ORARO & COMPANY ADVOCATES

LEGAL & KENYAN

ORARO & COMPANY ADVOCATES NEWSLETTER | ISSUE 5 | APRIL 2017

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A "pentagon" issue

Greetings!

The number five signifies strength and it is our earnest belief that the fifth issue of Oraro & Company's Newsletter, Legal & Kenyan, is testament to the publication going from strength to strength. We are grateful for the feedback received on our previous issues and we continuously strive to improve with each passing issue.

We are once again honoured to have a helping hand from one of our external partners, this time from Duncan Bagshaw of Stephenson Harwood, London. *Asante sana*, Duncan!

In this "pentagon" issue, Juliet C. Mazera and Beryl Rachier discuss the salient aspects of the Bribery Act, 2016 and examine its efficacy in tackling the troublesome vice of corruption in Kenya. I analyse the provisions of the Local Content Bill which is pending for debate before the Senate and if passed, is poised to change the way Kenya's extractive industry works, by entrenching local interest in the sector. Nelly Gitau and Lena Onchwari explain the mechanism behind share buybacks, which is an entirely new feature in Kenyan Company law. Walter Amoko reflects on the freedom of religion in learning institutions, while Daniel Okoth and I look at the Access to Information Act, 2016 which has paved the way for the members of the public to access information pursuant to Article 35 of the Constitution. Chacha Odera and Jill Barasa give a "lesson" on Court manners in the context of the new Contempt of Court Act, 2016, while Walter Amoko and Geoffrey Muchiri discuss the effect of fraud on insurance contracts. Lastly but certainly not least, Duncan Bagshaw takes us through the availability of security in Arbitrations conducted under the New York Convention in the light of a recent decision by the Supreme Court of England.

We do hope you enjoy the read!

Sincerely,

John Mbaluto,
Editor

Senior Partner's Note:

"One of my favourite Swahili proverbs is, "*Mti hauendi ila kwa nyenzo*," roughly translated it means that a log moves only with the proper tools. The saying is an accurate reflection of our current philosophy. We have recently bolstered our practice to provide broader expertise in areas such as intellectual property, real estate and tax. The variety of insights in this newsletter we believe reflects this new breadth. We certainly hope you find this issue informative."

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"Litigation is a very strong area for Oraro & Company. They are very knowledgeable and well respected in this field."

Chambers Global, 2017

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GREASE-PROOFING:

HIGHLIGHTS OF KENYA'S ANTI-BRIBERY LEGISLATION

A banner headline touching on a mega corruption scandal is an all too familiar feature in Kenyan newspapers. Similarly, irregularities in the conduct and award of public tenders are commonplace in the country, so much so that the sarcastic jibe, *"lipa kama tender"* (which translates to pay like a tender) is often directed at Government. The corruption vice has an obvious adverse impact on the economy and is an impediment to business where there is an unspoken rule that "facilitation" payments and other inducements are necessary in order to obtain certain services or business opportunities. Sadly, the country ranked 145 out of 176 countries on Transparency International's Corruption Perceptions Index 2016.

There is really no shortage of legislation meant to tackle corruption in Kenya, as Parliament has enacted the Anti-Corruption and Economic Crimes Act, 2011, the Ethics and Anti-Corruption Commission Act, 2011 and more recently, the Bribery Act, 2016 (**the Act**). The Act came into operation on 13th January 2017 and its purpose is to govern the prevention, investigation and punishment of bribery.

Offences under the Act

The Act prescribes that it is a bribery offence where a person offers, promises or gives financial or other advantage to another person who knows or believes the acceptance of that advantage would constitute the improper performance of a function or activities.

An advantage has been defined to include money, loan, fee, reward, office, employment, contract, release/discharge of any loan or liability, as well as protection from any penalty including disciplinary penal proceedings. It is important to note that it does not matter whether the person to whom the advantage is offered, or promised, or given is the same person who is required to perform the function. This essentially aims to place liability on any person involved in connection with the impugned activity.

One would imagine that receiving a bribe only entails the actual receipt of the advantage. However, the Act provides that a mere request or an agreement to receive the advantage also constitutes an offence.

The inverse also applies where the recipient of the bribe requests for or agrees to receive or accepts an advantage and the request, agreement, or acceptance constitutes the improper performance of a relevant function by that person.

It does not matter whether the recipient requests for, agrees to receive, receives or intends to request for the advantage directly, or through a third party, or whether the advantage is intended for the benefit of the recipient or another. Further, knowledge by the person giving the bribe that the performance of the function is improper is irrelevant.

The offence is deemed to be committed where it relates to a function or activity where the person is expected to perform it in good faith, be impartial or is in a position of trust. These functions are characteristic of many transactions in Kenya, for example approvals from Government agencies and procurement processes. A relevant function whether performed within or outside Kenya, includes any function or activity of a public nature, carried out by a State or public officer, or a foreign public official. The scope of the Act is quite wide as a relevant function has been defined to include any activity connected with a business or in the course of employment.

Responsibility of Organisations

Apart from an individual being held liable under the Act, where a person associated with a private entity bribes another with the purpose of obtaining business or an advantage for the private entity, that private entity is deemed to have committed an offence. This provision places investors and organisations on alert to be aware of the activities and conduct of their employees and to avoid liability being imputed on the organisation on account of an employee or agent.

In light of the above, the Act recognises the need for organisations to train their employees and agents and therefore places a mandatory obligation on public and private entities to put in place procedures for the prevention of bribery and corruption (**prevention procedures**). The Cabinet Secretary in consultation with the Ethics and Anti-Corruption Commission is to publish guidelines to assist in the preparation of prevention procedures.

A director or senior officer of a private entity is deemed to commit an offence under the Act if it is proved that failure of the private entity to put in place prevention procedures was done with their consent or connivance. It would however appear that no penalties apply to public entities such as the Government and statutory public bodies for failure to comply with the requirement to put in place prevention procedures. It is peculiar why public entities cannot be held liable in this respect, yet a majority of hurdles faced by investors is with respect to their dealings with public entities.

In addition to placing prevention procedures, there is an obligation on a person holding a position of authority in a public or private entity to report within twenty four (24) hours of any knowledge or suspicion of instances of bribery. Failure to do so constitutes an offence under the Act.

Whistle Blowers

The Act also recognises that for the effective prevention and investigation of bribery, some protection must be given to those persons with information relating to such activities. To this end, a whistle blower is protected from intimidation to provide information or give testimony in Court. Further, any adverse actions with respect to a whistle blower's employment, for example, demotion, termination or unfavourable transfer is deemed to be an offence punishable by a fine of KES 1 million (USD 10,000) or imprisonment for a term not exceeding one (1) year.

*The Act recognises the need for organisations to train their employees and agents and therefore places a mandatory obligation on public and private entities to put in place procedures for the prevention of bribery and corruption (**prevention procedures**).*

Accessories to Bribery

Liability under the Act is not limited to the person offering the bribe, the recipient or person performing the function. It also attaches to a person or private entity that obtains property intended for use in a bribe, uses, transfers or has in possession property obtained in connection with a bribe or records such property in the financial records of the entity. Investors and organisations must therefore be cautious when investing or acquiring assets where property may have been obtained in connection with a bribe, and this underscores the importance of thorough due diligence.

Penalties

The investigation and prosecution of offences under the Act are to be governed by the already existing Anti-Corruption and Economic Crimes Act, 2011. A person found guilty of offering, receiving or assisting in the giving or receiving of a bribe shall be liable on conviction, to imprisonment for a term not exceeding ten (10) years or to a fine not exceeding KES 5 million (USD 50,000) or both. Further, if the person received a quantifiable benefit or another person suffered a quantifiable loss, a mandatory fine equal to five (5) times the amount of benefit or loss may be imposed.

Additional remedies imposed by the Court include an order compelling the person or entity to pay back the amount or value of the advantage received or an order for confiscation of property received.

Other penalties relate to the ability of the persons found guilty to continue in their roles. Persons such as directors and partners may be disqualified from serving in those positions for a period not more than ten (10) years. There are also restrictions on running for public office or transacting with the Government if found culpable of an offence under the Act.

Conclusion

Investors and organisations can now be protected under the provisions of the Act to eradicate hurdles previously faced in doing business. However, on the same token, individuals and private entities are placed on alert as they may be held liable if found to have engaged in activities in connection with bribery.

On the effectiveness of accountability and liability, only time can tell as a leaf may be borrowed or lessons learned from the effectiveness of prosecutions conducted under the Anti-Corruption and Economic Crimes Act, 2011.

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HOMEGROUND ADVANTAGE:

ENTRENCHING LOCAL INTERESTS IN THE EXTRACTIVE INDUSTRY

Background

Kenya has recently discovered several blocks of natural gas and oil spanning several counties. However, most of these counties are poor, including Turkana which is known to have the most promising oil fields that could be exploited as early as June, 2017. Lamu and Wajir also have natural gas.

It has been observed that countries which are rich in natural resources, specifically non-renewable resources like minerals and fuels, somewhat paradoxically tend to have slow economic growth, little or no democracy leading to authoritarian rule, sluggish development and are more prone to conflict as compared to countries with fewer natural resources. This situation has been coined the "resource curse" or the "paradox of plenty".

