environmental affairs
Department:
Environmental Affairs
REPUBLIC OF SOUTH AFRICA

ACCREDITATION STANDARDS FOR A PANEL OF ENVIRONMENTAL ARBITRATORS

DISCUSSION DOCUMENT

VERSION 1
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TABLE OF CONTENT

1 Introduction

The National Environmental Management Act ["NEMA"], Chapter 4, provides for alternative dispute resolution in respect of environmental disputes. Section 21 of NEMA authorises the establishment of a Panel of persons to render facilitation, conciliation and arbitration services:

> ***21. Appointment of panel and remuneration***
>
> *(2) The Minister may create a panel or panels of persons from which appointment of facilitators and arbitrators in terms of this Act may be made, or contracts entered into in terms of this Act.*

It is clear that in establishing such a panel, the Minister needs to apply a certain standard as to competency of the appointed persons.

This document examines the demands on skills and knowledge posed by environmental disputes, and on the basis of that examination, describes the minimum requirements that a arbitrator should have in order to qualify for accreditation/appointment as an environmental arbitrator.

Environmental arbitration is a specialised field of arbitration. In other words:

- *The first requirement for such a specialist would be that the person is a qualified arbitrator*.

  Accordingly we will in section 2 of this document examine what the accreditation criteria should be in order to qualify as an *arbitrator*.

- *The second requirement would be that the person has the necessary specialist skills, knowledge and experience to mediate environmental disputes*.

  Accordingly we will in Section 3 of this document examine the additional requirements that are necessary to qualify a person as en *environmental* arbitrator.

This document is a collation of information from the sources cited in this document, and (save for the sections entitled "Analysis and conclusions") is not presented as original work.

2 Arbitration Accreditation Standards

2.1 Official Accreditation

The arbitration industry in South Africa is, like a number of other professions, self-regulating. This implies that there are no minimum standards set by way of statute or regulation.

However the Alternative Dispute Settlement ["ADR"] Industry has established a body for the purpose of formulating and prescribing minimum standards for dispute settlement practitioners. This entity is called the Dispute Settlement Accreditation Council of South Africa ["DiSAC"].

DiSAC is a voluntary organisation established by the ADR Industry in South Africa – specifically for purposes of determining and maintaining professional standards for the Industry.

The system of standards and accreditation provided by DiSAC is a voluntary, 'opt-in' system. It is not a licensing system. This implies that no practitioner can be forced to apply for accreditation, and that accreditation is not a requirement for practicing as a dispute settlement practitioner.

At the start of 2012 DiSAC published its first accreditation standard for the mediation industry. A full copy of this standard is available at: (Note – the website indicates that it is a "draft standard" – this is incorrect, and is in fact the current and approved standard)

http://www.usb.ac.za/disputesettlement/dispute_settlement_accreditation_council.html

This standard carries the blessing of all the DiSAC member organisations, who make up the bulk of the ADR industry in South Africa.

HOWEVER, DiSAC has not yet formulated or published any arbitrator accreditation standards.

Though the DiSAC mediation accreditation standard does give some guidance as to the structure of an accreditation standard, it gives no guidance as to content of an arbitrator accreditation standard.

2.2 Accreditation by Service Providers in South Africa

The following standards apply in South Africa with regard to the admission of arbitrators by the various service providers:

- Association of Arbitrators

The Association requires all its arbitrators to be thoroughly familiar with and experienced in the law and practice of arbitration, the rules of evidence and procedure, the laws of contract and delict, and basic legal principles.

In addition the Association requires its arbitrators to be mature, well-balanced personalities, capable of objective and dispassionate judgment, which is assessed in interviews with qualified applicants.

Fellows must be in possession of the Association's Higher Diploma (Fellowship Admission) or have such knowledge and experience of arbitration law and practice as the Executive

Committee may approve. In addition, applicants must possess a tertiary level or comparable educational qualification approved by the Association.

The Higher Diploma is obtained after completion of the following 4 modules Association. [1]

Module 1

Introduction to the Theory of Law: National law and its subject matter; principles of natural justice and equity; common law; Roman Dutch writers; South African Courts and the precedent system; personal and real rights; the classification of law.

Law of Contract 1: Principles of law of contract; nature and formation of a contract; operation and interpretation of a contract; various breaches and appropriate remedies; termination of a contract.

Module 2

Law and Practice of Arbitration 1: The role of arbitration in law and in our commercial life; the arbitration agreement; the qualifications of an arbitrator and how he is appointed; pre-hearing procedures; how the hearing is conducted; making and enforcing an award.

Module 3

Advanced Law of Contract (2) and Delict

This module will cover the advanced law of contract and the law of delict.

Module 4

Law and Practice of Arbitration (2) substantially covers the same ground as the Certificate in Arbitration, but in much greater detail and with greater emphasis on the arbitrator's duties, especially the writing of awards. It will also cover other alternative dispute resolution procedures.

Evidence in Arbitration Proceedings covers the principles of evidence with special emphasis on their application in domestic arbitration proceedings and the legislation, evidential and procedural rules governing international arbitrations

These modules are presented as distance learning, with some half-day workshops. Each module has 4 assignments, 2 exams. Each module covers at least 150 pages of notes with 2 prescribed texts. The course is two years in duration, and the approximate required study time for each module is as follows:

- Module 1 – 132 hours
- Module 2 – 132 hours
- Module 3 - 147 hours
- Module 4 - 177 hours2

Practicing lawyers are exempt from Models 1 and 3, and can complete training in one year.

- AFSA [Arbitration Foundation of SA]

Admission criteria to the panels require appropriate experience or training. The applicant must be a member of AFSA, and must complete the Panel Application form and pay a small

1 http://www.arbitrators.co.za/membership.html
2 As advised by AoA Course Manager – Donald Kellerman

fee. All accredited arbitrators are bound by the AFSA Code of Conduct.[3]

AFSA offers an advanced certificate in Alternative Dispute Resolution in conjunction with the University of Pretoria. The study programme lasts for approximately six months and is broken into four compulsory modules. One of these modules is an elective module which students choose from four options.

The compulsory modules for the advanced certificate are:

- An introduction to conflict management and dispute resolution;
- Mediation, consensus building processes and skills;
- Arbitration, adjudicative processes and skills.

The elective courses, from which the student must choose at least one, are:

- Labour arbitration;
- International commercial arbitration;
- Divorce mediation;
- Construction arbitration.

The ADR course is ideal for most professionals, business people, IR and HR professionals and union representatives. Graduates of the course qualify as arbitrators and mediators, and can apply for membership of AFSA, and to our panels.[4]

- Tokiso

For commercial arbitration Tokiso require successful applicants to have concluded the Association of Arbitrators arbitration fellowship course.

- Equillore

Equillore has made extensive use of arbitrators in its Road Accident Fund arbitration project. Qualified and practicing lawyers were admitted to the panel of arbitrators, on the basis of a two day arbitration training and assessment course.

3 http://www.arbitration.co.za/pages/FAQ.aspx#7
4 http://www.arbitration.co.za/pages/Training.aspx

2.3 Overview of other Jurisdictions

In order to give some perspective on the DiSAC standard, we provide a short overview of lesson learned regarding minimum standards of training and experience for the accreditation of arbitrators.

2.3.1 Canada

The designation of "Chartered Arbitrator" is recognized nationally and internationally, signifying to the public and to those referring clients that an ADR practitioner has achieved a particular level of skill and experience.

This table sets out the admission requirements for mediators and arbitrators in Canada.

FOR	Chartered Mediator	Qualified Mediator	Chartered Arbitrator
Education	Completion of at least **80 hours** mediation theory and skills training in mediation training programs approved by ADR Canada or acceptable to ADRIA Designations Committee; AND Completion of **100 hours** of study or training in dispute resolution or related field[1].	**40 hours** basic mediation training[12] and **40 hours** specialized training[13]	Possess a degree, qualification or demonstrated expertise in a particular discipline and Attended and successfully completed a course or courses of study in arbitration.
Experience	Conducted at least **15 mediations**[11] as the sole mediator or the mediation chairperson[3] and all 15 of the mediations must have been fee paid[2].	Conducted **2 supervised and assessed practice mediations** or two actual mediations, paid or unpaid; and 3 actual mediations, paid or unpaid, sole or co-mediated within 3 years of designation being awarded.	Practiced as an arbitrator for not less than two years and Chaired at least five arbitrations of which at least two have been fee-paid. Provide three (3) electronic copies of arbitration awards / decisions.
Skills Assessment	Observation and approval of an applicant conducting a sole mediation, to occur within two years before or after the date of the application, through one or more of the following: - An actual mediation - Video recorded mediation - Mediation assessed role play	Not required	Demonstrated competency in the process of arbitration as determined through either observation and approval by a qualifying Arbitrator through one or more of the following: - co-arbitration, - practicum, - role-playing, - videotaped arbitration or other processes approved by the Institute, or Successful completion of a competency assessment program
Letters of Recommendation	Provide 3 Letters of Recommendation (1 character / personal and 2 professional) of your services as a mediator.	Provide 3 Letters of Recommendation (1 character / personal and 2 professional) of your services as a mediator.	Provide 3 Letters of Recommendation (1 character / personal and 2 professional) of your services as an arbitrator.
Waiver	Education requirements may be waived where the ADRIA Designations Committee determines applicant has satisfied or exceeded the education requirements above through proven skills, competency, & longevity in practice as recognized and recommended by peers.*	Applicants may submit experience and qualifications to Designations Committee for review. A skills assessment may be required.	Requirements may be waived where the Committee determines applicant has satisfied or exceeded the requirements above through proven skills, competency, and recognition and recommendation by peers.*
Membership	Must be a member of ADRIA and ADR Canada (Full).	Must be a member of ADRIA and ADR Canada (Full).	Must be a member of ADRIA and ADR Canada (Full).
CEE Continuing Education & Engagement	Must accumulate 100 points for CEE in 3 years.	Must accumulate 60 points for CEE in 3 years.	Not determined to date
Application Filing Fee	$200 plus GST	$200 plus GST	$200 plus GST

The focus for arbitrator accreditation seems to be on experience, rather than on lengthy training. The training is described as follows:

- The ADR Institute of Canada, Inc. offers a correspondence course in arbitration at an extremely economical rate for individuals who prefer self-learning or are unable to attend local courses.

