

# DISPUTE RESOLUTION ALERT

## IN THIS ISSUE

### **ARBITRATION: HOWZAT UMPIRE?! OR IS IT ARBITRATOR?**

"We cannot afford to arbitrate before three arbitrators! The amount in dispute doesn't justify such costs." Words uttered all too often in the modern era of dispute resolution.

### **CORPORATE INVESTIGATIONS: IT'S ALWAYS THE ONES YOU KNOW: THE KEY TO UNDERSTANDING AND MITIGATING PROCUREMENT FRAUD RISKS**

The scourge of fraud and corruption is rife. Over the last few years, the media has consistently reported on matters involving tender fraud and corruption, often involving hundreds of millions of rands. The reality is that no organisation is immune to fraud and corruption. The reputation and financial consequences for organisations affected by these crimes can be disastrous.

# ARBITRATION: HOWZAT UMPIRE?! OR IS IT ARBITRATOR?

*The current Arbitration Act, a legislative relic of the sixties, governs all arbitrations in South Africa.*

*The third arbitrator appointed in this manner is in fact not an arbitrator at all ... such an "arbitrator" is in fact an umpire.*

**"We cannot afford to arbitrate before three arbitrators! The amount in dispute doesn't justify such costs." Words uttered all too often in the modern era of dispute resolution.**

The reality is that having three arbitrators preside over a dispute is at least three times as expensive. But, is there nothing that can be done to reduce the costs of a three-person tribunal? Of course there is. As a start, one can start applying the Arbitration Act properly.

The current Arbitration Act, a legislative relic of the sixties, governs all arbitrations in South Africa. Once the highly anticipated International Arbitration Act comes into force, the old act will only govern domestic arbitrations. But in South Africa at least, the number of domestic arbitrations far exceeds international arbitrations and this is unlikely to change anytime soon. A proper understanding of the Act is therefore not only useful, but essential.

Cue s11 of the Act, which provides for the appointment of the enigmatic umpire. An umpire, in this context, is not a person sporting a wide-brim hat and sunscreen. She is also not an arbitrator. Her role is not to preside over arbitral proceedings but, essentially, to resolve a deadlock.

Section 11(a) provides for the appointment of an umpire where the parties have elected an even number of arbitrators. The umpire will then have the final say in the event of a split decision. A very practical provision indeed - yet hardly ever used.

Section 11(b) is where the umpire is (or at least should be) given her moment to shine. Often parties agree to submit their dispute to a panel of three arbitrators, each party appointing one arbitrator with the appointees then appointing a third arbitrator. Nothing unusual about such a mechanism. But here's the kicker: the third arbitrator appointed in this manner is in fact not an arbitrator at all. In accordance with the Act, such an "arbitrator" is in fact an umpire (unless the agreement specifically states otherwise).

So what, one may ask? Well, an umpire occupies a distinct role to that of an arbitrator. She acts as the deadlock breaker when two arbitrators cannot agree on something. If the two arbitrators are in agreement then there is no role for the third umpire to play.

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.

Pieter Conradie ranked by CHAMBERS GLOBAL 2012–2017 in Band 1 for dispute resolution.

Jonathan Witts-Hewinson ranked by CHAMBERS GLOBAL 2017 in Band 2 for dispute resolution.

Joe Whittle ranked by CHAMBERS GLOBAL 2016–2017 in Band 4 for construction.



# ARBITRATION: HOWZAT UMPIRE?! OR IS IT ARBITRATOR?

CONTINUED

*Lightbulb moment: A proper understanding of the Act may immediately result in a 33% saving in tribunal fees!*



Accordingly, s19(b) of the Act, curtails the fees payable to any such third umpire. She is only entitled to charge for her time, attending hearings or contributing to the decision-making process, if specifically instructed to do so by the parties or where the arbitrators cannot agree on a point and expressly refer the question to the umpire for determination. In all other instances, the umpire is not entitled to charge fees.

Lightbulb moment: A proper understanding of the Act may immediately result in a 33% saving in tribunal fees!

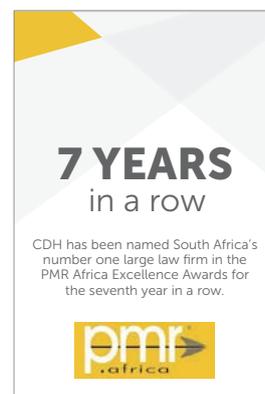
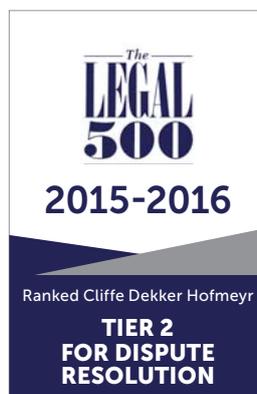
Section 11(c) provides one further golden nugget. Insofar as the arbitrators (the two appointed by the parties) fail to

render their award within the allocated time (and the parties do not advise the third umpire of any extension granted), the third umpire shall forthwith enter the fray, replacing the two arbitrators, acting as a sole arbitrator.