Resource Curse

The term resource curse was first used by a British economist, Richard Auty, in 1993 to describe how countries rich in mineral resources were unable to use that wealth to boost their economies and how contradistinctively, these countries had lower economic growth, than countries without an abundance of natural resources.

Avoiding the resource curse was one of the key issues raised by the public in 2012 after the Kenyan government announced that commercially viable oil had been discovered in Turkana. Several members of the public were apprehensive as they did not want Kenya to suffer the same resource curse suffered by several African countries such as Equatorial Guinea, Liberia, Libya, Nigeria, Republic of Congo, Sierra Leone and Sudan.

The Local Content Bill, 2016

Cognisant of the above, the Senate Committee on Energy, Roads and Transportation introduced the Local Content Bill in July 2016 (**the Bill**). The Bill is intended to avert the conflicts that have rocked communities in oil and gas rich areas by ensuring that the majority of poor Kenyans in those areas are assured of enjoying the benefits of natural resources.

The Bill is premised on Article 69(1) of the Constitution which imposes an obligation on the State to among other things, ensure the sustainable exploitation, utilisation, management and conservation of the environment and natural resources and ensure the equitable sharing of the accruing benefits and to ultimately utilise the environment and natural resources for the benefit of the people of Kenya.

Objectives of the Bill

The Bill seeks to provide a framework to facilitate local ownership, control and financing of activities connected with the exploitation of gas, oil and other mineral resources. It also seeks to make provision for an increase in local participation along the value chain in the exploration of gas, oil and other mineral resources.

The Bill also seeks to ensure that local content is entrenched in every aspect of the extractive industry through the involvement of local communities which should lead to the enhancement of the income received by local communities following their involvement in the extractive processes, for example, by ensuring that landowners and owners of resources receive the revenue due to them following use of their land and resources.

Further, the Bill looks to facilitate the development of local economies through the creation of employment opportunities and by ensuring the procurement of goods and services that are produced locally. Additionally, the Bill aims to stimulate local industrial development, capacity building and to increase the local capability to meet international standards in the supply of goods and services.

Local Content Committee

The Bill establishes a Local Content Development Committee (**the Committee**) whose functions include overseeing, coordinating and managing the development of local content in Kenya; making recommendations and advising the Cabinet Secretary in the Ministry of Mining (**the Cabinet Secretary**) on formulations of policy and strategies for the development and implementation of local content; making recommendations to the Cabinet Secretary on the minimum standard requirements for local content and the development of the local content plans; appraising, evaluating and approving local content plans and reports submitted to the Committee; overseeing, in consultation with the county governments, the implementation of local content policies and strategies by operators and collaborating with county governments in the implementation of strategies to improve the capacity of local persons, businesses and the capital markets to fully leverage the objectives of the intended Act.

Local Content Plan

Under the Bill, oil and gas companies will now be required to state how local communities will benefit from the proceeds of the extractive processes before they are licensed. The companies are required to submit a Local Content Plan (**the Plan**) to the Committee in which they should set out information regarding the procurement and utilisation of locally produced goods and services, the qualification requirements and employment of local persons to be engaged in the extractive industry, workforce development strategies in relation to locals and strategies for the support of local participation in the activities of the operator.

The operator is also required to set out in the Plan the strategies through which it intends to give priority to goods produced and services delivered locally and to also give priority to qualified local persons with respect to employment opportunities.

Skills and Technology Transfer

The Bill requires oil and gas exploration companies to commit to a skills and technology transfer agreement with local firms and individuals. This will ensure more Kenyans are employable and have the skills required for job opportunities in the extractive industry.

An operator is also required to submit to the Committee, a succession plan for any position not held by a local person within a period of six (6) months from the commencement of its operations. This provision seeks to ensure that where a certain position is held by an incumbent expatriate, the role will be taken up by a local person within a specified time.

The Bill also requires the Cabinet Secretary for Environment and Natural Resources to issue guidelines and contracting standards on thresholds to be attained by each operator with respect to the percentage of local equity ownership of companies engaged in the extractive industry.

Local Content Training and Development Fund

The Bill established the Local Content Training and Development Fund (**the Fund**) and requires the extractive industry players to remit such percentage of their net revenues to the Fund as will be determined by the Cabinet Secretary in consultation with the Committee for the purpose of training locals. This provision is aimed at ensuring that in the future, local content requirements are fully implemented as required under the Bill.

> *The Bill requires oil and gas exploration companies to commit to a skills and technology transfer agreement with local firms and individuals. This will ensure more Kenyans are employable in the extractive industry.*

A Nigerian Perspective

It is arguable that the discovery and exploitation of oil in Nigeria has been more of a curse than a blessing. The oil has benefited only a few people and this has resulted in frequent conflicts amongst communities, particularly in the oil-rich Delta region.

The Nigerian Oil and Gas Industry Content Development Act, 2010 (**the Nigerian Act**) on local content was thus enacted with similar intentions as the Kenyan Bill. The Nigerian Act seeks to increase indigenous participation in the oil and gas industry by prescribing minimum thresholds for the use of local services and materials and to promote transfer of technology and skills to the Nigerian labour force in the industry.

Like the Kenyan Bill, the Nigerian Act provides for preferential treatment of local ventures and workforce. It also provides a host of requirements designed to ensure workforce development of and technology transfer to Nigerians as a first option. It requires that, whenever possible, operators should hire Nigerians. When the operators are unable to find skilled workers, the Nigerian Act then requires that they put in place programs and procedures for training workers and to make periodic progress reports to the Nigerian Content Monitoring Board.

In addition, the Nigerian Act mandates that operators provide a succession plan for all positions filled by expatriates, except for five percent (5%) of management positions, which may be permanently held by foreigners, with Nigerians taking over after a maximum of four (4) years of apprenticeship under incumbent expatriates.

Conclusion

While the Memorandum of Objects and Reasons of the Kenyan Bill states that one of its objectives is to provide a framework to ensure that landowners and owners of resources receive the revenue due to them, it would appear that the Bill does not have express provisions on exactly how the proceeds of the extractive industry are to be shared with the local community.

The Bill seems to place more focus on the involvement of the local community in the mechanical processes of the extractive industry through the provision of goods and services required for the industry and less on actual distribution of the income generated from the extractive industry.

It may therefore be concluded that while the Bill provides a good starting point on addressing the concerns of the public regarding the direction Kenya is taking to safeguard local interests in the extractive industry, the question as to how effective the Bill will be in achieving its stated intention will be answered once the Bill is passed into law and with the passage of time.


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NEW IN THE MARKET:

SHARE BUYBACKS UNDER THE COMPANIES ACT, 2015

Share buybacks refer to the repurchasing of shares by the company that issued them. Until recently, the concept of share buybacks in Kenya was foreign. However, the coming into force of the Companies Act, 2015 (**the Companies Act**) introduced the concept to Kenya.

In a typical share buyback transaction, a company buys back its shares and then cancels them and the amount of the company's issued share capital is diminished by the nominal value of the cancelled shares. This effectively leaves the remaining shareholders with larger stakes in the company.

Rationale

There are several reasons why a company may repurchase its own shares. A common reason is that the company may have some extra money to spend. One of the ways a company can apply surplus funds is to purchase its own shares.

Another reason why a company may repurchase its own shares is to take advantage of undervaluation. If a stock is dramatically undervalued, the issuing company can repurchase some of its shares at this reduced price and then re-issue them at a later date once the market has corrected, thereby increasing its equity capital without issuing any additional shares.

Yet another reason for which share buybacks may be used, is to facilitate the exit of a member through the disposal of his shares, with the company purchasing the exiting member's shares.

Preliminaries

The company should take into account the following preliminary considerations before carrying out a share buyback:

- Whether the company's articles permit the buyback. A company will be deemed to have authority so long as the articles do not prohibit the buyback
- Whether there are any private agreements (e.g. shareholder agreements) which may prohibit the company's ability to purchase its own shares
- Whether there are any pre-emption rights which restrict the transfer of shares e.g. there may be a requirement for the shares proposed to be bought back to be offered to existing shareholders before they can be transferred to the company. If triggered, these provisions would need to be complied with or amended before the company undertakes a share buyback
- Whether there is any prohibition on giving financial assistance which could prevent the company from buying its own shares. Under the Companies Act, a company may give financial assistance for the acquisition of its own shares, so if there is any restriction on the giving of financial assistance in the company's constitution, this should be removed
- Whether the company has more than one class of shares. Whether the buyback will result in the variation of the rights attaching to those classes of shares (in which case class consent to vary will be required)
- Whether there is any banking facility which might restrict the company's ability to undertake a buyback

In order to give effect to a share buyback, a company must enter into a contract with the shareholder(s) whose shares are to be purchased. It is usually a simple agreement providing for the company to purchase the shares or it can be a contract under which the company may become entitled or obliged to purchase the shares in the future subject to certain conditions being met. It need not be a stand-alone contract and can be incorporated into the company's articles as a standing authority to buyback.

The terms of the contract should be approved by a special resolution of the company either before the contract is entered into or the contract should state that no shares will be purchased until its terms have been approved by resolution of the shareholders.

