

Short notes on:

IS ANY DISPUTE REFERABLE TO ARBITRATION?

Introduction

As attorneys, we often include dispute resolution provisions in the agreements we draft for our clients. In many instances, alternative dispute resolution is a powerful way in which to resolve an array of different disputes.

Advantages include:

1. the confidentiality of the process,
2. often being less formal, and
3. it is generally faster than litigation.

In my personal experience, there is rarely a cost-benefit, but in most instances, it does ensure a definite time benefit.

The Courts

The approach adopted by our courts in deciding whether a dispute falls within the ambit of referral was settled by the Supreme Court of Appeal, in *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd*.¹ The case dealt with the effect fraud has on such a clause.

The court held that it is in principle possible for the parties to agree that the question of the validity of their agreement may be determined by arbitration. Furthermore, in these specific instances, that the parties intended that the arbitrator's role would only be to determine disputes regarding accounting issues, and not intended the validity or enforceability of the agreement.

In the context of international arbitrations, the court in *Zhongji Development Construction Engineering v Kamoto Cooper Company Sarl*² that an arbitration agreement embodies an agreement distinct from the contract of which it forms part of.

¹ 2013 (5) SA 1 (SCA)

² (2015) (1) SA 345 (SCA)

In *Seabeach Property Investment No 28 (Pty) Ltd v Nunn*,³ the applicant sought an order that the dispute between the parties had validly and adequately been referred to arbitration, alternatively that the dispute is arbitrable and should be referred to arbitration by the court. The respondent did not agree and advanced an argument essentially that if an agreement is invalid from the outset, all clauses, including an arbitration clause, will be void from inception.

The ultimate question for consideration before the court was whether the parties intended that if a dispute arose, as in that instance, that dispute would be determined by an arbitrator. In considering the arbitration agreement, the court noted that the clause operative provided that:

“Any dispute between the parties in connection with or arising out of the formation, implementation, validity, enforceability and rectification of the Agreement, shall be referred to and determined by Arbitration”.

Also, the clause clarified that *“despite the termination of or invalidity for any reason of this Agreement of any part thereof”* the arbitration clause will remain in effect.

Having regard to the above clause and the agreement as a whole, the court held that the parties envisaged and intended, at the time of concluding the agreement, that all their disputes regarding the main agreement whether *void* or *voidable* would be determined by arbitration. The arbitration clause was therefore severed from any defects from which the main agreement may suffer.⁴

Conclusion

In an instance where parties intend all disputes regarding their agreement, including the formation, validity and enforceability of the agreement, be determined by arbitration, it is imperative that the arbitration agreement and the rules says explicitly so. Contact an expert at SchoemanLaw to review your contracts to construct what suits the situation best today!

³ (18310/18) [2019] ZAWCHC 9 (22 February 2019)

⁴ <https://www.cliffedekkerhofmeyr.com/en/news/publications/2019/Dispute/dispute-resolution-alert-24-july-When-does-a-dispute-fall-within-an-arbitration-agreement.html> : accessed 27/07/2019.