



AFSA | SARIPA

BUSINESS RESCUE

THE AFSA-SARIPA RULES FOR THE RESOLUTION OF DISPUTES IN BUSINESS RESCUE PROCEEDINGS

1. THE RULES: STATUS AND PURPOSE

- 1.1 These Rules have been established and endorsed by the Arbitration Foundation of South Africa (AFSA) and the South African Restructuring and Insolvency Practitioners Association NPD (SARIPA) for the purpose of resolving disputes arising in connection with business rescue proceedings.
- 1.2 AFSA and SARIPA share joint oversight over the administering Secretariat and the Panel of Arbitrators identified in these Rules and may jointly supplement or amend these Rules from time to time as circumstances dictate.
- 1.3 Such joint oversight is exercised through the AFSA-SARIPA Business Rescue Division within the AFSA corporate structure.

2. SUPERVISION OF THE AFSA SECRETARIAT

- 2.1 The AFSA-SARIPA Secretariat is the administering authority appointed by the AFSA Business Rescue Division to supervise and administer the resolution of disputes under these Rules.
- 2.2 Parties to any dispute undertake to co-operate with the AFSA Secretariat in order to assist it in its functions. Parties further undertake to deal with any requests made to them by the Secretariat quickly and constructively.
- 2.3 The address of the AFSA Secretariat is c/o AFSA at 1st Floor, Grindrod Tower, 8A Protea Place, Sandown, or PO Box 653007, Benmore, 2010, Telephone no. (011) 320-0600, Docex 143, Randburg.
- 2.4 All communication with the AFSA Secretariat may be effected by email or online.
- 2.5 Any communications between the parties and the arbitrator should take place through the AFSA Secretariat, which is always available to assist the parties with their queries concerning procedural aspects of the dispute and in clarifying issues arising out of these Rules.

3. INITIATING DISPUTE RESOLUTION

- 3.1 Any party to a dispute (the claimant) shall initiate the dispute resolution procedure by submitting the REQUEST FOR ARBITRATION in the form set out in Appendix A accompanied by payment of the claimant's share of the Secretariat's management and administration fee of R15 000.00 (Fifteen Thousand Rand).
- 3.2 The claimant must simultaneously transmit a copy of the REQUEST FOR ARBITRATION to the Business Rescue Practitioner and to any other party against whom the claimant also seeks any relief or order.

4. INTERRUPTION OF PRESCRIPTION

- 4.1 The simultaneous transmission of the REQUEST FOR ARBITRATION in proper form to the Secretariat and to the BRP and any other person against whom any relief or order is sought shall interrupt the running of prescription subject to 4.3 below.
- 4.2 The date of interruption shall be the date of receipt by AFSA of the REQUEST FOR ARBITRATION but subject to 4.3 below.
- 4.3 Prescription shall only be interrupted in this manner if the AFSA Secretariat accepts the REQUEST FOR ARBITRATION and if the claimant thereafter prosecutes the claim to finalisation under these Rules without falling into default.

5. ACCEPTANCE OR REJECTION OF THE REQUEST FOR ARBITRATION

- 5.1 The Secretariat, if satisfied:
 - 5.1.1 that the REQUEST FOR ARBITRATION has been completed in proper form and that payment of the claimant's share of its management and administration fee has been made; and
 - 5.1.2 that the dispute falls within the terms of the reference to arbitration contained in the Business Rescue Plan, shall accept the REQUEST FOR ARBITRATION and must notify the parties that it has referred the matter to arbitration and that the steps set out in the rest of the Rules will follow.
- 5.2 If the REQUEST FOR ARBITRATION does not comply with the requirements of 5.1 above the Secretariat will refuse the request to arbitrate in which case if the deficiency can be rectified, and is rectified, the REQUEST FOR ARBITRATION may be re-submitted.

6. RESPONSE BY THE BRP

Within ten business days from the date of receipt by the BRP, the BRP shall simultaneously transmit to the claimant, the Secretariat and any implicated person the BRP's response to Appendix A to the REQUEST FOR ARBITRATION, such response to be marked Appendix B and in which:

- 6.1 the BRP must either confirm as accurate or otherwise correct the information set out in paragraphs 1 – 4 and 6 of Appendix A;
- 6.2 the BRP must answer the claimant's claim as set out in paragraph 5 of Appendix A by way of a brief written statement indicating which statements made in support of the claim in paragraph 5 of Appendix A are admitted and which parts are denied, and why they are denied, further showing clearly and concisely the reasons and contentions which are relied upon to refute the claimant's claim;
- 6.3 Appendix B shall be accompanied by payment of the BRP's share of the Secretariat's management and administration fee of R15 000.00 (fifteen thousand Rand) plus VAT.

