

# DISPUTE RESOLUTION ALERT

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### **INTERNATIONAL ARBITRATION: BANKROLLING ARBITRATIONS – SCOPE FOR THIRD PARTY FUNDING IN AFRICAN INTERNATIONAL ARBITRATIONS?**

Third party funding in international arbitration has become a hot topic of late, receiving relatively equal praise and criticism. This type of funding is not a new innovation but it is certainly something African litigants should pay careful attention to.

### **BUSINESS RESCUE, RESTRUCTURING AND INSOLVENCY: RESERVATION OF OWNERSHIP: HOW PROTECTED ARE YOU?**

The introduction of business rescue proceedings by Chapter 6 of the Companies Act, No 71 of 2008 (Act) created uncertainty on various levels, in particular the extent and nature of certain rights previously enjoyed by creditors.

# INTERNATIONAL ARBITRATION: BANKROLLING ARBITRATIONS – SCOPE FOR THIRD PARTY FUNDING IN AFRICAN INTERNATIONAL ARBITRATIONS?

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**Third party funding in international arbitration has become a hot topic of late, receiving relatively equal praise and criticism. This type of funding is not a new innovation but it is certainly something African litigants should pay careful attention to.**

Third party funding exists both in court litigation and in arbitrations. But, due to the rise in popularity of international arbitration of late, most references to third party funding concern international arbitration funding.

Simply put, third party funding is the funding of legal proceedings on behalf of another, often to assist a party who would not ordinarily have been able to fund their own case (or on behalf of a party who chooses to out-source a portion of the risk associated with such proceedings). In return, a funder would often negotiate a higher than normal return, in the event of success. Seems rather simple and at first glance sounds a lot like a contingency fee arrangement. Only, it is not. Contingency fee legislation, in South Africa at least, only restricts legal practitioners and not pure funders of litigation. Third party funding in South Africa is presently not regulated but a relatively long line of civil case law exists which may be instructive in arbitral proceedings.

Recently, both Singapore and Hong Kong have made moves to enact legislation regulating the provision of third party funding in international arbitrations seated

in their respective regions. This move is in line with governmental support for the growth of these countries as preferred seats for such proceedings. Both regions are widely regarded as being at the cutting edge of developments in international arbitration.

So, what is all the fuss about? Well, many argue that further regulation is required. One cannot allow the resolution of disputes to evolve into a form of gambling, especially where the funding party is not on the hook for an adverse award. This leads to the next hot topic: the duty to disclose the existence of any third party funding arrangement.

Can a party request the disclosure of any such funding? Well, yes and no, depending on where the arbitration is seated. More and more jurisdictions around the world are providing mechanisms for the disclosure of not only the fact that the other party is funded, but also the terms of any such funding agreement, such as found in Singapore. Hong Kong seems to be more pro-active by shifting towards the mandatory disclosure of such arrangements.



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# INTERNATIONAL ARBITRATION: BANKROLLING ARBITRATIONS – SCOPE FOR THIRD PARTY FUNDING IN AFRICAN INTERNATIONAL ARBITRATIONS?

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*Third party funding is particularly important for disputes on the African continent where many parties simply cannot afford the disproportional cost of access to justice.*



The biggest risk to a funder is losing the case. It is therefore not unusual to see funders playing an active role in the proceedings. This then enters into the public policy domain. From a South African perspective, a court is likely to look into the actual nature of the funding. Insofar as the funder is an arms-length funder, without overly involving itself in the litigation, then the court will most likely permit it. If however, the funder is actively involved in the proceedings, such funding may be regarded as contradicting local public policy. Each region approaches this question in a different way and public policy on the continent is a constantly moving target.

Further difficulties arise regarding the issue of legal privilege. Such protections do not normally extend to disclosures made to a funder. Problematically, such a funder may find themselves subpoenaed to testify at subsequent proceedings. A funder may also be required to put up security to cover the legal costs of an opposing party.

Notwithstanding some of the difficulties highlighted above, one cannot overlook one of the prime objectives of third party funding: to enable a party who may not be able to afford realistic access justice, to do just that. For this reason, third party funding is particularly important for disputes on the African continent where many parties simply cannot afford the disproportional cost of access to justice. This coupled with the recent upsurge and interest in international arbitration in Africa, means that this form of investment is becoming increasingly attractive.


Astute investors know not to overlook Africa's potential. Similarly, African parties should not overlook this opportunity to achieve access to justice. A win-win, some might say. The others, well... they are less optimistic.

