19 SEPTEMBER 2018

DISPUTE RESOLUTION ALERT

IN THIS **ISSUE**

UK COURT OF APPEAL CONFIRMS PROFESSIONAL PRIVILEGE PROTECTION FOR LAWYERS' NOTES

The basic and important principles of legal professional privilege that give a client the freedom and confidence to speak freely to lawyers has been seriously compromised in the United Kingdom in a matter between the UK Serious Fraud Office (SFO) and Eurasian Natural Resources Corporation (ENRC) during 2017. Fortunately, an appeal against the judgment and the protection of notes and documents drafted during investigations where there is anticipated civil and/or criminal litigation prevails again.

INTERNATIONAL ARBITRATION AND FINANCIAL INSTITUTIONS – WHY DO FINANCIAL INSTITUTIONS GENERALLY AVOID ARBITRATION?

It is generally accepted that arbitrations are flexible, faster and cheaper than litigating in courts. Despite this, financial institutions have traditionally preferred national courts in key financial centres (such as New York) but have sought to avoid the courts in emerging markets.

CDH
CLIFFE DEKKER HOFMEYR

UK COURT OF APPEAL CONFIRMS PROFESSIONAL PRIVILEGE PROTECTION FOR LAWYERS' NOTES

Fortunately, an appeal against the judgment and the protection of notes and documents drafted during investigations where there is anticipated civil and/or criminal litigation prevails again.

The basic and important principles of legal professional privilege that give a client the freedom and confidence to speak freely to lawyers has been seriously compromised in the United Kingdom in a matter between the UK Serious Fraud Office (SFO) and Eurasian Natural Resources Corporation (ENRC) during 2017. Fortunately, an appeal against the judgment and the protection of notes and documents drafted during investigations where there is anticipated civil and/or criminal litigation prevails again.

The question that needed to be answered in the UK - and the same applies in South Africa - is what was the dominant purpose of the internal investigation.

The appeal judgment is surely also good news for South African multinational companies with an interest in the UK. South African subsidiaries with holding companies in the UK were bound by the ruling of the High Court (First Court) and can now relax as if there was never an attempt from the UK to gain access to notes made and other documents prepared during an investigation.

In the *SFO* case, the ENRC ran an internal investigation to establish whether there was any truth to the allegations made by a "whistle-blower" and to prepare for a potential criminal investigation. The SFO alleged that the ENRC made unjustified claims of legal privilege. The SFO also alleged that ENRC and other companies called on their external lawyers to conduct an investigation, and then interviewed witnesses and claimed privilege over the notes and documents generated during that process. The question that needed to be answered in the UK - and the same applies in South Africa - is what was the dominant purpose of the internal investigation. In the judgment of the First Court, the SFO succeeded and the court ordered that notes made by lawyers and other documents prepared during the investigation should be handed over to SFO as the documentation was not regarded as privileged.

The effect of the first judgment was that companies could no longer assume that records/notes prepared during internal interviews with its officers and employees could lawfully be withheld from a party requesting such documents. Further, the First Court ruled that litigation privilege can only protect documents which are prepared for the sole and dominant purpose of conducting litigation and cannot protect documents produced for the purposes of enabling advice to be taken in connection with anticipated litigation. Therefore, there had to be actual criminal prosecution or actual civil proceedings pending before such protection existed.

CDH
CLIFFE DEKKER HOFMEYR

UK COURT OF APPEAL CONFIRMS PROFESSIONAL PRIVILEGE PROTECTION FOR LAWYERS' NOTES

CONTINUED

The UK judgment in the First Court above is a sound example of the necessity to be aware of how various countries deal with the law of privilege where South African entities have an interest.

The first judgment found that a fact-finding investigation without such investigation having the dominant purpose of preparing for a pending civil or criminal matter, will not satisfy the litigation privilege requirement. The dominant purpose for the investigation must be to prepare for existing civil litigation or criminal prosecution to protect notes made by lawyers.

