Article

Technical Municipal Radius Clause Interpretations to Avoid Coronavirus Liability and Perspectives from the OECD and Vienna Convention on the Law of Treaties 1969—*Guardrisk Insurance Limited v Café Chameleon CC* (case no 632/20) [2020] ZASCA 173

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Abstract

Approximately fifteen years ago, most insurers inserted a radius clause to avoid paying claims based on financial losses and/or damages resulting from bacteria or viruses—known as notifiable diseases—that originate outside the radius. Other insurers tried to regulate liability for losses as a result of bacteria or otherwise, by inserting a force majeure clause (which is not a radius clause) in their insurance contracts. In this way, the insurer was not liable to pay for business interruption claims, irrespective of where the bacteria or viruses had originated. To avoid paying claims where a virus or otherwise originated within a specific radius, many insurers in OECD member states are willing to refund all paid premiums to their policyholders. Other insurers have given technical radius clause interpretations to avoid liability (coronavirus did not originate within the specified radius) or to grant premium payment holidays to policyholders as long as Covid-19 exists. The OECD considers these radius interpretations or arguments unreasonable, and for this reason it drafted a policy on gap cover to be implemented by its members. South Africa is not yet a full OECD member, and this article investigates whether a South African court would have a similar approach to radius clauses, which are considered unreasonable. To understand unreasonableness, the Vienna Convention on the Law of Treaties, 1969, which regulates the interpretation of treaties, is also discussed in this article.

Keywords: Radius Clause; Covid-19; Force Majeure; Act of God; *Pacta Sunt*

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Introduction*

The relationship between South African insurance law and international law pertaining to the principle of an act of God or force majeure is not clear.[1] As an example, while international law recognises customary international law explaining a force majeure or vis major as an act of God,[2] the Paris treaty on climate change does not use the phrase 'force majeure' to describe catastrophic climate events.[3] In Article 8, the treaty simply states that it does not involve or provide a basis for any liability or compensation for financial losses and/or damages.[4] Article 8 is binding on the signatories as a result of the customary international law principle—*pacta sunt servanda*.[5] This implies that no form of compensation may be claimed by one state from another as a result of an act of God. The Organisation for Co-operation and Economic Development (OECD) has issued a document on the way that its member states should acknowledge the rights of domestic policyholders and the protection of their rights in the event of an act of God. Although South Africa enjoys the status of a G20 country, it is not yet a full member of the OECD. The OECD has issued an insurance law principle, namely gap cover, and has requested its member states to implement a form of gap cover for Covid-19 related claims, for example business interruption claims.[6] Simply explained, gap cover is funded by OECD governments or states (and/or in partnership with insurers) to settle domestic policyholder claims in the event of an insurer rejecting liability on the basis of a force majeure clause, more specifically a radius clause.[7] South Africa does not provide gap cover for force majeure claims and follows a different approach by regulating radius

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1 OECD Policy Responses to Coronavirus (COVID-19) Responding to the COVID-19 and Pandemic Protection in Gap Insurance <https://www.oecd.org/coronavirus/policy-responses/responding-to-the-covid-19-and-pandemic-protection-gap-in-insurance-35e74736/> accessed 15 November 2020.

2 Myanna Delinger, 'Rethinking Force Majeure in Public International Law' (2017) 37(2) Pace Law Review Journal 455–508 at 502–503.

3 UN Framework Convention on Climate Change, The Paris Agreement 2016 (UNFCCC) (signed 22 April 2016, adopted 4 November 2016).

4 Delinger (n 2) footnote 8.

5 John Dugard et al, *Dugard's International Law, A South African Perspective* (5th edn, Juta 2018) 608. *Pacta sunt servanda* is generally associated with the common law principles of a nation, for example South Africa acknowledges *pacta sunt servanda* as part of its common law principles pertaining to the law of contract. However, it is also a principle relevant to customary international law; see in general Vienna Convention on the Law of Treaties 1969 (concluded at Vienna on 23 May 1969 and entered into force on 27 January 1980. UN Treaty Series, volume 1155, 331. South Africa is not a signatory to this treaty). Article 26 that reaffirms *pacta sunt servanda* as part of international law. *Pacta sunt servanda* means that contracts must be enforced.

6 OECD Policy Responses to Coronavirus (COVID-19) (n 1).

7 ibid.

clauses through the Financial Services Conduct Authority (FSCA). In this regard, a brief comparison will be made between the United States of America (an OECD member state) and South Africa in paragraph five. This comparison illustrates South Africa's financial regulatory approach to the interpretation of radius clauses and provides a suitable financial interpretation for radius clauses and force majeure liability. The *Guardrisk Insurance Company Limited* case did not consider the latter.

The OECD recognises that great financial losses may ensue for domestic policyholders when a domestic insurer rejects policyholder claims based on a radius clause. Manufacturing companies, retail companies, restaurants and similar businesses are severely affected by different interpretations of radius clauses.[8] In fact, claims by businesses that were able to obtain insurance cover are being disputed by insurance companies, thus placing them in a similar financial position to businesses with no insurance coverage.[9]

The OECD has suggested gap cover to achieve insurance coverage and continuity for domestic policyholders in all OECD member states. In brief, this gap cover requires states to accept liability for policyholder claims in the event an insurer denies liability.[10] In addition, this article considers the *Guardrisk Insurance Company Limited* case in regard to the interpretation of radius clause liability in municipal law and how it differs from international law (and customary international law) when interpreting treaties in general. In other words, does municipal law follow a similar approach to the Vienna Convention on the Law of Treaties 1969, which is relevant to the interpretation of treaties?[11] The *Guardrisk Insurance Company Limited* case tried to give clear guidelines on whether radius clauses will be relevant in future, and if so, under what circumstances an insurer may reject business interruption claims. The *Guardrisk Insurance Company Limited* case is considered a test case, as this is the first appeal case where a domestic insurer gave technical radius legal arguments to avoid liability for business interruption

8 ibid.

