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Dear Friend/Client

RESOLVING COMMERCIAL CONFLICTS THROUGH MEDIATION

I would like to thank you for making use of my services as an arbitrator in the past and request a few minutes of your time to consider the documents attached to this letter.

I have become more and more convinced that we have reached a stage in Botswana's commercial development that requires a thorough reappraisal of traditional dispute resolution. To be frank, we have all become stuck in an adversarial mind-set and are lagging behind international trends. For a host of reasons, the way forward is to bring disputants together through mediation rather than traditional combative methods of "winner-takes-all" legal contests. Such "winners" have become an endangered species in Botswana.

Attached to this letter you will find:

1. An explanatory note entitled "Settling Commercial Disputes";

   and

2. Model Mediation Procedure Rules.

You may wish to reconsider your own approach to resolving disputes and give consideration to mediation as opposed to litigation/arbitration. I believe that I will be of much greater use to practitioners and corporates in my capacity as mediator rather than arbitrator. My legal and judicial antecedents are, I think, known to you but my CV is available on request as are my testimonials.

Please email me if you have any queries.

Kind regards

PETER COLLINS

SETTLING COMMERCIAL DISPUTES

-a realistic and productive approach

1. Historically, commercial disputes In Botswana have been resolved either by courtroom or arbitration combat. The legal needs of corporates, and indeed ordinary people, have changed over the last decade. When faced with a dispute, business people are learning that, whenever possible, it is more advantageous to reach practical and private agreements than to fight for years, spending huge amounts of money in the process and without any real confidence in a fair and just result. Due to the vast amounts of time and money involved in the trial or arbitration process, corporates internationally are increasingly turning to alternatives that are more prompt, private and economical than the courtroom or other adversarial methods such as arbitration.

2. Arbitration was originally conceived as an inexpensive and speedy alternative to litigation and those were noble intentions. Unfortunately, the promise of "cheap and quick" has not been able to produce such an outcome but that is not the main reason arbitration, despite its lofty ideals, has been unable to deliver on its promises. In reality, arbitration has become another courtroom which is frequently more expensive (after all the arbitrator commands a fee whereas a judge comes free) and often takes as long as or longer than court proceedings. The benefits of judicial case management in the High Court, now in existence for the past 5 years, cannot be denied no matter what other imperfections may be identified in that system. In addition, arbitration is an adversarial, winner-takes-all, method of resolving conflict, which is identical to litigation. The arbitrator passes judgment (called an "award") adopting the same methodology as judicial process and it is this approach which businessmen are more and more calling into question.

3. An alternative to civil litigation or arbitration is mediation to which the international community is now turning. Litigation and arbitration need little introduction but mediation, commercial mediation, perhaps needs explanation.

Why Mediation?

4. Mediation is an ADR method where a neutral and impartial third party, the mediator, facilitates dialogue in a structured multi-stage process to help parties reach a conclusive and mutually satisfactory agreement. A mediator assists the parties in identifying and articulating their own interests, priorities, needs and wishes to each other. Mediation is a "peaceful" dispute resolution tool that is complementary to the existing court system and the practice of arbitration. It does not replace the latter, quite the contrary, but seeks to bring the disputing parties together to a point where hopefully the parties will be able to dispense with either litigation or arbitration.

5. Mediation is a voluntary and non-binding process - it is a creative alternative to the court system. Mediation often is successful because it offers parties the rare opportunity to directly express their own interests and anxieties relevant to the dispute. In addition, mediation provides parties with the opportunity to develop a mutually satisfying outcome by creating solutions that are uniquely tailored to meet the needs of the particular parties. A mediator is a neutral and impartial person; he does not decide or judge, but instead becomes an active driver during the negotiation between the parties. A mediator uses specialized communication techniques and negotiation techniques to assist the parties in reaching optimal solutions.

6. Mediation is not just a "talk-shop" where the disputants let off steam and endeavour to convince the mediator of the righteousness of their cause, as they might do in an adversarial environment. It is a structured process with a number of procedural stages in which the mediator assists the parties in resolving their disputes. The mediator and the parties follow a specific set of protocols that require everyone involved to be working together. This process permits the mediator and disputants to focus on the real problems and actual difficulties between the parties. Moreover, the parties are free to express their own interests and needs through an open dialogue in a relaxed atmosphere. The main aim of mediation is to assist people in dedicating more time and attention to the creation of a voluntary, functional and durable agreement. The parties themselves possess the power to control the process - they reserve the right to determine the parameters of the agreement. In mediation, the parties also reserve the right to stop anytime and refer a dispute to the court system or perhaps arbitration. They are neither locked in to the process nor bound by it. They can walk away at any time.