  This two-part correspondence program is designed for those with post-secondary education. Lawyers admitted to the bar in Canada do NOT have to complete Part I of the course however a law degree or training in arbitration is not essential. The 27 lessons that comprise the program cover concepts and procedures of contract and tort law, arbitration acts and procedures, evidence and court control of arbitration.

  Students must complete one assignment each month. These are assessed by ADR Canada members who are practicing and experienced arbitrators. The course culminates in a case study where students must apply their skill and newly acquired knowledge to a practical arbitration problem.

  > PART I — designed to provide non-lawyers with an understanding of the law of contracts and torts, and an introduction to commercial arbitration statutes. After completing each of the assigned chapters, students must complete and submit an assignment. After all assignments have been completed, an exam must be written.
  >
  > PART II —provides members of the legal profession and graduates of Part 1 with detailed information on the appointment, authority and role of the arbitrator; steps involved in the arbitration process; rules of evidence; and arbitration awards. As in Part 1 of the correspondence program, each lesson is followed by an assignment. After all assignments have been completed an exam must be written.

- The ADR Institute of Alberta offers an 84-hour Certificate Program in Arbitration consisting of one ADR introduction course, 3 distinct courses (Level I to III), and a Med/Arb Arb/Med course. [5]

- British Columbia offers the following:6

  > *Arbitrator Training Program*
  >
  > *Part I – "Basic Law For Arbitrators"*
  >
  > *3 days X 6 hours; plus pre-test and post-test; two sessions per year (in Vancouver, plus other locations as demand warrants)*
  >
  > *Content: An introduction to basic principles of law focusing on commercial disputes. Intensive review of principles of general contract law, plus selected types of contracts. The course is intended for non-lawyers. Text: Smyth, Soberman et al., "The Law and Business Administration in Canada"*
  >
  > *Part II – "Conduct of Arbitration Proceedings"*
  >
  > *3 days X 6 hours; plus post-test; two session per year (in Vancouver, plus other locations as demand warrants)*
  >
  > *Content: Intensive review of Commercial Arbitration Act and rules of procedure, including options under various sets of rules. Text: ADRIC, "The*

5 http://www.adralberta.com/arb-certificate.asp
6 http://www.amibc.org/training.html

Arbitration Practice Handbook", plus BCAMI materials.

- Ontario recognises a number of courses.[7] These include the Murray Miskin course in Toronto to train people to be arbitrators. The next course will be the week of 17 June 2013. Lawyers taking the course get all the Professional Development credits they require for 2013. Everyone who takes the course receives a Certificate from the ADR Institute of Ontario and is qualified for Arbitrator membership in the Institute.8

In their document "Principles, Criteria, Protocol, Competencies, for the designation of CHARTERED ARBITRATOR"[9], the Institute indicates the following:

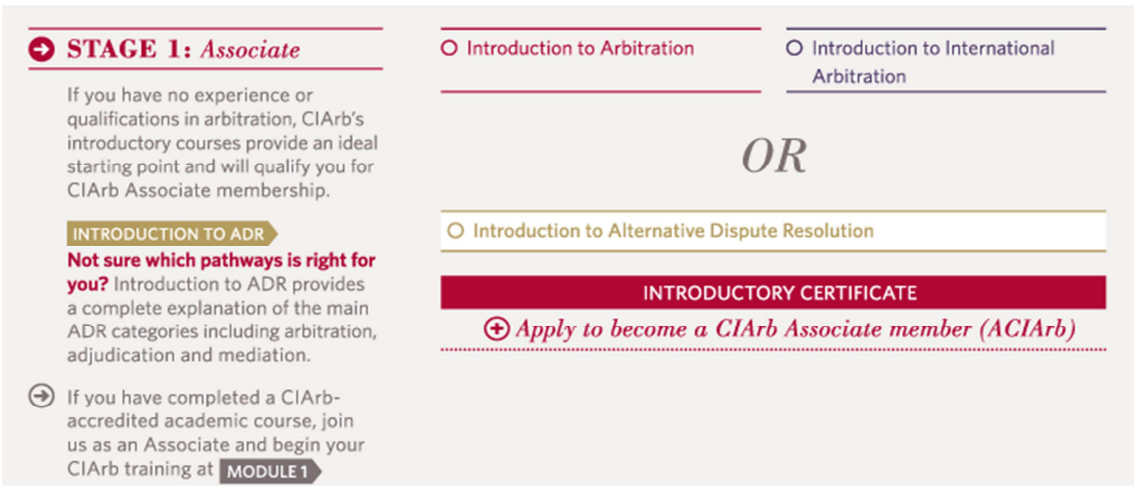
Summary of knowledge and skills applicable to an Arbitrator:

- *Knowledge of the Laws of Tort/Delict, Evidence and other applicable laws related to arbitration in the jurisdiction of the arbitration;*
- *Knowledge of the governing Arbitration Act (Law) in the applicable jurisdiction.*
- *Knowledge of ADR Canada's Code of Ethics and Rules of Conduct governing the conduct of an arbitrator generally and recognition of the importance and necessity to abide by same;*
- *The skills required to hear and evaluate the evidence in accordance with the applicable procedural rules, including the ability to assess conflicting points of view, evaluate the validity of arguments presented and determine the award;*
- *Knowledge of the arbitration process and possession of the skills to carry out the protocol required to initiate and complete an arbitration engagement, including the formalization of the engagement, procedures during the arbitration hearing and handing down the award.*

They also provide a detailed description of the competencies required by arbitrators. This has been included in Annexure A to this document.

2.3.2 United Kingdom

The Chartered Institute of Arbitrators in the United Kingdom, approaches membership as follows:

- 

7 http://www.adrontario.ca/resources/approved_courses.cfm
8 http://adrworks.com/
9 http://www.adrcanada.ca/resources/documents/CArbCriteria.pdf

10

Their training courses have the following content:

> <u>*Module 1 - Law of Obligations and Civil Evidence (Arbitration)*</u>
>
> *This course provides candidates with a robust understanding and appreciation of the key, relevant aspects of the local jurisdiction's legal system and approach to obligations and evidence that influence, shape or otherwise have a bearing on how disputes may be treated and resolved according to law.*
>
> *This course is intended for candidates who have not necessarily studied law previously and who wish to gain a firm understanding of all the key elements of obligations and evidential law that affect matters in civil and commercial disputes. The course is suitable both for candidates who wish to go on to become qualified arbitrators or adjudicators and those with a more general interest in dispute resolution.*
>
> *The course will be valuable for anyone wishing to understand and apply legal principles to a situation under dispute, including mediators, or distil the reasoning underlying a court's decision. The level of knowledge developed by the course is roughly equivalent to those elements of a first degree law at university relevant to alternative dispute resolution processes.*
>
> *The course is delivered over seven months, with a combination of private study and face-to-face tutorials. The course consists of a series of assignments and examinations.*
>
> *On successful completion of the course, candidates will be eligible to progress onto Module 2 of the arbitration, international arbitration or adjudication pathways.*
>
> <u>*Module 2 - Law of Arbitration (Arbitration)*</u>

10 http://www.ciarb.org/education-and-training/pathways/

This course provides candidates with a detailed knowledge and understanding of the law of arbitration, applying to their relevant jurisdiction, so that they can recognise or contribute to a legally satisfactory domestic arbitration.

The course details the law of civil and commercial arbitration. It is therefore valuable for anyone wishing to understand the arbitral process, whether as a party, advocate, witness, judge or potential arbitrator.

The course is delivered over five months, with a combination of private study and face-to-face tutorials. The course consists of an assignment and an examination.

On successful completion of the course, candidates will be eligible to apply to be a Member of the Chartered Institute of Arbitrators.

Module 3 - Practice, Procedure, Drafting and Deciding (Adjudication)

Module 3 (Adjudication) provides candidates with detailed knowledge of and guided practice in the main procedural elements of a commercial adjudication, so that successful candidates become proficient in giving independent advice on the process and drafting as professional advocates or adjudicators.

This course focuses on the processes, key documents and procedures of a modern, commercial adjudication - with the exception of writing a final and enforceable, reasoned award. It is therefore recommended for anyone involved in any stage of commercial adjudication, including lawyers drafting dispute resolution agreements and, professionals acting as advocates in construction disputes.

This course is delivered over a period of six months, with a combination of private study and face-to-face tutorials. The course consists of a series of assignments, an examination and an assessment workshop to assess knowledge, judgment and interactive/self-presentation skills.

Module 4 - Award Writing (Arbitration)

This course provides candidates with sufficient knowledge of and practice in all the requirements for the writing of a final, reasoned and enforceable arbitration Award in a commercial dispute.

