



# GOVERNMENT GAZETTE

## OF THE

# REPUBLIC OF NAMIBIA

N\$2.00

WINDHOEK - 29 April 2003

No.2970

### CONTENTS

*Page*

#### GOVERNMENT NOTICE

No. 93	Petroleum Products and Energy Act, 1990 (Act No. 13 of 1990) Regulations under section 4A(2)(b) of the Petroleum Products and Energy Act, 1990, regarding arbitration procedures .....	1
--------	--	---

## Government Notice

### MINISTRY OF MINES AND ENERGY

No. 93 2003

#### PETROLEUM PRODUCTS AND ENERGY ACT, 1990 (ACT NO. 13 OF 1990) REGULATIONS UNDER SECTION 4A(2)(b) OF THE PETROLEUM PRODUCTS AND ENERGY ACT, 1990, REGARDING ARBITRATION PROCEDURES

Under section 4A(2)(b) of the Petroleum Products and Energy Act, 1990 (Act No. 13 of 1990), I make the regulations set out in the Schedule.

**N. IYAMBO**  
**MINISTER OF MINES AND ENERGY**

Windhoek, 10 April 2003

### SCHEDULE

#### REGULATIONS FOR ARBITRATION PROCEDURES UNDER THE PETROLEUM PRODUCTS AND ENERGY ACT, 1990

#### Index

1. Definitions
2. Application of Regulations
3. Resolution of disputes through mediation
4. Venue of arbitration proceedings

5. Language of proceedings
6. Commencement of arbitration
7. Appointment of arbitrator to resolve dispute through arbitration
8. Vacancy
9. Disclosure
10. Rules of evidence
11. Defence that claim has prescribed
12. General provisions for arbitration proceedings
13. Default by a party
14. General powers of arbitrator
15. Oath or affirmation
16. Arbitration award
17. Settlements
18. Costs of arbitration
19. Consolidation of arbitration proceedings
20. Delivery

### **Definitions**

1. In these Regulations “the Act” means the Petroleum Products and Energy Act, 1990 (Act No. 13 of 1990), and any word or expression to which a meaning has been assigned in the Act, or in the Arbitration Act, 1965 (Act No. 42 of 1965), bears that meaning and, unless the context otherwise indicates -

“Arbitration Act” means the Arbitration Act, 1965 (Act No. 42 of 1965);

“arbitrator” means an arbitrator appointed in accordance with regulation 7 or 8;

“arbitration matter” means a matter contemplated in section 4A(2)(a) of the Act which has been referred for arbitration;

“dealer agreement” means an agreement between a wholesaler and an operator referred to in section 4A of the Act;

“defending party” means the party against whom a demand for arbitration is made;

“deliver” means to serve, submit, give, deliver or send pleadings, documents, notices or other communications as provided for in these Regulations;

“demanding party” means the party who demands an arbitration;

“dispute” means a dispute relating to an arbitration matter;

“Law Society” means the Law Society of Namibia established by section 40 of the Legal Practitioners Act, 1995 (Act No. 15 of 1995);

“party” means a party to dispute.

### **Application of Regulations**

2. (1) Subject to subregulation (2), these Regulations apply to an arbitration between a wholesaler and an operator with regard to a dispute arising from a dealer agreement which involves non-compliance with a principle set out in section 4A(1) of the Act.

(2) The parties to a dispute may, by mutual agreement, refer the dispute for arbitration to any person or body providing arbitration services to be arbitrated in accordance with the rules and requirements of such person or body, but subject thereto that such rules and requirements substantially correspond and deal with the matters set out in these Regulations and in such event these Regulations do not apply.

(3) In so far as any matter pertaining to the arbitration of a dispute is not regulated in these Regulations or in the rules and requirements contemplated in subregulation (2), such matter shall be governed by the Arbitration Act and in addition, where applicable,

by agreement between the parties or in accordance with the rulings and directives of the arbitrator.

### **Resolution of disputes through mediation**

3. (1) The parties to a dispute may, before commencing with arbitration proceedings, first attempt to resolve the dispute through mediation.

(2) Mediation must be conducted without legal representation by a single mediator.

(3) The mediator must be selected by agreement between the parties or, failing such agreement, be nominated by a mutually respected neutral person designated by them or, where the parties fail to agree on such a mutually respected person, by the Law Society.

(4) The appointed mediator must attempt to resolve the dispute through mediation within 30 days from the date of appointment of the mediator, but the parties may agree to extend that period.

