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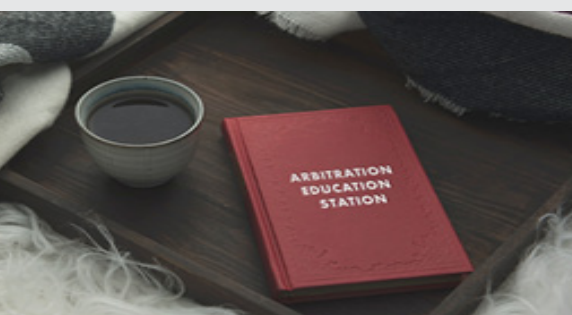
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**FROM THE EDITOR'S PEN:**

**Crispness in both weather and word**



Welcome to *Arbitrarily Speaking!*

As the winter months approach and a crispness cools the air, Don Miguel Ruiz's first and most significant agreement comes to mind: *Be impeccable with your word*. As arbitrators, a 'crispness' of word and phrase is foundational to all we do. Indeed, it is woven into our very **Code of Ethics**. That 'crispness' is tied to rigour and responsibility, to intention and integrity. And it's this very same spirit that we find in the contributions we receive to *Arbitrarily Speaking!*

In this issue, we not only welcome back the infinitely crisp Ms Maritza Breitenbach, Prof David Butler and Ms Adine Abro – all specialists in their respective fields – but we're just as delighted to announce the two winners of the highly acclaimed *Steenberg 1682 Chardonnay Cap Classique NV* for their respective contributions to the first two issues of the e-periodical in 2021, i.e., February 2021 e-periodical (issue 7) and April 2021 e-periodical (issue 8).

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**ARBITRATION EDUCATION STATION**

Adv Pierre Rossouw SC, provides an assessment of the first three lectures of 2021 that were hosted by the AoA remotely, via the Zoom platform, on the following dates, i.e., 18 March 2021, 22 April 2021 and 6 May 2021.

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The Association of Arbitrators (Southern Africa) has concluded an exclusive Southern African partnership with the Society of Mediators in London to present a series of Zoom based mediation courses. These mediation courses afford the Association's members with the unique – and not to be missed - opportunity to be trained in mediation by internationally renowned top class mediators and mediation trainers, namely Jonathan Dingle, Andrea Barnes and Zoey White. Our editor gives his assessment of one of the five day courses.

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Since its inception, the Association has promoted the greater use of arbitration as a means of resolving disputes. It is able to appoint competent and experienced arbitrators, as well as other specialists in alternative dispute resolution (ADR). To support these core activities, the Association has a proud history of providing excellent training and tutelage by a team of dedicated specialists.



## UNCLE OSWALD'S Q&A FORUM

**HOW SHOULD AN ARBITRATOR DEAL WITH A CHALLENGE TO HIS JURISDICTION ON THE GROUNDS THAT THE CONTRACT, INCLUDING THE ARBITRATION CLAUSE, IS VOID BECAUSE OF AN INITIAL ILLEGALITY?**

In this edition, Uncle Oswald, our retired arbitrator's experience is admirably on display in the advice he gives to *Challenged Charlie* on why an arbitrator is empowered to rule on a party's challenge to his jurisdiction, on the grounds of an alleged invalidity of the contract, including the arbitration agreement, supported by his cogent reasons and good authority for such advice.

For more astute advice from Uncle Oswald on your arbitration queries, send your questions to our General Manager, Rochelle Appleton, at [rochelle@arbitrators.co.za](mailto:rochelle@arbitrators.co.za).

