14 OCTOBER 2021

GUIDELINE FOR ARBITRATIONS

[CONCEPT AGREEMENT WITH DESCRIPTION OF ARBITRATOR'S POWERS]

1. The purpose of this guideline is to describe in general terms the recommended approach to arbitrations involving matters relating to procedures and remedies available in terms of the Admiralty Jurisdiction Regulation Act, 105 of 1983 ("the AJRA"). This guideline, in particular, relates to the powers which may be given to an arbitrator appointed by the parties to make an award setting aside an arrest or deemed arrest or an attachment or deemed attachment of maritime property.

2. NOTE: If the envisaged arbitration is an international commercial arbitration as defined in the International Arbitration Act 15 of 2017 and, more particularly, in Article 1(3) of the Model Law, Schedule 1 to the said Act, then the provisions of the International Arbitration Act that apply compulsorily will apply notwithstanding the terms of any arbitration agreement. If the arbitration is not an international commercial arbitration, then the provisions of the Arbitration Act 42 of 1965 will apply. Arbitration agreements should therefore be formulated with the aforegoing legislation in mind.

   There are provisions of the Model Law governing international commercial arbitrations by the International Arbitration Act which are rendered applicable unless the parties agree otherwise. These provisions include Article 3 (Receipt of written communications) and the interim measures set out in Articles 17A to 17G. If the parties do not wish any of the provisions to apply this should be expressly provided for in the arbitration agreement. If the arbitration is not an international commercial arbitration, then various powers are given to the arbitration tribunal in sections 14 and 15 of the 1965 Arbitration Act. Section 16 provides a mechanism for the subpoena of witnesses, section 17 deals with the recording of evidence and sections 18

and 19 provide for the reference of particular points to an umpire. Section 20 provides for the reference of points of law to the court or to counsel for an opinion. Again, if the parties do not wish for any of these provisions to apply this should be expressly provided for in the arbitration agreement.

3. The intention is that the arbitrator will apply the law and exercise the powers afforded to the arbitrator in a way that mirrors the powers of a court exercising its admiralty jurisdiction would. The objective is both:

3.1 to avoid the delays in obtaining hearings and rulings as may occur when these matters are dealt with by the courts; and

3.2 whilst alleviating pressure on the courts, to ensure the appointment of a decision-maker with the requisite experience and knowledge of maritime law and procedure in terms of the AJRA.

4. Although not necessary, consideration may be given to obtaining an order from the High Court officially referring the issue for arbitration in terms of section 5(2)(e) of the AJRA.

5. As indicated above, whilst the parties are free to agree otherwise, the general objective is to replicate the court process, but with the benefits of convenience and speed which an arbitration procedure can provide.

6. There, however, are certain powers given to a court in section 5(2) and elsewhere in the AJRA which an arbitrator will not be able to exercise. Such powers include ordering a party to furnish security for a claim or costs, and the power to order inspection of property. An arbitrator clearly also cannot have the power to direct that an arrest or attachment, effected pursuant to a court order or a direction by the Registrar be set aside. The concept agreement has been drafted with this in mind. So, for example, the arbitrator

is not given the power to direct that an arrest or attachment be set aside. The arbitrator has been given the power to direct, when finding that an arrest or attachment ought to be set aside, to direct that the unsuccessful claimant issue a warrant of release. If the unsuccessful claimant refuses to do this a court order can be sought enforcing the parties' agreement.

7. These guidelines deal specifically with the position where there is an existing arrest (*in rem* or in terms of section 5(3) of the AJRA) or an attachment (or deemed arrest or attachment) and an application is made to set aside that arrest or attachment.

8. Unless the parties agree the contrary in their arbitration agreement, the arbitrator will exercise the same discretion as would a judge in determining whether or not it is appropriate to refer any dispute for the hearing of oral evidence or to trial, and the precise terms of any such order. The arbitrator will in that regard apply the law in a manner similar to the way that a judge presiding in the high court exercising its admiralty jurisdiction would apply Uniform Rule 6(5)(g)..

