



Arbitration: an overview

Introduction

Arbitration, in a nutshell, is a form of alternative dispute resolution in which the parties approach a third party for the hearing of the dispute, the weighing of evidence and the making of a binding and final award. This is considered an alternative to the traditional dispute resolution process: litigation in a court of law. Arbitrations are governed by the Arbitration Act 42 of 1965 ("Arbitration Act"). So why would parties choose this process over the courts?

PROS:

Speedier More Flexible process;

Appoint arbitrator with expertise in area of dispute;

Private;

Final.

CONS:

Costly;

Enforceability;

Finality.

Commercially, alternative dispute resolution ("ADR") is recognised by the King III Report as an essential part of good corporate governance and calls upon directors to consider ADR before resorting to litigation. The Companies Act 71 of 2008 gives recognition to this principle by giving a person with the right to apply for relief in terms of that Act, the right to choose whether to approach a court or resolve a dispute using ADR as per section 167 ("Companies Act").

Arbitration Agreement

When will a matter be resolved by arbitration?

In order to fall within the purview of the Arbitration Act there must be a written agreement between the parties which gives either party an election to submit a dispute to arbitration or which stipulates that all disputes *shall* be resolved by arbitration. Such agreements are commonly included as a clause in a wide variety of agreements. **Tip:** *A contracting party would be wise to use the word “may” instead of shall as this allows either party, depending on the wording, the choice to elect whether to request arbitration or approach a court for resolution.*

As stated above, the Companies Act gives a person the right to send a matter to arbitration. This may conflict with the requirement that an arbitration agreement must be in writing, as the person may unilaterally decide to send the matter to arbitration without there being an existing written agreement providing for arbitration. This point has not yet been decided upon by a court of law.

An arbitration agreement is binding on the parties and shall not be terminated except with consent of the parties, unless the agreement provides otherwise as per section 3 of the Arbitration Act. However, this does not operate to oust the court's jurisdiction as either party may apply to court and show good cause to set aside the arbitration agreement; or order that a particular dispute not be referred to arbitration as per section 3(2) of the Arbitration Act.

Should one party disregard a valid arbitration agreement without good cause and institute legal proceedings in a court of law, the other party may apply to court for a stay of such proceedings as per section 6 of the Arbitration Act.

Procedure

In the event that a dispute arises between parties subject to an arbitration agreement, the parties must abide by the terms of their particular arbitration agreement read with the Arbitration Act. Certain agreements will make provision for the arbitration to be heard by the Arbitration Foundation of Southern Africa (“AFSA”) which has a further set of rules prescribing the procedure which the parties must follow.

Generally, the parties will first meet in an attempt to resolve the dispute without any further proceedings. Should this fail, an arbitrator will be appointed either by AFSA or as stipulated in the agreement. This allows parties the opportunity to ensure that the arbitrator is an individual or panel with a certain level of expertise in a certain area e.g. may be a chartered

accountant with 15 years of experience **Pro:** *this allows parties chose the person deciding the matter based on the area of dispute and required expertise.*

The referring party will deliver a statement of claim, the other party a statement of defence and discovery and inspection may be performed. For the most part, the arbitrator will orchestrate the proceedings and attempt to accommodate the parties as far as possible. A date for arbitration will be agreed upon. **Pro:** *Unlike a court hearing, the matter is heard privately and the record of proceedings and the final award are not accessible by the public. Large corporations may find comfort in resolving disputes without airing out their dirty laundry.*

Arbitration in Default

Should one of the parties fail to attend an arbitration without good cause and after having received reasonable notice of where and when the arbitration is to occur, the arbitration may proceed and an award may be granted in favour of the other party as per section 15(2) of the Arbitration Act. In the recent case of *Vidasky v Body Corporate of Sunhill Villas* 2005 (5) SA 200 (SCA) ("*Vidasky*"), it was held that an arbitration may proceed in the absence of one of the parties only if the non-attending party actually received reasonable notice of the arbitration. In *Vidasky*, it was held that it was insufficient that the non-attending party had been notified by means of registered post. It was shown that such post was only received by the defaulting party after the arbitration had occurred. As a result, the award was set-aside.