9 ibid.

10 ibid.

11 Curtis Bradley and Jack Goldsmith, 'Customary International Law as Federal Common Law: A Critique of the Modern Position' (1997) 110(4) Harvard Law Review 816–876 at 818. There is a close relationship between customary international law and the common law of a nation. It seems, that what is referred to as common law, also has its origins in customary international law. See in this regard *Van Breda v Jacobs* 1921 AD 330 where the court had to decide on the common law fishing practices of fishermen. This common law is in fact part of customary international law, although the court never referred to customary international law in its judgment. For example, the court established the existence of acceptance of a rule pertaining to sea fishing by South African fishermen; See also Dugard (n 5) 58; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Croatia v Serbia*) Judgment, ICJ Reports 2015 para 144-49. Here the International Court of Justice interpreted the reasonableness of an act.

claims.[12] In addition, this article considers whether the duty to respond to Covid-19 rests on the South African government or the local authority.

Facts

On 17 December 2020 the Supreme Court of Appeal delivered its judgment in favour of Café Chameleon CC, the respondent in the matter. The insurance contract between Guardrisk Insurance Limited and Café Chameleon CC made provision for liability in the event of a force majeure. The insurer liability was limited by a radius clause for notifiable diseases occurring within 50 km of the business premises of the policyholder (Café Chameleon CC).[13] The respondent operates a restaurant in Cape Town. The appellant argued that lockdown regulations imposed by the South African government were the actual reason why the respondent suffered losses. If it were not for the lockdown regulations, the respondent's business operations would have continued uninterrupted, irrespective of the existence of the notifiable disease known as Covid-19. In this regard, indemnity and liability were regulated by the radius clause and, in order to know whether the appellant was liable, a notifiable disease had to occur within a 50 km radius. In addition, the appellant argued that the radius clause in the insurance contract neither indemnified nor accepted liability for lockdown regulations (pandemic regulations).[14] In OECD member states, insurance policies provide coverage for notifiable diseases but not for pandemic notifiable diseases.[15] In addition, in the United Kingdom, fewer than one per cent of hospitality businesses received business interruption settlements for claims submitted to their insurers.[16]

To understand the seriousness of Covid-19, a brief timeline of its onset in South Africa is presented. The first case of Covid-19 was reported early in March 2020 in KwaZulu-Natal. A further six cases were reported on 11 March. By 13 March, two Covid-19 cases were reported in the Western Cape. By 17 March, the total number of Covid-19 cases in South Africa rose to 89. On 23 March, the Western Cape had twenty-five per cent of the total Covid-19 infections. By 30 April the number of cases increased by 3 000 per cent.[17] Due to the rapid increase in Covid-19 infections, the South African government implemented hard lockdown regulations from 23 March. The respondent, Café

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12 *Guardrisk Insurance Limited v Café Chameleon CC* Case No 632/20) [2020] ZASCA 173 (17 December 2020) para 67, accepting the persuasive reasoning of *Ma-Afrika Hotels Pty (Ltd) v Santam Ltd a Division of which is Hospitality and Leisure Insurance* 1 All SA 195 (WCC).

13 ibid paras 1-2.

14 ibid paras 3-4. The bird or swine flu outbreak of 2009 or earlier was not similar to the Covid-19 outbreak as a pandemic disease.

15 OECD Policy Responses to Coronavirus (COVID-19) (n 1) footnote 2.

16 ibid.

17 *Guardrisk* case (n 12) para 5. 89 cases to 2705 cases equal an increase of approximately 3 000%.

Chameleon CC, subsequently closed its doors for business on 27 March,[18] and in addition, was not allowed to sell takeaway food to the public. As a result of the lockdown regulations, the respondent submitted a claim for business interruptions, which was consequently rejected by the appellant, Guardrisk. The respondent applied for a declaratory order in the High Court as to how a radius clause should be interpreted in practice. The High Court subsequently granted relief to Café Chameleon CC and granted Guardrisk leave to appeal. The Supreme Court of Appeal had to decide on the legal question of whether a radius clause that accepts liability for notifiable diseases within 50 km includes lockdown regulations.[19]

Legal Question and Appellants' Arguments

The Supreme Court of Appeal considered the legal question based on the legal interpretation of the radius clause and stated clearly that this question was not based on the factual circumstances of the case, as discussed earlier. The Guardrisk insurance contract defines the risk (or peril) that results in a business interruption claim based on notifiable diseases. This contract clearly regulates a notifiable disease as an illness which only a competent local authority has stipulated as such—not the government—subject to the radius clause.[20] The latter sentence remains the main legal question—whether only a local authority (the City of Cape Town, for example) should be notified of Covid-19 and only a local authority should issue the necessary lockdown regulations? And in addition, why only a 50 km radius?