Fortunately, the Court of Appeal in the UK overturned the judgment and brought some sanity and clarity back into the law of privilege in the UK. The Court of Appeal reaffirmed that documents prepared and notes made by lawyers during an internal investigation are protected by litigation privilege.

The Court of Appeal stated, "It is critical that companies are not penalised for acting responsibly, and are able to instruct lawyers to conduct investigations without fear that the authorities will later be able to demand the lawyer's entire work product".

The judgment of the First Court had significant implications for the UK companies carrying out internal investigations and caused widespread concern. The disastrous change of the law of privilege caused by the First Judgment was of such importance that the Law Society of the UK intervened in the SFO case and said, "perversely, a lack of privilege in these cases could have made it more difficult to uncover wrong-doings, as organisations might have been less willing to investigate issues to their full extent without the protection offered by legal professional privilege".

Privilege protection is a powerful tool and legal advisors of multinational companies should always be acquainted with the different legal principles adopted in various countries dealing with privilege. The UK judgment in the First Court above is a sound example of the necessity to be aware of how various countries deal with the law of privilege where South African entities have an interest.

Pieter Conradie

Tim Fletcher was named the exclusive South African winner of the **ILO Client Choice Awards 2017 – 2018** in the litigation category.

Richard Marcus was named the exclusive South African winner of the **ILO Client Choice Awards 2018** in the Insolvency & Restructuring category.

CLICK HERE to find out more about our Dispute Resolution practice.

CDH
CLIFFE DEKKER HOFMEYR

INTERNATIONAL ARBITRATION AND FINANCIAL INSTITUTIONS – WHY DO FINANCIAL INSTITUTIONS GENERALLY AVOID ARBITRATION?

The International Chamber of Commerce Commission (ICC) recently carried out a study on the perceptions and experiences of financial institutions in international arbitration.

It is generally accepted that arbitrations are flexible, faster and cheaper than litigating in courts. Despite this, financial institutions have traditionally preferred national courts in key financial centres (such as New York) but have sought to avoid the courts in emerging markets. The International Chamber of Commerce Commission (ICC) recently carried out a study on the perceptions and experiences of financial institutions in international arbitration.

The ICC rules now provide for the appointment of an emergency arbitrator.

The ICC interviewed approximately 50 financial institutions and examined a broad range of banking and financial activities, whether undertaken by licensed banks or by funds (equity, investment or sovereign wealth). The study focused on arbitration in, among other areas, derivatives, sovereign lending, regulatory matters and international financing trade finance.

The ICC identified the following issues as the primary hurdles preventing financial institutions from using international arbitration:

a) **Interim measures**

Financial institutions are concerned with the fact they may not be able to obtain interim and urgent relief before an arbitral tribunal is constituted. In remedy of this, the ICC rules now provide for the appointment of an emergency arbitrator.

b) **Summary/default awards**

The perceived inability of tribunals to issue a default judgment in the event of a party failing to appear before the tribunal is viewed as a disadvantage in terms of both cost and efficiency. Arguments have been raised that this may be overcome if parties agree and expressly authorise the tribunal to dispose of the matter by default.

In the absence of such authorisation and agreement between the parties, any party may petition the tribunal to use its powers as conferred by the applicable law or institutional rules to deal with a claim in an expedited manner. It is generally accepted that the tribunal may proceed with a case even if a party fails to participate, provided that party has been properly notified of the arbitration.

c) **Consolidation**

Financial institutions expressed concern over the risk of finding themselves involved in several parallel, albeit related, proceedings. Article 10 of the ICC Rules allows for a consolidation of pending separate arbitrations. However, consolidation will not be imposed or required where the economic rationale underlying the banking transaction militates in favour of isolating the transaction from the related group of contracts. This would be the case, for instance, in the context of project finance where the project company's obligation to repay the lenders is not expected to be impacted by the performance of the contract, absent an agreement or specific circumstances to the contrary.

CDH
CLIFFE DEKKER HOFMEYR

INTERNATIONAL ARBITRATION AND FINANCIAL INSTITUTIONS – WHY DO FINANCIAL INSTITUTIONS GENERALLY AVOID ARBITRATION?