Force and Effect of an Arbitration Award

The arbitrator will hear evidence from both parties and proceed to make an award which shall be final, not subject to appeal and binding on the parties unless the arbitration agreement provides otherwise as per section 28 of the Arbitration Act. **Pro:** *The finality of arbitration proceedings is an advantage in that the matter is not drag out ad nauseam, with appeal after appeal, through all the courts in the country. This provides commercial enterprises with the certainty that disputes may be disposed of timeously and at an ascertainable cost. Con:* *However, such finality may prove a disadvantage in that the arbitrator may make an error as to law or fact which cannot be examined by a court of law.*

In order to enforce an award it may be made an order of court upon application as per section 31 of the Arbitration Act. The award will then have the effect of a civil judgment and depending on the content thereof it may be enforced by means of attachment and execution by the sheriff. **Con:** *if the losing party fails to comply with the award, the other party will still have to approach a court to make that award an enforceable court order.*

However, either party may, within 6 weeks after the publication of the award, apply to court, as per section 33 of the Arbitration Act, to have the award set aside on the limited grounds that:

- i. the arbitrator misconducted himself in relation to his duties;
- ii. the arbitrator committed any gross irregularities in the conduct of the arbitration proceedings; or
- iii. an award was improperly obtained.

These grounds limited the application to what is essentially a review of the arbitrator or the proceedings and as such the court will examine the procedural legitimacy of the arbitration and not the merits. Should the award be set aside, either party may request that the matter be submitted to a new arbitrator to be heard afresh as per section 33(4) of the Arbitration Act.

Court's discretion to refuse to make an arbitration award a court order

In the recent judgment of *Cool Ideas 1186 CC v Hubbard and Another* [2014] ZACC 16 ("Cool Ideas"), the Constitutional Court was called upon to decide whether an arbitration award which if enforced would violate a statutory prohibition may nevertheless be made an order of court.

In brief, Cool Ideas 1186 CC ("CC") undertook to build Mrs Hubbard ("Hubbard") a home, after completion Hubbard claimed compensation for defective workmanship and the CC counterclaimed that the remaining portion of the payment price was outstanding. The matter was referred to arbitration and an award was made in favour of the CC. However, section 10 of the Housing Consumers Protection Measures Act 95 of 1998 ("Housing Protection Act") prohibits an unregistered home builder from receiving compensation for the construction of a home. The CC was an unregistered home builder when it approached the High Court to make the award a court order. Before judgment, the CC registered as a home builder and the High Court, for this and numerous other reasons, made the award an order of court. The Supreme Court of Appeal set aside the High Court's order and the CC appealed the matter to the Constitutional Court.

The Majority delivered a cautionary message to courts when deciding whether to make an award an order of the court, stating at paragraph 56 that:

[c]ourts should respect the parties' choice to have their dispute resolved expeditiously in proceedings outside formal court structures. If a court refuses too freely to enforce an arbitration award, thereby rendering it largely ineffectual,

because of a defence that was raised only after the arbitrator gave judgment, that self-evidently erodes the utility of arbitration as an expeditious, out-of-court means of finally resolving a dispute.

The Court went on to declare that an arbitration award will not necessarily be, by the fact of statutory prohibition alone, unenforceable. The force of prohibition must be weighed against the important goals of private arbitration. It is important to note that a violation of section 10 of the Housing Protection Act is a criminal offence. This moved the Court to hold that *[g]enerally speaking, party autonomy in voluntary arbitrations will not trump the principle of legality where the enforcement of the arbitral award would constitute a criminal offence...* as per paragraph 58 of *Cool Ideas*. Accordingly, the Court refused to make the award a court order and dismissed the CC's appeal.

Conclusion

Arbitration proceedings provide parties with the option to follow a cost effective, timeous and party-controlled dispute resolution process. However, whether such a process is preferable to litigation in a court of law depends on the nature of the dispute, the quantum of the matter and the relationship of the parties involved. Before drafting or signing an agreement containing an arbitration clause, the parties must examine their specific circumstances and consider whether arbitration is the most advantageous dispute resolution process to follow for them.

Written and prepared by:

Patrick Wainwright

patrick@bkm.co.za

Please do not hesitate to contact us on +27 11 788-0083 should you have any further enquiries or email enquiries@bkm.co.za

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