After the share buyback, the company must lodge a return of purchase with the Registrar of Companies (**the Registrar**) and after the shares are cancelled a notice of the same must be also lodged with the Registrar together with a Statement of Capital.

Restrictions

The Companies Act has introduced provisions that allow companies limited by shares, whether private or public and companies limited by guarantee with a share capital to purchase their own shares (including redeemable shares) subject to any restrictions or prohibitions in its articles and the provisions of the Act on purchase of its own shares by a company.

Under the Companies Act, a limited company may not purchase its own shares if as a result of the purchase there would no longer be any issued shares of the company other than redeemable shares or shares held as treasury shares. Secondly, a limited company may not purchase its own shares unless they are fully paid and lastly a limited company may purchase its own shares only out of distributable profits of the company or the proceeds of a fresh issue of shares made for the purpose of financing the purchase. A private limited company may however purchase its own shares out of capital.

Types of Share Buybacks

The power of a limited company to purchase its own shares may be exercised in three (3) ways: by an off-market purchase; by a market purchase; by a contingent purchase contract.

(i) Off-market purchases

An off-market purchase is defined as one which is not effected on an approved securities exchange, or one which is so effected but the shares are not subject to a marketing arrangement on the exchange. Principally, therefore, purchases by private and non-listed public companies and over-the-counter purchases by listed companies are "off-market" purchases.

(ii) Market purchases

Alternatively, a company may purchase its own shares by a market purchase. A purchase is a market purchase if it is made on an approved securities exchange and the shares are not subject to a marketing arrangement on the exchange. This means that market purchases do not apply to private limited companies.

(iii) Contingent purchase contracts

A contingent purchase contract is a contract entered into by a company and relating to shares in the company, that does not amount to a contract to purchase the shares but under which the company may (subject to any conditions) become entitled or obliged to purchase the shares.

The simplest example of a contingent purchase contract is a "put" option given by a company to one of its own shareholders under which the company will become obligated to acquire a certain number of shares from him at an agreed price if the shareholder exercises the option. Similarly, a "call" option taken by a company will be a contingent purchase contract, since it entitles the company to require the other party to transfer a certain number of shares in the company at an agreed price, if the company chooses to call on him to do so.

In a typical share buyback transaction, a company buys back its shares and then cancels them and the amount of the company's issued share capital is diminished by the nominal value of the cancelled shares.

Benefits

Share buybacks reduce the number of shares available in the market. This has the potential of increasing earnings per share on the remaining shares, benefiting shareholders. Buybacks can also serve to increase share prices by simply reducing the supply of available shares in the market and as per the demand theory, a lower supply can cause an increase in price in some cases.

Share buybacks can also be used to boost shareholder confidence in the company as the shareholder will view the purchase of undervalued shares by the company as a sign of confidence by the company. Also, when a company's share price has suffered a significant fall in the market, a buyback can be a good way for a company to cushion its shareholders.

Buying back stock can also be an easy way to make a business look more attractive to investors. By reducing the number of outstanding shares, a company's earnings per share ratio is automatically increased.

Disadvantages

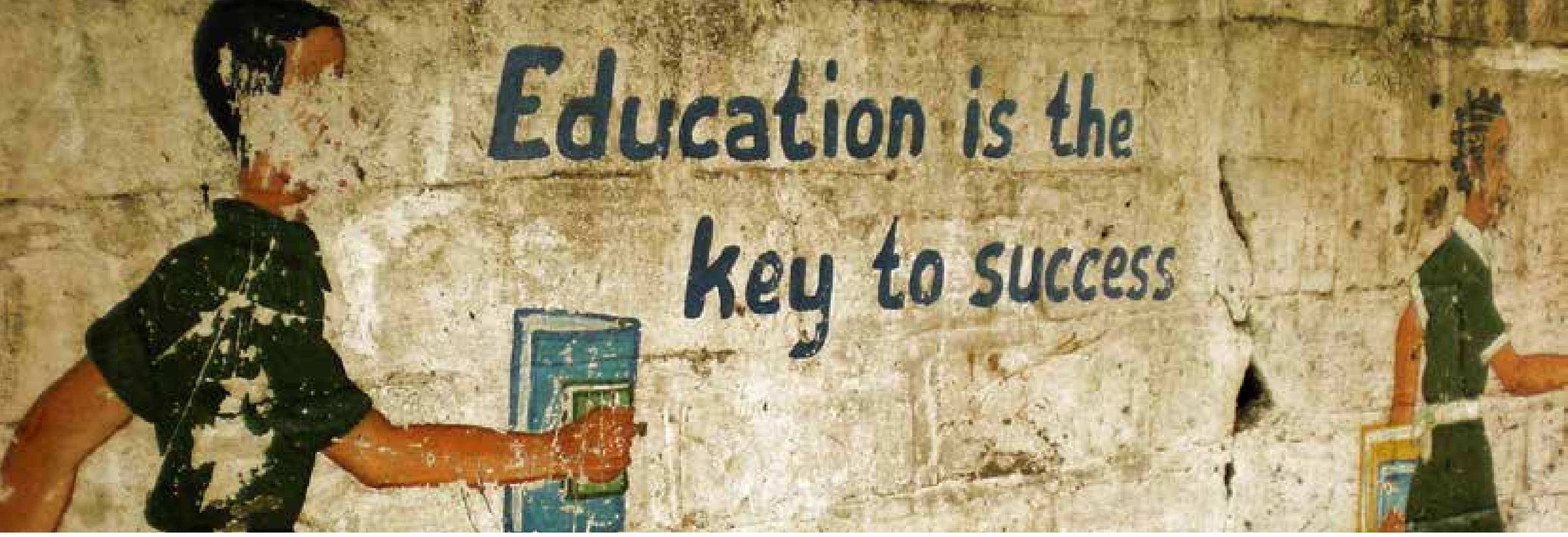
For years it was thought that share buybacks were a positive thing for shareholders. However, there are some downsides to buybacks as well. The impact of buybacks on earnings per share can give an artificial lift to the stock and mask financial problems that would be revealed by a closer look at the company's ratios. Some have said that companies use buybacks as a way to allow executives to take advantage of stock option programs while not diluting earnings per share. Share buybacks can also create a short-term bump in the share price that some say allows insiders to profit, while other investors might buy in after they see the prices move higher.

Tax

A buyback of shares from a shareholder will trigger capital gains tax at the rate of five per cent (5%) on the gain. The capital gains tax is payable by the shareholder. The company on the other hand will also be liable to pay stamp duty at the rate of one per cent (1%) on the share purchase price when buying back the shares.

Conclusion

The Companies Act has elaborately set out the different ways, a limited company can exercise its power to purchase its own shares and set out the procedure for the same. It should however be noted that the share buyback scheme is novel in Kenya and that there are presently no regulations that govern share buyback transactions, neither have prescribed forms been issued. Be that as it may, the share buyback concept is a welcome development in Kenya, as it is a tool whose benefits far outweigh the disadvantages.

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PRAYING AND LEARNING:

SOME CONSTITUTIONAL DIMENSIONS ON THE FREEDOM OF RELIGION

Given the different religious and cultural backgrounds of students, religion can be a flashpoint for potentially debilitating conflicts in schools and other learning institutions. This is profound as schools should ideally present an opportunity to live out at an early stage in the development of young and impressionable citizens one of the aspirations contained in the preamble to our Constitution, *"proud of our ethnic, cultural and religious diversity, and determined to live in peace and unity as one indivisible sovereign nation."*

Ideally, the balancing of dissimilar sets of beliefs and practices in schools can lead to a virtuous circle of plurality and harmony as opposed to a vicious one of intolerance which could set the stage for religious discord that has blighted much of human history and is still prevalent in some parts of the world.

Historical Backdrop

The history of the enlightenment values of religious freedom and tolerance was partly borne out of repudiation of among other things religious persecution of minority religious groups as they all once were, before the Catholic hegemony was broken; the religious wars that plagued 16th and 17th Century Europe; the sad history of persecutions of non-favoured religion in England since King Henry VIII denounced Papal authority culminating in the infamous abuses by the Star Chamber as shifting religious affiliations of English monarchs targeted different groups; and the mass migration to the 'New' world to avoid persecution.

The shift to the recognition of freedom of conscience was animated by the spirit of toleration of the plurality of the religious belief as explained by John Locke - *"What has produced all the religious quarrels and wars that have occurred in the Christian world is not the (inevitable) diversity of opinions but rather the (avoidable) denial of toleration to those who are of different opinions."* Articles 27 and 32 of the Constitution repudiate the history of religious conflicts and persecutions and instead embrace and entrench the tolerance Locke advocated.

