

12 MAY 2021

CORPORATE & COMMERCIAL

# INSURANCE ALERT

## IN THIS ISSUE

### Cell captive insurers: The insurance of first party vs third party risks in cell structures

In our pilot article "*When being 'captured' is not a dirty word*" published in March 2020, we briefly touched on the regulatory landscape relating to the conduct of insurance business by cell captives, particularly the extent of compliance by cell captive insurers with the Insurance Act, 2017 (Insurance Act), which ushered in the codified regulation of cell structures.



INCORPORATING  
KIETI LAW LLP, KENYA

[CLICK HERE](#) 

For more insight into  
our expertise and  
services

## Cell captive insurers: The insurance of first party vs third party risks in cell structures

The two-year transitional period contemplated in the Insurance Act has since come and gone and in the absence of any extension to such two-year period, all cell captives ought to be compliant with the provisions of the Insurance Act.

In our pilot article "*When being 'captured' is not a dirty word*" [published in March 2020](#), we briefly touched on the regulatory landscape relating to the conduct of insurance business by cell captives, particularly the extent of compliance by cell captive insurers with the Insurance Act, 2017 (Insurance Act), which ushered in the codified regulation of cell structures.

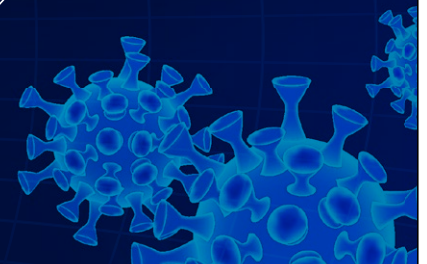
The two-year transitional period contemplated in the Insurance Act has since come and gone and in the absence of any extension to such two-year period, all cell captives ought to be compliant with the provisions of the Insurance Act. Well, at least that is the theory. Cell captives had a fair amount of corrective actions to perform to get their houses in order. This ranged from updating contractual arrangements to ensure proper ringfencing of the different cells, to limiting the

insurance business placed through the cell to either first party or third-party cell insurance business. This latter aspect is of particular significance given that in certain instances cell captives would have been required to split their relevant insurance business between two different cells.

Striking a balance between regulation to attain financial stability and leaving enough room for business to thrive, is a fine art. We have come across a few matters where that balance may not have been achieved, at least not practically speaking. One of these relates to the aforesaid change in how cell captive insurers are to deal with cell owner self-insurance. The Insurance Act introduces restrictions on the risks which cell captives are permitted to insure through a cell: The Insurance Act provides inter alia that cell captives may not insure first party risks and third-party risks in the same cell structure.

## CDH'S COVID-19 RESOURCE HUB

[Click here for more information](#) 



## Cell captive insurers: The insurance of first party vs third party risks in cell structures...*continued*

One such exception may entail an allowance for a third-party cell captive insurer to be able to place a limited percentage of cell-owner-self-insurance business through the same cell.

First party risks in relation to a cell captive insurer are the operational risks of a cell owner and the operational risks of:

- a. the group of companies of which the cell owner is a part;
- b. any associate of a company that is part of the group of companies referred to in paragraph (a) above; or
- c. any joint arrangement that a company which is part of the group of companies referred to in paragraph (a) participates in.

In simpler terms, a first party cell structure in relation to a cell captive insurer is used where a cell owner wishes to insure its own operational risks, whereas a third party cell structure in relation to a cell captive insurer is used in instances where an owner of a cell captive insurer cell structure wishes to insure the risks of "third parties," such as a portfolio of its customers. Historically, cell captive insurers treated all insurance business placed through a cell, other than cell-insurer-self-insurance business, as third-party insurance business. It can no longer do so without regulatory intervention, notwithstanding the adverse commercial implications this may hold.

With the legal codification of the "rules" applicable to the insurance of first party risks vs third party risks in relation to cell structures being a recent phenomenon,

an assessment of the level of compliance with this rule may yet reveal that this blanket rule has unintended adverse consequences. It should not come as a surprise if such assessment concludes that the costs of compliance are not always commensurate to the benefits realisable through this blanket rule. Such an assessment may conclude that the need exists for certain legitimate exceptions to operate in relation to the blanket rule. One such exception may entail an allowance for a third-party cell captive insurer to be able to place a limited percentage of cell-owner-self-insurance business through the same cell. It seems nonsensical to force a cell owner whose primary business entails the placement of third-party insurance business to operate an additional cell simply to self-insure its own risks where such risks are also the subject matter of a reinsurance arrangement.

However, until those exceptions are promulgated, we suggest that cell captive insurers ensure that they, as well as their cell owners, align their interpretation concerning what would constitute first party insurance business vs third party insurance business to a legal interpretation that is defensible in terms of the Insurance Act to ensure compliance with the applicable provisions of the Insurance Act.

---

*Charl Williams and Andrea Trueman*

## OUR TEAM

For more information about our C&C: Insurance Regulatory & Transactional sector and services, please contact:



**Charl Williams**  
Director  
T +27 (0)21 405 6037  
M +27 (0)82 829 4175  
E charl.williams@cdhlegal.com



**Andrea Trueman**  
Associate  
T +27 (0)21 481 6322  
E andrea.trueman@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

### **NAIROBI**

CVS Plaza, Lenana Road, Nairobi, Kenya. PO Box 22602-00505, Nairobi, Kenya.  
T +254 731 086 649 | +254 204 409 918 | +254 710 560 114 E cdhkenya@cdhlegal.com

### **STELLENBOSCH**

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

©2021 10004/MAY



INCORPORATING  
**KIETI LAW LLP, KENYA**



CORPORATE & COMMERCIAL | [cliffedekkerhofmeyr.com](http://cliffedekkerhofmeyr.com)