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INTELLECTUAL PROPERTY

IP transactions and exchange control

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In March 2017 the South African Reserve Bank (SARB) proposed certain new exemptions relating to the sale and licensing of Intellectual Property (IP) from South African residents to foreign entities. These exemptions are well received and indeed a relaxation toward stringent exchange control regulations for foreign IP transactions.

It is important to note that while some of the exemptions concern the exchange control procedure and submission requirements, notably that the submission may be made to an "Authorised Dealer" (which includes banks or financial institutions with authority to deal with foreign currency) and not necessarily SARB, all other requirements and legalities concerning the sale and transfer of IP remain intact.

BACKGROUND

Since 2011 any IP transferred from a South African entity to a foreign entity requires SARB approval failing which the transaction would be considered void. In terms of SARB's recent proposal:

> *Government proposes that companies and individuals no longer need the Reserve Bank's approval for standard intellectual property transactions. It is also proposed that the "loop structure" restriction for all intellectual property transactions be lifted, provided they are at arms' length and at a fair market price. Loop structure restrictions prohibit residents from holding any South African asset indirectly through a non-resident entity.*

Exchange Control Circular no. 7 of 2017 and no. 8 of March 2017 consequently issued by Financial Surveillance Department of the South African Reserve Bank (FinSurv) implement the proposal as follows:

> *Authorised dealers may, however approve the outright sale, transference and assignment of intellectual property by a South African resident, excluding mandated state owned companies as defined in schedule 2 of the Public Finance Management Act, 1999 (Act no. 1 of 1999) to unrelated non-resident parties at an arms' length and a fair and market related price, provided that authorised dealers view the sale, transfer or assignment agreement and the provision of an auditor's letter or intellectual property valuation certificate confirming the basis of calculating the sale price. The abovementioned dispensation excludes sale and lease back agreements.*

SUBMISSION TO AN AUTHORISED DEALER

Although Exchange control approval is still required for foreign IP transactions, in terms of this Circular the submission for approval may be submitted to an Authorised Dealer rather than to the SARB (as previously) which may simplify the process.

The Circular indicates, however, that this relaxation allowing submission to an Authorised Dealer applies only if the following conditions are met in the transaction:

- The parties are unrelated;
- The transaction is conducted at arms-length;
- The transaction is at a fair, market related price.

The Authorised Dealer requires the following:

- The sale, transfer or assignment document;
- An auditor's certificate or IP valuation report justifying the calculation of the purchase price. Any payment due must be paid back into South Africa within a period of thirty days from when the payment was due.

Authorised Dealers may have further specific requirements for exchange control approval. Parties are cautioned that if an Authorised Dealer is constrained to refer the submission to FinSurv, approval can be delayed.

It is strongly recommended that you consult your IP attorney concerning the transfer of your IP notwithstanding consulting your tax attorney and exchange control adviser when entering into such a transaction.

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