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DISPUTE RESOLUTION ALERT

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NEW SERIES: ANTI-DUMPING DUTIES

ANTI-DUMPING INVESTIGATIONS: BUILDING WALLS AROUND LOCAL INDUSTRY

The thing about walls is that they keep undesirable elements at bay and safeguard dominions. For most, this is a good thing; for others, it is not. The imposition of anti-dumping duties is the equivalent of building a wall around local industries, to protect jobs and industries against unfair competitive practices from abroad.

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For parties to international arbitral proceedings to enforce any legal obligation of confidentiality, reliance must be placed on applicable domestic law regulating the arbitration proceedings.

One of the selling points for resolving cross-border or international commercial disputes by arbitration is the proposition that the arbitral proceedings and ultimately the arbitral award will be protected as confidential between the parties. "Confidentiality" being understood to entail the obligation on the parties not to disclose information concerning the arbitration to third parties, such as hearing transcripts, written pleadings, submissions, evidence adduced, material produced during disclosure and arbitral awards.

Parties involved in international commercial transactions with public bodies will carefully consider the implication of s11 of the International Arbitration Bill, particularly when such international commercial agreements select South Africa as the governing law for the arbitration.

For parties to international arbitral proceedings to enforce any legal obligation of confidentiality, reliance must be placed on applicable domestic law regulating the arbitration proceedings, as opposed to any provisions of the Convention on the Recognition of Foreign Arbitral Awards, 1969 (New York Convention) that only deal with the recognition and enforcement of arbitration agreements and arbitral awards. Most states that have adopted the UNCITRAL Model Law for International Commercial Arbitration (UNCITRAL Model Law) as domestic arbitration laws to regulate international arbitrations are often silent on the confidentiality of arbitral proceedings, rather:

- confidentiality obligations in those jurisdictions are imposed by arbitration agreements; or
- implied obligations of confidentiality are recognised by courts of certain jurisdictions for international commercial arbitrations.

Contrary to other jurisdictions, the International Arbitration Bill of South Africa, 2017 (which intends to incorporate the 2006 version of the UNCITRAL Model Law) specifically contains a provision on confidentiality. Section 11 of the International Arbitration Bill contemplates confidentiality for private parties' arbitration proceedings, but where one of the parties is a public body, the arbitration proceeding must be public, unless the arbitral tribunal determines otherwise.

The implication of this provision is that any international commercial arbitration proceedings involving state-owned entities, such as Eskom, the IDC, Transnet and SAA, must by default be held in public – with no regard to the commercial nature of the dispute - and the arbitration proceeding will only be private once "compelling reasons" are provided. There appears to be a justifiable reason (ie public funds and so on) for arbitration proceedings involving public bodies to be held in public, but the Bill provides no direction as to what "compelling reasons" would entail. Parties involved in international commercial transactions with public bodies will carefully consider the implication of s11 of the International Arbitration Bill, particularly when such international commercial agreements select South Africa as the governing law for the arbitration.

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NEW SERIES: ANTI DUMPING DUTIES
ANTI-DUMPING INVESTIGATIONS: BUILDING WALLS AROUND LOCAL INDUSTRY

At its core, dumping enables a process of undercutting which has the potential of pricing local producers out of the market, thereby threatening jobs and the livelihood of South African people.

To safeguard local industry against the effects of dumping, government has the power to impose anti-dumping duties, pursuant to recommendations from the International Trade Administration Commission.

The thing about walls is that they keep undesirable elements at bay and safeguard dominions. For most, this is a good thing; for others, it is not. The imposition of anti-dumping duties is the equivalent of building a wall around local industries, to protect jobs and industries against unfair competitive practices from abroad.

Dumping is a practice where goods are exported to South Africa at an export price which is lower than the normal selling price of such goods in the exporting country. At its core, dumping enables a process of undercutting which has the potential of pricing local producers out of the market, thereby threatening jobs and the livelihood of South African people. Although it is not *per se* illegal to gain market share by selling goods under their market value, the potential repercussions of dumping are such that it is considered a highly undesirable practice. In addition, nothing prevents the foreign exporter of dumped goods from increasing its prices once local producers have been driven out of the market.