CONTINUED

As a dispute resolution mechanism, international arbitration has grown, evolved and adapted to become the solution required by financial institutions to swiftly and effectively resolve disputes.

d) **Precedents**

Financial institutions consider the lack of precedent to be a disadvantage of arbitration. The ICC and other arbitration institutions do regularly publish awards, but these awards are usually redacted in order to avoid disclosure of sensitive information, thus preventing the creation of full and complete precedents.

e) **Costs**

In some jurisdictions arbitration is viewed as more expensive than litigation. However, to effectively manage their proceedings and reduce costs, the parties may adopt one or more of the techniques suggested in the *Commission's report Controlling Time and Costs in Arbitration.* (Parties have the autonomy to arrange time frames.)

f) **Lack of transparency**

Some interviewees expressed concern over the lack of transparency in arbitration and, more specifically, the perception of arbitration as an exclusive club. To try and deal with this growing concern, the ICC has decided to publish the names of all sitting arbitrators in cases filed after 1 January 2016, provided that the parties consent.

g) **Insolvency and enforcing security interests**

An arbitral tribunal cannot commence an insolvency proceeding or disregard a court order concerning the commencement of such a proceeding. Nor is it entitled to appoint an insolvency administrator or consider whether the assertion of a claim by a creditor before the arbitral tribunal dispenses with the need to file that claim with the court appointed insolvency administrator.

However, contractual claims that are not impacted by the stay imposed by the insolvency proceeding are clearly arbitrable, even if the award were to impact the validity or the amount of such claims. For instance, an arbitral tribunal has jurisdiction to rule on the issue of whether the claim of a bank against a borrower is due, even if the borrower is the subject of an insolvency proceeding.

As a dispute resolution mechanism, international arbitration has grown, evolved and adapted to become the solution required by financial institutions to swiftly and effectively resolve disputes.

Financial institutions are enjoined to consult an international arbitration expert before deciding on a dispute resolution mechanism to govern a contract.

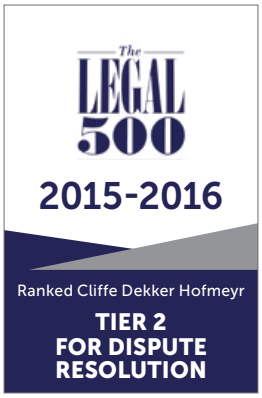
Jackwell Feris and Thapelo Malakoane

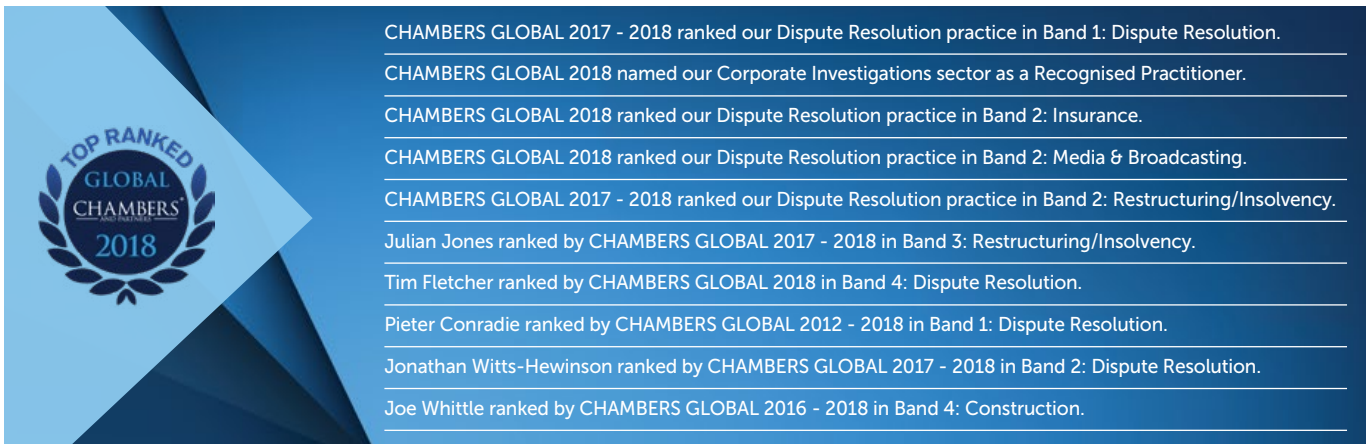
CLICK HERE to find out more about our International Arbitration practice.

