

# DISPUTE RESOLUTION ALERT

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### PART TWO

#### **CORPORATE INVESTIGATIONS: ANTI-MONEY LAUNDERING IS NOW FOCUSED ON EFFECTIVENESS: DOES YOUR SYSTEM WORK?**

South Africa's much-publicised and anxiously-awaited Financial Centre Amendment Act has now become law in order to comply with the global standard set by the Financial Action Task Force: the inter-governmental body responsible for the global standard in anti-money laundering and combating financing of terrorism. The bar has been raised substantially.

#### **ARBITRATION: CHALLENGING AN ARBITRATION AWARD: IS IT THERE FOR THE TAKING?**

Arbitrations are regarded as a useful means of alternative dispute resolution for parties wishing to avoid long drawn-out court proceedings. Notably, one of the advantages of arbitration as opposed to litigation is the efficiency in the finality of the process. However, agreements which make provision for arbitration in the event of a dispute may be open to abuse by a party seeking to delay the finality of such dispute, with the resultant award being challenged by the dissatisfied party.

# CORPORATE INVESTIGATIONS: ANTI-MONEY LAUNDERING IS NOW FOCUSED ON EFFECTIVENESS: DOES YOUR SYSTEM WORK?

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*Accountable institutions now have to include the management of business relations with prominent persons in their Risk Management and Compliance Programs.*



**South Africa's much-publicised and anxiously-awaited Financial Centre Amendment Act has now become law in order to comply with the global standard set by the Financial Action Task Force (FATF): the inter-governmental body responsible for the global standard in anti-money laundering and combating financing of terrorism (AML/CTF). The bar has been raised substantially.**

This new approach aligns the South African legislative AML framework with the FATF standards and with the expedited roll-out of the 4<sup>th</sup> AML Directive of the European Parliament, introduced as a result of the terrorist attacks in Europe and the UK and following exposition of the Panama Papers. These new measures aim to enhance the efficiency of the current AML/CFT system and have been introduced to coherently supplement it. Although these measures were largely targeted at terrorist financing, the impact will be felt in all areas of finance, including tax. This comes as a result of substantial advances in communications and technology which make the global interconnected financial system an ideal environment for criminals to move and hide illicit funds, often to evade tax. Tax crimes (both direct and indirect taxes) are globally regarded as predicate offences for money laundering.

This new approach to the combating of money laundering and terrorist financing (AML/CTF) introduces a risk-based approach - as opposed to a rules-based approach - in getting to identify the customer. It also introduces beneficial ownership as a concept. Crime syndicates abuse corporate entities for criminal purposes. Accountable institutions are now required to probe for beneficial ownership to identify the natural person who ultimately owns or controls the legal entity constituting the client. The risk management compliance programme will have to provide for methodology and verification sources in order to address the obligation.

The new regime also affects prominent persons: domestic and foreign. Accountable institutions now have to include the management of business relations with prominent persons in their Risk Management and Compliance Programs (RMCP). Businesses with domestic prominent influential persons are not inherently high risk but the potential of such risks need to be managed. Businesses with foreign prominent public officials on the other hand must always be regarded as high risk. In accordance with a risk management compliance programme an accountable institution will have to obtain senior management approval and establish the source of wealth and source of funds, and monitor the business relationship when dealing with a domestic prominent person posing a high risk or dealing with a foreign prominent foreign official. Accountable institutions are no longer burdened with long control lists and tick boxes for each and every client and can save time and costs through the introduction of a RMCP which entails applying time and resources in areas where it is most needed, that is where the identified risks are high.

There is huge innovation in the risk and compliance space. The potential uncertainties stemming from Brexit and the new US-Trump administration do not appear to have halted the development of initiatives to investigate, expose and punish those involved in business crime.

