

SHOULD YOU INCLUDE AN ARBITRATION CLAUSE IN YOUR CONTRACTS?

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written by Lucinda Botes | March 19, 2019



"Any dispute arising from or in connection with this Contract shall be finally resolved in accordance with the Rules of the Arbitration Foundation of Southern Africa by an arbitrator appointed by the Foundation."

Many contracts or agreements contain this clause, which makes it necessary for a matter be resolved through arbitration rather than be litigated in a court. Regrettably, these provisions are often included without a second thought as to their practical consequences. In deciding whether to arbitrate there are a few things you should consider.

What is Arbitration?

Arbitration is a form of Alternative Dispute Resolution (“**ADR**”). ADR is a method of settling a dispute outside the courts. The process of resolving a dispute using arbitration is much like a court procedure, where there is a third party that makes a ruling as to the outcome of a matter.

One could pick any third party to be an arbitrator. Such arbitrator would then decide your dispute based on his or her understanding of justice and fairness. However, most contracts provide that disputes are to be arbitrated by specified arbitration associations, such as the Arbitration Foundation of Southern Africa, which has arbitrators readily available and provides for a set of rules that are to be applied by the arbitrators in deciding a case.

Cost of Arbitration

Arbitration can be expensive. If the amount in dispute is small, the cost of arbitration may far exceed the claim. To initiate arbitration, you have to first pay the arbitration association’s fees, which is costly. The fees range from R4,500.00 – R60,000.00 per party depending on the amount which is claimed. On the other hand, litigation can be very expensive in the long run. The parties in a litigation may spend huge sums on attorneys and advocates fees. However, arbitration proceedings are much speedier and steps that are required in litigation might be limited in arbitration proceedings which may limit costs.

Anonymity

The public has no access to your arbitration dispute, whereas in court litigation, it is a matter of public record. Depending on your dispute, this may be an advantage or disadvantage.

Discretion of Arbitrators

An arbitrator has a lot of discretion on how to run the dispute proceedings, what evidence to allow and what precedents to follow. This means that arbitrators tend to let “fairness” and “equity” rule, even if not entirely within the constraints of prior case law. This can make the results unpredictable.

No Appeal

An arbitration award is usually binding and final. This means that the parties may not usually appeal the decision of the arbitrator. In order for a party to appeal, they would have to agree to appeal prior to the hearing of the arbitration and is usually dealt with at the pre-trial conference. Whether this is a good or bad thing depends on which side you are on.

Conclusion

In essence arbitration provides an alternative to the litigation process, but, it is not entirely suitable to all cases. Therefore, exercise caution, and consider all your options when deciding whether to include an arbitration clause or not.

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