



COLLEGE OF LAW AND MANAGEMENT STUDIES

SCHOOL OF LAW: UNIT OF MARITIME LAW AND MARITIME STUDIES

**THE APPLICATION OF FOREIGN LAW TO SOUTH AFRICAN
MARINE INSURANCE CONTRACTS: A CRITICAL ANALYSIS OF
THE CASE OF *THE REPRESENTATIVES OF LLOYDS & OTHERS*
v CLASSIC SAILING ADVENTURES (PTY) LTD,
IN REFERENCE TO SECTION 6 OF THE ADMIRALTY
JURISDICTION REGULATION ACT 105 OF 1983**

by

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**Mini Dissertation submitted to the School of Law in fulfilment of the requirements
of the degree of Master of Laws in Maritime Law**

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ABBREVIATIONS AND ACRONYMS

AJRA	Admiralty Jurisdiction Regulation Act 105 of 1983
GEIS	General Export Incentive Scheme
SAMSA	South African Maritime Safety Authority
SCA	Supreme Court of Appeal
STIA	Short-Term Insurance Act 53 of 1998

ABSTRACT

It is trite that the development of marine insurance law in South Africa has been heavily influenced by its English counterpart. While English law and precedents may not be binding on South African courts, they do hold certain persuasive authority, especially in the realm of marine insurance.

This dissertation aims to provide an analysis on the application of section 6 of the Admiralty Jurisdiction Regulation Act 105 of 1983 and the manner in which it has been utilised by South African courts. In the case of *The Representatives of Lloyds & Others v Classic Sailing Adventures (Pty) Ltd.*, the decision concerned a complex conflict of laws owing to the existence in the contract of insurance of a choice of law clause which provided for the application of English law within South African jurisdiction.

Reference will also be made to the manner in which the court in the above case approached the conflict of laws, illustrating that South African law provisions and, in particular, mandatory provisions of domestic statutes, were formulated to be applicable; and that to the extent that English law was inconsistent with the domestic law, it was not applied.

CHAPTER 1: INTRODUCTION

1.1 Background and Rationale

Contracts of insurance are a type of symbiotic relationship, with one party, the insurer, undertaking to protect the financial well-being of another, the insured, in the event of any damage caused to an insured asset by a risk insured against. In return, the insurer is compensated for their service, should it ever be required, by payment of a premium. However, suppose the insurer refuses to fulfil his contractual obligations, on the basis of alleged misrepresentation, non-disclosure and illegality? Additionally, imagine a scenario in which both parties are protected by two different legal systems, which would be procedurally problematic. Can a foreign law be applied in a South African court when its provisions differ from provisions in a South African statute that would otherwise apply to the dispute? This was the issue faced by the Supreme Court of Appeal in the case of the *Representatives of Lloyds and Others v Classic Sailing Adventures (Pty) Ltd*¹ (hereinafter referred to as ‘the Mieke case’), which will be the focus of this dissertation. The decision upheld the result of a judgment in the Cape High Court but reached that result on different legal grounds.²

The *Mieke* case was first heard in the Western Cape High Court. The insured, Classic Sailing Adventures (Pty) Ltd, sought an order compelling the insurer (Lloyds of London) to honour the contract of insurance, with regard to sinking of the vessel. The court held in favour of the insured, and the matter went on appeal directly to the Supreme Court of Appeal. The insured, Lloyds of London, raised three special defences, which they believed relieved them of liability.

The matter concerned the sinking of the ‘SY *Mieke*’ off the coast of Mozambique, allegedly as a result of freak weather conditions which caused irreparable damage to the hull of the luxury yacht. The vessel had originally been a motorised yacht which had been used primarily for the purposes of fishing at sea. On 15 September 2005, the ‘SY *Mieke*’ sailed from Vilanculos. After having set sail, the vessel and its crew encountered rough seas as a result of adverse weather conditions, during which time the vessel lost ninety percent of its fuel intake. Attempts were made to prevent the inflow of water. However, it proved futile, as there was ‘little to do to save the vessel’, because there appeared to be a crack in the hull of the vessel. The large swells, caused by the severe weather conditions, caused various objects to crash against the

¹ *The Representatives of Lloyds & others v Classic Sailing Adventures* (250/09) [2010] ZASCA 89.

² *Classic Sailing Adventures (Pty) Ltd v Representative of Lloyd's and Others* (AC 38/2006) [2009] ZAWCHC 14.

vessel which possibly damaged the vessel and ultimately allowed for the ingress of water through the hull of the vessel.³

One would be wrong in assuming that the greatest point in contention in the litigation was the factual cause of the incident leading to the sinking of the vessel. Granted, ordinarily, this would have provided a platform for widespread analysis, investigation and debate. However, in this instance, the most contentious points were to be found in the rationale behind the insurer's decision to refute the claims. In summary, the insurer based their defence on three special defences:

- First, it was alleged that there was a material misrepresentation of the extent of the dispute between the insured and the South African Maritime Safety Authority ('SAMSA'), with regard to the skipper's certification, prior to the insurer accepting the risk.⁴
- Second, it was alleged that there was a material non-disclosure of the fact that there was no stability information, in the form of the stability book on board the vessel as required by section 226 of the Merchant Shipping Act⁵ and regulations 7, 8 and 10 of the Safety of Navigation Regulations, 1968 (made under the Merchant Shipping Act;⁶ and that such information that was on board the vessel was not accurate, was not in the prescribed form, and had not been approved by the South African Maritime Safety Authority.⁷
- Last, it was alleged that the venture leading to the sinking of the *Mieke* had been carried out in an unlawful manner,⁸ because the skipper, at the time the incident occurred, was not properly certified to serve as such⁹ and was therefore in breach of the implied warranty of legality in terms of section 41 of the English Marine Insurance Act.¹⁰

³ The *Mieke* case (SCA) para 1, 2, 51 and 58. *Also See* The *Mieke* (WC) para 1–5 and 49.

⁴ The *Mieke* case (SCA) para 36–42; the *Mieke* case (WC) para 38–40.

⁵ 57 of 1951.

⁶ GN 651 GG 2049 19 April 1968.

⁷ The *Mieke* case (WC) para 4.

⁸ *Ibid.*

⁹ The *Mieke* case (SCA) para 43–49. *See also* para 41–48 of the *Mieke* case (WC) .

¹⁰ 1906 c.41.

The insurance contract provided for the application of English law within South African jurisdiction. In the court a quo it was held that section 54 of the Short-Term Insurance Act¹¹ ('the STIA') applied, and on this basis the third defence was rejected. The judgment was criticised by Van Niekerk on the basis that, arguably, section 54 was not mandatory law that should override the provisions of English law.¹² Further, Van Niekerk questioned why, if the STIA was found to be mandatory, section 53 had not been relied upon. The court a quo decided the first two defences on the basis of English law.

In fact, the Supreme Court of Appeal ('the SCA') then held that both sections 53 and 54 of the STIA are mandatory provisions of South African law and cannot be contracted out of.¹³ The question is then: what requirements need to be satisfied in order for a statute to be classified as mandatory? Moreover, would this constitute an unnecessary limitation on party autonomy?

The case involved the complicated legal issue of a conflict of laws, namely whether full effect was to be given to the parties' choice of law clause, in terms of which the policy was subject to English law. The validity of choice of law clauses is recognised in terms of section 6(5) of the Admiralty Jurisdiction Regulation Act ('the AJRA').¹⁴ However, in agreeing to English law, would it mean that the insured had renounced the protection afforded to him under the South African Short-Term Insurance Act?¹⁵

The SCA judgment sets a precedent on how to approach a matter involving a choice of law in future conflicts arising in admiralty, albeit that detractors have argued that the correctness of the grounds for the decision should be questioned.

In the *Mieke* case, the insurers' defence relied heavily on the elements of 'misrepresentation' and 'non-disclosure'. There is a statutory codification of both defences in English law, in terms respectively of section 18(2) of the English Marine Insurance Act,¹⁶ and in South African insurance law in terms of section 53(1) of the Short-Term Insurance Act.¹⁷ However, the test is substantially different in both legal systems. Thus in deciding whether the English test should

¹¹ 53 of 1998.

¹² JP Van Niekerk "Choice of English Law and Practice in South African Short-Term Policy of Marine Insurance: Jurisdiction and Applicable Law" 604.

¹³ The *Mieke* case (SCA) para [26], [29] and [47].

¹⁴ 105 of 1983.

¹⁵ 53 of 1998.

¹⁶ 1906 c.41.