To answer the above, the appellant presented four arguments in the Supreme Court of Appeal as to why the 50 km radius was relevant and enforceable to avoid liability. First, no competent local authority (eg the City of Cape Town) had declared the disease one of the listed notifiable diseases. The contract of insurance clearly stipulates that this requirement is the duty of a competent local authority alone. By focusing on the local authority in the policy contract, the appellant tried to argue that they were not liable for notifiable pandemic diseases. Second, it was argued that the Covid-19 virus is a global or pandemic virus and it had not originated within the required 50 km radius. Third, the insurance contract did not cover national government lockdown regulations and, lastly, there was no link (*causa* or *nexus*) between the interruption of the business and the financial losses suffered by the respondent as a result of Covid-19.[21] For example, the losses were the result of lockdown regulations only and if it had not been for those regulations, the respondent would have continued with its business operations as

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18 Disaster Management Act 2002, Amendment of Regulations Issued in terms of Section 27(2) Government Gazette 43168 26 March 2020 regulation 11B(1)(b) included restaurants which were not included in the previous Disaster Management Act 2002, Amendment of Regulations Issued in terms of s 27(2) Government Gazette 43148 25 March 2020.

19 *Guardrisk* case (n 12) para 9.

20 ibid para 11.

21 ibid para 14.

normal. The last argument has value, since hard lockdown regulations were enforced as from 23 March, and subsequently amended to include other businesses, for example restaurants, and consequently the respondent stopped trading as such from 27 March.[22] The *causa* is not considered the legal question in this case, since it would seem that the Supreme Court of Appeal answered the appellant's *causa* argument in *obiter dicta*.

If one considers the above arguments, it would appear that the legal question should be decided by the factual circumstances of Covid-19 only, that is, the day and time that the government-amended lockdown regulations included other businesses' activities as from 27 March. In order to avoid the last sentence and to focus on the law to address the legal question, the rules pertaining to the interpretation of contracts are relevant to our discussion.[23] The interpretation of contracts requires the application of the following four legal requirements: first, contracts must be construed by having regard to their purpose, context and language; second, a commercial interpretation is essential to understand the purpose and object of the contract; third, the interpretation should be objective; and last, what the parties intended to cover in the contract, by focusing on the contract as a whole.[24] Other OECD member states have similar interpretation requirements, for example the Australian Federal Court in *Swiss Re International Se v LCA Marrickville Pty Limited* referred to the relevance of insurance policy language, the reason (purpose) for the policy, the commercial interpretation (objectiveness or common-sense) of the policy, and the intention of the parties etcetera to give a correct interpretation for business interruption claims.[25] Such interpretations are not contrary to customary international law pertaining to the interpretation of treaties.[26] Generally, customary international law does not recognise a hierarchy of rules of interpretation; in other words, which rule (for example ordinary meaning of language or intention, etcetera) is more superior to the interpretation of contracts (treaties).[27] In customary international law, the judge is allowed to choose a rule (to avoid an absurd result) that is most appropriate for the interpretation of treaties—generally, the purpose of the

22 ibid paras 14-15.

23 ibid para 12.

24 ibid para 12; Oliver Dörr and Kirsten Schmalenbach, *Vienna Convention on the Law of Treaties, A commentary* (Springer 2012) 540. One can argue that a commercial interpretation is required in the common law to allow for an effective interpretation. In international law, the principle of effectiveness is no more than what is the true object and purpose of the treaty. In addition, good faith is added to the interpretation of treaties from an international law perspective.

25 *Swiss Re International Se v LCA Marrickville Pty Limited* (Second Covid-19 insurance test cases) 2021 FCA 1206 paras 86-89 <https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2021/2021fca1206> accessed 10 January 2022.

26 Dugard (n 5) 622–623.

27 Bradley and Goldsmith (n 11) 818. There is a close relationship between customary international law and the common law of a nation; Dörr and Schmalenbach (n 24) 523 and 541 state that it is now generally accepted by international law lawyers that the Vienna Convention on the Law of Treaties in Articles 31 and 32 reflect pre-existing customary international law interpretation principles. There is no stated hierarchical order for rules of interpretation.

contract shows the true intention of the parties.[28] However, since 1969 customary international law has, to some extent, been codified by the Vienna Convention on the Law of Treaties. In this regard, the International Court of Justice uses Article 38(1) of the Statute of the International Court of Justice to interpret treaties.[29] Article 38(1) lists the relevant sources for the interpretation of treaties; for example, customary law, general principles recognised by civilised nations, judicial decisions and the like. By focusing on these sources, specifically general principles recognised by civilised nations, the language and or purpose of the contract as discussed earlier could be equally relevant from an Article 38(1) perspective. However, while the four interpretation requirements of the appellant are relevant to the interpretation of contracts, insurance contracts as indemnity contracts require an additional (or special) legal requirement; that is, insurance contracts should also be interpreted reasonably (and fairly) in favour of the policyholder.[30] The reason for this is that an insurance contract is a contract of indemnity, to indemnify the policyholder for losses suffered. It is therefore possible to argue that the Vienna Convention on the Law of Treaties, 1969, also supports an interpretation of reasonableness, since the International Court of Justice acknowledges the law of civilised nations.[31]

The *Guardrisk Insurance Company Limited* case continued by adding this additional legal requirement to achieve reasonableness (and fairness) for the policyholder, especially with regard to radius clauses that are susceptible to two interpretations.[32] In this regard, the radius clause accepted liability for notifiable diseases within fifty kilometres, while rejecting liability for notifiable diseases exceeding this radius; in other