On successful completion of this module, candidates will be able to demonstrate in depth knowledge and understanding of what is involved in writing an enforceable Award, practical skill in writing a formal document that is legally satisfactory, clear, cogent, comprehensive and concise and skill in evaluating evidence, distilling issues from submissions and deciding issues by applying legal principles to facts.

This course is delivered over a period of four months, with a combination of private study and face-to-face tutorials. The course consists of an assignment and an examination.

At the end of the course, candidates will be eligible to progress onto the Peer Interview in order to become a Fellow member of the Chartered Institute of Arbitrators.

Accelerated Route to Membership (Domestic Arbitration):

This assessment programme provides candidates with a fast-track route to Membership.

Recognising the demands on professionals' time, and in line with a fundamental aim of arbitration - efficiency, this fast-track route is designed for busy, legally qualified

professionals who have a law qualification and some knowledge of the law of arbitration. The programme has been devised to take into account, knowledge and experience gained through academic and practical means.

The assessment programme is delivered over 1.5 days, and consists of a pre-course exercise, workshops assessing knowledge of arbitration law and an examination.

On successful completion of the assessment programme, candidates will be eligible to apply to be a Member of the Chartered Institute of Arbitrators.

2.3.3 India

The Certificate Course on arbitration offered by the Institute of Chartered Accountants of India is as follows"

Duration of the course: 40 hours spread over 6 days.

Course Objective:

The objective of the course is to familiarize the members with the legal framework of arbitration in the country, its history and background, international scenario-procedure and practices, procedural aspects of the arbitration process, arbitration award, challenge of the award, etc. and equip them with the necessary level of expertise necessary for stepping into the area of practice. It is also designed to cover practical aspects comprising case studies and mock arbitral proceedings.

Syllabus

The course contents for Certificate Course on Arbitration comprised of the following

Seven Modules:

Module I – Introduction to Alternative Dispute Resolution

Module II – Allied Laws

Module III – Arbitration in India

Module IV – Arbitration Procedure

Module V - Arbitration Award

Module VI - Skills, Ethics and Economics in Arbitration

Module VII - Arbitration in Other Countries and Emerging Trends

Research paper on Comparative ADR or ODR or assignment

2.3.4 Australia

The Australian Institute of Arbitrators and Mediators stipulate the following requirements in their POLICY FOR THE REGISTRATION OF PRACTISING ARBITRATORS (2008):[11]

Register of Practising Arbitrators

2.1 The Register of Practising Arbitrators shall comprise those members of the Institute who have been given a grading by Council and have been allocated a Panel or Panels that cover the professional or occupational fields in which the member

11 http://www.iama.org.au/sites/default/files/membership/members-area/arbitrator/00aArb-PolicyforRegistration_000.pdf

practises.

2.2 The Register of Practising Arbitrators shall be restricted to those members who satisfy Council that they have the knowledge, experience, personal qualities and qualifications necessary to qualify them to be nominated as an arbitrator.

2.3 Any member seeking grading and entry on the Register of Practising Arbitrators shall:

(a) apply in writing on the prescribed forms for grading and for listing on those Panels on which the applicant considers he/she is qualified to be so listed, providing details of qualifications and experience in the applicant's profession or calling and in the field of arbitration.

(b) satisfy Council that he or she has the academic knowledge and experience appropriate for an arbitrator, by completion of education and training to the satisfaction of Council in accordance with Section 8 of this Policy.

(c) be interviewed and recommended by an Assessment Panel appointed pursuant to Section 7 of this Policy.

2.4 The Council of the Institute may, if it is otherwise satisfied as to the competence of a member to act as an arbitrator, in its unfettered discretion, exempt a member from compliance with any or all of the requirements of this Policy.

The training requirement stipulated in Section 8 of the policy specifies the following:

Education and Training

8.1 Council may approve University Courses for the education and training of members seeking grading and entry on the Register of Practising Arbitrators. Such courses will be held annually, providing sufficient enrolments are obtained and appropriate arrangements can be made with a University or Universities for the provision of such course.

8.2 Satisfactory completion of an approved University Course is a pre-requisite for grading unless:

(a) the applicant is qualified under Section 8.3; or

(b) Council grants exemption from completion of an approved University or Institute Course to an applicant who has other qualifications which Council considers sufficient to justify exemption.

Persons seeking exemption under Section 8.2(b) shall apply in writing giving full details of their qualifications together with such documents or information as Council requires assessing whether the qualifications are sufficient for exemption.

Prerequisite requirements for entrance to these University Courses are as follows:

Entry requirements [12]

This is a Postgraduate Professional Certificate and admission requires one of the qualifications:

a. a recognised university degree and 2 years practice in a relevant field

b. diploma or other tertiary qualification (University or TAFE) plus at least 3 years practice in relevant field

12 http://www.adelaide.edu.au/arbitration/future/#admission

c. a recognised industry-based qualification plus at least 4 years' experience holding a senior and responsible position within a relevant field

d. at least 5 years' experience holding a senior position in a field of practice or discipline

Specific prerequisite knowledge required for the Professional Certificate: an understanding of the fundamentals of business law equivalent to 6 units of study including, but not limited to, one of the following:

a. Bachelor of Laws (LLB)

b. Bachelor of Commerce (BCom) that includes Commercial Law I (COMMLAW 1004) and Commercial Law II (COMMLAW 2500)

c. Introduction to Business Law (LAW 7157)

d. Other equivalent qualification or experience

2.3.5 Singapore

Minimum Standards for admission to the Singapore International Arbitration Centre Panel are as follows:[13]

The applicant must have:

• tertiary education

• at least 10 years post qualification experience

• a fellowship from the Singapore Institute of Arbitrators or any comparable professional arbitration institute

• experience as an arbitrator in five or more cases

• completion of at least two commercial arbitral awards

• aged between 30 and 75 years

SIAC reserves the right, in its absolute discretion, to admit or to refuse the admission of any person to the Panel. In exercising its discretion, SIAC will have regard to, inter alia, the qualifications, experience and standing of an applicant as well as to the number of arbitrators currently on the Panel from the country in which the applicant is resident.

In order to obtain fellowship of the Institute of Arbitrators, the applicants must pass a fellowship assessment course:14

FELLOWSHIP ASSESSMENT COURSE

The Fellowship Assessment Course (FAC) consists of a two-full day programme which covers Modules 2, 3, 4 & 5 with topics such as: institution arbitration and ad-hoc arbitration, arbitration agreement, appointment of arbitrator, the UNCITRAL model law, roles of tribunal and parties, procedures for arbitration, drafting of directions, hearing, procedures for arbitration and drafting of Award. Non-legally trained candidates are required to undertake Module 1 which covers topics related to Laws of Contract, Tort and Evidence.

13 http://www.siac.org.sg/index.php?option=com_content&view=article&id=65&Itemid=87
14 http://www.siarb.org.sg/Index_Training_Research_Material_2.html

To complete the Fellowship Assessment Course successfully, candidates are required to achieve 100% attendance and pass assessments of Modules 1, 2, 3, 4 and 5. Lawyers are exempted from completing Module 1. This is an Open Book Examination and candidates may bring into the examination hall any books or documents deemed relevant. Successful completion of the course modules and the Award Writing Examination will be deemed to be equivalent of passing the corresponding requirements for Fellowship of SIArb provided that candidates are aged at least 35 years old at the time of application. Subject to other admission criteria, successful completion of the Award Writing Examination will qualify members of the Law Society of Singapore to be admitted to the Panel of Arbitrators of the Law Society Arbitration Scheme

2.4 Analysis

On the basis of the above information, the following conclusions can be made:

- There is general consensus that specialist arbitrator training and assessment is a practice requirement
- The training requirements can be broadly categorised as follows:
    - Substantive National Law

      General understanding and knowledge of national law of South Africa, including the principles of personal and real rights, the law of contract, and the law of delict;
    - The Theory of Legal Process

      General understanding and knowledge of the classification of law, the South African Courts and the precedent system, its law of evidence, general principles of legal procedure, and principles of natural justice and equity.
    - Law and Practice of Arbitration

      Arbitration legislation in South Africa, international arbitration, the role of arbitration in commercial life; ethical issues in Arbitration, the arbitration agreement; the appointment of the arbitrator, the arbitrator's duties, pre-hearing procedures; how the hearing is conducted; evidence in arbitration, the writing of awards, making and enforcing an award.
- There is broad (though not general) agreement that the training modules require extensive study that:
    - Includes self-study and reading, assignments, tutorials and workshops, and assessment. about the required duration for such arbitrator training:
    - Is spread over a period of time of one to two years.
    - There is an alternative view that a more condensed program (40 to 84 hours) can also be offered (Canada & India)
- There is wide (though not general) consensus that qualified lawyers should be treated differently with regard to the training / assessment requirements, but there is disagreement as to the extent:
    - One view is that lawyers should be exempt from the "Substantive national

law" and "Theory of legal process" components of training courses, but should still be required to do the full "Law and practice of arbitration" components

- This view is supported by the Association of Arbitrators and Tokiso

- A second view is that, in addition to this exemption, lawyers with knowledge and experience of arbitration should be allowed to qualify by completing an "assessment course". If they prove their capability as arbitrators, they should be allowed to practice without additional training.
  - This view is supported by the Singapore Institute of Arbitrators, the UK Chartered Institute of Arbitrators, and Equillore.
- The Australian view appears to be that ALL applicants (including lawyers) are be required to pass a University level arbitration training course.