To safeguard local industry against the effects of dumping, government has the power to impose anti-dumping duties, pursuant to recommendations from the International Trade Administration Commission (ITAC). ITAC has very wide powers to investigate dumping practices and to recommend appropriate remedial action. When government imposes an anti-dumping duty, the import price of goods is artificially inflated, so that local industry is able to compete with the prices at which goods can be imported into South Africa.

Although the imposition of anti-dumping duties plays a vital role in our economy, it does not happen automatically, or overnight. Industry leaders must keep a watchful eye on the marketplace to identify potential dumping practices, otherwise such practices may go unnoticed.

Once a possible dumping practice is identified, a properly documented application should be submitted to ITAC, with a request to investigate whether or not dumping is in fact occurring. This application would then set in motion an extensive anti-dumping investigation by ITAC, which on average could take about 10 months to complete.

Recent examples of anti-dumping investigations conducted by ITAC include:

- An investigation was performed in respect of Portland cement originating from Pakistan. It was found that dumping occurred, which resulted in anti-dumping duties being imposed.
- ITAC investigated whether dumping occurred in respect of wheelbarrows imported from China. The outcome of the investigation confirmed it.

Once anti-dumping duties are imposed they do not last indefinitely. Such impositions are only valid for a period of five years and local producers who are concerned that the expiry of anti-dumping duties would result in the continuation or recurrence of dumping, should apply for a so-called sunset review, if they wish for duties to be maintained. Conversely,

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CONTINUED

The imposition of trade remedies such as anti-dumping duties involve a complex balancing act between the need to encourage trade between countries by giving effect to international trade agreements, on the one hand, and the need to protect local industry against unfair trade practices from abroad.

exporters, who would like anti-dumping duties to be removed, are entitled to make submissions to ITAC, in support of the removal of such duties.

Some examples of recent sunset review applications include:

- Franke Kitchen systems, a local producer of stainless steel sinks, applied for a sunset review in respect of sinks imported from China. This resulted in a recommendation by ITAC that duties be maintained.
- The local Garlic Growers Association applied for a sunset review in respect of garlic imported from China. This too resulted in duties being maintained.
- PGF, a manufacturer of float glass in South Africa, initiated an application for a sunset review on float glass imported from China. The outcome of that investigation was yet another recommendation that anti-dumping duties be maintained.
- At present ITAC is conducting sunset reviews in respect of polyethylene terephthalate (which is a resin used in the manufacture of clothing and containers for liquids and foods, among other things) and unframed glass mirrors.

Not all anti-dumping applications are successful. The remedy available to unsuccessful applicants is to apply to the High Court for a review of the unfavourable determination made by ITAC. Further, there is no reason why foreign exporters of goods in respect of which anti-dumping duties have been recommended cannot apply to the High Court for a review of such a recommendation, provided that such application is brought within a reasonable period of time.

An example of a reported case where an exporter of goods successfully opposed the imposition of anti-dumping duties is *International Trade Administration Commission v SA Tyre Manufacturers Conference* (738/2010) [2011] ZASCA 137 (23 September 2011), which concerned an application by a group of local tyre manufacturers for anti-dumping duties to be imposed on tyres originating from China. In that case, the Supreme Court of Appeal overturned the High Court's decision and found that there was no evidence that the prices at which the tyres in question were exported to South Africa were lower than the normal prices of such tyres, when sold in China.

In the end, the imposition of trade remedies such as anti-dumping duties involve a complex balancing act between the need to encourage trade between countries by giving effect to international trade agreements, on the one hand, and the need to protect local industry against unfair trade practices from abroad. To build a protective wall around a particular local industry, an anti-dumping application can be used, but it must be properly documented and based on relevant information.

Freddie Terblanche

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Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 3 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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