30 MAY 2018

# DISPUTE RESOLUTION ALERT

IN THIS **ISSUE**

## DO NOT CONFUSE THE 1965 ARBITRATION ACT WITH THE 2017 INTERNATIONAL ARBITRATION ACT

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## GLOBAL LEADERS HAVE JUST RAISED THE BAR REGARDING TRANSPARENCY AS A FUNCTION OF GLOBAL BUSINESS AND GRC

May 2018 will stand out as red-letter month on the calendar of Governance Risk and Compliance (GRC) leaders.

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On 2 May 2018, Judge President Mlambo issued a practice directive applicable to the Gauteng Local Division, Johannesburg for a Full Court to be constituted to decide the legal issues that arise from application proceedings launched by bond creditors.

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# DO NOT CONFUSE THE 1965 ARBITRATION ACT WITH THE 2017 INTERNATIONAL ARBITRATION ACT

*Be aware that the mere fact that parties to an international commercial agreement elected South Africa to be the seat of arbitration does not mean that the 1965 Act then becomes applicable.*

**Let there be no confusion. The Arbitration Act of 1965 (1965 Act) is still alive and well. The International Arbitration Act of 2017 (2017 Act) did not repeal the 1965 Act.**

The 1965 Act regulates all domestic arbitrations that do not fall under the ambit of the 2017 Act which has the object to resolve international commercial disputes. The 2017 Act applies when the seat of arbitration is in South Africa. Be aware that the mere fact that parties to an international commercial agreement elected South Africa to be the seat of arbitration does not mean that the 1965 Act then becomes applicable. Johannesburg may be the seat of arbitration, but the 2017 Act will apply if the arbitration is international.

*An important development with the promulgation of the 2017 Act is that the UNCITRAL Model Law on International Commercial Arbitration will apply to international arbitration agreements.*

### When is an arbitration agreement international?

According to the United Nations Commission on International Trade Law (UNCITRAL) Model Law, Chapter 1(3), "an arbitration agreement is international if:

(a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or

(b) one of the following places is situated outside the State in which the parties have their places of business:

  (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;

  (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or

(c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country."

An important development with the promulgation of the 2017 Act is that the UNCITRAL Model Law on International Commercial Arbitration will apply to international arbitration agreements. UNCITRAL is an internationally accepted model, which will in future assist to persuade an international party to a commercial agreement entered into with a South African party, to consent to an arbitration agreement or clause, which is governed by the 2017 Act.

A South African party to an international commercial agreement may now be able to persuade an international corporate based, for example, in China to accept the jurisdiction of the 2017 Act because the China company may find comfort in the fact that the parties to the international arbitration agreement may agree to the application of, for instance, the ICC

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# DO NOT CONFUSE THE 1965 ARBITRATION ACT WITH THE 2017 INTERNATIONAL ARBITRATION ACT

CONTINUED

*The 2017 Act only deals with a possible arbitration in future between parties in the event of a dispute and has nothing to do with the terms of the commercial agreement which embodies the intention of the parties to do business.*

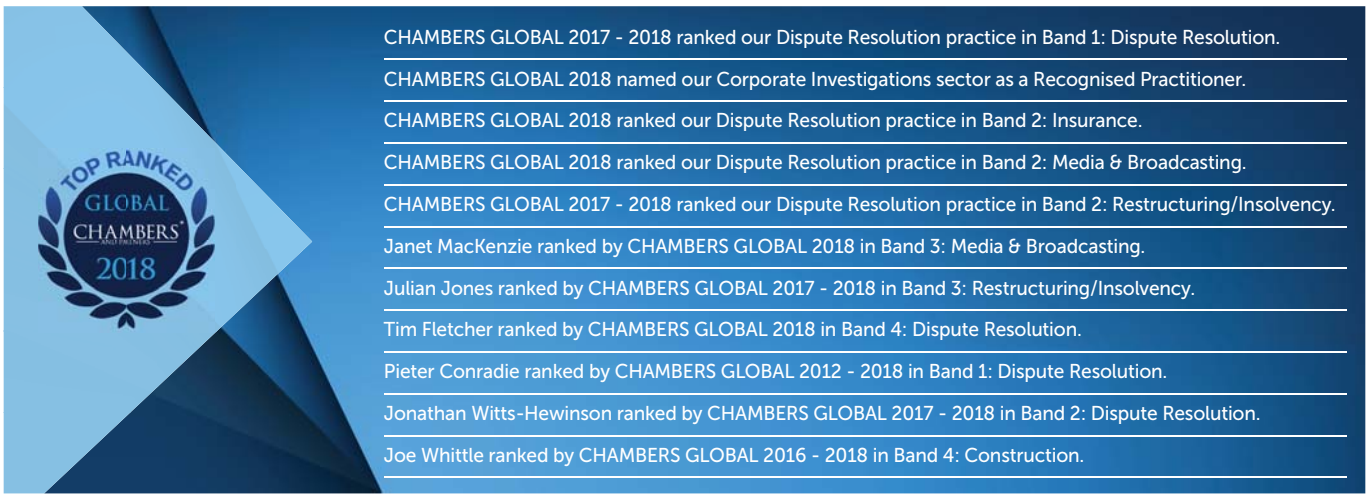
rules and for that arbitral institution to administer the arbitration. The parties in an international commercial agreement may also agree to appoint the Arbitration Foundation of South Africa (AFSA), to be such an institution. To ensure that the 2017 Act applies, the arbitration agreement/clause must stipulate South Africa as the seat of arbitration. Such choice will automatically result in the law of South Africa being the law governing the arbitration agreement/clause. However, do not confuse the law governing the arbitration agreement with the law chosen by the parties to be the substantive law applicable to the commercial agreement. South African law may apply to govern the arbitration agreement/clause and to give effect thereto, but Singapore law may have been chosen as the substantive law for an arbitrator to follow regarding the commercial agreement and its terms.

