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INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION

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PROJECTS

Research Group on
Arbitrator Immunity

SOUTH AFRICA

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SURVEY RESPONSES ON ARBITRATOR IMMUNITY – SOUTH AFRICA

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SOUTH AFRICA		
I. Definitions	Yes/No/NA	Comments, if any.
<p>I.1.</p> <p>“Arbitrator”</p> <p>For the purpose of this survey, an “arbitrator” is a person appointed by the parties, on behalf of the parties, or by an institution to adjudicate a dispute under an arbitration agreement, either alone or as one member of an arbitral tribunal. When answering the questions in this survey, please include all regulations, standards, or duties that apply to or include arbitrators but not those that apply solely to mediators.</p>		
<p>I.2.</p> <p>“Legislation”</p> <p>For the purpose of this survey, “legislation” includes laws in force and any draft bills or legislative initiatives that are currently at an advanced stage, including for example if the proposal is before a legislative body for vote or approval. It is helpful to signal the content and status of any such legislative initiatives in this survey, so that readers can also be aware of changes that may be forthcoming.</p>		<p>Note: The South African statutory regime applicable to arbitrations differs in respect of domestic arbitrations (which are governed by the Arbitration Act, 1965) and international arbitrations (which are governed by the International Arbitration Act, 2017).</p> <p>Additionally, most of the case law precedent which has been handed down relates to the domestic Arbitration Act.</p> <p>Accordingly, in our responses, we have had to differentiate between the two.</p>

II. General	Yes/No/NA	Comments, if any.
<p>II.1. What standards or duties (including ethical standards or duties) apply to arbitrators in your jurisdiction? Please briefly describe these standards or duties and cite to their legislative, regulatory, jurisprudential, or other basis.</p> <p>[Examples of such standards or duties may include:</p> <ul style="list-style-type: none"> – Duty to disclose potential conflicts of interest. – Duty of impartiality. – Duty of care/competence. – Duty to respect and maintain the confidentiality of the arbitration. – Duty to conduct the proceeding in an appropriate/fair/judicious manner. 		<p>As a starting point arbitrators are required to act in accordance with (1) the arbitration agreement; (2) the provisions of the International Arbitration Act (“IAA”) which is applicable to international arbitrations in South Africa; (3) the provisions of the Arbitration Act, 1965 (“the AA”) which is applicable to domestic arbitrations in South Africa; and (4) the rules of natural justice.</p> <p>In general, arbitrators are required to act impartially, exercise care in the performance of their duties and conduct the proceedings fairly and judiciously.</p> <p>Regarding the duty to act impartially, arbitrators have a duty to disclose any material, as and when it may arise, that will impact their impartiality,¹ and to conduct the proceedings in an impartial manner. A failure to do so could result in the removal of the arbitrator,² or a refusal by the South African courts to enforce the award.³</p> <p>In respect of the duty to conduct proceedings in a fair and judicious manner, the South African Courts have stated that where an arbitrator assumes a quasi-judicial role, they must ensure full compliance with the right to a fair trial as outlined in the South African Constitution.⁴ Under the AA, an arbitrator is expressly required to give every party to the arbitration written notice of the hearing, and every party has a right to be heard at the hearing.⁵ This duty to act fairly is also recognized in the IAA, which allows an award to be set aside in the event that a breach of the arbitral tribunal’s duty to act fairly occurred in connection with the making of the award which has caused or will cause substantial injustice to a party.⁶</p> <p>Despite the duty to act with care, in certain circumstances, a breach of this duty may not have an effective remedy, for example, in domestic arbitrations, negligence on the part of the tribunal in arriving at its decision on the merits is not a ground for setting aside an award, unless it can be shown to be “misconduct” on the part of the arbitrator.⁷</p>

1 Article 12 of Schedule 1 (the UNCITRAL Model Law) to the IAA; Graaff-Reinet Municipality v Jansen 1917 CPD, at pg. 607.

2 Section 13 of the AA and Article 12 of Schedule 1 to the IAA.

3 Section 33(1)(a) of the AA and Article 34 of Schedule 1 to the IAA.

4 Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another [2009] ZACC 6., at paras 76 and 86-95.

