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DISPUTE RESOLUTION ALERT

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CONVERGENCE AND NEW MEDIA:
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There are currently no limits on the duration of an assignment of copyright but this is set to change as s22(3) of the revised Copyright Amendment Bill to a period of 25 years commencing from the date of the assignment.

The Department of Trade and Industry (DTI) published the Copyright Amendment Bill, 2015 (2015 Bill) for initial comment in 2015. While there is considerable value in principle to the 2015 Bill, the 2015 Bill was met with widespread industry criticism for failing to take into account the basic tenets of copyright law. Following a review of the public comments, a revised Copyright Amendment Bill (Bill) was introduced in the National Assembly during May 2017.

If the amendment is to apply with retrospective effect then this could amount to an unconstitutional deprivation of property rights.

A major theme of the Bill is the updating of copyright legislation in line with the ever-evolving dictates of a digital world. The Bill also seeks to develop a copyright and related rights framework that will protect the rights of artists, producers and authors of works through the increased regulation of royalty payments and the promotion of greater access to information, research and resources for educational purposes and by persons with disabilities.

While a number of concerns have been addressed in the Bill, there are some areas which remain largely untouched. Section 22 which deals with the assignment of copyright and the granting of licences in respect of copyright, is a case in point.

Under the Copyright Act, copyright is transmissible as movable property by assignment, testamentary disposition or operation of law. There are currently no limits on the duration of an assignment of copyright but this is set to change as s22(3) of the Bill proposes to limit assignments of copyright to a period of 25 years commencing from the date of the assignment. Of further concern is that on a strict interpretation of the section, it appears that an assignment of copyright can only be for a period of 25 years and not for a longer or shorter period.

Copyright ownership brings several benefits including unrestricted freedom of use and an ability to control third party exploitation and revenue generation opportunities. The amended s22(3) will affect the ability of the owners of copyrighted works to freely commercialise their works. Of particular concern is that the provision will impact negatively on a nascent but flourishing local production industry. Ongoing investment in the film and television industry is vital to the continued growth of this industry. This is likely to be lost if content producers are only able to acquire the copyright in productions which they have specifically commissioned for a limited assignment period.

The section also fails to differentiate between existing and future assignments of copyright. If the amendment is to apply with retrospective effect then this could amount to an unconstitutional deprivation of property rights. Section 25(1) of the Constitution provides that no person may

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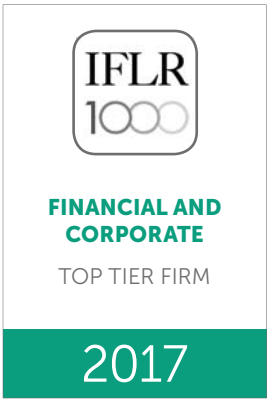
Public hearings will be held on 27, 28 and 29 June.

be deprived of property except in terms of a law of general application and no law may permit arbitrary deprivation of property. This is interpreted to place both a procedural and substantive requirement of rationality on all lawful deprivations of property. This means that substantively there should be a link between the end sought to be achieved by the law and the means employed for that purpose. It is not clear what purpose is to be achieved by restricting assignments of copyright to a period of 25 years.

The owners of copyright should have the flexibility to decide on the commercial arrangements that suit them best. The proposed amendments essentially undermine the flexibility afforded in copyright ownership and use. If future assignments of copyright are to be limited to a period of 25 years then the Bill should be amended to make it clear that the period of 25 years will only be of application to assignments entered into after the Bill's promulgation.

The Portfolio Committee on Trade and Industry has invited interested parties to submit written comments on the Bill. Public hearings will be held on 27, 28 and 29 June.

Janet Mackenzie and Judith Njuguna



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INTERNATIONAL ARBITRATION: SELLING FEATURES OF AN AFRICAN-SEATED ARBITRATION

The United Nations Commission on International Trade Law has developed the Model Law on International Commercial Arbitration.

The perception that international arbitral awards are only difficult to enforce in Africa is incorrect. African countries have regimes similar to those of developed arbitral jurisdictions.