(5) The mediator must formulate its costs in respect of the mediation and such costs must be borne equally by the parties.

(6) If a dispute remains unresolved after mediation, the dispute may be referred for arbitration in accordance with the Regulations if a party continues to be of the opinion that a provision in a dealer agreement does not comply with a principle set out in section 4A(1) of the Act.

### **Venue of arbitration proceedings**

4. The parties must decide on a venue for the arbitration proceedings and, if the parties fail to agree, the venue must be determined by the arbitrator once he or she is appointed, taking into consideration all relevant factors including, but not limited to, the location of the parties and financial implications.

### **Language of proceedings**

5. Except with the prior written permission of all parties -

- (a) arbitration proceedings must be conducted in the English language; and
- (b) all documents and testimonies offered into evidence during the arbitration must be translated into the English language at the expense of the party offering the evidence.

### **Commencement of arbitration**

6. (1) Notice of a demand for arbitration by the demanding party must be delivered in writing upon the defending party.

(2) In no event can a demand for arbitration be made or permitted after the date when the claim being asserted in the demand has prescribed.

(3) A notice of demand referred to in subregulation (1) must -

- (a) state the name, description, physical and postal addresses, telephone and fax numbers of the demanding party;
- (b) contain a statement setting out the nature of the dispute, all the material facts and contentions relied upon by the demanding party so as to clearly establish the circumstances of the case and the relief claimed and such statement must be accompanied by copies of all documentation relied upon by the demanding party in support of such facts and contentions; and

- (c) state the demanding party's choice of a particular arbitrator.
- (4) The defending party must, within 21 days after receipt of the notice of demand, respond to that demand by -
  - (a) either agreeing to the appointment of the arbitrator selected by the demanding party or, if not agreeing to the appointment of that arbitrator, stating its choice for an arbitrator;
  - (b) stating its name, description, physical and postal addresses, telephone and fax numbers;
  - (c) stating its defence, setting out the material facts and contentions relied upon by it, and indicating which of the demanding party's facts and contentions are admitted and which are disputed by it, and which of the demanding party's claims for relief are conceded and which are disputed by it, and setting out its prayers for relief and such statement must be accompanied by copies of all documentation relied upon by the defending party in support of such facts and contentions;
  - (d) by delivering any counter-claim which it seeks to bring.
- (5) Default by the defending party to respond timeously under this regulation may result in the arbitrator, once appointed and after giving notice of the time and place of the arbitration proceedings as contemplated in these Regulations, making an award without further notification to the defending party.

#### **Appointment of arbitrator to resolve dispute through arbitration**

7. Unless the parties agree otherwise, they must appoint only one arbitrator to conduct the arbitration, but -
- (a) if the parties fail to agree on the arbitrator, the arbitrator must be nominated by a mutually respected person designated by them; or
  - (b) if the parties fail to designate a mutually respected person, an arbitrator must be nominated by the Law Society; or
  - (c) if the defending party does not respond with regard to the appointment of an arbitrator, the arbitrator must be nominated by the Law Society,

not later than 30 days after the date of the notice of demand for an arbitration made under regulation 6(1).

#### **Vacancy**

8. If for any reason the person appointed ceases to act as arbitrator, the parties must within 21 days appoint another arbitrator and, failing agreement on the appointment of a new arbitrator, the procedure prescribed in paragraphs (a), (b) and (c) of regulation 7 shall apply.

#### **Disclosure**

9. The parties to a dispute are entitled to disclosure to the same extent permitted in any civil proceedings in a court of law.

#### **Rules of evidence**

10. (1) In arbitration proceedings under these Regulations strict rules of evidence do not apply.
- (2) The parties may offer such evidence as they desire and the arbitrator must accept such evidence as he or she deems relevant to the issues and accord to it such weight as he or she deems appropriate.

**Defence that claim has prescribed**

11. The arbitrator may consider any defence that all or part of the claims being asserted in the arbitration cannot be heard by reason of any applicable law on prescription, and the merits of such defence before determining the substantive merits of the claims, unless the arbitrator determines that the merits of any asserted prescription defence is sufficiently intertwined with the substantive merits of the claims being asserted as to make impractical or inefficient the determination of the merits of the prescription defence as a preliminary matter.