7. In addition to economic and legal backgrounds, mediators in the commercial environment should be professionals who possess specialized skills in the resolution of disputes. A mediator plays a dual role during the mediation process - as a facilitator of the parties' positive relationship, and as an evaluator adept at examining the different aspects of the dispute. After analysing a dispute, a mediator can help parties to articulate a final agreement and resolve their dispute. The agreement at the end of the mediation process is product of the parties' discussions and decisions. The aim of mediation is to find a mutually satisfactory agreement that all parties believe is beneficial. Their agreement serves as a landmark and reminds parties of their historical, confrontational period, and ultimately helps them anticipate the potential for future disputes.

8. Generally, an agreement reached through mediation specifies time periods for performance and is customarily specific, measurable, achievable, and realistic. It is advisable for the parties to put their agreement in writing to create tangible evidence that they accomplished something together. The written agreement reminds the parties of their newly achieved common ground and helps to prevent arguments and misunderstandings afterward. Most importantly, a written agreement provides a clear ending point to the mediation process. The agreement, once reached, binds the parties contractually. In case of disputes concerning compliance with the mediated agreement (e.g., whether a party carries out an agreement) or implementation of a mediated

agreement (e.g., disputes concerning the precise terms for carrying out an agreement), the agreement is enforceable as a contract, as it would be in cases of the non-fulfilment of any ordinary contractual provision.

9. Some particular advantages exist in choosing mediation as opposed to pursuing judicial proceedings or arbitration. Consider the following:

- The all-important consideration of economics and the daunting costs of resolving disputes. Mediation proceedings are by far cheaper in monetary expense than either judicial proceedings or arbitration. Mediation fees vary in accordance with the hourly rate of the mediator and the length of the mediation session, and are usually shared equally by the parties participating in the mediation.

- Another important advantage is in the decreased time these proceedings customarily take as opposed to the traditionally litigated or arbitrated dispute. Mediation is regarded as more time-efficient than arbitration since proceedings have the potential, providing there has been full disclosure in advance, to come to a productive close in under 3 hours.

- Mediation is not formal or intimidating. There are a variety of mediation techniques available and employed. These depend on the mediator's personality, the parties' personalities, and the complexity of the dispute. Mediation is an incredibly flexible yet functional process.

- What substantially sets mediation apart from traditional judicial proceedings and arbitration is that the parties strive personally to find common ground. They work to develop mutually agreeable solutions directly with each other and without any exterior imposition of a decision by a judge or arbitrator.

- The efficiency of the mediation process is evident in that it aims to avoid further complication of the dispute and animosity between the parties - a mediator actively uses specialized communication and negotiation techniques to guide the parties to the realization of a mutually beneficial agreement.

- Mediation is a voluntary process and often it produces such desirable results because it permits parties to express their own interests and anxieties directly, while helping them to create a suitable solution.

- Mediation also offers the opportunity to create innovative solutions to business disputes that further the unique interests of the parties in an analytical framework that is broader than traditional legal rights and remedies. In this sense, the mediation process may be used to secure "business solutions to business disputes," because it encourages the parties to consider all the dimensions of a dispute, including both legal issues and business interests.

10. The mediation process is both informal and confidential. In contrast to litigation and arbitration, which adopt formal rules of evidence and procedure, mediation is flexible in terms of evidence, procedure, and formality. The proceedings are entirely confidential as the parties allow a neutral third-party to discuss the dispute without exposing the parties' dealings to public scrutiny or judgment. Specifically, the statements of a party during mediation are confidential and may not be disclosed without written consent. Generally, confidentiality in mediation also extends to documents specifically prepared for the purpose of the mediation. Confidentiality is paramount to the effectiveness of the mediation process--it creates an atmosphere where all parties are comfortable to discuss their dispute without fear that their words will be used against them at a later date. Confidentiality promotes open communication about the issues involved between the parties. All participants in mediation are bound by confidentiality, including the parties, the mediator, and non-parties. The scope of confidentiality is broad, covering both statements made by parties during mediation and documents prepared for mediation. The only exception to the rule of confidentiality is the mediated settlement agreement itself, which may be used to enforce its terms in the event of non-compliance.

11. As already indicated, one unique feature of mediation is that any party, unilaterally, can decide to stop the mediation at any time if they believe the process is not productive.

12. According to international and European trends, mediation is emerging as an effective and preferred method for private commercial companies and government agencies to fulfil their organizational and business relationships.

PETER COLLINS
COLLINS COMMERCIAL
MEDIATION SERVICES

August 2013
Gaborone

IN THE MATTER OF A PRIVATE MEDIATION
[In which the parties in dispute have appointed Peter Collins as mediator]

between:

_____

and

_____

("the Parties")

MODEL MEDIATION PROCEDURE

The Parties

1. The Parties to the Dispute will attempt settlement by mediation. Duly authorised representatives of the Parties and the Mediator will attend Mediation meetings. All communications relating to, and at, the Mediation will be without prejudice and confidential.

