

# Dispute Resolution & International Arbitration



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### SOUTH AFRICA

International Arbitration: A comparison of the rules of selected arbitration institutions in Africa and Europe



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## International Arbitration: A comparison of the rules of selected arbitration institutions in Africa and Europe

Traditionally, many disputes involving African parties have been resolved by international arbitration at key arbitral centres in Europe. However, Africa also boasts well-established international arbitration institutions, and contracting parties have the choice of a wide range of arbitral institutions that provide specialised arbitral services. These arbitral institutions have developed and implemented their own rules that set out the procedural framework for the arbitral proceedings and establish key processes such as the appointment of the tribunal, designating elements of the process in the absence of party agreement, and fixing the fees payable. As set out in this comparative brochure, although there are some important differences between the rules, there are also many substantial procedural and technical similarities.

This brochure sets out a brief overview comparing the rules of the following selection of African and European institutions:

- The Arbitration Foundation of Southern Africa (AFSA), whose head office is in Johannesburg, South Africa

- The Mauritius International Arbitration Centre (MIAC), based in Port Louis, Mauritius
- The Nairobi Centre for International Arbitration (NCIA), based in Nairobi, Kenya
- The International Court of Arbitration of the International Chamber of Commerce (ICC), headquartered in Paris, France
- The London Court of International Arbitration (LCIA), based in London, England
- The United Nations Commission on International Trade Law (UNCITRAL); the UNCITRAL Secretariat is based in Vienna, Austria (although UNCITRAL itself does not act as an administering entity for arbitrations conducted with its rules)

There are many additional leading arbitral centres that are not included in this comparison for brevity, but which also offer up-to-date and effective rules for the resolution of arbitrations. These include leading African arbitral institutions in Lagos (the Lagos Court of Arbitration and the Lagos Chamber of Commerce International Arbitration Centre), Kigali (the Kigali International Arbitration Centre) and Cairo (the Cairo Regional Centre for International Commercial Arbitration). We can advise clients on the selection of arbitral rules most appropriate for their commercial contracts.

# International Arbitration: A comparison of the rules of selected arbitration institutions in Africa and Europe

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INSTITUTION	AFSA	NCIA	MIAC	LCIA	ICC	UNCITRAL
<b>RULES</b>	AFSA International Arbitration Rules. Effective 1 June 2021	NCIA Rules 2015. Revised 2019	MIAC Arbitration Rules. Effective 27 July 2018	LCIA Arbitration Rules. Effective 1 October 2020. Costs Schedule effective 1 December 2023	ICC Arbitration Rules. Effective 1 January 2021	UNCITRAL Arbitration Rules. Effective 19 September 2021
<b>FORMATION OF THE TRIBUNAL</b>						
<b>NUMBER OF ARBITRATORS IN ABSENCE OF AGREEMENT</b>	<b>ONE</b> Unless the AFSA Court determines otherwise <i>(Art. 6(1))</i>	<b>ONE</b> Unless the NCIA determines otherwise <i>(Rule 7.8)</i>	<b>THREE</b> <i>(Art. 7.1)</i>	<b>ONE</b> Unless the LCIA Court determines otherwise <i>(Art. 5.8)</i>	<b>ONE</b> Unless the ICC Court determines otherwise <i>(Art. 12.2)</i>	<b>THREE</b> <i>(Art. 7.1)</i>
<b>TRIBUNAL APPOINTMENT IN MULTI-PARTY DISPUTES</b>	The 'Claimant' and 'Respondent' parties each nominate an arbitrator. In the absence of joint nomination, the AFSA Court may appoint <i>(Art. 9)</i>	The 'Claimant' and 'Respondent' parties each nominate an arbitrator. In the absence of joint nomination, the NCIA may appoint <i>(Rules 7.10 &amp; 12)</i>	The 'Claimant' and 'Respondent' parties each nominate an arbitrator unless the parties agree otherwise. In the absence of joint nomination, the appointing authority may appoint <i>(Art. 10)</i>	The 'Claimant' and 'Respondent' parties each nominate an arbitrator. In the absence of joint nomination, the LCIA Court will appoint <i>(Art. 8.1)</i>	The 'Claimant' and 'Respondent' parties each nominate an arbitrator. In the absence of joint nomination, the ICC Court may appoint <i>(Arts. 12 (6)&amp;(8))</i>	The 'Claimant' and 'Respondent' parties each nominate an arbitrator unless the parties agree otherwise. In the absence of joint nomination, the appointing authority may appoint <i>(Art. 10)</i>
<b>ARBITRATOR NATIONALITY</b>	If parties are of different nationalities the sole or presiding arbitrator shall not be the same nationality as any party unless the parties agree <i>(Art. 6(8))</i>	If parties are of different nationalities the sole or presiding arbitrator shall not be the same nationality as any party, unless the party who is not that nationality agrees <i>(Rule 9)</i>	No specific requirements, but the appointing authority shall take nationality into account when considering factors likely to secure arbitrator independence and impartiality <i>(Art. 6(3))</i>	If parties are of different nationalities the sole or presiding arbitrator shall not be the same nationality as any party, unless the party who is not that nationality agrees <i>(Art. 6.1)</i>	If the ICC Court is appointing, the sole or presiding arbitrator shall not be of the same nationality as any party unless in suitable circumstances and no party objects <i>(Art. 13.5)</i>  If the arbitration arises from a treaty, no arbitrator shall have the same nationality as any party <i>(Art. 13.6)</i>	No specific requirements, but the appointing authority shall take nationality into account when considering factors likely to secure arbitrator independence and impartiality <i>(Art. 6(3))</i>

