

DEPARTMENT OF TRADE AND INDUSTRY

NO. R. 712

13 JULY 2018

**NOTICE IN TERMS OF SECTION 14 OF THE PROTECTION OF INVESTMENT
ACT, 2015 (ACT NO. 22 OF 2015)**

By virtue of the powers vested in me in terms of section 14 of the Protection of Investment Act, 2015 (Act No. 22 of 2015) I, Dr Rob Davies, Minister of Trade and Industry, hereby:

- a) Make the Regulations embodied in the schedule hereunder.
- b) Determine that the Regulations will come into effect on the date of commencement of the Protection of Investment Act, 2015, (Act No. 22 of 2015).



Dr Rob Davies, MP
Minister of Trade and Industry

SCHEDULE
REGULATIONS ON MEDIATION RULES
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CHAPTER 1

INTERPRETATION AND APPLICATION

Definitions

1. In these Regulations any word or expression to which a meaning has been assigned in the Protection of Investment Act, 2015 (Act No. 22 of 2015), has the meaning so assigned and, unless the context otherwise indicates—

"competent authority" means the Judge President of one of the divisions of the High Court of South Africa;

"day" means a working day and exclude Saturdays, Sundays and public holidays;

"mediation" means a process in which the parties to a dispute, with the assistance of a mediator identify the issues in dispute, develop options, consider alternatives and endeavour to reach a settlement;

“mediation rules” means the mediation rules made in terms of the Regulations on Mediation Rules, 2017;

"mediator" means a neutral third party who has been nominated by the competent authority or mutually agreed to by the parties, and who has accepted such appointment in terms of regulation 8;

"parties" means an investor and the government;

"preliminary meeting" means an initial meeting convened by the mediator to deal with procedural or administrative matters in connection with the mediation; and

“Regulations” means the Regulations on Mediation Rules, 2017.

Application of Regulations

2. (1) These Regulations apply to a dispute between the parties whereby an action by government has breached the protection provided to the investor in terms of the Act, provided that such government action has affected an investment of or in connection with a foreign investor.

(2) A dispute contemplated in subregulation (1) submitted for mediation must be dealt with in accordance with these mediation rules unless otherwise agreed in writing between the parties.

Object of mediation rules

3. (1) The parties must act in accordance with the mediation rules and the reasonable directives of the mediator.

(2) The parties must at all times during mediation conduct themselves in a spirit of cooperation with the view of actively seeking a resolution of the dispute in an amicable and consensus seeking manner.

CHAPTER 2

GENERAL PROVISIONS

Declaration of dispute

4. (1) An investor may declare a dispute within six months of becoming aware of the dispute by completing the prescribed form contained in Schedule 1 and which is also available on the Department's website.

(2) An investor declaring a dispute must serve a notice of a dispute on the other party to the dispute calling on such party to serve a response on the investor within 30 days of receipt of such notice.

(3) The investor must lodge the declaration of the dispute in triplicate with the Department, who must issue same by affixing a case number thereon and registering the dispute in the registry of pending disputes for resolution and thereafter the issued declaration of the dispute must be returned to the investor.

Service of declaration of dispute

5. (1) If the other party to the dispute is not the Department, the investor must serve a copy of the declaration of dispute on the other party by—

(a) personally serving a copy of the declaration of dispute on the duly authorised official of the other party, and where applicable the accounting officer;

- (b) emailing, faxing or telexing a copy of the declaration of dispute to the authorised email address, fax or telex of the other party; or
- (c) sending a copy of the declaration of dispute by registered post to the authorised mailing address of the other party.

(2) The other party to the dispute must within 30 days of receipt of the declaration of dispute, acknowledge receipt thereof.

(3) If the other party to the dispute is the Department, the Department must within 30 days of receipt of the declaration of dispute, acknowledge receipt thereof by retaining a copy of the declaration and affixing its stamp detailing the date and the signature of the official who took receipt of the declaration on the original declaration as well as the investor's copy.

Filing of declaration of dispute

6. The investor must after effecting service of the declaration of dispute on the other party, file the original declaration of dispute with the Department confirming that the declaration was served on the other party.

Mediators

7. (1) The Department must maintain a list of suitably qualified mediators, who are willing and able to serve as mediators and such a list may be obtained from the Department's website.

(2) A mediator must be of high moral character, not convicted of a crime, and with demonstrated competence in the fields of law, commerce, industry or finance and upon a request –

(a) from the Department, must disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality; and

(b) from the parties during his or her appointment or in the course of a mediation proceeding, must without delay disclose any such circumstances contemplated in paragraph (a) to the parties.

(3) A mediator must in the execution of his or her duties, exercise independent discretion.

(4) A person who has accepted a request to become a mediator must be assessed as competent to mediate, and if necessary must be subjected to a 40 hour accredited training course identified by the Department.

Appointment of mediator

8. (1) A mediator may be nominated by agreement between the parties, from the list of mediators contemplated in regulation 7 and must be appointed by the Department subject to the requirements listed in regulation 7 within 10 days after receipt of the other party's response.

