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DISPUTE RESOLUTION ALERT

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CONVERGENCE AND NEW MEDIA:
THE CYBERCRIMES AND CYBERSECURITY BILL

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CLIFFE DEKKER HOFMEYR

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Such crimes remain a growing risk to business and individuals: PWC claims cybercrimes as the second most reported economic crime affecting organisations. SABRIC states that SA loses R2.2 billion to Internet fraud and Phishing attacks annually. The Bill creates new crimes and offences. It makes even more complex, compliance with information security and requirements pertaining to Protection of Personal Information ("POPI"). When enacted, this law will have far reaching implications for individuals and organisations, particularly those that process data, as well as for banks or electronic communications service providers. Below, is a brief overview of the key aspects of the Bill.

The Bill criminalises unlawful and intentional conduct relating to accessing, acquiring, using, possessing and storing, data, data messages, computer systems and programs, networks and passwords.

In line with international best practice, the Bill criminalises unlawful and intentional conduct relating to accessing, acquiring, using, possessing and storing, data, data messages, computer systems and programs, networks and passwords. It creates new crimes of cyber fraud, cyber forgery and cyber uttering. It criminalises malicious communications – namely messages that result in harm to person or property, such as revenge porn or cyber bullying. It augments local jurisdiction where the crime is not only committed in SA, but inter alia, if the effect of it is felt in the country. The police are given extensive investigation, search and seizure powers in the Bill and an array of penalties, including fines and imprisonment apply, including various prescribed in terms of the Criminal Procedure Act, 1977.

The Bill provides standard operating procedures to be followed in criminal investigations. Of significance are the onerous obligations imposed on electronic communications service providers and financial institutions not only to assist in the investigation of cybercrimes, but also to report them. Much attention is also given to creating the framework for mutual co-operation between foreign states with respect to the investigation and prosecution of cybercrimes.

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This Bill is controversial: it raises numerous issues which require debate such as its (over) reach, possible unintended consequences and effect on other laws such as POPI and RICA. A framework is necessary to combat and prosecute cybercrimes in SA.

Quite firmly within the security cluster, the Bill creates a number of new structures and cross functional ministerial and departmental responsibilities all aimed at developing capacity to detect, prevent, apprehend and investigate cybercriminals. The Bill establishes a 24/7 Point of Contact to render assistance with cybercrime incidents and the formation of a Cyber Response Committee to implement policy and initiatives in this domain. A Computer Security Incident Response Team will also be established along with the already functional Cyber Security Hub, which will facilitate co-operation with the private sector on cyber security and facilitate the co-ordination of nodal points in different sectors to receive and distribute incident information.

The Bill provides for the declaration of Critical Information Infrastructure such as for example, national databases, financial institutions or the stock exchange – essentially anything with which unlawful interference might result in loss, damage, disruption or immobilisation and may prejudice the security of the state.

This Bill is controversial: it raises numerous issues which require debate such as its (over) reach, possible unintended consequences and effect on other laws such as POPI and RICA. A framework is necessary to combat and prosecute cybercrimes in SA – the question is how much amendment is required to make this an effective one.

Tracy Cohen and Judith Njuguna

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INTERNATIONAL ARBITRATION:
THE ENFORCEMENT OF FOREIGN ARBITRAL AWARDS AMONGST BRICS NATIONS: DOUBLE STANDARDS OR OVERSIGHT?

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For international commercial transactions the recognition and enforcement of a foreign arbitral award or a non-domestic award is important for the promotion of trade and investment amongst states. The importance thereof lies in parties to an international commercial transaction having piece of mind that an arbitral award rendered in one state against one of the parties to the transaction will be recognised and enforced by the courts of another state where enforcement is sought. This is especially important among economic groupings such as BRICS with an objective of encouraging further trade and investment among the member states of the economic block.

Contracting states may only refuse the recognition and enforcement of a foreign arbitral award on the grounds set out in the New York Convention, unless a contracting state when signing, ratifying or acceding to the New York Convention restricted the application thereof by making a specific reservation.