➢ Despite the formal training requirements, most registration / accreditation programs have a provision that applicants who have extensive experience (and training) as practicing arbitrators may be allowed to apply for membership (sometimes called a "grandfather" clause). They will be assessed, and if found to be skilled, they will be registered / accredited.

2.5 Conclusions

In the absence of a generally recognised arbitration accreditation standard in South Africa, the Department is required to prescribe its own accreditation standard. The Department will however, in formulating such a standard, be guided by existing arbitration practice in South Africa, as informed by International learning.

The Department will however request the Dispute Settlement Accreditation Council to as a matter of urgency consider and adopt a national arbitration accreditation standard. In this regard, DiSAC will specifically be requested to consider the possibility of formulating such standards in accordance with the SA Qualifications Authority (SAQA) framework.

In determining its arbitrator accreditation standard, the Department is guided by the following:

- The precedent set by environmental legislation in South Africa. Of particular relevance is the National Water Act, 36 of 1998:
  - The Act makes provision for the establishment of a Water Tribunal that has wide (and in most cases final) jurisdiction over water decisions.
  - Section 146(4) only provides that members of the Tribunal must have *"knowledge in law, engineering, water resource management or related fields*".
- NEMA Chapter 4 provides no guidelines as to the qualifications of persons to be admitted to the Panel in terms of Section 21.
- Section 21(3) of NEMA reads as follows:

  "*The Minister may, pending the establishment of a panel or panels in terms of subsection (2), adopt the panel established in terms of Section 31(1) of the Land Reform (Labour Tenants) Act, Act 3 of 1996*".

- NEMA refers specifically to the Land Reform (Labour Tenants) Act, Act 3 of 1996 (hereinafter "the Land Reform Act") in that it provides some indication as to the requirements preceding the appointment of arbitrators to serve on the panel, compiled by the Minister, in terms section 31(1) of the Land Reform Act. Section 31(1) of the Land Reform act reads as follows:

  "The Minister shall in consultation with the Minister of Justice compile a panel of persons from whom arbitrators shall be appointed in terms of Section 19(3)(b)".

- Section 31(2) reads as follows:

  "An arbitrator shall be a person who, by virtue of his or her training or experience, has skills and knowledge relevant to land matters and the resolution of disputes".

  It is therefore proposed that the Department of Rural Development and Land Reform be approached in order to ascertain information on the initial requirements they deem necessary for appointment of their arbitrators, relating to arbitration accreditation standards. A similar approach can then be adopted, if appropriate. It will also promote inter-governmental cooperation and a sense of uniformity.

- NEMA also refers to "*specific environmental management acts*" which means:

  The Environmental Conservation Act, Act 73 of 1989;

  The National Water Act, Act 36 of 1999 (already discussed);

  The National Environmental Management: Protected Areas Act, Act 57 of 2003;

  The National Environmental Management: Biodiversity Act, Act 10 of 2004 (hereinafter "NEMBA");

  The National Environmental Management: Air Quality Act, Act 39 of 2004.

- The aforementioned "*specific environmental acts*" may be considered when ascertaining relevant requirements of skills and knowledge essential to arbitrators, specifically Section 14(1) and 14(1)(b) of NEMBA, which reads as follows:

- *"A member of the Board must have appropriate qualifications and experience in the field of biodiversity".*

- It therefore becomes apparent that the arbitrators, appointed by the Minister, should have the necessary skills, qualifications and experience in the relevant field, being two-fold:
  - Environmental issues; and
  - Settlement of disputes.

- The need for the immediate establishment of a credible and diverse panel of environmental arbitrators. The accreditation requirements may therefore not be determined as high as some local and international precedent would have it, but still high enough to meet generally acknowledged professional requirements.

With the above background, it is proposed that the Department adopts the following approach with regard to training and assessment requirements for arbitrators to be admitted to its Panel:

- Applicant arbitrators should be required to have completed the Association of Arbitrators higher diploma, or the AFSA Certificate in ADR, or an equivalent;
- Applicants may apply for exemption from this training requirement if they:

- Have been admitted to practice law in South Africa as an attorney or advocate of the High Court;
- Have some previous knowledge and/or experience of practicing as arbitrators; AND~~and~~
- Have passed an arbitrator assessment course (minimum requirements for such a course is 40 hours).

➢ In exceptional circumstances, experienced arbitrators who are acknowledged by their peers as such, may be accredited on the basis of their experience in arbitration practice without having to first complete an accredited training programme. A person who previously held a permanent appointment as a Judge of the High Court in South Africa shall be deemed to have sufficient prior experience

3 Specialist Skills and Experience Required for Environmental Arbitration

When we determine accreditation standards for specialist arbitrators we must consider the substantive *knowledge* and expertise that is required of the specialist field in which the arbitrator wishes to practice.

This section will therefore consider both these requirements with regard to environmental arbitrators.

3.1 Special Demands Imposed by Environmental Disputes

One of the principle reasons for using arbitration is that the parties have the ability to appoint a person that has specialist knowledge in the subject matter of their dispute. They do not need to "educate" that arbitrator in order for him/her to make an informed decision – to the contrary, the arbitrator is able to quickly understand evidence, and because of his background, effectively probe and evaluate the evidence that is presented.

> *[T]he use of specialized training by an arbitrator cannot be a substitute for evidence adduced by the parties. Accordingly, while specialized training may be of assistance in understanding and evaluating record evidence, it may not be used to bridge a gap in evidence adduced by a party or as a substitute for existing evidence. An arbitrator may not use expertise that he or she may have to create new 'evidence' by extrapolating from record evidence, nor can an arbitrator use such expertise as a basis for conducting factual investigations.*[15]

In a previous discussion document entitled "Accreditation Standards for Environmental Mediators", we discussed the specialist requirements that environmental mediation imposes on practitioners.[16] These include

- The arbitrator must be "environmentally literate". In other words he/she must have substantive knowledge of the following:
  - The language of environmental science and policy – either as a result of a tertiary academic qualification or as a result of extensive experience in the field of environmental management.

    It is unlikely that this background can be adequately taught through a short course – the arbitrator must have a proper academic or practise background in the field of environmental management.
  - The legal and legislative framework, and the institutional setting of an environmental dispute (legislation, administrative and judicial procedures, and the organizational context in which disputes are contested) – either through appropriate academic background or through extensive experience in the field.

15 See Page 6, TOEING THE LINE: ARBITRATORS WITH EXPERT KNOWLEDGE Xerox Canada Ltd v MPI Technologies Inc., By Nicholas Pengelley, Advocates Quarterly, Vol. 33, No. 3, pp. 363-382, 2007, at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1311073

16) This discussion should be read in conjunction with that document, as it informs this section (and for ease of reference we have quoted sections of the discussion in Annexure A).Though these principles do not all apply directly to arbitration, the broad background requirements discussed here, are equally applicable to environmental arbitration.

- The arbitrator must have training and/or experience in public policy dispute resolution – i.e. conflict that is in the public domain, and where the outcome must be value determined (in this context it must be consistent with the directives set out in NEMA).

Arbitration requires of the arbitrator to make binding decisions about the dispute. These decisions need to be based on environmental law and policy. There is accordingly a much stronger onus on the arbitrator (compared to the mediator), to be fully informed of all such legal and policy considerations.

Against this background we conclude that an environmental arbitrator should as a minimum require the following substantive environmental qualification and experience:

- *A tertiary degree or a tertiary qualification (meaning any post matric SAQA accredited qualification) in environmental management, -law, -planning or -science, law, commerce, business, or social sciences;*
- *Where the arbitrator's tertiary qualification is not in the field of environmental law - management, -planning or -science, he/she is required to have a minimum of 8 years of progressively responsible professional work in environmental law, - policy, - planning or -science;*
- *Minimum of eight years work experience;*
- *The arbitrator must have sufficient knowledge of the legal and legislative framework, and the institutional setting of an environmental dispute (legislation, administrative and judicial procedures, and the organizational context in which disputes are contested)– either through appropriate academic background, demonstrable experience in the field, or additional training;*

3.2 Arbitration Experience

Given the complex, multi-faceted nature of environmental disputes that was outlined in the previous paragraphs it is clear that an environmental arbitrator should have prior experience of arbitration.

The most effective method for developing competent environmental arbitrators is through reflective practice under the leadership of experienced arbitrators. A training program is but one component of this education. In addition to the exposure to real issues and real people, practical experience introduces the trainee to the dynamics of "unanticipated events" and to the dispute resolution process as a whole.

The importance of applying not only what has been learnt but one's "common sense" or intuition becomes more apparent in handling real cases. Real cases thus provide the grist for the development of a training program.

Prior experience can be the result of (a combination of) the following:

- Arbitration in other fields – preferably in areas where public policy also plays a role.
- Mentoring – Mentorship is a form of apprenticeship whereby a trainee has the opportunity to learn the practice of arbitration by working with an experienced professional. Often the trainee gains knowledge and experience of the arbitration process by, for example, keeping a visible record of the meeting discussion, writing meeting summaries, and providing feedback to the arbitrator based on personal observations. Though time-consuming and costly for the mentor (unless the trainee is subsequently integrated into the mentoring organization), mentoring offers the best

potential for fostering quality practice grounded in real-world experience. The trainee has the opportunity to observe arbitrations, think through the case, strategize potential actions to be taken, and assume other responsibilities under the supervision of a professional arbitrator. The duration of the mentoring program would depend upon the trainee's previous experience with an ever-increasing role for the trainee.

