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ALERT

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When does a dispute fall within an arbitration agreement?

The approach adopted by our courts in deciding whether a dispute comes within the provision(s) of a domestic arbitration clause, was settled by the Supreme Court of Appeal, in *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* 2013 (5) SA 1 (SCA). The case dealt with the effect fraud has on a domestic arbitration clause in general and can now be considered as trite law, even though its application in any particular instance has proven to be tricky over the years.

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When does a dispute fall within an arbitration agreement?

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The approach adopted by our courts in deciding whether a dispute comes within the provision(s) of a domestic arbitration clause, was settled by the Supreme Court of Appeal, in *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd 2013* (5) SA 1 (SCA). The case dealt with the effect fraud has on a domestic arbitration clause in general and can now be considered as trite law, even though its application in any particular instance has proven to be tricky over the years.

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 even though the reference to arbitration is part of the agreement being questioned. Having examined the ambit of the arbitration clause in question and what the parties intended by having regard to the purpose of their agreement, the court in *North East Finance* found that the parties intended that the arbitrator's role would only be to determine disputes regarding accounting issues, and it was not intended that the validity or enforceability of the agreement, which was allegedly induced by fraudulent misrepresentations and non-disclosures would be arbitrable.

In the context of international arbitrations, the court in *Zhongi Development Construction Engineering v Kamoto Cooper Company Sarl* (2015) (1) SA 345 (SCA) readily accepted that an arbitration agreement embodies an agreement distinct from the agreement of which it forms part of and absent a challenge, the arbitration agreement must be given effect to under its terms, the so-called separability presumption. The court found that the dispute fell within the provisions of the arbitration agreement based on the Rules for the Conduct of Arbitrators as published by the Association of Arbitrators for Southern Africa, which were imported into the arbitration agreement by reference. The relevant rule explicitly provided that an *'arbitrator may decide any dispute regarding the existence, validity or interpretation of the arbitration agreement and, unless otherwise provided therein, may rule on his own jurisdiction to act'*.

The Western Cape Division of the High Court, Cape Town has recently dealt with two matters in the context of domestic arbitrations: *City of Cape Town v Namasthethu Electrical (Pty) Ltd and Another* (446/2017) [2018] ZAWCHC 150; [2019] 1 All SA 634 (WCC) (12 November 2018) and *Seabeach Property Investment No 28 (Pty) Ltd v Nunn* (18310/18) [2019] ZAWCHC 9 (22 February 2019).

Nunn

The applicant sought an order that the dispute between the parties had properly and validly been referred to arbitration, alternatively that the dispute is arbitrable and should be referred to arbitration by the court. The respondent held a different view and insisted that only a court can resolve the dispute. According to the respondent, the purported written agreement entered into between the parties was *void ab initio* due to a fundamental mistake on her part brought about by the applicant's estate agents which rendered the whole agreement, including the arbitration clause, *null* and *void*. The argument advanced by the respondent was essentially that if an agreement is *void* from the outset, all clauses including an arbitration clause will be *void* from inception.

When does a dispute fall within an arbitration agreement?*...continued*

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 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". In addition, 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. To view it differently would give the agreement a commercially insensible meaning. In any event, the court found that the arbitration clause in effect constituted a separate self-standing agreement to refer disputes such as the one that featured in the matter to arbitration whatever the ultimate consequence or outcome thereof might be in relation to the remainder of the main agreement by providing that the clause constituted an irrevocable agreement to go to arbitration, from which agreement the parties could not withdraw. The parties intended to isolate and ring-fence their agreement to go to arbitration. Thus, even if the remaining part of the main agreement was found void or voidable, the parties intended and agreed this would not affect the validity and enforceability of the arbitration clause. The arbitration clause was therefore immunised from any fatal illness from which the main agreement may suffer.

Namasthethu

The question before the court was whether the parties contemplated that the validity of the agreement, alleged to have been induced by fraud, would be an issue to be adjudicated upon. The clause read: *"Should any disagreement arise between the employer or his principal agent or agents, and the contractor arising out of or concerning this agreement or its termination, either party may give notice to the other to resolve such disagreement"*. The clause went further to record that where such disagreement is not resolved within a certain period, it shall be deemed to be a dispute and shall be referred by the party which gave such notice to either adjudication or litigation. According to the respondent, the parties agreed that a disagreement about termination of agreement should be adjudicated upon, if the disagreement is not resolved. But the City contended that it never contemplated that the validity of the agreement would be submitted to adjudication.

The court accepted that for the validity of the agreement to be determined by reference to adjudication or arbitration, the agreement must *"specifically say so"* or the agreement must clearly indicate as much. This was because the general position is clear in that if there is a dispute as to whether the agreement which contains the arbitration clause has ever been entered into at all, then the issue cannot go to arbitration under that clause. This position only changes if the parties make a provision for such referral, and

When does a dispute fall within an arbitration agreement?...*continued*

This should serve as a reminder to the legislature to align the badly out-dated Arbitration Act, 1965 with the International Arbitration Act, 2017 and for the judiciary to interpret domestic arbitration agreements having regard to international best practice.

this would *"require very clear language"*. Having regard to the clause and the rest of the agreement, the court found it does not appear that the parties anticipated an agreement whose validity could be determined on adjudication. It therefore followed that the adjudicator was not empowered to deal with the question of the validity of the agreement.

Domestic arbitrations

The position under South Africa law, at least insofar as domestic arbitrations are concerned, therefore seems to be that: if 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/or the rules specifically says so. This potentially means the arbitrator would not have jurisdiction to deal with questions of the validity and existence of the agreement unless the arbitration agreement explicitly declares so.

International arbitrations

The position in international arbitrations seems somewhat different. Article 16 of the Model Law, which was adopted and applies in South Africa subject to the International Arbitration Act, 2017, provides that *the arbitrator may rule on his own jurisdiction, including any objections regarding the existence or validity of the arbitration agreement* and a decision by the arbitrator that the main agreement is *null* and *void* shall not lead to the invalidity of the arbitration clause. In this instance, it is important to note that some leading arbitral institutions such as the International Chamber of Commerce have a very generic arbitration clause not even referring to *'formation, existence, formation or validity'*. In those cases, it is generally accepted as trite that an arbitrator would be empowered to settle *'any dispute'* challenging the main agreement, the so-called *'competence/competence'*.

Conclusion

The advantages of arbitration over litigation, particularly regarding the expeditious and inexpensive resolution of disputes, are reflected in its growing popularity worldwide. Those advantages may be diminished or destroyed entirely if arbitrators are, in certain instances, precluded from ruling on their own jurisdiction as appropriate for the just, expeditious, economical and final determination of the dispute before them. This should serve as a reminder to the legislature to align the badly out-dated Arbitration Act, 1965 with the International Arbitration Act, 2017 and for the judiciary to interpret domestic arbitration agreements having regard to international best practice.

Vincent Manko

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