¹⁷ Van Niekerk note 12 op cit.

be applied (in terms of the choice of law clause) to decide the matter, comparisons needed to be drawn between the two tests.¹⁸

Of crucial importance to the discussion is the standard to which the parties were held, as in terms of South African Short-Term Insurance Act,¹⁹ the ‘reasonable persons’²⁰ test was to be applied; however, in terms of the English Marine Insurance Act, the test to be applied was that of the ‘reasonable/prudent insurer’.²¹

Flowing from this arose the debate regarding the limitations that may properly be placed on party autonomy. An incautious reading of section 6(5) of the Admiralty Jurisdiction Regulation Act²² may lead one to the incorrect assumption that any choice of law clause agreed to by the parties would in effect invalidate any domestic laws relating to the subject matter of the case. However, according to Lewis JA, this section must be read with section 6(2)²³, which states that:

‘[t]he provisions of subsection (1) shall not derogate from the provisions of any law of the Republic applicable to any of the matters contemplated in paragraph (a) or (b) of that subsection’.²⁴

Therefore, in the opinion of the learned judge, this section would serve as a restriction on ‘complete party autonomy’,²⁵ and section 6(5) must also be read as subject to section 6(2).²⁶ It is the court’s interpretation of section 6(2) that has been particularly controversial. Arguments can be made for and against the decision, which will be discussed in chapter 4. The most glaring criticism is that there is no basis to find that section 6(5) is indeed restricted by section 6(2), when the legislation clearly states in unambiguous terms that section 6(1) is subject to

¹⁸ The first test is found in terms of section 18(2) of the English Marine Insurance Act, 1906, which states: ‘Every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk’. The second test is found in terms of section 53(1) of the Short-Term Insurance Act 53 of 1998. Both tests will be discussed at length in Chapter 2 of this dissertation.

¹⁹ 53 of 1998.

²⁰ G Hofmeyr *Admiralty Jurisdiction Law and Practice in South Africa* (2014) 141.

²¹ Van Niekerk note 12 op cit 595.

²² See note 9 above.

²³ Ibid.

²⁴ Section 6(2) of the Admiralty Jurisdiction Regulation Act 105 of 1983.

²⁵ ‘Party autonomy is the guiding principle in determining the procedure to be followed in an international commercial arbitration. It is a principle that has been endorsed not only in national laws, but by international arbitration institutions and organisations. The legislative history of the Model Law shows that the principle was adopted without opposition...’ See A. Redfern & M. Hunter (with N Blackaby and C Partasides) *Law and Practice of International Commercial Arbitration*, 4 ed. (2004) 265.

²⁶ Admiralty Jurisdiction Regulation Act 105 of 1983.

section 6(2)²⁷ but does not include any such express limitation in relation to section 6(5). That is not to say that the right to rely on the choice of law clause was not correctly limited, on the facts of this case, by applying public policy principles. It is thus possible to agree with the outcome but to disagree with the rationale behind the decision. Van Niekerk argues that in all cases involving conflict of laws the chosen law should be applicable only to the extent that it is not inconsistent with mandatory domestic law²⁸. This view was expressed by the Supreme Court of Appeal,²⁹ but how to determine which laws are mandatory was not clearly set out in the judgment. By this Van Niekerk means a *ius cogens* rule and one that the parties cannot renounce.

1.2 Structure of the Dissertation

Chapter 2 provides an analysis of the relevant provisions of the English Marine Insurance Act³⁰ and the Short-Term Insurance Act³¹ and the tests for materiality which are found within sections 18 and 53, respectively.

Flowing from this, chapter 3 will encompass a discussion of the relevant principles of party autonomy, and preemptory legislation. In this chapter, reference shall be made to the arguments considered by the SCA in relation to the preemptory nature of the STIA.

Chapter 4 provides an analysis of section 6, with particular emphasis being placed on the subsections directly applicable to the *Mieke* case, namely, subsections (1), (2) and (5). In concluding this chapter, the author will provide a critique of the judgment delivered by Lewis JA, with particular attention being paid to the learned judge's interpretation of the AJRA and the application of the STIA.

Chapter 5 concludes with a summary of findings and recommendations regarding the contentious topics identified in the dissertation.

²⁷ Van Niekerk note 12 op cit 604.

²⁸ Ibid.

²⁹ The *Mieke* case (SCA) para 26–47.

³⁰ 1906 c.41.

³¹ 53 of 1998.

1.3 Problem Statement

There has been criticism of the judgment delivered in the *Mieke* case (SCA) owing to the manner in which the conflict of laws was decided.³² The SCA held that the Short-Term Insurance Act³³ was a mandatory law and could thus not be contracted out of. The issue stems from the court's reasoning in relation to the mandatory nature of the South African Act and its interpretation of section 6 of the AJRA. This dissertation will provide a comprehensive analysis of the judgment that will be of relevance to marine insurance contracts, containing a choice of law clause, and more broadly to the application of section 6(5) of the Admiralty Jurisdiction Regulation Act to choice of law clauses in contract disputes being adjudicated by the South African High Court exercising its admiralty jurisdiction. Moreover, the mandatory nature of South African laws and the limitation on party autonomy shall be discussed at length, so as to provide a full understanding of the current conflict of laws position in South Africa. Although the Insurance Act 17 of 2018 repeals section 53 of the STIA, that section is not yet operative.³⁴

1.4 Key Questions to be Answered

- 1.4.1 In terms of an alleged misrepresentation or non-disclosure, relating to contracts of insurance, how far does the standard of the reasonable person extend the duty to disclose? Moreover, in terms of the South African and English approach to the *materiality* of information, when is information considered to be material?
- 1.4.2 Was the circumvention of the doctrine of party autonomy unfairly limited in the case of *The Mieke*? Furthermore, in the event of a conflict of laws, how is the dispute to be decided?
- 1.4.3 Does section 6(2) of the Admiralty Jurisdiction Regulation Act 105 of 1983 override the notion of party autonomy recognised in section 6(5)?
- 1.4.4 Was the Supreme Court of Appeal correct in its decision and the rationale therefor?

³² JP Van Niekerk "Choice of Foreign Law in South African Marine Insurance Policy: An Unjustified Limitation of Party Autonomy". (2011) *JS Afr. L.*, 159.

³³ STIA note 11.

³⁴ See commencement notice GN 639 GG 41735 27 June 2018.

1.5 Research Methodology

Desktop research was undertaken, involving a comprehensive literature review of relevant legislation, case law, books and journal articles.

1.6 Conclusion

The Supreme Court of Appeal's judgment in the *Mieke* case was an interesting, albeit controversial, judgment. The Court was required to determine the correct approach to adopt in an instance of a conflict of laws. The court was further required to balance the concept of party autonomy with the somewhat ambiguous element of public policy. The purpose of this dissertation is to examine the rationale for the decision and shed some light on a seemingly under-researched area of law. What is to follow in the subsequent chapters is a detailed discussion of the principles of law relevant to an analysis of the judgment delivered by Lewis JA and the issues faced by the Supreme Court of Appeal in attempting to balance the choice of law clause in terms of the contract of insurance, while still trying to give effect to public policy considerations.

CHAPTER 2: NON-DISCLOSURE, MISREPRESENTATION AND ILLEGALITY IN THE *MIEKE* CASE

2.1 Introduction

Written agreements between parties create binding rights and obligations, which if not adhered to would give rise to an action for breach of contract by the innocent party, or if the contract is deemed to have been induced by means of misrepresentation, duress or undue influence, would render the contract voidable in the circumstances.³⁵

This chapter shall discuss the defences raised by the insured in the case of *The Representatives of Lloyds and Others v Classic Sailing Adventures (Pty) Ltd*,³⁶ namely, the special defences of misrepresentation, non-disclosure and illegality. The fundamental question which needs to be answered is whether, based on the relevant facts in question and relevant statutory and case law of both South Africa and England, the Insurer would be able to successfully rely on any of these special defences, and thus avoid liability in terms of the contract. To answer this, one needs to consider the common law position in South Africa prior to the enactment of the Short-Term Insurance Act³⁷ and the position under both the aforementioned Act and its English counterpart.

2.2 The *Mieke* Case

As set out in Chapter 1, the insurer raised three special defences. On that point, what follows is an analysis of the defences raised on appeal, as well as the approach of South African and English courts to this area of law, and the extent of the burden of proof associated with each.

2.2.1 Burden of Proof

As with all litigation proceedings, it is important to consider the incidence of burden of proof, as this would provide a guideline as to the extent to which either party needs to provide evidence of their respective claims or exceptions. When a matter is first heard, the onus shall rest on the insured to provide evidence, which proves that there has been actual loss or damage suffered.³⁸ This is evidenced by Reinecke, as the learned scholar states that the principles

³⁵ R Sharrock *Business Transactions Law* 8 ed (2011) 133, para 2.

³⁶ (250/09) [2010] ZASCA 89.

³⁷ 53 of 1998.

³⁸ C. Dillon & JP van Niekerk *South African Maritime Law and Marine Insurance: Selected Topics*. (1983) 160, para 1.

applicable to civil litigation are directly applicable to contracts of insurance.³⁹ Therefore, it is understood that the onus rests with the insured to prove that the risk insured against in terms of the contract of insurance has materialised. Moreover, should the risk be limited in the contract, the insured will then need to prove on a balance of probabilities that the claim is in relation to an event insured against and which was caused by an insured peril.⁴⁰ Author John Hare⁴¹ provided a satisfactory synopsis of the burden of proof in marine insurance claims, in which he went on to make the following statement:

‘The onus of establishing that loss was by peril of the sea lies on the assured. It is for the assured to bring the loss within the parameters of the limitations of the policy, even before the insurer attempts to raise any defence. It is particularly difficult for an assured to discharge this onus in scuttling cases, where there is a loss by the ingress of water, but where there is a suggestion that the assured’s conduct has been criminally fraudulent. Thus in *P Samuel and Co Ltd v Dumas* the House of Lords confirmed that a loss caused by scuttling was not a peril of the sea for want of the required fortuitousness and accident. Because of this want, even the innocent mortgagee whose interests were insured under separate insurance was unable to recover’.⁴²

Once the burden has been transferred to the insurer, the onus will then rest with the insurer to prove, on a balance of probabilities, that there are exceptions which were stated in the contract of insurance and which have subsequently been breached, thus exempting the insurers from all liability in terms of the contract.⁴³ In reference to the *Mieke* case, however, the insurers (Lloyds of London) were relying on elements of misrepresentation, non-disclosure and illegality as alternative defences in order to escape liability by avoiding the contract altogether. Only one of the special defences needed to succeed for insurers to avoid all liability.⁴⁴

2.2.2 The Defence of Non-Disclosure

The defence of non-disclosure was directly related to the fact that the insured had failed to disclose that the stability book in question, which was on board the vessel at the time the incident occurred, was allegedly inaccurate and most importantly that it had not been approved

³⁹ MFB Reinecke, JP Van Niekerk & PM Nienaber *South African Insurance Law* (2013) 271, para 1–2.

