

18 JUNE 2020

# DISPUTE RESOLUTION ALERT

## IN THIS ISSUE

### Risks of pandemic-related insurance – a public-private partnership on the horizon

The enforceability of extension clauses relating to contagious or infectious diseases contained in certain business interruption insurance policies has raised legal and policy considerations, with different opinions being advanced from within legal circles.

## Risks of pandemic-related insurance – a public-private partnership on the horizon

The South African Financial Sector Conduct Authority and Prudential Authority have released Joint Communication 5 of 2020.

**The enforceability of extension clauses relating to contagious or infectious diseases contained in certain business interruption insurance policies has raised legal and policy considerations, with different opinions being advanced from within legal circles.**

The South African Financial Sector Conduct Authority (FSCA) and Prudential Authority (PA) (collectively, the Authorities) have released Joint Communication 5 of 2020. This regulatory response to business interruption insurance clauses requires, *inter alia*, clear communication from insurers to their policyholders regarding the extent of the insured's cover in relation to COVID-19 and the adoption of an approach that will ensure fair outcomes for the parties. It was confirmed that the Authorities were not considering initiatives that require insurers to retroactively cover losses related to COVID-19, which were specifically excluded from policies.

This position is similar to the position that has been adopted by the United Kingdom's Financial Conduct Authority (FCA) in its final guidance for firms. The FCA has obtained samples of policy wordings for business interruption clauses and will be approaching the courts in a test case to ascertain the liability of insurers for claims related to the coronavirus pandemic. The final guidance for firms published by the FCA requires insurers to inform policyholders of affected claims and inform policyholders of the test case and the impact that the test case may have on their claims. Insurers are also required to fairly resolve claims once the test case has been concluded.

Whilst developments in this regard will be followed with interest, of equal importance is the position likely to be adopted by insurers and regulators in relation to future pandemics. With scientific reports pointing towards the intensification of pandemic risks due to globalisation and urbanisation, it is no surprise that some insurers have moved towards the mid-term withdrawal of cover relating to infectious or contagious diseases. Pandemic risks, due to the magnitude of the number of potential policyholders affected, coupled with the substantial period of time required for the risk to dissipate, present significant obstacles for private insurers to provide cover. In addition, the losses are driven by considerations of public policy and by public policy decision makers as was the case with the implementation of the 'hard lockdown' and regulations promulgated under the Disaster Management Act. This uncertainty threatens insurers with potential material solvency risks and undermines their ability to settle other types of claims.

A different suggestion has been offered by the legislators in the United States of America. A bill titled 'Pandemic Risk Insurance Act' was introduced by Congresswoman Carolyn Maloney on 26 May 2020, and is currently being considered by the House Committee on Financial Services. The bill seeks to legislate business interruption and event cancellation reinsurance by the government for stated losses incurred by participating insurers for a specified period. Insurers would be able to cover pandemic related business interruption claims with government providing cover of up to 95% of the losses incurred by insurers

## Risks of pandemic-related insurance – a public-private partnership on the horizon...*continued*

A public-private partnership between the South African government and the insurance sector, such as that proposed by the USA's Pandemic Risk Insurance Act, may provide some comfort as it will mitigate against the losses that businesses and the insurance sector may jointly incur.

in specified instances. The bill seeks to provide cover in instances where a public health emergency, as with the COVID-19 pandemic, is identified and declared as such in terms of the applicable legislation.

As the lockdown restrictions slowly lift and businesses seek to resume operations, many are likely to renew leases, invest in real estate, incur operational expenses related to their industries and ensure that these initiatives are covered for

losses in the event of a resurgence of the coronavirus and future pandemics. A public-private partnership between the South African government and the insurance sector, such as that proposed by the USA's Pandemic Risk Insurance Act, may provide some comfort as it will mitigate against the losses that businesses and the insurance sector may jointly incur.

*Byron O'Connor and Akhona Mdungo*

CDH's Dispute Resolution practice is ranked as a Top-Tier firm in THE LEGAL 500 EMEA 2020.  
 Tim Fletcher is ranked as a Leading Individual in Dispute Resolution in THE LEGAL 500 EMEA 2020.  
 Eugene Bester is recommended in Dispute Resolution in THE LEGAL 500 EMEA 2020.  
 Joe Whittle is recommended in Construction in THE LEGAL 500 EMEA 2020.  
 Jonathan Witts-Hewinson is recommended in Dispute Resolution in THE LEGAL 500 EMEA 2020.  
 Pieter Conradie is recommended in Dispute Resolution in THE LEGAL 500 EMEA 2020.  
 Rishaban Moodley is recommended in Dispute Resolution in THE LEGAL 500 EMEA 2020.  
 Timothy Baker is recommended in Dispute Resolution and Construction in THE LEGAL 500 EMEA 2020.  
 Kgosi Nkaiseng is ranked as a Next Generation Partner in THE LEGAL 500 EMEA 2020.  
 Tim Smit is ranked as a Next Generation Partner in THE LEGAL 500 EMEA 2020.  
 Gareth Howard is ranked as a Rising Star in THE LEGAL 500 EMEA 2020.  
 Siviwe Mccetywa is ranked as a Rising Star in THE LEGAL 500 EMEA 2020.