2. Representatives will have the necessary authority to settle the Dispute. The procedure at the Mediation will be determined by the Mediator after consultation with the Representatives.

Mediation Agreement

3. The Parties and the Mediator will enter into an agreement ("Mediation Agreement") immediately following an initial meeting between them for conduct of the Mediation. The Mediator proposes that the matters below be included in the Mediation Agreement.

The Mediator

4. The Mediator will abide by the terms of the Mediation Agreement and will be responsible for:

    - attending any meetings with any or all of the Parties and their Representatives preceding the Mediation, if requested or if the Mediator decides this is appropriate;

    - assisting the Parties in drawing up the Mediation Agreement;

- organizing a suitable venue and dates;
- organizing exchange of the Summaries and Documents;
- reading before the Mediation each Summary and all the Documents sent to the Parties in accordance with paragraph 7;
- determining the procedure after consultation (see paragraph 2 above);
- assisting the Parties in drawing up any written principles of settlement, if so requested;
- conducting general administration in relation to the Mediation, as requested by the Parties.

5. The Mediator will not act for any of the Parties individually in relation to the subject matter of the Mediation in any capacity either during the currency of this Agreement or at any time thereafter.

Other participants

6. Each Party will notify the other Party of the names of those people, witnesses, etc. in addition to the Representatives that it intends will be present on its behalf at the Mediation. Each Party, in signing the Mediation Agreement, will be deemed to be agreeing on behalf of both itself and all such persons to be bound by the confidentiality provisions of this Model Procedure.

Exchange of Information

7. Each Party will simultaneously exchange with the other and send to the Mediator at least two weeks before the Mediation or such other date as may be agreed between the Parties:

- a concise summary ("the Summary") stating its case in the Dispute and the relief requested;
- copies of all the documents to which it refers in the Summary and to which it may want to refer in the Mediation ("the Documents").

8. The Parties will try to agree on a joint set of documents from their respective Documents

Disclosure and Confidentiality

9. The Parties will make full disclosure to each other and to the Mediator during the mediation of all information and documentation relevant to the issues being mediated. The Mediator shall hold the information and/or documentation so designated in confidence.

10. The Parties agree and understand that the mediation discussions and any documents created for the mediation process are without prejudice and for the purpose of reaching a mutually acceptable agreement.

11. The Mediator will not produce any report or testify in any court or arbitration with respect to what was said in mediation. The Parties will not call the Mediator as a witness in any legal or adjudicative proceeding and will not subpoena any notes or records made by the Mediator in relation to the mediation.

12. The Parties acknowledge that no statutory privilege exists for mediators and that the Mediator may be required by the Courts to testify despite this Agreement to the contrary.

13. Nothing in this Agreement shall prevent the discovery or admissibility of any evidence that is otherwise discoverable or admissible, merely because the evidence was presented in the course of mediation.

The Mediation

14. No formal record or transcript of the Mediation will be made, unless otherwise agreed by the Parties.

15. If the Parties are unable to reach a settlement in the negotiations at the Mediation and only if all the Representatives so request and the Mediator agrees, the Mediator will produce for the Parties a non-binding written recommendation on terms of settlement. This will not attempt to anticipate what a court might order but will set out what the Mediator suggests are appropriate settlement terms in all of the circumstances.

Settlement Agreement

16. Any settlement reached in the Mediation will not be legally binding until it has been reduced to writing and properly executed by, or on behalf of, the Parties.

Termination

17. Any of the Parties may withdraw from the Mediation at any time and shall immediately inform the Mediator and the other Representatives in writing upon withdrawal. The Mediation will terminate when:

- a breach of the Mediation Agreement occurs; or
- a Party withdraws from the Mediation; or
- written principles of settlement are concluded and initialled by the Representatives; or
- in the opinion of the Mediator, it is in the best interests of the Parties that the Mediation be terminated.

No Further Steps

18. The Parties undertake not to take any further steps in any legal proceedings regarding the issues being mediated while the Mediation is in progress unless the same are required to preserve rights.

Fees, Expenses and Costs

19. The Mediator's fees and other reasonable expenses of the Mediation will be borne equally by the Parties. Payment of these fees and expenses will be made directly to the Mediator in accordance with the Mediator's fee schedule and terms and conditions of business.

20. Each Party will bear its own costs and expenses of its participation in the Mediation, unless otherwise agreed.

Waiver of Liability

21. The Mediator shall not be liable to the Parties for any act or omission in connection with the services provided in relation to the Mediation, unless the act or omission is fraudulent or involves wilful misconduct.