



# Drafting successful ABS contracts – with a particular view to benefit sharing clauses



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BMZ



Federal Ministry  
for Economic Cooperation  
and Development



DANISH MINISTRY  
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# Drafting a pa

# with



THE **ABS**  
CAPACITY  
DEVELOPMENT  
INITIATIVE



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Programme Implementing  
Biodiversity Convention



# FNI's ABS Publications

- The **Australian ABS** Framework - A Model Case for Bioprospecting?, By Christian Prip, G. Kristin Rosendal, Steinar Andresen and Morten Walløe Tvedt, *FNI Report 1/2014*
- Medaglia, Jorge Cabrera, Morten Walløe Tvedt, Frederic Perron-Welch, Ane Jørem and Freedom-Kai Phillips. *The Interface between the Nagoya Protocol on ABS and the ITPGRFA at the International Level - Potential Issues for Consideration in Supporting Mutually Supportive Implementation at the National Level*. Lysaker, Fridtjof Nansens Institutt, 2013. (FNI Report, no. 1/2013)
- Book: **Global Governance** of Genetic Resources Access and Benefit Sharing after the Nagoya Protocol. Edited by Sebastian Oberthür and G. Kristin Rosendal Routledge, 2014.
- **Implementing** the Nagoya Protocol on ABS: A Hypothetical Case Study on Enforcing Benefit Sharing in Norway (with Ole Kristian Fauchald 2011)



# Link to the AU Guidelines:

10 Benefit sharing AU Member States should, as appropriate, include provisions in their domestic legislative, administrative or policy measures to clarify ownership of GR and aTK, in order to provide legal certainty and ensure fair and equitable sharing of benefits arising from their utilization.

When **negotiating benefit sharing arrangements**, provisions should be made in MATs about how various costs will be covered.



# Link to the AU Guidelines:

10 [...] When developing community protocols or procedures, ILCs may wish to reflect on how they will be dealing with sharing of benefits deriving from the utilization of aTK shared by neighbouring or other communities, in the same country and elsewhere.

AU Member States shall support the creation of a GMBSM to address the fair and equitable sharing of benefits derived from the utilization of genetic resources and traditional knowledge associated with genetic resources that occur in transboundary situations or for which it is not possible to grant or obtain prior informed consent.



# What is a contract?

- A **contract** is an agreement between two or more parties that creates an obligation on all parties to perform (or not perform) a particular action or set of related actions.
- **Contract law** determines what makes a particular contract enforceable, and provides remedies when a contract is breached.
- Contract law is **highly diverse** between countries
- If you don't follow contract law (in a careful and legal manner), a contract will/may not be enforceable when you want it to be, and may be enforceable when you don't want it to be.



# The situation in GR Policy and Law

## International law

- The principle of sovereignty
  - Sovereign rights over (natural resources)
- sovereignty to nat.

Hinder for  
cross-border  
enforcement of:

- law,
- policy,
- judgments  
and
- adm.  
decisions

Kenya

Mov  
mate

Norway

Requirements to the  
contract

What is required in  
the contract?

How will this contract  
be treated under the  
jurisdiction or legal  
situation?



# The situation in GR Policy and Law

International law

- **Different legal tools**
- - **Memorandum of understanding**
  - **Prior informed consent**
  - **Two-step mutually agreed terms**
  - **Contracts**

R  
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What is required in  
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# The situation in GR Policy and Law

International law

- **Different legal tools**
- - **Memorandum of understanding**
  - **Prior informed consent**
  - **Two-step mutually agreed terms**
  - **Contracts that are enforceable in the user country – must meet contract law requirements**

[S]

R  
C  
W

the contract?



# The situation in GR Policy and Law

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- The principle of sovereignty
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Hinder for cross-border enforcement of:

- law,
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How will a contract come around or be negotiated?

Kenya

Mov  
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Requirements to the contract

What is required in the contract?

How will this contract be treated under the jurisdiction or legal situation?