⁴⁰ *Ibid.*

⁴¹ J Hare *Shipping Law and Admiralty Jurisdiction in South Africa* 2 ed (2009) 926.

⁴² *Ibid.*

⁴³ Above, note 9 para 3.

⁴⁴ The *Mieke* case (SCA) above para 8.

by the South African Marine Safety Association ('SAMSA')⁴⁵. Therefore, as per the arguments made by the insurers, this was a violation of section 18 of the Marine Insurance Act.^{46 47}

2.2.3 The Defence of Misrepresentation

It was alleged by the insurers that the insured had misrepresented the true extent of the dispute between its skipper and the South African Maritime Safety Association (SAMSA), with regard to the skipper's certification, which is required for all persons holding his title. As such, the insurers argued that this misrepresentation influenced their underwriting process prior to concluding the contract of insurance, and in the circumstances that it was a valid ground to avoid the contract.⁴⁸

2.2.4 The Defence of Illegality

In the *Mieke* case, the insurers based their final defence on the element of illegality, stating that the skipper of the vessel was not properly certified to hold such a title because there was a dispute between the insured and SAMSA relating to the said certification at the time the incident had occurred.⁴⁹ The defence of illegality which was raised by the insurers was premised on the illegal manner in which the voyage had been carried out. It was argued that the voyage had breached the implied warranty of legality found in section 41(1) of the English Marine Insurance Act.⁵⁰

2.3 The Duty of Good Faith

Many areas of South African law, including insurance law, have been heavily influenced by English law.⁵¹ The same applies in maritime law and marine insurance⁵² and as such, quite frequently one would notice an overlap between South African and English legal principles.

⁴⁵ *Representative of Lloyds & Others v Classic Sailing Adventures (Pty) Ltd*, para 30.

⁴⁶ 1906 Edw VI c.41

⁴⁷ The *Mieke* case (SCA) above para 30, See also the *Mieke* case (WC) Para 17–20.

⁴⁸ The *Mieke* case (SCA) above para 36–42, See also the *Mieke* case (WC) para 38–40.

⁴⁹ The *Mieke* case (SCA) above para 43–49, See also the *Mieke* case (WC) para 41–48.

⁵⁰ Edw VII, 1906 c.41

⁵¹ G Gordon & WS Getz *The South African Law of Insurance* 4 ed (1936) 2–4 indicate that English law applied by statute to fire, life and marine insurance in the Cape and Orange Free State, but that the English law of insurance was regarded as highly persuasive in all areas of insurance and was also applied by courts in the Transvaal and Natal.

⁵² Hare note 41 op cit 15, para 1.

The foremost comparison to be drawn between the two legal systems is in relation to the duty of utmost good faith,⁵³ and by extension, the development of legal principles governing misrepresentation and non-disclosure during pre-contractual negotiations⁵⁴.

The stark disparity between the two legal systems, as discussed more fully later in this chapter, is the standard to which the insurer and the insured are held in relation to a misrepresentation or non-disclosure made by either party.⁵⁵

The duty of utmost good faith can be found in section 17 of the English Marine Insurance Act, 1906, which states the following:

‘A contract of marine insurance is a contract based upon the utmost good faith, and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party’.⁵⁶

Heeding the words in section 17 above, one must consider the landmark case of *Carter v Boehm*,⁵⁷ in which the duty of utmost good faith originated in England. Lord Mansfield, in his judgment, opined that it was fundamental for the progression of marine insurance law to address the issue of fraudulent misrepresentation on the part of both the insurer and the insured.⁵⁸ The rule, however, went further, as even if one were innocent, it was possible for the insurer to avoid the policy if the risk had been misrepresented.⁵⁹ The ‘governing principle’ on which the decision was based was the requirement of good faith that applies to contractual dealings.⁶⁰ Lord Mansfield did limit the rule to an extent, as he explained that the information which is to be disclosed prior to the conclusion of a insurance contract must be at all times material to the contract, in the sense of ‘varying materially the object of the policy and changing the risqué understood to be run’⁶¹. Furthermore, it should be information the insurer is ignorant

⁵³ See, for example, s 17 of the (English) Marine Insurance Act, 1906 Edw VII c.41; *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1994] 3 All ER 581; [1995] 1 AC 501 (HL); *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd* [2003] 1AC 469 (HL); *Mutual & Federal Insurance Co Ltd v Oudtshoorn Municipality* 1985 (1) SA 419 (A) 431H–433F.

⁵⁴ A Hutchison & H Stoop. “*Misrepresentation in Consumer Insurance: The United Kingdom Legislature Opts for a ‘Reasonable Consumer’ Standard*”. (2013) SALJ 705, para 1.

⁵⁵ *Ibid.*

⁵⁶ Section 17 of the English Marine Insurance Act, 1906.

⁵⁷ [1766] 3 Burr 1905, 97 E.R 1162

⁵⁸ *Carter v Boehm* note 57 above 1164.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

of; the policy is not voidable if the insurer actually knew the information or waived his right to be informed thereof.⁶²

The duty of disclosure cannot be separated from the overarching duty of good faith:

In almost every instance in which a policy of sea insurance is effected, the underwriter must rely solely on the good faith of the assured for supplying him with full and true information of many of those facts on which the character and nature of the risk, and consequently the rate of premium, depend.’⁶³

In terms of the law of contract in South Africa, the duty to disclose, and the duty not to misrepresent, material facts, is directly correlated to the fact that all contracts in our law require an element of *bona fides*.⁶⁴ Nevertheless, what remains an important difference is that unlike an ordinary contract where the existence of a duty to disclose must first be established from the facts of the case, a duty to disclose is implied in every contract of insurance.

Thus in South African contractual law, there is no general duty to disclose; rather, the duty will arise only if it is deemed to be required based on the elements of public policy, which are the legal convictions of the community.⁶⁵ The law of insurance, on the other hand, requires a party to disclose all information within his knowledge which is material to the risk being underwritten.⁶⁶ The insured is required to disclose not only information he/she believes is necessary, but all facts which a reasonable person would regard as material and of which the insurer is not aware.⁶⁷

Failing to comply with this duty will ultimately provide grounds for the insurer to avoid the contract.⁶⁸ In this instance, the insurer will escape liability, should the non-disclosure relate to a material fact.⁶⁹

⁶² Ibid.

⁶³ Ibid.

⁶⁴ See *Meskin v Anglo-American Corporation of SA Ltd* [1968] 4 All SA 281 (W); *Van der Westhuizen v Arnold* [2002] 4 All SA 331; *Magna Alloys & Research (SA) Pty Ltd v Ellis* [1984] 2 All SA 583 (A).

⁶⁵ Reinecke et al note 39 op cit 151.

⁶⁶ *Munns v Santam Ltd* [2000] 4 SA 359 (D); [2000] 4 All SA 248 (D) para 64.

⁶⁷ Hutchison & Stoop note 54 op cit 706, para 1.

⁶⁸ *President Versekeringsmaatskappy Bpk v Trust Bank van Afrika Bpk en n Ander* 1989 (1) SA 208 (A).

⁶⁹ Nortje, M. “Pre-contractual Duties of Disclosure in the South African Common Law (Part 1)”. (2015) 2 *TSAR*, 347, para 1.

Academics and the judiciary previously held that the duty of disclosure in insurance contracts was one of “utmost” good faith.⁷⁰ However, Joubert JA, in the case of *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality*,⁷¹ held the following:

‘... [U]berrima fides is an alien, vague, useless expression without any particular meaning in law... it cannot be used in our law for the purpose of explaining the juristic basis of the duty to disclose a material fact before the conclusion of a contract of insurance. Our insurance law has no need for *uberrima fides* and the time has come to jettison it.’⁷²

The existence of a duty of good faith, albeit now no longer described in South African law as one of “utmost” good faith, imposes a duty of disclosure. The ambit of this duty is governed by the concept of materiality. The insured must make full disclosure and correctly represent all facts material to the risk and assessment of premium. Thus, to this extent, English law and South African law are the same. However, the test for materiality differs between the two legal systems.

2.4 The South African Approach to Materiality of a Non-Disclosure or Misrepresentation

Materiality at common law is a legal theory which if properly effected allows one to establish liability on the part of either contracting party which has been accused of a misrepresentation or non-disclosure⁷³.