It was inevitable that the balance (or imbalance, if you will) of religion in schools would be the subject of Constitutional litigation especially on behalf of religious minorities. Initial challenges before the High Court failed as the Judges felt religious minorities were essentially asking for a special pass they were not entitled to, exempting them from general laws and regulations. These cases include *Ndanu Mutambuki & 119 others v Minister for Education (2007) eKLR, Republic v Kenya High School & another ex parte SMY (2012) eKLR, Mohamed Fugicha v Methodist Church in Kenya & 3 others (unreported) Meru Petition 30 of 2014; Seventh Day Adventist Church (East Africa) Ltd v Minister of Education & others (2014) eKLR.*

In the *Ndanu Mutambuki* case, Justice Nyamu dismissed an interlocutory application seeking conservatory orders in a Constitutional petition based on Section 78 of the old Constitution in which female minors belonging to a church known as *Arata Aroho Mutheru Society* challenged a prohibition against the wearing of headscarves in school, as wearing such headscarves was a mandatory requirement of their faith. Justice Nyamu was unimpressed and dismissed the application as he found no infringement of the rights guaranteed under Section 78 of the old Constitution. It was held, amongst other things, that headscarves were not a fundamental tenet of the petitioners' faith but an afterthought arbitrarily introduced by their spiritual leader. The Judge further found that upon admission to the school, the petitioners' consented to wear the prescribed uniform and that the uniform requirement was justified in order to instill discipline and equality in school and under Section 70 of the previous Constitution.

Expansive Bill of Rights

With the promulgation of the current Constitution, which boasts an expansive Bill of Rights, it was expected that the resolution of such challenges on behalf of religious minorities would be different. Surely Article 8 of the Constitution which stipulates that there is no state religion thus making Kenya a secular state and the explicit provisions in the Bill of Rights that are, *"an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies"*, dictated a favourable outcome. The expectation was also founded upon Article 32 on freedom of conscience, religion, belief and opinion, Article 56 on protection of minorities and Article 27(4) which prohibits discrimination on account of among, other things, religion, conscience, belief and culture.

Dashing such hopes was the *Kenya High School* case, in which the applicant sought an order compelling the Principal and Board of Governors of the Kenya High School to allow students professing the Islamic faith to wear the *Hijab* as directed by the Ministry of Education. Following the decision of the *Ndanu Mutambuki* case, Justice Githua dismissed the petition holding that the rights under Article 32 were not absolute and could be legitimately restricted to prohibit wearing of *hijabs* for the sake of a common uniform for all students. The Judge also invalidated the directive from the Ministry.

Further decisions referred to above followed this trend as religious minorities were required to conform with general rules of school respecting days of worship or dress code notwithstanding contrary dictates of their faiths.

In effect, the High Court continued to uphold arguments offered by the affected learning institutions which include dystopian nightmares in which liberally allowing the practice of divergent faiths would visit unmanageable chaos in the learning institutions and offend the practices and beliefs espoused by the sponsoring religious groups or the religious history of the school would be adversely affected by allowing religions alien to it.

Institutions also claim that they face challenges, for example, that some religious groups worship on different days of the week whilst others would demand to dress in a particular manner different from majority of the learners. They add that in a bid to ensure equality and avert any form of discrimination, all learners regardless of their social and religious background, ought to be subject to the same rules and regulations prescribed by the learning institution which they voluntarily agreed to be bound by upon admission. In any event, the Courts had to respect their right to run the institution as they deem fit.

Progressive Precedents

The Court of Appeal has now in two separate decisions by differently constituted panels vindicated the hope of religious minorities who are being forced to conform with majoritarian practices at the expense of their conscience or the tenets of their faith.

In *Mohamed Fugicha v Methodist Church in Kenya & 3 others (2016) eKLR*, the Court considered an appeal from the decision of the High Court which had dismissed a Constitutional petition where the petitioner had sought the declaration that the decision to bar his daughters, Muslim girls, from wearing hijab and white trousers in a Methodist Church sponsored school, was unconstitutional.

In allowing the appeal, the Court emphatically upheld the freedom of religion, and rejected the notion that equality requires equivalent treatment. Their Lordships held:

"To our mind this is a duty requiring a sponsor to rise above and go beyond the narrow parochialism and insularity of its own religion or denomination and respect the equal right of others to be different in religious or denominational persuasion. It is a call to broadmindedness and respect for others including those whose creeds and the manner of their manifestation may be unappealing or baffling. It is a duty to uphold the autonomy and dignity of those whose choices are discordant with ours and acknowledgment of heterodoxy in the school setting as opposed to a forced and unlawful artificial and superficial homogeneity that attempts to suppress difference and diversity.

"...In obedience to that explicit direction, we are clear in our minds that the view we have taken that the Muslim girls ought to have been allowed to wear the hijab promotes the values and principles of dignity, diversity and non-discrimination. We also advance the law by making a definite finding that what the school did to Fugicha's daughters' amounts to indirect discrimination, a concept on which there appears not to have been any judicial engagement from the jurisprudence that has so far flowed from the High Court. We affirm, endorse and uphold the rights of equality and freedom of religion as set out in Articles 27 and 32 of the Constitution."

It was inevitable that the balance (or imbalance, if you will) of religion in schools would be the subject of Constitutional litigation especially on behalf of religious minorities.

This has been followed and emphatically affirmed in *Seventh Day Adventist Church (East Africa) Ltd v Minister for Education & others (unreported) Civil Appeal No. 172 of 2014* in which their Lordships succinctly capture the core of the freedom guaranteed under Article 32 of the Constitution.

"The right to freedom of conscience, religion, thought, beliefs and opinion, as explained above in its various facets is far-reaching and profound; it encompasses freedom of thought on all matters, personal conviction and the commitment to religion or belief, whether manifested individually or in community with others, privately or in public. The manifestation through observance includes observance of a day of worship, and a believer will not be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice."

The Court subjected the various justifications offered by learning institutions to searing scrutiny and ultimately rejected them, reminding learning institutions of their obligations to operate within the law and to respect the rights of students.

The Judges were not insensitive to the problems of balancing the competing interests in issue and therefore provided guidance as to how this was to be achieved under the concept of reasonable accommodation whereby, *"In schools with multi-faith students, the students are able to co-exist, each practising their respective religions and balancing that with their right to education under the law, while at the same time, complying with school rules and regulations."* At the heart of such reasonable accommodation is the requirement that to honour and give effect to the Constitutional guarantee of conscience, schools must be prepared to incur the costs and bear inconvenience required for rights to be respected.

They also gave valuable elucidation as to what was required for a restriction on the exercise of a fundamental right or freedom to pass muster under Article 24 of Constitution, holding that all its strictures must be fully complied with, for a restriction to be upheld.

Lessons Learned

The lessons to be taken from the foregoing is that learning institutions need to bring themselves up to speed with the Constitutional and statutory duties by not only permitting learners to fully subscribe to and practise any faith of their choice but also avoid imposing their preferred religion upon learners. They also need to adopt liberal thinking which promotes religious diversity and strive to eliminate any form of intolerance or discrimination. In the words of Judge Dickson in *R v Big M. Drug Mart Ltd (1985) 1 SCR 295*:

"A truly free society is one which can accommodate a wide variety of beliefs, diversity and tastes and pursuits, customs and codes of conduct. A free society is one which aims at equality with respect to the enjoyment of fundamental freedoms... Freedom must surely be founded on respect for the inherent dignity and the inviolable rights of the human person. The essence of the concept of freedom of religion is the right to ascertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination."

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ACCESS GRANTED:

A LOOK AT THE ACCESS TO INFORMATION ACT, 2016

Prior to 2010, the right to access information was not easily enforceable in Kenya. Indeed, if information was required for any given purpose, the only recourse was to politely request for the same and hope for the custodian's magnanimity. However, the promulgation of the Constitution of Kenya, 2010 (**the Constitution**) which was propelled by well-documented historical injustices as well as the bloody aftermath of the 2007 elections, has been lauded as ushering in the most progressive Bill of Rights in the continent, drawing comparisons with the South African Constitution. Amongst other fundamental human and socio-economic rights provided for in the Constitution is the right of access to information.

Constitutional Framework

Article 35 of the Constitution provides for the right of every citizen to access information held by the State and information held by another person and required for the exercise or protection of any right or fundamental freedom. The Article further provides for the right of every person to the correction or deletion of untrue or misleading information that affects that person and concludes by obligating the state to publish and publicize any important information affecting the nation.

As with other provisions of the Constitution, given its relative novelty, attention soon turned to the Courts for interpretation on the full extent of the rights and obligations created under Article 35.

Approach by the Courts

In the case of *Famy Care Ltd v Public Procurement Administrative Review Board & Another (2012) eKLR*, the High Court held that the right of access to information under Article 35 has an implicit limitation that the right is only available to a Kenyan citizen. Unlike other rights which are available to "every person" this right is limited by reference to the scope of persons who can enjoy it. The Court went on to hold that a reading of the Constitution and an examination of words "person" and "citizen" within the Constitution could only lead to one conclusion – that the definition of a citizen in Article 35 must exclude a juridical person and a natural person who is not a citizen.

A similar determination was arrived at in the case of *Nairobi Law Monthly Company Limited v Kenya Electricity Generating Company & 2 Others (2013) eKLR* (**Nairobi Law Monthly Company Limited case**), where the High Court held that the right to freedom of information is limited to citizens. The Court further held that citizens are entitled as of right to information held by the State, while the right of access to information held by other persons is limited to instances where a citizen can show that the information is required for the exercise or protection of a fundamental right or freedom.

