

Arbitration Clause Survives

Most arbitrations arise from arbitration agreements contained in arbitration clauses that are part of a larger contract whether it be a contract for the supply of goods or services, a partnership agreement, a shareholder agreement or the like.

In modern times it is a generally accepted principle of most legal systems that the arbitration clause stands as a separate agreement. This means that if the larger contract is void for whatever reason, the arbitration clause is unaffected and indeed may be seen as covering the dispute over voidness of the larger contract.

In Scotland this principle is enshrined in section 5 of the 2010 Act. But that's not the case in all countries. In South Africa the issue of severability was considered in *Seabeach Property Investment v. Nunn* [2019] ZAWCHC 9 where the larger contract was one for the sale of heritable (immoveable) property.

FACTS

S sold a large residential property to N. After signing the contract of sale, N discovered that a large rooftop area that she was purchasing was not in the sole ownership of S but was owned in common.

N claimed that she had been induced to sign the sale contract by misrepresentation of S or S' estate agents and that the sale contract was void either from the outset or from her subsequent avoidance of it. S disputed this. There was an arbitration clause in the contract.

S raised court proceedings to have it declared that the dispute must be resolved by arbitration.

N argued that the misrepresentation voided the arbitration clause as well as the sale contract.

The Court found the arbitration clause stated that it covered any dispute in connection with or arising from the formation of the contract and its validity and enforceability. That was sufficient to cover a dispute over voidness through misrepresentation.

Furthermore the clause had a provision that it was severable from the rest of the agreement and should remain in effect despite the invalidity or termination of the agreement.

In these circumstances the court declared that the dispute had to be resolved by arbitration.

DISCUSSION

Survivance of Arbitration Clauses

Given section 5 of the Arbitration (Scotland) Act the outcome in Scotland would have been the same. This reflects the pro-arbitration spirit of the 2010 Act.

Lessons

It is interesting to see arbitration being used in the equivalent of missives. There is of course no reason why arbitration clauses cannot be included in missives. Where the sale is of a high value as here that seems eminently sensible.