**General provisions for arbitration proceedings**

12. (1) The arbitrator must -

- (a) conduct the arbitration in a manner that he or she considers appropriate to determine the dispute fairly and quickly;
- (b) deal with the merits of the dispute with the minimum of legal formality and rule upon procedure and upon time limits for complying with such procedure in so far as such procedure is or limits are not prescribed by these Regulations;
- (c) in such a manner as it deems appropriate conduct hearings or otherwise deal with any further procedural and interlocutory matters, including matters relating to compliance or non-compliance with its procedural rulings;
- (d) proceed with the hearing until the conclusion thereof;
- (e) at the conclusion of the hearing, make a written award on all issues in the dispute, including an award on cost.

(2) Subject to the discretion of the arbitrator as to the appropriate form of the proceedings, a party to the dispute may give evidence, call witnesses, question the witnesses of any party and address concluding arguments to the arbitrator.

(3) If both parties consent, the arbitrator may suspend the arbitration proceedings and attempt to resolve the dispute through conciliation.

(4) In any arbitration proceedings, a party to the dispute may appear in person or be represented by -

- (a) a legal practitioner;
- (b) a director or employee of the party; or
- (c) any other person selected by such party to represent such party.

(5) Subject to regulation 13, if a party to a dispute fails to appear in person or to be represented at the arbitration proceedings, and that party -

- (a) has demanded the arbitration, the arbitrator may dismiss the matter; or
- (b) has not demanded the arbitration, the arbitrator may -
  - (i) continue with the arbitration proceedings in the absence of that party; or
  - (ii) adjourn the arbitration proceedings to a later date.

**Default by a party**

13. (1) Subject to subregulation (2), the arbitrator, upon being satisfied that any notice required to be given to a party has been given in the manner prescribed in these Regulations and that the determined time for responding thereto has expired, may regard a party who fails to appear at a time and place of which reasonable notice has

been given to the parties, or who fails to comply with any ruling made by the arbitrator, as being in default, and may, after giving the parties reasonable notice of the time when and place where he or she intends to proceed with the arbitration, proceed with the arbitration in the absence of such defaulting party or without hearing or further hearing such party: Provided that a defaulting party who does not appear personally or by a representative at the said time and place must be given an opportunity of applying in such manner and within a period determined by the arbitrator, to the arbitrator to rectify its default, whereupon the arbitrator may either grant such application on such terms and conditions as he or she deems fit and proceed with the further conduct of the arbitration in the manner determined by him or her (but subject to these Regulations), or refuse such application and proceed with the arbitration without further hearing the defaulting party.

(2) If a party has at any time before an award is made, on reasonable notice to all other parties, given the arbitrator good and sufficient cause for its default in timeously complying with these Regulations or with any ruling made by the arbitrator, the arbitrator may afford it an opportunity to rectify the default, and, if it fails to rectify the default within the time stipulated by the arbitrator, the arbitrator may proceed with the arbitration in the absence of, or without further hearing, the defaulting party, to its final conclusion at a time and place of which reasonable notice has been given to all parties, including the defaulting party.

#### **General powers of arbitrator**

14. (1) The arbitrator shall have the widest discretion and powers allowed by law to ensure the just, expeditious, economical, and final determination of all disputes raised in the arbitration proceedings, including the matter of costs.

(2) Without derogating from the generality of subregulation (1), the arbitrator may -

- (a) rule on his or her own jurisdiction;
- (b) strike out or dismiss any claim or defence on the grounds of failure of a party timeously to comply with any ruling or award of the arbitrator, or on the ground of delaying conduct on the part of a party so as to give rise to a substantial risk of serious prejudice to the other party or parties;
- (c) proceed with the arbitration in accordance with these Regulations and his or her rulings, and make an award in the absence of or without hearing any party who is in default as provided for in these Regulations, or fails to appear or to comply with any ruling or award of the arbitrator;
- (d) make any ruling or give any direction mentioned in these Regulations or as he or she otherwise considers necessary or advisable for the just, expeditious, economical and final determination of all the disputes raised in the pleadings, including the matter of costs;
- (e) determine, from time to time, the date and place of the hearing, and the hours during which the hearing shall take place;
- (f) extend before or after their expiry, or abbreviate, any time limits provided for in his or her rulings or directions;
- (g) appoint one or more advisors or experts on any matter (including law) to assist in the conduct of the arbitration, but only with the agreement of the parties and of such advisor or expert, and only if the parties and such advisor or expert has agreed on the payment of the fees of such advisor or expert directly by one or more of the parties;
- (h) make a ruling with regard to the furnishing of security for costs by a party in respect of its claim or counterclaim;
- (i) allow, in accordance with these Regulations, other parties to be joined in the arbitration proceedings, and to make an award on all issues submitted by all parties, including parties so joined, for decision by the arbitrator;