The Paradox

The jurisprudence flowing from case law presented somewhat of a paradox – that a body corporate or a company was not entitled to the right to access to information which could possibly incapacitate the juristic body's ability to enforce other rights available to it under the Bill of Rights. For instance, in the case of *Friends of Lake Turkana Trust v the Attorney General & 2 Others (2014) eKLR*, it was recognised that the right to access environmental information, to which Article 69 of the Constitution places an obligation on the state to encourage public participation in the management, protection and conservation of environment, necessitates the accessibility to such information as might be necessary to monitor the activities of both the Government and private sector on the environment. It cannot be gainsaid that juristic persons, who dominate the field of environmental management and conservancy, would need to access the relevant information to enforce environmental rights.

Another example is seen under Article 40(1) of the Constitution which guarantees the right of every person (which includes juristic persons) to either individually or in association with others, to acquire and own property. It was an unsettled question whether a juristic person would be permitted to access information held by the state or another private person for the purposes enforcing its right to property. Of significance would have been the need to protect property owners, whether natural or juristic persons, during a process of compulsory acquisition and the inability of such persons to access the information ought not to defeat the enforcement of this right.

The Access to Information Act, 2016

The Access to Information Act, 2016 (**the Act**) was enacted in order to give effect to the right of access to information as provided under Article 35 of the Constitution. The Act came into force on 21st September, 2016.

Citizen

Section 2 thereof defines "citizen" to mean any individual who has Kenyan citizenship and any private entity that is controlled by one or more Kenyan citizens. This definition supersedes the decision by the High Court in the Nairobi Law Monthly Company Limited case to the extent that it held that, a legal person created under the Companies Act, 2015 was not a "citizen" that may have a right of access to information as contemplated under Article 35. Private companies and other juridical bodies entities can now breathe easy knowing that the enforcement of their rights can now not be prejudiced by lack of information.

Limitation

It is however worth noting that Section 6 of the Act limits the right of access to information in respect of information whose disclosure is likely to, amongst others, undermine national security, impede due process of law, involve the unwarranted invasion of the privacy of an individual other than the applicant, substantially prejudice the commercial interests including intellectual property rights of the person or entity from whom the information is sought or infringe the professional confidentiality as recognised in law or by rules of a registered association of a profession.

Objectives

Section 3 of the Act provides for the objectives of the Act to include providing a framework for public entities and private bodies to provide information on request in line with the constitutional principles. Further, the Act provides a framework to facilitate access to information held by private bodies in compliance with any right protected by the Constitution.

In the Nairobi Law Monthly Company Limited case it was also held that a person seeking information is required to make a request for such information. A violation of the right to information cannot be alleged before a request for information has been made. In the case of *Kituo Cha Sheria & Another v Central Bank of Kenya & 8 Others (2014) eKLR*, the High Court affirmed the assertion that the right to information is not a blanket cover for the petitioners to seek information that they are curious about, but have not requested for. There must be a request for information before a party entitled to that information can allege violation.

Written Application

The Act contains extensive provisions on applying for access to information. Section 8 requires that an application shall be made in writing in English or Kiswahili unless the applicant is unable to make a written request because of illiteracy or disability in which case, necessary steps will be taken to ensure that the applicant makes a request in a manner that meets their needs. The Act further limits the period within which a decision on the application for information is to be made, to twenty one (21) days subject only to extension on a single occasion for a period of not more than fourteen (14) days.

> *The Act equally clarifies the obligations of the State as well as other custodians of information to allow for the hitherto unavailable right of access to information.*

No Fee

Section 12 of the Act prohibits the levying of fees in relation to the submission of an application. However, a public entity or private body to which an application for access to information has been made may charge a prescribed fee for the provision of the information and the fee shall not exceed the actual costs of making copies of such information and if applicable, supplying them to the applicant. In contrast, such entities or private bodies are to effect correction of information, at the request of an applicant, at their own expense.

Commission of Administration of Justice

In case the request for information is declined, the requester may apply to the Commission of Administration of Justice (**the Commission**) for review of the decision. An application for review may also be made against a decision made to grant access to information in edited form or a decision refusing to correct, update or annotate a record of personal information.

Public Interest

Another incisive provision of the Act is Section 16 which protects persons disclosing information which was obtained in confidence in the course of any employment, profession, contract, the holding of any office, if the disclosure is in the public interest. The Act prescribes that disclosure which is made to a law enforcement agency or to an appropriate public entity shall be deemed to be made in the public interest.

Enforcement

Section 20(1) of the Act grants the Commission the powers of oversight and enforcement of the Act. In case there has been an infringement of the Act, Section 23 empowers the Commission to order the release of any information withheld unlawfully, recommend for the payment of compensation, or grant any other lawful remedy or redress. Such an order made by the Commission is appealable to the High Court within twenty one (21) days from the date the order was made.

It is a basic principle of Constitutional law that where there are sufficient mechanisms to deal with a specific issue or dispute by other designated constitutional organs, the jurisdiction of the Courts should not be invoked until such mechanisms have been exhausted. It therefore means that a person must first comply with the steps and procedures outlined under the Act before invoking the jurisdiction of the Courts.

Conclusion

The Act is a laudable attempt to give effect to the purpose and intention of Article 35 of the Constitution and gives clarity on the extent of the right to access information, including the means of enforcing the right.

The Act equally clarifies the obligations of the State as well as other custodians of information to allow for the hitherto unavailable right of access to information.


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MIND YOUR MANNERS:
THE LATEST ON KENYA'S CONTEMPT OF COURT LAWS

The Contempt of Court Act, 2016 (**the Act**) came into force on 13th January, 2017 and represents an exciting development in Kenyan law relating to contempt of Court. The Act seeks among other objectives, to safeguard and bolster the dignity of Courts by ensuring compliance with Court orders and directions.

The words, "I hold you in contempt!" implicitly carry with them significant weight and one wouldn't want to be on the receiving end of that profound phrase. What then is contempt? Simply put, contempt is disobedience or disrespect of a Court of law or its officers.

Jurisdiction

Every Superior Court (meaning the High Court, Employment and Labour Relations Court or Environment and Land Court) shall have power to punish for contempt of Court and uphold the dignity and authority of subordinate Courts (such as the Magistrates' Court or a tribunal).

An offence of contempt of Court shall be tried by dispensing with formal proceedings dealing with discovery and the Court shall keep a record of the proceedings. However, proceeding, to try an offence of contempt of Court do not negate the right of any person to a fair trial and fair administrative action in accordance with the Constitution. Further, proceedings for criminal contempt cannot be instituted except by, or with the consent of the Director of Public Prosecutions, with the leave of the Court.

Defences

The Act provides for various defences to contempt of Court. These include but are not limited to fair comment on the general working of the Court made in good faith, in public interest and in temperate language; fair comment on the merits of a decision of a Court made in good faith and in temperate language; that the publication is a fair and substantially accurate report of any judicial proceeding; innocent publication; and that the publication was by a person who had no reasonable grounds to believe that such judicial proceedings were pending at the time of the publication of the matter.

The Act also provides that the fair criticism of a judicial act or the merits of a case which has been heard and determined does not amount to contempt. The Act also recognises that a person is not guilty for contempt in respect of a complaint made in good faith against the presiding officers of the Court.

The publication of information relating to proceedings held in chambers or in camera does not amount to contempt, except in certain cases such as where the publication is contrary to law or public policy, on the grounds of public order or national security, or where the information relates to a secret process, discovery or invention in issue before the Court.

A person is however not guilty of contempt of Court for publishing the text or a fair and accurate summary of the whole, or any part, of an order made by any court sitting in chambers or in camera, unless the Court has expressly prohibited its publication.

Court Recordings

In this day and age of near obsessive sharing of videos, photographs and screenshots, the use of recording devices in Courts is widespread. The Act nips this growing vice in the bud by providing for several actions as amounting to contempt such as using a recording device without the leave of the Court; publishing a recording of legal proceedings by playing it in the hearing of the public or any section of the public, or disposing it with a view to such publication; or using any such recording contrary to any conditions granted by the Court to record the proceedings.

The provisions of the Act on the use of recording devices however do not apply to the making or use of sound recordings for purposes of official transcripts of proceedings, a provision which speaks to the efforts by the judiciary to enhance the delivery of justice.

Disclosure

The Act provides that refusing to disclose the source of information contained in a publication for which the person is responsible does not

In this day and age of near obsessive sharing of videos, photographs and screenshots, the use of recording devices in Courts is widespread. The Act nips this growing vice in the bud by providing for several actions as amounting to contempt such as using a recording device without the leave of the Court.

amount to contempt unless the Court is satisfied that such disclosure is necessary in the interests of justice, national security, or for the prevention of disorder or crime.

Strict Liability Rule

Under the Act, there are instances where conduct may be treated as contempt of Court as tending to interfere with the course of justice particularly in the context of legal proceedings regardless of the intent to do so. This means that one may be found guilty of contempt and it shall be immaterial whether the interference was unintentional, what is known as the "strict liability" rule.

Publication

There are however limitations on the application of the rule firstly being that it only applies to publications which create a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced and secondly, it will apply only if the proceedings in question are active at the time of publication. The Act provides a Schedule which sets out the instances when proceedings are to be treated as being active.