*Jonathan Ripley-Evans*



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# BUSINESS RESCUE, RESTRUCTURING AND INSOLVENCY

## RESERVATION OF OWNERSHIP: HOW PROTECTED ARE YOU?

*The Applicant brought an application, in the form of a rei vindicatio, and claimed from the First Respondent return of possession of the Equipment on the basis that the Applicant, pursuant to the reservation of ownership clause, remained the owner of the Equipment.*

*The court confirmed that the common law does not allow the Second Respondent to transfer ownership of the property of another (the Applicant's) because a transferor of rights cannot transfer more rights than it has.*



**The introduction of business rescue proceedings by Chapter 6 of the Companies Act, No 71 of 2008 (Act) created uncertainty on various levels, in particular the extent and nature of certain rights previously enjoyed by creditors.**

Our courts are making progress in finding a path through the muddy waters in this regard and every day a judgment is delivered that sheds some light on previous uncertain propositions.

Creditors often reserve ownership in movable goods when entering into certain transactions for comfort that should the other party become financially distressed or be wound up, some form of security in respect of such movable property will be retained, if not pure ownership.

Business rescue practitioners often dispute such rights of creditors and attempt to dispose of movable assets subject to reservation of ownership.

In *Energydrive Systems (Pty) Ltd v Tin Can Man (Pty) Ltd and Others* 2017 (3) SA 539 (GJ) the court was called upon to determine the meaning and effect of a reservation of ownership clause in the context of a business rescue.

Energydrive Systems (Pty) Limited (Applicant) leased a power-saving variable-speed drive system (Equipment) to Winplaas (Pty) Limited (Second Respondent) by way of a written lease. The lease contained a reservation of ownership clause in favour of the Applicant. The value of the Equipment was approximately R800 000. The Equipment was installed in the plant of the Second Respondent on the latter's premises. The Second Respondent

went into business rescue. The fourth respondent was the business rescue practitioner of the Second Respondent. In that capacity, the fourth respondent concluded a sale agreement with Tin Can Man (Pty) Limited (First Respondent). The sale agreement described the goods sold to include the "movable items situated in the premises", which in turn included the Equipment.

The Applicant brought an application, in the form of a rei vindicatio, and claimed from the First Respondent return of possession of the Equipment on the basis that the Applicant, pursuant to the reservation of ownership clause, remained the owner of the Equipment.

Pursuant to the sale, the First Respondent took possession of all the movable goods on the said premises, including the Equipment, and the First Respondent claimed that it became owner of the goods on the premises in terms of the sale agreement and delivery when it took possession.

The court confirmed that the First Respondent could not raise the defence that the Applicant did not retain ownership of the goods as such a defence would not have been available to the Second Respondent because of the reservation of ownership clause, and the Second Respondent could not transfer more rights than it had. The court confirmed that the common law does not allow the Second Respondent to transfer

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*The court concluded that, in general terms, the phrase “property over which another person has any security” in s134(3) of the Act refers to property of the company under business rescue which secures an indebtedness of the company.*

ownership of the property of another (the Applicant's) because a transferor of rights cannot transfer more rights than it has.

The First Respondent in its defence, however, also relied on a statutory right in terms of s 134(3) of the Act, which provides that:

- (3) If, during a company's business rescue proceedings, the company wishes to dispose of any property over which another person has any security or title interest, the company must:
- (a) obtain the prior consent of that other person, unless the proceeds of the disposal would be sufficient to fully discharge the indebtedness protected by that person's security or title interest; and
  - (b) promptly:
    - (i) pay to that other person the sale proceeds attributable to that property up to the amount of the company's indebtedness to that other person; or
    - (ii) provide security for the amount of those proceeds, to the reasonable satisfaction of that other person.

The argument advanced on behalf of the First Respondent was that the fourth respondent had the right to sell the Equipment without the consent of the Applicant because the proceeds of the disposal were sufficient to fully discharge the indebtedness of the Second Respondent to the Applicant.

The court, in determining whether the Equipment constituted “security or title interest” in terms of s134(3), considered recent cases which dealt with the correct approach to interpretation of legislation. In essence the courts now approach interpretation of, among other things, legislation by attributing meaning to the words used in a document and by having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence.

The Act does not define the word “security” as used in s134. After seeking guidance from definitions in other statutes, the court concluded that, in general terms, the phrase “property over which another person has any security” in s134(3) of the Act refers to property of the company under business rescue which secures an indebtedness of the company, for example property subject to a notarial bond.

