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The Director-General
Attention: Ms V. Gilbert
Department of Trade and Industry
Private Bag X84
Pretoria
0001
Communicated electronically to: investment@thedti.gov.za

Dear Ms Gilbert

Comments on the proposed Regulations in terms of the Protection of Investment Act: Draft Regulations on Mediation Rules (Government Gazette 40526, Notice 958 of 2016)

INTRODUCTION

The publication of the draft Regulations on Mediation Rules for public comment is acknowledged and the input provided in this submission represents the views of 42 stakeholders, all of whom of accredited commercial mediators (names and contact details available on request).

This submission intends to raise principled concerns with the draft regulations and, in a spirit of constructive engagement, provide specific input on how they can be improved should the development of the regulations progress.

These comments are based on over 25 years' experience in the field of Alternative Dispute Resolution. John Brand and Felicity Steadman trained labour and employment mediators for the Indepdent Mediation Service of South Africa and the Commission for Conciliation, Mediation and Arbitration between 1989 and 2000. They have trained commercial mediators for the Arbitration Foundation of South Africa and for Conflict Dynamics since 1996. They are extremely experienced labour / management and commercial mediators with both local and international experience.

CONCERNS OF PRINCIPLE

The lack of overarching policy and legislation for Alternative Dispute Resolution - domestic disputes

Alternative Dispute Resolution (ADR) is a term used to describe procedures for settling disputes by means other than litigation. ADR procedures include negotiation, mediation, conciliation, and arbitration, amongst others.

ADR, in the form of mediation, remains in its infancy in South Africa despite the successful use thereof both locally and internationally. However, developments over the last few years in the policy and legislative arena have led to the development of the Court-Annexed Mediation Rules (CAMR), provisions in various primary pieces of legislation catering for ADR, and the further development of private sector services to Parties who do not want to make use of, or cannot afford, the normal legal processes.

It is clear that ADR is increasingly being accepted as a means not only to resolve disputes efficiently and effectively, but also to prevent and manage conflict in a proactive manner. In such a growing field it is important

for legislators, those who practise ADR, and the public alike to share a common vision and implementable strategy for ADR in South Africa. Despite the growth in the sector of ADR, an overarching policy framework and Act is lacking for mediation, and the existing legislation relating to arbitration needs to be updated. Legislation is being developed in an ad-hoc fashion that cannot be supported, as the policy and legislative outcomes could be very different depending on what competent authority is being engaged with, and even what matter is at hand that requires ADR. This would introduce unnecessary complexity into the ADR space in South Africa.

Domestic efforts to develop overarching ADR legislation – for domestic and international disputes

The Law Society of South Africa has been working on advocating for the need for overarching legislation for a number of years, and this work continues. However, there is resistance to the development of the legislation and, in the interim, legislation such as these draft regulations are being developed.

From an international perspective, the legislation is seen to exist in a vacuum, not being enforceable due to a lack of Supreme Court Rules for ADR for example, and not being in line with international expectations. The credibility of ADR in South Africa is therefore being put at risk during a period when strong growth should be experienced in the sector and at a time when the judiciary is under such intense pressure. Although CAMR now exist and are being implemented in selected Magistrate's Courts on a trial basis, the uptake is slow.

Furthermore, without such overarching legislation in place, there cannot be the development of a position for South Africa relating to international agreements on ADR. Such international agreements are critical to contributing to the reduction of investor policy uncertainty, increasing international investment in South Africa, and subsequent social upliftment through job creation.

No access to international arbitration

Following recent revisions of domestic legislation, South Africa's international investors are no longer able to approach international arbitration platforms when disputes arise; leaving only domestic provisions – that as described above are not sufficiently developed or implemented – to be platforms to resolve disputes. This has grave consequences for South Africa as investors continue to lose confidence in South Africa as an investment destination because they are unsure whether their investments will be protected.

As just two examples, the American Chamber of Commerce has publicly criticised these actions and locally the media has reported that the regulations are the "Achilles heel of investment in SA".

Misalignment of policy

Domestically, regionally and internationally, the draft regulations represent evidence of the level of domestic institutional policy misalignment that currently faces South Africa. Domestically, the regulations cannot be supported due to the reasons provided above, because, if implemented, they will exist in a vacuum.

Regionally, the draft regulations go against policy of the Southern African Development Community of which South Africa is a member.

Internationally, the ADR policy environment does not align to investor expectations where South Africa has cancelled many bilateral investment agreements whilst assuring investors that South Africa will ensure economic policy certainty.