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INSTITUTION	AFSA	NCIA	MIAC	LCIA	ICC	UNCITRAL
<b>GROUNDS FOR PARTY CHALLENGE OF ARBITRATORS</b>	Justifiable doubts as to the arbitrator's impartiality or independence, or if the arbitrator does not possess qualifications agreed by the parties  Challenge to be made within 15 days <i>(Art. 13)</i>	Justifiable doubts as to the arbitrator's impartiality or independence  Challenge to be made within 15 days <i>(Rule 11)</i>	Justifiable doubts as to the arbitrator's impartiality or independence, or if they fail to act or if it becomes impossible to perform their functions <i>(Arts. 12(1)&amp;(3))</i>  Challenge to be made within 15 days <i>(Art. 13(1))</i>	Justifiable doubts as to the arbitrator's impartiality or independence, or the arbitrator is unable or unfit to act  Challenge to be made within 14 days <i>(Arts. 10.1 &amp; 3)</i>	Alleged lack of impartiality or independence or "otherwise"  Challenge to be made within 30 days <i>(Art. 14)</i>	Justifiable doubts as to the arbitrator's impartiality or independence, or if they fail to act or if it becomes impossible to perform their functions <i>(Arts. 12(1)&amp;(3))</i>  Challenge to be made within 15 days <i>(Art. 13(1))</i>
<b>REVOCATION OF APPOINTMENT OF ARBITRATORS (OTHER THAN RESIGNATION)</b>	The AFSA Court may at its own initiative remove an arbitrator who fails, or is unable, to perform their functions or act without undue delay  <i>(Art. 13(7))</i>	An arbitrator will be replaced if they are rendered incapable of undertaking their functions or refuses or is unable to act  <i>(Rule 12(2))</i>	Challenge procedure applies <i>(Art. 12(3))</i> or non-participating arbitrators can be replaced by the tribunal  <i>(Art. 12(4))</i>	The LCIA Court can revoke on its own initiative or at the tribunal's request if an arbitrator is unable or unfit to act, or there are justifiable doubts as to impartiality or independence  <i>(Art.10.1)</i>	The ICC Court can replace an arbitrator who is prevented from fulfilling their duties or is not fulfilling their functions  <i>Art. 15(2))</i>	Challenge procedure applies  <i>(Art. 12(3))</i>