7. RESPONSE BY ANY OTHER IMPLICATED PARTY AND COUNTERCLAIMS

- 7.1 The provisions of Rule 6 will separately apply to any party against whom any claimant seeks an order whether separately from or in addition to any relief sought against the BRP.
- 7.2 In the event that the BRP or other implicated party seeks relief against the claimant for any reason the grounds for such reciprocal claim shall also be concisely set out together with such relief as is sought.

8. MEDIATION

Should both parties agree, or should the AFSA Secretariat so direct, the dispute will first be referred to mediation for a quick and amicable resolution. In such an instance the Secretariat will make the necessary arrangements for the mediation and will appoint the mediator. The Secretariat will issue directions as to the process to be followed.

9. SELECTING THE ARBITRATOR

- 9.1 Unless the parties have notified the Secretariat within four business days of the claimant transmitting the REQUEST FOR ARBITRATION that they have selected a particular arbitrator on the approved Panel of Arbitrators the Secretariat will select an arbitrator from the Panel.

- 9.2 The arbitrator, whether selected by the parties or by the Secretariat, must confirm that he or she is not conflicted in any way and is able to deal with the matter without delay and has signed the AFSA Code of Conduct for Arbitrators.

10. OBJECTION TO ARBITRATOR'S APPOINTMENT, RECUSAL AND REPLACEMENT

- 10.1 In the event that any party has a substantive objection to the appointment of a particular arbitrator or to the conduct of the arbitrator thereafter that party must inform the Secretariat within three days following notification of the appointment or following it first becoming aware of the conduct which is the subject of complaint. The Secretariat will rule on the merits of the objection and either set aside the arbitrator's appointment or confirm same and its decision is final.
- 10.2 An arbitrator shall recuse himself or herself when, due to physical, mental, or other disability, he or she becomes incapable properly to perform his or her duties, and in circumstances which would require a judicial officer to recuse himself or herself.
- 10.3 The Secretariat shall be entitled, after a written or oral hearing (as directed by the Secretariat) of the parties and the arbitrator, to terminate the appointment of an arbitrator on the grounds that he or she has become disqualified from acting or continuing to act in terms of these Rules, or his or her inability or refusal to act, or that he or she has failed timeously and effectively to perform any of his or her functions as arbitrator.
- 10.4 Where the position of arbitrator falls vacant for any reason the Secretariat will appoint a substitute arbitrator who shall have the power to act in the arbitration and make an award as if originally appointed and the substitute arbitrator may proceed on the evidence recorded in the proceedings before his or her appointment or may make re-call for further examination the person/s who gave such evidence.

11. SECRETARIAT'S NOTIFICATION TO THE ARBITRATOR

- 11.1 The Secretariat must immediately notify the arbitrator of his or her appointment, confirm and approve the fees chargeable by the arbitrator and transmit to the arbitrator Appendix A and Appendix B for the immediate attention of the arbitrator.
- 11.2 The Secretariat must arrange an initial meeting between the arbitrator and the parties as quickly as possible following the arbitrator's appointment.

12. THE INITIAL MEETING AND TIMETABLE

- 12.1 The purpose of the initial meeting is to allow the arbitrator after consultation with the parties to decide whether the fair and expeditious determination of the dispute:
- 12.1.1 requires further elaboration of the claim or the response and, if so, in what respects;
- 12.1.2 requires the production of books or documents and if so which books or documents must be produced;
- 12.1.3 permits the submission of evidence and contentions upon which the parties rely in written form and without the need for oral presentation.
- 12.2 In determining the procedure for the determination of the dispute the arbitrator:
- 12.2.1 must draw up a timetable for the progress of the matter to finalisation and notify the Secretariat of the timetable;
- 12.2.2 must give priority to the need for the expedited determination of the dispute and to a cost-effective process; and
- 12.2.3 if the substance of the proceedings involves a review of any decision, act or ruling of the Business Rescue Practitioner then the proceedings should be conducted by way of written evidence and submissions save for oral argument;
- 12.2.4 in choosing the appropriate procedure to be followed the arbitrator must be satisfied that each party will (barring default) enjoy a fair and equal opportunity to present its case.

13. PAYMENT OF THE ARBITRATOR'S FEES AND CHARGES

- 13.1 The fees and charges of the arbitrator will be paid by the Secretariat to the arbitrator and it is the obligation of the parties to pre-pay the Secretariat the invoiced amount of such fees and charges on demand.
- 13.2 In the event of the failure by any party to pre-pay such amount the provisions of Rule 13 will apply to the defaulting party and the other party or parties will, in the interim, be called upon to pay the deficit.

