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IN THIS ISSUE:

1 - Foreword

2 - Can exemption clauses in agreements help your company limit exposure?

3 - Learn to Protect Your Business from Espionage

4 - Is your compliance Desk aware of what URSB expects from your business?

5 - What is an ideal corporate governance checklist for non-profit organizations?

6 - Early Neutral Evaluation in Court Cases

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FOEREWORD

By Matsiko Godwin Muhwezi, Managing Partner

The World is on semi-lockdown and in some places, economies are expected to grind to a halt. What will be most helpful for businesses to bounce back and or limp through some of the challenges in this time will boil down to a few areas we cover in this edition of our Cymbell Advocates letter to clients. It will be important to see how clients have historically structured their partnerships. What tools have they used to limit exposure, risk and espionage? In jurisdictions where governments are yet to adjust regulatory measures, will there be outstanding compliance questions. Is the Company properly equipped to make difficult governance and structural decisions in this period? We also moot a rare alternative dispute option which should help companies reduce litigation bills at a point when every penny counts.

Hope you find this insightful.

Making a Difference is Our Practice.

2. Can exemption clauses in agreements help your company limit exposure?

By Henry Owen-Banking & Real Estate

Exemption or exclusion clauses are a common feature in contracts especially standard form contracts. Such clauses seek to limit or in some cases, entirely exclude liability with regard to loss or harm that may be suffered in the course of the contractual relationship. Incorporating exemption clauses in a contract serves a useful function of spreading risk. They form part of the contract meaning when one agrees to be bound by the contract, they have also agreed to the terms contained in the exclusion clause.

Courts have traditionally upheld and enforced exemption clauses where they meet the requirements or tests of a valid exemption clause. This is grounded in the legal principle of freedom of contract which holds that the intentions of parties who freely enter into a contract should be upheld.

How does an exclusion clause operate?

An exemption or exclusion clause operates to "excuse" the guilty party from a breach of contract that would ordinarily entitle the innocent party to damages or compensation for the breach. In essence, the innocent party will have waived their right to claim damages or compensation for the breach.

Because of the potential unfairness of such clauses, a strict approach has been adopted by courts when dealing with such a clause. Such clauses are strictly or narrowly interpreted in the sense that the clause is construed as narrowly or as conservatively as possible, and usually in favour of the innocent party.

Courts consider whether the words are extensive enough in their ordinary meaning to cover the breach on the part of the defendant. In case of doubt, it must be resolved against the author of the clause, or in legal terms, the "*proferens*".

A party who seeks to include an exclusion clause in their contract should generally ensure the following:

1. The clause must be agreed on

It is a requirement that the exclusion clause should have been agreed upon by both parties.

This can be achieved by bringing the clause to the attention of the other party prior to the entering into the contract.

There is always the temptation of incorporating the clause in the fine print making it very hard for the other party to see and read. Courts however insists that before a party can rely on an exclusion clause that party has to prove that the clause was brought to the attention of the party before entering into the contract, and was therefore agreed upon. An exclusion clause may also be agreed upon subsequently. What matters is that it agreed upon by both parties.

2. The clause must be clear and unambiguous

This requires that the clause conveys a clear meaning or interpretation when read in the context of the contract as a whole. Where the clause is confusing or conveys more than one potential interpretation, the ambiguity will be resolved against the party who authored and seeks to rely on the clause.

3. The exclusion clause must be reasonable

Courts in Uganda have struck down or refused to enforce an exclusion clause on the grounds that the exclusion is unreasonable or unrealistic. Traditionally, our courts have maintained that one cannot exclude liability for a breach that goes to the root or core purpose of the contract. For example, if a contract is for provision of security services, it would be unreasonable to exclude liability arising out of failure to provide the service. Excluding liability to such an extent actually shows that the party may not have had any intention of being bound contractually, which, if is the case, would vitiate a contract.

Although exemption clauses are acceptable, they have to comply to the standards set out above.

3. Learn to Protect your Business from Espionage

By Brenda Karuhanga-Due Diligence, Research & Investigations

The biggest threat to business information security today is business espionage. Business espionage is the unlawful gathering of business or commercial information such as trade secrets from a competitor for commercial or financial purposes, using espionage techniques such as spying, or outright theft.

