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# DISPUTE RESOLUTION ALERT

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## Corporate Investigations: Gearing up for International Fraud Awareness Week

According to the ACFE Report, South African businesses lose an estimated 5% of their revenue annually due to fraud.

**International Fraud Awareness Week (Fraud Week) kicks off on 17 November and ends on 23 November 2019. This is an opportune time for every organisation in the country to consider the importance of raising fraud awareness among their employees.**

Fraud Week was established by the Association of Certified Fraud Examiners (ACFE) in 2000 as a dedicated time to raise awareness about fraud. This week-long campaign is part of a global effort to minimise the impact of fraud and white-collar crime around the world.

Occupational fraud has been identified by the 2018 ACFE Report to the Nations (ACFE report) as the most prevalent threat to organisations. According to the ACFE Report, South African businesses lose an estimated 5% of their revenue annually due to fraud. Furthermore, the 2018 Global Economic Crime and Fraud Survey that was conducted by PWC South Africa revealed that 77% of South African organisations have experienced economic crime over the last two years. This figure is higher than the global average of 49%. Fundamentally, the significance of Fraud Week is to highlight the scourge of fraud in organisations and to discuss ways in which organisations can take proactive steps to mitigate the risk and effect of fraud.

The ACFE report defines occupational fraud as fraud that is committed against the organisation by its own officers, directors or employees which constitutes an attack against the organisation from within. Fraud can have drastic financial consequences as it is perpetrated by the very people who are entrusted to protect

an organisation's assets and resources. Fraud can also cause insurmountable damage to an organisation's reputation. Fraud Week is a great opportunity for an organisation to assess or reassess the measures it has in place to prevent, detect and effectively combat fraud.

Mitigating the risk of fraud does not necessarily involve implementing complex processes and procedures. There are numerous practical measures that an organisation can take in order to protect itself from fraud. The following ACFE checklist can be used by an organisation to assess the effectiveness of its fraud prevention measures:

- Is there ongoing anti-fraud training provided to all employees in the organisation?
- Is there an effective fraud reporting mechanism in place?
- Is possible fraudulent conduct aggressively sought out and investigated?
- Is the tone at the top one of honesty and integrity?
- Are there fraud risk assessments performed regularly to proactively identify the organisation's vulnerabilities to fraud?
- Are there strong anti-fraud controls in place that operate effectively?

The above list of questions is by no means exhaustive. Each organisation will be guided by various factors such as the size of the organisation, the nature of the business conducted by the organisation and the risk that the organisation faces.

## Corporate Investigations: Gearing up for International Fraud Awareness Week...continued

Establishing a mechanism for whistle-blowers to report any irregular behaviour is an important step to take in order to weed out fraud.

The ACFE Report has, however, shown that whistle-blower tips are the most common method of detecting fraud. Establishing a mechanism for whistle-blowers to report any irregular behaviour is an important step to take in order to weed out fraud.

There are also various initiatives which organisations can take part in during Fraud Week. The ACFE advises organisations to seek advice on the measures to implement to protect businesses. Business leaders are encouraged to raise awareness about the impact and effect that fraud has on businesses. Organisations can host training opportunities, distribute anti-fraud information or promote anti-fraud activities during Fraud Week.

The commitment to preventing fraud should not stop when Fraud Week ends. Organisations need to remain vigilant at all times and provide regularly scheduled anti-fraud awareness training to employees, evaluate fraud policies and communicate the policies to employees on a regular basis. Successfully combating fraud begins with being sufficiently prepared to prevent and to detect fraud before it is too late.

For more information about Fraud week, visit <https://www.fraudweek.com/>.

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## Invoking hardship in difficult economic times to renegotiate commercial obligations

By incorporating a hardship clause in their final agreement, parties essentially create a contractual regime to regulate unforeseen circumstances to deal with any severe financial impact on the long-term sustainability of the relationship.

With suppressed economic activity in South Africa, suppliers, distributors and service providers are all feeling the economic pinch and seeking various means to obtain some financial reprieve to remain sustainable for the next economic upswing. While the obvious option may be business rescue proceedings, such a solution comes with its own pitfalls. Parties in long-term commercial relationships often look to rather explore options to re-negotiate the commercial terms that underpin their relationship.