# Rules for drafting contracts:

- 1 Why is Awareness of Contract Law Important in ABS?
- 2 Develop a Commercial Plan for the Contractual Relationship
- 3 Avoid Ambiguity
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  - 4.1 Make Sure You Contract with the Right Parties
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# Challenges for ABS Contracts I:

- There is no agreed international contract law for ABS
- Long time between access, utilisation and benefit sharing
- The cross-boarder challenge: sovereignty, jurisdiction, Parties and private parties

**What is the idea of an ABS Contract?**

- Regulate the research and development
- It is a utmost dynamic object in the contract



# The situation in GR Policy and Law

International law

- **Two or more worlds are meeting**
- - Indigenous leaders and representatives
  - Corporate lawyers/ companies
  - Human right law
  - International environmental lawyers
  - Biotechnologists/ scientists/ biologists

contract

be treated under the  
jurisdiction or legal  
situation?



# Contract law

**Contract: Two-party relationship (or more parties)**

- Bind the entity where benefits will be created
- The legal “glue” is in the accept to be bound
- **Ability to accept on behalf of someone/ entities**



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# Avoid Ambiguity:

**A first step to a functional benefit-sharing obligation is to reduce the ambiguity to an absolute minimum and formulate the contract with externally verifiable criteria**

- Contract law is built on specificity and concreteness, and cannot function without it
- Terms like “access,” “benefit-sharing,” “genetic resources,” “traditional knowledge,” “derivative,” “utilization,” “provider,” “user” still have multiple meanings
- Contracts are a legal tool that must create and impose concrete obligations.



# Avoid Ambiguity:

- Unspecific terms leaves the interpretation of the meaning of the contract to national judges
- If you cannot be more specific in your drafting, how can you expect a judge later to understand your contract better than its drafters?



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- If you cannot be more specific in your drafting, how can you expect a judge later to understand your contract better than its drafters?
- On this point there is a need in **shifting paradigm** in ABS to make contracts work otherwise there will be a whole generation of ABS contracts being signed that will end up as unenforceable.



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# Be Specific and Concrete Regarding All Substantive Obligations and Processes:

## Content of a benefit-sharing clause:

- Definition of the material
- Manners of its utilisation that are legal under the contract
- Stipulate exact manner in which benefit sharing obligations will be discharged
- **Definition of what acts are not allowed**
- **Clear stipulation of consequences of breaches**



# The overall virtue

- **Remove uncertainties**
- **Describe what you foresee happening in the clearest language (ever) step-by-step till the expected scenario has been ended**
- **Make it possible for a non-biologist, lawyer judge to understand all steps and their consequences**



# Definition of 'Utilisation of GR'

## ARTICLE 2: definitions

- (c) “Utilization of genetic resources” means to **conduct research and development** on the **genetic and/or biochemical composition** of genetic material, including through the application of biotechnology as defined in Article 2 of the Convention.
- (d) “Biotechnology” as defined in Article 2 of the Convention means **any technological application** that uses biological systems, living organisms, or derivatives thereof, to make or modify products or processes for specific use.
- (e) “Derivative” means a **naturally occurring biochemical compound** resulting **from the genetic expression** or **metabolism** of biological or genetic resources, even if it does not contain functional units of heredity.

## Observations:

- **Complex and ambiguous – open to interpretations**
- **Can work in international law - must be specified in national law**
- **Not at all suited for being the wording in a contract**



# The variety of actors involved in ABS agreements:

- Academics
- Master student and PhD
- Small scale company
- Public breeding companies
- Large commercial entities
- Multinational companies
- Traders
- Collections

**What does  
each of these  
users want  
from you?**

**What can you  
provide?**



# **The great challenge:**

## **How to turn this into a written language definition:**

- **Clear**
- **Enforceable**
- **Understandable**



# A case study – the teff contract:

- Teff varieties sent from Ethiopia to the Netherlands
- The purpose/ rational was twofold:
  - Making a new plant variety for being grown in Europe
  - Develop the market in Europe for Ethiopian grown teff
- Common ground of understanding
  - Make a long term relationship or get some quick benefits?