Tim Fletcher was named the exclusive South African winner of the **ILO Client Choice Awards 2017** in the litigation category.



# BUSINESS RESCUE, RESTRUCTURING AND INSOLVENCY

## RESERVATION OF OWNERSHIP: HOW PROTECTED ARE YOU?

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*The obligation to promptly pay or secure the debt and the consideration is a requirement for the valid transfer of ownership by the practitioner by way of a sale and delivery in terms of s134 without consent of the creditor.*



The Applicant's case was not that the Equipment was the property of the Second Respondent over which the Applicant held "security" and the court held that the reference to "security" in s134(3) did not assist the Applicant.

The court conceded that reference to "title interest" in s134(3) is more difficult to deal with and noted that the meaning of the combination of these two words, "title interest" is novel in South African law. The court found that the legislature chose to refer to "title interest" as an alternative to security and that it must have been intended to mean something other than "security". The last portion of ss(a) indicates that, like "security", "title interest" is something which safeguards the payment of the indebtedness due to the creditor of the company under business rescue.

Considering that it is not unusual for the word "title" to be used as a synonym or alternative for ownership, the court held that the term "title interest" would include a reservation of ownership clause such as the one in the lease between the Applicant and the Second Respondent.

The court concluded, after finding that the purpose and context of business rescue are not aimed at the destruction of the rights of a secured creditor, that s134(3) of the Act allows a company under business rescue to dispose of property which is subject to "security" or a reservation of ownership clause without the consent of the creditor concerned only if the proceeds of the disposal would be sufficient to fully discharge the indebtedness protected by the security. Section 134(3)(a) authorises a business rescue practitioner to dispose of the property of the company under business rescue by selling and delivering such property. In such event s134(3)(b) requires the practitioner to promptly pay the debt due to the secured creditor or owner, or provide security therefore to the reasonable satisfaction of the Applicant.

Of importance for creditors in this position is the finding by the court that such obligation to pay or secure the debt is not a mere personal right against the practitioner but that the obligation to promptly pay or secure the debt and the consideration is a requirement for

CHAMBERS GLOBAL 2017 ranked us in Band 1 for dispute resolution.

Tim Fletcher ranked by CHAMBERS GLOBAL 2015–2017 in Band 4 for dispute resolution.

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## RESERVATION OF OWNERSHIP: HOW PROTECTED ARE YOU?

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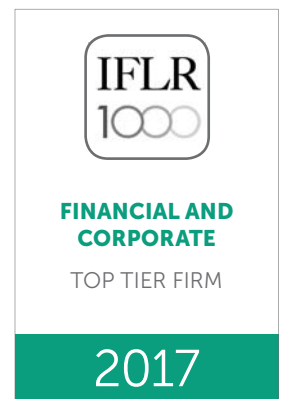
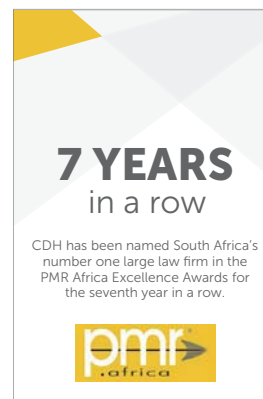
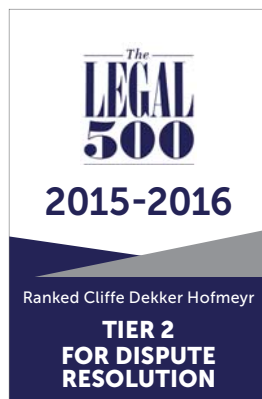
*The Energydrive judgment provides some comfort to creditors who reserve their rights of ownership.*

the valid transfer of ownership by the practitioner by way of a sale and delivery in terms of s134 without consent of the creditor. The rights of the creditor will only be terminated on payment or the provision of other security.

The *Energydrive* judgment provides some comfort to creditors who reserve their rights of ownership. It also emphasises the importance of seeking proper legal advice when entering into commercial agreements to ensure that all your rights are properly protected in the event of further financial distress of your co-contracting party.

On the facts the court held that the fourth respondent did not pay or secure the debt due to the Applicant and as such the practitioner did not validly destroy the right of ownership of the Applicant and found the Applicant is still to be the owner of the Equipment.

*Lucinde Rhoodie*



**CLICK HERE** to find out more about our Business Rescue, Restructuring and Insolvency team.

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