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DISPUTE RESOLUTION **ALERT**

IN THIS **ISSUE**

The age-old question: When is a written agreement validly amended or varied

A lot has been written about the requirements to validly amend the terms of a written agreement between parties, particularly where a written agreement contains what is commonly known as a non-variation clause.

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The age-old question: When is a written agreement validly amended or varied

The leading case, setting out requirements that parties need to meet to validly amended a written agreement by email correspondence, is *Spring Forest Trading 599 CC v Willbery (Pty) t/a Ecowash and another* [2015] JOL 32555.

A lot has been written about the requirements to validly amend the terms of a written agreement between parties, particularly where a written agreement contains what is commonly known as a non-variation clause.

A non-variation clause generally provides that no amendment or variation of and to a written agreement will be binding on the parties unless such amendment or variation is reduced to writing and signed by both parties.

This type of clause has led to many a dispute in the past as parties sometimes accept and act as if a written agreement has been amended after holding a meeting, having a telephone conversation or shaking on it. Only later do the parties learn that nothing they agreed to has any legal effect, since it was not reduced to writing nor signed by the parties to the agreement.

With technology advancing as fast as it has, coupled with demands of the fast-paced commercial world, parties to written agreements have started to record verbally-agreed-to amendments by email, instead of preparing addendums to agreements. This appeared to present a quick and easy way to *"agree"* to amendments to written documents, fulfilling the *"in writing"* requirement. Parties found comfort in the fact that verbal discussions were recorded over email, presuming compliance with non-variation clauses.

This soon appeared to present its own difficulties as parties involved in disputes started to challenge email correspondence as a valid manner of complying with the requirements of non-variation clauses.

Our courts have been called upon to determine this issue and the leading case, setting out requirements that parties need to meet to validly amended a written agreement by email correspondence, is *Spring Forest Trading 599 CC v Willbery (Pty) t/a Ecowash and another* [2015] JOL 32555 (SCA).

In this case, there was a non-variation clause which provided that any variation to the written agreement would not be valid unless it was reduced to writing and signed by both parties. The variation of the agreement, whereby the agreement was purportedly cancelled, took place in a series of emails.

The court confirmed that s13(1) of the Electronic Communications Act, No 25 of 2002 (ECTA) requires an advanced electronic signature to be used on an email when a signature is required by law. In contrast, if the parties to a transaction impose the requirement for a signature in an agreement, but have not specified the type of signature to be used, s13(3) of ECTA states that the requirement is met if a method is used to identify the person and to indicate the person's approval of the information communicated, and, having regard to all the relevant circumstances at the time the method was used, the method was as reliable and was appropriate for the purposes for which the information was communicated.

The age-old question: When is a written agreement validly amended or varied...*continued*

As long as the data in an email is intended by the user to serve as a signature and is logically connected with other data in the email, the requirement for an electronic signature is satisfied.

The legal question the court was called upon to determine was whether the names of the parties at the foot of the emails constituted signatures as contemplated by s13(1) and s13(3) of ECTA.

The court stated that s13(3) of ECTA applied to the case, as the parties agreed to the non-variation clause and if one had regard to the purpose for which advanced electronic signatures are required, it was apparent that it does not apply to private agreements such as in the case.

The court found that an *"advanced electronic signature"* is a signature which results from a process accredited by an accreditation authority and is used for accredited authentication products and services.

In the *Spring Forest* case the court found that there was no suggestion that either of the parties' businesses dealt in products and services to which contracts that require advanced electronic signatures as envisaged in the ECTA relate and to impose these onerous requirements on the parties would have a detrimental effect on electronic transactions.

The court stressed that the approach of courts to a signature, in circumstances like this, is pragmatic, not formalistic. The method of signature must, however, fulfil the function of authenticating the identity of the signatory.

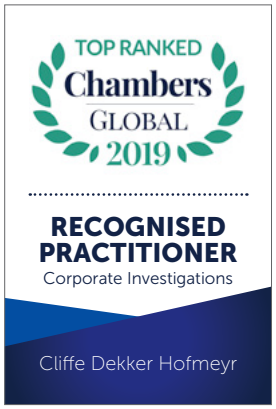
As long as the data in an email is intended by the user to serve as a signature and is logically connected with other data in the email, the requirement for an electronic signature is satisfied.

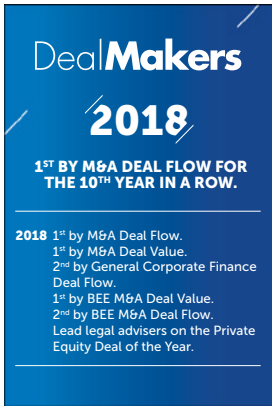
Therefore, the names of the parties at the foot of the emails setting out the agreed-to amendments, will meet the definition of an *"electronic signature"* and will, if all the requirements discussed above are met, mean *"in writing"* and *"signed by all parties"* as required by a non-variation clause.

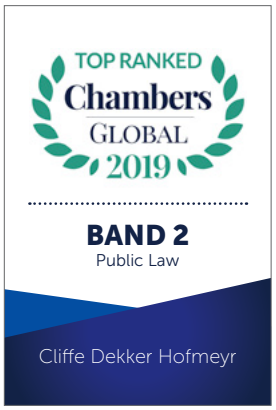
It will be incumbent on each of the parties to an agreement with a non-variation clause to ensure that the requirements, as confirmed by the court in the *Spring Forrest* decision, are met, to avoid any disputes as to the validity and enforceability of any amendments to the agreement.

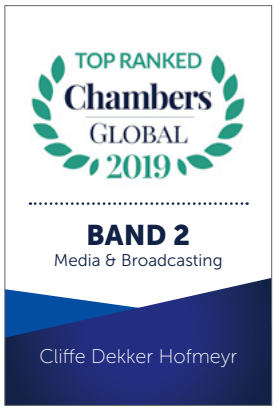
"Technology is, of course, a double edged sword. Fire can cook our food but also burn us"- Jason Silva.

Lucinde Rhoodie and Ngeti Dlamini









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Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 1 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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