It is thus far settled amongst various commentators that in order for parties to a dispute to conclude that a particular country is an arbitration-friendly jurisdiction the following requirements must be met:

- An established strong legal framework;
- An independent judiciary;
- Recognition and enforceability of foreign arbitral awards;
- No interference by the local courts at the seat;
- Privacy and confidentiality.

Does Africa meet these requirements?

A country is an appropriate choice for arbitral seating when the arbitral legal framework in that country is clear and unambiguous: the country has a competent, reliable, consistent and impartial judiciary and when the domestic law acknowledges the enforcement of the rule of law and arbitration as a medium for dispute resolution.

The United Nations Commission on International Trade Law (UNCITRAL) has developed the Model Law on International Commercial Arbitration. This Model Law or variations thereof can be adopted by a country to regulate international commercial arbitration. African jurisdictions such as Egypt, Tunisia, Kenya, Uganda, Rwanda, Nigeria, and South Africa have adopted the Model Law, which contains principles generally accepted to be international arbitration practice. The Model Law was developed to address the diverse approaches taken in international arbitration throughout the world and to provide modern and easily adopted rules.

The perception that international arbitral awards are only difficult to enforce in Africa is incorrect. African countries have regimes similar to those of developed arbitral jurisdictions. Many countries may face unexpected challenges concerning recognition and enforceability and Africa is no different. These challenges are, however, not only linked to the legal regime but also to the judicial perception of international arbitration in the particular country.

South Africa adopted the International Arbitration Bill (Bill) on 28 April 2016. This Bill provides for the incorporation of the Model Law on international commercial arbitration as adopted by UNCITRAL. South Africa like many other African countries has ratified (without reservation) the New York Convention (Convention). The provisions relating to the Convention ensure that foreign arbitral awards will be enforced in South Africa and permit domestic courts to refuse to recognise or enforce foreign arbitral awards in very limited circumstances. In any event, South African courts are long reputed to have issued orders recognising and enforcing arbitral awards from foreign jurisdictions.

The Bill further confirms that parties to international commercial arbitrations will have the benefit of privacy and confidentiality unless there arecompelling reasons for the contrary or the arbitrator directs otherwise. This means that all

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Increased attention on African arbitral centres, improved legislative frameworks reinforcing international commercial arbitration, better resources and training will enhance the attractiveness of African Institutions as arbitral seats.

documents relating to the arbitration proceedings will be kept confidential by the parties and the arbitrator, except to the extent that disclosure is required because of a legal duty to do so or to protect or enforce a legal right.

The greatest concern when considering an African-seated arbitration is the interference by domestic courts as such interference could cause delays and procedural uncertainty.

Although international corporates have been reluctant to have their disputes heard in Africa, increased attention on African arbitral centres, improved legislative frameworks reinforcing international commercial arbitration, better resources and training will enhance the attractiveness of African Institutions as arbitral seats.

Thabile fuhrmann and Johanna Lubuma

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INTERNATIONAL ARBITRATION:
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In 2013, the International Chamber of Commerce registered almost double as many arbitrations involving African parties as it did in 2012, but only few of the arbitrators hearing these disputes were African.

Africa's economy has grown significantly over the past years. This has led to an increase in foreign investment in the continent and inevitably in increased international disputes. In addition to the growth of commercial and investment arbitrations involving African parties, Africa is seeing a change in direction with the establishment of new arbitral institutions in Kigali, Nairobi and Accra.

Could this be a sign of increased investor confidence in the African region, not only in regard to the economy but also the ability of African institutions to resolve multiparty commercial disputes? In 2013, the International Chamber of Commerce (ICC) registered almost double as many arbitrations involving African parties as it did in 2012, but only few of the arbitrators hearing these disputes were African. It is also notable that most of the international commercial arbitrations involving African parties were not heard in Africa.

The International Centre for Settlement of Investment Disputes (ICSID) heard a total of four arbitration cases involving the Republic of the Gambia until at least 2015. Of particular interest was that only one of the 12-panel arbitrators in these proceedings was from Africa, while eight were from the EU and three from North America. An opportunity presents itself for African professionals to acquire and gain the much-needed specialist expertise in this fast growing industry in our continent.

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Thabile fuhrmann and Johanna Lubuma

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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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