9. The procedure agreed by the parties should provide for an expeditious determination of the arbitration. The arbitration, wherever possible, should be determined on the affidavits exchanged by the parties and after argument. A reconsideration application in terms of uniform rule 6(12)(c) may be referred to an arbitrator for determination, in which case the party seeking reconsideration may do so on the founding papers alone.

10. Subject to what is stated above, the procedure agreed upon should, as far as possible, follow the procedure set out in Admiralty Rule 18 and Uniform Rule 6 and should provide for the following:

10.1 Delivery of a notice of motion and founding affidavit in support of

the application to set aside the arrest or attachment;

10.2 Delivery of an answering affidavit;

10.3 Delivery of a replying affidavit; and

10.4 Delivery of a further affidavit by the respondent strictly dealing only with new matter contained in the replying affidavit.

11. The delivery of further affidavits will be permissible only if leave is given by the arbitrator, in the same way as would be the case if the matter was being decided in court.

12. The arbitrator should have the power to summarily determine preliminary matters of procedure and to make appropriate orders, such as (but not limited to) a direction that a party produce documents for inspection and copying similar to an order that a judge is empowered to make in terms of Uniform Rule 35(12).

13. The parties should agree a timetable for the exchange of the affidavits referred to above, and this should strictly be adhered to and departed from only after an appropriate direction by the arbitrator. The arbitrator should be given the power to set a timetable in the event that the parties cannot agree to one.

14. The parties should also agree that any affidavit that, *ex facie* the document, has been sworn before a notary public or similar official in a foreign country, shall be admissible as evidence in the arbitration without further authentication, subject to the parties being entitled to give notice of an objection thereto (on reasonable grounds, which should be explained) within a reasonable time.

15. Heads of argument should be exchanged shortly after the time for the filing of the last of the affidavits described above, and the hearing should take place shortly thereafter. If the parties cannot agree dates for the filing of heads, the arbitrator should be given the power to decide this.

16. Virtual hearings: The parties may agree that the arbitration hearing takes place by video conference, via an online platform such as Microsoft Teams or Zoom, or that certain witnesses may testify via video conference. Failing agreement between the parties, an arbitrator shall have the same powers as the court to decide whether the hearing or any part thereof shall take place by way of video conference, and to determine the mechanisms and protocols for such conference.

17. Where the ship remains under arrest or attachment and the matter is of extreme urgency, provided there are no complicating interlocutory disputes, the parties should aim to set down the application to set aside the arrest or attachment for argument before an arbitrator within three weeks of the commencement of the reference.

18. An arbitrator cannot direct that a ship be released from arrest. The arbitration agreement should expressly provide that the parties will honour an award so that a vessel will be released if a final award is made to that effect, without the parties having to approach the court for an order. Nevertheless, the agreement should provide that the award may be enforced by application to court if necessary (See above).

19. The arbitrator will also exercise some of the powers that a court would have in terms of section 5 of the AJRA, subject to the recognition of the fact that the arbitrator clearly cannot make orders falling solely within the province of a judge.

20. The parties may consider in suitable cases deviating from the provisions of the concept arbitration agreement so as to arrive at an expeditious result For example, in suitable cases they may decide that disputes of fact may be determined by the arbitrator solely on the papers, in circumstances where a court would not be permitted to do so.

21. The parties should give consideration to including a mechanism for the noting and prosecution of an appeal. It should be borne in mind that, were the matter to be dealt with in court, a successful application to set aside an arrest or attachment might be appealable, but the prosecution of an appeal would not suspend the order setting aside the arrest or attachment (actual or deemed) and the ship could sail. It is advisable, if the parties agree that there will be an appeal procedure, that there is clarity and that there is an effective appeal for both parties. The parties should then record their agreement clearly, for example that the award will have no effect unless and until it is a final and unappealable award (which is the provision ordinarily included in Letters of undertaking).

22. The agreement should also set out the composition of any appeal tribunal and provide the mechanism for the appointment of members of the appeal tribunal should the parties fail to reach agreement.