Dispute Resolution

ALERT | 2 April 2024

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SOUTH AFRICA

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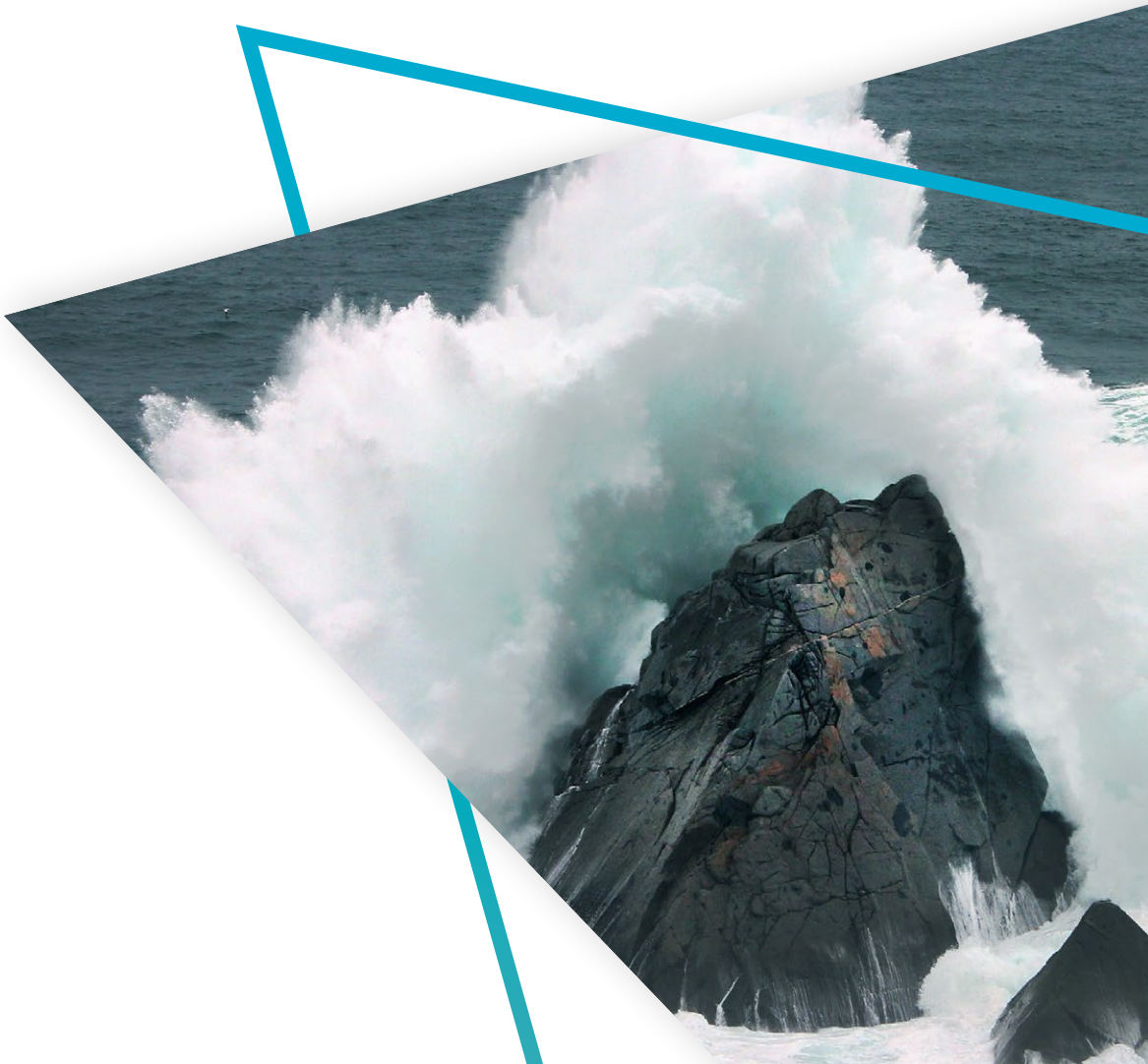

DISPUTE RESOLUTION ALERT

Settlement agreements: Creditors, secure your victory and don't stop half way, debtors beware

Before a court decides on the outcome of a case, parties involved may agree to settle their dispute. However, it's important to understand that when a settlement agreement is made an order of court, it holds the same weight and authority as any other ruling issued by a court.