The law of insurance regards a misrepresentation as a positive statement or omission, made either expressly through words or writing, or tacitly through conduct.⁷⁴

Non-disclosure is closely related to misrepresentation. However, one notable difference is the absence of a positive statement⁷⁵. Therefore, non-disclosure is the failure to reveal information when under a duty to do so.⁷⁶

⁷⁰ *Oudtshoorn Municipality* note 53 431H–432A.

⁷¹ *Ibid* 433.

⁷² *Oudtshoorn Municipality* note 53 433A–F.

⁷³ M Nortje *A New Look at Materiality*. (2010) 2010(3) *TSAR*, 468–485 468.

⁷⁴ Reinecke et al note 39 op cit 145.

⁷⁵ *Ibid*, 161, para 8.6.

⁷⁶ Sharrock note 35 op cit 134.

The primary enquiry which must be held relates to the materiality of the information which was not disclosed, and accordingly whether the non-disclosure was wrongful. Information is material if it may influence the insurer's assessment of the risk, in the sense that the insurer would have charged a different premium or would have chosen to accept or reject the risk. After a long period where the law was uncertain,⁷⁷ the correct approach to materiality was authoritatively established in the case of *Mutual and Federal v Oudtshoorn Municipality*⁷⁸ as an objective test which considers the standard of the reasonable person. This test asks whether the reasonable man would regard the information as material in the above sense.⁷⁹ In *Munns and Another v Santam Ltd*,⁸⁰ the court accepted that an insured's poor financial history and the fact that he is technically insolvent are factors which affect the so called moral risk because they touch on the insured's whole personality. The court considered that an insured with a poor financial record and who is in dire financial straits may well institute an inflated claim or fail to take reasonable steps to protect the insured property or even deliberately dispose of the property. The facts were thus material.

Should this be the case, the contract would be voidable at the instance of the other party, which would allow that party to void the contract.⁸¹ Van Niekerk provides a synopsis of the duty of disclosure and the effects of non-disclosure, in which he states the following:

It is trite that in terms of South African law an insured is under a duty to disclose of his own volition certain facts to the insurer with which he intends concluding an insurance contract. The facts to be disclosed are referred to as material facts and are those which, generally speaking, are relevant to, or have a bearing upon, the risk to be taken over by the insurer in terms of the insurance contract in question. Equally trite, a breach of the duty of non-disclosure amounts to a misrepresentation – more specifically, a misrepresentation *per omissionem* – and renders the insurance

⁷⁷ *Fine v The General Accident, Fire and Life Assurance Co. Ltd* 1915 AD 213, *Pereira v Marine and Trade Insurance Co. Ltd* 1975 4 SA 745 (A), *Fransba Vervoer (Edms) Bpk v Incorporated General Insurance* 1976 (4) SA 970 (W); *Bodmer, N.O. v American Insurance Co.* 1960 (4) SA 428 (T).

⁷⁸ 1985 (1) SA 419 (A). See also *Pereira* note 78 above 756, where the court states that the insured is in possession of all material information which is relevant to the risk assessment. This was the rationale for the shift from the reasonable insurer to the reasonable insured.

⁷⁹ *Munns* note 66 above para 64. The insured's view and the particular insurer's view are not relevant to this objective enquiry. However, the onus of proving that the facts are material rests on the insurer. See further *Fransba Vervoer* note 77 above, dictum 975G–H.

⁸⁰ *Munns* note 66 above.

⁸¹ Reinecke et al note 39 op cit 128.

contract voidable at the option of the insurer induced by it to conclude that contract.’⁸²

Prior to the amendment in 2003 of section 53(1) of the Short-Term Insurance Act 53 of 1998, the materiality of a non-disclosure or positive misrepresentation was decided in two very distinct manners. To begin with, the materiality of an alleged non-disclosure was decided with reference to the ‘reasonable person’ test,⁸³ an objective test developed at common law. This test was established in the case of *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality*,⁸⁴ where the court laid down the test for determining ‘materiality’. It was held that the test is whether, having regard to the circumstances, the undisclosed information is reasonably relative to the risk or the assessment of the premiums. This test was discussed further in the case of *President Versekeringsmaatskappy Bpk v Trust Bank van Afrika Bpk en n Ander*.⁸⁵ In this instance, the presiding officer modified the approach taken in the previous matter. The court held that the question is not merely whether a reasonable person would regard the information as affecting the risk, but rather, whether in the opinion of a reasonable person, the information could affect the insurer’s decision as to whether to accept the risk or charge a higher premium than usual.

The test for materiality in relation to positive misrepresentations developed in a different direction. Following *Jordan v New Zealand Insurance Company*,⁸⁶ section 63(3) of the Insurance Act⁸⁷ was introduced⁸⁸ and read as follows:

‘Notwithstanding anything to the contrary contained in any domestic policy or any document relating to such policy, any such policy issued before or after the commencement of this Act, shall not be invalidated and the obligation of an insurer thereunder shall not be excluded or limited and the obligations of the owner thereof

⁸² JP Van Niekerk "Goodbye to the Duty of Disclosure in Insurance Law: Reasons to Rethink, Restrict, Reform or Repeal the Duty (Part 1)". (2005) 17, *S. Afr. Mercantile LJ*, 150 para 1.

⁸³ JP Van Niekerk "More on Insurance Misrepresentation, Materiality, Inducement and No-Claim Bonuses: *Mahadeo v Dial Direct Insurance Ltd*. (2008) 20 *S. Afr. Mercantile L.J.*, 427–438 430, para 1.

⁸⁴ 1985 (1) SA 419 (A). See also *Commercial Union Insurance Co of SA Ltd v Lotter* 1999 (2) SA 147 (SCA) 154. Where the court held that ‘facts are material if a reasonable person — rather than the reasonable insured or the reasonable insurer — would have considered that the facts in question, which were not disclosed, should have been disclosed to the insurer so that it could form its own view on their effect on the assessment of the risk or the rate of the premium’. See further, *Fransba Vervoer* note 77 above 975–6. The court in this instance considered whether it is relevant to take into account, the mindset of the insured, and whether or not he/she understood or appreciated the materiality of the information.

⁸⁵ *President Versekeringsmaatskappy Bpk* note 68 above.

⁸⁶ 1968 (2) A 238 (E) – the case dealt with an affirmative warranty of the insured’s age.

⁸⁷ Act 27 of 1943.

⁸⁸ The amendment was introduced by section 19 of Act 39 of 1969.

shall not be increased, on account of *any representation made to the insurer which is not true*, whether or not such representation has been warranted to be true, *unless the correctness of such representation is of such a nature as to be likely to have materially affected the assessment of the risk* under the said policy at the time or issue or any reinstatement or renewal thereof.' [*Researcher's emphasis.*].

When the Short-Term Insurance Act⁸⁹ was enacted, section 53(1) followed substantively the same wording. Thus section 53 did not provide a clearer explanation on the manner in which the test for materiality was to be carried out, and was fundamentally no different from its predecessor.⁹⁰ There was disappointment and criticism expressed⁹¹ that the Act did not provide the much desired 'clarity and logic'⁹² in this tumultuous area of law.

In *Pillay v South African National Life Assurance Co Ltd*,⁹³ the court held that the test for materiality in terms of section 63(3) of the (then applicable) Insurance Act,⁹⁴ which was applicable to positive misrepresentations⁹⁵ which were warranted to be true⁹⁶ was the test for materiality that had been developed in the *Oudtshoorn Municipality* case⁹⁷ in matters of non-disclosure⁹⁸.

Moreover, Van Niekerk argued that it would be rational to assume that the very same test for materiality would be applicable to incorrect positive misrepresentations which were not warranted to be true.⁹⁹ In addition, he went on to state that, in terms of a contract of insurance, there is no fundamental difference between a positive misrepresentation and a non-disclosure, for the purposes of materiality.¹⁰⁰

⁸⁹ 53 of 1998.

⁹⁰ N Whitear-Nel. 'Test for Materiality of Misrepresentation in Insurance Contracts' (1999) 116 *S. African LJ*, 465–473, 465.

⁹¹ *Joubert v ABSA Life Ltd* 2001 (2) SA 322 (W) 326.

⁹² W Schulze, "The Test for Materiality in Insurance Contracts – The Undisclosed and Bitter Fruits of *Qilingele*". (1998) 10 *S. Afr. Mercantile LJ*, 248. 254.

⁹³ 1991 (1) SA 363 (D).

⁹⁴ Act 27 of 1943 (note 88 above). Section 63(3) was replicated without change in section 53 of the Short-Term Insurance Act 53 of 1998 but later amended by Act 17 of 2003 which expanded the scope of the section to include non-disclosures and inserted an objective test for materiality for both misrepresentations and non-disclosures, whether warranted to be true or not, into a new sub-section 53(1)(b).

⁹⁵ Some authors argue that a misrepresentation can either be a false representation or it can be made by omission, i.e. a non-disclosure.

⁹⁶ An incorrect representation, which has been warranted, refers to a contractual warranty that the information is correct.

⁹⁷ *Oudtshoorn Municipality* note 53 above.

⁹⁸ *Pillay v South African National Life Assurance Co Ltd* 1991 (1) SA 363 (D) 367D–E.

⁹⁹ Van Niekerk note 83 op cit 375.