# CORPORATE INVESTIGATIONS: ANTI-MONEY LAUNDERING IS NOW FOCUSED ON EFFECTIVENESS: DOES YOUR SYSTEM WORK?

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*The success of the global AML/CTF framework depends on the extent to which each country aligns its own national regulatory framework with the global standard.*



Across the globe, new legislation has been enacted or proposed which continues to reinforce the anti-corruption agenda. In Australia, the Coalition Government has engaged in a consultation process on proposed legislative reform including the creation of a new corporate offence for failing to prevent foreign bribery, following the UK Bribery Act model. In France, the bodies needed to implement the SAPIN II anti-corruption law are being created and established. The US Department of Justice (DOJ) extended the Foreign Corrupt Practices Act pilot programme intended to encourage corporate self-reporting and it has also sent strong signals that it will continue to take a robust approach to white collar and FCPA enforcement. Acting Assistant Attorney General Kenneth A. Blanco recently confirmed that the US DOJ “will continue pushing forward hard against corruption, wherever it is”. He also confirmed that the Kleptocracy Asset Recovery Initiative is specifically designed to target and recover the proceeds of foreign official corruption that have been laundered “into or through the US”. He further stressed that in these kleptocracy cases, one of their goals is to return the assets to those harmed by criminal conduct. The Financial Crimes Enforcement Network (FINCEN) in the US has also introduced a final rule currently being implemented to be in force by May 2018 which applies to financial institutions who have to align their due diligence programmes with FINCEN’s guidance on core elements of a customer due diligence programme. These four core elements include: customer

identification and validation, beneficial ownership identification and verification, understanding the nature and purpose of customer relationships to develop a customer risk profile, ongoing monitoring for reporting suspicious transactions; and on a risk-basis, maintaining and updating customer information.

Going forward, the extent of the workload and responsibilities of every company’s compliance office will increase exponentially as AML/CTF becomes the platform to combat crime effectively. This is the reason it has now become popular to criminalise non-compliance. The effect of non-compliance and subsequent sanctions on a company’s reputation and brand value adds further credence to the prediction above. It has already reached a point where the desire to obtain “credits” from the DOJ in the US is regarded as very similar to proving to the UK’s Serious Fraud Office that there has not been a “failure to prevent”, when it comes to investigations of bribery and corruption.

A chain is only as strong as its weakest link. The success of the global AML/CTF framework depends on the extent to which each country aligns its own national regulatory framework with the global standard. If this is achieved effectively, criminals, tax evaders, kleptocrats and terrorists will find that it has become very difficult to disguise the origin of criminal proceeds or to channel funds for terrorist purposes.

*Willem Janse van Rensburg*



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# ARBITRATION: CHALLENGING AN ARBITRATION AWARD: IS IT THERE FOR THE TAKING?

*Section 33(1) of the Arbitration Act, No 42 of 1965 sets out the grounds in terms of which a party may apply to court for the setting aside of an arbitration award.*

*The Supreme Court of Appeal recently handed down judgment in which the court set out factors that must be taken into account when considering whether an arbitration award should be set aside on grounds of alleged gross irregularity in the conduct of the arbitration proceedings.*



Arbitrations are regarded as a useful means of alternative dispute resolution for parties wishing to avoid long drawn-out court proceedings. Notably, one of the advantages of arbitration as opposed to litigation is the efficiency in the finality of the process. However, agreements which make provision for arbitration in the event of a dispute may be open to abuse by a party seeking to delay the finality of such dispute, with the resultant award being challenged by the dissatisfied party.

Section 33(1) of the Arbitration Act, No 42 of 1965 sets out the grounds in terms of which a party may apply to court for the setting aside of an arbitration award where:

- an arbitrator has misconducted him/herself in relation to his/her duties as arbitrator or umpire;
- an arbitrator has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded his/her powers; or
- an award has been improperly obtained.

The Supreme Court of Appeal (SCA) recently handed down judgment in the case of *State Information Technology Agency SOC Limited (SITA) v ELCB Information Services (Pty) Ltd & another* (995/16) [2017] ZASCA 120 in which the court set out factors that must be taken into account when considering whether an arbitration award should be set aside on grounds of alleged gross irregularity in the conduct of the arbitration proceedings.

## The facts

The case involved service agreements concluded between SITA and ELCB Information Services for the procurement of information technology goods and services on behalf of SITA and other government departments.

The parties had not been able to locate the signed copy of one of the agreements, and consequently SITA denied that the contract was ever concluded.

ELCB performed all its contractual obligations in respect of both agreements, having rendered the professional services to SITA. Likewise, SITA fulfilled its obligations and duly paid a substantial portion of what was due to ELCB.

Both agreements provided that if a dispute arose between the parties, then such dispute would be referred to arbitration which would be conducted in accordance with the rules of the Arbitration Foundation of Southern Africa.