Regulations go beyond the scope of the Act

A critical challenge with the draft regulations, and an ever-increasing trend in domestic law-making, is that they go beyond the provisions of the Act. The regulations ultimately allow the Government to determine if a matter will be subject to mediation or not by requiring parties (the investor and the South African Government) to agree that the matter will be mediated, rather than only requiring an investor to refer a matter for mediation which then should take place as a matter of course. This is not only beyond the provisions of the Act (section 13 clearly articulates recourse to mediation as a right afforded to foreign investors) but is not in good faith or in harmony with international best practice. As they stand, the regulations, in effect, give the government a veto over any referral to mediation and deprive foreign investors of the only special protection provided by the Act.

SPECIFIC COMMENTS

As mentioned previously, an overarching ADR policy and legislative framework for South African domestic and international investor disputes requires intense and urgent attention from a development and implementation perspective prior to the development of subordinate pieces of legislation. Should this become a reality in South Africa there will then be provisions for the resolution of domestic disputes too. However, this will not allow support to be given to the further development of these regulations that cater for disputes with international investors, unless there is a major policy shift whereby the regulations are aligned to the requirements of international investors and practice.

It therefore must be clearly understood that the input provided by this submission proposes no support for the further development and implementation of these regulations until they can be revised once the appropriate overarching policy and legislative framework is available. That overarching policy should be aligned with international convention that favours appropriate recourse to investors. The Department should apply pressure on the Department of Justice and Constitutional Development in this regard.

By supporting the further development of subordinate legislation, no matter the competent authority, would be to support the further silo-driven manner in which legislation is being developed in South Africa, and this cannot be supported.

However, in a constructive spirit, the following specific comments are made on the Draft Regulations on Mediation Rules, for consideration. These comments should in no way suggest support for their further development.

The numbers and titles reflected below refer to those of the draft regulations.

2. Application of Rules

As this appears to be an overarching regulation that is intended to provide rules for mediation in terms of the Act, the section of the Act that provides for Government other than the Department of Trade and Industry needing to comply with these regulations, should be given in the regulations.

Although not suggested for the regulation, it is important to understand how all of Government will be made aware and educated on how to proceed when a declaration of a dispute is lodged. As the implementing authority,

it would be imagined that **the dti** could be approached for assistance – however, the conflict of interest that this may pose should be considered.

3, 4 and 5. Declaration, Service and Filing of Dispute

3(1): A website address or contact information should be provided in the regulation.

3(2): As there is no form to review, it is important that the form only contain the information provided for by the regulation, as well as relevant contact details of **the dti**.

3(2)(b) versus (e), and other: Wherever possible, only a single term should be used (different terms should not be used interchangeably). For example, the difference between "claim", "measures" and "relief" should be clear in the regulation, if a difference is intended. Further examples are "declaration of dispute" and "notice of a dispute", and "form" and "notice".

3(3) versus the whole of 4, and 5: This seems unnecessarily repetitive. Furthermore, regulation 4 sets out an "acknowledgement" process which needs to take place within the same thirty days as the response required in 3(3) and 4(2), and there is no indication who "authorised official" is for each part of Government. It is recommended that:

- regulation 4 be deleted entirely to resolve this conflict and remove the duplication, and
- further provisions be given under 3(3) that determine who the "authorised official" of each part of Government is – recommended to be the Director-General of the National Department in all cases.

In addition, regulation 5 can also be deleted and the necessary regulation be given under 3(3) that a copy of the declared dispute, received by Government other than **the dti**, be provided to **the dti**.

6. Mediators

6(1): No information is provided in terms of how mediators become listed with **the dti**. It is also interpreted that other Government Departments should use the list of mediators maintained by **the dti**. The intention should be clarified. Furthermore, "suitably qualified" requires further expansion. It is recommended that "suitably qualified mediators" are mediators who have been trained and assessed as competent on a 40-hour mediator skills training course that has been accredited by the South African Dispute Settlement Accreditation Council (DiSAC).

6(2): "high moral character" should be expanded upon or replaced with confirmation that the mediator has not been convicted of a crime involving dishonesty. "recognised competence" would equal "suitably qualified" provided for in 6(1) and should therefore be deleted. Furthermore, one of the advantages of mediation is its neutrality and therefore specific fields of competencies ("law, commerce, industry or finance") should not be prerequisites.