# The subject in the teff case:

## 4 The scope of access

- 4.1 The **Provider** agrees that the **Company** accesses and uses the genetic resources of Teff specified in Annex 1 to this **agreement**.
- 4.2 Under this **agreement**, the **Company** is permitted to use the genetic resources of Teff only for the purpose of developing non-traditional Teff based food and beverage products that are listed in Annex 3 to this **agreement**.
- 4.3 The **Company** cannot use Teff for any other purposes (e.g. chemical, pharmaceutical etc.) whatsoever unless explicit written consent is given by the **Provider**.
- 4.4 The **Provider** shall not grant to other parties access to Teff genetic resources for the purpose of producing the products of the **Company** listed in Annex 3 of this **agreement** unless it secures the consent of the **Company**.
- 4.5 The **Company** is not permitted to access the traditional knowledge of Ethiopian communities on the conservation, cultivation and use of Teff. Therefore, the **Company** shall not claim any rights over, nor make commercial benefit out of, such traditional knowledge unless explicit written **agreement** is given to it by the **Provider**.
- 4.6 To avoid possible confusion between the traditional knowledge of Ethiopian local communities and inventions made by the **Company**, the **Provider** shall, upon submission by the **Company** of its research proposals, inform the **Company** of the

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# Relationship to IPRs:

## 5 Intellectual property ownership

- 5.1 The **Company** shall neither claim nor obtain intellectual property rights over the genetic resources of Teff or over any component of the genetic resources. However, plant variety protection may be obtained over Teff varieties.
- 5.2 The plant variety protection rights over new Teff varieties the **Company** will develop shall be co-owned by the **Company** and **EARO**. Such varieties shall be used by **EARO** and the **Company** in such a way as not to damage the business interests of the **Company** in so far as the products listed in Annex 3 or the interests of **EARO** or the **Provider** are concerned.
- 5.3 The Teff varieties that are not developed by the **Company** shall be owned by the **Provider** on behalf of the Teff farming local communities of Ethiopia. If it is found to be in the interest of the **Provider** or the **Company**, such varieties may be registered in the name of **EARO**. The **Company** shall handle and cover the cost of such registration outside of Ethiopia, provided that it has the finances in the given budget year.



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# Selection of claims in the teff patent

## Claims

1. A flour of a grain belonging to the genus *Eragrostis*, preferably *Eragrostis tef*, **characterized in that** the falling number of the grain at the moment of grinding is at least 250, preferably at least 300, more preferably at least 340, most preferably at least 380.
2. A flour according to claim 1, **characterized in that** the grain has after-ripened.
3. A flour according to claim 2, **characterized in that** the falling number of the grain at the moment of grinding is at least 1.01 times higher than at the moment of harvesting the grain, preferably at least 1.05, more preferably at least 1.20 and still more preferably at least 1.30 times higher.



# Selection of claims in the teff patent

## Claims

- 4. A flour according to any one of the preceding claims, **characterized in that** the grain is gluten-free.
- 5. A flour according to any one of the preceding claims, wherein the grains has been ground at least 4, preferably least 6, more preferably at least 8 weeks after harvesting.
- 6. A flour according to any one of the preceding claims, wherein the falling number of the grain at the moment of grinding is substantially stable for at least 2-3 weeks.
- ...
- 16. A **dough or batter** comprising flour according to any one of claims 1-15.
- 17. A **gluten-free dough** or batter comprising flour according to any one of claims 1-14.
- 18. A **food product** comprising flour according to any one of claims 1-15.



# Be Specific and Concrete Regarding All Substantive Obligations and Processes:

## Content of a benefit-sharing clause:

- Definition of the material
- Manners of its utilisation that are legal under the contract
- **Stipulate exact manner in which benefit sharing obligations will be discharged**
- Definition of what acts are not allowed
- Clear stipulation of consequences of breaches





A second great challenge:

# Exact manners to stipulates the sharing-obligations

- Concrete
- Well defined and externally verifiable trigger points
  - Calculable
  - Legal certain for both parties
  - Enforceable



# How to draft benefit-sharing obligations:

- Clear and defined trigger-points
- What shall be shared?
- When?
- How to calculate?
- What happens if/ when something goes wrong?



# Benefit sharing in a scoping agreement

2.4 Benefit sharing under the ABS Agreement during Actualization Phase shall be based on each party's contribution, fairness and mutual consensus.

