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DISPUTE RESOLUTION **ALERT**

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Arbitration Act: The Intersection between Remittal and Review

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"Pay now, argue later"

What is adjudication and why is it commonly used in the construction industry as a form of dispute resolution? The case of *Framatome v Eskom Holdings SOC Ltd 2021* (2) SA 494 (GJ) dealt with a contractual construction dispute which was to be resolved through adjudication. In so doing, the court confirmed certain principles and made certain observations in regard to adjudication clauses. We consider these below, together with our own observations.

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Arbitration Act: The Intersection between Remittal and Review

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It is arguable that (one of) the most important legal consequences of an arbitration award is that it brings finality to the dispute between the parties in that the arbitrator's decision is final and there is no appeal to the courts or an appeal tribunal unless the arbitration agreement makes provisions for an appeal to an appeal tribunal. This feature certainly makes arbitrations appeal to users.

The reality however is that an award is often not the last piece in a dispute. The Arbitration Act, 1965 contain various mechanisms to challenge the outcome such as the remittal for consideration in terms of section 32 and the setting aside in terms of section 33.

Remittal of an award for reconsideration

Section 32(2) of the Arbitration Act provides that the court may, on good cause shown, remit any matter which was referred to arbitration, to the arbitration tribunal for reconsideration and for the making of a further award or a fresh award or for such other purpose as the court may direct. An award may therefore be remitted where *"good cause"* has been shown for doing so. Good cause is generally understood to be a phrase of wide import that requires a Court to consider each case on its merits in order to achieve a just and equitable result in the particular circumstances.

At reconsideration, the arbitration tribunal must dispose of a matter within three months unless the parties or the court direct otherwise. It is however crucial to bear in mind that remittal is not a disguised appeal or review, but a remedy to ensure that the arbitrator or tribunal resolves the disputes which fall for adjudication in a manner that is clear and unambiguous, thereby avoiding prejudice to the parties.

Setting aside of award

The circumstances under which an arbitral award can be set aside are set out in section 33 as follows:

- where the arbitrator has misconducted himself in relation to his duties as arbitrator;
- the arbitrator has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded his powers; or
- an arbitration award has been improperly obtained.

If the award is set aside the dispute shall, at the request of either party, be submitted to a new arbitration tribunal constituted in the manner directed by the court.

It is clear from the above that the rights of parties to have an arbitral award set aside are very limited. Our courts observe a high degree of deference to arbitral decisions in line with the principle of party autonomy. Hence the scope for intervention by the courts is very limited.

Arbitration Act: The Intersection between Remittal and Review*...continued*

In practice, it is always not entirely clear whether a party must submit the award for remittal and reconsideration or seek to set aside the award or a portion thereof in any particular set of circumstances.

In practice, it is always not entirely clear whether a party must submit the award for remittal and reconsideration or seek to set aside the award or a portion thereof in any particular set of circumstances. This is borne out by two recent High Court judgments of *Croock v Lipschitz and Others* (2019/18319) [2020] ZAGPJHC 80 (12 March 2020) and *Quality Products (Pty) Ltd v MAMCSA Security Consultants CC and Another* (12447/2017) [2020] ZAKZDHC 13 (20 May 2020).

In *Croock*, the applicant sought an order reviewing and setting aside an award on the basis that the arbitrator committed gross irregularities in the conduct of the arbitration proceedings. During the arbitration, one of the parties pleaded and argued that the terms of the agreement are such that it was *contra bonis mores* or against public policy, and consequently unenforceable. The arbitrators however did not deal with this defence at all. The court found in these circumstances, the arbitrators failed to deal with a substantive issue pleaded which resulted in not having a case fully and fairly determined. The court therefore set aside a portion of the award and referred it back to the same arbitration panel to hear argument and to determine the defence pleaded.

In *MAMCSA*, the applicant sought an order remitting the award to the arbitrator for reconsideration on the basis that he failed to consider and determine whether a natural person can hold a member's interest as a nominee; and if so, does it necessarily follow that a nominee is vested with the rights of the registered member. The court found that the arbitrator failed to consider the second issue before him and in particular, consider the argument and the cases relied upon in support thereof. This was found to constitute good cause for a remittal as required.

So even though the guiding principle of consensual arbitration remains finality – right or wrong, the Arbitration Act, 1965 contains various mechanisms to upset an arbitral award. It is therefore important that parties carefully consider an arbitral award upon publication as it is always not entirely clear whether a party must submit the award for remittal and reconsideration or seek to set aside the award or a portion thereof in any particular set of circumstances. Identifying the correct cause of action is therefore key.

Vincent Manko, Camille Kafula and Storm Arends

"Pay now, argue later"

Adjudication and arbitration are two distinct alternative dispute resolution (ADR) mechanisms, i.e. procedures to resolve disputes outside of the court process.