The Act also recognises that a publication made as part of a discussion in good faith of public affairs or other matters of general public interest does not amount to contempt of Court if the risk of impediment or prejudice to legal proceedings is merely incidental to the discussion.

Procedure

Where the contempt is committed in the presence or hearing of a Superior Court, the Court may cause such person to be detained in custody and at any time before the rising of the Court, on the same day or not more than twenty four (24) hours thereafter and must inform the person in writing of the contempt with which they are charged; afford them an opportunity to be heard and give them a chance to make their defence to the charge upon which the Court will make a decision and issue an order for the punishment or discharge of such person on such terms as may be just.

In the case of any criminal contempt of a subordinate Court, the Superior Court may take action on a reference made to it by the subordinate Court or upon an application by the Director of Public Prosecutions.

No Court shall allow any proceedings for contempt of Court to be commenced, after the expiry of a period of six (6) months from the date on which the contempt is alleged to have been committed.

Offences

There is a principle of law that one cannot be charged with an offence that is not provided for in written law nor its punishment prescribed in a written law. Accordingly, the Act provides for various offences for example:

- assaulting, threatening, intimidating, or wilfully insulting a Judge or judicial officer or a witness, during a sitting or attendance in a Court, or in going to or returning from the Court

- wilfully and without lawful excuse disobeying an order or directions of a Court
- showing disrespect, in speech or manner, regarding proceedings, or to any person before whom judicial proceedings are being heard
- where a witness fails to show up in Court to give or despite attending Court, refuses to be sworn or to make an affirmation, or, having been sworn or affirmed, refuses without lawful excuse to answer a question or to produce a document, or remains in the Court room after the witnesses have been ordered to leave the Court room
- causing an obstruction or disturbance in the course of judicial proceedings
- publishing a report of the evidence taken in any judicial proceeding directed to be held in private
- attempting to wrongfully interfere with a witness either before or after he has given evidence
- dismissing an employee or servant for giving evidence on behalf of a certain party to judicial proceedings
- forcibly retaking possession of land from any person who has recently obtained possession by an order of Court
- committing any other act of intentional disrespect to any judicial proceedings, or to any person before whom such proceeding is being heard or taken

Punishment

The Act provides that upon conviction, a contemnor (a person who commits contempt) shall be liable to a fine not exceeding two hundred thousand shillings (KES 200,000) or to imprisonment for a term not exceeding six (6) months, or both. No Court may impose a sentence in excess of this.

The Act allows a Court to order that the accused person be detained in police custody until the rising of the Court. Although the Court may at any time revoke an order of committal so made and if the offender is in custody, order his discharge.

Of note, is that the offender may be discharged or the punishment awarded may be remitted upon an apology being made to the satisfaction of the court.

Contempt by a Company

Where contempt is committed by a company, every person who, at the time the contempt was committed, was in charge of and was responsible to the company for the conduct of business of the company, as well as the company, shall be deemed to be guilty of the contempt and such person may with the leave of the Court be committed to civil jail.

There is however a catch, in the sense that such a person will not be liable to punishment if they prove to the satisfaction of the Court that the contempt was committed without their knowledge or that they exercised all due diligence to prevent its commission.

Contempt by the State

Where a State organ, government department, ministry or corporation is guilty of contempt in respect of any undertaking given to a Court by the State organ, government department, ministry or corporation, the Court shall serve a notice of not less than thirty (30) days on the accounting officer, requiring the accounting officer to show cause why contempt of Court proceedings should not be commenced against him.

The Act provides that upon conviction, a contemnor (a person who commits contempt) shall be liable to a fine not exceeding two hundred thousand shillings (KES 200,000) or to imprisonment for a term not exceeding six (6) months, or both. No Court may impose a sentence in excess of this.

The notice shall be served on the accounting officer and the Attorney-General. If the accounting officer does not respond to the notice to show cause within thirty (30) days of receipt of the notice, the Court shall proceed to hear and determine the contempt of Court proceedings against the accounting officer.

Review and Appeal

The Act provides mechanisms for the review of an order as well as for an appeal from an order to punish for contempt. A person who is aggrieved by an order by a subordinate Court, to punish for contempt may make an application to the Superior Court to revise the order or file an appeal.

Upon revision, the Superior Court may either uphold the order of the subordinate Court; or release the applicant with or without conditions. An application for revision may be made where there is an error apparent on the face of the record, or discovery of new important material or evidence which, after the exercise of due diligence, was not within the knowledge of the applicant and could not be produced by the Applicant at the time when the order was made.

The High Court also has power to review its own orders and it may make several orders pending such review to suspend the execution of the punishment, or order to be reviewed and the contemnor released on bail if he or she is in confinement.

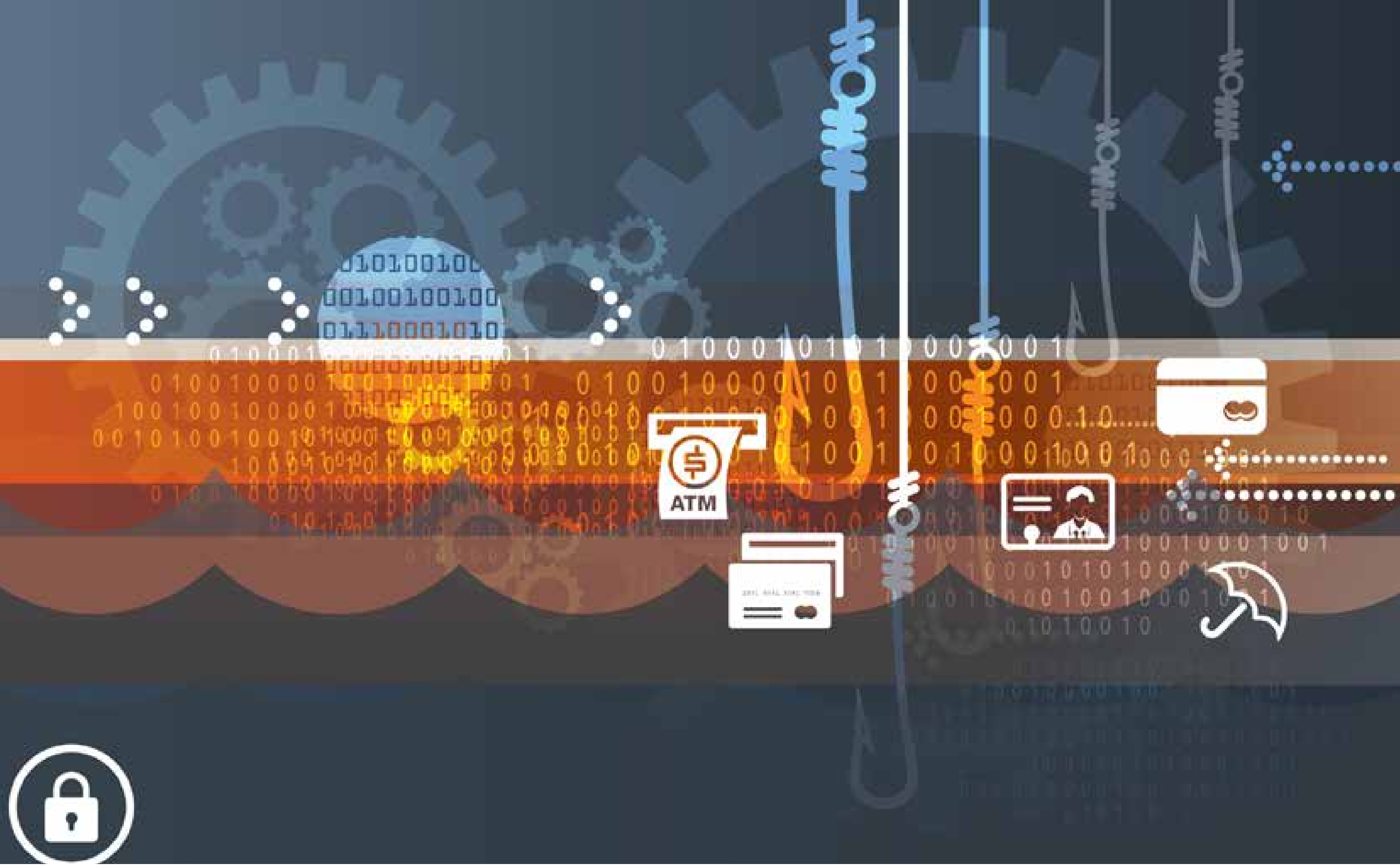
The Act provides for an appeal only on points of law to the Court of Appeal, from any order or decision of the High Court in the exercise of its jurisdiction to punish for contempt. Pending an appeal, an appellate court or the High Court may order that the execution of the punishment or order appealed against be suspended; and if the appellant is in confinement, that the appellant be released on bail.

An appeal to the High Court must be filed within thirty (30) days while an appeal to the Court of Appeal must be filed within sixty (60) days from the date of the order appealed against.

"Verdict"

The Act marks a great achievement in codifying the law relating to contempt of Court in Kenya, as previously, the law merely incorporated the law of contempt prevailing in England and Wales. It is therefore very much localised, which is a major milestone for all those who take pride in Kenyan-made laws.