- (j) order the parties to produce or make available for inspection by any other party and by the arbitrator, by advisors or experts appointed to assist him or her and by any expert engaged by any party, any property or thing under the control of the party or parties against whom such order is made;
  - (k) permit the amendment of any pleading or other document (other than an affidavit) delivered by a party;
  - (l) make rulings on any matter of onus, admissibility of evidence, or procedure, including rulings of an interlocutory or interim nature, and rulings relating to liability for and payment of costs and implementation of awards;
  - (m) receive and take into account such oral or written evidence as it deems relevant, and to make such findings of fact and law as may be required for the purposes of the proceedings and the award;
  - (n) at any stage before making a final award, state any question of law arising in the course of the arbitration in the form of a special case for the opinion of the court or of counsel (this power may be exercised on the application of any party to the reference and shall be exercised if the court on the application of any party so directs and such opinions shall be final and no subject to appeal and shall be binding on the arbitrator and on the parties to the reference);
  - (o) express his or her award in the Namibian currency unless otherwise agreed by the parties;
  - (p) order specific performance of any contract in circumstances in which the High Court of Namibia would have the power to do so;
  - (q) make an order as to costs;
  - (r) appoint a commissioner to take the evidence of any person within or outside Namibia and forward such evidence to the arbitrator as if it were a commissioner appointed by the court;
  - (s) require any party to amend its pleadings so that they are not evasive but are to the point, and, on the application of another party, strike out from a party's pleadings any averments which are embarrassingly vague, scandalous, vexatious or irrelevant;
  - (t) receive evidence by telephonic or telecasting means, provided he or she is satisfied that such means afford all parties adequate opportunity of examining the witness giving such evidence;
  - (u) make an award whereby a party is restrained from any conduct, either as an interim or final basis;
  - (v) generally exercise such powers and duties as are allowed him or her by any agreement of the parties or by law of Namibia and as are required for the just, economical and expeditious conduct and conclusion of the arbitration proceedings, where these Regulations are silent in any respect.
- (3) In determining the procedure for the conduct of the arbitration proceedings, and without detracting from the generality of subregulation (2), the arbitrator may, after hearing the parties thereon, and if he or she considers it appropriate for the just economical, expeditious and final determination of the dispute, direct -
- (a) that the dispute should be determined summarily at an informal hearing attended by all parties;
  - (b) the summary determination of an issue to decide whether any issue or point raised has a reasonable prospect of success or should be dismissed or struck out;

- (c) the summary determination of an issue as to whether an award should be made for any sum indisputably due (whether on account of debt or damages or on any other basis);
- (d) that any party should furnish more particulars or details of its case on any issue;
- (e) that there should be discovery on oath or otherwise of documents and recordings (subject to valid legal objection) either in regard to all relevant matters or to particular issues as determined by the arbitrator;
- (f) that the parties provide each other with a list of the names of witnesses to be called, and with a statement of the substance of each witness' evidence, and that, except with the leave of the arbitrator, no witness may be called in respect of whom such name and summary has not been provided;
- (g) that the hearing should proceed on documents (including written submissions) only, without the presentation of other evidence; and, if the parties so agree, without the presentation of argument.

#### **Oath or affirmation**

15. An arbitrator may administer an oath to, or accept an affirmation from, any person called to give evidence or be questioned.

#### **Arbitration award**

16. (1) The arbitrator must make his or her final award as soon as may be practicable, and in any event not later than 30 calendar days after the completion of the arbitration hearing, unless the parties in writing agree to an extension of that period.

(2) An award must be made in writing and include the reasons upon which the award is based.

(3) The award must be signed and dated by the arbitrator.

(4) The arbitrator must deliver the award to the parties or their representatives being present or having been summoned to appear.

(5) If an award is made for the payment of an amount of money, such amount, unless the award otherwise provides, carries interest from the date on which it has been made known to the parties at the same rate as a judgement debt.

(6) An award is final and not subject to appeal and each party must abide by and comply with the award in accordance with its terms.

(7) A party to arbitration proceedings in which an award has been made may, within 14 calendar days after the award has been made known to the parties, upon written notice to the arbitrator and all other parties, apply to the arbitrator to correct in the award any clerical or typographical errors, any patent errors arising from any accidental slip or omission, errors in computation, or any errors of a similar nature.

(8) The arbitrator must, if he or she considers the application for correction to be *prima facie* warranted, give the other parties an opportunity of making oral or written submissions, as he or she may determine on the application for correction, and thereafter and in any event within 30 calendar days of the application, either refuse the application or correct the award made, and thereupon the initial award or the corrected award, as the case may be, is the final award.