(2) In the event where there is no list of mediators as contemplated in regulation 7 (1), the parties may nominate a person who may be appointed by the Department, subject to the requirements contemplated in regulation 7.

(3) Depending on the complexity of the dispute, and with the consent of the parties concerned, more than one mediator may be appointed to assist in facilitating the resolution of the dispute,

(4) The appointed mediators must confirm by way of a signed statement –

- (a) his or her independence;
- (b) any information pertaining to a possible conflict of interest; and
- (c) any financial interest.

(5) If the Department is a party to the dispute, the parties may jointly request the competent authority who has jurisdiction over the matter, to appoint a mediator.

(6) In exercising the discretion to appoint a mediator, the competent authority may appoint a mediator from the list of mediators compiled by the Department and may request parties to make representations relating to any suitable mediators.

(7) The mediator must within 10 days of his or her nomination accept or decline such nomination by filing a notice with the Department to that effect, which notice must be communicated to the parties.

Notice of mediation proceeding

9. (1) The mediator must within 10 days of his or her appointment give notice to the parties of the date on which and the venue where the mediation will take place.

(2) The mediation proceedings must commence after 30 days of the notice contemplated in subregulation (1), unless the mediator and parties agree otherwise.

Place of mediation

10. The mediator may conduct the mediation at a place, which in his or her discretion is appropriate and convenient for the parties to the dispute, taking into account the circumstances and any representation made by the parties.

Representation of parties

11. (1) The parties may in writing furnish the mediator and each other with the names, designations and addresses of the representatives who will be in attendance at the mediation within 10 days after the appointment of the mediator.

(2) The parties are entitled to be represented by a legal practitioner should the parties deem it necessary to do so.

(3) The representative of the government should have the necessary authority and mandate to act on behalf of the government.

Preliminary meeting

12. (1) The mediator may convene a preliminary meeting with the parties, in person or by teleconference unless the parties, with the mediator's concurrence, agree otherwise.

(2) The purpose of the preliminary meeting is to—

- (a) discuss and agree on the issues in dispute;
- (b) formulate a process in terms of which the issues in paragraph (a) can be clarified and agreed to;
- (c) plan and agree on how a negotiated resolution of the dispute should proceed including, where appropriate, a timetable for exchange of information, including position papers and other relevant documents, and the filing of same with the Department and mediator;
- (c) make arrangements, if necessary, for confidentiality undertakings to be signed by all parties to the mediation proceedings; and
- (d) undertake such planning and administrative arrangements as may be required and necessary for the mediation proceedings, including the terms of appointment of the mediator.

Role of mediator

13. (1) At the commencement of the mediation proceedings, the mediator must direct that the parties engage each other with the view—

- (a) of defining the dispute or any ancillary issues;
- (b) to determine whether any agreement could be reached in respect of the issues in dispute; and
- (c) to determine whether agreement could be reached in respect of the most appropriate relief.

(2) The mediator may impose any reasonable condition and request, which in the mediator's view will contribute to the efficient resolution of the dispute.

(3) The mediator must assist the parties to negotiate a mutually acceptable resolution of the dispute by—

- (a) advising the parties to the dispute to attempt a resolution in a spirit of good will, cooperation, while using their best endeavours to maintain good institutional and personal relations with each other;
- (b) assisting the parties to identify and define the issues in dispute;
- (c) implementing a procedure which is aimed at achieving resolution of the dispute expeditiously, fairly and cost-effectively;
- (d) where appropriate, suggesting particular dispute resolution techniques for individual issues aimed at narrowing the issues in dispute expeditiously, fairly and cost-effectively; and
- (e) acting as the facilitator in direct negotiations between the parties.

(4) During the mediation process, the mediator may convene such meetings between the parties as the mediator considers appropriate, for the purpose of—

- (a) identifying and defining the issues in dispute; and
- (b) resolving or narrowing the issues in dispute, on terms acceptable to the parties.

(5) The mediator may decide on the most appropriate way of bringing clarity to the issues in dispute and may—

- (a) direct that meetings between the disputing parties take place;
- (b) consult with the disputing parties jointly or individually;

- (c) seek the assistance of or consult with relevant experts and stakeholders, only after the parties to the dispute agree to seek such assistance; or
- (d) provide any additional support requested by the disputing parties.

(6) The mediator must endeavour to bring the mediation proceedings to a closure within two months from date of appointment as mediator.

Role of parties

14. (1) The parties must do all things reasonably necessary to ensure that the mediation is conducted in a proper, expeditious and cost-effective manner.

(2) Without limiting the generality of subregulation (1), each party must—

- (a) participate in good faith in the mediation process;
- (b) comply without delay with any order made by the mediator on procedural matters; and
- (c) appear in person or through an authorised representative at the meeting scheduled by the mediator or agreed to between the parties.

