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ALTERNATIVE DISPUTE RESOLUTION: NEGOTIATION/MEDIATION/ARBITRATION

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Having regard to the ever-increasing delays in the Court systems, and particularly the High Court, with, after the pleadings and related paperwork have been completed, of five years to obtain a trial date, there have been greater reliance on engaging in various forms of alternative dispute resolution. When concluding a contract, whether of a strictly commercial nature or indeed the more usually encountered agreements such as a lease, sale of property or business agreement, a services agreement and shareholders agreement (the few examples not being exhaustive), it would be prudent to ensure the inclusion of suitable "alternative dispute resolution" provisions.

It would similarly be wise not to accept merely a pre-printed agreement or contract and to assume that the breach clause and possibly alternative dispute resolution provisions are adequate.

Where the agreement provides for payment of money, whether on a monthly basis or by certain dates, the entitled person should nevertheless have the right to enforce his remedies in the event of a breach where the claim will be for a liquidated amount and easily determined.

The alternative dispute resolution provisions may take many forms, and it is important to consider the following, the list again not being exhaustive:

- where will the venue of the arbitration be. This may well depend upon where the contracting parties are located;

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- if the agreement involves a foreign party, it would be necessary to ascertain which particular rules will apply;
- the appointment of the arbitrator – depending on whether the nature of the dispute is financial, legal or may involve another expert discipline – e.g. an engineer or architect;
- a mechanism to determine how the arbitrator will be appointed in the absence of agreement between the disputant parties;
- a pre-arbitration agreement must be entered into with, ordinarily, the arbitrator in attendance in order to determine the format of the arbitration in conformity with the rules which will be applicable, the right of the arbitrator to hear interlocutory matters, the basis of any appeal to an arbitration tribunal, the timelines for the submission of claims, defences, discovery, expert evidence, and the fixing of a date for the hearing.

The benefits of alternative dispute resolution are that the parties and their respective attorneys will effectively control the process, will be able to ensure that the arbitrator is competent and available to hear the matter on the agreed dates for the hearing, and that the dispute should be determined with reasonable expedition (in comparison to High Court proceedings).

It is a reality that the cost of the arbitration would more than likely not be less than High Court proceedings, as the parties would initially be obliged to contribute, in equal shares, to the costs of the Arbitrator, the hire of the venue, the recording and transcription of the record charges, the arbitrator being afforded the right in terms of his award to make an order as to the responsibility for the costs of the arbitration.

It is also convenient in the interests of ensuring that the arbitration is the last resort in terms of an attempt to resolve the dispute, to engage in a two or three step process:

- first, by way of a negotiation between the senior directors or representatives of the disputant parties, without the involvement of attorneys, unless both sides so agree;
- secondly, if the negotiation process is unsuccessful, the dispute would be referred to mediation by a mediator to be similarly mutually agreed, and absent agreement to be appointed by, e.g. the Institute of Directors, or the Secretariate of the particular industry or sector's controlling body;
- if the parties do not subscribe to the mediator's recommendation, the final settlement of the dispute would accordingly be to refer the dispute to arbitration.

The provisions relating to the arbitration take various forms, and it can be made subject to various provisions, e.g. the Arbitration Act 1965, the Arbitration Foundation of Southern Africa (AFSA), and if it is of a commercial nature, its Commercial Rules, the Institute of Directors, and the Institute of Arbitrators.

The arbitrator should also be afforded latitude to relax any of the applicable Rules in order to ensure that the dispute is dealt with and determined expeditiously.

The arbitration provisions would commonly provide that same will survive the termination or cancellation of the relevant agreement, and that the submission to arbitration will not prevent any of the parties seeking any interim or urgent relief from a Court of competent jurisdiction.

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The Legal Practice Council has a roster of attorneys – mainly the more senior attorneys, who have particular specialisation or expertise in a particular area of law, and provided the attorney designated by the Legal Practice Council is acceptable to the disputant parties, the arbitration can often be conducted on a less formal and less expensive basis before an attorney arbitrator.

Depending on the nature of the dispute, the amount involved and the importance of a matter (to the parties), in practice the parties' respective attorneys would endeavour to reach agreement on the appointment of either a retired judge, advocate (whether a senior counsel or another advocate with the necessary experience in the particular field), or an expert in terms of the particular dispute, building or engineering, contract, financial/accounting dispute.

The opening comments are repeated that attorneys should indeed recommend to their client when drawing or reviewing a contract or other legal document, that suitable alternative dispute resolution provisions are inserted and adapted as deemed appropriate.

By Steven Klagsbrun (Director) | Corporate and Commercial Department

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