¹⁰⁰ *Ibid.*

The reasoning of the *Pillay* case,¹⁰¹ which, it is submitted, has an appealing logic, was not followed in the case of *Qilingele v South African Mutual Life Assurance Society*.¹⁰² In that case the Supreme Court of Appeal rejected the approach adopted in *Pillay* and held that one would apply a subjective approach, taking into account the view of the insurer when determining the materiality of a misrepresentation which had been warranted to be true.¹⁰³ This approach was criticised on the basis that it extends the duty placed on the insured too widely.¹⁰⁴ One is essentially assuming that all persons have the same knowledge regarding the law of insurance and insurance practices as the insurance company itself and to do so would be a step too far.¹⁰⁵ Moreover, the case created the undesirable scenario of having two different tests for materiality, one being in terms of section 63(3), and the other being in terms of common law.

Van Niekerk,¹⁰⁶ in his critique of the *Qilingele*¹⁰⁷ case, argued that it was undesirable for a court to apply a subjective test¹⁰⁸ of materiality for matters regarding misrepresentation, as per section 63(3) of the Insurance Act, while applying the objective 'reasonable persons' test, to all matters relating to non-disclosure.¹⁰⁹ The courts demanded uniformity, which meant that reference to the subjective test needed to be removed in totality, which in turn necessitated the call for a single unified test, which would have universal application to both misrepresentation and non-disclosure when contracting.¹¹⁰

In the case of *Clifford v Commercial Union Insurance Co of SA Ltd*,¹¹¹ Schutz JA provided much needed insight into the flaws found within the *Qilingele* case and the rationale behind favouring the approaches previously stated in the *Outdshoorn Municipality* and *President Versekeringsmaatskappy Bpk* cases, respectively:

¹⁰¹ *Pillay* note 99 above.

¹⁰² 1993 (1) SA 69 (A).

¹⁰³ *Qilingele* note 103 above 74F. See also *Pillay* note 98 above 367.

¹⁰⁴ Whitear-Nel note 90 op cit 465.

¹⁰⁵ One 'brake' on the law was that an insurer must also provide inducement. Its right to void the policy depends also on the extent to which the insurer could establish a likelihood that the misrepresented fact affected the assessment of the risk that had been undertaken when the policy was issued and induced the contract. See *Qilingele* note 103 74F, 75D–E.

¹⁰⁶ JP Van Niekerk "Of Insurance Misrepresentation, Materiality, Inducement and No-Claim Bonuses". (2008) 20 *S. Afr. Mercantile LJ*, 117.

¹⁰⁷ *Qilingele* note 103 above.

¹⁰⁸ *Ibid* note 103 above 119. See further, *Clifford v Commercial Union Insurance Co of SA Ltd* 1998 (4) SA 150 (SCA) 158; *SA Eagle Insurance Co Ltd v Norman Welthagen Investments (Pty) Ltd* 1994 (2) SA 122 (A).

¹⁰⁹ *Qilingele* note 103 above.

¹¹⁰ Van Niekerk note 83 op cit. See further Schalk van der Merwe 'Uberrima Fides en die Beraming van die Risiko voor Sluiting van 'n Versekeringskontrak' (1977) 40 *THRHR* 1 6.

¹¹¹ *Clifford* note 109 above.

‘The purpose of the legislature in enacting s 63(3) as being to improve the lot of the insured by ridding insurers of a means of abusing warranties by elevating trivialities to material status by contractual agreement. The subjective view of materiality actually has the effect of *worsening* the position of the insured by conflating the concepts of materiality and inducement. Under the common law the insurer must prove materiality in the objective sense and must also prove that the material misrepresentation induced it to enter into the contract. *Qilingele's* approach, however, treats the question of materiality and inducement as a single concept... All the insurer has to satisfy the court of is that the particular representation, whatever its nature, really would have influenced the decision of the insurer as to whether to insure. The inducement is thus treated as a matter of fact, subjectively and the insured was left in a worse position than under the common law,’¹¹²

This statement was *obiter*, and was not followed in *Joubert v ABSA*,¹¹³ a case decided under section 53(1) of the Short-Term Insurance Act prior to its amendment. The Supreme Court of Appeal applied the subjective interpretation set out in the *Qilingele* case,¹¹⁴ on the grounds that the wording of the sections was identical.¹¹⁵

Evidently, this issue needed to be addressed by the Legislature, and there was an attempt to rectify the situation with the amendment of section 53(1) of the Short-Term Insurance Act in 2003. The section, as amended, now states:

‘(1) (a) Notwithstanding anything to the contrary contained in a short-term policy, whether entered into before or after the commencement of this Act, but subject to subsection (2)–

- (i) the policy shall not be invalidated;
- (ii) the obligation of the short-term insurer thereunder shall not be excluded or limited; and
- (iii) the obligations of the policyholder shall not be increased,

on account of *any representation made to the insurer which is not true, or failure to disclose information*, whether or not the representation or disclosure has been

¹¹² Ibid note 109 470.

¹¹³ *Joubert v ABSA Life* note 91 above.

¹¹⁴ *Qilingele* note 103.

¹¹⁵ *Joubert v ABSA* note 91 above 327.

warranted to be true and correct, unless that representation or non-disclosure is such as to be likely to have materially affected the assessment of the risk under the policy concerned at the time of its issue or at the time of any renewal or variation thereof.

*(b) The representation or non-disclosure shall be regarded as material if a reasonable, prudent person would consider that the particular information constituting the representation, or which was not disclosed, as the case may be, should have been correctly disclosed to the short-term insurer so that the insurer could form its own view as to the effect of such information on the assessment of the relevant risk...'*¹¹⁶ [Researcher's emphasis.]

Section 53 of the Short-Term Insurance Act 53 of 1998 now refers to both misrepresentation and non-disclosure, and the new section 53(1)(b) contains an objective test for determining the materiality of misrepresentations and non-disclosures, even if the facts were warranted to be true, in South African law.

In *Regent Insurance Co Ltd v King's Property (Pty) Ltd t/a King's Prop*,¹¹⁷ Lewis JA approved the statute in her judgment, in which it was held that: 'since the introduction of s 53(1) of the Short-Term Insurance Act ... the test in respect of both misrepresentations and non-disclosures is an objective one, thus bringing the legislation in line with the common law'.¹¹⁸ Then in *Mahadeo v Dial Direct Insurance Ltd*,¹¹⁹ the court confirmed the objective test defined in the Act, and held further that the question to be considered is whether the reasonable prudent person considered the information relevant to the insurers risk assessment.¹²⁰ Lastly, Van Niekerk,¹²¹ in his critique of the unreported case of *Hollely v Auto & General Insurance Co Ltd*,¹²² wrote:

¹¹⁶ Section 53(1) of the Short-Term Insurance Act 53 of 1998.

¹¹⁷ 2015 (3) SA 85 (SCA).

¹¹⁸ *Regent Insurance Co Ltd* note 118 above 23.

¹¹⁹ (06/3536) [2007] ZAGPHC 305; 2008 (4) SA 80 (W).

¹²⁰ Note 85 and note 120 above para 17–18.

¹²¹ Van Niekerk note 83 op cit.

¹²² *Hollely v Auto & General Insurance Co Ltd* (unreported, WLD, November 2007, case no 04/31731). 4–22.

‘Not surprisingly, the Court on various occasions referred seemingly without discrimination to the insured’s misstatement of the true facts and/or to his failure to disclose them to the insurer. And quite correctly so. They are but different sides of the same coin and there is, and should be, no difference in principle between them. There should be no difference in the principles applicable depending on whether the insurer chooses the one or the other as its cause of action. And therefore, quite correctly, the same test for materiality should apply to both, as the Legislature has now, at last, come to recognise.’¹²³

2.5 The English Law Approach to Materiality of a Non-Disclosure or Misrepresentation

English law also requires there to be a ‘material’ misrepresentation or non-disclosure. However, the classification of information as ‘material’ differs.

In matters of marine insurance, the position is governed by sections 18 and 20 of the Marine Insurance Act.¹²⁴ The pre-contractual duties of disclosure and misrepresentation were a codification of the common law position in the United Kingdom at the time, as expounded by Lord Mansfield in *Carter v Boehm*¹²⁵ and grounded in the duty of good faith discussed above.

Section 18 provides that:

‘(1) Subject to the provisions of this section, the assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured, and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him. If the assured fails to make such disclosure, the insurer may avoid the contract.

(2) Every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk...’¹²⁶

¹²³ Van Niekerk note 106 op cit 123.

¹²⁴ Edw VII 1906, c.41.

¹²⁵ (1766) 3 Burr 1905.

¹²⁶ Marine Insurance Act Edw VII 1906, c.41.

While section 18 pertains to the duty of disclosure, section 20 sets out the law regarding misrepresentations made during the pre-contractual phase of the transaction.

Section 20 provides that:

‘(1) Every material representation made by the assured or his agent to the insurer during the negotiations for the contract, and before the contract is concluded, must be true. If it be untrue the insurer may avoid the contract.

(2) A representation is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk.’¹²⁷

While misrepresentation in section 18 and non-disclosure in section 20 are defined as separate concepts, the enquiry into materiality is essentially the same,¹²⁸ namely, that a fact is material ‘which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk’. The test is thus based on what a reasonable (prudent) insurer would regard as being relevant to the risk.¹²⁹ Van Niekerk¹³⁰ stated that a failure to disclose such a material fact entitles the insurer to avoid the contract.

