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DISPUTE RESOLUTION ALERT

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INTERNATIONAL ARBITRATION:
DAVOS 2018 DECONSTRUCTED: SOUTH AFRICA'S SHARE IN A FRACTURED WORLD?

The theme for this year's World Economic Forum annual meeting in Davos, Switzerland was "Creating a Shared Future in a Fractured World". South Africa, as a fractured nation itself, had the very difficult task of convincing the world that it is still the investment destination of choice in Africa. In Davos, the South African delegation appears to have managed to reassure investors that the winds of change are blowing to deal with the country's serious political and structural concerns inhibiting the economy's growth and development.

CONVERGENCE AND NEW MEDIA:
MAINTENANCE AMENDMENT ACT: MORE COMPLIANCE REQUIREMENTS FOR ELECTRONIC COMMUNICATIONS NETWORK OPERATORS

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The first few weeks of 2018 have seen the South Africa government make some dramatic changes in the fight against corruption and corporate reform at parastatals. This includes the Deputy President's reassuring statements at the WEF in respect of the government's approach on a number of policy and proposed regulatory measures that inhibit economic growth in sectors, such as mining and energy. To an extent, it appears that the actions by government, pursuant to a shift of political power in the governing party during December 2017, have resulted in various investors relooking at South Africa's investment potential. However, for any new foreign direct investment (FDI) to flow to the country, the South African government will need to commit to "conditions" or "requirements" to ensure policy and regulatory certainty in the medium to long-term.

More particularly, government needs to clearly deal with, among others, the following policy and regulatory matters:

- Expropriation of property without compensation
  The African National Congress (ANC) identified this as one of their policy mandates during the December 2017 elective conference. Since property and property rights form the cornerstone of any investment, it is important for South Africa to clearly set out what the basis for any expropriation of property without compensation would be. Such clarity is essential because, if implemented, such a policy would violate s25 of the Constitution of South Africa and customary international law, as well as the guarantees provided under bilateral and multilateral investment treaties that any expropriation must be accompanied by fair market compensation.
- The protection of investment measures for foreign investors
  Specifically, South Africa needs to clearly define the different protections provided to foreign investors from different jurisdictions. This certainty is particularly important considering that (i) the Protection of Investment Act has still not been promulgated; and (ii) the bilateral and multilateral investment framework of South Africa for FDI has been dramatically altered. The South African investment framework provides for divergent protection measures for investment into the country, essentially where the same investment type or class into South Africa will receive different levels of legal protection, depending on the state from which the investment flows. In other words, where one investor could rely and

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enforce commitments made by the state under international treaties, an investor from another state, making the same investment, may only rely on domestic law protection. This is exacerbated by the elimination of recourse to investor-state arbitrations for investors from certain states (such as European investors), but not for other investors (such as Chinese and Russian investors). There is a need for a uniform approach to investment protection of FDI flow to South Africa, as currently there appears to be a clear disparity.

- Radical economic transformation in the broader South African economy
  The ANC also endorsed this objective at the elective conference. This notion appears to filter into the draft Mining Charter III on ownership and control, procurement of goods and services by mines, and social and labour matters. The draft Mining Charter III is a hot-potato plagued by various legal and practical problems, widely seen as a regulatory measure which will result in South Africa losing more investment in the mining sector and costing the economy dearly. The current court battle between the Minister of Mineral Resources and the industry through the Chamber of Mines does not serve South Africa's interest. For the future growth and development of the mining sector in South Africa, it is imperative that the government reconsiders the draft Mining Charter III to ensure inclusive growth that will be the catalyst for radical structural changes to the economy.
- Legislative changes in the Information and Communication Technology sector
  South Africa is contemplating enacting legislation to impose a mandatory wholesale open access regime and shared infrastructure regime in the ICT sector. Such a move would appear to violate the South African rule of law and certain fundamental international law obligations. Before the policy is implemented, it would be wise for government to carefully reconsider its impact. As with the policy uncertainty that plagued other economic sectors such as mining and energy, it is imperative that prior to government proposing a change to the underlying business fundamental to an industry, in-depth regulatory impact assessments must be conducted. Such precautions may avert unnecessary and costly legal battles over government policy.

