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CORPORATE & COMMERCIAL ALERT

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More time means more money – negotiating protections against the relaxation of time-bar clauses

The benefits of arbitration are well-known. It is often cheaper, quicker and allows the parties flexibility to a process that suits their needs. Moreover, the process, pleadings, agreements and rulings may also remain confidential, unlike the case in public court proceedings. As a result, many commercial agreements allow for disputes to be resolved by way of arbitration.

More time means more money – negotiating protections against the relaxation of time-bar clauses

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In addition, in order to promote finality and certainty in their contracting arrangements, parties will often include provisions in their agreements relating to the period of time within which disputes, differences or claims under an agreement may be referred to arbitration. This is known as a “*time-bar clause*”. While the benefits of a time-bar clause are clear, parties should be aware that the enforceability of such provisions is not a foregone conclusion.

Under section 8 of the Arbitration Act 42 of 1965 (Arbitration Act), a party to arbitration proceedings may approach a court to extend the time stipulated in a time-bar clause for commencing arbitration proceedings. Courts have the power under this section to extend the time fixed by an agreement for referrals to arbitration if it is of the opinion that, in the circumstances of a case, undue hardship would otherwise be caused. The application of section 8 of the Arbitration Act was discussed in the recent case of *Samancor Chrome Holdings (Pty) Limited and Another v Samancor Holdings (Pty) Limited and Others* [2019] ZAGPJHC 370 (Samancor Case).

The Samancor Case concerned a sale of shares agreement which contained indemnities in favour of the purchaser in respect of income tax to be paid by the target company to SARS. The parties agreed to a time limitation of six years for the institution of tax-related claims. It transpired that the target company’s income tax returns were filed more than two years late and erroneously under-declared the company’s taxable income, resulting in substantial claims by SARS against the target company for income tax (including penalties and interest). Due to the delays in lodging the income tax returns and SARS’ investigations, the claim was instituted after the six-year time-bar period. Initially, the arbitrator found that while the purchaser’s claim was well-founded, the time-bar clause prevented the claim from being instituted.

The purchaser then approached the Gauteng High Court (Johannesburg) to consider under section 8 of the Arbitration Act whether the strict application of the time-bar clause in the agreement would cause “*undue hardship*” to the purchaser. Drawing on English case law, the court decided that, notwithstanding the clear wording of the agreement between the parties, the time-bar should be extended to allow for the institution of arbitration proceedings. The reasons for this decision included, amongst other things, that (i) the purchaser’s claim was almost certain to succeed on the merits (which was not disputed), (ii) the purchaser was unable to prevent the lapsing of the time-bar, (iii) the hardship on the purchaser would

More time means more money – negotiating protections against the relaxation of time-bar clauses...*continued*

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be far greater than what the circumstances warranted, (iv) the purchaser had not unreasonably delayed in instituting the claim once it had materialised, and (v) the respondents had not been prejudiced by the delay in instituting the claim.

Therefore, even though the clear wording of the contract stipulated a six-year time-bar period, the court ruled that ordinary businessmen entering into the agreement would surely have agreed that a refusal to extend the time-bar period in exceptional circumstances such as those at hand would cause undue hardship.

The result of the Samancor Case makes it clear that time-bar clauses are not absolute and there may be instances where a court, on application, extends the period of time within which disputes and claims under an agreement may be made, notwithstanding what the parties may have agreed. The length of time by which such period may be extended will depend on a number of factors, including (i) the quantum of a claim, (ii) a party's fault in causing delays leading to an expiry claims period, (iii) the severity or degree of the fault of the delaying party, (iv) the length of the delay and (v) the degree of the prejudice suffered by the party seeking to institute the claim.

As a result of the Samancor Case, parties may wish to proactively seek to mitigate the effects of section 8 of the Arbitration

Act where it is in their interest to do so. For example, a seller may seek to protect itself from the possibility of an extended time-bar period by:

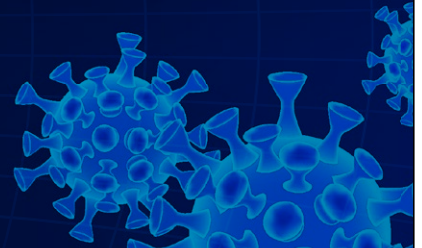
1. providing that an indemnity arises only in respect of a stipulated number of the past financial years of a target entity (for example, the past three years);
2. including a monetary cap on indemnity claims;
3. providing for specific limitations or monetary caps which become applicable only in the instances where a time-bar is extended by a court under section 8 of the Arbitration Act; and/or
4. providing that if a court finds that a time-bar period should be extended in respect of an indemnity claim, there is nevertheless a second time-bar which kicks in: for example, the purchaser must nevertheless still bring its claim within 1 year after the earlier of (i) its learning of the cause of action or (ii) the date on which it ought to have known of the facts which comprise a cause of action.

In any event, parties would be well-advised to seek legal advice when drafting or seeking to enforce time-bar clauses included in arbitration provisions, as the enforceability, or unenforceability, of a time-bar clause could have very costly consequences.

Anita Moolman, Andrew Giliam and Josh Reuter

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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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