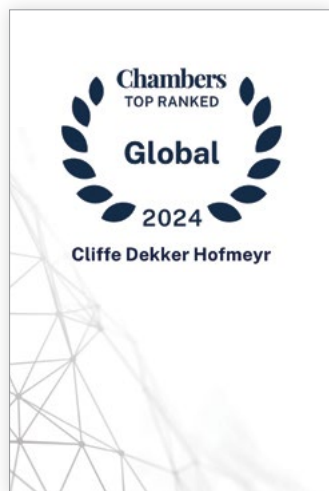
# International Arbitration: A comparison of the rules of selected arbitration institutions in Africa and Europe

CONTINUED

INSTITUTION	AFSA	NCIA	MIAC	LCIA	ICC	UNCITRAL
<b>URGENT PROCEEDINGS AND RELIEF</b>						
<b>ARE EXPEDITED PROCEEDINGS AVAILABLE?</b>	<b>YES</b> A party can apply for expedited proceedings prior to formation of the tribunal if (i) the aggregate amount in dispute does not exceed USD 500,000; or (ii) the parties agree <i>(Art. 10(1))</i>	<b>NOT IN FULL</b> There are no bespoke expedited proceedings but a party can apply to the NCIA for the expedited formation of the tribunal in exceptional circumstances <i>(Rule 10)</i>	<b>NO</b> There are no bespoke expedited proceedings	<b>NOT IN FULL</b> There are no bespoke expedited proceedings but a party can apply to the LCIA Court for the expedited formation of the Tribunal in cases of exceptional urgency <i>(Art. 9A)</i>	<b>YES</b> The expedited procedures apply (unless the parties have opted out, concluded their arbitration agreement before the expedited provisions came into effect or the ICC Court determines expedited proceedings inappropriate) if: (i) the amount in dispute is under specified thresholds (USD 2-3m depending on the date of proceedings); or (ii) the parties agree <i>(Art. 30)</i>	<b>YES</b> Expedited proceedings are available with the express consent of the parties <i>(Art. 1(5))</i>
<b>ARE EMERGENCY ARBITRATION PROCEEDINGS AVAILABLE?</b>	<b>YES</b> A party can apply prior to the formation of the tribunal. The aim is to appoint the arbitrator within 2 days and to determine the claim within 14 days <i>(Art. 11)</i>	<b>YES</b> A party can apply prior to the formation of the tribunal (unless the parties have opted out) (Rule 28). The aim is to appoint the arbitrator within 2 days and determine the claim within 15 days <i>(Schedule 2(3)&amp;14)</i>	<b>NO</b> No bespoke emergency proceedings	<b>YES</b> A party can apply prior to the formation of the tribunal (unless the arbitration agreement pre-dates October 2014 or the parties have opted out). The aim is to appoint the arbitrator within 3 days and determine the claim within 15 days <i>(Art. 9B)</i>	<b>YES</b> A party can apply prior to transmission of the file to the tribunal (unless the arbitration agreement pre-dates 2012, the parties have opted out, or the arbitration arises from a treaty) (Art. 29, Appendix V). The aim is to appoint the arbitrator within 2 days and make an order within 15 days <i>(Art. 6 of Emergency Rules)</i>	<b>NO</b> No bespoke emergency proceedings
<b>CAN THE TRIBUNAL AWARD INTERIM RELIEF?</b>	<b>YES</b> The tribunal may order interim measures unless otherwise agreed by the parties <i>(Art. 24)</i>	<b>YES</b> The tribunal may order interim measures unless otherwise agreed by the parties <i>(Rule 27)</i>	<b>YES</b> The tribunal may order interim measures <i>(Art. 26)</i>	<b>YES</b> The tribunal may order interim measures <i>(Art. 25.1)</i>	<b>YES</b> The tribunal may order interim measures unless otherwise agreed by the parties <i>(Art. 28)</i>	<b>YES</b> The tribunal may order interim measures <i>(Art. 26)</i>