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28 Dörr and Schmalenbach (n 24) 522. Interpretation is a process to establish the true meaning of the parties; Author unknown, 'The Vienna Convention on the Law of Treaties and the OECD Commentaries' (2017) <https://kevinburt.co.za/2017/06/01/oecd-commentaries-tax-treaty-interpretation/> accessed 20 January 2022. In this article reference is made to the Australian case, *Thiel v FCT* (1990) 171 CLR 338, confirming that Article 31 of the Vienna Convention on the Law of Treaties, 1969, for example, is a codification of customary international law (n 5). Article 31(1) states: 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose' and Article 31(4), loosely presented here, states that a special meaning for a term or phrase shall be given if so intended by the parties; Ulf Linderfalk, *On the Interpretation of Treaties, The Modern International Law as Expressed in 1969 Vienna Convention on the Law of Treaties* (Springer 2007) 30 <https://www.corteidh.or.cr/tablas/r32592.pdf> accessed 10 January 2022. He states that the '[T]he purpose is to establish the intention of the parties.'

29 Linderfalk (n 28) 28; Dugard (n 5) 28. The sources listed in Art 38 is relevant to all forms of disputes, not only to the interpretation of contracts.

30 *Guardrisk* case (n 12) para 13.

31 Dörr and Schmalenbach (n 24) 542. Here reasonableness is discussed with reference to a reasonable person; Vienna Convention on the Law of Treaties 1969 (n 5). Article 32 refers to Ar 31 in regard to applying the circumstances where a treaty was concluded to avoid a result that is manifestly absurd or unreasonable; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Croatia v Serbia*) (n 11).

32 *Guardrisk* case (n 12) para 33.

words, it accepted liability for force majeure within fifty kilometres and rejected liability for similar force majeure exceeding the 50 km radius-notifiable pandemic diseases. In addressing this, we will first focus on the merits of the arguments presented by the appellant, and afterwards, on the legal consequences of a *causa*. The merits and rules of the municipal interpretation of contracts are divided into two paragraphs below, since there is an overlap in their explanation.

Merits of the Arguments Presented by the Appellant and Rules for Interpretation of Contracts

No Competent Local Authority had Declared the Disease as One of the Listed Notifiable Diseases

First, no competent local authority (for example the City of Cape Town) had declared the disease as one of the listed notifiable diseases. Contracts in municipal law must be construed by having regard to their purpose, context and language, which is an objective enquiry in the law—this is also to some extent supported by Article 31 of the Vienna Convention on the Law of Treaties, 1969.[33] Guardrisk argued that, as required by the insurance contract, only a local authority may confirm the outbreak of a notifiable disease. The court subsequently considered the by-laws of the City of Cape Town, but was unable to find any by-law requesting the City to confirm an outbreak of any notifiable disease among its citizens.[34] The purpose of this clause (so it was argued) is that only a local authority should respond to an outbreak by promulgating a suitable by-law and this will only happen if the outbreak is reported to that local authority. Accordingly, the context of this clause does not require the promulgation of national legislation.[35] The language requesting a local authority to respond to an outbreak, as was argued by Guardrisk, is also not ambiguous language. Although this may be true and correct, the High Court was unable to find any by-law issued by the City of Cape Town forcing its citizens to notify it of such a disease, nor was any by-law found forcing the City of Cape Town to promulgate a by-law to regulate (or to stop) the spread of the disease. For this reason, the High Court rejected Guardrisk's argument of the importance of a local authority.[36] In this regard, Article 32 refers to Article 31 of the Vienna Convention of the Laws of Treaties, stating that certain wording of a contract may be

33 Vienna Convention on the Law of Treaties, 1969 (n 5). Article 31(1) states: 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.'

34 *Guardrisk* case (n 12) para 15.

35 *Café Chameleon CC v Guardrisk Insurance Company Ltd* [2020] ZAWCHC 65 para 62. '[t]he principal reason why the notification requirement was introduced to the Notifiable Diseases Extension, was to ensure that cover thereunder would be triggered by outbreaks of the most serious diseases, and not whether the source of that obligation to report the gravity of the threat was national legislation, rather than subordinate legislation enacted by a local authority.'

36 *Guardrisk* case (n 12) para 16.

ignored in order to avoid an interpretation that is manifestly absurd.[37] In this regard, without any relevant by-laws, one may draw the conclusion that it is absurd to focus on the wording of the policy that requires only a local authority to regulate the spread of notifiable diseases without any relevant by-law supporting this contractual duty. In other words, in this instance, it was irrational to expect a local authority to regulate (or to stop) the spread of Covid-19 as a notifiable disease.

It is important to consider here that a global outbreak of the most serious diseases would trigger a national regulation instead of a local one. A global outbreak poses extreme public health risks, and only the government has the capacity to stop the local, national or international spread of a disease such as Covid-19. This is an objective interpretation of the insurance clause, as to why the local authority (the City of Cape Town) has no capacity to stop the spread of notifiable diseases either nationally or even internationally.[38] Guardrisk also argued that radius clauses are relevant and applicable for understanding the purpose of the contract[39] and that it was only liable for diseases that originated within the radius. This interpretation presented to the court is a subjective interpretation of a radius clause. An objective interpretation requires not the local authority but the government to stop the spread of the disease. The Supreme Court of Appeal did not explain what constitutes a subjective interpretation of a radius clause, but a practical example is relevant to our discussion to illustrate the subjectiveness of the above argument.[40] Why should it be a radius of only fifty kilometres and not forty or even ten? Therefore, one can conclude that a radius distance is arbitrary and the reasons why liability is either accepted or not by the insurer for a particular radius, are known only to that particular insurer. However, objectively, the City of Cape Town has no relevant by-law to stop the spread of the disease, and objectively a radius clause is arbitrary and for these reasons a commercial interpretation is required. This will be discussed in the next paragraph.