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# ARBITRATION: CHALLENGING AN ARBITRATION AWARD: IS IT THERE FOR THE TAKING?

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*The arbitrator dismissed SITA's application of invalidity of the agreements with costs, and in so doing, refused to stay the arbitration proceedings.*



## The dispute

A dispute arose between the parties for unpaid sums due to ELCB and the matter was reserved for arbitration. SITA failed to adhere to the pre-arbitration directives issued by the arbitrator, as agreed to by the parties, and failed deliver a statement of defence and further process.

On the date of the arbitration hearing, SITA brought an application for an order declaring both agreements constitutionally invalid, unlawful and unenforceable stating that SITA had failed to comply with the procurement procedures applicable to state procurement of goods and services in entering into agreements. In this application, SITA also sought an order that the arbitration proceedings be stayed or postponed pending the final determination of the validity of the agreements.

## The impugned award

The arbitrator dismissed SITA's application of invalidity of the agreements with

costs, and in so doing, refused to stay the arbitration proceedings. At this juncture SITA and its legal representatives left the proceedings, and the arbitration continued in their absence.

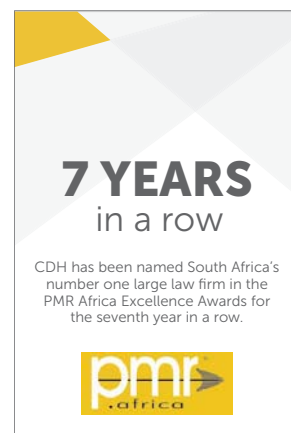
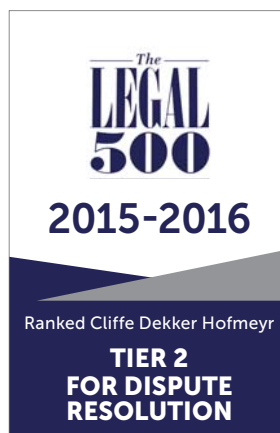
Ultimately, the arbitrator made an award having considered the undisputed evidence of ELCB. SITA was ordered to pay certain amounts plus interest to ELCB together with the costs of arbitration.

## Grounds challenging the arbitration award

SITA filed an application in the High Court, seeking an order to review and set aside the arbitration award. This application was unsuccessful.

SITA then filed leave to appeal to the SCA, where the main issue was whether the arbitration award should be set aside on the grounds that the arbitrator committed gross irregularities in that:

- SITA was excluded from participating from the arbitration proceedings – thus was not given a hearing;



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*The SCA stated that an alleged irregularity must be of such a nature that it renders the decision reached unreasonable in the circumstances.*



- the second agreement was not signed by SITA and thus never came into existence;
- the arbitrator exceeded his powers when he awarded interest in the absence of demand for payment;
- the arbitrator failed to properly apply his mind to the evidence placed before him; and
- the arbitrator contravened provisions of the second agreement in that he failed to give written reasons.

The SCA stated that an alleged irregularity must be of such a nature that it renders the decision reached unreasonable in the circumstances. A review of an arbitrator's award does not deal with the merits, but the manner in which a decision was reached. Thus, whether the arbitrator came to an incorrect conclusion is irrelevant in arbitration proceedings.

#### The SCA's decision

Given that SITA had left the arbitration proceedings on its own volition, the SCA found that SITA failed to provide compelling reasons that the arbitrator, in conducting the proceedings, committed gross irregularities which warranted

the setting aside of the award. Having considered all the grounds relied on for the setting aside of the award, the SCA concluded that none of the grounds raised had any merit, and thus dismissed the appeal.

This case shows that reviewing and setting aside an arbitration award on grounds of irregularities is not simply there for the taking. Parties seeking to resolve disputes by way of arbitration should be mindful that the role of an arbitrator is to strike a balance between competing issues between the parties based on the facts and evidence before them.

This case reminds all litigants seeking to resolve their disputes by way of arbitration that they should act with utmost good faith so as to ensure that disputes are resolved without delay. As a general rule, parties dissatisfied with the outcome of the proceedings should resist the temptation of challenging the arbitration award on grounds of an alleged gross irregularities, unless there are grounds to do so, more so where the parties have not made provision for an appeal.

*Mongezi Mpahlwa*

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



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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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.

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