Questions:

- Based on each contribution – relative contribution.
  - Danger: low value to natural resources, high value to research
- 'mutual consensus' – what happens if they do not agree?

# Benefit sharing clause

## 4.1 Calculation of Benefits and payment

**THE COMPANY** will make payment to the **ILC** of an amount of three percent (3%) of the net sales (as per **THE COMPANY's** accounting standards) of the Products by **THE COMPANY** , whether in [one specific country] or abroad. The payments will be calculated bi-annually (every six months) by **THE COMPANY** and paid to the Trust fund managed by MINISTRY within two months after the end of each six month period.



# Example agreement

## 4.1 Calculation of Benefits and payment

**THE COMPANY** will make payment to the **ILC** of an amount of three percent (3%) of the net sales (as per **THE COMPANY's** accounting standards) of the Products by **THE COMPANY**, whether in [one specific country] or abroad. The payments will be calculated bi-annually (every six months) by **THE COMPANY** and paid to the Trust fund managed by **MINISTRY** within two months after the end of each six month period.

- three percent (3%)
- net sales, after all and every cost the Company might relate
- as per the Company's accounting standards [themselves?]
- the Products – which products the coffee machine or only this particular cappuccino?
- which branch of the company
- whether in one country or abroad – Will this national branch sell anything abroad?



# Benefit-sharing calculation principles:

- Relative contribution?
- What if the GR was taken out of the scenario?
- The low value of nature as a problem
- How to calculate? Net or gross?



# Building a lab:

- Identify the vision for bio-innovation
- Identify your needs
- Which institutional structure exists?
- What can each bio-pro prospector contribute with?
- Development aid contribution?

**Griffith University and Eskites as 'best practices'**

**Bhutan**





# The link to IPRs - patents:

- Apply for a patent together? Common recognition as inventors
- A patent is an object for property – can be transferred
- Prohibit patenting?
- Encourage patenting?
- How to ensure a part
- Relative values?



## Be Specific and Concrete Regarding All Substantive Obligations and Processes: Formulate in most concrete manner possible:

- (i) the resources accessed and its location (genetic resources and/or ATK),
- (ii) the user's rights and expectations,
- (iii) the provider's rights and expectations,
- (iv) the user's obligations,
- (v) the provider's obligations and
- (vi) the overall contract objective.

The text of the contract must convey exactly what is included and what the parties have agreed to do, with the highest possible level of clarity and detail.



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## Rules for drafting contracts:

There is a need in **shifting paradigm** in ABS to make contracts work otherwise there will be a whole generation of ABS contracts being signed that will end up as unenforceable.

(copy-past is not useful)

# Countries making examples available:

Kenya

Cameroon

Ethiopia

South Africa

**My worry: that we are making agreements that will not be fulfilled and will not be possible to enforce.**



# MoU Kenya:

- **ARTICLE 8: BENEFIT SHARING**
- Benefits resulting from utilization of biological resources by all partners will be used in accordance with the CBD and Nagoya Protocol and in line with the country's constitution 2010 and the domestic legislations such as Wildlife Conservation and Management Act 2013 and EMCA 2015.
- Partners shall take inventory of all potential and derived benefits guided by the IP audit reports and develop agreeable benefit sharing plan.



# MoU Kenya:

- **ARTICLE 8: BENEFIT SHARING**
- [...]
- Benefits shall include both monetary and non-monetary on the R&D value chain, which will include both academic and commercial steps. These benefits will be shared in accordance with the benefit sharing plan in the Annex V and utilized as stipulated in Nagoya protocol Article 9,
- The benefit sharing plan shall consider the communities living adjacent to the project sites and their indigenous knowledge.





# MoU Kenya:

## ARTICLE 6: INTELLECTUAL PROPERTY RIGHTS AND PROTECTION

- I. [...].
- II. The Project Partners will undertake IP audit before, during and towards the end of the project to show the baseline and progress of existing and generated intellectual property. All generated and potential IP will be recorded in special note books and all parties to the IP generated will sign specific IP agreements as per the SOP.
- III. All partner institutions will submit their IP policy to the Project Management Office and harmonized appropriately under this MoU.