Types of business espionage

There are majorly three types of business espionage. These include (i) economic espionage which is usually conducted by governments against other governments, (ii) industrial espionage, and (iii) corporate espionage which are usually conducted by a company against competitors whether in the same industry/sector or not.

How business espionage is done

Business espionage can occur in different ways such as (i) where a dissatisfied employee appropriates information to competitors to advance personal or competitor interest or to damage the reputation of the company, or (ii) by a competitor who unlawfully obtains information for example by way of spying or hacking to advance his or her own financial interests. The usual targets are trade secrets, client information, financial information and marketing information.

How to protect yourself from business espionage

Having proper risk management in place is an essential first step, and this should be strong enough to deal with any risk scenario. Risk management means the understanding of circumstances that may expose a company to espionage. Companies should allocate more resources in areas where there is higher risk, establish clear work processes, lines of communication, levels of clearance to handle information and regular review of the measures in place to protect its data.

Aspects such as due diligence also play a major role in interactions with third parties, particularly those who may have access to business information or data.

When it comes to information protection many companies consider due diligence in relation to business partners, suppliers, and vendors. It is important for a company to have clear policies or guidelines when dealing with outsiders or suppliers, for example non-disclosure agreements should be in place, and only information absolutely necessary for the transaction should be disclosed, with clear monitoring and follow up to ensure that the information is used for only the intended purposes.

Vendor security assessment is another tool or means by which a company can safeguard its business information or data from vendors including cloud vendors or third parties who may have access to business information or data. It would be very embarrassing, to say the least, for your business information or data to be availed on the internet through vendor security breach.

Companies can rely on technology to internally store and manage its data rather than depend on third party servers or service providers. This will allow the company to control who accesses its servers, data room, documents, or any other critical information. It is also easy to track the source of a breach if data is stored and managed internally rather than externally.

In Conclusion companies should enact policies on the proper storage, control, and dissemination of information and ensure that their employees are trained to follow procedures and the employees should understand that the threat from espionage is internal as well as external.

4. Is your compliance Desk aware of what URSB expects from your business?

By Wanda Samuel Ronald - Corporate Advisory

When Companies are registered it does not mark the end of it's compliance with the law. Various statutory filings are expected of the company throughout it's life. Below we discuss the major filings that a company should not miss out in order for it to stay compliant.

Annual Returns

Companies are required to file annual returns indicating details/particulars of the company. Such details include the share capital, the number and class of shares, the shareholding and details of the shareholders, and details of the directors and secretary of the company. Annual returns should be filed within 42 days after holding the Annual General Meeting (AGM). Failure to comply with filing annual returns attracts a default penalty. If a company is dormant, an exemption to file returns for one year may be granted upon notification to the Registrar made within 15 days of passing the resolution of dormancy. A company which has not filed annual returns for five consecutive years may be struck off the Register, unless good cause is shown as to why it should not be struck off the Register. Foreign companies incorporated in any part of the commonwealth are expected to make returns within 60 days in the event of any change in their particulars. Those incorporated outside the commonwealth must file a balance sheet and a profit and loss account. If a foreign company defaults on any of the reporting provisions under the Companies Act, they are liable to a default fine of Uganda Shillings 20,000,000 and for any day that it continues in default to a fine of Uganda Shillings One Hundred Thousand Shillings.

Resolutions

It is worth noting that typical company decisions are made through resolutions and such resolutions are supposed to be filed for registration with the Registrar of Companies within 30 days. In the event of default, the company and its officers (directors) are liable to a default fine of Uganda Shillings One Hundred Thousand.

Return of allotment

Allotment of shares is the process of apportioning particular shares of the company to the individuals shareholders.

After apportioning the shares, a return of allotment is required to be filed for registration with the Registrar of Companies.

Notice of increase of share capital

Where there are changes in the share capital, for example if the company increases or reduces its share capital, it is obliged to file a return notifying the change in share capital and the number of shares following such change.

Particulars of charges

Companies often pledge their movable and immovable property as collateral for securing credit. It is the company's duty to register the details of any charge or security created over the assets of the company within 42 days lest the company and its directors will be liable to a fine.