5 Section 15(1) of the AA.

6 Article 34(5)(A) of Schedule 1 to the IAA.

7 Sourcecom Technology Solutions (Pty) Ltd v Kolber 2001 2 SA 1097 (C) 1107B–1108B and Section 33 of the AA.

			<p>Regarding duties of confidentiality, the position differs between domestic and international arbitrations.</p> <p><u>International arbitrations:</u> Section 11 of the IAA provides (in respect of international arbitrations only) that if the arbitration is held in private, the parties and tribunal must keep the award and all documents created for the arbitration, confidential (unless required to enforce a legal right or if such documents are otherwise in the public domain). In regard to international arbitrations involving public bodies, the IAA requires those to be held in public unless, for compelling reasons, the tribunal directs otherwise.⁸</p> <p><u>Domestic arbitrations:</u> There is, yet, no statutory basis for the privacy of the arbitration hearing and the confidentiality of the arbitration proceedings including the award, in domestic arbitrations. South African courts have found it unnecessary to decide if the English Law rule which states that the obligation on the parties to keep the arbitration proceedings and the award confidential is a natural consequence of the arbitration agreement, should also be applied in South Africa.⁹ This is usually dealt with in the arbitration agreement, or the applicable rules.</p> <p>However, even where there is an express obligation relating to confidentiality imposed by the arbitration agreement, the rule is subject to certain exceptions, the full extent of which have yet to be determined. These include where disclosure takes place through consent, or pursuant to a court application pertaining to the proceedings or the award.¹⁰</p> <p>In addition to the principles mentioned above, professional bodies such as the Association of Arbitrators and the Arbitration Foundation of Southern Africa have established codes of ethics that arbitrators are required to adhere to.</p>
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8 Section 11 of the IAA.

9 Replication Technology Group v Gallo Africa Ltd 2009 JOL 23517 (GSJ); 2009 5 SA 531 (GSJ) and MV Alina II Transnet Ltd v MV Alina II 2013 6 SA 556 (WCC)

10 Sections 31-33 of the AA.

<p>II.2.</p>	<p>In cases of potential arbitrator misconduct of a civil (as opposed to criminal) nature, what remedies or disciplinary measures are available in your jurisdiction <i>vis-à-vis</i> the arbitrator?</p> <p>Please provide citations to any relevant legislation, regulations, jurisprudence, or other secondary sources of law.</p>		<p><u>Domestic arbitrations:</u> The extent of the remedies in this regard are limited to –</p> <ol style="list-style-type: none"> 1. A setting aside of the award on the basis of “misconduct” by the arbitrator in relation to their duties as arbitrator¹¹ (i.e., where the approach deprived the aggrieved party of their right to a fair trial);¹² or 2. An application to court to have the arbitrator removed if “good cause” is shown.¹³ “Good cause” is not defined and could include a variety of circumstances, including misconduct, bias or prejudice.¹⁴ Generally, “good cause” will be assessed depending on the facts of the case.¹⁵ <p><u>International arbitrations:</u> Under the IAA, an arbitrator’s appointment can only be challenged if circumstances exist that give rise to “justifiable doubts” as to their impartiality or independence, or if they do not possess qualifications agreed to by the parties.¹⁶</p> <p>Accordingly, “misconduct” in the broad sense is not necessarily a statutory ground for removal. However, the arbitrator’s misconduct may constitute grounds for the setting aside of the award.¹⁷</p>
<p>II.3.</p>	<p>Is there anything in the <u>legislation</u> of your jurisdiction recognizing a general principle of arbitrator liability and/or a principle that could provide a basis for an arbitrator to be subject to suit or found liable personally for breaches of any of the duties/standards described above?</p>	<p>No – domestic arbitrations.</p> <p>Yes – international arbitrations.</p>	<p><u>Domestic arbitrations:</u> The AA does not contain any express provisions relating to the personal liability of arbitrators.</p> <p><u>International arbitrations:</u> The IAA provides that an arbitrator is not liable for any act or omission in the discharge of their functions, unless the act or omission is shown to have been done in bad faith.¹⁸ Accordingly, this implies that an arbitrator <i>may</i> be found to be personally liable under the IAA, if they acted in “bad faith”. However, we are not aware of any case law on this issue, to date.</p>