The Covid-19 Virus is a Global Virus; It did not Originate within the Required 50 Km Radius and the Insurance Contract did not Regulate Government Lockdown Regulations

A commercial interpretation is essential to understand the purpose and object of the insurance contract and what the parties intended to cover as a whole. International law does not refer strictly to the phrase 'commercial interpretation of a treaty' but rather to the 'principle of effectiveness' to understand the purpose and object of the treaty—which is similar to the phrase 'commercial interpretation.'[41] Nevertheless, in the event

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37 Vienna Convention on the Law of Treaties, 1969 (n 5). Article 32(b) states: 'Leads to a result which is manifestly absurd or unreasonable.'; Dörr and Schmalenbach (n 24) 548 the interpretation of a treaty should not lead to an absurd or unreasonable result.

38 ibid para 19.

39 ibid paras 24–31.

40 ibid para 13.

41 Dörr and Schmalenbach (n 24) 540.

of a serious disease posing a threat to public health, municipal law requires that such a threat be reported to national government authorities.[42] In this case, a doctor or a laboratory should inform the patient that they have a duty to protect third parties or fellow citizens by reporting the disease (eg the Covid-19 status of a patient) to designated national government authorities, as a method to allow the South African government to act in the best interests of it citizens in stopping the spread of the disease.[43]

In the commercial interpretation of the radius clause that regulates liability for notifiable diseases, it should be understood that any form of national government response would be appreciated by the insurer and policyholder in stopping the spread of the disease—although it is not specifically recorded between the parties in the contract—and a policyholder may experience business interruptions caused by the actions of the South African government to stop the spread. Accordingly, business interruptions are an integral part of the insurance contract, and it should therefore be understood that the commercial purpose of the insurance contract is to provide cover in the event of business interruptions that result from the government trying to stop the spread of the disease.[44] The true intention of the parties is to indicate the commercial relevance of covering business interruption claims, although this was not explicitly regulated in the contract of insurance between Guardrisk and Café Chameleon.[45]

Since the City of Cape Town had no by-laws to force its citizens to report such serious outbreaks to a local authority or to promulgate any by-law to regulate or to stop the spread of a disease, the High Court rejected the appellant's argument.[46] Subsequently, Guardrisk focused on the 50 km radius, arguing that the Covid-19 outbreak occurred in multiple locations in South Africa. Therefore, the purpose of the radius clause is clear—to accept only those claims where the outbreak occurred within the specified radius. Although the Supreme Court of Appeal held that the parties had a true intention to cover notifiable diseases, as explained earlier, the court continued that the 50 km radius does not make commercial sense.[47] For example, the national government's reaction in closing its borders to stop the spread of Covid-19 was not limited to a 50 km radius; it was a national effort to stop the spread of the disease in South Africa and/or

42 The Surveillance and Control of Notifiable Medical Conditions Government Gazette 41330 15 December 2017 regulation 13 was issued for the surveillance and control of notifiable medical conditions.

43 See in general Disaster Management Act 2002, Amendment of Regulations Issued in terms of s 27(2) Government Gazette 43168 26 March 2020; David J McQuoid-Mason, 'Covid-19 and Patient-Doctor Confidentiality' South African Medical Journal in Practice <http://www.scielo.org.za/pdf/samj/v110n6/10.pdf/> accessed 10 January 2021.

44 *Guardrisk* case (n 12) para 20.

45 ibid para 24.

46 ibid para 25.

47 ibid para 33.

internationally.[48] The appellant's arguments—use of the local authority and radius clause to accept or reject liability—are strikingly similar; however they do not make sense when the focus is on the commercial interpretation of the policy. Therefore, the true purpose of the policy contract—and therefore the true intention of the parties—was to indemnify the policyholder against business interruptions. This commercial interpretation is supported by the Vienna Convention on the Law of Treaties 1969, which attempts to avoid the interpretation of a treaty where the end-result would be manifestly unreasonable. Therefore, the merit of the appellant's (Guardrisk) arguments to avoid liability cannot be supported in a rational fashion.[49] In addition, the Vienna Convention on the Law of Treaties requires that a treaty be interpreted in good faith. To understand the interpretation of 'good faith', the Australian Federal Court in *Swiss Re International Se v LCA Marrickville Pty Limited*[50] stated that if the state or government made a mistake in the regulation or control of a pandemic, and policyholders suffered financial losses as a result of the business interruptions caused by this mistake, on what basis should an insurer be excluded from liability? This question can be posed differently: on what basis could it be inferred that the insurer intended to exclude business interruption claims merely because a state or national authority acted in good faith to stop the spread of notifiable diseases?[51] This question was not posed to the Supreme Court of Appeal and will therefore, not consider its legal consequences.[52]

For the above reasons, the appellant focused on a *causa* argument to avoid liability for business interruptions.