It is said that the obedience of Court orders is the linchpin upon which the wheels of justice turn and ultimately, the Act is a laudable attempt to uphold the dignity and authority of Courts. One should always strive to obey Court orders so as to avoid a charge of contempt of Court, for as Francois de la Rochefoucauld said, *"only the contemptible fear contempt."*



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RISKY BUSINESS:

EFFECT OF FRAUD ON INSURANCE CONTRACTS

Given the position of the parties in any insurance contract with the insured presumably possessing all the relevant information, upon which the insurer takes the risk for possible indemnification (for a sum which may well exceed the premium paid, should such risk come to pass), the law has consistently frowned upon lack of full disclosure at the time of formation of the contract.

Utmost Good Faith

This principle, to whom we owe its most definitive statement to that great commercial Judge, Lord Mansfield, is encapsulated in the phrase *"a contract of insurance is one of utmost good faith (uberrimae fidei)."* The principle was eventually codified in the United Kingdom's Marine Insurance Act, 1906 upon which the Kenyan Marine Insurance Act (Cap. 390) is based. However, its common law basis has not been supplanted.

This rule of *uberrimae fidei* that governs the relationship between an insured and the insurer has long been accepted due to the fact there exists an information imbalance (informational asymmetry) insofar as the insurance industry is concerned. This is because as at the time that an insurer enters into a contract with the insured agreeing to indemnify the insured, the particulars of the risk that warrant the obtaining of an insurance policy are within the knowledge of the insured. Failure by the insured to furnish such information would entitle the insurer to avoid the contract of insurance *ab initio*. It seems in practice the duty of ultimate good faith is a one-way traffic applicable only to clients while insurance companies are not always honourable when it comes to settling claims.

Material Non-Disclosure

There has always been some controversy as to when such non-disclosure would entitle the insurer to avoid a claim or policy. In the case of *Pan Atlantic v Pine Top (1994) 3 All ER 581*, by a bare majority, the House of Lords held that the insurer would only be entitled to avoid the contract if the misrepresentation or non-disclosure was material i.e. whether it would have affected the decision of a prudent insurer had it been disclosed to enter into the contract. If it did not, it would not constitute a ground for avoiding the contract. The minority was unimpressed finding that the test for materiality was nebulous and ill-defined in situations where what was required should be precise and clear.

Post-Contractual Good Faith

Another set of questions was whether the pre-contractual duty of good faith imposed on the insured extended also to the post-contractual period especially in relation to claims i.e. if the insured makes a dishonest claim, is the insurer entitled to avoid the claim or contract?

The House of Lords had occasion to consider this question in the case of *Manifest Shipping v Uni-polaris (2001) 1 All ER 743*. This was an appeal by an insurer who had unsuccessfully sought to avoid a claim for total constructive loss because the insured had failed to disclose or diligently act upon the recommendations that they had inadequate fire-fighting equipment on their vessels after fires broke out on two sister ships. The insurer argued that failure to disclose accident reports was fraudulent conduct and a breach of good faith thereby allowing them to avoid the contract along the same lines as pre-contractual non-disclosure of a material fact. In allowing the appeal, the House of Lords held:

- Ordinarily, the right to the indemnity accrues as soon as the loss has been suffered
- The law is that the insured who has made a fraudulent claim may not recover the claim which could have been honestly made as the insured has a duty of honesty in the presentation of a claim
- The presentation of a dishonest or fraudulent claim constitutes a breach of duty that entitles the insurer to repudiate any liability for the claim and, prospectively at least, to avoid any liability under the policy
- An inevitable consequence in the post-contract situation is that the remedy of avoidance of the contract is in practical terms wholly one-sided. It is a remedy of value to the insurer of disproportionate benefit to him as it enables him to escape retrospectively the liability to indemnify which he has previously and (on this hypothesis) validly undertaken
- The duty of good faith does not exist once litigation is commenced as once the parties are in litigation it is the procedural rules that govern the extent of the disclosure which should be given in the litigation

Recent Decision

Recently, the Supreme Court of England grappled with the extent of the continuing duty of good faith at the time of making claim in the case of *Versloot Dredging BV & Another v HDI Gerling Industie Versicherung AG and Others [2016] UKSC 45.* Specifically, the issue on this appeal was whether the insurers of a ship were entitled to avoid liability on the ground that the insured had told a lie in presenting the claim, even if the lie proved to be irrelevant to whether the insured was entitled to be indemnified and the extent of such indemnification.

In an effort to accelerate payment of a claim for cost of repair for damage caused to the engine by floods (an uncontested peril of the sea covered by the policy), the owners lied that an alarm had sounded but this could not be investigated because the vessel was rolling in heavy weather when in fact no such report had been made. The lie was told in an effort to divert attention from where the owners might reveal other facts – the state of the engine's bulkheads – entitling the insurers to avoid liability. It was, however irrelevant to the claim, since the loss was found to have been caused by a peril of the seas. Despite this, the insured argued that the lie entitled them to reject the claim. At first instance, a reluctant Judge who felt bound by precedent upheld the insurers' position, a judgment upheld on appeal to the Court of Appeal.

An appeal to the Supreme Court was successful. It is clear from the four to one (4:1) majority judgment that the state of the law in this area was not satisfactory, their Lordships admitting that the result they reached produced an anomaly. All judges gave separate decisions (with Lords Sumption and Hughes giving the lead judgments for the majority and Lord Mance dissenting). Essentially the majority held:

- The common law rule in contracts of insurance was that where an insured had made a fraudulent claim by fabricating or dishonestly exaggerating the claim, the insurer was not liable and the insured forfeited the whole claim

It seems in practice the duty of ultimate good faith is a one-way traffic applicable only to clients while insurance companies are not always honourable when it comes to settling claims.

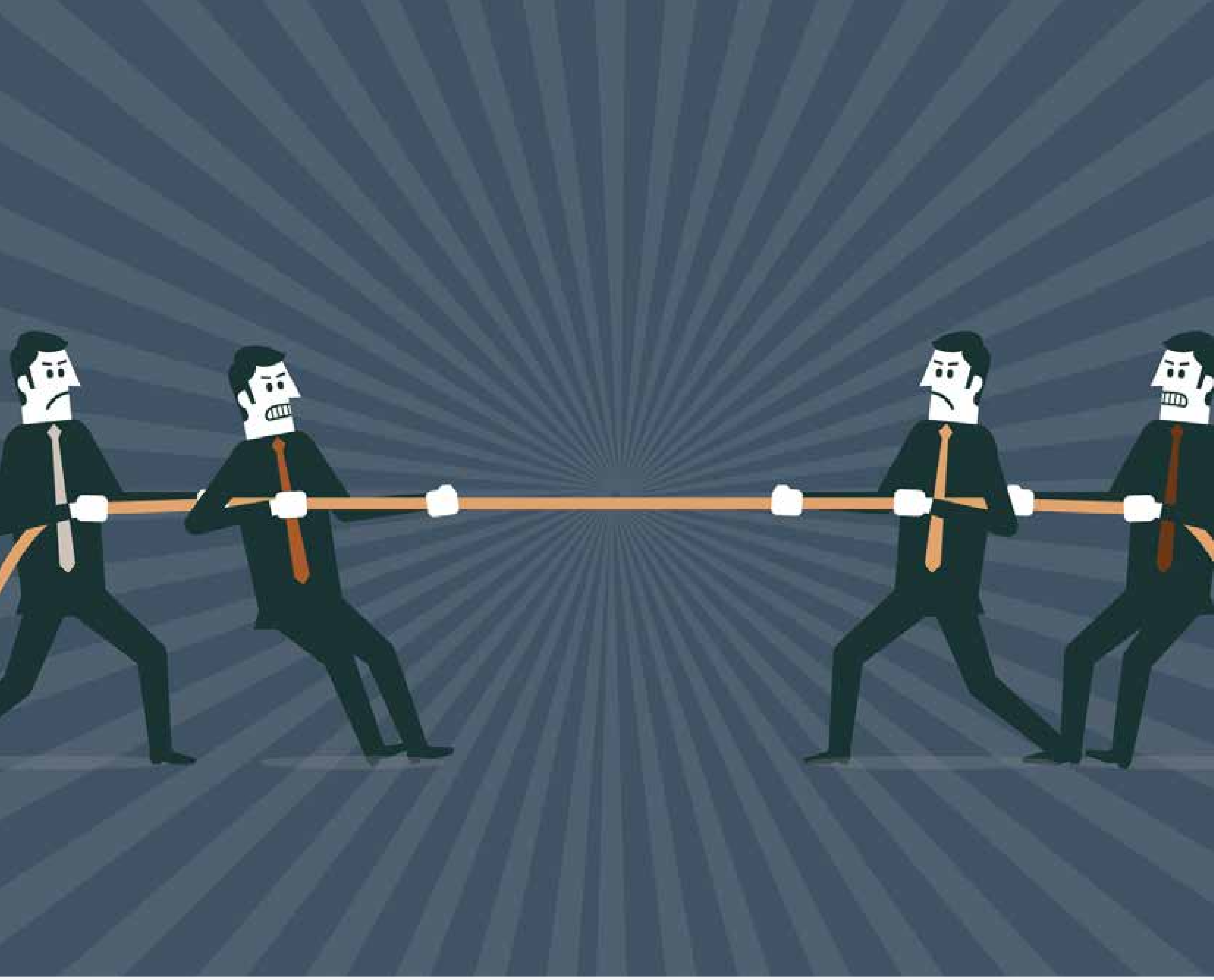
- However there is distinction between fraud and the use of fraudulent devices. In the words of Lord Sumption, fraud in the insurance context was where a claim had been fraudulently exaggerated by the insured's dishonesty which was calculated to get him something to which he was not entitled, thereby disentitling him from succeeding in his claim as the law declines to sever the honest part of the claim from the invented part
- A fraudulent device such as a collateral lie was where the insured was trying to obtain no more than the law regards as his entitlement and the lie was irrelevant to the existence or amount of that entitlement. The immateriality of the lie to the claim made it not just possible, but appropriate to distinguish between them
- A fraudulently exaggerated claim was where the insured's dishonesty was calculated to obtain something which he was not entitled to and collateral lies used to embellish a justified claim and which were irrelevant to the validity of the claim
- The common law rule did not apply to a lie which the true facts, once admitted or ascertained, showed was immaterial to the insured's right to recover. Since the claimants' lie was irrelevant to the merits of the claim they were entitled to the sum which the judge found would have been due but for the forfeiture of the claim
- The extension of the fraudulent claims rule to lies which are found to be irrelevant to the recoverability of the claim is a step too far. It is disproportionately harsh to the insured and goes further than any legitimate commercial interest that the insurer can justify
- The fraudulent claims rule is of considerable importance and must be preserved, but its extension to collateral lies is not based on sound authority and would result in a remedy disproportionate to the breach of the duty involved

