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Dispute Resolution ALERT

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Pipped at the post? (the pitfall of instituting a claim in the wrong forum and how this relates to the relevant arbitration clause and underlying agreement)

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CLIFFE DEKKER HOFMEYR

INCORPORATING
KIETI LAW LLP, KENYA

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As a result of court backlogs and delays, and the public nature of court hearings, it has become common place for commercial contracts to include an arbitration clause. Arbitrations are a form of alternative dispute resolution whereby a dispute is resolved through a private procedure before an arbitrator instead of a judge. An arbitration clause normally seeks to include all disputes between the parties arising out of an agreement.

However, it is important that the arbitration clause be clear as to exactly which disputes are subject to arbitration and also that, in the event of a dispute in relation to the validity of the arbitration clause itself, or the validity of the agreement in which the arbitration clause appears, this too should be decided by the arbitrator.

If such clear wording is not included, a party that refers a dispute to arbitration may be faced with a challenge by its opponent, in the courts, to the effect that the referral to arbitration is not valid (for whatever reason) and they are accordingly in the wrong forum and must instead proceed with their claim in the courts. Conversely, a party that proceeds to court may be met with a challenge from its opponent to the effect that the court is the wrong forum for the dispute, which must be referred to or decided by arbitration. Such points, which may be decided many years after the initial institution of the relevant legal proceedings, or only at the ultimate hearing in such proceedings, if successful,

will result in significant delay and additional costs being incurred in the finalisation of the dispute. In a worst-case scenario, it may even result in a party losing its claim forever (due to prescription where, generally speaking, a party has three years within which to institute legal proceedings, otherwise it loses its claim – if more than three years have elapsed since the initial proceedings were instituted and such proceedings are then found to have been invalid and the party is obliged to institute fresh proceedings, it may be too late to do so as its claim may have prescribed by then).

In this context, a question that arises from time to time is whether a party may approach the courts regarding whether a referral to arbitration was valid, despite the existence of an arbitration clause in the agreement governing the relationship between the parties. A further question that sometimes arises is whether an arbitration clause is binding and effective when an agreement is void.



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These two issues were considered in the case of *Weissensee v Stone-Bird Investments (Pty) Ltd and Others* [2022] 4 All SA 905 (GJ), where the defendant raised jurisdictional points (to the effect that the disputes must be referred to arbitration rather than be heard in court) in an effort to prevent the court case from continuing against it in the courts.

Background

Stone-Bird operates in the project funding and investment sector, and acts as an asset manager. Weissensee intended to raise funding for projects to be launched internationally. As a result, the parties entered into an asset management agreement. Before signing, Weissensee enquired whether Stone-Bird held a Financial Services Board licence. Weissensee was told that Stone-Bird did not require a licence as a Mr Lomolino held the international equivalent licence. Lomolino was an officer of AS Private Equity (AS Equity), an international company that a director of Stone-Bird had a partnership with. Accordingly,

Weissensee paid €600,000 to Lomolino, which would be used to secure a bank guarantee.

The arbitration clause

The asset management agreement contained the following arbitration clause: "Any 'eventual controversy' regarding the interpretation of the clauses shall be submitted to the ICC [International Chamber of Commerce] conciliation and arbitration in Paris."

High Court

Weissensee approached the High Court to declare the asset management agreement void as Stone-Bird did not hold a valid licence in terms of section 7(1) of the Financial Advisory and Intermediary Services Act 37 of 2002 (FAIS Act). Stone-Bird contended that the court did not have jurisdiction to determine the matter as the agreement contained an arbitration clause which required any "eventual controversy" to be submitted to arbitration according to the rule of the ICC.

Jurisdiction and arbitration

The court was tasked with disposing of the jurisdiction issue before considering the merits of the case. The court found that Stone-Bird's contention that the court had no jurisdiction to rule on the issue of referral to arbitration was misguided. It held that, although the law recognises party autonomy (i.e. it will normally regard parties as bound by an arbitration clause in an agreement), the court's jurisdiction to consider whether a matter should be referred to arbitration is not ousted by an arbitration clause in an agreement. The court noted that the parties did not rely on the applicable arbitration acts in presenting their cases, but the court nevertheless considered the position under both the international and domestic arbitration acts. In terms of Article 8 of Schedule 1 to the International Arbitration Act 15 of 2017, a court shall stay proceedings and refer the matter to arbitration on the request of any party, unless the agreement is null and void, inoperative or incapable

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of being performed. Under the domestic Arbitration Act 42 of 1965, courts would often give effect to an arbitration clause when determining its jurisdiction, however, not when the contract itself was void as all clauses, including arbitration clauses, are incapable of being relied on.

The court found that the agreement was void for the reasons set out below, and therefore the referral to arbitration must fail under either scenario (i.e. under the international or domestic arbitration act).

Agreement null and void

The FAIS Act states that no person may act or offer to act as a financial service provider, unless they have been issued with a licence. Further, no one may act or offer to act as a representative unless appointed as a representative of an authorised financial services provider. Neither Stone-Bird NOR AS Equity were authorised in terms of the act as neither held a licence under FAIS.

Accordingly, Weissensee argued that the agreement was void as Stone-Bird was not licensed to provide financial services. Stone-Bird argued that the agreement was not void as it was a product supplier, and as such the agreement between the product supplier (Stone-Bird) and the client (Weissensee) was not unenforceable as a result of a lack of authorisation under section 7(2) of the FAIS Act.

