

The parties and, by accepting his or her appointment, the arbitrator agree that no statement or comment by them, whether written or oral, made or used by them or their representatives in preparation for or in the course of the arbitration shall be relied upon to found or maintain any action for defamation or related complaint and this undertaking by the parties and the arbitrator may be pleaded as a bar to any such action.

**11) Fees**

- a) The Institute shall charge such fees for the part played by it before and in an arbitration as may be fixed from time to time by the Institute and published as a Schedule to these Rules.
- b) The Institute shall not be obliged to take any action in respect of an arbitration until the requisite fees for that arbitration have been paid to it by the parties.

- c) **The arbitrator shall not be obliged to render his or her final award until the parties have settled his or her fee.**
- d) **The fees of the arbitrator and the manner and timing of the payment of those fees shall be fixed by the Institute after consultation with and the agreement of the arbitrator.**

**12) The Arbitration Act**

**Subject to the other provisions of these Rules, every arbitration shall be held in accordance with the provisions of the Arbitration Act, 1965, as amended.**

**13) Urgent Interim Relief**

**Nothing in these Rules shall preclude any party to an arbitration from seeking any urgent interim relief from any court of competent jurisdiction**