Lord Mance in his dissent was of the view that, no distinction ought to be made between the effect of the use of fraud or a fraudulent device (semantic word play) in an insurance claim as they should all result in the insured losing his claim - as the whole rationale in having such rules governing fraud and the use of fraudulent devices was to deter fraud. Also, to ensure that there was no distortion of the claim recovery process and lead to among other things, an increase in premiums to other policy holders.

Local Jurisprudence

In the case of *Sukinder Singh Jutley v Prudential Assurance & Another (2007) eKLR,* (a case which touched on a claim by the insured claiming that he had been involved in an accident with an imaginary buffalo), the Court of Appeal held that an insured who makes a fraudulent claim would forfeit his entire benefit under his policy whether there was indeed a clause in the insurance contract or not. The Court held that the Kenyan position with regard to fraudulent claims was no different from that in England.

It remains to be seen whether the distinction between the effect of the employment of fraudulent devices and fraudulent claims in the *Versloot Dredging* case will be adopted by Kenyan Courts in the future.



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ON ARBITRATION:

AVAILABILITY OF SECURITY IN NEW YORK CONVENTION ENFORCEMENT CASES

The English Supreme Court has handed down its judgment in the long-running case of *IPCO (Nigeria) Ltd v Nigerian National Petroleum Corp*. In the judgment, the Supreme Court provided important guidance on the approach of a court considering an application to enforce an arbitral award in England under the New York Convention, when it is asked to order that the award debtor should provide security for the award sum.

Background

By an arbitration award made in 2004 in Nigeria, the Nigerian National Petroleum Corporation (**NNPC**) was ordered to pay around USD 150 million to IPCO (Nigeria) Ltd (**IPCO**) for additional works and damages arising out of a contract for work on a new petroleum export terminal near Port Harcourt, Nigeria.

NNPC sought to challenge the award in Nigeria on the grounds of errors by the arbitrators. IPCO applied to enforce the award in the English Courts but the English Commercial Court agreed to adjourn the enforcement under Section 103(5) of the Arbitration Act, 1996 (**the Act**) pending a decision in Nigeria.

Years passed and the Nigerian court had made little progress. NNPC had also discovered evidence that IPCO had committed fraud before the arbitral tribunal. NNPC therefore sought to set aside the award, and resist enforcement, on the additional ground of this alleged fraud. In 2012, IPCO made a further application to the English Court to enforce the award, on the grounds that the delays in Nigeria meant that the Nigerian courts would not make a decision on the set-aside application for many years and that the fraud challenge was weak. The English Commercial Court rejected these arguments.

The Court of Appeal agreed that the fraud challenge had merit, but decided that the delays in Nigeria justified the English Court, rather than the Nigerian Court, hearing and deciding the fraud challenge. It therefore ordered that the Commercial Court should decide whether enforcement should be refused under Section 103(3) of the Act, on the grounds that it would be against public policy.

What is an adjournment?

The Court of Appeal purported to order NNPC to provide additional security for USD 100 million (which was part of the sum due under the arbitral award) under Section 103(5) of the Act. This was pending an "adjournment" for the Commercial Court to decide whether enforcement should be refused pursuant to Section 103(3) of the Act on the grounds of the alleged fraud. If the security was not provided, the court would enforce the award immediately without hearing NNPC's arguments against enforcement. If, on the other hand the security was provided, the Commercial Court would proceed to a trial of the issues under Section 103(3).

The word "adjournment" is used in several senses by English lawyers. As Lord Sumption remarked during the hearing, the Supreme Court would normally "adjourn" for lunch during a hearing. "Hopefully not on the basis of security", replied Toby Landau QC, who appeared for NNPC.

Section 103(5) of the Act provides for security to be ordered, as a condition of adjourning the decision on whether to enforce an award. However, the Court of Appeal ordered security as a condition of making a decision on the alleged grounds to refuse to enforce, with an automatic decision in favour of enforcement, if the security was not provided. That is not what Section 103(5) provides at all. The Supreme Court therefore held that the Court of Appeal could not properly make an order for security, under Section 103(5) of the Act, in those circumstances.

Security as a condition for what?

The Supreme Court provided helpful clarification as to the consequences when a party who has given security in compliance with an order under Section 103(5), fails to provide it or allows it to lapse. The Supreme Court was in a good position to do so, because the bench included Lord Mance, who was part of the Court of Appeal bench in the case of *Dardana v Yukos*.

The Supreme Court confirmed, as Lord Mance had indicated in *Dardana v Yukos*, that the extent of the power to order security under Section 103(5) is to order that the adjournment will lapse if security is **not** provided. It is not to order that failure to provide security will mean that enforcement may follow immediately and without consideration of the merits of any unresolved Article V New York Convention defences.

The New York Convention as a code for refusal of enforcement

The Supreme Court considered that the provisions in the New York Convention, allowing security to be ordered for the award sum as a condition for not enforcing are to be treated as exhaustive. They are not to be treated as mere illustrations of when security can be ordered. That follows from the court's conclusion that, "the conditions for recognition and enforcement set out in Articles V and VI of the Convention do constitute a code," which is to lay down a common international approach.

National courts ought not to impose a condition, requiring the provision of security for sums payable under the award, upon the right to ask the court to make a decision on a properly arguable ground for refusal of enforcement under Article V. Had that been contemplated,

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the Supreme Court took the view that, "it could and would have been said," in the New York Convention.

The Supreme Court considered this outcome to be consistent with the overall spirit of the New York Convention, which is:

"… a balancing of interests, with a prima facie right to enforce being countered by rights of challenge… Apart from the second paragraph of Article VI, its provisions were not aimed at improving award creditors' prospects of laying hands on assets to satisfy awards."

Discussion

The New York Convention, whilst generally promoting enforcement, provides important safeguards which protect award debtors from the enforcement of bad awards.

The court should not have a general discretion to order an award debtor to give security as a condition for raising any of the grounds in Article V. This is so for the same reasons that a court deciding an ordinary claim on the merits, will not normally have a general discretion to order the defendant to give security for the sum claimed. The Supreme Court's decision therefore protects an award debtor's right to raise *bona fides* defences to enforcement, without the fetter of being required to put up security in advance.

Implications of the decision

In summary, the implications of the Supreme Court's decision are as follows:

- Articles V and VI of the New York Convention constitute a **code** for the enforcement of foreign awards. The parts of the Act under which the English courts enforce awards should be construed accordingly
- In relation to the matters dealt with specifically in Articles V and VI of the New York Convention, the English courts are likely to consider that those articles set out the whole regime governing resisted applications for enforcement
- An order for security for the sums payable under the award, against a debtor resisting enforcement of a foreign arbitration award in the English courts is only available where an application has been made to adjourn, under Section 103(5) of the Act and the court does adjourn pending the decision of the courts of the seat
- In theory, an order could also be made for security, pursuant to the power under the Civil Procedure Rules (**CPR**) to make an order subject to a condition, where an award debtor is asking the court for discretionary relief under the CPR, or where the award debtor has defaulted during the court proceedings
- It remains to be seen whether the Commercial Court might in future be persuaded to order security to be provided for the award sum under the CPR, where the court has made a preliminary assessment of the merits of the grounds for resisting enforcement and found them to be weak, or "problematic" (as the Supreme Court put it)

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“ *What you know is a treasure [for] your life.* ”

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