No Link (*Causa*) Between the Interruption of the Business and the Financial Losses Suffered

In this section focus is on the requirements for a *causa* or *nexus* between lockdown regulations and business interruptions. Strictly speaking, the Supreme Court of Appeal focused on the *nexus* argument as an *obiter dicta* statement, but the court did not use this argument as part of its analysis of why *radius* clauses should be rejected in future. The court only considered this analysis because *causa* was raised by the appellant as a

48 ibid para 30.
49 Linderfalk (n 28) 45.
50 OECD Policy Responses to Coronavirus (COVID-19) (n 1); *Swiss Re International Se* (footnote 25) para 87.
51 Dörr and Schmalenbach (n 24) 541, 548. Interpretation in good faith flows directly from the *pacta sunt servanda* rule and 'interpreting a treaty is a necessary element of its performance, logic requires that good faith be applied to the interpretation of treaties.'
52 *Peters Flamman and Co v Kokstad Municipality* 1919 AD 427 435 <https://www.lexisnexis.co.za/__data/assets/pdf_file/0008/759005/Case-extracts-on-force-majeure-and-vis-major-1880-to-2019.pdf> accessed 15 January 2022. See the interpretation of a *vis major* or *casus fortuitus* as an act of state (equal to an act of God).

method to reject liability on the basis of lockdown regulations.[53] In international law, *causa* or causation is generally regulated in treaties, and treaties may define how to apply *causa* in practice, for example a defined event that actually caused the consequences.[54] The OECD explains that most of its member states require physical damage to property (as the cause) to trigger a business interruption claim.[55]

To explain the *nexus* or *causa* argument we will use the following simple example. In the event of a hotel being undamaged after a hurricane that had destroyed all the amenities in the surrounding area, it is unlikely that tourists would make bookings at that hotel in future as there would be nothing left to see. Consequently, although the hotel is still standing, it will experience business interruptions, not as a result of being destroyed or damaged, but because tourists have no interest in visiting an area destroyed by a hurricane. Supposing that the owner of the hotel had insurance cover for business interruptions, would he be entitled to submit a valid claim, bearing in mind that there is absolutely nothing to prevent a tourist from making a booking at the hotel? In fact, the hotel is still open for business. In this regard, the *causa* or *nexus* is a factual rather than a legal question.[56] To answer the factual question, the Supreme Court of Appeal used a 'but for' test.[57] The following question might explain the 'but for' test: What would have happened to the owner of the hotel had it not been for the hurricane? The factual answer to this question is clear—the owner still has a fully functioning hotel, ready to accept tourist bookings.

One can therefore argue that the hurricane—an act of God—did not cause any business interruptions, only the fact that tourists have no interest in visiting that specific location. Many hotels are not favoured as tourist destinations, irrespective of whether there is a hurricane or not. Because a 'but for' test may produce unfair results, the Supreme Court of Appeal cited the *Minister of Safety and Security v Van Duivenboden* with approval on how to apply the test in practice.[58] In this regard, the 'but for' test cannot be used to identify *causa* or *nexus* with certainty, and one should rather focus on the probable cause

53 *Guardrisk* (n 12) paras 25–26.

54 Martin Jarrett, 'Causation in International Investment Law' (*Jus Mundi* 2021) <https://jusmundi.com/en/document/wiki/en-causation-in-international-investment-law> accessed 4 February 2021.

55 OECD Policy Responses to Coronavirus (COVID-19) (n 1); Dörr and K Schmalenbach (n 24) 521–570 does not discuss causation relevant to treaty interpretation.

56 This example is based on *Orient-Express Hotels Limited v Assicurazioni General Spa (UK) (t/a Generali Global Risk)* [2010] EWHC 1186. In this case, the city of New Orleans was destroyed by Hurricane Katrina. The court agreed with the insurers that business interruptions were not experienced by the hotel owner, as required by the insurance contract, because the city of New Orleans was destroyed, which was the actual reason for financial losses—loss would have occurred whether or not the hotel had been damaged.

57 *Guardrisk* case (n 12) para 37.

58 ibid para 38.

for the losses and/or financial losses.[59] If one considers the probable cause for financial losses in the hotel example above, it becomes clear that the hurricane is the probable cause why tourists are no longer making bookings at the hotel. In this regard, although the hotel was not destroyed by an act of God, the owner suffered financial losses as a result of the hurricane. Therefore, a factual link could exist between the financial losses suffered and the hurricane—even if the hotel is still standing.

In *Financial Conduct Authority v Arch Insurance (UK)*,[60] the court's interpretation of a ‘'but for’ test concurs with the above interpretation, bearing in mind that the UK is an OECD member state.[61] The court stated that a hurricane is an integral part of aggregate damages. Therefore, one cannot exclude the effect or factual consequences of a hurricane, even if the hotel remains undamaged.[62]

The Supreme Court of Appeal followed the explanation presented in the *Financial Conduct Authority* case to answer Guardrisk’s lack of causation argument. The court held that an act of God could cause multiple damage, and this is part of the same ‘chain of events’, in other words part of a singular event.[63] Therefore, if we focus on the simple hotel example, there was no breakage in the chain of events; the hotel owner suffered financial losses as a result of a hurricane and business interruptions consequently occurred as a result of no tourist bookings. For this reason, a hotel owner with coverage for business interruptions should be able to submit a successful claim to the insurer for payment. The same applies to Covid-19.[64] The spread of Covid-19 and the government’s response to the disease is a singular action, that is, part of the ‘chain of events’ to stop Covid-19, irrespective of how lockdown regulations were imposed by the government, and in this regard the insurance contract clause cannot exclude the government's response based on the ‘but for’ test.[65] As a result, different OECD member states and South Africa implemented (or tried to implement) financial regulatory responses (to

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59 ibid paras 38–39.