What is adjudication and why is it commonly used in the construction industry as a form of dispute resolution? The case of *Framatome v Eskom Holdings SOC Ltd 2021* (2) SA 494 (GJ) dealt with a contractual construction dispute which was to be resolved through adjudication. In so doing, the court confirmed certain principles and made certain observations in regard to adjudication clauses. We consider these below, together with our own observations.

The parties had concluded a NEC3 Engineering and Construction Contract (June 2005), which is a standard-form contract in the construction industry. The dispute resolution clause (that the parties had selected) provided that an adjudicator's decision is binding unless and until it is revised by an arbitration tribunal, and that it is final and binding if neither party has objected to it within the time required by the contract.

Adjudication and arbitration are two distinct alternative dispute resolution (ADR) mechanisms, i.e. procedures to resolve disputes outside of the court process.

Arbitrations are similar in their procedure to court proceedings, but instead of a judge an arbitrator is appointed (normally a lawyer), who fulfils a role analogous to a judge. The arbitrator will hear oral evidence and argument, or written evidence, and will make a decision known as an 'award'. If there is an arbitration agreement it will be governed by the Arbitration Act 42 of 1995 and the award may then be made into an order of court. Absent certain limited grounds to review or set aside an arbitral award (e.g. gross irregularity in the proceedings), the courts will enforce arbitration awards, adhering to the principle of party autonomy, i.e. the fact that the parties agreed to submit to the arbitral process. Although normally more truncated than a court process, arbitrations take significantly longer to finalise than adjudications.

Adjudication normally includes the following characteristics:

1. The process is fairly simple and the goal is to achieve a swift and cost effective decision;
2. The adjudicator is an independent third party (often an expert); and
3. The adjudicator's decision is normally binding immediately but can be challenged by subsequent arbitration or litigation.

Similarly to arbitrations, courts will normally give effect to adjudication awards if they are approached. In this case, the court emphasised that a court should enforce an adjudicators decision unless the question which the adjudicator decided was not the question that was referred to them (a jurisdiction point).

Adjudication is a very useful mechanism in construction contracts to ensure that a dispute is dealt with swiftly so that the construction project is not held up or delayed, as it may be if such dispute had to first be resolved by way of arbitration.

"Pay now, argue later"*...continued*

It is important for parties to understand the adjudication process, and how it differs from and interfaces with arbitration.

The adjudication process, and status of an adjudication award, is dependent on the wording of the adjudication clause. It normally allows for an interim but binding award to be made, which is effective immediately, and which becomes final unless challenged within a specified time frame. This is the so called *"pay now, argue later"* principle.

Adjudication is a particularly useful process to deal with interim payment disputes (allowing the construction project not be delayed by such issues). A further benefit of this process is that, if the underlying issues are technical, the parties can appoint an adjudicator with the appropriate technical expertise, such as an engineer, rather than a lawyer (since the legal process is less involved than in an arbitration).

On the other hand, an adjudication is a much less rigorous process than an arbitration. For example, there is not normally oral evidence or cross examination, or discovery of all relevant documents in the matter. For this reason, it is not ideal where there is a substantial or complex dispute between the parties. It is therefore important that the contract clearly prescribe and limit which disputes go to adjudication (with all other disputes going directly to arbitration).

In conclusion, it is important for parties to understand the adjudication process, and how it differs from and interfaces with arbitration. In particular, to ensure the appropriate clauses are included in their contract and that such clauses are correctly applied in the event of a dispute.

Timothy Baker and Claudia Moser

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CDH's Dispute Resolution practice is ranked as a Top-Tier firm in THE LEGAL 500 EMEA 2021.
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Timothy Baker is recommended in Construction in THE LEGAL 500 EMEA 2021.
Siviwe Mcetywa is ranked as a Rising Star in Construction in THE LEGAL 500 EMEA 2021.

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CHAMBERS GLOBAL 2018 - 2021 ranked our Dispute Resolution practice in Band 2: Insurance.

CHAMBERS GLOBAL 2017 - 2021 ranked our Dispute Resolution practice in Band 2: Restructuring/Insolvency.

CHAMBERS GLOBAL 2020 - 2021 ranked our Corporate Investigations sector in Band 3: Corporate Investigations.

Chambers Global 2021 ranked our Construction sector in Band 3: Construction.

Chambers Global 2021 ranked our Administrative & Public Law sector in Band 3: Administrative & Public Law.

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Clive Rumsey ranked by CHAMBERS GLOBAL 2013-2021 in Band 1: Construction and Band 4: Dispute Resolution.

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Tim Fletcher ranked by CHAMBERS GLOBAL 2019 - 2021 in Band 3: Dispute Resolution.

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Tobie Jordaan ranked by CHAMBERS GLOBAL 2020 - 2021 as an up and coming Restructuring/Insolvency lawyer.

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BBBEE STATUS: LEVEL TWO CONTRIBUTOR
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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