11 Section 33(a) of the AA.

12 Civil and Power Generation Projects (Pty) Ltd v MHI Power ZAF (Pty) Ltd and Another, at paras 42- 43.

13 Kelly and Another v Lane 2000 JDR 0699 (W), at para 6.

14 OFS Provincial Administration v Ahier; Parys Municipality v Ahier 1991 3 All SA 114 (W).

15 Horn and Another v Nel and Others 2023 JDR 2023 3207 (GP) at para 19.

16 Article 12 of Schedule 1 to the IAA.

17 Article 34 of Schedule 1 to the IAA.

18 Section 9 of the IAA.

<p>II.4.</p>	<p>Is there anything in the <u>jurisprudence/ other secondary sources of law</u> of your jurisdiction recognizing a general principle of arbitrator liability and/or a principle that could provide a basis for an arbitrator to be subject to suit or found liable personally for breaches of any of the duties/standards described above?</p>	<p>No</p>	<p><u>Domestic arbitrations:</u> South African Common law generally provides that arbitrators are immune from personal liability in the event of negligence.¹⁹ This principle is rooted in the idea that arbitrators must be free to make decisions without fear of personal liability.</p> <p>Most domestic procedural rules are, however, likely to deal with arbitrator liability and those may provide a basis for liability. For example, the Commercial Rules of the Arbitration Foundation of Southern Africa (“AFSA”) state that arbitrators in domestic arbitrations may not be held personally liable except in the event of “<i>deliberate misconduct</i>”.²⁰</p> <p>As far as we are aware, no case law exists in terms of which an arbitrator has been held personally liable in a domestic arbitration.</p> <p><u>International arbitrations:</u></p> <p>The AFSA International Rules contain a provision in terms of which the parties agree to waive any claim against members of the Arbitral Tribunal, based on any act or omission in connection with the arbitration, save in the event of <i>intentional wrongdoing</i>.²¹</p>
<p>II.5.</p>	<p>Is there anything in the <u>jurisprudence/ other secondary sources of law</u> of your jurisdiction that could provide a basis for an arbitrator generally to be subject to suit or found liable personally for acts or omissions in relation to an arbitration?</p>	<p>No – domestic arbitrations.</p> <p>Yes – international arbitrations</p>	<p><u>Domestic arbitrations:</u> As stated above, the general position is that arbitrators must be free to make decisions without fear of personal liability, and we are not aware of case law to the contrary that may provide a basis for personal liability.</p> <p>However, this may be dealt with in the procedural rules chosen by the parties.</p> <p><u>International arbitrations:</u> As stated above, the IAA provides that an arbitrator is not liable for any act or omission in the discharge of their functions, unless the act or omission is shown to have been done in bad faith. Accordingly, this implies that an arbitrator may be found to be personally liable under the IAA, if they acted in “bad faith”. However, we are not aware of any case law on this issue, to date.</p> <p>This may also be dealt with in the procedural rules chosen by the parties.</p>

19 Hoffman v Meyer 1956 2 SA 752 (C) 756A–B and Chelsea West (Pty) Ltd v Roodebloem Investments (Pty) Ltd 1994 1 SA 837 (C) 851J–852A.

20 AFSA Commercial Rules at Article 21.

21 AFSA International Rules at Article 37

<p>II.6.</p>	<p>If your answer to question II.3, II.4 or II.5 is yes, is there a corresponding statute of limitations or similar time-limit in your jurisdiction for the initiation of a claim against an arbitrator?</p>	<p>Yes</p>	<p>The relevant statute which imposes temporal limitations on the bringing of claims in South Africa is the Prescription Act, 1969.</p> <p>Generally, delictual claims (claims in tort) and contractual claims will prescribe 3 years after a debt becomes “due”, or after the date that the claimant became aware (or ought reasonably to have become aware) of the facts giving rise to the claim.</p> <p>There is no special statute of limitations for claims against arbitrators, the general rules under the Prescription Act would (theoretically) apply to such a claim.</p>
<p>II.7.</p>	<p>If your answer to question II.3, II.4 or II.5 is yes, is there anything in the <u>legislation or jurisprudence/other secondary sources of law</u> of your jurisdiction that addresses the possibility of joint liability among the members of the tribunal, either <i>vis-à-vis</i> the parties or among themselves?</p>	<p>No</p>	<p>There is no specific statutory provision in South African law that addresses joint liability among arbitrators, nor is there case law or precedent on this issue.</p> <p>However, the general principles of delictual (tort) and contractual liability would (theoretically) apply. If multiple individuals committed the misconduct/breach which, jointly, caused the alleged loss, a court may impose joint liability.</p>