60 *Financial Conduct Authority v Arch Insurance (UK)* [2020] EWHC 2448 paras 150–160.

61 *Guardrisk* case (n 12) paras 52–58. The Supreme Court of Appeal referred to the *Financial Conduct Authority v Arch Insurance (UK)* with caution, because the UK Supreme Court of Appeal had not delivered judgment in this regard at the time of judgment was delivered in the *Guardrisk* case. Nevertheless, Cachalia JA considered the reasoning of the UK High Court as persuasive.

62 ibid paras 150–160.

63 *Guardrisk* case (n 12) paras 40–45.

64 ibid paras 47–51.

65 ibid para 62, where the court held the following: ‘An “other circumstance” by definition, therefore, refers to an occurrence separate from or independent of the insured peril, not one that is intrinsic to it. The Lockdown Regulations, I have found, were part and parcel of the insured peril. They are not an “other circumstance” as envisaged in the trends clause. If Guardrisk’s submission were correct it would have the extraordinary consequence that despite being part of the insured peril for which cover is provided, the Lockdown Regulations simultaneously operate as a circumstance to negate the cover.’

introduce gap cover or not) to insurers who were unwilling to settle claims based on business interruptions.

South Africa's Financial Regulatory Approach to Radius Clauses

The consequences of a radius clause as explained earlier, are clear. In the event that a clause is subject to two different interpretations, the court will always interpret a clause that accepts the policyholder's claim to cover (or pay) the losses suffered by that policyholder.[66] The South African financial regulator, the Financial Services Conduct Authority (FSCA), issued Communication 34 of 2020 on the way in which radius clauses should be interpreted in practice by insurers.[67] A radius clause is an arbitrary clause—some radius clauses are for forty kilometres, while others are for fifty—and policyholders must submit evidence that a notifiable disease originated within the specified radius.[68] This is an impossible requirement imposed on a policyholder, as most (or all) policyholders' travel history is not tracked by specific electronic devices. The FSCA therefore holds the view that a radius clause is neither reasonable nor fair to policyholders.[69]

Communication 34 of 2020 indicates that indemnity clauses that are not susceptible to two different interpretations are valid and enforceable, for example a clause that is similar to Article 8 of the Paris Agreement discussed earlier.[70] In other words, if an insurer has a force majeure clause that excludes liability for notifiable diseases that are not subject to a radius clause, the force majeure exclusion remains valid and enforceable between the policyholder and the insurer.[71] In this regard, the FSCA had no intention of voiding these clauses (or providing gap cover) merely to void radius clauses that could be interpreted differently by insurers to avoid liability for business interruption claims.[72]

If one considers the gap cover explained earlier, governments act in partnership with insurers to settle business interruption claims.[73] The FSCA's approach differs in this regard, holding that insurers remain liable for business interruption claims where a claim is subjected to a radius clause. The Communication does not stipulate any form of

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66 ibid para 13.

67 FSCA communication 34 of 2020 <https://www.fsca.co.za/Regulatory%20Frameworks/Temp/FSCA%20Communication%2034%20of%202020%20(INS).pdf> para 6.2 accessed 10 December 2020.

68 *Guardrisk* case (n 12) paras 30 and 52.

69 ibid para 33.

70 FSCA communication 34 of 2020 (n 67).

71 ibid.

72 ibid.

73 OECD Policy Responses to Coronavirus (COVID-19) (n 1).

partnership between the government, nor does it state how insurers should pay for business interruption claims in the event of an insurer being insolvent.

The United States of America is a member of the OECD and has tabled various bills for comment by the Committee for Financial Services.[74] The purpose of the Business Interruption Insurance Coverage Bill, 2020, is to void any force majeure clause. The difficulty with this proposed legislation is that no gap cover has been included, for example no provision has been made for government liability for business interruption claims. An additional bill, the Pandemic Risk Bill, 2020, was later tabled which made provision for gap cover—the federal government is solely liable for the aggregate of business interruptions claims between US$250 million and US$750 million.[75] At present, it is unclear which bill has been accepted into legislation, if any.

Conclusion

Linderfalk devoted nearly 400 pages on the interpretation of treaties, and it is impossible to give a thorough explanation of international law principles relevant to the interpretation of treaties within a single article.[76] However, the interpretation of treaties could also, for example, include sources from civilised nations, as discussed earlier in regard to Article 38.[77] In conclusion, South Africa, through relevant legislation, has a duty to respond to a global outbreak; in this case, to stop the spread of Covid-19 nationally and internationally by, for example, closing its borders.[78] However, the Guardrisk insurance clause that recognised notifiable diseases (which included Covid-19) required the local authority—the City of Cape Town—to respond to (or report on) notifiable diseases. This provision in the insurance contract—although stated in clear, unambiguous language—has no legal relevance since there are no by-laws that the City of Cape Town has to respond to regarding Covid-19.[79]

Although the radius clause requires a notifiable disease to originate within a specified radius for liability to occur and although such a clause is unambiguous, such clauses are nevertheless arbitrary clauses.[80] Interpretation of the Guardrisk policy contract requires a commercial interpretation to avoid an absurd or unreasonable outcome for the policyholder. Such an interpretation is also supported by the Vienna Convention on the Law of Treaties with regard to avoiding an interpretation that is absurd or

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74 The Business Interruption Insurance Coverage Bill 2020 <https://www.congress.gov/bill/116th-congress/house-bill/6494/text> accessed 1 March 2021.