The insured is required to disclose all information which would ultimately influence the insurer’s decision to accept the risk on the current terms of the insurance contract or affect the premium¹³¹. Thus

‘an insurer needs to show that the circumstances would reasonably affect him in determining whether he will accept the insurance and if so, on what premium and on what conditions ... it will suffice [in English law] if the prudent insurer would rightly take it into account as a factor in coming to his/her decision’.¹³²

¹²⁷ Ibid.

¹²⁸ See, for example, *Lambert v Co-operative Insurance Society Ltd* [1975] 2 Lloyd’s Rep 485 as an illustration of the application of the test derived from the statute. While it is not within the scope of this dissertation to discuss the critique of the English approach to materiality, for a detailed discussion on this topic, see H Thanasegaran "Pre-contractual Duty of Disclosure and Misrepresentation" in *Good Faith in Insurance and Takaful Contracts in Malaysia*. Singapore: Springer (2016) 47–108, 57–60. See further *International Inc. v Oceanus Mutual Underwriting Association Ltd* [1982] 2 Lloyd’s Rep 178–188.

¹²⁹ The *Mieke* case (WC) para 18 and *Pine Top* 587C and 618H.

¹³⁰ Van Niekerk note 12 op cit.

¹³¹ JP Van Niekerk. “*The Test for Materiality in Insurance Law: ‘The Reasonable Person in Context’* ”. (2004) 16 *S. Afr. Mercantile LJ*, 113 para 1.

¹³² The *Mieke* case (WC) para 18.

Arnould J offers an explanation for the application of the English test in which he states that:

‘[t]he test of materiality is the probable influence of the statement made on the mind of the underwriter... it is sufficient that it either in fact did exert, or may reasonably be presumed to have exerted, an influence over the mind of the insurer in determining him to assume a responsibility he would not otherwise have undertaken’.¹³³

It is submitted that the prudent insurer test is difficult to apply in a way that is fair to the insured. Considering that the insured, at the time of requesting insurance, may not fully understand the manner in which the risk will be assessed by the underwriter, would it then be required that the insurer provide a detailed explanation of the risk factors considered relevant to the insurers assessment?

The landmark case is *Pan Atlantic Co Ltd and Another v Pine Top Insurance Co Ltd*,¹³⁴ an English case, which attempted to solve the then complicated issue of materiality in terms of English insurance law.¹³⁵ After much deliberation, the court held that:

‘[i]f the insurer wishes to avoid the contract, then it must be shown that not only would a prudent insurer have ‘wanted to know’ the undisclosed fact, but also that he would have regarded the undisclosed fact as increasing the risk; he does not, however, have to act differently’.¹³⁶

The ‘decisive influence’ test¹³⁷ was rejected by the majority of the House of Lords¹³⁸ in favour of a test that regards a fact as material when it is something that the insurer would have taken into account even if it did not influence his ultimate decision. This remains controversial. As Birds and Hird point out, the majority nevertheless had to consider whether the fact influenced the insurer in applying the requirement of proving that the misrepresentation did induce the contract,¹³⁹ and was rejected.¹⁴⁰ One of the criticisms of this test is the lack of mention made

¹³³ J Gilman *Arnould’s Law of Marine Insurance and Average* 17th ed. (2008) 27–28.

¹³⁴ [1994] 3 All ER 581; [1995] 1 AC 501 (HL)

¹³⁵ J Birds & NJ Hird. “Misrepresentation and Non-disclosure in Insurance Law – Identical Twins or Separate Issues?” (1996) 59(2) *The Modern Law Review*, 285–296.

¹³⁶ [1993] 1 Lloyd’s Rep 496, Steyn LJ, 505–506.

¹³⁷ Birds & Hird note 135 above op cit 287.

¹³⁸ Per Mustill LJ [1994] 3 All ER 581.

¹³⁹ Birds & Hird note 135 above op cit 288.

¹⁴⁰ *Ibid.*

of the ‘influence’¹⁴¹ of the non-disclosure on the prudent insurer and that the Court relied on a convoluted analysis of the inducement element.¹⁴²

2.6 The Defence of Illegality

The warranty of legality¹⁴³ is dealt with in the statutory law of both South Africa and England,¹⁴⁴ in the form of section 54(1) of the Short-Term Insurance Act¹⁴⁵ and section 41 of the English Marine Insurance Act, respectively. Both statutes played an important role in the case of *The Mieke*, as it was argued that the voyage of the vessel, prior to its sinking, was carried out in contravention of the implied warranty against illegality in terms of section 41 of the Marine Insurance Act:

‘There is an implied warranty that the adventure insured is a lawful one, and that, so far as the assured can control the matter, the adventure shall be carried out in a lawful manner.’¹⁴⁶

The South African Short-Term Insurance Act does not adopt the same approach, but rather states that:

‘(1) A short-term policy, whether entered into before or after the commencement of this Act, shall not be void merely because a provision of a law, including a provision of this Act, has been contravened or not complied with in connection with it...’¹⁴⁷

¹⁴¹ See S. Marshall *Treatise on the Law of Insurance*. 3rd ed (1823). Vol. 1: On Marine Insurance *on Insurance* (3rd ed, 1823) vol 1, at p4465, in which he states that “Every fact and circumstance which can possibly influence the mind of a prudent and intelligent insurer, in determining whether he will underwrite the policy at all or at what premium he will underwrite it, is material”.

¹⁴² Birds & Hird. note 135 op cit 290.

¹⁴³ In the case of *Lewis Ltd v Norwich Union Fire Insurance Co Ltd* 1916 AD 509, Innes CJ defined the two types of warranties as either affirmative or promissory warranties. The former is a contractual undertaking to the effect that a certain state of affairs actually exists, while the latter are undertakings by the insured stating that they will act in a certain manner. Breach of warranty entitles an insurer to cancel the contract. See *Parson’s Transport v Global Insurance Co Ltd* 2006 (1) SA 488 (SCA).

¹⁴⁴ See MJ Mustill & JCB Gilman *Arnould’s Law of Marine Insurance and Average*. Vol. 2. 16 ed (1981). See further Hare note 41 op cit 901 para 2.

¹⁴⁵ 53 of 1998.

¹⁴⁶ *Ibid*.

¹⁴⁷ *Ibid*, section 54(1).

In addition to the above statutes, one is required to consider the effects of section 226(1) of the Merchant Shipping Act,¹⁴⁸ which requires that:

‘(1) The owner of every South African ship of the class or tonnage prescribed by regulation built after the coming into operation of this section shall cause to be kept on board the ship such information in writing about the stability of the ship is necessary for the guidance of the master in loading and ballasting the ship.’

In terms of the statutory approach to illegality in England and South Africa, the former requires that all voyages be carried out in a lawful manner and failing to do so would render the contract void. South African law, however, as stated in section 54(1),¹⁴⁹ does not automatically invalidate a contract resulting from a supposed breach of law.

2.7 The Application of the Law in the High Court and the Supreme Court of Appeal

Prior to the *Mieke* case being taken on appeal to the Supreme Court of Appeal, the matter was heard in the Cape High Court, under the adjudication of Cleaver J. It is necessary to consider the manner in which the law was applied in both courts because both in the court a quo and the Supreme Court of Appeal, judgment was found in favour of the insured, Classic Sailing Adventures (Pty) Ltd. However, what should be noted is the differences between the legal grounds relied upon by both judges.

Firstly, as regards the defence of misrepresentation, Cleaver J held that:

‘In my view, the fact that the underwriters had been informed that Hennop's qualifications had not been accepted by SAMSA and had also been told that there was confusion in the offices of SAMSA meant that the underwriters had been put on guard and they could have ascertained the full picture by making the necessary enquiries. After all, Northfield in his expert summary recorded that had a prudent underwriter been advised that SAMSA had not approved the certification of the skipper, this would have had a substantial influence as to whether or not to conclude the contract. In the circumstance, I conclude that the underwriters have failed to discharge the onus resting on them.’¹⁵⁰

¹⁴⁸ 57 of 1951.

¹⁴⁹ 53 of 1998.

¹⁵⁰ *Classic Sailing Adventures (Pty) Ltd v Representatives of Lloyd's* (AC 38/2006) [2009] ZAWCHC 14, para 40.

The learned judge placed great emphasis on the fact that the insurer had been made aware – and understood – that SAMSA had, at that point in time, not accepted Hennop’s qualification. As such, the insurers, acting in accordance with this knowledge, should have had ample information when deciding to accept or reject the risk, and in concluding the contract, and should ultimately have acknowledged and accepted the risk, regardless of the issues relating to SAMSA.

