

# DISPUTE RESOLUTION ALERT

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### PEREMPTION AND EQUIVOCATION: IS IT OK TO BLOW WITH ONE NOSTRIL AND SUCK WITH THE OTHER?

Peremption (not to be confused with pre-emption) is not a word you hear every day. At common law, the doctrine of peremption states that a party must make up its mind: it cannot equivocate by acquiescing in a judgment and later on deciding to appeal.

### MINIMISING THE POTENTIAL BINDING EFFECT OF EMAIL EXCHANGE IN CONTRACTS

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# PEREMPTION AND EQUIVOCATION: IS IT OK TO BLOW WITH ONE NOSTRIL AND SUCK WITH THE OTHER?

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How does one acquiesce in a judgment? According to case law, it is through unequivocal conduct, after judgment is delivered, inconsistent with an intention to appeal. In *Venmop 275 (Pty) Ltd and Another v Cleverlad Projects (Pty) Ltd and Another* (reportable 2014/14286), Venmop brought an application to set aside the award of an arbitrator. The application was brought outside the six week period prescribed in the Arbitration Act, No 42 of 1965 apparently because Venmop's attorneys, prior to bringing the application but after receipt of the award, sent a letter to Cleverlad Projects offering to discharge the award granted against Venmop in monthly payments, rather than as a lump sum. Venmop then had to make out a case for good cause for an extension of time and to do so it needed to meet two principal requirements: provide a reasonable explanation for the delay in bringing the application and present a bona fide case on the merits with some prospect of success.

The court considered Venmop's explanation for the delay to be weak but said that the thin justification could be excused if Venmop had strong prospects of success. The first hurdle to Venmop's success was whether or not it had perempted its right to set aside the award by making the offer to pay in instalments.

Acting Judge Peter followed a line taken by previous cases and held that an unsuccessful litigant who has acquiesced in a judgment cannot appeal against it. He also held that a court will not undertake an enquiry into the subjective state of mind of the person alleged to have acquiesced in the judgment but will rather consider the objective conduct of that person and the conclusion to be drawn from that conduct.

The judge noted that the doctrine had extended to applications for rescission of default judgment and judicial review, and that the doctrine should also be applicable in the context of an application to set aside an arbitration award.

Turning to the letter written by Venmop's attorneys, the court found that the offer to satisfy the award, albeit on terms more favourable to Venmop, was not something Venmop was compelled to do. Venmop argued that the letter was inadmissible but the court rejected the argument and found that the only reasonable inference to be drawn from sending such a letter was that Venmop had shown an intention to abide by the award, had thus acquiesced in the award and had perempted any right to set the award aside.

# PEREMPTION AND EQUIVOCATION: IS IT OK TO BLOW WITH ONE NOSTRIL AND SUCK WITH THE OTHER?

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*Even where a party's prospects on appeal are otherwise good, an appeal may be refused on the basis of peremption.*



Even where a party's prospects on appeal are otherwise good, an appeal may be refused on the basis of peremption. The court will not come to the aid of a party who initially expresses an intention, even if only by implication, to abide by the original finding of an adjudicator and then suddenly changes its mind. The doctrine may be criticised for its potential to restrict the constitutional right of access to court

but it makes sense that a party must make up its mind whether it is aggrieved by a decision and wants to appeal or whether it wants to pay up albeit in instalments.

*Tim Fletcher and Megan Badenhorst*



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# MINIMISING THE POTENTIAL BINDING EFFECT OF EMAIL EXCHANGE IN CONTRACTS

*A formal requirement for an agreement, such as that the contract be in writing is satisfied if it is in the form of an email.*

*Where the signature of a person to a transaction is required, s13 of ECTA distinguishes between two instances, namely, where a signature is required by operation of law and where the parties to a transaction impose this obligation upon themselves.*



**Negotiating contracts by way of email exchange can create rights and obligations between the parties, which are legally binding and enforceable, unless that eventuality is expressly excluded.**

Section 22(1) of the Electronic Communications and Transactions Act, No 25 of 2002 (ECTA) provides that “[a]n agreement is not without legal force and effect merely because it was concluded partly or in whole by means of data messages”. This provision applies to email correspondence as well as other data generated, sent, received and stored by electronic means. Therefore, a formal requirement for an agreement, such as that the contract be in writing is satisfied if it is in the form of an email.

Parties negotiating agreements might think that until the ink hits the page (literally speaking) they cannot be bound, but we advise such parties to consider the comments below before hitting send.

**Certain contracts cannot be concluded by electronic means.**

Certain agreements including the sale of immovable property, and certain documents such as wills cannot be concluded electronically. However, these exceptions are dwindling due to technology’s prominence in all areas of life and law.

**When an electronic contract is possible what will bind a party?**

Where the signature of a person to a transaction is required, s13 of ECTA distinguishes between two instances,

namely, where a signature is required by operation of law and where the parties to a transaction impose this obligation upon themselves:

- Section 13(1) provides that where a signature is required by law and such law does not specify the type of signature to be used, the requirement in relation to a data message is met only if an ‘advanced electronic signature’ is used, which is defined in the ECTA as “a signature which results from a process accredited by an Accreditation Authority”.
- Where, however, the parties to a transaction formulated electronically require a signature but they themselves have not specified the type of electronic signature to be used, s13(3) provides that the requirement in regard to a data message is met if:
  - a method is used to identify the person and to indicate the person’s approval of the information communicated (s13(3)(a)); and
  - having regard to the circumstances when the method was used, it was appropriately reliable for the purpose for which the information was communicated (s 13(3)(b)).

# MINIMISING THE POTENTIAL BINDING EFFECT OF EMAIL EXCHANGE IN CONTRACTS

CONTINUED

*In the wake of ECTA, standard variation clauses do not offer the protection they once did.*



## **A real-life scenario concerning s13(3) (where the parties themselves required the signature).**

The case of *Spring Forest Trading 599 CC v Wilberry (Pty) Ltd t/a Ecowash & Another 2015 (2) SA 118 (SCA)* dealt with the cancellation of an agreement via email. The Supreme Court of Appeal (SCA) was asked to determine whether or not the names of the parties appearing at the foot of their emails constituted signatures as contemplated in s13(1) and s13(3) of the ECTA. If they did, the non-variation clause in the agreement between the parties would be satisfied and the agreement was validly cancelled. Non-variation clauses are intended to protect the parties from informal changes to the contract that they formally agreed to.

The SCA took a pragmatic approach - the names of parties placed on the foot of each email sent could be regarded as a 'signature' in the context of the nonvariation clause. In the *Spring Forest* case the agreement was validly cancelled because the provisions of s13(3) were met.

The tech-savvy negotiator should therefore be alive to the fact that an email, signed off in a manner that identifies the sender and indicates concordance with its contents, is the legal equivalent of writing a message by hand, signing it and physically giving it to the recipient.

The ECTA and the *Spring Forest* judgment have certainly brought parity between traditional hand-written or computer-generated documents, and perhaps, the most commonly used means of modern communication, email and its digital relatives.

## **What protection is there against the potential binding nature of email correspondence?**

The standard non-variation clause which stipulates that "any variation must be in writing and signed by both parties" can now be met by two seemingly innocuous emails: one requesting the other party to vary the terms of the agreement and another, replying to the first, agreeing to that variation. Thus, in the wake of ECTA, standard variation clauses do not offer the protection they once did.

In order to minimise the risk of informal email correspondence giving rise to a binding agreement, parties should define the terms 'in writing' and 'signed' and specifically exclude electronic forms of acceptance or variation (as defined in ECTA) from those definitions. Such an exclusion will retain the status quo of the pen being mightier than email.

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