III. Limitations of Liability		Yes/No/NA	Comments, if any.
III.1.	<p>Is there a general principle of arbitrator immunity (<i>i.e.</i>, whereby an arbitrator is immune from civil liability for his or her activities undertaken as arbitrator) in your jurisdiction? If yes, is this immunity less than, equivalent to, or greater than the immunity, if any, afforded to judges or members of the judiciary?</p> <p>Please provide citations to any relevant legislation, regulations, jurisprudence, or other secondary sources of law.</p>	Yes	<p><u>Domestic arbitration</u>: As noted above, the AA does not contain any statutory provisions relating to immunity. However, South African Common law generally provides that arbitrators are immune from personal liability including instances of negligence – this is rooted in the idea that arbitrators must be free to make decisions without fear of personal liability.</p> <p>Most domestic procedural rules are likely to include some form of immunity, for example, the AFSA Commercial Rules (although these do include a carve out for “<i>deliberate misconduct</i>”).²²</p> <p><u>International arbitration</u>: As stated above, the IAA provides that an arbitrator is not liable for any act or omission in the discharge of their functions, unless the act or omission is shown to have been done in bad faith. Accordingly, this implies that an arbitrator may be found to be personally liable under the IAA, if they acted in “bad faith”.²³</p> <p>This is also subject to the procedural rules chosen by the parties, for example, the AFSA International Rules contain a provision in terms of which the parties agree to waive any claim against members of the Arbitral Tribunal, based on any act or omission in connection with the arbitration, save in the event of intentional wrongdoing.²⁴</p>
III.2.	Is there anything in the <u>legislation</u> of your jurisdiction that otherwise limits an arbitrator’s personal civil liability?	Yes	Only the IAA (applicable to international arbitrations seated in South Africa), contains such a limitation – the AA does not.
III.3.	Is there anything in the <u>jurisprudence/ other secondary sources of law</u> of your jurisdiction that otherwise limits an arbitrator’s personal civil liability?	Yes	See response to III.1.

22 AFSA Commercial Rules at Article 21.

23 Section 9 of the IAA.

24 AFSA International Rules at Article 37.

<p>III.4.</p>	<p>If your answer to question III.1, III.2, or III.3 is yes, are there any exceptions to that immunity or limitation of liability?</p> <p>For example, is there any exception to an arbitrator’s immunity from suit or limitation of liability where the arbitrator’s alleged misconduct involves fraud, bad faith, negligence, or intentional wrongdoing (to the extent these concepts are recognized in your jurisdiction’s legal framework)?</p> <p>Please provide citations to the relevant legislation, regulations, jurisprudence, or other secondary sources of law.</p>	<p>Yes</p>	<p><u>Domestic arbitrations:</u> The general principle is that an arbitrator will not be held liable for negligence. As far as we are aware, there is no precedent of an arbitrator being held personally liable in the event of fraud / bad faith / intentional wrongdoing (unless this was allowed by the applicable procedural rules. This caveat should not be regarded as exclusionary, as such conduct would generally fall within the category of gross misconduct).</p> <p>As stated above, the AFSA Commercial Rules do envisage that arbitrators may be held personally liable in the event of “deliberate misconduct”.</p> <p><u>International arbitration:</u> As stated above, the IAA contains a limitation to the indemnity, namely, if the arbitrator acted in “bad faith”. Further, the AFSA International Rules limits the indemnity in circumstances where the arbitrator committed an “intentional wrongdoing”.</p>
<p>III.5.</p>	<p>Is there any <u>jurisprudence/other secondary sources of law</u> in your jurisdiction which considers the effectiveness of limitation of liability clauses found in arbitral institution rules?</p> <p>If yes, please provide a brief description of the case(s) or secondary source(s), limited to one paragraph per case/secondary source, including, if applicable:</p> <ul style="list-style-type: none"> – The type of misconduct alleged. – The relevant limitation of liability language and its source (<i>i.e.</i>, UNCITRAL Arbitration Rules 2010, American Arbitration Association Commercial Arbitration Rules, etc.). 	<p>No</p>	

	<ul style="list-style-type: none"> - A summary of the court's findings as to the effectiveness of the limitation of liability clause in limiting or excluding an arbitrator's liability. 		
<p>III.6.</p>	<p>Is there any <u>jurisprudence/other secondary sources of law</u> in your jurisdiction which considers the effectiveness of limitation of liability clauses or indemnity clauses (<i>i.e.</i>, clauses by which the parties to the arbitration agree to cover any losses or damages suffered by the arbitrators in a potential suit, or to otherwise hold the arbitrators harmless) found in an arbitration's procedural materials – <i>i.e.</i>, Terms of Reference, Terms of Appointment, Procedural Order No. 1, etc.?</p> <p>If yes, please provide a brief description of the case(s) or secondary source(s), limited to one paragraph per case/secondary source, including, if applicable:</p> <ul style="list-style-type: none"> - The type of misconduct alleged. - The limitation of liability or indemnity language found in the relevant procedural material (if available). - A summary of the court's findings as to the effectiveness of the limitation of liability or indemnity clause in limiting or excluding an arbitrator's liability. 	<p>No</p>	