In relation to the defence of misrepresentation the Supreme Court of Appeal affirmed that the letter drafted by Devereux, which was later marked ‘*Seen*’ by James, made it unequivocally clear that Hennop had not been properly certified by SAMSA, in accordance with the rules and regulations of the regulatory body, for him to skipper the vessel.¹⁵¹ For insurers to rely successfully on the defence of misrepresentation, it is crucial that they were completely unaware of the issues surrounding Hennop’s lack of certification. However, the actions of James – in reading the report and noting the word “seen” on the document – served to act as an acceptance of the circumstances regarding Hennop’s qualifications. Thus insurers appeared to have no objection.¹⁵² Lewis JA concluded that no misrepresentation had been proved and as such, the test for materiality did not need to be considered.¹⁵³

Turning to the defence of non-disclosure, it was held in relation to the fact that at the time of conclusion of the contract, the stability information on board the vessel was inaccurate and had not been approved by SAMSA.¹⁵⁴ In the court a quo, counsel for insurers argued that the material non-disclosure was evident, if one were to consider that at the time the contract of insurance was completed, there was no approved¹⁵⁵ stability information on board the vessel, which was to be disclosed, along with the information that the temporary approval received by SAMSA had lapsed, a fact which was also not disclosed.¹⁵⁶ While various experts who testified at the trial were of the opinion that insurers should have been informed that there was no stability book on board the vessel, Cleaver J, held that, in light of all the evidence which had been led, the representatives of Lloyds were rather required to deal with the allegation of inaccuracy in respect of the calculations of elements such as length, breath, depth¹⁵⁷ and finally,

¹⁵¹ Ibid para 42.

¹⁵² Ibid.

¹⁵³ Ibid.

¹⁵⁴ Ibid note 141. See *Classic Sailing Adventures* (WC) note 150 para 21–35.

¹⁵⁵ In this instance, approval refers, to the approval of SAMSA after the reviewing the stability information, and that it is now satisfied that the vessel is capable of completing its voyage safely and successfully.

¹⁵⁶ *Classic Sailing Adventures* (WC) note 150 para 29.

¹⁵⁷ Ibid para 35.

gross and nett tonnage¹⁵⁸. After corrections had been made, the naval architect concluded that the alterations in the calculations made no material difference to the stability information specified in the stability book.¹⁵⁹ In his concluding remarks, Cleaver J, made the following comments:

‘Importantly, in my view, it was never established from James what his attitude would have been had he been informed that the only respect in which SAMSA had not been satisfied in respect of stability information was the ostensibly negligible differences mentioned above ... it was also alleged that the information was not in the prescribed form as it did not comply with Regulation 10 of the Safety of Navigation Regulations.’¹⁶⁰

Based on this information, the learned judge concluded that the insurers had failed to establish the alleged non-disclosure.¹⁶¹ He applied the law as it would have been applied if the matter had been heard by an English court. As such, he reasoned that:

‘[t]he English courts have held that it is not necessary to show that the circumstances would have a decisive influence on the judgment of prudent insurer. All that the insurer needs to show is that the circumstance would have had an effect on the mind/thought processes of the insurer in weighing up the risk’.¹⁶²

The learned judge held further that the onus is on the insurer to prove that the non-disclosure reasonably affected his decision either to accept or reject the insurance, and if accepted, would it be at an increased premium with conditions attached.¹⁶³ The terms on which Cleaver J explained the English test of materiality are echoed in the judgment of *Container Transport International Inc. and Another v Oceanus Mutual Underwriting Association (Bermuda Limited)*,¹⁶⁴ where Lord Justice Kerr held:

¹⁵⁸ Ibid. See further para 35–37, for an analysis of the calculations which were carried out in 2004 by the naval architects.

¹⁵⁹ *Classic Sailing Adventures* (WC) note 150.

¹⁶⁰ Ibid para 36.

¹⁶¹ It is interesting to note that, throughout Cleaver J’s judgment, there was no reference made to section 53(1) of the Short-Term Insurance Act, which sets out the test of materiality. The enquiry was whether the fact that the stability information was inaccurate and materially affected the decisions of the insurers, in accepting the contract on the specific terms. Therefore, rather than relying on the facts alone, should one not consider the test for materiality as set out in section 53(1)? Van Niekerk made a similar criticism; see notes 12 and 195 op cit 604.

¹⁶² *Classic Sailing Adventures* (WC) note 150 para (18). See also, for a discussion on the English common law approach to non-disclosure, *Pan Atlantic* note 53 per Lord Goff, 587c; per Lord Mustell, 618h.

¹⁶³ *Classic Sailing Adventures* (WC) note 150.

¹⁶⁴ [1984] 1 Lloyd’s Rep 476 528–529.

‘What are material facts have been defined by authority. It is the duty of the assured to communicate all facts within his knowledge which would affect the mind of the underwriter at the time the policy is made, either as to taking the contract of insurance, or as to the premium on which he would take it.’¹⁶⁵

Conversely, McGillivray,¹⁶⁶ in his works, is of the opinion that where a material fact is established, and it would not necessarily have any bearing on the insurer electing to accept the insurance or the premium, it is sufficient to show that the prudent insurer would have taken the information into account as a factor in coming to his decision.

In his judgment, Cleaver J gave effect to section 18,¹⁶⁷ in response to the defence raised by the insurers, being the alleged non-disclosure regarding the stability book, and nevertheless held that on this test the non-disclosure was not material.¹⁶⁸ Conversely, Lewis JA on appeal applied section 53(1) of the Short-Term Insurance Act, and held that, after its application, it was apparent that, despite the fact that there was a failure to disclose relevant information, one could not regard that information as material, applying South African law:

‘Thus even if there had been a failure to disclose that the stability book was not accurate, it could hardly be said to be material. The ‘reasonable, prudent person’ would not have thought that information as to the measurements of the ship, or a stamp of approval, affected the assessment of the risk. . . SAMSA itself was not concerned about the stability of *The Mieke*. It had allowed her to sail, from Cape Town to Port Elizabeth and to Mozambique and back.’¹⁶⁹

Ultimately, Lewis JA found that no material non-disclosure had occurred, and while there was an omission of ‘relevant’ information, it was not material.

Lastly, regarding the defence of illegality, Cleaver J relied on a number of English and Australian cases, to address this particular issue. Of particular importance, however, was the case of *Doak v Weeks*,¹⁷⁰ an Australian case, which addresses the issue of an unlawful voyage. In this matter, it was contended that the ship owner had knowingly sent the vessel to sea under the control of a Master and crew who were not properly qualified to man the vessel safely. The judge concluded that to do so was a breach of the implied warranty against sailing a vessel

¹⁶⁵ *Container Transport* note 165 above 528.

¹⁶⁶ N Legh-Jones, J Birds & D Owen, (eds). *MacGillivray on Insurance Law*. Vol. 10. (10th ed) (2003) para 17–35.

¹⁶⁷ Marine Insurance Act Edw VII 1906, c.41.

¹⁶⁸ See *Classic Sailing Adventures* (WC) note 150 para (4.2) for the full allegation of non-disclosure.

¹⁶⁹ *Lloyds* above para 35.

¹⁷⁰ [1986] 82 FLR 334.

without a properly certified Master and crew, provided for in terms of section 47 of the Australian Marine Insurance Act.¹⁷¹

‘...[A] regulation which requires a ship which goes to sea to be provided with a duly certificated crew and imposes a penalty on the owner and master if this requirement is not complied with must be treated as one which is in effect a prohibition of the voyage unless performed with the crew or master that the law required...’¹⁷²

Thus, the insurers in that instance were discharged of all liability from the date of the breach.¹⁷³ The English case of *Holman v Johnson*¹⁷⁴ appears to provide the precedent for the above judgment, as in this case the majority held that any contract which is deemed to be illegal is void and unenforceable. However, the South African approach, with reference to the more recent case of *Sasfin (Pty) Ltd v Beukes*¹⁷⁵ takes a more impartial perspective to illegality. The court held that illegality of a contract should be determined in light of public policy considerations.¹⁷⁶ However, Smallberger JA goes on to state that ‘to declare a contract contrary to public policy,¹⁷⁷ one must ensure that the decision is fair in the circumstances and not a result of one’s *individual sense of propriety and fairness*’ [*Researcher’s emphasis*].¹⁷⁸ More specifically, as an indication of whether a contract is against public policy, there simply has to be justice between man and man.¹⁷⁹

Cleaver J found that the voyage had not been not carried out illegally, as the issue in contention with SAMSA regarding the stability information and Hennop’s certification (as SAMSA had permitted him to skipper the vessel, knowing that there was a minor issue regarding his certifications) was irrelevant to the requirements set out in the Merchant Shipping Act, with

¹⁷¹ 1909 (Cth) (MIA).

¹⁷² *Classic Sailing Adventures (Pty) Ltd* (WC) note 150 para 41.

¹⁷³ *Ibid.*

¹⁷⁴ (1775) 1 Cowp 341.

¹⁷⁵ 1989 1 SA 1 (A).

¹⁷⁶ *Sasfin* note 176 above para 9A.

¹⁷⁷ See the South African case of *Brisley v Drotzky* (432/2000) [2002] ZASCA 35 34, where Cameron JA, in response to the question of invalidity due to public policy, believed that, when considering the effect a contract will have on public policy, it is imperative that all facets in respect of social norms, generally accepted values and relevant policy considerations be used as a guide in making any determination.

¹⁷⁸ *Ibid.* See further WM Van Der Westhuizen “South Africa” (1990) 2 *Int’l Legal Prac.*, 15 16.

