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DISPUTE RESOLUTION ALERT

IN THIS **ISSUE**

DOMICILIUM CITANDI ET EXECUTANDI – DO YOU REALLY UNDERSTAND THIS TERM?

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INTERNATIONAL ARBITRATION: DRAFT REGULATIONS ON MEDIATION RULES FOR INVESTOR-STATE DISPUTES

On 30 December 2016, the Minister of Trade and Industry, Rob Davies, published Draft Regulations on Mediation Rules (Draft Regulations) under Government Gazette No. 40526 in terms of the Protection of Investment Act, No 22 of 2015 (Investment Act).

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On appeal, the Gauteng Local Division, considered the validity of the service of a summons at a contractually chosen domicilium citandi et executandi.

In simple terms *domicilium citandi et executandi* means the address one elects for the purpose of receiving all legal notices and processes. This is applicable to all contractual arrangements including, among others, the entering of lease agreements, loan agreements and financial agreements.

Upon the conclusion of an agreement parties as a standard practice insert a *domicilium* clause in the agreement to make provision for the contracting parties to elect their address of choice to which they wish to receive service of legal notices and processes in relation to the agreement. This entails inserting a street and/or postal and/or email address upon which notices of breach, letters of demand or court processes can be served. But is it as simple as that? Should more attention be given to the *domicilium* clause during the drafting stage?

On appeal, the Gauteng Local Division, Johannesburg in the matter of *Shepard v Emmerich* (A5066/2013) [2014] ZAGPJHC 120 considered the validity of the service of a summons at a contractually chosen *domicilium citandi et executandi*.

In the matter, the *domicilium* clause was contained in an addendum to a sale of business agreement, concluded between the appellant, as the purchaser, and the respondent as the seller (Agreement). In terms of the Agreement the seller elected the second floor of its attorneys of record and named a person for such service.

The purchaser issued summons against the seller for payment of a sum of money based on the Agreement. The summons was served by the deputy sheriff, which, according to the return of service, was effected on the seller's legal representatives being the chosen *domicilium citandi et executandi* by "affixing a copy of the combined summons to the principal door" of the *domicilium* address.

The service, not being effected at the second floor of the domicilium address and not marked for the attention of the named person did not comply with the provisions of the domicilium clause in the Agreement between the parties.

Strictly speaking, the service, not being effected at the second floor of the *domicilium* address and not marked for the attention of the named person did not comply with the provisions of the *domicilium* clause in the Agreement between the parties.

It was further accepted by the court a quo (court of first instance) that it was common cause that prior to the service of the summons, the law firm had moved offices from the *domicilium* address and further that the named person had resigned from the firm. As a consequence, the summons never came to the attention of the seller and judgment by default was subsequently sought and granted. Pursuant thereto the seller launched an application for rescission of the default judgment. The application was opposed and the court a quo found that the service was defective. The purchaser appealed the judgment.

On appeal, the court (full bench) found that the double provision in the *domicilium* clause provided for service on the second floor, which was not complied with. The second requirement was a reference to the named person which likewise was not complied with.

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CONTINUED

It is therefore imperative at a drafting stage to not merely regard the domicilium clause as a standard clause but to pay more attention thereto.

Of importance to note from the judgment was that the court stated that although the firm had moved and that the named person had resigned, this was immaterial as it did not and could not change the requirements for a proper service. Had the service been effected in accordance with the *domicilium* clause, even though the summons did not come to the attention of the seller due to the changed circumstances, it would have constituted proper service.

As a result, the appeal was dismissed as the purchaser did not adhere to the provisions of service as stipulated in the *domicilium* clause.

It is therefore imperative at a drafting stage to not merely regard the *domicilium* clause as a standard clause but to pay more attention thereto. On interpretation of the *domicilium* clause it will come down to the wording used. Parties as well as their attorneys must apply their minds to the *domicilium* clause as well as familiarise themselves with the service process of legal notices and summonses.

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INTERNATIONAL ARBITRATION:
DRAFT REGULATIONS ON MEDIATION RULES FOR INVESTOR-STATE DISPUTES

Section 13 of the Investment Act, as the empowering provision for the Draft Regulations, regulates the dispute resolution mechanism available to investors, including mediation.

On 30 December 2016, the Minister of Trade and Industry, Rob Davies, published Draft Regulations on Mediation Rules (Draft Regulations) under Government Gazette No. 40526 in terms of the Protection of Investment Act, No 22 of 2015 (Investment Act). The intended purpose of the Draft Regulations is to provide for rules to govern the mediation of any investor-state dispute between investors (whether foreign or domestic) in South Africa and the government of South Africa. It will essentially be triggered by actions by the government (as contemplated by the Investment Act) which affect an investor investment in South Africa.

The Draft Regulations are open for public comment until 30 January 2017.

Section 13 of the Investment Act, as the empowering provision for the Draft Regulations, regulates the dispute resolution mechanism available to investors, including mediation. Section 13(2)(d) specifically provides that "recourse to mediation must be governed by prescribed rules". Section 13(1) of the Investment Act appears to only contemplate investor-state mediation with a "foreign investor" and not also domestic investors. However, the Draft Regulations place no limitation on the type of investor (both domestic and foreign) who may refer a dispute to mediation. A dispute must be referred to mediation "within six months of becoming aware of the dispute". The time bar for the initiation of a mediation process by an investor does not appear sensible, as parties should always have the option and be encouraged to resolve disputes with the state on an amicable basis, even after other formal dispute resolution processes have been initiated.

The Draft Regulations propose rules governing, amongst others, the following:

- the application of the mediation rules to investor-state disputes in South Africa;
- the time limits for filing an investment dispute with the Department of Trade and Industry (DTI) for settlement by mediation;
- the appointment of mediators;
- procedural matters relating to the declaration of an investor-state dispute with the DTI and/or any other third party organ of state in South Africa; and
- the manner in which the mediation will be conducted.

The Draft Regulations are open for public comment until 30 January 2017.

The Draft Regulations are to some extent unorthodox where the DTI being a government department will essentially facilitate an investor-state dispute between investors and other organs of state through mediation in accordance with "rules set by government". Investors would possibly prefer a mediation process where government's perceived influence in the mediation process is limited through the selection of independent mediation rules such as the '*IBA Rules for Investor-State Mediation*', including mediators which are not on a list kept by DTI to be appointed. More flexibility to allow the state and

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DRAFT REGULATIONS ON MEDIATION RULES FOR INVESTOR-STATE DISPUTES

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The rules contemplated by the Draft Regulations should be made more flexible for the parties to decide on which rules should be applicable to govern the mediation.

the investor to decide what rules would be suited to govern the investor-state mediation process would be apposite. Most foreign investors would prefer 'international mediation rules' adapted for investor-state disputes, as opposed to a process in accordance with rule of the state with which it has a dispute with.

Thus, the rules contemplated by the Draft Regulations should be made more flexible for the parties to decide on which rules should be applicable to govern the mediation. In addition to providing a more flexible approach certain mandatory provisions relating to the initiation of a mediation process against organs of state and such administrative matters relating to the facilitation of the dispute between the DTI and such organ of state may remain. In doing so, the Draft Regulations may encourage the use of mediation to resolve investor-state disputes with the South African government. The Investment Act has not yet come into effect and it appears that the intention is for the Draft Regulations to be effective on the same date the Investment Act comes into effect.

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BBBEE STATUS: LEVEL THREE CONTRIBUTOR

Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 3 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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