### Hardship clauses

Long-term agreements in the mining, energy and natural resources sectors ordinarily contain a hardship provision which allows, under certain well-defined circumstances, one of the contracting parties to submit a request to the other contracting party for the re-negotiation of particular commercial terms causing economic hardship. A hardship dispute may arise, for example, if the production cost for goods, say mined ore, becomes unsustainable for the miner/supplier relative to the purchase price for such product. Since the outcome usually introduces a material change in the commercial terms that underpin the relationship, parties often get locked into protracted negotiations and sometimes arbitration to achieve a fair landing on the new commercial terms.

By incorporating a hardship clause in their final agreement, parties essentially create a contractual regime to regulate unforeseen circumstances to deal with any severe financial impact on the long-term sustainability of the relationship. The purpose behind any hardship clause is thus to ensure the commercial relationship operates on the basis of commercial fairness.

A hardship provision typically triggers when a new situation or circumstance arises that:

- is outside the control of the affected party;
- could not reasonably have been anticipated by the affected party at the time of the conclusion of the agreement; and
- results in:
  - a *major material* disadvantage to affected party and a corresponding major material advantage to the other party; or
  - *severe hardship* to the affected party without any advantage to the other party.

If these criteria are met, the affected party may then serve a notice on the other party setting out the relevant circumstances with such expert evidence to support the hardship being experienced.

## Invoking hardship in difficult economic times to renegotiate commercial obligations...*continued*

A party invoking a hardship negotiation with arrogance risks the counterparty pulling-up its arms to dispute the hardship – dragging the hardship process out for an undefined period of time, costing money and potentially jeopardising the long-term relationship.

### Renegotiating commercial terms

With complex long-term supply arrangements in which both parties to the commercial relationship are interdependent on each other (for example, a dedicated coal mine for a particular power station), it is normally easier to renegotiate commercial terms (such as price, quantity and qualities). However, due to the potential financial impact re-negotiation may have on a counterparty's commercial terms (such as a higher price for product), the counterparty will probably push back. Thus, before invoking any hardship provision under an agreement it is important to strategize on the end-goal and understand all the commercial pushbacks of the counterparty. The major problem with hardship provisions is that the process can take a significant time to conclude and during that period the hardship experienced by the affected party usually persists. If the counterparty is a state-owned entity or government, it adds an additional layer of complexity. In addition to the commercial considerations during the negotiation to deal with the hardship event, public entities or governments may have certain prescribed legislative requirements to meet before being able to agree to any amendments to existing commercial arrangements.

Before any negotiations under a hardship notice can commence, there is a process in place for the counterparty to react to the validity of the affected party's hardship notice and/or the commencement date of the alleged hardship. If the counterparty disputes the validity of the hardship and/or the commencement date of the alleged hardship, the matter is referred to arbitration for an arbitrator to settle the issue. Once resolved, the parties may commence with negotiations to deal with the so-called relevant circumstances causing the hardship as set out in the hardship notice. Should the parties fail to agree on an appropriate amendment to the agreement to deal with the hardship, the particular issues which inhibit the conclusion of amendments to the agreement will go to an arbitrator for final resolution.

Any party to an agreement that contains a hardship provision must ensure a strategy is developed that deals with all possible eventualities, especially how to avoid being dragged into disputes with the counterparty as opposed to quickly resolving real issues that affect the long-term sustainability of the relationship. A party invoking a hardship negotiation with arrogance risks the counterparty pulling-up its arms to dispute the hardship – dragging the hardship process out for an undefined period of time, costing money and potentially jeopardising the long-term relationship.

## Invoking hardship in difficult economic times to renegotiate commercial obligations ...continued

If a long-term agreement does not provide for the re-negotiation through a hardship clause, it may be possible to consider whether a case can be made out for impossibility of performance.

### What if there is no hardship clause?

If a long-term agreement does not provide for re-negotiation through a hardship clause, it may be possible to consider whether a case can be made out for impossibility of performance. Under South African law a party may avoid obligations under a valid agreement under the doctrine of supervening impossibility. A supervening impossibility arises if, pursuant to a valid agreement having come into existence, performance of an obligation arising from it becomes objectively and permanently impossible through no fault of either of the parties. The typical examples of such impossibility are irresistible force (*vis maior*) or unforeseeable accident (*casus fortuitus*). Most commercial agreements contain a *vis maior/force majeure* and/or *casus fortuitus* clause – clauses that are usually distinguishable from hardship provisions.

### Conclusion

In tough economic times, tough decisions must be made by businesses to ensure sustainability in the long run. When re-negotiating pertinent commercial terms, it is important to have a well-defined strategy that deals with all the pertinent matters to entice the counterparty to negotiate in good faith in the shortest possible time to achieve a long-term commercial benefit for both parties. Failure to do so may result in unnecessary arbitrations and negotiations that outlast the actual period of economic hardship.

