

Short notes on:

COVID 19 – THE UNDERSTATED IMPORTANCE OF ALTERNATIVE DISPUTE RESOLUTION CLAUSES IN CONTRACTS

Introduction

The Covid-19 pandemic and the resulting nation-wide lockdown has tested every facet of the South African economy, its legal system and the ability of its entrepreneurs and innovators to withstand immense turmoil.

With the South African legal system coming to an almost standstill earlier this year, contracting parties affected by breach, inability to perform and a number of other contract/ agreement related disputes were forced to seek alternative avenues for relief in each instance.

Section 34 of the South African Constitution provides that *“Everyone has the right to have any dispute which can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.”*¹

Section 34 appears to solidify the availability of alternate avenues of relief.

What is alternative dispute resolution?

Alternative dispute resolution refers to any other form of dispute resolution mechanism which does not involve a court of law.² However, in most instances when we refer to alternative dispute resolution, we are referring to the mechanisms of mediation and arbitration.

Common purposes for seeking alternative dispute resolution include the following³:

- Providing relief to congested or overloaded courts;
- Facilitating access to justice;
- Prevent excess cost and undue delay; and,
- Providing more effective dispute resolution.

Pros and cons of concluding an alternative dispute resolution clause in your contract

There are certain advantages to seeking alternative dispute resolution which include the possibility of a faster and cheaper resolution to a contractual dispute. However, advantages can also include greater control over the process and rules which apply to the mediation or arbitration of a dispute.⁴

Having an alternative dispute resolution clause within your contract allows for the contracting parties in the first instance, to elect alternative dispute resolution as an alternative mechanism to litigation. In the second instance, it allows the parties to give life to the advantages mentioned above by drafting specific clauses providing for same.

Alternative dispute resolution clauses may provide for the specific governing law which applies to disputes arising out a specific contractual relationship. It may also elect a specific alternative dispute resolution forum whose rules will apply to the process and it may, furthermore, elect a venue at which such process will take place.

In saying that however, it is important to note that arbitrators and mediators may be limited in respect of the type of matters they will be able to resolve. Certain disputes may only be decided by a court

of law eg dissolving a marriage, issues surrounding liquidity and status or eviction and it is important to assess the nature of possible disputes when drafting alternative dispute resolution clauses.

Conclusion

Recent events have highlighted the importance of having existing alternative dispute resolution clauses in contracts. Contractual relationships which are not governed by an alternative dispute resolution clauses have proven to be rather difficult to navigate when court forums are backlogged or difficult to access in instances of dispute, as it is usually difficult to agree to new terms were a relationship has become acrimonious.

Contact an attorney at [SchoemanLaw](#) Inc for your all your dispute resolution needs.