Drastic, yes. Effective? Absolutely.

Before you balk at the idea of the three-member arbitral tribunal, check that you have been advised properly. A three-member panel may be more appropriate than you think...

*Jonathan Ripley-Evans*



[CLICK HERE](#) to find out more about our International Arbitration team.

# CORPORATE INVESTIGATIONS: IT'S ALWAYS THE ONES YOU KNOW: THE KEY TO UNDERSTANDING AND MITIGATING PROCUREMENT FRAUD RISKS

*It is critical that organisations fully understand the risks they face in order to mitigate them and implement measures to detect procurement fraud.*

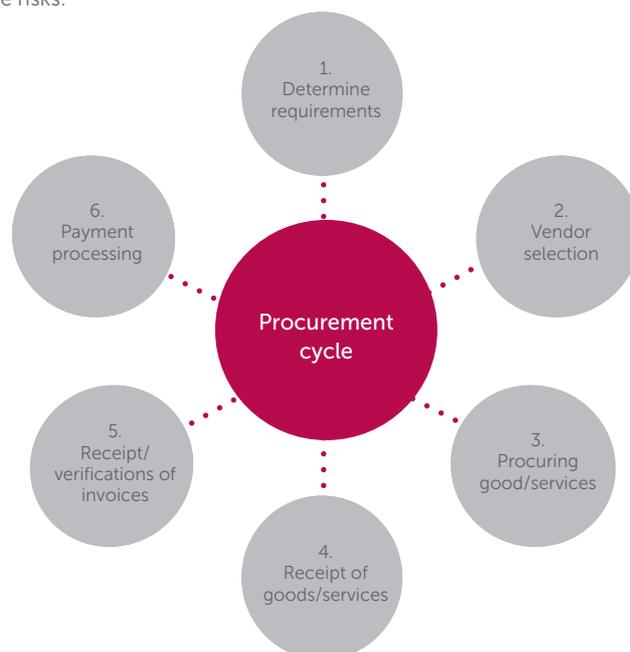
*All of the processes and procedures involved in procuring goods or services for the relevant organisation should be considered.*

The scourge of fraud and corruption is rife. Over the last few years, the media has consistently reported on matters involving tender fraud and corruption, often involving hundreds of millions of rands. The reality is that no organisation is immune to fraud and corruption. The reputation and financial consequences for organisations affected by these crimes can be disastrous.

Procurement fraud affects organisations across a broad range of industries in both the public and private sector. It is critical that organisations fully understand the risks they face in order to mitigate them and implement measures to detect procurement fraud.

The key to understanding these risks is, firstly, to understand the organisation's procurement cycle in order to identify the various risk areas. Secondly, it is important to understand the various types of procurement fraud and the methods used by fraudsters. This will place an organisation in a better position to implement appropriate measures to mitigate these risks.

When assessing an organisation's procurement cycle, all of the processes and procedures involved in procuring goods/services for the relevant organisation should be considered. These processes will start right from the identification of the organisation's need for goods/services all the way to the processing of payments to the relevant vendors. When performing this assessment, all control weaknesses should be identified so that these can be strengthened. Simplistically, an organisation's procurement cycle typically involves the following stages:



# CORPORATE INVESTIGATIONS: IT'S ALWAYS THE ONES YOU KNOW: THE KEY TO UNDERSTANDING AND MITIGATING PROCUREMENT FRAUD RISKS

CONTINUED

*In the war against fraud and corruption, it is better to stand prepared than get caught off-guard.*



Each of the role players involved in the procurement cycle should also be identified. An organisation is usually at risk of falling victim to procurement fraud by one or more of the following role players:

- suppliers/service providers
- procurement employees
- tender committee members
- finance personnel
- quality/product assurance representatives

Red flags to look out for in the procurement cycle include the lack of segregation of duties in procurement and payment processes, employees living beyond their means, lack of supporting documentation accompanying vendor payments, payment of round amounts, invoices with brief descriptions of goods/services rendered, price changes after a tender has been awarded, unjustifiable sole-source contracting as well as excessive entertainment of employees by vendors.

Once all of the risks have been identified, adequate controls should be implemented in order to mitigate these risks. These controls should be designed to effectively detect and prevent an incident of fraud occurring. While one can never completely eradicate the risk of a fraud occurring, having proper, well-thought out controls will go a long way in substantially mitigating procurement fraud risks.