Taking steps to address concerns with these policy and regulatory measures is imperative to unlock a host of economic development opportunities that will be a catalyst for inclusive growth. Dealing with these issues will further demonstrate to investors that – as Deputy President put it in Davos - "South Africa is open for business".

Jackwell Feris

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CONVERGENCE AND NEW MEDIA:
MAINTENANCE AMENDMENT ACT: MORE COMPLIANCE REQUIREMENTS FOR ELECTRONIC COMMUNICATIONS NETWORK OPERATORS

Most notably, the proposed Cybercrimes and Cybersecurity Bill, tabled last year, add new monitoring obligations for communications service providers and financial institutions.

Providers of electronic communications services (ECSPs) face an increasingly complex framework of compliance requirements in respect of their networks and accessing information pertaining to their use. While these requirements used to be derived primarily from sector legislation, such as the Electronic Communications Act, No 36 of 2005 and Interception laws (the RICA Act, No 70 of 2002) this is no longer the case. Requirements in respect of voice and data interception, real-time or archived communication-related information (meta data) and compliance with law enforcement directives have increased.

The order may only be granted if the court is satisfied that all reasonable efforts have been made by the maintenance officer to locate the defaulter and such efforts have failed.

Most notably, the proposed Cybercrimes and Cybersecurity Bill, tabled last year, add new monitoring obligations for communications service providers and financial institutions. This Bill requires an ECSP (and financial institution) within 72 hours of becoming aware of its network being involved in the commission of a cybercrime, to report it and preserve any information which may be of assistance to law enforcement agencies.

The latest piece of legislation to create further obligations for service providers is the Maintenance Amendment Act, No 9 of 2015. The opportunity for defaulters of maintenance to avoid their responsibilities is now becoming increasingly difficult, with maintenance officers that may now request electronic communications service providers to furnish contact information of defaulters.

During 2015, this Act came into force, with the exception of two sections and one subsection, presumably in light of certain practical difficulties. With effect from 5 January 2018, the three outstanding provisions, ie s2, 11 and 13(b) of the Maintenance Amendment Act, have become effective.

Section 2 of the Maintenance Amendment Act amends s7 of the Maintenance Act, No 99 of 1998, which deals with the investigation of maintenance complaints. The new provision sets out that if a person responsible for maintenance cannot be traced by a maintenance officer and is a customer of an ECSP, the maintenance court may now issue a direction to one or more ECSPs, to furnish the court with the contact information of the responsible person. In addition, the order may only be granted if the court is satisfied that all reasonable efforts have been made by the maintenance officer to locate the defaulter and such efforts have failed.

As is the case in the Cybercrimes Bill, an ECSP may apply for an extension of time, if it can be shown that the information cannot be provided timeously. The service provider may also apply for the cancellation

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The cost implications to obtain the information from a service provider may be funded by the State if it is found that the complainant cannot afford to do so.

of the direction, if it can be proven that no service is provided to the person in question, or if the requested information is not available in its records.

The cost implications to obtain the information from a service provider may be funded by the State if it is found that the complainant cannot afford to do so. The court may also order the person affected by the order (the defaulter), to refund the State, if it has paid the costs for the furnishing of information.

While this amendment may assist in tracing defaulters who often do everything in their power to evade their maintenance obligations, it adds a further obligation on service providers to comply with information and interception directives – an increasingly complex area of network compliance.

Tracy Cohen and Reinhardt Biermann

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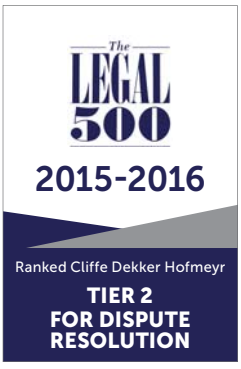
LITIGATION

LAW FIRM OF THE YEAR



CHAMBERS GLOBAL 2017 ranked us in Band 1 for dispute resolution.

Tim Fletcher ranked by CHAMBERS GLOBAL 2015–2017 in Band 4 for dispute resolution.

Pieter Conradie ranked by CHAMBERS GLOBAL 2012–2017 in Band 1 for dispute resolution.

Jonathan Witts-Hewinson ranked by CHAMBERS GLOBAL 2017 in Band 2 for dispute resolution.

Joe Whittle ranked by CHAMBERS GLOBAL 2016–2017 in Band 4 for construction.

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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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