Plaintiffs as creditors who agree to settle a dispute prior to the trial should not simply remove the matter from the trial roll on the basis that it has been settled and then wait for performance. In order to secure the position gained, it is imperative that the settlement agreement be made an order of the court.

Once a settlement agreement has been made an order of court, the dispute between the parties is disposed of and the parties cannot institute further litigation in respect of the cause of action giving rise to the settlement agreement (save in the event of the settlement agreement specifically excluding a novation of the original cause of action), as the matter is *res judicata* (already judged) despite a judge not necessarily having decided on the merits of the matter. This order is recorded as a judgment in credit assessments, and any debt arising from the settlement agreement becomes a judgment debt, which only prescribes after 30 years.

In the case of *Makhafola & Verster Incorporated v Hurter & Coetzee Legal Consultants* CC [2022] JDR 2509 (GP), the court stated that a settlement agreement which is made in terms of Rule 27(6) of the Magistrate's Court Rules, may be made an order of court. Rule 27(6) of the Magistrate's Court Rules provides a mechanism for litigants to apply for a settlement agreement to be made an order of court at any time during litigation, but before judgment. The terms of the settlement may be recorded by the court without entry of judgment, or the settlement agreement may be made an order of court if the terms of the settlement provide for it.

Treated as a final judgment

In the case of *Arcus v Arcus* [2022] 1 All SA 626 (SCA), the court clarified that a settlement agreement, once made an order of court, is treated as a final judgment. This means that section 11(a)(ii) of the Prescription Act 68 of 1969 (Prescription Act), which concerns judgment debts, applies. Without such a court order, a settlement agreement is considered an ordinary debt and prescribes after three years under section 11(d) of the Prescription Act. Parties, and debtors in particular, should be cautious when entering into settlement agreements that later become court orders. While this approach may expedite dispute resolution and lower litigation costs, it also means that any debt arising from the agreement is treated as a judgment debt against a party which may be executed upon and will impact their credit rating.

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In *Eke v Parsons* [2015] (11) BCLR 1319 (CC), the Constitutional Court summed up the position with respect to settlement agreements being made an order of court as it determined the status and impact of a settlement order. The respondent in this case had obtained summary judgment against the appellant in the court *a quo* for defaulting in terms of a settlement agreement which had been made an order of court. The appellant appealed the order granting the summary judgment, which was dismissed by the Constitutional Court, as it found that, amongst other things:

> *"The effect of a settlement order is to change the status of the rights and obligations between the parties. Save for litigation that may be consequent upon the nature of the particular order, the order brings finality to the lis between the parties, the lis becomes res judicata (literally, 'a matter judged'). It changes the terms of a settlement agreement to an enforceable court order. The type of enforcement may be execution or contempt proceedings. Or it may take any other form permitted by the nature of the order."*

Once a settlement agreement becomes a court order, it holds the weight of a final judgment, finalising the dispute between the parties but also subjecting them to long-term obligations and potential enforcement actions. The debtor in the settlement agreement shall ultimately become the judgment debtor. While the terms of payment which are agreed to between the litigants may be more favourable to the debtor than what the court would have ordered if it were to make an order on the merits, understanding the implications of turning a settlement into a court order is essential, as it impacts parties' rights, obligations and credit ratings. Therefore, thorough consideration and legal guidance are crucial before agreeing to make a settlement agreement an order of the court.

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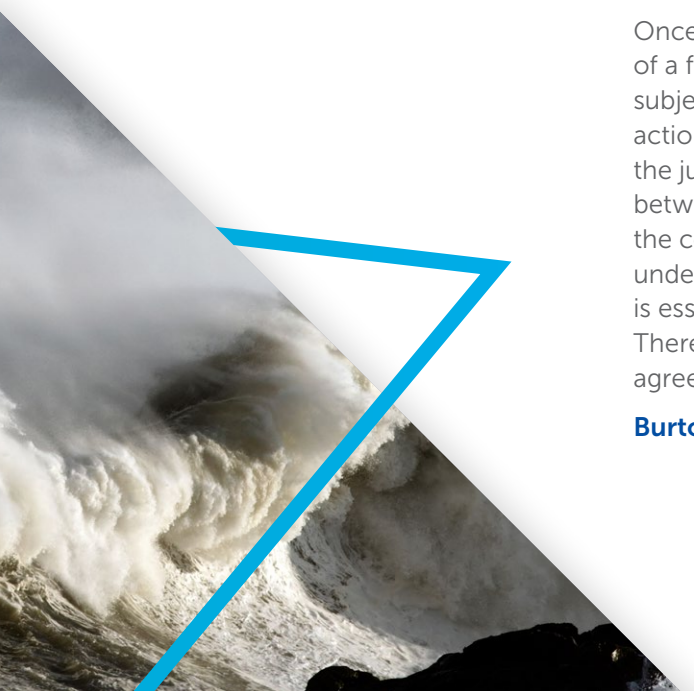

Early Detection of Fraud and/or Corruption in Arbitrations: Lessons from the Recent English Court Decisions?