Preventative measures that can be implemented include having appropriate checks and balances throughout the procurement cycle, ensuring supporting documents are attached to all payment packs, detailed vendor vetting, regular monitoring of vendor behaviour, having a centralised vendor database as well as regularly reviewing and cleaning up of the vendor database to ensure that there are no dormant vendors on the database. It is also important to ensure that all processes and procedures are documented in detailed policies. Employees should be trained on these policies regularly. The tone at the top is also critical and senior management should ensure that the message throughout the organisation is clear: zero tolerance to any irregular or fraudulent conduct.

Taking the time to review an organisation's procurement cycle to identify all risks and then implementing appropriate measures to mitigate those risks will go a long way in protecting an organisation from the devastating consequences the organisation could endure if it fell victim to fraudulent or corrupt conduct. In the war against fraud and corruption, it is better to stand prepared than get caught off-guard.

*Zaakir Mohamed*



**CLICK HERE** to find out more about our Corporate Investigations team.

## OUR TEAM

For more information about our Dispute Resolution practice and services, please contact:



**Tim Fletcher**  
National Practice Head  
Director  
T +27 (0)11 562 1061  
E tim.fletcher@cdhlegal.com



**Grant Ford**  
Regional Practice Head  
Director  
T +27 (0)21 405 6111  
E grant.ford@cdhlegal.com

**Timothy Baker**  
Director  
T +27 (0)21 481 6308  
E timothy.baker@cdhlegal.com

**Roy Barendse**  
Director  
T +27 (0)21 405 6177  
E roy.barendse@cdhlegal.com

**Eugene Bester**  
Director  
T +27 (0)11 562 1173  
E eugene.bester@cdhlegal.com

**Tracy Cohen**  
Director  
T +27 (0)11 562 1617  
E tracy.cohen@cdhlegal.com

**Lionel Egypt**  
Director  
T +27 (0)21 481 6400  
E lionel.egypt@cdhlegal.com

**Jackwell Feris**  
Director  
T +27 (0)11 562 1825  
E jackwell.feris@cdhlegal.com

**Thabile Fuhrmann**  
Director  
T +27 (0)11 562 1331  
E thabile.fuhrmann@cdhlegal.com

**Anja Hofmeyr**  
Director  
T +27 (0)11 562 1129  
E anja.hofmeyr@cdhlegal.com

**Willem Janse van Rensburg**  
Director  
T +27 (0)11 562 1110  
E willem.jansevanrensburg@cdhlegal.com

**Julian Jones**  
Director  
T +27 (0)11 562 1189  
E julian.jones@cdhlegal.com

**Tobie Jordaan**  
Director  
T +27 (0)11 562 1356  
E tobie.jordaan@cdhlegal.com

**Corné Lewis**  
Director  
T +27 (0)11 562 1042  
E corne.lewis@cdhlegal.com

**Janet MacKenzie**  
Director  
T +27 (0)11 562 1614  
E janet.mackenzie@cdhlegal.com

**Richard Marcus**  
Director  
T +27 (0)21 481 6396  
E richard.marcus@cdhlegal.com

**Burton Meyer**  
Director  
T +27 (0)11 562 1056  
E burton.meyer@cdhlegal.com

**Rishaban Moodley**  
Director  
T +27 (0)11 562 1666  
E rishaban.moodley@cdhlegal.com

**Byron O'Connor**  
Director  
T +27 (0)21 562 1140  
E byron.oconnor@cdhlegal.com

**Lucinde Rhoodie**  
Director  
T +27 (0)21 405 6080  
E lucinde.rhodie@cdhlegal.com

**Jonathan Ripley-Evans**  
Director  
T +27 (0)11 562 1051  
E jonathan.ripleyevans@cdhlegal.com

**Willie van Wyk**  
Director  
T +27 (0)11 562 1057  
E willie.vanwyk@cdhlegal.com

**Joe Whittle**  
Director  
T +27 (0)11 562 1138  
E joe.whittle@cdhlegal.com

**Jonathan Witts-Hewinson**  
Director  
T +27 (0)11 562 1146  
E witts@cdhlegal.com

**Pieter Conradie**  
Executive Consultant  
T +27 (0)11 562 1071  
E pieter.conradie@cdhlegal.com

**Nick Muller**  
Executive Consultant  
T +27 (0)21 481 6385  
E nick.muller@cdhlegal.com

**Marius Potgieter**  
Executive Consultant  
T +27 (0)11 562 1142  
E marius.potgieter@cdhlegal.com

**Nicole Amoretti**  
Professional Support Lawyer  
T +27 (0)11 562 1420  
E nicole.amoretti@cdhlegal.com

### BBBEE STATUS: LEVEL THREE CONTRIBUTOR

Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 3 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

### JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.  
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

### CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.  
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

©2017 1900/SEPT