Changes in particulars of directors and secretary

Where a company makes any changes in its directors or secretary, it is required to file a notice of change in particulars of the directors or secretary. The notice is meant to serve as a notice to the public as to who is authorized to act on behalf of the company.

Particulars of registered address

It is a requirement under the Companies Act for a company to keep the Registrar notified as to the details of its registered address or any changes.

Therefore, it is prudent for all companies to abide by the said reporting timelines with URSB in order for it to remain compliant to avoid any inconveniences. Cymbell Advocates is best placed to further guide you on how to effectively and periodically file these documents under our corporate and commercial advisory business unit.

5. What is an ideal corporate governance checklist for non-profit organizations?

By Alebar Kanyonza—Admin & Finance

Corporate governance refers to how organizations are directed, managed or controlled, and how they relate with or cater to the interests of the different stakeholders concerned. Corporate Governance has a broad scope. It includes ethical, social and institutional aspects. Corporate Governance encourages a trustworthy, moral, as well as an ethical environment. It is about balancing individual, societal, economic and social goals.

Many people attribute corporate governance to big multinational and profit oriented organizations, however corporate governance is equally applicable to non-profit or charitable organizations. In fact, for such an organization, the stakes are higher and the need for sound corporate governance practices is more critical because of the many stakeholders involved, the source of funds, and the charitable objectives/ mission of the non-profit organization.

Whereas the basic principles of good corporate governance apply equally to non-profit entities as they do for profit oriented entities, non-profit governance demands a unique set of expectations by the stakeholders. A good corporate governance image enhances the reputation of the organization and makes it more attractive towards its cause and sponsors.

Quality of the Board

The Board composition of a non-profit organization is its first sign as to how well the organization is governed and how committed it is to its goal. It is important to appoint Board members who are not only knowledgeable or experienced, but also deeply committed to the goals and values of the non-profit organization. This will guard against dilution of the objectives of the organization if management is not fully sold out to the cause.

The Board should ensure and encourage maximum accountability and transparency to the stakeholders, since they are the torchbearers of the organization. Whereas profit oriented organizations need only meet the statutory requirement of reporting, non-profit organizations should go an extra mile in

Scandals

Strong non-profit corporate governance should have in place internal controls to protect the organization's reputation. This includes clear channels of communication, a strict code of conduct and a thorough vetting process for all appointments. A non-profit organization should strive to avoid political scandal or any political inclination. This can be done through accurate and full disclosure of source of funds, and avoiding identification with any political party.

Proper internal controls significantly reduce the incidence of fraud, corruption, or any scandal that may affect the goodwill of the non-profit organization.

Growth

Proper corporate governance not only ensures that your non-profit organization meets legal and ethical standards, but also improves the overall strength or growth of the organization. Focusing on rules and procedures increases efficiency in the workplace. When new potential projects surface, a responsive board and proper procedures ensure the non-profit organization has the right structures to succeed and expand.

Record Keeping

Many elements of good corporate governance are tested and evidenced in the quality of records kept. Records range from minutes of board meetings, official correspondence, financial records and statutory filings such as annual and tax returns. Proper corporate governance ensures that the organization has all the necessary documents well preserved and that record keeping procedures are in place.

Most donors are strict regarding management of non-profit organizations. Where donors cannot access the documents or records, this may affect the repu-

Early Neutral Evaluation (ENE) is an alternative mechanism of dispute resolution as opposed to the adversarial method of litigation. It is a forum in which attorneys present the core of the dispute to a neutral evaluator in the presence of the parties.

Maycook (2001b) describes ENE as neutral evaluation and sometimes simply called case evaluation. Therefore the evaluative strength of ENE comes in the form of predicting the outcome of the trial with utmost caution and precision so that the disputants are briefed on the reality of their case and are able to make their decision with certainty.

This occurs after the case is filed but before discovery is conducted. The neutral then gives an assessment of the strengths and weaknesses of the case. If settlement does not result, the neutral helps narrow the dispute and suggests guidelines for managing discovery (*Minnesota's State Supreme Court Rule 114*)

Proponents of ENE processes recommend that ENE should occur either prior to the filing of the matter in court or after filing in court but before the judge hears the case so that the parties can have a realistic perception of their case and explore the possibility of settlement. The session should be attended by both the parties and their lawyers if they are represented plus the neutral evaluator.