Two recent English Commercial Court decisions serve as a warning to dishonest parties hoping to exploit the arbitral process to obtain or enforce fraudulent or corrupt arbitration awards. The English courts generally follow a non-interventionist approach when it comes to the challenge of enforcement of arbitral awards. However, these recent decisions signify that the Commercial Court can and will use its statutory powers to intervene, investigate and order disclosure to uphold the legitimacy of the arbitral process and parties' rights.

Wayward parties or other participants in the arbitral process considering following a similar path and committing what the Commercial Court characterised as "*the most severe abuses of the arbitral process*" because they are "*driven by greed and prepared to use corruption; giving no thought to what their enrichment would mean in terms of harm for others*", should take note.

A challenge on the basis of serious irregularity

The first decision concerned a challenge to a London seated arbitration award of USD 11 billion obtained against the Republic of Nigeria. Given the very high quantum involved (which equated to almost half of Nigeria's 2023 national budget) the case was the subject of intense attention in Nigeria and beyond.

Nigeria challenged the award under section 68 of the English Arbitration Act (which deals with challenges to an award on the basis of a serious irregularity), alleging that the award had been procured by fraud and/or conduct that was contrary to public policy. The Commercial Court ordered extensive disclosure of documents and upheld Nigeria's challenge and later set aside the USD 11 billion award. It found that the award had been obtained by fraud and procured in a way that was contrary to public policy, including corrupt payments made at the time the original contract was concluded and throughout the arbitration.

An application to enforce an arbitral award

The second decision concerned an application by a British Virgin Islands company to the English courts for permission to enforce an arbitration award. The arbitration had purportedly been seated in Kuwait under the rules of the Kuwait Chamber of Commerce and Industry Commercial Arbitration Centre.

In February 2024 the Commercial Court set aside an earlier decision granting leave to enforce the arbitral award with the extraordinary finding that the arbitration agreement, arbitration proceedings and alleged award were all entirely fabricated and had never happened, and therefore there was no triable issue of enforcement for the court to determine. Some of the compelling evidence included the fact that sections of the purported 'award' were copied from an unrelated English judgment, and the Kuwaiti arbitral centre confirmed that it had not administered the case. The judgment described the audacious and brazen attempted fraud as "*very disquieting and of the utmost seriousness*"

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Effective application of the legislative framework

These cases demonstrate that the English Arbitration Act and accompanying enforcement legislation can provide an effective statutory framework for the Commercial Court to act as a 'check and balance' on challenges and enforcement of arbitral awards. As the judgment in Nigeria's favour declared: "*What happened in this case is very serious indeed, and it is important that [the English Arbitration Act] has been available to maintain the rule of law*".

It is noteworthy that, in order to preserve the final and binding intent of arbitration, the English Arbitration Act only allows for appeals and challenges in very limited "*extreme cases*" and they are very rarely successful. In the 2020–2021 court year only 4% of section 68 challenges succeeded. The Commercial Court recognised that the facts of Nigeria's appeal satisfied that high threshold. This confirms that the possibility of challenge is open in these extreme cases, but that the threshold remains high. This has the secondary advantage of stopping defaulting entities from alleging corruption or fraud against innocent parties in the hope that it will win an award in their favour or delay or deny enforcement of an award against them.

Additionally, the statutory framework worked effectively as the Commercial Court was empowered by legislation to order the disclosure of documents relevant to Nigeria's challenge, even though such documents had not been before the original arbitral tribunal. Ultimately that "*remarkable and crucial*" disclosure "*enabled the truth to be reached*" and without the Commercial Court exercising its powers the truth may not have prevailed.

