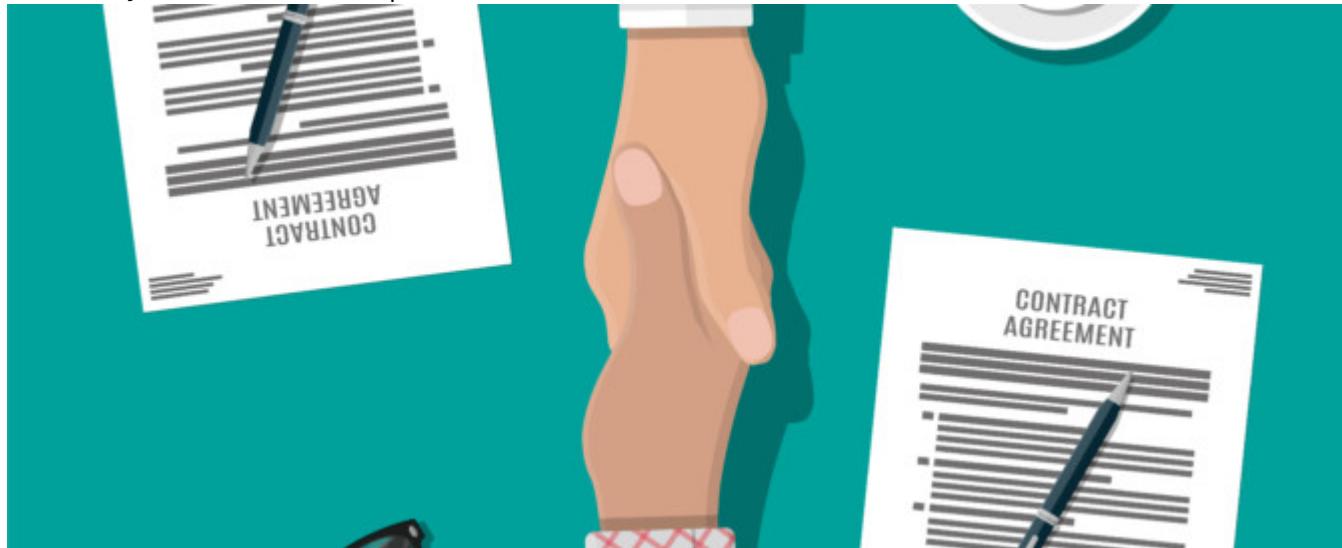


# ADHERENCE TO AN ARBITRATION CLAUSE IN A CONTRACT IS PARAMOUNT

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The law of South Africa affords parties the freedom to enter into a contract and to choose who they wish to enter into a contract with. The general requirements for a legally enforceable contract are consensus, capacity, certain mandatory formalities and legality.

In exercising their freedom of contract, the parties to a contract are permitted to conclude an arbitration agreement or to include an arbitration clause in their contract. An arbitration agreement is a written agreement that provides for the reference of any existing dispute or any future dispute relating to a matter specified in the agreement, to arbitration.

When entering into a contract, the possibility of a dispute arising is unforeseeable. Therefore, it is imperative that the contract provide for the submission of a dispute to arbitration by stipulating that, if a dispute should arise between the parties making a purported contract voidable, that dispute should be submitted to arbitration and not to our courts.

## **Failure to refer a dispute to arbitration prior to instituting legal proceedings**

In the event of a dispute where the aggrieved party institutes litigation proceedings in any court against any other party to the arbitration agreement, without first referring a dispute to arbitration, the other party may at any time after entering into an appearance to defend, but before delivering any pleadings, apply to court for a stay of such proceedings as provided for in section 6 of the Arbitration Act.

## **Fraudulent misrepresentation**

It is crucial for contracting parties to expressly state in a contract that in the event of a dispute regarding the validity of the contract when fraud is alleged, the arbitration will be referred to arbitration rather than to proceed to court. In *Namasthethu Electrical (Pty) Ltd v City of Cape Town*

*and Another*<sup>[1]</sup>, the Supreme Court of Appeal considered whether a dispute resolution clause in a contract that came about as the result of fraud and misrepresentation is regarded as invalid. The court held that fraud invalidates the contract and the arbitration clause.

In *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd*, the court considered the question of fraud in relation to an arbitration clause and reiterated that the fraudulent misrepresentation shall make the contract voidable. In that regard, the court held that the arbitration clause could not survive in the face of allegations of fraud by one party, even though it expressly included the phrase 'any question as to the enforceability of this contract'.

## **Conclusion**

As much as an arbitration clause in a contract is enforceable, the contracting parties must expressly state in a contract, that in the event of a dispute regarding the validity of the contract, when fraud is alleged, the arbitration will be referred to arbitration rather than to proceed to court.

[1] Case number 201/19.