– Co-arbitration – Co-arbitration does allow for many benefits, including the potential for increased acceptance by the disputants; diversity of arbitration style and experience; easing of some of the pressure that a single arbitrator might experience; sharing the work; and, even for experienced arbitrators, an opportunity to learn.

– Case Analysis – Case analysis is an effective way to illustrate real-world disputes and possible solutions, enabling one to draw conclusions that have wider application. If the stated training objective is not achieved by means of an available case, then it might be instructive to have the participants redesign the exercise based on their experiences. It is crucial that the trainee relate case analysis to conflict theory in order to understand how the outcome of a dispute is influenced by the dispute resolution tools applied.

– Role Plays and Simulations – Role plays allow trainees to test out arbitration styles and techniques in mock arbitrations. They can help trainees better understand the interests of various disputants, both in general terms and in specific disputes, and role play can help trainees learn and practice skills.

  In simulation exercises, trainees take on the responsibility of performing "micro tasks," for example, setting an agenda or writing up an agreement. Such exercises are different from role plays in that the trainee focuses on only one aspect of a arbitrator's role at a time. Simulations are also more likely to be designed around aspects of an actual arbitration rather than the interpretation of the dispute by trainees during a role play. The key to simulation exercises is to model reality as closely as possible. In both role plays and simulation exercises, debriefing and feedback offer an opportunity to correct role misinterpretations, caricatures, etc., and compel people to be more realistic in portraying a role or conducting a task.

It is therefore proposed that a requirement should be imposed that the environmental arbitrator should have prior experience of arbitrating a minimum of 10 cases. This experience can be obtained through a combination of the following ~~:or any one on its own~~:

- *General arbitration experience (minimum of 5) through any of the following;*
  - *Sitting as arbitrator*
  - *Mentoring and/or co-arbitration in arbitrations*
  - *Case studies, role plays AS ARBITRATOR and simulations of arbitrations (maximum of 3 matters may be counted towards the total);*
- *Experience of environmental arbitration through the following (minimum of 5):*
  - *Mentoring and/or co-arbitration in environmental arbitrations (a minimum of 2 matters must be counted towards the total);*
  - *Actual experience of arbitration in public policy matters (including non-environmentally related cases) (maximum of 2 non-environmentally orientated matters may be counted towards the total);*
  - *Case studies, role plays AS ARBITRATOR and simulations of environmental*

arbitrations (maximum of 2 matters may be counted towards the total)

Compliance with the experience requirement should be based on an evaluation and assessment of candidates based on the guidelines set out above.

Candidates with insufficient experience should agree to participate in a programme of mentoring/supervising apprentice arbitrators when required. In principle this should be required for all new entrants who have little or no experience of environmental arbitration. The purpose of supervision of candidate arbitrators is to provide mentoring to these candidates, and to ensure that candidates have the requisite skills to mediate cases without supervision.

Supervision means the attendance of a qualified arbitrator in the arbitration proceedings being conducted by a candidate arbitrator. The supervisor should co-mediate the case, and will therefore be able to actively participate so as to ensure the proper outcome of the arbitration proceedings for the parties in attendance. Candidate arbitrators would not be entitled to any fees for cases performed under supervision.

After each assessment, the supervisor should:

- Provide the candidate arbitrator with verbal feedback and advice.
- Submit a confidential written report on the performance of the candidate arbitrator to the authority doing the assessment of the candidate. Such report must stipulate whether or not the candidate arbitrator is ready to arbitrate on his/her own, and may recommend additional training and mentoring, where necessary.

4 Additional Requirements

4.1 Diversity & Access to Justice

By becoming entrenched in the Department of Environmental Affair's dispute settlement strategy, arbitration will start to play a fundamental role in the way in which people perceive the Department. If it serves to enhance access to justice, it will serve to legitimise the legal system, and vice versa.

This is a big responsibility that needs to be understood and taken up.

> Rawls's theory of justice as fairness aids in understanding both the social justice promise and critique of the field of dispute resolution. To begin with the promise, much of the enthusiasm for "alternative" dispute resolution arose out of popular dissatisfaction with the courts. The costs associated with litigation and the delay in reaching trial made public adjudication virtually inaccessible to many citizens. Some citizens also questioned the legitimacy of attorneys' and judges' dominance over the litigation process and their control over the norms to be used for decision making.[47] Viewing these concerns through the prism of Rawls's analysis, it could be argued that dispute resolution advocates perceived the courts as failing to operate in a manner that assured all citizens the opportunity to exercise their basic liberties, particularly the right to trial and the right to free expression, which are essential for the achievement of political and social justice.
>
> The courts' embrace of mediation and arbitration may thus be seen as an attempt to find other legitimate mechanisms that would allow citizens to exercise these liberties, at least to an acceptable degree. Both mediation and arbitration offer citizens the opportunity for free expression—perhaps even freer expression than is available in the courts—and the opportunity to reason together. Isabelle R. Gunning has highlighted this connection between mediation, social justice, and procedural justice in urging that disadvantaged people "need, even more so than advantaged group members, a forum in which their authentic voices and experiences can be expressed" and that mediation, as a forum fostering the expression of such authentic voices, offers "another locus in American political, social and legal life where ideas about equality are defined and redefined."[48] Each mediation session thus represents a powerful, individualized opportunity for citizens to grapple directly with the law and engage in the mutual deliberation and decision making so prized by Rawls. Depending upon a mediator's management of the disputants' interaction, a mediation session also can offer citizens an empowering "civic education"[49] in the respect, responsibility, and dialog that "fair and equal" citizens extend to each other and that ease public deliberation and decision making.[50] 17

It is therefore essential that environmental arbitrators should:

- Understand diversity – specifically in the South African context;

17 Remembering the Role of Justice on Resolution: Insights from Procedural and Social Justice Theories, by Nancy A Welsh http://law.psu.edu/_file/Welsh/Remembering%20the%20Role%20of%20Justice%20in%20Resolution.pdf

- Be capable of dealing with cultural and language differences between the parties;
- Be qualified to deal with party imbalances (represented *vs* unrepresented, sophisticated *vs* unsophisticated, powerful *vs* weak, the organised *vs* the disorganised, etc.).

These realities are a very persistent component of environmental arbitrations, and therefore need to be part of the training and accreditation standards for environmental arbitrators.

4.2 Professional & Experience Requirements

Given the complex, multi-faceted nature of environmental disputes, the range of parties involved, and the cross-cutting character of natural and social settings, it is vital for the environmental arbitrator to have considerable "life experience," that is, to understand environmental disputes as they manifest themselves in the real world. Limited real-world experience is likely to result in simplistic and possibly naive conceptualization of environmental disputes and yield unworkable strategies for their resolution. Life experience is needed to enable the arbitrator to exercise sound judgment under circumstances in which there is little time for consultation or reflection. Furthermore, it can be important for arbitrators to be peers of the disputants, in terms of life experience, in order to engender their respect and confidence.

In South Africa an aged based requirement will probably amount to unfair discrimination, and is in any event not required. Qualification and experience requirements can however be justified in this context.

4.3 Language Proficiency

South Africa has 11 official languages and there is thus a need for arbitrators in different languages. It is therefore proposed that arbitrators be required to stipulate which language(s) they are practising in. They then have to be able to demonstrate proficiency in the stipulated language(s).

If required, an independent, standard internationally acknowledged, language test can be adopted to test and certify language proficiency.

4.4 Moral Character

Most jurisdictions require some degree of moral character as a minimum requirement of a arbitrator. This could range from testimonials to a requirement that the arbitrator should not have any criminal conviction that relates to fraud.

It is therefore proposed that, as a minimum, a person must not have a criminal record involving dishonesty and must not be declared insolvent.

4.5 Risk and Supervision

It is normal practice to require that arbitrators work within a governance environment. This ensures that standards are maintained, and that there is recourse in cases where the arbitrator deviates form the norms of acceptable conduct. This requirement can best be expressed by requiring the arbitrator to:

- Comply with a professional code of conduct, and practise under the monitoring of an accredited service provider (- where such a code of conduct is part of the regulatory framework);
- Have sufficient professional insurance for purposes of civil liability claims against

him/her as arbitrator.

4.6 Analysis and Conclusions

The following additional requirements should therefore be set for environmental arbitrators:

- The arbitrator must have training or experience in arbitrating in culturally diverse circumstances (as set out above). Where this is lacking it can be supplemented by a short course;
- The arbitrator must have adequate life experience – this can best be expressed as a requirement that he/she must have sufficient work experience ~~in the relevant field~~. It is suggested that a minimum of 8 years be required;
- The arbitrator must be in good standing in that the applicant must not have a criminal record involving dishonesty and must not be declared insolvent;
- The arbitrator must comply with a professional code of conduct, and practise under the monitoring of an accredited service provider (- where such a code of conduct is part of the regulatory framework);
- The arbitrator must have sufficient professional insurance for purposes of civil liability claims against him/her as arbitrator.