<p>III.7.</p>	<p>Is there any <u>jurisprudence/other secondary sources of law</u> in your jurisdiction which considers the effectiveness of a clause limiting the arbitrators' liability found in the parties' arbitration agreement?</p> <p>If yes, please provide a brief description of the case(s) or secondary source(s), limited to one paragraph per case/secondary source, including, if applicable:</p> <ul style="list-style-type: none"> – The type of misconduct alleged. – The relevant limitation of liability language in the parties' arbitration agreement. – A summary of the court's findings as to the effectiveness of the limitation of liability clause in limiting or excluding an arbitrator's liability. 	<p>No</p>	
<p>III.8.</p>	<p>If your answer to question III.5, III.6, or III.7 is yes, does any of this <u>jurisprudence/secondary sources of law</u> comment on whether the <i>source</i> of the limitation of liability or indemnity language (<i>i.e.</i>, institutional rules v. procedural order v. terms of reference v. arbitration agreement) was relevant to the court's finding?</p> <p>If yes, please provide a brief description of the court's or secondary source's reasoning on the issue, limited to one paragraph per case/secondary source.</p>	<p>N/A</p>	

<p>III.9.</p>	<p>If your answer to question III.5, III.6, or III.7 is yes, does any of this <u>jurisprudence/secondary sources of law</u> comment on whether the particular language used in the relevant limitation of liability or indemnity clause was relevant to the court's finding?</p> <p>If yes, please provide a brief description of the court's or secondary source's reasoning on the issue, limited to one paragraph per case/secondary source.</p>	<p>N/A</p>	
<p>III.10.</p>	<p>If your answer to question III.5, III.6, or III.7 is yes, does any of this <u>jurisprudence/secondary sources of law</u> comment on whether the moment in the arbitration when the relevant limitation of liability or indemnity clause was agreed to was relevant to the court's finding, <i>i.e.</i>, whether it was agreed to <i>ex ante</i> (in advance of the relevant arbitration proceeding having been initiated) or after the arbitration was commenced?</p> <p>If yes, please provide a brief description of the court's or secondary source's reasoning on the issue, limited to one paragraph per case/secondary source.</p>	<p>N/A</p>	

<p>III.11.</p>	<p>To the extent there is any principle of arbitrator immunity or limitation of liability recognized in your jurisdiction (<i>i.e.</i>, if your answer to question III.1, III.2, or III.3 is yes), does that immunity or limitation of liability apply in proceedings in which a party is requesting interim relief (interim injunction, conservatory or similar temporary measures), as distinct from final relief (including damages), from an arbitrator?</p> <p>Please provide citations to the relevant legislation, regulations, jurisprudence, or other secondary sources of law.</p>	<p>Domestic arbitration: Unclear, but likely.</p> <p>International arbitration: Yes.</p>	<p><u>Domestic arbitrations:</u> The AA does not deal with the issue of arbitrator immunity, nor is there any case law / precedent on this specific issue. However, the general principles set out above are likely to extend to interim awards.</p> <p><u>International arbitrations:</u> The wording of the indemnity provision contained in the IAA (Section 9) is sufficiently broad to cover immunity in respect of requests for interim relief, as it states that an arbitrator cannot be held liable for any act or omission “<i>in the discharge or purported discharge of that arbitrator’s functions as arbitrator...</i>”. However, no case law exists on the question at present.</p>
<p>III.12.</p>	<p>To the extent there is any principle of arbitrator immunity or limitation of liability recognized in your jurisdiction, (<i>i.e.</i>, if your answer to question III.1, III.2, or III.3 is yes), does that immunity or limitation of liability permit an arbitrator to refuse to serve as a witness or provide documents when subpoenaed, or otherwise compelled, by a judicial authority (for example, in enforcement proceedings)?</p> <p>Please provide citations to the relevant legislation, regulations, jurisprudence, or other secondary sources of law.</p>	<p>Unclear under South African law.</p>	<p><u>Domestic arbitrations:</u> The AA does not expressly deal with this issue. Theoretically, it may be possible for an arbitrator to be compelled to serve as a witness or disclose documents, as there is (as yet) no statutory basis for the confidentiality of the arbitration proceedings in domestic arbitrations (unless expressly dealt with in the arbitration agreement, or the applicable rules); and our courts have not incorporated the English Law rule which states that the obligation on the parties to keep the arbitration proceedings and the award confidential is a natural consequence of the arbitration agreement.²⁵</p> <p>Conversely, given the lack of precedent, an arbitrator who is so compelled <i>may</i> be able to resist this on the basis of the arbitration agreement and/or the applicable rules agreed to by the parties.</p> <p>We are, however, not aware of any case law where this has been dealt with by the South African courts.</p>