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INSTITUTION	AFSA	NCIA	MIAC	LCIA	ICC	UNCITRAL
<b>CONDUCT AND PROCESS OF THE ARBITRATION</b>						
<b>ARE TERMS OF REFERENCE REQUIRED?</b>	<b>NO</b>	<b>NO</b>	<b>NO</b>	<b>NO</b>	<b>YES</b> except in expedited proceedings <i>(Art. 23 and Expedited Rules Article 3(1))</i>	<b>NO</b>
<b>IS JOINDER OF PARTIES TO PROCEEDINGS POSSIBLE?</b>	<b>YES</b> Prior to formation of the tribunal, a party or non-party can apply to the AFSA Secretariat for joinder if (i) all proposed parties consent; or (ii) the non-party is <i>prima facie</i> bound by the arbitration agreement  After formation of the tribunal a party or non-party can apply for joinder if all proposed parties consent  <i>(Art. 29)</i>	<b>YES</b> Prior to the formation of the tribunal, a party can apply to the NCIA Registrar for joinder of a non-party  After the appointment of any arbitrator, a non-party can only be joined with the agreement of all the parties  <i>(Rule 16)</i>	<b>YES</b> The tribunal may allow the joinder of a non-party if the non-party is a party to the arbitration agreement, unless the tribunal determines such joinder would prejudice any proposed party  <i>(Art. 17(5))</i>	<b>YES</b> The tribunal may allow the joinder of a third party with the consent of the non-party and applicant party  <i>(Art. 22.1(x))</i>	<b>YES</b> Prior to the formation of the tribunal, a party can apply to the ICC Secretariat for joinder of a non-party  <i>(Art 7.1)</i>  After the confirmation of any arbitrator, joinder is only permissible if (i) all proposed parties consent; or (ii) with the tribunal's approval and the agreement of the non-party to the constitution of the tribunal and to the Terms of Reference  <i>(Art. 7.5)</i>	<b>YES</b> The tribunal may allow the joinder of a non-party if the non-party is a party to the arbitration agreement, unless the tribunal determines such joinder would prejudice any proposed party  <i>(Art. 17(5))</i>



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INSTITUTION	AFSA	NCIA	MIAC	LCIA	ICC	UNCITRAL
<b>IS CONSOLIDATION OF DIFFERENT PROCEEDINGS POSSIBLE?</b>	<p><b>YES</b></p> <p>Prior to formation of the tribunal a party can apply to the AFSA Secretariat for consolidation if (i) all the parties agree; or (ii) all the claims are made under the same arbitration agreement <i>(Art. 30(1))</i></p> <p>After formation of the tribunal, a party can apply to the tribunal for consolidation if (i) all the parties agree; (ii) all the claims are made under the same arbitration agreement with the same tribunal (or no tribunal yet); or (iii) the arbitration agreements are compatible and have the same tribunal (or no tribunal yet) and the disputes arise from the same legal relationship, contracts or transactions <i>(Art. 30(6))</i></p>	<p><b>YES</b></p> <p>A party may request the consolidation of other proceedings under the NCIA rules or administered by the NCIA, if: (i) all the parties agree; (ii) all the claims are made under the same arbitration agreement; or (iii) the arbitrations are between the same parties in connection with the same legal relationship and the NCIA finds the arbitration agreements to be compatible <i>(Rule 17(1))</i></p>	<p><b>NO</b></p>	<p><b>YES</b></p> <p>The tribunal and the LCIA Court have similar powers to consolidate if (i) if all the parties agree; or (ii) the claims arise under the same or compatible arbitration agreements with the same tribunal (or no tribunal yet) between the same parties or arising from the same transaction <i>(Art. 22A)</i></p> <p>Arbitrations can also be ordered to run concurrently if commenced under the same or compatible arbitration agreements, between the same parties or arising from the same transaction, with the same tribunal (or no tribunal yet) <i>(Art. 22A – 22.7(iii))</i></p>	<p><b>YES</b></p> <p>The ICC Court may order consolidation if (i) all the parties agree; (ii) the claims are made under the same arbitration agreement(s); or (iii) the arbitrations are between the same parties, relate to the same legal relationship and the arbitration agreements are compatible. <i>(Art. 10)</i></p>	<p><b>NO</b></p>
<b>DEFAULT SEAT IN ABSENCE OF AGREEMENT</b>	Determined by the AFSA Court <i>(Art. 18)</i>	Nairobi, Kenya <i>(Rule 18.2)</i>	Mauritius <i>(Art.18.1)</i>	London, unless the tribunal determines otherwise <i>(Art.16.2)</i>	Determined by the ICC Court <i>(Art. 18)</i>	Determined by the tribunal <i>(Art. 18.1)</i>