The  
**LEGAL  
 500**  
 EMEA

CDH IS THE EXCLUSIVE MEMBER FIRM IN AFRICA FOR THE:

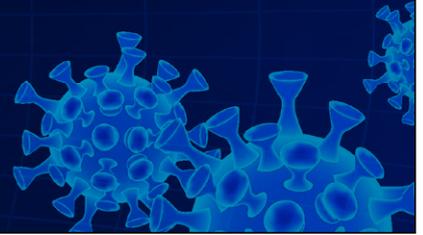
**Insuralex Global Insurance Lawyers Group**  
 (the world's leading insurance and reinsurance law firm network).

[CLICK HERE TO READ MORE](#)



# CDH'S COVID-19 RESOURCE HUB

Click here for more information 



CHAMBERS GLOBAL 2017 - 2020 ranked our Dispute Resolution practice in Band 1: Dispute Resolution.

CHAMBERS GLOBAL 2018 - 2020 ranked our Dispute Resolution practice in Band 2: Insurance.

CHAMBERS GLOBAL 2020 ranked our Public Procurement sector in Band 2: Public Procurement.

CHAMBERS GLOBAL 2017 - 2020 ranked our Dispute Resolution practice in Band 2: Restructuring/Insolvency.

CHAMBERS GLOBAL 2020 ranked our Corporate Investigations sector in Band 3: Corporate Investigations.

Tim Fletcher ranked by CHAMBERS GLOBAL 2019 - 2020 in Band 3: Dispute Resolution.

Pieter Conradie ranked by CHAMBERS GLOBAL 2019 - 2020 as Senior Statespeople: Dispute Resolution.

Tobie Jordaan ranked by CHAMBERS GLOBAL 2020 as an up and coming Restructuring/Insolvency lawyer.

Jonathan Witts-Hewinson ranked by CHAMBERS GLOBAL 2017 - 2020 in Band 2: Dispute Resolution.



TOP RANKED  
**Chambers**  
GLOBAL  
2020

CLIFFE DEKKER HOFMEYR

**BAND 1**  
Dispute Resolution

TOP RANKED  
**Chambers**  
GLOBAL  
2020

CLIFFE DEKKER HOFMEYR

**BAND 2**  
Insurance

TOP RANKED  
**Chambers**  
GLOBAL  
2020

CLIFFE DEKKER HOFMEYR

**BAND 2**  
Public Procurement

TOP RANKED  
**Chambers**  
GLOBAL  
2020

CLIFFE DEKKER HOFMEYR

**BAND 2**  
Restructuring/Insolvency

TOP RANKED  
**Chambers**  
GLOBAL  
2020

CLIFFE DEKKER HOFMEYR

**BAND 3**  
Corporate Investigations

The  
**LEGAL**  
**500**

EMEA  
**2017-2020**

**TIER 1**  
Dispute Resolution

**DealMakers**  
**2019**

THE LEGAL DEALMAKER OF THE DECADE BY DEAL FLOW

M&A Legal DealMakers of the Decade by Deal Flow: 2010-2019.

**2019** 1<sup>st</sup> by BEE M&A Deal Flow.  
**2019** 1<sup>st</sup> by General Corporate Finance Deal Flow.  
**2019** 2<sup>nd</sup> by M&A Deal Value.  
**2019** 2<sup>nd</sup> by M&A Deal Flow.

**IFLR**  
**1000**

**2020**

FINANCIAL AND CORPORATE

**TOP TIER FIRM**

## 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

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

**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

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

**Mongezi Mpahlwa**  
Director  
T +27 (0)11 562 1476  
E mongezi.mpahlwa@cdhlegal.com

**Kgosi Nkaiseng**  
Director  
T +27 (0)11 562 1864  
E kgosi.nkaiseng@cdhlegal.com

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

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

**Belinda Scriba**  
Director  
T +27 (0)21 405 6139  
E belinda.scriba@cdhlegal.com

**Tim Smit**  
Director  
T +27 (0)11 562 1085  
E tim.smit@cdhlegal.com

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

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

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

### BBBEE STATUS: LEVEL TWO CONTRIBUTOR

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.

### PLEASE NOTE

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

### 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

### STELLENBOSCH

14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.  
T +27 (0)21 481 6400 E cdhstellenbosch@cdhlegal.com

©2020 9071/JUNE