25 Replication Technology Group v Gallo Africa Ltd 2009 JOL 23517 (GSJ); 2009 5 SA 531 (GSJ) and MV Alina II Transnet Ltd v MV Alina II 2013 6 SA 556 (WCC)

			<p><u>International arbitrations:</u></p> <p>Section 11 of the IAA broadly provides that if the arbitration is held in private, the parties and tribunal must keep the award and all documents created for the arbitration, confidential (unless required to enforce a legal right or if such documents are otherwise in the public domain). We are, however, not aware of any case law where this has been dealt with by the South African courts in the context of an arbitrator being compelled to serve as a witness or disclose documents. Accordingly, the position is not clear.</p>
III.13.	<p>Is there any <u>jurisprudence/other secondary sources of law</u> in your jurisdiction which considers whether a limitation of liability clause found in arbitral institution rules, procedural materials, or the parties' arbitration agreement operates to permit an arbitrator to refuse to serve as a witness or provide documents when subpoenaed, or otherwise compelled, by a judicial authority?</p> <p>If yes, please provide a brief description of the case(s) or secondary source(s), limited to one paragraph per case/secondary source.</p>	No	
III.14.	<p>To the extent an arbitrator is permitted to be called upon to act as a witness in your jurisdiction but is otherwise bound by confidentiality obligations related to the underlying arbitration, is there any guidance (found in jurisprudence or elsewhere) as to how the arbitrator should proceed?</p>	No	No such guidance currently exists, and the position is unclear.

IV. Effectiveness of Professional Indemnity Insurance		Yes/No/NA	Comments, if any.
IV.1.	Does the legal framework in your jurisdiction mandate professional indemnity insurance coverage for arbitrators?	No	<p>South Africa does not mandate professional indemnity insurance specifically for arbitrators.</p> <p>However, “Legal Practitioners” (attorneys and advocates) are required by the South African Legal Practice Council (“LPC”) to carry such insurance. Legal practitioners are required to obtain professional indemnity insurance from the Legal Practitioner’s Indemnity Insurance Fund NPC (“LPIIF”) (and they are free to take out any additional coverage that they may choose).</p> <p>Arbitrators who are governed by other regulatory bodies by virtue of their ancillary qualifications may be required to have professional indemnity insurance coverage, but no such insurance is mandated specifically for arbitrators.</p>
IV.2.	Is there any <u>legislation</u> or <u>jurisprudence/other secondary sources of law</u> in your jurisdiction which considers whether acting as an arbitrator counts as an act constituting the practice of law?	No	
IV.3.	<p>Is there any <u>jurisprudence/other secondary sources of law</u> in your jurisdiction which considers whether the professional indemnity insurance policy of a law firm or barrister’s chambers covers activities undertaken by a member of that firm/chambers as arbitrator where the arbitrator has been appointed in an individual capacity (<i>i.e.</i>, rather than as a representative of the firm/chambers)?</p> <p>If yes, please provide a brief description of the case(s) or secondary source(s), limited to one paragraph per case/secondary source, including, if applicable:</p> <ul style="list-style-type: none"> – The type of misconduct alleged. 	No	<p>There is no reported South African case law directly addressing whether professional indemnity insurance policies of law firms or chambers would cover a member acting as an arbitrator in their individual capacity. This would depend on the wording of the insurance policy itself, and the coverage provided thereunder.</p> <p>Generally, all legal practitioners are required by the LPC to hold a Fidelity Fund Certificate. This certificate provides professional liability cover through the LPIIF which operates under the LPC’s oversight. Acts committed in a practitioner’s professional capacity, or as an extension thereof such as serving as an arbitrator, would typically fall within the scope of this coverage.</p> <p>In respect of advocates (barristers), coverage under the LPIIF’s Master Policy is applicable to the advocate as a sole practitioner, and not to the advocate’s chambers. Accordingly, any appointment as arbitrator in their individual capacity would likely be covered by the Master Policy.</p>