75 The Pandemic Risk Bill 2020 <https://www.congress.gov/bill/116th-congress/house-bill/7011/text> accessed 1 March 2021.

76 Linderfalk (n 28).

77 Bradley and Goldsmith (n 11) 818.

78 McQuoid-Mason (n 43).

79 The Surveillance and Control of Notifiable Medical Conditions (n 42).

80 *Guardrisk* (n 12) para 67–68.

unreasonable.[81] Although Covid-19 infections occurred in multiple places in South Africa, the outbreak should be seen as a singular event, and the national government responded to the outbreak in good faith to stop the spread of the disease; irrespective of a 50 km radius.[82] This is a rational interpretation of the policy and explains why Guardrisk is liable for business interruption claims. In addition, we believe that radius clauses have no relevance in future in regulating force majeure insurance liability in South Africa. This is in line with the OECD recommendations that such clauses, in general, are unreasonable.[83]

81 Vienna Convention on the Law of Treaties 1969 (n 5). Article 32(b) states: 'Leads to a result which is manifestly absurd or unreasonable.'

82 *Guardrisk* case (n 12) para 62.

83 OECD Policy Responses to Coronavirus (COVID-19) (n 1).

References

Author unknown, 'The Vienna Convention on the Law of Treaties and the OECD Commentaries' (2017) <https://kevinburt.co.za/2017/06/01/oecd-commentaries-tax-treaty-interpretation/> accessed 20 January 2022.

Bradley C and Goldsmith J, 'Customary International Law as Federal Common Law: A Critique of the Modern Position' (1997) 110(4) Harvard Law Review <https://doi.org/10.2307/1342230>

Delinger M, 'Rethinking Force Majeure in Public International Law' (2017) 37(2) Pace Law Review Journal.

Dugard J and Du Plessis M, *Dugard's International Law, A South African Perspective* (5th edn, Juta 2018).

Dörr O and Schmalenbach K, *Vienna Convention on the Law of Treaties, A Commentary* (Springer 2012) <https://doi.org/10.1007/978-3-642-19291-3>

FSCA communication 34 of 2020 <https://www.fsca.co.za/Regulatory%20Frameworks/Temp/FSCA%20Communication%2034%20of%202020%20(INS).pdf> accessed 10 December 2020.

Jarrett M, 'Causation in International Investment Law' (*Jus Mundi* 2021) <https://jusmundi.com/en/document/wiki/en-causation-in-international-investment-law> accessed 4 February 2021 <https://doi.org/10.2139/ssrn.3705322>

Linderfalk U, *On the Interpretation of Treaties, The Modern International Law as Expressed in 1969 Vienna Convention on the Law of Treaties* (Springer 2007) <https://www.corteidh.or.cr/tablas/r32592.pdf> accessed 10 January 2022.

McQuoid-Mason DJ, 'Covid-19 and Patient-Doctor Confidentiality' South African Medical Journal in Practice <http://www.scielo.org.za/pdf/samj/v110n6/10.pdf/> accessed 10 January 2021.

OECD Policy Responses to Coronavirus (COVID-19) Responding to the COVID-19 and Pandemic Protection in Gap Insurance <https://www.oecd.org/coronavirus/policy-responses/responding-to-the-covid-19-and-pandemic-protection-gap-in-insurance-35e74736/> accessed 15 November 2020.

UN Framework Convention on Climate Change, The Paris Agreement 2016 (UNFCCC) (signed 22 April 2016, adopted 4 November 2016).

Vienna Convention on the Law of Treaties 1969 (concluded at Vienna on 23 May 1969 and entered into force on 27 January 1980. UN Treaty Series, volume 1155, 331).

Cases

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Croatia v Serbia*) Judgment, ICJ Reports 2015.

Café Chameleon CC v Guardrisk Insurance Company Ltd [2020] ZAWCHC 65.

Financial Conduct Authority v Arch Insurance (UK) [2020] EWHC 2448.

Guardrisk Insurance Limited v Café Chameleon CC Case No 632/20) [2020] ZASCA 173 (17 December 2020).

Ma-Afrika Hotels Pty (Ltd) v Santam Ltd a Division of which is Hospitality and Leisure Insurance 1 All SA 195 (WCC).

Orient-Express Hotels Limited v Assicurazioni General Spa (UK) (t/a Generali Global Risk) [2010] EWHC 1186.

Peters Flamman and Co v Kokstad Municipality 1919 AD 427 435.

Swiss Re International Se v LCA Marrickville Pty Limited (Second Covid-19 insurance test cases) 2021 FCA 1206 <https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2021/2021fca1206> accessed 10 January 2022.

Thiel v FCT (1990) 171 CLR 338.

Van Breda v Jacobs 1921 AD 330.

Legislation

Disaster Management Act 2002, Amendment of Regulations Issued in terms of s 27(2) Government Gazette 43148 25 March 2020.

Disaster Management Act 2002, Amendment of Regulations Issued in terms of Section 27(2) Government Gazette 43168 26 March 2020.

The Business Interruption Insurance Coverage Bill 2020 <https://www.congress.gov/bill/116th-congress/house-bill/6494/text> accessed 1 March 2021.

The Pandemic Risk Bill 2020 <https://www.congress.gov/bill/116th-congress/house-bill/7011/text> accessed 1 March 2021.

The Surveillance and Control of Notifiable Medical Conditions Government Gazette 41330 15 December 2017.