Challenge of mediator

15. (1) A party to the dispute may request for the recusal of the mediator, should such party be of the view that such mediator may not be independent or impartial provided that the recusal request is done by way of a notice to the other party and the Department.

(2) The application must be brought within seven days of a party becoming aware of such a circumstance giving rise to such suspicion.

(3) The mediator may require the applicant applying for his or her recusal to set out the basis for the application.

(4) The mediator must recuse himself or herself if cogent and justifiable grounds for recusal are presented by a party to the dispute.

(5) In the event that the mediator does not recuse himself or herself and the other party is aggrieved by such decision pertaining to recusal of the mediator, the other party must within five days notify the mediator and file a recusal application dispute with the Department outlining the reasons thereof.

(6) The Department must within five days of receipt of such dispute request the mediator to provide reasons for his or her non-recusal.

(7) Upon receipt of the reasons for non-recusal by the mediator, the Department must within five days and by agreement with the parties nominate and appoint a mediator to resolve the recusal dispute provided if the Department is the other party, the competent authority may appoint such nominee. .

(8) The outcome facilitated by the mediator appointed to resolve the recusal dispute is final.

(9) This regulation is also applicable in the instance where there is more than one mediator appointed to resolve a particular dispute, where a party is of the view that any such mediator may not be independent or impartial.

Closure of mediation

16. (1) The mediator may declare the mediation closed under the following circumstances—

- (a) after being satisfied that the dispute has been successfully facilitated with a resolution being agreed upon;
- (b) if the parties to the dispute are in agreement that the dispute is incapable of being resolved by means of mediation; or
- (c) the mediator is of the view that the dispute is incapable of being productively resolved through the mediation proceedings.

(2) The declaration contemplated in subregulation (1)(a) must through the mutual agreement of the parties concerned be reflected in a settlement agreement.

(3) Closure of the mediation under the circumstances contemplated in subregulations (1)(b) and (c) must be stipulated by way of a declaration emanating from the mediator and signed by the parties concerned.

(4) The Department must be notified in writing of the closure of the mediation except in the instance where the Department is a party to the dispute,

Termination of mediation

17. (1) Any party to the dispute may terminate the mediation at any time by written notice to the other party, and the mediator.

(2) Such a written notice must clearly state the reasons for terminating the mediation.

Privilege

18. (1) The mediation process and all documentation relating thereto are privileged and may not be disclosed or relied upon or be subject to any disclosure with the view of proving any fact in any legal proceedings arising out of or in connection with the dispute.

(2) The privilege extends to—

- (a) any view expressed, or admission or concession made, by or on behalf of a party;
- (b) any view expressed, or suggestion made by the mediator; and
- (c) any document created or utilised for the purpose of the mediation.

Confidentiality and non-disclosure

19. (1) The government, the mediator, the parties and all advisors and representatives of the parties must—

- (a) except as provided in these rules, ensure that all information disclosed during and after the mediation proceedings remains confidential;
- (b) only use any information disclosed during the mediation proceedings for the purpose of the mediation;
- (c) not publish or cause the publication of any information relating to the mediation;
- (d) sign a non-disclosure of information and maintain the confidential nature of the proceedings and any information disclosed during such proceedings.

(2) The obligation to maintain the confidential nature of the mediation proceedings and or information disclosed therein may be dispensed with—

- (a) if disclosure is compelled by law;
- (b) to the extent necessary to give effect to any agreement which the parties to the dispute may reach during these proceedings or to enforce any agreement to settle or resolve the whole or any part of the dispute; or
- (c) if the parties to the mediation agree in writing to the disclosure of confidential information.

(3) A party to the proceedings may not record the mediation proceedings or any part thereof, unless the other parties agree to such recording, which form of recording will be decided upon between the parties.

(4) Mediation proceedings may be provided *in camera*.

Liability for acts or omissions

20. The parties agree that the mediator may not be liable to any party for or in respect of any act or omission in the discharge or purported discharge of his or her functions under these mediation rules, unless such act or omission has been –

- (a) fraudulently committed; or
- (b) the intention of the mediator.

Fees and costs

21. (1) The fees and costs of the mediation are, in the absence of an agreement to the contrary, borne jointly by all parties.

(2) The Department may from time to time publish the schedule relating to the fees and costs related to the mediation of disputes.

Short title and commencement

22. These Regulations is called the Regulations on Mediation Rules, 2018, and will come into operation on the date of commencement of the Protection of Investment Act, 2015 (Act No. 22 of 2015).



Schedule I:

Declaration of dispute of foreign investor

- NB:
1. Please type or print.
 2. Please attach copies of all relevant documents (contracts, receipts, etc.) upon which the claim is based.
 3. Hand this form to the _____ (**the dti**)

A. PARTICULARS OF INVESTOR

Full Names

.....

Business Address

.....

Postal Address

.....

Code

Telephone Number: (H) (.....) (W) (.....)

.....

B. PARTICULARS OF RELEVANT GOVERNMENT DEPARTMENT

Full Names

.....

Business Address

.....