# MoU Kenya:

## ARTICLE 6: INTELLECTUAL PROPERTY RIGHTS AND PROTECTION

IV. The accessed biological resources **shall remain the property** of the Kenyan Government and all voucher specimen duplicates s will be deposited in Kenyan designated repositories and other agreed repositories as per established standards in conformity with Nagoya protocol instruments of PIC, MAT and MTA.

VIII. **Transfer** of generated IP rights by partner **to new ownership** will be subject to authorization by the provider and consultations by all partners under this MoU.



# Prior Informed Consent AGREEMENT:

20 academic visits to THE USER COUNTRY for Kenyan professionals will be supported for exchange programs in institutions in THE USER COUNTRY under xxx and other fellowships. The Academic Exchange Programs will be undertaken to THE USER COUNTRY by the Kenyans spread across the five years as outlined in the project proposal (Year 1, 4 visits; year 2, 5 visits, Year 3, 4 visits, Year 4, 5 visits and year 5, 2 visits). ONE INSTITUTION will have 8 and ONE INSTITUTION 6 of these visits.



# Ethiopia: material transfer agreement:

## 4. Utilization of Material

1. The Researcher shall utilize the material for said research program only.
2. The Researcher cannot use the material for commercial purpose nor can it obtain any intellectual property right on the material.
3. The Researcher retains the material for the period of the research in ----- (destination country) whereupon it shall return any remaining unused material to the Provider.



# Ethiopia: material transfer agreement:

## 5. Other Obligations

1. The Researcher shall not transfer the material to any third party whatsoever without first notifying to and securing explicit written agreement of the Provider.
2. Any third party that obtains the material from the Researcher in the absence of permission from the Provider shall not have any right whatsoever over the material and its components.



# Ethiopia: material transfer agreement:

## 5. Other Obligations

3. The Researcher shall notify the Provider the progress of its research through periodic research report.
4. The Researcher shall at the end of the research present to the Provider the hard and electronic copy of the research results.
5. Any benefit that accrues from the use of this material shall be subject to the relevant existing and future national and international laws.



# Ethiopia: contract

4.3 The **User** shall not use *Aloedebrana* genetic/biological resource for any other purposes whatsoever unless an explicitly written permit is given by the **Provider**.

4.4 The **User** shall not transfer the *Aloedebrana* genetic/biological resource to third parties the Access permit or the rights and obligations there under without obtaining explicit written consent from the **Provider** to that effect.

4.11 The **User** shall neither claim any rights over, nor make commercial benefit out of such community knowledge unless an explicitly written permit is given to it by the **Provider**.





# Ethiopia: contract

## 5. Intellectual property ownership right

5.1. The **User** shall neither claim nor obtain intellectual property rights over *Aloe debranagenetic*/biological resource or any parts thereof and associated community knowledge.

5.2. The **User** shall acknowledge and declare Ethiopia as a geographic origin of *Aloedebrana* genetic/biological resource for the product developed therefrom.

5.3. Any joint inventions made by Parties based on *Aloedebrana* genetic/biological resource or parts thereof shall be jointly owned by the Parties.



# Ethiopia: contract

## 6. Transfer to third parties

The **User** shall not transfer *Aloedebrana* genetic/biological resource or any component of it to the third parties for any purpose without first obtaining explicit written consent from the **Provider**.



# Ethiopia: contract

## 8. Benefit sharing

The **User** has agreed to share the following benefits that arise out of the utilization of genetic/biological resource:

8.1 The **User** agrees to pay to the **Provider** a yearly amount of xxx amount of Ethiopian Birr per year.

8.2 The mode of payment will be effective at the first month of each agreement year.

8.3 The years for the purpose of this agreement begins from the date of the entry in to force of this agreement.



# Ethiopia: contract

## 8. Benefit sharing

The **User** has agreed to share the following benefits that arise out of the utilization of genetic/biological resource:

8.4 The **User** shall give the community priority to supply the raw materials of *Aloedeburan* genetic/biological resource required for the production of Aloe oil/gel.

8.5 The **User** shall have the obligation to provide equipment and technological support to the communities for the proper collection and harvesting of *Aloedeburana* genetic/biological resource.