5 A Draft Standard

1) The recommended Accreditation Requirements for Environmental Arbitrators are as follows:

- A tertiary degree or a tertiary qualification (meaning any post matric SAQA accredited qualification) in:
    - Environmental management, -law, -planning or –science; or
    - In law, commerce, business, law or social sciences;
- Where the arbitrator's tertiary qualification is not in the field of environmental management, -planning or -science, he/she is required to have a minimum of 8 years of progressively responsible professional work in environmental policy, -planning or -science;
- Minimum of eight years' work experience ~~in the relevant field~~;
- The arbitrator must have fulfilled requirements of the arbitrator qualification training programme presented by the Association of Arbitrators (the higher diploma), or AFSA (the Certificate in ADR), or an equivalent or better qualification;
    - Applicants may apply for exemption from this training requirement if they:
        - Have been admitted to practice law in South Africa as an attorney or advocate of the High Court;
        - Have relevant knowledge and/or experience of practicing as arbitrators; AND~~and~~
        - Have passed an arbitrator assessment course (minimum requirements for such a course is 40 hours, and must assess the competencies described in Annexure B).
    - In exceptional circumstances, experienced arbitrators who are acknowledged by their peers as such, may be accredited on the basis of their experience in arbitration practice without having to first complete an accredited training programme. A person who previously held a permanent appointment as a Judge of the High Court in South Africa shall be deemed to have sufficient prior experience.
- The arbitrator must have sufficient knowledge of the legal and legislative framework, and the institutional setting of an environmental dispute (legislation, administrative and judicial procedures, and the organizational context in which disputes are contested)– either through appropriate academic background, demonstrable experience in the field, or additional training;
- The arbitrator must have additional training or demonstrable experience with regard to the following:
    - Public policy dispute resolution – ie conflict that is in the public domain, and where the outcome must be value determined (in this context it must be consistent with the directives set out in NEMA).

- Arbitrating in culturally diverse circumstances.

- Sufficient arbitration experience. This should be based on an evaluation of candidates based on the guidelines set out below. Candidates with insufficient experience should agree to participate in programme of mentoring/supervising apprentice arbitrators when required. In principle this should be required for all new entrants who have little or no experience of environmental arbitration.

  As a general guide an environmental arbitrator requires prior experience of arbitrating a minimum of 10~~5~~ cases. This experience can be obtained through a combination of the following:

  - General experience as arbitrator in any kind of arbitration (minimum of 5~~10~~ cases). through the following:
    - Arbitrating in any case
    - Mentoring and/or co-arbitration in arbitrations
    - Case studies, role plays AS ARBITRATOR and simulations of arbitrations (maximum of 3~~5~~ cases may be counted towards the total);
  - Experience of environmental and public policy arbitration through the following (minimum of 5 cases):
    - Arbitrating environmental disputes;
    - Arbitrating in public policy matters (including non-environmental cases) (maximum of 3 non-environmental cases may be counted towards the total);
    - Arbitrating and/or co-arbitration in environmental arbitrations (a minimum of 2 cases must be counted towards the total);
    - Case studies, role plays AS ARBITRATOR and simulations of environmental arbitrations (maximum of 2 cases may be counted towards the total);

- Be in good standing in that the applicant must not have a criminal record involving dishonesty and must not be declared insolvent;
- Comply with a professional code of conduct, and practise under the monitoring of an accredited service provider (where such a code of conduct is part of the regulatory framework);
- Have sufficient professional insurance for purposes of civil liability claims against him/her as arbitrator.

For purposes of membership, arbitrators must specify what language they are proficient with to mediate in. Their proficiency in that language must then be of a high enough standard, and this may be evaluated if necessary.

6 Procedural Issues

6.1 Comments on the Accreditation Standard

It is strongly recommended that prior to adopting or finalising the draft accreditation standard set out in this document, it should be published for comment – at least to a select group of stakeholders.

It is suggested that at least the following entities should be asked to comment on the draft standard:

- Other internal sections/Units within the DEA and relevant stakeholders within the sector
- The Dispute Settlement Accreditation Council (DiSAC)

6.2 Assessment, Supervision and Accreditation

It is clear that in order to establish and maintain an Environmental Arbitration Panel on the principles contained in the Draft Standard, the following specific expertise and capacity is required:

- Capacity to assess the process competencies of candidate arbitrators;
- Capacity to assess the substantive knowledge required of arbitrators;
- Capacity to provide supervision and mentorship to candidate arbitrators.

It is recommended that DEA reaches a strategic agreement with DiSAC, that DiSAC will adopt and accredit environmental arbitrators in accordance with the final Draft Standard, and provide capacity for the supervision and mentorship of candidate arbitrators. The DEA can then constitute its panel from the group of arbitrators that are accredited by DiSAC as environmental arbitrators.

6.3 The Arbitration Panel

NEMA provides as follows:

"19. Arbitration

(1) A difference or disagreement regarding the protection of the environment may be referred to arbitration in terms of the Arbitration Act, 1965 (Act No. 42 of 1965).

(2) Where a dispute or disagreement referred to in subsection (1) is referred to arbitration the parties thereto may appoint as arbitrator a person from the panel of arbitrators established in terms of section 21."

It is submitted that:

- The use of the word "may" in Section 19(2) (rather than the word "shall"), indicates that the section does not prescribe that arbitrators be appointed from the Panel.
- It is clear that, in terms of the Arbitration Act (which according to Section 19(1) governs these arbitration proceedings), the parties can by agreement appoint any person as their arbitrator.
- The establishment of a Panel, in terms of Section 19(2), would therefore merely serve to assist the parties in readily identifying persons who are qualified to arbitrate their dispute – rather than to limit their choice to the persons on the Panel.

Annexures

Annexure A: Special Demands imposed by Environmental disputes

In order to determine what specialist skills and experience are required, we need to understand the special demands imposed by environmental mediation.

- What is "Environmental Conflict"?

"Environmental conflict stems from divergent views about how to allocate and utilize land, air, water, and living resources. At its deepest level, environmental conflict is the division that arises over competing demands for individual and collective rights, fulfilment of basic human needs, and biophysical constraints, under conditions of political and scientific uncertainty.

The term *environment* refers to interconnected biophysical, economic, political, and social systems; it encapsulates human interactions with the natural world. It is therefore an inclusive term encompassing both natural and human systems.

Conflict [– in this context -] refers to generic or systemic differences parties have with respect to goals, values, and interests that can lead to deployment of resources and power in an endeavour to gain a relative advantage over other parties.

*Dispute*s are one specific outcome or manifestation of conflict, in which parties are likely to adopt countervailing positions in their effort to realize their goals, values, and interests in the context of a particular issue. For example, a lawsuit filed by a nongovernmental environmental organization against the proponent of a housing development in an ecologically sensitive habitat at a particular locale is an environmental dispute that reflects, at its root, conflicting goals, values, and interests about the appropriate use of natural resources, matters of environmental quality, property rights, and economic development."[18]

- Characteristics of Environmental Conflict

Environmental disputes uniquely manifest high levels of the following characteristics:

1. *Environmental disputes center on the relationship between natural and human systems; they exhibit high levels of complexity and uncertainty, and they impinge on the public good.*

Natural and human systems are intricately connected in a variety of ways (for example, via flow of energy, cycling of nutrients, and movement of materials). The manner in which land, air, water, and living resources are used can yield impacts that are spread out in time and space. Yet we have imperfect understanding of how these complex, interconnected systems function and hence what the consequences of various patterns of use might be. Furthermore, some actions pose serious threats to public health and well-being through their impact on common resources (resources that do not facilitate effective individual ownership, such as oceanic fisheries) and the spectre of irreversible consequences (for example, species or "cultural" extinction).

2. *Many parties with divergent views, experiences, and resources are involved in or affected by environmental disputes.*

Given the proclivity for environmental impacts to be spread out in time and space, there are invariably multiple parties involved in or affected by such disputes. These parties may

18 Bruce C. et al, ditto at page 270.

include private citizens, business and industry, government agencies, elected and appointed officials, and a host of nongovernmental organizations concerned with a variety of issues. These parties often introduce socioeconomic, racial, and ethnic differences to environmental disputes. Disputants are likely to have divergent ideological perspectives and varying attitudes towards risk. The organizational structure, strategy, and capacity of the parties is also likely to vary.

3. *The environmental setting involves incongruous "boundary" conditions.*

The boundaries of natural systems seldom conform to administrative and legislative boundaries. Invariably, there is overlapping or incomplete jurisdiction. Coordination of activities among different governmental agencies is problematic, and parties have incomplete decision-making authority, financial responsibility, and/or liability Furthermore, the significance of the issues in dispute may assume greater or lesser importance depending on the perspective from which one views the dispute. For instance, a matter might be significant on a local scale, but not at the national level, or vice versa. Environmental disputes can thus be distinguished by virtue of their primary concern with the allocation and use of land, air, water, and living resources. This focus is manifested in disputes characterized by high levels of uncertainty and complexity with consequences that affect the public good, involve multiple stakeholders, and are subject to incongruous boundary conditions.[19]

The characteristics that make environmental mediation unique can be summarised as follows:

- Disputes are *filled with complexity and uncertainty*
- They usually involve *multiple parties* with different experiences, interests, and resources
- There are often multiple stakeholders with *varying degrees of organization and leadership*
- There may be *little or no continuing relationship* among some or even all of the parties
- Overlapping or *incomplete jurisdiction* within the ambit of the affected stakeholders
- *Few common goals* may be apparent between the stakeholders
- The *negotiation framework may be entirely alien* to one or more of the parties
- The implications of the dispute and of any agreements may reach well beyond the disputants to the general *public good*
- The implications of decisions having an *impact on the environment* may be far-reaching-and even irreversible. [20]

Environmental Literacy

Environmental literacy means familiarity with the language of environmental science and public policy. In addition to the need for the consummate mediator to be a "process expert", it is important that the mediator be proficient in the language and substance of environmental science and public policy.