	<ul style="list-style-type: none"> - The relevant language of the professional indemnity insurance policy of the arbitrator’s law firm or barrister’s chambers (if available). - A summary of the court’s finding as to the scope of that policy’s coverage <i>vis-à-vis</i> the arbitrator’s activities as an arbitrator. 		
<p>IV.4.</p>	<p>If your answer to question IV.3 is no, is there any <u>jurisprudence/other secondary sources of law</u> in your jurisdiction which considers whether the professional indemnity insurance policy of a law firm or barrister’s chambers covers activities undertaken by an employee or partner of that firm/chambers as a board member of an external organization (<i>i.e.</i>, a corporation, charity, etc.)?</p> <p>If yes, please provide a brief description of the case(s) or secondary source(s), limited to one paragraph per case/secondary source, including, if applicable:</p> <ul style="list-style-type: none"> - The type of misconduct alleged. - The relevant language of the professional indemnity insurance policy of the member’s law firm or barrister’s chambers (if available). - A summary of the court’s finding as to the scope of that policy’s coverage <i>vis-à-vis</i> the member’s activities as a board member. 	<p>No</p>	<p>There is no reported South African case law directly addressing this issue. This would depend on the wording of the insurance policy itself and the coverage provided thereunder.</p>

<p>IV.5.</p>	<p>Assuming that there is coverage of the types envisioned in questions IV.3 and IV.4, is there any <u>jurisprudence/other secondary sources of law</u> in your jurisdiction which considers whether that coverage extends to breaches of cybersecurity and data privacy laws?</p> <p>If yes, please provide a brief description of the case(s) or secondary source(s), limited to one paragraph per case/secondary source, including, if applicable:</p> <ul style="list-style-type: none"> – The nature of the alleged cybersecurity/privacy breach. – The relevant language of the professional indemnity insurance policy (if available). – A summary of the court’s finding as to the scope of that policy’s coverage <i>vis-à-vis</i> the alleged cybersecurity/privacy breach. 	<p>No</p>	<p>There is no reported South African case law directly addressing this issue. This would depend on the wording of the insurance policy itself and the coverage provided thereunder.</p> <p>To the extent that the arbitrator is a legal practitioner who is only covered under the LPIIF Master Policy, it specifically excludes coverage for losses arising out of “Cybercrime”. “Cybercrime” is defined as “[a]ny offence that is facilitated by or involves the use, interception or interference with electronic communications, information systems, computer data storage mediums or computer systems, including but not limited to interception of or interference with data as described in the Cybercrimes Act 19 of 2020 or any successor thereto.”</p>
<p>IV.6.</p>	<p>Assuming that there is coverage of the type envisioned in question IV.3, please provide sample language from commonly used insurance policies that were found by those courts or secondary sources to cover work undertaken independently as an arbitrator.</p>	<p>N/A</p>	

IV.7.	Are there any other issues that, in your view, a prospective arbitrator should be aware of in ensuring that their work as an arbitrator in your jurisdiction is covered by their law firm's or chamber's professional indemnity insurance policy?	No	
V. Involvement of Arbitral Institutions		Yes/No/NA	Comments, if any.
V.1.	Is there any <u>jurisprudence</u> in your jurisdiction where an arbitral institution has been sued alongside an arbitrator?	Yes	<p>This is not common, as South African arbitral bodies generally have limitation of liability clauses contained in their rules which cover the institution itself (see for example, Section 21.3 of the AFSA Commercial Rules and Article 37 of the AFSA International Rules).</p> <p>However, in the case of <i>Agricultural Research Council v NAP Designs (Pty) Ltd & Others</i>²⁶ the Applicant cited the Association of Arbitrators (Southern Africa) NPC (“AOA SA”) as the third respondent alongside the arbitrator. In that matter, the applicant sought to challenge the arbitration award based on alleged misconduct and irregularities, and it sought an order that the AOA SA be directed to appoint a new arbitrator with sufficient qualification and experience to arbitrate the dispute afresh. The application was dismissed by the court.</p> <p>We are not aware of any other reported case where the arbitral institution has been cited and/or sued.</p>
V.2.	Is there any <u>jurisprudence</u> in your jurisdiction where an arbitrator has been sued and then an arbitral institution subsequently intervened in the proceeding?	No	