It is best practice that lawyers should attend all ENE sessions because the participation of the lawyer offers guidance and advice to clients during the process of ENE and undertake the drafting of settlement agreement to document the settlement.

It should be noted that if an ENE session is not scheduled within the early days after filing, it defeats the purpose of early. According to Santeramo (2004) the later the ENE process is initiated, the more expensive or less cost effective it becomes.

How long should the process last?

In jurisdictions such as California, and Minnesota that have greatly implemented the practice, ENE on average lasts between 2 hours – 3.5 hours in a single session over two days. The initial day usually lasts approximately 3 hours of initial assessment.

The salient theoretical features of ENE

Held early prior to litigation for Parties to discuss the possibility of settlement

ENE enlightens and brings settlement to the attention of the disputants. That is to say, since ENE as evidenced by practice in many jurisdictions is conducted at the earliest stages of the case, parties get the opportunity for an evaluator to share his or her opinion on each party's' chances in litigation such that the disputants decide based on the certainty of the outcome given to them if they settle or choose to proceed for hearing.

Empowerment of Disputants

ENE just like in mediation offers the disputants power over their dispute. Therefore, each party presents its case plus evidence to a neutral evaluator. This allows the parties the freedom to engage in discussion and arguments in a confidential and non-binding manner as they honestly explore and assess the merits and demerits of their cases. As a result, it is parties that make the decision based on the evaluations made.

Confidential and Non-Binding

ENE provides a non-binding evaluation to disputants. In other jurisdictions such as California USA, ENE has received statutory recognition that aims to prohibit a party from disclosing to a settlement judge any communication made in connection with an ENE session.

Evaluative

It is evaluative in nature and it is conducted by a neutral person who is an expert in the particular field. The expert must be neutral and an expert with impeccable knowledge in the subject matter of the dispute. The expert specifically enables the parties to get an evaluation of the dispute after listening to both parties. The neutral expert basically lays out the weaknesses and the strength of each party's case thus helping them to predict the possible outcome were they to proceed to litigation. This often is a eureka moment for litigants to resolve disputes through mediation.

Who should be Responsible for ENE Programs?

It is overwhelmingly recommended that ENE programs should be court –mandated and run by the judiciary which would lend credibility to the program. In addition, association to the judiciary will ensure that the evaluators are sufficiently trained and accredited.

Santeramo (2004) recommends that an independent and experienced coordinator with knowledge of ENE processes be hired to run the program and assist judicial officers in dispute resolution thus offering an alternative to litigation. Pearson (2006) offers support to Santeramo's recommendation as she notes that the cooperation and partnership between the judiciary and evaluators is one of the critical considerations for the success of the ENE program.

She posits that the judicial officers and other referees can enhance the program by informing litigants about the advantages of the ENE program and explaining how it compares to other forms of non-judicial dispute resolution programs, that it can save them time and money and that it offers a flexible approach to issues that often become stumbling blocks for people.

Conclusion

Generally what has been greatly embraced in Uganda and some countries such as Kenya is the use of mediation prior to setting the suit for hearing. For Uganda's case, legislation (The Judicature (Mediation) Rules, 2013) were put in place to give mediation the force of law. The Rules thus made it mandatory for parties to file mediation summaries clearly outlining their disputes for the mediator to know the facts of their case, and the evidence to be relied upon during mediation. Therefore, mediation is a fully fledged program administered and supervised by the judiciary. On the other hand, ENE at the moment is a procedure that is not practiced in Uganda or most parts of Africa. The procedure is relatively unfamiliar and is still elien in Africa as it is mostly practiced in a few developed countries such as the United States, United Kingdom and Australia.

Lastly, it should be noted that for certain types of cases, or at certain points in the life of a case, neutral evaluation can often be a better choice than mediation or arbitration -- although ultimately it works best when used as a prelude to either of those processes. Neutral evaluation, which has nearly all the benefits of mediation and arbitration yet little of their downsides, is truly an ADR technique whose time has come.