19 Bruce C et al, ditto, p 270 - 271.
20 Bruce C. et al, ditto, p 274.

As a "bridge" to enhancing understanding among the disputants, the mediator needs to be well-grounded in the substantive issues so as to fulfil responsibilities that include translating and communicating, across different disciplines, often varied and contradictory viewpoints of issues characterized by technicality, complexity, and incomplete knowledge. Mediating scientifically intensive environmental disputes therefore demands an understanding of the nature of science and a reasonable degree of environmental literacy.

Additionally, in order to promote creative and effective resolution of environmental disputes, the mediator should have a "real world understanding of how the decision-making or policy-making process functions in practice (including matters of law, politics, and administration), and how it might be improved through negotiation-based responses."[21]

There are at least two major categories of substantive knowledge essential for environmental mediators: the *scientific / technical* setting and the *political / organizational* environment.

It is essential that a mediator be familiar enough with the language of environmental science to converse competently with those who work in that arena. *This competency cannot be developed in a short training program*, but its importance should be emphasized.

In addition, understanding the institutional setting of an environmental dispute is essential before one can fully grasp the limitations and opportunities for mediation. The institutional setting includes the political, legal, and administrative arenas in which a dispute is being contested.

A dispute over contamination of groundwater by leaking storage tanks, for example, may involve questions of geology and hydrology, but it is also affected by the interaction of local, federal, and state governments, by the legislative and regulatory contexts of the government agencies, and by the dynamics of advocacy and business groups. One must understand the leveraging power of each of these groups, the regulatory mandates of each agency, and the political and legal obstacles confronting all parties.

A training program tailored to the needs of the trainees should provide an introduction to legislation, administrative and judicial procedures, and the organizational context in which disputes are contested. [22]

In some cases of particular complexity it may be necessary to have a Team Mediation. Team Mediation is a model where (depending on the needs of the case) the mediation team consists of a mediator trained and experienced in the mediation theory and process, an environmental attorney with subject matter expertise in the legal area of dispute, and/or an environmental expert with expertise in the technical issues in dispute.[23] Where this is required, the environmental mediator needs to understand the process implications of team mediation.

In summary, environmental mediators must be able to demonstrate the following:

- *Familiar enough with the language of environmental science – either as a result of a tertiary academic qualification or as a result of extensive experience in the field of environmental management. It is unlikely that this background can be adequately taught through a short course.*
- *An understanding of the institutional setting of an environmental dispute – either through appropriate academic background or through extensive experience in the*

21 Bruce C. et al, ditto, p 284
22 Bruce C. et al, ditto, p 287 - 288
23 See Michael Young, Resolving Environmental Disputes With Environmental Team Mediation: A New Model, http://www.mediate.com/articles/youngm1.cfm .

field. Where this is lacking, it can be amplified through a short course.

Ethics: The Purpose, Goals and Values of Environmental Mediation

We have previously indicated that dispute settlement of environmental disputes takes place within the context of "the public good". This context imposes an additional requirement on the mediator, which we will examine here.

Like other professions that impinge on the "public good," environmental mediators have a responsibility to understand and mitigate the potential adverse consequences of this impact. However, environmental mediation has an added dimension of responsibility with its consequences for other life forms. The ideals of a transformative practice of environmental mediation, and advocacy for sustainable development, provide a value foundation upon which to build an ethical framework. Ethical behaviour relies upon a sense of responsibility for one's actions, a clear set of values underlying ethical principles and imperatives, and commitment and competency to enact those values and principles.

The ethics of environmental mediation thus involve considerations ranging from the types of cases a mediator pursues to the purposes and goals of a particular intervention, and to the day-to-day interaction with the disputants. All intervention strategies and behaviours have value and ethical implications; therefore, ethics cannot be merely a discrete component of training but must imbue the entire training program.[24]

We find fundamental and important differences among mediators concerning the purposes, goals, and values of environmental mediation. These differences may be summarized as outlined below. A distinction can be made between two opposing ideological orientations toward environmental and other forms of public conflict and conflict resolution. These competing orientations are not the exclusive property of the environmental mediation field; rather, they are consistent with divisions found in other disciplines such as planning and public administration.

- The "ideology of management" approach

From the part of the continuum representing what is termed an *"ideology of management*" (Dukes, 1993, 1996), the public problem receiving the greatest attention is the inability of public officials to govern, or what is known as "gridlock" or the "crisis of governance." The main components of this problem, according to those tending toward this orientation, are the proliferation of competing single-interest groups and a resultant diffusion of power; overregulation; excessive litigation; apathetic citizenry; and an overall sense of moral, cultural, and economic decline. People engage one another primarily to further their own self-interest, which is essentially economic. It is the aggregate of these competing private interests that realizes the public good. Reforming public decision making, whether in law, planning, public administration or environmental mediation, shifts the focus on improved efficiency, productivity and managerial capability of authorities. *At this end of the continuum, the only goal of the environmental mediator is to settle disputes, or get agreements*.

- The "transformative" approach

In contrast to the ideology of management is a "*transformative" orientation to public conflict*. Within a transformative approach, the main problem is less the crisis of governance than the threat to public life itself, posed by the disintegration of community and of the relationships and the inability to solve public problems and resolve public conflict

24 Bruce C. et al, ditto, p 287.

From a transformative perspective, environmental disputes are viewed not only as policy stalemates but as indicators of the fragmentation of community, civic life, and governance. *The interventions of independent environmental mediators are thus not only efforts to break those stalemates, but opportunities as well to provide the means for strengthening community, enhancing civic engagement, and building a responsive and effective governance*.

The transformative approach recognizes the need for and potential of improved public dialogue to challenge the sense of decline and distrust that permeates civic culture. In brief, *a transformative approach views the settlement of disputes as merely one of a range of important goals of environmental mediation*, including such intangible benefits to disputants and communities as enhanced environmental awareness, strengthened citizenship, and improved relationships. *The conflict resolution process is thus a vehicle for transforming communities, citizenry, and the institutions and practices of democratic governance*.

A transformative practice of environmental mediation seeks not only to help competing interests find common ground but to create a higher ground for engagement in environmental conflict-a ground where qualities such as fairness, integrity, openness, trustworthiness, and responsibility for public good are both expected and rewarded. The overriding goal is to create forums and processes-indeed, a civic culture-where individuals and organizations can be strong advocates for their views while learning of and from the views of others, where public officials can take actions that are both effective and legitimate, where communities can unite rather than separate when faced with difficult problems and divisive conflicts, and where the search for sustainable development may be pursued and advanced.[25]

- Approach prescribed by NEMA

It is clear that the National Environmental Management Act, 107 of 1998 ("NEMA") prescribes that a transformative approach be followed – in accordance with the principles set out in section 2 of the Act, also with regard to interventions in terms of Chapter 4 of the Act.

Section 2(d) of NEMA provides as follows:

> *"The principles set out in this section apply throughout the Republic to the actions of all organs of state that may significantly affect the environment and -*
>
> *(d) serve as principles by reference to which a conciliator appointed under this Act must make recommendations;"*

The essence of the principles prescribed by section 2 is set out in Sections 2(2) and 2(3):

> *"(2) Environmental management must place people and their needs at the forefront of its concern, and serve their physical, psychological, developmental, cultural and social interests equitably.*
>
> *(3) Development must be socially, environmentally and economically sustainable."*

Any mediator practising in this field will therefore be required to be an "Advocate for Sustainable Development".

This role of the mediator is consistent with commitment to a practice that is independent or non-aligned (not obligated to a particular party) and impartial (treating all parties without prejudice), but not neutral, to the extent that the latter implies necessarily remaining detached from or ignoring marked differences in disputants' capacities to meaningfully

25 Bruce C. et al, ditto, p 277-278.

participate in the process. We are not suggesting that the mediator adopt the role of philosopher-king in prescribing the content of an agreement to disputants. Furthermore, we acknowledge that in some environmental disputes, the aforementioned principles may not be at stake. We are, however, of the opinion that the environmental mediator has an obligation [and is directed by the provisions of NEMA] to focus the attention of the disputants on the implications of the mediated outcome on the biophysical, socio-political, and economic realms that may be at stake.[26]

The generic commercial mediation training does not equip the mediator to deal with public policy dispute resolution – i.e. dispute resolution where the outcome must be value determined (in this context it must be consistent with the directives set out in NEMA). Additional training is required in order to address this.

26 Bruce C. et al, ditto, p 279.
Also see this source for a full and informative discussion of the meaning and implications that the requirement of being "an advocate for sustainable development" has for mediators (p 279 -282)

Annexure B: Arbitrator Competencies

(This guideline was obtained from the document "Principles, Criteria, Protocol, Competencies, for the designation of CHARTERED ARBITRATOR, published by the ADR INSTITUTE OF CANADA, INC. See: http://www.adrcanada.ca/resources/documents/CArbCriteria.pdf)

Summary of knowledge and skills applicable to an Arbitrator:

- Knowledge of the Laws of Delict, Evidence and other applicable laws related to arbitration in the jurisdiction of the arbitration;
- Knowledge of the governing Arbitration Act (Law) in the applicable jurisdiction.
- Knowledge of the Code of Ethics and Rules of Conduct governing the conduct of an arbitrator generally and recognition of the importance and necessity to abide by same;
- The skills required to hear and evaluate the evidence in accordance with the applicable procedural rules, including the ability to assess conflicting points of view, evaluate the validity of arguments presented and determine the award;
- Knowledge of the arbitration process and possession of the skills to carry out the protocol required to initiate and complete an arbitration engagement, including the formalization of the engagement, procedures during the arbitration hearing and handing down the award.