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*Jackwell Feris*

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## When does freedom of expression go one step too far?

The practical effect of this judgment is that it highlighted that hate speech is not limited to oral statements.

Freedom of expression and hate speech must be considered against the background and the diversity of the population of a specific country, culture, historical background and history in general. The test of whether hate speech constitutes freedom of expression will therefore differ from country to country. Although an offensive or controversial view does not necessarily constitute hate speech, in our rainbow nation, South Africans must be cautious not to step over the line and the only way to do this is to be aware of the cultural difference in the country and show respect to fellow South Africans.

In the recent matter of *Nelson Mandela Foundation Trust and Another v Afriforum NPC and Others* [2019] 4 All SA 237 (EqC), the court found that hate speech is not limited to verbal expressions of disparaging content but encompasses other types of expressions. In this matter, the court had to consider whether the display of the old South Africa flag constituted hate speech and ultimately found that it did. The court's rationale in this regard is that the flag objectively demonstrates a "hurtful, harmful and hateful meaning" which is associated with the apartheid era, and as such, the gratuitous display of the flag is not to be permissible.

The practical effect of this judgment is that it highlighted that hate speech is not limited to oral statements. Images, symbols and other expressions can constitute hate speech because persons cannot be forced to endure injury to their dignity purely on the basis that hatred was communicated in a non-verbal manner. Imagine the hurt and revolt that would be caused if the Nazi flag was waived in Israel.

This symbol has at its core an extremely injurious meaning as it symbolises systematic hatred and abuse against a group of people.

This judgment has important ramifications - people need to consider the context, sensitivities and history of an expression and be mindful of not only what they say, but also be aware of images and symbols that they associate themselves with which may be offensive in nature, because all forms of expressions, when considered in context, have the capacity to injure.

The misconception of freedom of expression as an absolute right causes problems. People may falsely believe that they may speak their minds and display their controversial views through symbolism or conduct in a limitless manner - but this is not the case.

The right to freedom of expression is a right enshrined in section 16 of the Constitution of South Africa and does not extend to propaganda for war, incitement of imminent violence or advocacy of hatred that is based on race, ethnicity, gender or religion and constitutes incitement to cause harm. In the matter of *Islamic Unity Convention v Independent Broadcasting Authority 2002* (4) SA 294, which arose from the terrible allegation made on radio that, *inter alia*, Jewish people were not gassed in concentration camps during the Second World War but died of infectious diseases, the court held that "implicit in its provisions is an acknowledgment that certain expression does not deserve constitutional protection because, among other things, it has the potential to impinge adversely on the dignity of others and cause harm". Therefore, a step too far does not deserve constitutional protection.



## When does freedom of expression go one step too far?...continued

Section 36 of the Constitution makes provision for the limitation of the right to freedom of expression to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

Furthermore, section 36 of the Constitution makes provision for the limitation of the right to freedom of expression to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

The relationship between freedom of expression and the right to dignity is a delicate yet fundamental one. Given the symbiotic nature of these rights, it is crucial that as a society, we understand the practical extent to which these rights can be exercised and the importance of protecting, nurturing and upholding each.

Hate speech is the expression of hatred and intolerance on one or other of the listed grounds such as on the basis of race, gender and religion. Due to the harmful nature of hate speech it constitutes an unjustifiable affront to dignity and is therefore prohibited by section 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. Conclusively, South Africans must be alive to the harm that may be caused by hateful expressions and must also be aware that one can, in certain circumstances, face criminal sanctions for such expressions.

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## “Impossibility” is no excuse! High Court enforces compliance with adjudicator’s decision

Alstom, in its answering affidavit, contended that the Adjudicator’s decision could not be enforced as the Adjudicator’s remedy was impossible to perform.

**On 2 September 2019, the Johannesburg High Court handed down a judgment (Case Number 2104/18) in which it had to determine whether to enforce a decision of an adjudicator in circumstances where performance of the remedy prescribed in the decision was allegedly impossible.**

Alstom S&E Africa (Pty) Ltd (Alstom) entered into a subcontract with Murray and Roberts Limited (M&R) for certain works to be done at the Kusile power station. These works included the erection of large vessels on site, referred to as absorbers. Alstom undertook to supply the steel plates to be used by M&R in the construction of the absorbers. Each steel plate supplied by Alstom was to have a marking on its surface which corresponded to a material certificate which, amongst other things, indicated the composition of the steel. The composition of the steel plates indicated the steel plates’ characteristics and whether the plates complied with the required specifications.