Do not discard the arbitration agreement/clause used in South African-based commercial agreements as the provisions in such clauses are still relevant and applicable and it should still be used in respect of commercial arbitrations without any change where the 1965 Act is applicable.

Corporates will have to draft new arbitration agreements/clauses for incorporation in international commercial agreements. Such arbitration agreements/clauses will have to refer to the juridical seat of arbitration as South Africa.

It must be remembered that the 2017 Act only deals with a possible arbitration in future between parties in the event of a dispute and has nothing to do with the terms of the commercial agreement which embodies the intention of the parties to do business.

*Pieter Conradie*



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# GLOBAL LEADERS HAVE JUST RAISED THE BAR REGARDING TRANSPARENCY AS A FUNCTION OF GLOBAL BUSINESS AND GRC

*The latest development in the UK will, if the legislation is promulgated, prove that the UK is very serious in its commitment to eradicate money laundering and to curb illicit financial flows (IFF).*

*The tax havens of the world have been accused of facilitating money laundering by supplying anonymity and thereby enabling the activities of corrupt politicians and tax evaders.*

**May 2018 will stand out as red-letter month on the calendar of Governance Risk and Compliance (GRC) leaders.**

Firstly, on 11 May 2018 the new FinCEN Customer Due Diligence (CDD) Rule, providing for beneficial ownership, became effective in the US. Secondly, the UK announced in the first week of May 2018 that the 14 British Overseas Territories will be required, by 31 December 2020, to have created public beneficial ownership registers for companies registered in their jurisdiction. Thirdly, the Council of the EU formally adopted the 5th Money Laundering Directive (MLD5) on 14 May 2018 and, fourthly, to just really spice GRC up even more, the European Union's new General Data Protection Regulation (GDPR) became effective on 25 May 2018.

We have in previous alert articles drawn attention to the vanguard role adopted by the UK in anti-money laundering (AML) and anti-bribery and corruption (ABC). The UK Bribery Act as a model for ABC has become very popular with other jurisdictions. The offence in s7, failure to prevent bribery of foreign officials, was followed by two new "failure-to-prevent" offences namely failure to prevent facilitation of UK tax evasion and failure to prevent facilitation of foreign tax evasion, which became law in September 2017. The UK has also demonstrated its role as global leader in transparency by publishing an open data register of real estate owners and controllers of companies, i.e. beneficial owners. The latest development in the UK will, if the legislation is promulgated, prove that the UK is very serious in its commitment to eradicate money laundering and to curb illicit financial flows (IFF).

The tax havens of the world have been accused of facilitating money laundering by supplying anonymity and thereby enabling the activities of corrupt politicians and tax evaders, which in turn deprives developing countries of billions of dollars in tax revenues and cheating people in developing countries out of much-needed funds for eradication of poverty. Thabo Mbeki, chairperson of the African Union's High Level Panel on Illicit Financial Flows, estimated that Africa loses annually over USD 50 billion through IFF and he stressed that financial secrecy was a problem. Mbeki observed in 2015 that tax havens and financial secrecy jurisdictions are at the centre of the IFF problem and that there is no global architecture to ensure the required concerted global action to combat IFF. If the UK implements tax-haven transparency in British Overseas Territories (BOTs) it will go a long way in establishing a foundation for the architecture referred to by Thabo Mbeki. The covert world of anonymous shell companies will have to endure financial transparency.

