

DISPUTES

Mindset shift needed in arbitration

4 July 2018 5 min read

Speed, cost-efficiency and the ability to tailor the process to fit the parameters of the dispute are among the most often-cited reasons why parties choose to [arbitrate](#). In South Africa, however, these objectives are frequently not achieved. Parties who have been promised a faster and more efficient procedure than they would get in the High Court nevertheless find themselves mired in a wasteful, drawn-out process that closely resembles litigation. This is all the more frustrating because it is unnecessary. South Africa now has a modern international arbitration statute incorporating the UNCITRAL Model Law and reflecting best international practice. This includes giving the arbitrator wide powers to determine the procedure to be followed when the parties have not agreed on it. The only strictures placed on the arbitrator are that he treat the parties with equality and afford each party a full opportunity of presenting its case. Neither does the 1965 Arbitration Act, which continues to govern domestic arbitration, impose any formal procedural requirements; by implication, the arbitrator is at liberty to determine an appropriate procedure in the absence of the parties' agreement, subject only to the requirements of natural justice. Thus, South African arbitrators have always had the statutory green-light to mold the proceedings in accordance with the needs of the specific case. But, this power is often not used. Commercial arbitrators in SA often revert by default to the familiar forms and processes of litigation.

A mindset shift is needed to unleash the true potential of arbitration. Lawyers and parties from modern arbitral jurisdictions will expect proceedings in South Africa to conform to international best practice, as our governing statute now does. Arbitrators and practitioners must consciously avoid trying to impose an ill-fitting litigation paradigm onto arbitration proceedings, and start taking advantage of the procedural flexibility that arbitration offers. Some of the practical ways to achieve this are:

- **Witness statements:** streamline the process by making the parties' factual evidence known to each other in advance, enabling them to prepare for cross-examination prior to the hearing. It then makes no sense to retain oral examination-in-chief, where the contents of the witness statement are simply repeated. Best practice is for the witness simply to confirm the contents of the statement under oath, and then proceed directly into cross-examination. An opportunity is sometimes allowed for the witness to clarify or elaborate upon aspects of the statement; but even this ought to be unnecessary if the statement is clear and exhaustive. In the event that a party wishes to supplement its witness' testimony after statements have been filed but prior to the hearing, this can be done by way of a supplementary statement.
- **Limiting cross-examination:** South African lawyers generally recoil from the suggestion of any attempt to curtail the right to cross-examination, seeing it as an inviolable pillar of a fair hearing. But there is no right to indefinite cross-examination, and best international practice is to impose time limits, ensuring that counsel do not waste time on irrelevant material, and enabling counsel to plan to cover all the ground that they need to cover in advance.
- **Witness time-tables:** the arbitrator can ensure the efficient use of limited hearing time by allocating a specific amount of time for each witness – the "chess clock" method. The amount of time to be allocated to each witness can be determined at a pre-arbitration meeting prior to the hearing, when the arbitrator has the advantage of having received factual witness statements and is able to take a view as to the relative importance and volume of each witness' testimony.
- **Focused discovery:** best practice in international arbitration tends away from the "carpet-bombing" litigation approach to disclosure, preferring instead to require each party to submit the documents upon which it relies, and then affording the parties the opportunity to request from each other the disclosure of specified further documents or categories of

documents, with the arbitrator ruling on the request if the liability to disclose the requested further documents is disputed.

- **Curtailling oral submissions:** time limits might be imposed upon counsel's opening and closing submissions; or, oral closing submissions might be dispensed with altogether and the arbitrator might direct that written arguments be submitted after the hearing has concluded.
- **Dispensing with a hearing** in appropriate cases: there is no absolute requirement for a hearing, unless the parties have agreed to it or one party requests it. On the majority of commercial cases, a hearing will be necessary to test the parties' evidence and resolve factual disputes. But in cases where there are no material disputes of fact, or where these are few or simple and can be resolved on the papers, the arbitrator might decide to proceed on a documents-only basis.

In short, South African arbitrators and practitioners need to become comfortable wielding the various tools and methods at their disposal to tailor the procedure for maximum efficiency and to suit the needs of the specific matter. Merely having a modern statute on the books is not enough; only by consciously releasing ourselves from the shackles of litigation-paradigm thinking will we be able to tap into arbitration's true potential and give rise to a vibrant and booming industry that will attract foreign entities to conduct their international arbitrations here, turning South Africa into the regional arbitration hub that it ought to be.



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