CDH
CLIFFE DEKKER HOFMEYR

Best Lawyers 2018 South Africa

NAMED CDH LITIGATION LAW FIRM OF THE YEAR





CDH
CLIFFE DEKKER HOFMEYR

OUR TEAM

For more information about our Dispute Resolution practice and services, please contact:

Tim Fletcher
National Practice Head
Director
T +27 (0)11 562 1061
E tim.fletcher@cdhlegal.com

Thabile Fuhrmann
Chairperson
Director
T +27 (0)11 562 1331
E thabile.fuhrmann@cdhlegal.com

Timothy Baker
Director
T +27 (0)21 481 6308
E timothy.baker@cdhlegal.com

Roy Barendse
Director
T +27 (0)21 405 6177
E roy.barendse@cdhlegal.com

Eugene Bester
Director
T +27 (0)11 562 1173
E eugene.bester@cdhlegal.com

Tracy Cohen
Director
Business Development
T +27 (0)11 562 1617
E tracy.cohen@cdhlegal.com

Lionel Egypt
Director
T +27 (0)21 481 6400
E lionel.egypt@cdhlegal.com

Jackwell Feris
Director
T +27 (0)11 562 1825
E jackwell.feris@cdhlegal.com

Anja Hofmeyr
Director
T +27 (0)11 562 1129
E anja.hofmeyr@cdhlegal.com

Julian Jones
Director
T +27 (0)11 562 1189
E julian.jones@cdhlegal.com

Tobie Jordaan
Director
T +27 (0)11 562 1356
E tobie.jordaan@cdhlegal.com

Corné Lewis
Director
T +27 (0)11 562 1042
E corne.lewis@cdhlegal.com

Richard Marcus
Director
T +27 (0)21 481 6396
E richard.marcus@cdhlegal.com

Burton Meyer
Director
T +27 (0)11 562 1056
E burton.meyer@cdhlegal.com

Zaakir Mohamed
Director
T +27 (0)11 562 1094
E zaakir.mohamed@cdhlegal.com

Rishaban Moodley
Director
T +27 (0)11 562 1666
E rishaban.moodley@cdhlegal.com

Byron O'Connor
Director
T +27 (0)11 562 1140
E byron.oconnor@cdhlegal.com

Ashley Pillay
Director
T +27 (0)21 481 6348
E ashley.pillay@cdhlegal.com

Lucinde Rhoodie
Director
T +27 (0)21 405 6080
E lucinde.rhoodie@cdhlegal.com

Willie van Wyk
Director
T +27 (0)11 562 1057
E willie.vanwyk@cdhlegal.com

Joe Whittle
Director
T +27 (0)11 562 1138
E joe.whittle@cdhlegal.com

Pieter Conradie
Executive Consultant
T +27 (0)11 562 1071
E pieter.conradie@cdhlegal.com

Willem Janse van Rensburg
Executive Consultant
T +27 (0)11 562 1110
E willem.jansevanrensburg@cdhlegal.com

Nick Muller
Executive Consultant
T +27 (0)21 481 6385
E nick.muller@cdhlegal.com

Jonathan Witts-Hewinson
Executive Consultant
T +27 (0)11 562 1146
E witts@cdhlegal.com

Nicole Amoretti
Professional Support Lawyer
T +27 (0)11 562 1420
E nicole.amoretti@cdhlegal.com

BBBEE STATUS: LEVEL TWO CONTRIBUTOR
Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 2 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.

JOHANNESBURG
1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN
11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

CDH
CLIFFE DEKKER HOFMEYR