The court found that there was nothing in the papers that proved that Stone-Bird was a product supplier. Rather Stone-Bird gave advice and provided intermediary services to Weissensee, and was empowered to obtain a bank guarantee on her behalf. Therefore, when the parties entered into the agreement, Stone-Bird did not hold a valid licence in terms of FAIS and Stone-Bird could not act as a financial services provider. The agreement was therefore a nullity and *void ab initio* for impossibility of performance and illegality.

The court declared the asset management agreement between Weissensee and Stone-Bird *void ab*

initio and as a result they had to pay €600,000 plus interest to Weissensee. The court held the two directors of Stone-Bird personally liable together with Stone-Bird for the payment.

Conclusion

In the case of *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd (492/12)* [2013] ZASCA 76, which is referenced in the *Weissensee* case, it was 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.

Parties ought therefore to include very clear wording in their arbitration clause to the effect that, if the validity of the agreement itself is in dispute, such dispute will be resolved by arbitration (together with any other disputes arising out of the agreement). Otherwise, this could have dire consequences for their claim.

Timothy Baker and Claudia Moser

OUR TEAM

For more information about our Dispute Resolution practice and services in South Africa and Kenya, please contact:



Rishaban Moodley

Practice Head & Director:
Dispute Resolution
Sector Head:
Gambling & Regulatory Compliance
T +27 (0)11 562 1666
E rishaban.moodley@cdhlegal.com



Tim Fletcher

Chairperson
Director: Dispute Resolution
T +27 (0)11 562 1061
E tim.fletcher@cdhlegal.com

Timothy Baker

Director:
Dispute Resolution
T +27 (0)21 481 6308
E timothy.baker@cdhlegal.com

Eugene Bester

Director:
Dispute Resolution
T +27 (0)11 562 1173
E eugene.bester@cdhlegal.com

Neha Dhana

Director:
Dispute Resolution
T +27 (0)11 562 1267
E neha.dhana@cdhlegal.com

Claudette Dutilleux

Director:
Dispute Resolution
T +27 (0)11 562 1073
E claudette.dutilleux@cdhlegal.com

Jackwell Feris

Sector Head:
Industrials, Manufacturing & Trade
Director: Dispute Resolution
T +27 (0)11 562 1825
E jackwell.feris@cdhlegal.com

Thabile Fuhrmann

Joint Sector Head:
Government & State-Owned Entities
Director: Dispute Resolution
T +27 (0)11 562 1331
E thabile.fuhrmann@cdhlegal.com

Tiffany Gray

Director:
Dispute Resolution
T +27 (0)11 562 1388
E tiffany.jegels@cdhlegal.com

Anja Hofmeyr

Director:
Dispute Resolution
T +27 (0)11 562 1129
E anja.hofmeyr@cdhlegal.com

Tendai Jangara

Director:
Dispute Resolution
T +27 (0)11 562 1136
E tendai.jangara@cdhlegal.com

Tobie Jordaan

Sector Head:
Business Rescue, Restructuring & Insolvency
Director: Dispute Resolution
T +27 (0)11 562 1356
E tobie.jordaan@cdhlegal.com

Corné Lewis

Director:
Dispute Resolution
T +27 (0)11 562 1042
E corne.lewis@cdhlegal.com

Vincent Manko

Director:
Dispute Resolution
T +27 (0)11 562 1660
E vincent.manko@cdhlegal.com

Richard Marcus

Director:
Dispute Resolution
T +27 (0)21 481 6396
E richard.marcus@cdhlegal.com

Burton Meyer

Director:
Dispute Resolution
T +27 (0)11 562 1056
E burton.meyer@cdhlegal.com

Mongezi Mpahlwa

Director:
Dispute Resolution
T +27 (0)11 562 1476
E mongezi.mpahlwa@cdhlegal.com

Kgosi Nkaiseng

Director:
Dispute Resolution
T +27 (0)11 562 1864
E kgosi.nkaiseng@cdhlegal.com

Desmond Odhiambo

Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E desmond.odhiambo@cdhlegal.com

Lucinde Rhoodie

Director:
Dispute Resolution
T +27 (0)21 405 6080
E lucinde.rhodie@cdhlegal.com

Clive Rumsey

Sector Head: Construction & Engineering
Director: Dispute Resolution
T +27 (0)11 562 1924
E clive.rumsey@cdhlegal.com

Belinda Scriba

Director:
Dispute Resolution
T +27 (0)21 405 6139
E belinda.scriba@cdhlegal.com

Tim Smit

Director:
Dispute Resolution
T +27 (0)11 562 1085
E tim.smit@cdhlegal.com

Roxanne Webster

Director:
Dispute Resolution
T +27 (0)11 562 1867
E roxanne.webster@cdhlegal.com

Kylene Weyers

Director:
Dispute Resolution
T +27 (0)11 562 1118
E kylene.weyers@cdhlegal.com

Joe Whittle

Director:
Dispute Resolution
T +27 (0)11 562 1138
E joe.whittle@cdhlegal.com

Roy Barendse

Executive Consultant:
Dispute Resolution
T +27 (0)21 405 6177
E roy.barendse@cdhlegal.com

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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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JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa.

Dx 154 Randburg and Dx 42 Johannesburg.

T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.

T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

NAIROBI

Merchant Square, 3rd floor, Block D, Riverside Drive, Nairobi, Kenya. P.O. Box 22602-00505, Nairobi, Kenya.

T +254 731 086 649 | +254 204 409 918 | +254 710 560 114

E cdhkenya@cdhlegal.com

STELLENBOSCH

14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.

T +27 (0)21 481 6400 E cdh Stellenbosch@cdhlegal.com

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