#### **Settlements**

17. (1) If, at any time during the arbitration proceedings, the parties reach a written settlement, the arbitrator must, upon being furnished by any party with proof that

the parties have in writing agreed thereto, make an award in accordance with the written settlement.

(2) If a settlement does not deal with all the disputes raised in the arbitration, the arbitrator must, unless the terms of the settlement precludes it, make an award in accordance with the settlement and proceed with the arbitration proceedings in respect of any disputes, including the matter of costs, not dealt with in the settlement.

### **Costs of arbitration**

18. (1) Unless the parties have in writing otherwise agreed, the arbitrator must in his or her award deal also with the costs of the arbitration, and decide which party must bear the costs of the arbitration or in what proportions the parties must bear such costs.

(2) Unless the parties agree on a different scale on which costs are to be taxed and recovered, the arbitrator must, when it awards costs, direct that the scale on which such costs are to be taxed and be recoverable be in accordance with the scale applicable to a civil action in the High Court of Namibia.

(3) In making an award as to costs the arbitrator may declare that such costs include the costs incurred in the obtaining of an opinion of the court or the opinion of counsel on a question of law under these Regulations or under the provisions of a law.

(4) A party in whose favour or against whom an order for costs has been made by the arbitrator, is entitled to have the amount of such costs taxed as contemplated in subregulation (2), and if neither party objects, such costs may be taxed by the arbitrator.

(5) Notwithstanding anything to the contrary in this regulation, the arbitrator may, if he or she considers that in all the circumstances (not being limited to the degree of success of the parties on the merits of the dispute) it is just to do so, provide in his or her award for a limit to the amount of costs which may be recovered.

### **Consolidation of arbitration proceedings**

19. An arbitration under these Regulations may include, by consolidation, joinder or any other manner, any person or entity if -

- (a) the dispute involving the person or entity is substantially related to the dispute being arbitrated and involves a common question or questions of fact or law; and
- (b) such person or entity has consented to participation in the arbitration.

### **Delivery**

20. (1) All pleadings and other documents and notifications, complete with annexures, must be delivered in typed form and a sufficient number of copies to provide one copy for each party and one copy for the arbitrator.

(2) The address to which all pleadings, documents, and other notifications to the demanding party may be physically delivered or sent, is the address furnished by such party in the demand for arbitration, or such other address as the demanding party may thereafter in writing notify to all other parties or the arbitrator.

(3) The manner in which all pleadings, documents, and other notifications to a party may be physically delivered or sent, is:

- (a) by physical delivery to a party, but subject thereto that if the party is a minor, a person under legal disability or a deceased estate, it may be physically delivered or sent to the party's guardian, curator, tutor, executor or a person in a similar legal relationship to that party (hereafter called such person's "representative"); or

- (b) by physically delivering it at or sending it to the residence or place of business of a party or a party's representative; or
  - (c) by physically delivering it at or sending it to a party's place of employment; or
  - (d) if a party has chosen a *domicilium citandi*, by physically delivering it at or sending it to the address so chosen; or
  - (e) in the case of a juristic person, by physically delivering it at or sending it to the registered office or the principal place of business of such juristic person; or
  - (f) by physically delivering it to or sending it to any agent who is authorised in writing to accept it on behalf of the party to whom it is addressed; or
  - (g) where the party is a firm, a partnership or a voluntary association, by physically delivering it or sending it to its place of business or to the proprietor of the firm, a partner of the partnership, or the chairperson or secretary of the committee or managing body of the voluntary association in the manner referred to in paragraph (a), (b), (c), (d) or (f).
- (4) Delivery or notification or communication of any pleading, document or other notification from a party to another party or from the arbitrator is deemed to have been effected on the day when such delivery or notification or communication was actually received, or if made to an address referred to subregulation (3), on the day when it should in the ordinary course have been received by the party to whom it was addressed or the party's representative or a person at that address who would ordinarily be expected to have brought to the party's attention.
- (5) Periods of time specified in these Regulations or by the arbitrator commences on the day following the day on which a pleading or notification is deemed to have been delivered or sent as provided for in this regulation, or, as the case may be, the order of the arbitrator was made or other event occurred whereafter a party is required to take any step or perform any act within a certain period: Provided that if the first or last day (but not intervening days) of such period is a Saturday or Sunday or official holiday, the period in question commences or expires, or both commence or expire, on the first working day thereafter.
-