The Financial Action Task Force (FATF) has been concerned about misuse of corporate vehicles as long ago as 2011 when the World Bank published the Puppet Masters Report. The FATF has therefore established standards of transparency but has conceded that implementation thereof has been challenging resulting in the publication of a Guidance Paper on Recommendation 24 and 25, encapsulating the FATF standard.



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# GLOBAL LEADERS HAVE JUST RAISED THE BAR REGARDING TRANSPARENCY AS A FUNCTION OF GLOBAL BUSINESS AND GRC

CONTINUED

*South Africa endorses the FATF standards on AML/FATF as well as the G20 High-level Principles on Beneficial Ownership Transparency.*

The 4th Money Laundering Directive (Directive), which was adopted on 20 May 2015 and which came into force in the EU on 26 June 2017, bolstered transparency measures throughout Europe addressing the definition of beneficial owner and also introduced central registers for corporate entities. The Directive will now raise the bar even more. In the Preamble the Directive states that "the prevention of money laundering and of terrorist financing cannot be effective unless the environment is hostile to criminals seeking shelter for their finances through non-transparent structures. The Directive is a response to the terrorist attacks of 2015 and 2016 in Paris and Brussels and also to the Panama Papers leaks. Citizens will enjoy the right to access information on the beneficial owners of firms which operate in the EU and this transparency will definitely curtail the criminal use of letterbox companies abused to launder money, hide wealth and avoid paying taxes, the latter clearly exposed by the Panama Papers. Persons with a "legitimate interest", such as investigative journalists and non-governmental organisations (NGOs) will be provided with access to data on beneficial owners of trusts and "similar legal arrangements". Member states have the right to provide broader access to information, in accordance with their national law. The Directive also provides for a tightening of rules regulating anonymous prepaid cards and virtual currencies. The Directive shall enter into force twenty days after it has been published in the Official Journal of the European Union after which date transposition into national law by member states will roll out in 18 months.

South Africa endorses the FATF standards on AML/FATF as well as the G20 High-level Principles on Beneficial Ownership Transparency. The Financial Intelligence Centre Amendment Act which has been enacted in stages since June 2017 introduced the legal definition of "beneficial owner" as well as a risk-based approach to customer due diligence. This was done to ensure that South Africa implements measures as required by the FATF arising from the 2009 Mutual Evaluation by the FATF. The next Mutual Evaluation takes place in 2019.

Focusing on transparency in AML globally not only serves to detect and facilitate investigation of money laundering and IFF but also becomes a powerful deterrent for criminals seeking to launder proceeds of crime.

*Willem Janse van Rensburg*

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# THE GATES HAVE BEEN CLOSED (TEMPORARILY) ON FORECLOSURES

*It has been the practice of the Gauteng Local Division to postpone these foreclosure applications for a few months to give homeowners a chance to pay the arrears on their bond account.*

*What has been happening as a result is that the bond creditors have started asking the court only for money judgments for the full accelerated outstanding balance due on the home loan.*

**On 2 May 2018, Judge President Mlambo issued a practice directive applicable to the Gauteng Local Division, Johannesburg for a Full Court to be constituted to decide the legal issues that arise from application proceedings launched by bond creditors (mostly the commercial banks) and which are not opposed by the home owners concerned, for:**

- money judgments for the accelerated payment of the full outstanding balance due under a home loan secured by a mortgage bond over the home; and
- an order declaring that the property may be sold on auction by the Sheriff.

It has been the practice of the Gauteng Local Division to postpone these foreclosure applications for a few months to give homeowners a chance to pay the arrears on their bond account. If the homeowner is able to pay the arrears, then the court would not give an order for the home to be sold on auction. This practice is aligned with s26(3) of the Constitution which provides that "no one may be evicted from their home, or have their home demolished without an order of court made after considering all relevant circumstances...". Naturally bond creditors are aggrieved at the delay as they are not being paid the monthly instalments and are not able to get their money through the courts.

What has been happening as a result is that the bond creditors have started asking the court only for money judgments for the full accelerated outstanding balance due on the home loan. With that judgment the bond creditor then issues a warrant of execution and attaches the movable property of the homeowner. That property is then sold on auction and the money is paid into the bond account to reduce the balance due.

The disparity in the processes described above has become an issue and accordingly the Full Court will be asked to consider:

- whether the Court has a discretion (in terms of the National Credit Act), when postponing an application in respect of the executability of a property in order to afford the homeowner an opportunity of paying the arrears, to refuse to give an immediate accelerated money judgment for the outstanding amount due in terms of the bond;
- if the Court does have that discretion, whether the Practice Manual should stipulate uniformity of treatment by the Judges in the Gauteng Local Division and if so, what should that uniformity be; and
- the circumstances under which the Court should set a reserve price for an auction of the immovable property and how that reserve price would be determined.