This objective is frustrated:

- when businesses from BRICS states are required to comply with additional domestic law requirements (of the specific BRICS state) for the recognition and enforcement of a foreign arbitral award in addition to the requirements of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention); or
- when restrictions are put in place by a BRICS state to the recognition and enforcement of a foreign arbitral award made in another BRICS state.

This practice does not foster trade and investment amongst BRICS states, as it creates an unfair bargaining power in respect of certain commercial issues (governing law, seat of arbitration and so on) regulated in commercial transactions and potentially increases the transaction cost for one of the parties.

Article V of the New York Convention sets out an exhaustive list of grounds contracting states may rely on to refuse the recognition and enforcement of a foreign arbitral award. Contracting states may only refuse the recognition and enforcement of a foreign arbitral award on the grounds set out in the New York Convention, unless a contracting state when signing, ratifying or acceding to the New York Convention restricted the application thereof by making a specific reservation. The New York Convention allows for two types of reservations by contracting states.

- The first reservation, known as the "reciprocity reservation" allows states to apply the New York Convention only to awards made in the territory of another contracting state. Thus, only foreign arbitral awards or non-domestic awards made in the territory of a contracting states will be recognised and enforced by such state imposing a reciprocity reservation.
- The second reservation, known as "commercial reservations" allows a state to apply the New York Convention only to "differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration". Thus only matters considered as commercial under the law of a state were enforcement is sought will be enforced. Any matter not deemed "commercial" will be not be enforceable.

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The South Africa government must make a concerted effort to persuade the Ministry of Law and Justice of India to declare that it recognises the Republic of South Africa to be a territory to which the New York Convention applies.

All five BRICS states (Brazil, Russia, India, China and South Africa) acceded to the New York Convention and thus one would expect that a foreign arbitral award made in any BRICS state would be recognised and enforced in another BRICS state, without the risk of such award being unenforceable. However, international commercial transactions between South Africa and India are faced with the following real risks:

- any arbitration clause governed by South African law (pursuant to a dispute) in terms of an international commercial transaction with an Indian counterparty will not be recognised by Indian courts; and
- any foreign arbitral award rendered in South Africa will not be recognised and enforced by the Indian courts.

India has imposed a specific reservation against South Africa in respect of the recognition and enforcement of foreign arbitral awards made in South Africa. The Official Government Gazette of India does not indicate that South Africa ratified or acceded to the New York Convention, despite South Africa having acceded to the Convention on 3 May 1976. As a result of this reciprocity reservation by India, any arbitral award rendered in South Africa or arbitration clause submitting a dispute to arbitration in South Africa will be unenforceable in India. In the case of *Swiss Singapore Overseas Enterprise (Pty) Ltd v M/V Africa Trader*, the High Court of Gujarat, Indian, (23/2005) the court refused to refer parties to arbitration in South Africa on the grounds that the Indian Official Gazette did not mention South Africa's accession to the New York Convention.

This approach frustrates the promotion of trade and investment between these two BRICS states and increases the transactional cost of South African businesses contracting with Indian businesses. South African commercial parties will be materially prejudiced during commercial negotiations due to the automatic exclusion of South Africa as a seat of arbitration flowing from a commercial transaction with an Indian national (or any other national which has significant assets in India for purpose of securing performance). This goes against the Indian governments initiatives to develop an international arbitration system to serve BRICS nations as highlighted during the Conference on International Arbitration in BRICS: Challenges, Opportunities and Road Ahead on 27 August 2016 held in New Delhi.

The South Africa government must make a concerted effort to persuade the Ministry of Law and Justice of India to declare, through an official notification in India's Official Gazette, that it recognises the Republic of South Africa to be a territory to which the New York Convention applies, for the purpose of recognition and enforcement of foreign arbitral awards. This is very important for, amongst other factors, (a) South Africa's target to increase bilateral trade with India from the current $10 billion to $20 billion by 2018 and (b) the promotion of South Africa as a model law jurisdiction for international commercial arbitration through the planned adoption of an International Arbitration Bill.

Jackwell Feris

CLICK HERE to find out more about our International Arbitration team.

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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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