M&R refused to proceed with the erection of the absorbers due to certain steel plates lacking surface markings which meant that the plates could not be traced to the material certificates or were not accompanied by material certificates at all. Alstom objected to M&R’s contention and accordingly referred a dispute to a Dispute Adjudication Board (Adjudicator) for adjudication.

On 1 September 2017, the Adjudicator published his decision and decided that Alstom was obliged to provide M&R with traceability and material certificates (with

authentic test records) in compliance with the EN10204 type 3.1 certification (EN Standard). Should any of the steel plates not have a material certificate or should there be no legible markings on the steel plates, Alstom would be obliged to have the materials subjected to appropriate testing to positively identify the steel plates and provide M&R with the testing records in compliance with the EN Standard.

Alstom refused to perform in terms of the Adjudicator’s decision which resulted in M&R instituting motion proceedings against Alstom in the High Court to enforce the Adjudicator’s decision. M&R argued that according to the terms of the subcontract, the Adjudicator’s decision was binding and should be given effect to unless and until the decision was revised by amicable settlement or overturned in an arbitral award.

Alstom, in its answering affidavit, contended that the Adjudicator’s decision could not be enforced as the Adjudicator’s remedy was impossible to perform in that there was no testing method which would positively identify the particular grade of steel and only the manufacturer of the steel plates could issue a certificate in line with the EN Standard.

The court acknowledged that it has a general discretion to refuse specific performance in certain instances. The court differentiated those circumstances with the facts before it due to the Adjudicator, and not the court, having already decided on an appropriate remedy. Therefore, the court did not have to determine whether specific performance,

## “Impossibility” is no excuse! High Court enforces compliance with adjudicator’s decision...*continued*

The court took into account the fact that in these circumstances the parties had elected to make use of a dispute resolution mechanism for the determination of their disputes.

or another remedy, should be granted but had to determine whether it should exercise its discretion to enforce the remedy provided in the Adjudicator’s decision or not.

The court considered the following factors in the exercise of its discretion whether to enforce the Adjudicator’s decision, who had decided upon the remedy, in circumstances where performance was alleged to be impossible. These factors included, but were not limited to, the following:

1. Did the adjudicator decide the dispute now raised before the court? If not, could the party contending impossibility have raised the issue before the adjudicator?
2. Why should the party contending impossibility escape its obligations to be bound by the outcome of the adjudication, to treat it as final and give effect to it?

3. What are the consequences of permitting a party to escape the enforcement of the decision?
4. What are the systemic risks if agreed procedures for dispute resolution that are intended to be quick and avoid disruption to large construction projects nevertheless give rise to lengthy litigations before the courts?
5. Is there a risk that the impossibility relied upon will indeed, if an order is made, require what cannot be done and expose the defaulting party to risk of contempt proceedings?

The court, while considering these factors, took into account the fact that in these circumstances the parties had elected to make use of a dispute resolution mechanism for the determination of their disputes. While the court enjoys a supervisory jurisdiction over the enforcement orders it makes, it should not act as a “court of appeal” by considering



## “Impossibility” is no excuse! High Court enforces compliance with adjudicator’s decision...*continued*

The court accordingly weighed up the factors and ordered compliance with the Adjudicator’s decision, finding that there was no basis for Alstom’s defence of impossibility of performance.

the merits of the decision or the decided remedy. Such interference would obviate the expedited nature of adjudication proceedings and go against the contractual mechanism agreed between the parties. Accordingly, the court should exercise its discretion to avoid depriving a successful party from benefitting from an adjudicator’s decision, unless there are compelling reasons to do so. The role of the court in this instance would be binary: To enforce the Adjudicator’s decision or, on compelling grounds, refuse to do so.

The court considered the undisputed facts on affidavit before it and held that performance of the Adjudicator’s decision was not impossible as Alstom could conduct the necessary tests in order to identify the relevant steel plates’ characteristics and Alstom

could provide sufficient testing records to show compliance with the EN Standard (as opposed to producing the relevant certificate).

The court accordingly weighed up the factors and ordered compliance with the Adjudicator’s decision, finding that there was no basis for Alstom’s defence of impossibility of performance. This case illustrates that our courts are reluctant not to enforce an adjudicator’s decision where an adjudicator has considered the merits of the dispute and determined an appropriate remedy. Our courts will only do so if compelling reasons exist that warrant the successful party in the adjudication not receiving the appropriate benefit it is entitled to.

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