Notwithstanding the 2 May practice directive, homeowners continue defaulting on bond payments and bond creditors have carried on enrolling foreclosure applications for hearing pending the outcome of the hearing of the Full Court. That was until 28 May 2018.



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# THE GATES HAVE BEEN CLOSED (TEMPORARILY) ON FORECLOSURES

CONTINUED

*The hearings of foreclosure matters in the Gauteng Local Division, Johannesburg have been placed on hold until the Full Court has handed down judgment on the issues.*

On 28 May 2018, Judge President Mlambo issued a further directive that:

- all foreclosure matters already enrolled be postponed *sine die* pending the decision of the Full Court; and
- no new matters involving the issues that would be considered by the Full Court can be enrolled until such time as the Full Court has made its decision.

So there it is. The hearings of foreclosure matters in the Gauteng Local Division, Johannesburg have been placed on hold until the Full Court has handed down judgment on the issues.

It is important to note that these directives only relate to foreclosure matters issued out of the Gauteng Local Division, Johannesburg. Given that the Gauteng Provincial Division, Pretoria has concurrent jurisdiction, forum shopping is probably inevitable, as is a similar practice directive in that court.

*Tim Smit and Tim Fletcher*

Tim Fletcher was named the exclusive South African winner of the **ILO Client Choice Awards 2017 – 2018** in the litigation category.

Richard Marcus was named the exclusive South African winner of the **ILO Client Choice Awards 2018** in the Insolvency & Restructuring category.



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# Best Lawyers 2018 South Africa

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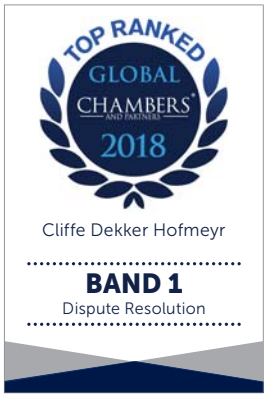



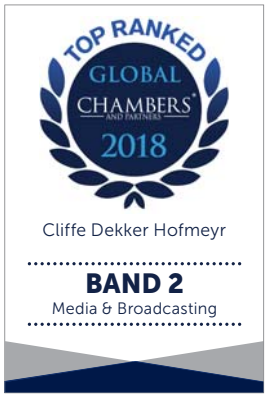


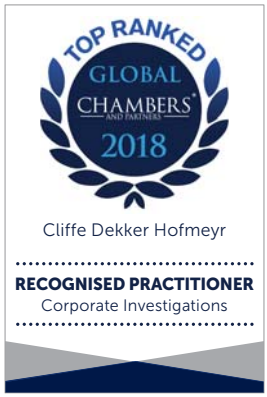


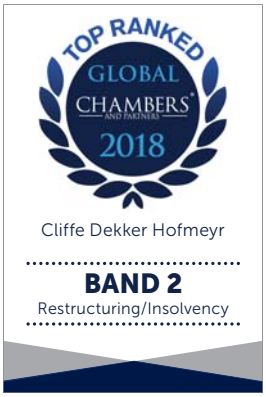



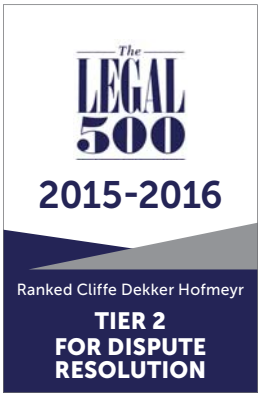


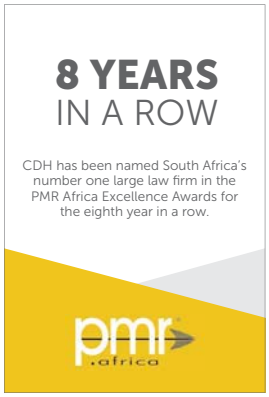




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CLIFFE DEKKER HOFMEYR

## 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



**Thabile Fuhrmann**
Chairperson
Director
T +27 (0)11 562 1331
E thabile.fuhrmann@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
Business Development
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

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

**Zaakir Mohamed**
Director
T +27 (0)11 562 1094
E zaakir.mohamed@cdhlegal.com

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

**Byron O'Connor**
Director
T +27 (0)11 562 1140
E byron.oconnor@cdhlegal.com

**Ashley Pillay**
Director
T +27 (0)21 481 6348
E ashley.pillay@cdhlegal.com

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

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

**Willem Janse van Rensburg**
Executive Consultant
T +27 (0)11 562 1110
E willem.jansevanrensburg@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

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

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


**BBBEE STATUS:** LEVEL TWO CONTRIBUTOR
Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 2 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.




**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






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