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<b>DEFAULT LANGUAGE IN ABSENCE OF AGREEMENT</b>	English <i>(Art. 20)</i>	Determined by the tribunal <i>(Rule 20(4))</i>	Determined by the tribunal <i>(Art. 19)</i>	Determined by the tribunal <i>(Art. 17.4)</i>	Determined by the tribunal <i>(Art. 20)</i>	Determined by the tribunal <i>(Art. 19.1)</i>
<b>ARE PROCEEDINGS CONFIDENTIAL BY DEFAULT?</b>	Yes, subject to certain exceptions e.g. if disclosure is required by legal duty <i>(Art. 36)</i>	Yes, unless the parties expressly agree in writing to the contrary and subject to certain exceptions e.g. if disclosure is required by legal duty <i>(Rule 34.1)</i>	No specific confidentiality provisions <i>(although Art. 34(5))</i> requires consent for the award to be made public and witnesses can be required to retire during testimony <i>(Art. 28)</i> and confidentiality provisions may apply under applicable law	Yes, subject to certain exceptions e.g. if disclosure is required by legal duty <i>(Art. 30.1)</i>	No, but the Tribunal may make orders concerning confidentiality <i>(Art. 22.3)</i> and confidentiality provisions may apply under applicable law	No specific confidentiality provisions <i>(although Art. 34(5))</i> requires consent for the award to be made public and witnesses can be required to retire during testimony <i>(Art. 28)</i> and confidentiality provisions may apply under applicable law
<b>AWARDS</b>						
<b>INSTITUTIONAL SCRUTINY OF THE AWARD?</b>	<b>NO</b>	<b>NO</b>	<b>NO</b>	<b>NO</b>	<b>YES</b> by the ICC Court <i>(Art. 34)</i>	<b>NO</b>
<b>CORRECTIONS TO THE AWARD?</b>	<b>YES</b> by party request or tribunal initiative within 30 days <i>(Art. 24)</i>	<b>YES</b> by party request or tribunal initiative within 15 days <i>(Rule 30)</i>	<b>YES</b> by party request or tribunal initiative within 30 days <i>(Art. 38)</i>	<b>YES</b> by party request or tribunal initiative within 28 days <i>(Art. 27)</i>	<b>YES</b> by party request or tribunal initiative within 30 days <i>(Art. 36)</i>	<b>YES</b> by party request or tribunal initiative within 30 days <i>(Art. 38)</i>
<b>ARE AWARDS PUBLISHED?</b>	AFSA may publish awards in an anonymized form unless a party objects within 30 days <i>(Art. 36)</i>	The NCIA will not publish awards without the consent of the parties and the tribunal <i>(Rule 34(3))</i>	Awards can be made public with the consent of all parties <i>(Art. 34.5)</i>	The LCIA does not publish awards unless the parties and tribunal consent <i>(Art. 30.3)</i>	All ICC awards from January 1, 2019 may be published within two years unless the parties opt out <i>(ICC Note on the Conduct of Arbitration)</i>	Awards can be made public with the consent of all parties <i>(Art. 34.5)</i>