<p>V.3.</p>	<p>If your answer to question V.1 or V.2 is yes, in your experience, or to the extent this information is publicly available, did the arbitrator and arbitral institution defend the suit jointly, or did the arbitrator defend the suit on his/her own behalf, separate from any defense mounted by the institution?</p> <p>If the suit(s) was/were defended jointly, in your experience or, to the extent this information is publicly available, did the institution pay for the arbitrator's counsel fees?</p>	<p>No</p>	<p>In the <i>Agricultural Research Council</i> case, there was no indication that the arbitrator and the institution defended the matter jointly (or at all). The case seems to have been defended solely by the counterparty in the arbitration proceedings.</p>
<p>V.4.</p>	<p>If your answer to question V.1 or V.2 is yes, in your experience, or to the extent this information is publicly available, did the suit result in a settlement?</p>	<p>No</p>	<p>In the <i>Agricultural Research Council</i> case, no settlement occurred.</p>
<p>VI. Procedural Issues</p>			
<p>VI.1.</p>	<p>Is there any <u>jurisprudence</u> in your jurisdiction where an arbitrator and/or arbitral institution was sued by a party, and the arbitrator or arbitral institution objected on the grounds of improper forum or venue?</p> <p>If yes, please provide a brief description of case(s), limited to one paragraph per case, including:</p> <ul style="list-style-type: none"> – The parties. – The type of misconduct alleged. 	<p>No</p>	

	<ul style="list-style-type: none"> - The nature and basis of the arbitrator’s or arbitral institution’s objection to venue. - The outcome of the objection (<i>i.e.</i>, whether the case proceeded to be heard or was dismissed for improper forum or venue) and the court’s reasoning for the same. 		
VI.2.	<p>Is there any <u>legislation</u> or <u>jurisprudence/other secondary sources of law</u> in your jurisdiction which considers the potential consequences if a suit against an arbitrator is unsuccessful?</p> <p>For example, if a suit against an arbitrator is unsuccessful, what remedies would be available to the arbitrator? Moreover, would any sanctions be applicable to the unsuccessful party who brought the suit if it is found that the suit was frivolous?</p>	No	Theoretically, the arbitrator may be entitled to seek a “punitive” (higher) costs order against the party who sued them, if the suit was found to be frivolous.
VI.3.	While this survey generally focuses on the civil liability of arbitrators, if there is any relevant information from your jurisdiction related to claims for criminal liability brought against arbitrators, please include such information.	N/A	None that we are aware of.
VI.4.	Is there any other information about your jurisdiction not already provided in your responses to the questions in this survey that is relevant to understanding and explaining arbitrator liability in your jurisdiction?	No	

ICCA RESEARCH GROUP ON ARBITRATOR IMMUNITY

Goals

The primary goal of the Arbitrator Immunity Research Group is to study questions of arbitrator liability and immunity, and to raise practitioners' and arbitrators' awareness of the current legal landscape. The project's goals include investigating the limits of arbitrator immunity, evaluating the effectiveness of language limiting arbitrator liability in procedural orders and institutional rules, and examining the impact and limitations of professional indemnity insurance.

Methodology

To understand the current global landscape of arbitrator immunity, the Research Group designed a detailed survey and selected sample jurisdictions for inclusion. The Research Group compiled a list of survey respondents for each jurisdiction by seeking recommendations for responsive, high-quality contributors who had previously participated in ICCA research projects, as well as recommendations from arbitral institutions and colleagues in the international arbitration community. After receiving the completed surveys, the research team collaborated with the respondents in two rounds of edits to improve clarity, understanding, and formatting.

Citations to this Research

Researchers and authors using this data should use the following citations to refer to this research:

- General citation to the project website: 'ICCA Research Group on Arbitrator Immunity' (Kate Brown de Vejar, Victoria Shannon Sahani, and Damien Nyer, eds., 2026), <https://www.arbitration-icca.org/research-group-arbitrator-immunity>
- Citation to the individual survey response: 'Survey Responses on Arbitrator Immunity for South Africa', in ICCA Research Group on Arbitrator Immunity (Kate Brown de Vejar, Victoria Shannon Sahani, and Damien Nyer, eds., 2026), <https://www.arbitration-icca.org/research-group-arbitrator-immunity>

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Disclaimers

- **Viewpoints Disclaimer:** The survey responses do not represent the viewpoints, opinions, or research of ICCA, its Governing Board or members, or the Research Group in general, or its individual members. The Research Group's editing process focused solely on enhancing clarity, comprehension, and formatting.
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