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**THE DISTINCTION BETWEEN THE JURISDICTION OF THE ARBITRAL TRIBUNAL AND THE ADMISSIBILITY OF A CLAIM IN THE LAW OF ENGLAND AND SINGAPORE – IS SUCH A DEVELOPMENT NECESSARY IN SOUTH AFRICAN ARBITRATION LAW?**

The doyen of arbitration law in Southern Africa, Prof David Butler, undertakes a critical analysis of, among other cases, the recent English judgment in *Republic of Sierra Leone v SL Mining Ltd* [2021] EWHC 286 (Comm), as well as relevant decisions of the Court of Appeal in Singapore that favour the recognition of the distinction between the admissibility of claims and the jurisdiction of the arbitral tribunal. The author, with his usual clarity of thought and careful articulation, sets about explaining why South African arbitration law should similarly recognise such distinction and how this best can be achieved on the domestic front.

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## TOOLS OF THE TRADE

**CODE OF ETHICS PRACTICAL APPLICATION: INTRODUCTION (PART 1 OF 4)**

This is the first of Ms Maritza Breitenbach's four-part series of articles devoted to the discipline of ethics. In this introductory article she redirects our focus to the internal landscape of an arbitrator's character to examine the moral fibre required for the successful execution of arbitral duties. In doing so, she acquaints the readers with the meaning and implications of the underlying, implicit and critical ethical obligations expressed in the Code of Ethics of the Association of Arbitrators (Southern Africa) NPC.

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**'UNCONSCIONABILITY': TO WHAT EXTENT DOES IT, OR CAN IT, CONSTITUTE A DEFENCE IN SOUTH AFRICAN LAW TO A PARTY'S ABILITY TO MAKE A CALL FOR PAYMENT UNDER AN ON-DEMAND GUARANTEE?**

Construction law specialist, Ms Adine Abro, outlines a cogent argument why an 'unconscionability' exception – as distinct and quite separate from the well-recognised fraud exception – could be accommodated in South African law as a defence to sufficiently reprehensible calls for payments under an on-demand guarantee issued in relation to construction projects. Her article examines the recent Constitutional Court judgment in *Beadica 231 CC and Others v Trustees, Oregon Trust and Others* 2020 (5) SA 247 (CC), which, so Ms Abro contends, at least opens the constitutional path for the domestic acceptance of the unconscionability exception on the same basis that it has been accepted and applied in various Singaporean cases.

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## CAN AN ARBITRATOR RESIGN?

Association Fellow and director, Adv Kiki Bailey SC, answers this vexed question after carefully analysing the relevant statutory framework (comprising both the Arbitration Act 42 of 1965 and the International Arbitration Act 15 of 2017), the applicable rules of the Association, as well as relevant case law.

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## A CASE IN POINT: RECENT CASE REPORTS

To what extent can the obligation by the guarantor to pay the beneficiary under a typical construction guarantee be interdicted? This issue comes to the fore in our editor's analysis of the recent case of *Joint Venture between Aveng (Africa) (Pty) Ltd and Strabag International GmbH v South African National Roads Agency SOC Ltd and another* [2019] 3 All SA 186 (GP).

This regular column features interesting and informative case reports and judgments, and we invite you to add to our growing collection of analyses of important cases.

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## ALL ABOUT THE AOA

In the February edition of *Arbitrarily Speaking!* we shared the AoA's fee discount policy that was formulated and adopted to offer financial respite to our valued members in these exigent economic times. Your support remains a source of inspiration for our endeavours and reinforces our resolve to preserve this policy.

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## AOA BREAKING NEWS

On Thursday, 15 April 2021, the AoA's board of directors approved a 'Protocol on Remote Arbitration Hearings' (the Protocol) that also can be downloaded electronically.

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The AoA's KwaZulu-Natal and Western Cape regions' reports, by their respective chairpersons, Mr Alastair Hay and Mr Jonathan Mitchell, outline the recent activities in these areas.

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The AoA has an active branch in the Western Cape which is chaired by Jonathan Mitchell.

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## IN MEMORIAM

### TRIBUTES TO:

**The late Judge Fergus Blackie by the Association's Vice Chairperson, Adv Tjaart van der Walt SC;**

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**The late Adv Kemp Jurgens Kemp SC by Association Fellow and director, Mr Alastair Hay.**

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