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INSTITUTION	AFSA	NCA	MIAC	LCIA	ICC	UNCITRAL
<b>FEES AND COSTS</b>						
<b>DISCLOSURE OF THIRD-PARTY FUNDING?</b>	<b>YES</b> <i>(Art. 27)</i>	<b>SILENT</b>	<b>SILENT</b>	<b>SILENT</b>	<b>YES</b> <i>(Art. 11(7))</i>	<b>SILENT</b>
<b>ADMINISTRATION FEES</b>	Fixed registration fee. Administrative fees calculated in proportion to the value of the dispute <i>(Art. 35(1) and Schedule of Cost)</i>	Fixed registration fee. Administrative fees calculated by reference to the value of the dispute <i>(First Schedule – Fees and Costs)</i>	Variable and alternative arrangements available including partial waiver of fees depending on value  The tribunal shall fix the 'costs' of the arbitration which includes any fees and expenses of MIAC. <i>(Art. 40(2))</i>  The MIAC's administrative fees are fixed on an hourly basis and subject to a cap depending on the value of the dispute <i>(MIAC's Schedule of Fees)</i>	Fixed registration fee. Administrative fees charged at specified hourly rates <i>(Art. 28.1 and LCIA Schedule of Costs)</i>	Fixed registration fee. Administrative fees calculated in proportion to the value of the dispute <i>(Art. 38 &amp; Appendix III)</i>	Not applicable
<b>TRIBUNAL FEES</b>	Calculated in proportion to the value of the dispute (and Schedule of Cost) <i>(Art. 35(1) and Schedule of Cost)</i>	Calculated in proportion to the value of the dispute <i>(First Schedule – Fees and Costs)</i>	Determined by the tribunal but shall be reasonable in amount taking into account the amount in dispute, the complexity, the time spent and any other relevant circumstances <i>(Arts. 40 &amp; 41)</i>	Charged at hourly rates <i>(Art 28.1 and LCIA Schedule of Costs)</i>	Calculated in proportion to the value of the dispute reflecting the relevant circumstances <i>(Art. 38, Appendix III, Art. 2)</i>	Determined by the tribunal but shall be reasonable in amount taking into account the amount in dispute, the complexity, the time spent and any other relevant circumstances <i>(Arts. 40 &amp; 41)</i>
<b>CALCULATION AND ALLOCATION OF COSTS</b>	Costs fixed and apportioned by the tribunal <i>(Arts. 35 (3) &amp; (4))</i>  In principle the unsuccessful party bears the costs, subject to the tribunal's consideration of relevant circumstances which may include the parties' conduct <i>(Art. 35(5))</i>	Costs fixed and apportioned by the tribunal <i>(Rule 31)</i>  Unless the parties agree otherwise, in principle the unsuccessful party bears the costs, subject to the tribunal's consideration of relevant circumstances <i>(Rule 31(7))</i>	Costs fixed and apportioned by the tribunal <i>(Arts. 40(1) &amp; 42)</i>  In principle the unsuccessful party bears the costs, subject to the tribunal's consideration of relevant circumstances <i>(Art. 42(1))</i>	Costs fixed and apportioned by the tribunal <i>(Art. 28)</i>  In principle the unsuccessful party bears the costs, subject to the tribunal's consideration of relevant circumstances which may include the parties' conduct <i>(Art. 8(4))</i>	Costs fixed and apportioned by the tribunal <i>(Art. 38(4))</i>  The tribunal may take into account such circumstances it considers relevant <i>(Art. 38(5))</i>	Costs fixed and apportioned by the tribunal <i>(Arts. 40(1) &amp; 42)</i>  In principle the unsuccessful party bears the costs, subject to the tribunal's consideration of relevant circumstances <i>(Art. 42(1))</i>

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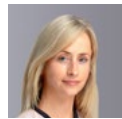
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**BBBEE STATUS:** LEVEL ONE CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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