# Ethiopia: contract

## 8. Benefit sharing

The **User** has agreed to share the following benefits that arise out of the utilization of genetic/biological resource:

8.6 The **User** shall include Ethiopian scientists/researchers involved in the research undertaken. The kind of research on which Ethiopian scientists/researchers will participate and the mode of participation shall be specified by written mutual agreements of the parties.

8.7 The **User** shall share with the **Provider** the results of research it will undertake on the genetic/biological resource. Accordingly, the **User** shall share with the **Provider** the knowledge or technologies it may generate using *Aloedebrana* genetic/biological resource.



# Ethiopia: contract

## 8. Benefit sharing

The **User** has agreed to share the following benefits that arise out of the utilization of genetic/biological resource:

8.8 The **User** shall give training for the concerned institutions and local communities to enhance skills in genetic/biological resource conservation, development, propagation and sustainable use of *Aloedebrana* genetic/biological resource.



# Cameroon:

## Article 3 : Duration of the MAT

- (1) The present MAT are agreed upon for a duration of three (3) years, renewable by agreement of the parties on site or off site.
- (4) With respect to the sharing of monetary benefits during the commercialization phase,
  - To guarantee the purchase of the dried roots at the price of 2700 FCFA per kilo, to be paid by bank transfer according to the amounts specified in article 6 and onto the accounts specified in annex 1;
  - To define jointly with the Local Community at the beginning of each year the quantity of the dried roots requested;



# Cameroon:

4 [...]

- To pay 25% of the **benefits** before taxes **associated with the selling** of products arising from the **utilization of genetic material** of the plant *Echinops giganteus* by bank account to the Local Community specified in annex 1;
- To ensure transparency in the sharing of monetary benefits resulting from commercialization of the genetic resources.





# Cameroon:

(5) With respect to intellectual property rights,

- Not to hold any rights to intellectual property on the genetic material of *Echinops giganteus*;
- To only sell products deriving from the roots of *Echinops giganteus* as agreed with the Local Community. Any other new product must be negotiated in a new agreement with the Local Community according to the laws and regulations in force in Cameroon.



# South Africa:

6.1 As consideration for the KNOWLEDGE conveyed to the USER by the PROVIDER, the PARTIES hereby agree that, should commercially viable PRODUCT(S) be developed by the USER **as a result of** its use of the KNOWLEDGE, the PROVIDER shall be entitled to, for the duration of the ROYALTY PERIOD, **share** in the FINANCIAL BENEFITS in the form of ROYALTIES [...]



# South Africa:

## 7. REVIEW OF AGREEMENT

This agreement will be reviewed every \_\_\_\_\_ (fill in agreed timeframe), with a view to amending the agreement if necessary.

One month prior to every review, the permit holder must disclose any new material information with regard to the biotrade / bioprospecting to all stakeholders to enable stakeholders to participate in the review from an informed basis.



# South Africa:

## 8. THIRD PARTY TRANSFER

The RECIPIENT/PERMIT APPLICANT undertakes not to transfer the indigenous genetic and biological resources to a Third Party, without the written authorization of the ACCESS PROVIDER; and then only under a legally binding written agreement with the ACCESS PROVIDER based on this Agreement.



# South Africa:

## 11. BREACH AND TERMINATION

11. If a party to this agreement( “the breaching party”) breaches any material provision of this agreement, the other party ( “the aggrieved Party”) shall be entitled to deliver to the breaching party a written notice requiring the breaching party to rectify that breach within 30 days of receipt. If the breaching party remains in breach of such provision within 30 days after receipt of the notice, the aggrieved party shall be entitled (without derogating from any of its other rights or remedies under this agreement or at law)



# South Africa:

## 11. BREACH AND TERMINATION

11.1 To sue for immediate specific performance of any of the defaulting party's obligations under this agreement, whether or not such obligation is then due, or

11.2 To cancel this agreement, in which case written notice of the cancellation shall be given to the defaulting Party, provided that the remedy of specific performance or damages would not adequately prevent the aggrieved party from being prejudiced.





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*Thank you for your attention*

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