6(3): The use of the term "judgement" is unfortunate as this implies that the role of the mediator is to provide judgement which is certainly not the case. It may be the intention of the Department to indicate that the mediator act in an independent, neutral and impartial manner, and should not be influenced in any way by either Party or any circumstance when exercising mediation duties. A rewording may allow clarification and confirmation of the independence, neutrality and impartiality of the mediator.

7. Appointment of Mediator

It would be more appropriate for some of the rules given in this regulation to be moved to regulation 11; for example, 7(6) and 7(7).

Furthermore, the following regulations require elaboration:
7(6): Timing – it should be clarified that this is referring to the mediation itself and not preliminary meetings or discussions held prior to the mediation.
7(7):"speedy" is not an acceptable term for a set of regulations. This should be reconsidered. The term "efficient" should be considered.
7(8): More than a single day may need to be available for the mediation. The regulation implies, by the use of the singular "date", that only one day is required.
7(9): the term "determine" should be replaced with "agree".

9. Representation of Parties

The use of the term "at least" is not understood. Surely the term "within" should be used?

10. Preliminary Meeting

10(2)(b): Documents referred to here should surely be filed with the mediator and not with the Department.

10(2)(c): Kindly change the "or" to "and/or" as either of the options could be relevant. The use of "or" implies that only one option can be the basis for the preliminary meeting.

One of the main purposes of this preliminary meeting should be to settle the Mediation Agreement or Agreement to Mediate. No reference is made in the Draft Regulations to such an Agreement. While the mediation process and its principles might be regulated by proposed Mediation Rules, it is usual for the parties and the mediator to sign an 'Agreement to Mediate' or a 'Mediation Agreement'. Such an agreement forms the contractual basis of the parties' participation in the mediation and typically incudes clauses pertaining to:

- authority and status of the parties in the mediation to negotiate and to bind that party to the terms of any settlement;
- confidentiality and without prejudice status of proceedings;
- the role of the mediator;
- settlement formality, including that no terms of settlement reached at the mediation will be legally binding until set out in writing and signed by or on behalf of the parties;
- fees and costs of the mediation, what these are and how they will be paid; and
- legal status and effect of the mediation:

12. Role of Parties

12(1): The words "and settlement of the dispute" should be added to the end of the sentence.

13. Challenge of Mediator

13(8): The use of the terms “decision of the mediator” is unfortunate as the mediator facilitates the resolution of conflict by creating an environment that is conducive to the self-resolution of disputes. The mediator does not make decisions on behalf of any of the Parties. This provision requires further consideration.

14. Closure of Mediation

14: Settlement agreements are critical to be provided for as, once this is in place, mediation has been successful and can be terminated; unless there is agreement that Parties should come together in the future for any reason (e.g. implementation of the current settlement agreement or the mapping and discussion of other related or unrelated disputes). These should therefore be provided for in the regulation. The enforcement of a settlement agreement should also be provided for by referencing other relevant legislation (in the absence of overarching ADR policy and legislation), thereby making it clear that the outcome(s) of mediation are binding and enforceable.

15. Termination of Mediation

15: Text should be included to clarify that mediation can be terminated by any Party “at any time”, and should provide for the next steps.

16 and 17. Privilege versus Confidentiality

The intention of disaggregating these concepts is not understood and should be reviewed with an aim to consolidate the provisions.

17. Confidentiality

17(4): The following text should be added: “unless agreed otherwise as a part of the Settlement Agreement.”.

19. Fees and Costs

19(2): The payment of the mediator is not adequately addressed in the regulation. Firstly, these regulations contemplate disputes that may arise between investors and any Government entity in South Africa. It should be considered that payment may take some time and assurances should be provided for in the regulations; with a time-frame for payment. Secondly, the payment structure between the Parties should also be catered for. Competent mediators busy building their practices in the unsupportive regulatory environment in South Africa will not take on Government work if payment becomes a challenge.

In reviewing the draft Regulations on Mediation Rules the drafters would be well advised to follow international best practice, such as the investor-state mediation rules approved by the International Bar Association (IBA) in 2012.

CONCLUSION

As must be clear from the comments made above, the formulation, drafting and implementation of mediation rules requires careful consideration, not only at the level of a Department or industry but more broadly from a legal policy and legislative point of view.

Conflict Dynamics would, of course, be open to assist in this regard or to discuss these comments and recommendations further.

We look forward to engaging on the matter in due course.

Kindly acknowledge receipt of this input and indicate the way forward. We welcome further engagement.

Yours sincerely

John Brand, Felicity and Marion Shaer

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