ADMINISTRATIVE SKILLS

General Definition: The ability to organize and conduct the practice of arbitration in an efficient and effective manner.

a. Ability to organize and maintain office systems

- appointment system
- correspondence system
- case file system with monitoring feature
- time log, billing and disbursements receivable system

b. Ability to work within the system/rules governing the accepting and handling of cases

- records details of appointment (terms, conditions and fee)
- confirms appointment in writing (engagement letter or contract)
- ensures all correspondence sent and received is provided to both parties
- demonstrates a clear understanding of the applicable Arbitration Act and Ethics

c. Ability to allocate time, effort and other resources

- expeditiously reviews and deals with documents and information received
- develops an overall perspective of the case
- draws up timetable for dealing with preparatory matters and conduct of the arbitration

d. Ability to organize the required needs of the arbitration

- adequacy of hearing room to accommodate the parties and others
- capability for cloistering of witnesses
- capability to provide privacy of private consultations
- suitability of the location in terms of minimizing external distractions or interruptions

e. Ability to bring case to completion

- exhibits timeliness in drafting the award
- if on a panel, works co-operatively to draft the decision
- promptly notifies the parties on the completion of the award
- submits the fee billing in accordance with terms of engagement or within a reasonable time

PROCEDURAL SKILLS

General definition: Ability to conduct matters using fair, flexible and effective procedures.

a. Ability to clearly establish understandings

- clearly explains the role of the arbitrator
- clearly defines and explains the rules of procedure
- in cooperation with the parties, estimates time that will be required

b. Ability to determine legitimacy and jurisdiction

- reviews contracts between the parties (if they exist)
- determines if agreements are effective and enforceable
- ensures the issues in dispute are covered by the arbitration clause
- ensures there is no reason for parties to challenge the appointment
- ensures that the appointment is not inconsistent with the applicable arbitration statute , local laws or institutional rules.

c. Ability to deal with preliminary matters

- holds preliminary meeting if required or requested
- provides directions on pleadings and disclosure of evidence
- requires parties to disclose and make available to the arbitrator and the parties, at the earliest opportunity , all relevant information,
- determines if legal counsel, witnesses, experts or other parties will be involved
- addresses the issue of exclusion of witnesses
- ensures all parties have a clear understanding of how the arbitration hearing will be conducted and the award issued
- ensure all procedural steps have been completed as required

d. Ability to supervise the preliminary meeting

- supervises conduct of the meeting
- explains the purpose and content of the meeting
- intervenes when necessary to ensure that the exchange of documentary evidence does not become a presentation of oral evidence
- brings the parties to agreement on procedural matters

e. Ability to handle interlocutory matters

- hears parties arguments on the matter
- characterizes and decides the points of issue
- defines and supervises a fair interlocutory procedure

f. Ability to conduct a fair hearing

- affords each party full and appropriate opportunity to present its' case
- allows each party an opportunity to examine the other party's witnesses

- allows parties to make and respond fully to objections
- allows parties adequate opportunity for rebuttal
- allows parties adequate time to deal with surprises
- deals expeditiously with procedural objections
- keeps interruptions to a minimum
- narrows issues (by clarification without unnecessarily interjecting)
- maintains order
- recognizes the need for recess or adjournment
- ensures the hearing is conducted in accordance with the applicable arbitration statute or institutional guidelines
- keeps the parties deliberations focused on the issues of the dispute
    - g. Ability to handle witnesses
- knows the formalities for swearing or affirming witnesses
- explains procedure to witnesses where necessary
- in the case of expert witnesses, determines legitimacy of expertise
- encourages expert witnesses to make use of lay language

h. Ability to keep a record of evidence

- ensures proper record is kept of submissions and evidence
- subjects the record to review and organization on a timely basis
- analyzes the evidence record periodically during the hearing
- limits evidence to relevant topics

INTERPERSONAL SKILLS

General Definition: The ability to control the arbitration process in a manner which engenders mutual respect between all those involved, to communicate effectively and assist others to do so.

a. Ability to maintain an appropriate relationship between the parties

- acts with courtesy, respect and patience
- indicates empathy for the issues
- does not pre-judge the parties on the issues
- is modest in attitude held towards others
- devotes appropriate care and attention towards the parties

b. Ability to remain impartial and independent

- ensures both parties have all documents
- does not send unilateral correspondence
- discloses all facts which may give rise to doubts about impartiality
- allows both parties equal access to correspond with the arbitrator
- remains detached but not unfriendly
- avoids conduct which may reflect bias or coercion
- avoids personal cross examination and interrogation of witnesses
- controls emotion
- never discusses anything related to the case with any party to the exclusion of all the other parties
- demonstrates an understanding of the rules of natural justice

c. Ability to maintain legitimacy

- personal appearance commands respect
- is punctual
- displays a confident manner
- maintains consistent behaviour
- identifies limits of personal expertise
- is discreet and diligent
- keeps all information confidential
- acts with self-confidence and authority
- commands respect for the office of arbitrator

d. Ability to listen actively

- remains visibly alert at all times (utilizes collateral body language to confirm alertness)
- intervenes selectively to obtain clarification or maintain order
- does not interrupt except in the most serious circumstances

e. Ability to speak effectively

- uses clear diction and collateral body language
- asks succinct questions when necessary
- is direct but not intimidating
- adopts a moderate volume and pace of speaking
- uses an unemotional and detached tone of voice
- uses simple language
- utilizes terminology that is common to the parties' industry

f. Ability to maintain a conductive atmosphere during the hearing

- uses civil language
- permits humor which is beneficial to the process
- displays understanding of the evidence and submissions
- puts parties and witnesses at ease
- avoids distracting body movements or facial expressions
- discourages an excessively adversarial climate

EVIDENCE MANAGEMENT SKILLS

General Definition: The ability to deal with the quantity and quality of evidence in a manner which facilitates the identification and analysis of relevant issues.

a. Ability to organize and analyse data

- develops an overall perspective of the case
- understands the sequence and nature of events contributing to the dispute
- organizes data into logical principles or legal concepts
- determines the most effective and efficient way to utilize the evidence to complement the process

b. Ability to identify documents required to assist the arbitration

- identifies the factual evidence from the data provided by the parties
- identifies those documents necessary to the arbitration and makes appropriate request for them to be made available

- notes the absence of any relevant evidence
- distinguishes between material and non-material facts

c. Ability to differentiate between different types of evidence

- understands the difference between direct and cross examination of a witness
- notes any absence of oral evidence where it may be desirable
- notes any problems with completeness or accuracy of documentary evidence
- understands the definition of hearsay evidence and weights it accordingly
- separates legal and emotional issues
- identifies circumstantial evidence and weights it accordingly

d. Ability to differentiate the value and reliability of evidence

- observes and seeks to accurately interpret nonverbal demeanor of witnesses
- notes ambiguities and inconsistencies in the evidence
- identifies corroborative evidence
- attempts to test the consistency of own observations against the facts submitted
- does not utilize information or technical knowledge, gained outside of the hearing, to assess balance of probabilities without consent of all parties

e. Ability to make inferences

- determines inferences that can be properly drawn from data presented or omitted

f. Ability to deal with expert evidence

- identifies need of expert evidence
- understands the significance of expert evidence

DECISION MAKING SKILLS

General Definition: The ability to reach a principled decision determining the rights and liabilities of the parties and expound that decision in the form of a reasoned award.

a. Ability to recognize the factual issues

- separates the parties claims and issues
- identifies the real issues
- reconstructs the issues in terms that will assist understanding
- evaluates the strengths and weaknesses of arguments and counter arguments
- evaluate submissions and the relevant evidence
- isolates those issues that are of no or little relevance

b. Ability to define legal issues and apply them to the facts

- determines the relevant principles of law
- applies the relevant law to the specific facts of the case
- distinguishes between the different sources of law (i.e. the contract between the parties, the law of tort, land law, etc.)
- uses deduction to determine the application of relevant principles of law

c. Ability to come to a decision

- reaches an independent and impartial decision only after a careful study and consideration of all the relevant evidence
- makes a decision that can be enforced by a court if necessary

d. Ability to articulate the decision

- succinctly articulates, the reasons and terms of the award as well as the evidence considered and the weight given to the evidence
- uses terminology appropriate to the audience at which it is directed
- reserves jurisdiction, if necessary, in order to address remaining issues

AWARD WRITING SKILLS

General Definition: The ability to effectively convey a decision in writing.

a. Ability to address formalities

- cites parties names, dates, etc.
- understands the requirement of formalities

b. Ability to summarize facts and issues

- briefly describes the nature of the dispute
- summarizes evidence and submissions
- identifies undisputed facts and agreed upon law
- distinguishes parties claims and issues
- restates issues in terms which assist understanding
- separates relevant and irrelevant facts

c. Ability to reference the law relied on

- provides a clear reference to any law relied upon

d. Ability to substantiate the decision

- corroborates findings with relevant evidence
- explains chosen weighting of evidence
- discloses inconsistencies in evidence

e. Ability to convey decision clearly to the parties

- writes clearly and concisely
- presents the decision components in a logical manner
- uses appropriate language for the audience
- presents decisions in an impartial manner
- succinctly articulates the reasons for reaching the decision
- addresses each identified issue and sets out the remedy (if any)