14. ARBITRATOR'S POWERS IN THE EVENT OF DEFAULT

Should any party to the proceedings:

- 14.1 fail to pay the Secretariat's management and administration fee; or
- 14.2 fail to pay the amount invoiced for that party's share of the arbitrator's fees and charges; or
- 14.3 fail to comply with the provisions of these Rules notwithstanding prior warning by the Secretariat or by the arbitrator; or
- 14.4 fail to carry out the terms of any ruling or directive of the arbitrator or the Secretariat; or
- 14.5 is guilty of delaying conduct so as to give rise to a substantial risk of serious prejudice to the other party or parties, then:
 - 14.6 where a party is in default due to failure to pay its share of any management and administration fee or arbitrator's fee when requested by the Secretariat that party will lose the right to participate in the arbitration process and the proceedings will continue to their conclusion in the absence of such party unless the arbitrator orders otherwise in the special circumstances of the case; and
 - 14.7 where the default is of any other sort as itemised above the arbitrator can either:
 - 14.7.1 give that party written notice that unless it remedies the default or omission within a given time, it will forfeit the right to continue to participate in the arbitration with the same consequences as set out above; or
 - 14.7.2 warn the party in writing that its default or omission may make it liable to a punitive order of costs irrespective whether it succeeds in the arbitration or not and such punitive award of costs may include an order of attorney and client costs or attorney and own client costs as those expressions are understood in the Uniform Rules of Court.

15. GENERAL POWERS OF THE ARBITRATOR

- 15.1 The arbitrator shall have the widest discretion and powers allowed by law to ensure the just, expeditious, economical, and final determination of all the disputes raised in the proceedings, including the matter of costs.
- 15.2 Without detracting from the generality of the foregoing, the arbitrator shall have the powers:
 - 15.2.1 to rule on his or her own jurisdiction;
 - 15.2.2 to admit claims or any security or preference whether recognised under the Business Plan or not and to review and set aside a ruling of the Business Rescue Practitioner in regard to the admission or rejection of claims including the power to admit a rejected or partially rejected claim or any security or preference;
 - 15.2.3 to deal with cases of default in accordance with the powers conferred upon the arbitrator in terms of these Rules;
 - 15.2.4 to make any ruling or give any direction mentioned in these Rules or as he or she otherwise considers necessary or advisable for the just, expeditious, economical and final determination of all the disputes raised on the pleadings, including the matter of costs;
 - 15.2.5 to extend before or after their expiry, or abbreviate any time limits provided for in these Rules or by his or her rulings or directions;
 - 15.2.6 to order any party who is a claimant, or claimant under a counterclaim, to furnish security for costs in respect of his claim or counterclaim;
 - 15.2.7 to allow (but only with their express written consent) other parties to be joined in the arbitration proceedings, and to make an award on all issues submitted by all parties, including parties so joined;
 - 15.2.8 to make an order as to costs and
 - 15.2.9 to make any settlement agreement concluded between the BRP, claimant and any other party to the arbitration proceedings, an award which will have the same effect as an award made at the conclusion of the arbitration proceedings.

16. INTERLOCUTORY MATTERS AND TEMPORARY ORDERS

Should the need arise for any party to seek interim or temporary relief before the arbitration is finalised, that party may apply to the arbitrator to grant such interlocutory order or give the required temporary relief and the arbitrator shall have the same

power to do so as if the matter were one heard by a Judge of the High Court save that if by law such power or order cannot be exercised or given by an arbitrator then, and then only, should the parties refer such matter to an appropriate Court.

17. THE AWARD

- 17.1 The arbitrator must give his/her award within thirty days after finalisation of the proceedings unless the parties otherwise agree or unless the AFSA Secretariats permits an extension of that time.
- 17.2 The arbitrator's award must be published to the parties in an appropriate fashion as determined by the AFSA Secretariat.
- 17.3 Unless the parties have in writing instructed the AFSA Secretariat otherwise at any time before the final award is given, there shall be no right of appeal from the award. In cases where the AFSA Secretariat has been instructed otherwise, the appeal provisions contained in Article 22 of the AFSA Rules for Commercial Arbitrations will apply.

18. NON-LIABILITY OF AFSA-SARIPA DIVISION, THE SECRETARIAT AND THE ARBITRATOR

The AFSA-SARIPA Division and its Secretariat shall not be liable to any party for any act or omission relating to an arbitration conducted under its aegis, and shall have no liability or responsibility towards the parties or to any arbitrator in respect of any arbitration commenced under the aegis of the AFSA-SARIPA Division but not completed according to these Rules. An arbitrator appointed by the AFSA-SARIPA Division shall not be liable for any act or omission relating to an arbitration in which he or she was the arbitrator, except in the case of deliberate misconduct.