Future strategy and mitigations

Although thankfully such egregious examples of fraud and corruption are rare, there are inevitably concerns to ensure sufficient protections and checks are in place to prevent unscrupulous entities from abusing the arbitral process. Questions are rightly being asked about whether the fraud and corruption that tainted these cases could or should have been uncovered sooner by the appropriate tribunal or court. Some practitioners have also expressed a concern that the confidential nature of arbitration renders it susceptible to this type of behaviour as there is less public scrutiny of the conduct of the parties and the allegations forming the subject matter of the arbitration.

The judgment in Nigeria's appeal encouraged reflection among the arbitration community, state users of arbitration and the courts with responsibility to oversee and supervise arbitration, to consider whether the arbitration process needs attention or amendment. This is particularly important where such significant sums of money are in dispute and a state is involved.

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Any new procedures or innovations arising from this reflection will necessarily take time to develop. However, it is hoped that the high-profile nature of these cases will put courts and tribunals around the world on alert to potential abuses of the process. Additionally there are considerations for participants in the process that could further mitigate against similar risks both at the stage of contractual negotiation and once an arbitration is underway –

- If a dispute arises, parties should select and appoint lawyers that are experienced in international arbitration and the subject matter of the dispute. Parties and their legal representatives should then work together to fully and proactively engage with the arbitration. By appointing experts in the process and being alert and equipped to identify issues of fraud and corruption, parties can ensure that all relevant information is put before the tribunal and the correct procedural steps followed. In this respect lessons should be learnt from Nigeria's failure to appoint adequate legal representation and the disastrous lack of engagement with the arbitration, where: "*legal representatives did not do their work to the standard needed, where experts failed to do their work, and where politicians and civil servants failed to ensure that Nigeria as a state participated properly in the Arbitration. The result was that the Tribunal did not have the assistance that it was entitled to expect, and which makes the arbitration process work*".
- Parties should also choose a legal seat for the arbitration that has a legislative framework and robust court system to protect the integrity of the arbitral process. Choosing to arbitrate in a jurisdiction like South Africa or England where the courts are supportive of the arbitration process and empowered to intervene where appropriate as a check and balance on the arbitral process is valuable, especially to compel the disclosure of evidence (for example pursuant to the powers enshrined in Article 27 of Schedule 1 of South Africa's International Arbitration Act) to ensure that procedural irregularities, dishonesty and corruption are exposed. Jurisdictions where the courts have less investigatory powers for disclosure may face more obstacles in uncovering fraud or corruption.
- Arbitration users should consider what the appropriate level of confidentiality is. Although primarily a confidential process, there is a case for greater public scrutiny of disputes and their outcomes to combat corruption and bribery. This is particularly relevant when one of the parties is a state entity and there would be significant adverse consequences for the nation's finances, contractual performance or reputation. Different legal seats and institutional rules prescribe different levels of confidentiality and due consideration should be given to the appropriate forum. For example Article 11 of South African International Arbitration Act requires that any arbitration proceedings with a state-owned entity must be held in public.

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- Parties should carefully select appropriate institutional rules to ensure that tribunals are empowered to conduct proceedings effectively. Choosing arbitral rules from an institution like the London Court of International Arbitration (LCIA) or the Arbitration Foundation of Southern Africa (AFSA) empowers the tribunal to gather evidence, call witnesses, request documents or appoint expert witnesses. This can help ensure that fraud, dishonesty and corruption are uncovered at an early stage.
- Tribunals should be alert to the risk of corruption and fraud throughout the arbitral process, and proactively deal with signs or allegations of fraud or corruption. This is to both uncover corruption when it occurs, and to protect innocent parties when corruption is alleged to thwart enforcement of an award. Judges and courts with responsibility or oversight of arbitrations should remain similarly alert and not accept facts or documents at face value, especially given technological and AI advancements which can result in the creation of false or misleading evidence.
- Commercial entities should ensure they have adequate document and data retention systems in place both at the time of contracting and after any dispute arises. They should also ensure they have experienced and adequate legal advisers when negotiating and drafting contracts, as well as robust procedures in place to prevent and identify instances of corruption tainting the negotiations. This can be essential for refuting any allegations of fraud or corruption made in the future, especially where there is a significant imbalance in the resources or expertise of the parties. For example, in higher-risk transactions such as with a state-owned entity there is a risk that if there is a change of political regime, a subsequent regime may seek to undo previous commercial contracts. In doing so the new regime could make unsubstantiated allegations of fraud or corruption to set aside a contract or to resist enforcement of an award against them, and in such instances a detailed evidential record will be invaluable.

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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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