¹⁷⁹ S Van der Merwe & G Lubbe. “*Bona Fides* and Public Policy in Contract”. (1991) 2 *Stellenbosch L. Rev.*, 91. para 2.

regard to sections 73(1)¹⁸⁰ and 226¹⁸¹ respectively. Moreover, the contract itself was not illegal, meaning the claim was not founded on an illegal contract, which satisfies the English law principle upon which he relied. Finally, Cleaver J reinforced his decision by citing section 54(1) of the Short-Term Insurance Act,¹⁸² which simply states that a contract will not necessarily be void, merely because a law has been contravened.¹⁸³

In stark contrast to the court a quo, Lewis JA, on appeal, disposed of the defence of illegality relatively swiftly and was keen to draw attention to the rather superfluous nature of the defence of illegality, owing to the abundance of evidence to prove that the voyage had not been carried out illegally.¹⁸⁴ Therefore, on her analysis of the facts, it is clear that even if she had applied English law, she would have concluded that there had been no breach of the implied term of illegality in terms of section 41 of the Marine Insurance Act.¹⁸⁵ In summary, Lewis JA identified three reasons which negate the element of illegality, namely:

- The stability book was on board the vessel at all times and was in accordance with the requirements as set out in the Merchant Shipping Act.¹⁸⁶ Moreover, the general safety certificate was issued with the understanding that the vessel was destined for Mozambique;¹⁸⁷
- The insurers were made aware – through a third party – that the skipper (Hennop) had issues regarding his certifications,¹⁸⁸ which were not recognised by SAMSA.

¹⁸⁰ 'Subject to the provisions of this section, the owner and the master of every ship operating on declared waters shall ensure that there is employed on board that ship, in their appropriate capacities, the number of officers and other persons, duly certificated as prescribed by regulation, or deemed to be so certificated.'

¹⁸¹ 'The owner of every licensed vessel of a class, length or tonnage prescribed by legislation shall cause to be kept on board the ship such information in writing about the stability of the ship as is necessary for the guidance of the master in loading and ballasting the ship.'

¹⁸² 53 of 1998.

¹⁸³ Ibid note 169.

¹⁸⁴ *Lloyd's* note 150 para 45.

¹⁸⁵ 1906 Edw VII, c.41.

¹⁸⁶ 57 of 1951.

¹⁸⁷ Ibid note 38.

¹⁸⁸ The insured argued that in terms of section 85 of the Merchant Shipping Act, SAMSA has a discretion when faced with issues of certifications and if they are satisfied that the issues in question would not result in any harm or loss, they may permit the voyage. The section reads as follows: 'Notwithstanding the provisions of section 73 the Authority may, in its discretion and for such periods and under such conditions as it may specify if it is satisfied that no suitable holder of a certificate of the required grade and granted under this Act or referred to in section 83 or 84 is available, permit a ship to operate on declared inland waters without the prescribed number of certificated officers or other persons, and while any such permission remains in force any person who acts in terms thereof shall not, if the *conditions under which it was granted are complied with, be deemed to have contravened the provisions of section 73*'. [*Researcher's emphasis*]

Therefore, it could not be said there was a warranty to the effect that he was properly certified;¹⁸⁹

- Lastly, owing to the inconsistency between section 54(1) of the Short-Term Insurance Act¹⁹⁰ and section 41(1) of the English Marine Insurance Act,¹⁹¹ the latter should not be applicable to the contract, as the parties – in the opinion of Lewis JA – could not contract out of the application of the South African statute.¹⁹²

While insurers relied upon the provisions of the English Act, contending that English law was applicable by virtue of the choice of law clause, on appeal Lewis JA reasoned that the Short-Term Insurance Act was a mandatory rule, and that the protection it affords to the insured cannot be contracted out of. Furthermore, it was held that legality was to be determined by the law of the forum.¹⁹³ On her factual analysis there was no illegality, but had the facts been different and involved a breach of the Merchant Shipping Act, this would not automatically have invalidated the policy in terms of section 54 of the Short-Term Insurance Act.

One interesting feature that emerges from the judgments in the *Mieke* case is that even though the court a quo applied English law, it concluded on the facts that there had been no misrepresentation, no non-disclosure (in the respects pleaded), and no illegality. Assuming English law to be applicable, it was unnecessary to go further and decide whether South African law should override the choice of law provision. If the Supreme Court of Appeal had adopted this approach, there was no need to discuss the mandatory nature of the Short-Term Insurance Act.

2.8 Conclusion

The basis of all contractual relationships is good faith, as such neither party should have the intention of defrauding or misleading the other. However, to breach this duty does not necessarily require the party to have the requisite intention, as the enquiry does not relate to why the information was given, but rather, how it was received by the insurer and the effects thereof.

¹⁸⁹ *Lloyd's* note 150 above, para 46.

¹⁹⁰ 53 of 1998.

¹⁹¹ 1906 Edw VII, c.41.

¹⁹² *Lloyd's* note 150 above, para 47.

¹⁹³ *Ibid*, para 21.

The approach taken by South African courts at common law to non-disclosures is the objective test of the *reasonable person*,¹⁹⁴ which has essentially been incorporated into section 53(1)(b) of the Short-Term Insurance Act. The test considers a reasonable person in the position of the insured. As such, if it is found that a reasonable person would regard the information as being likely to affect the assessment of the risk or the premium to be charged, then the information is said to be *material*.¹⁹⁵ Conversely, if the information would have had no bearing on the assessment of the risk or the premium to be charged, the information cannot be regarded as material.¹⁹⁶

On that point, in English law, the test for materiality relies on the standard of the reasonable insurer, having moved away from precedents set by prior case law which adopted conflicting subjective and objective approaches to materiality. The statutory approach in South Africa appears to be fairer; however, one cannot reach a definitive conclusion until the concept of party autonomy and its proposed limitation in relation to mandatory rules of the forum are considered. Chapter 3 will discuss the extent to which a choice of law clause may be avoided or limited in terms of South African insurance law.

The passages in Lewis's judgment which do discuss the mandatory nature of the Short-Term Insurance Act were not expressly stated to be obiter,¹⁹⁷ but did indicate that the 'definitive answer'¹⁹⁸ was an application of section 6(2) of the Admiralty Jurisdiction Regulation Act 105 of 1983. Section 6 will be discussed further in chapter 4, where it is suggested that section 6(2) should override a choice of law clause only when the statute in question has mandatory application as a matter of public policy.

¹⁹⁴ It should be noted that this position was not always as clear as it is today. Historically the standard of reasonableness was viewed from the perspective of the insurer. In that, the contract would only be voidable at option of the insurer, should it be proved that the misrepresentation affected the insurers assessment of the risk.

¹⁹⁵ Noted legal Scholar, JP Van Niekerk, in his work entitled "Choice of English Law and Practice in a 'South African Short-Term Policy' of Marine Insurance: Jurisdiction and Applicable Law" ((2004) 16 *S. Afr. Mercantile LJ*, 113) stated that a failure to disclose such a material fact entitles the insurer to avoid the contract. A material fact, the section continues, is every fact "which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk".

¹⁹⁶ Van Niekerk notes 12 & 195 op cit.

¹⁹⁷ Although as indicated above it was not, it is submitted, necessary for the Supreme Court of Appeal to decide this point if it reached the same conclusion on the facts as the court a quo.

¹⁹⁸ Para 27.

CHAPTER 3: LIMITATIONS ON PARTY AUTONOMY

3.1 Introduction

Party autonomy is an essential component in the machine that is private international law.¹⁹⁹ It is the principle that parties have the freedom to choose the legal system that would be applicable to their contract.²⁰⁰ It ensures that international relations between parties do not encounter any unnecessary obstacles when entering into various agreements. Normally when there is an international contract concluded between parties residing in different countries, that gives rise to a conflict of laws problem in determining what law should govern the contract.²⁰¹ The court exercising jurisdiction in a matter would ordinarily apply domestic law. However, in a conflict of laws scenario, the procedural aspects are governed by domestic law (the *lex fori*) but substantive aspects are governed by the proper law of the contract. A choice of law by the parties, whether made expressly or impliedly, is thus usually a practical solution to the conflict of laws problem.

However, without infringing unduly on the parties' right to freedom of contract,²⁰² there remains the need to limit the application of all contractual arrangements, in the event that they may be contrary to public policy or in conflict with a mandatory rule of the forum.²⁰³ Therefore, if our courts will not condone absolute party autonomy, to what extent may it be limited?

De Villiers has this to say about this very question:

‘Despite its widespread acceptance, party autonomy is rarely unlimited, especially in the field of consumer contracts. The principal justification for the limitation of the doctrine is the relatively weaker bargaining position of the consumer. Consumers act outside of their profession or trade. They are not legal experts, nor do they generally have the funds necessary to access the same level of legal advice available to suppliers. Therefore they do not have at their disposal the same knowledge and information as the supplier. Accordingly, applying the normal rules

¹⁹⁹ CF Forsyth *Private International Law: The Modern Roman-Dutch Law Including the Jurisdiction of the High Courts* 2 ed (2012) 320; Symeonides "Party Autonomy in Rome I and II from a Comparative Perspective" in Boele-Woelki et al (eds) *Convergence and Divergence in Private International Law – Liber Amicorum Kurt Siehr* (2010) 513.

²⁰⁰ Forsyth note 199 above 514.

²⁰¹ *Ibid.*

²⁰² E Rabel *The Conflict of Laws: A Comparative Study*, Vol, Two: Foreign Corporations: Torts: Contracts in General (1960) 399 para 3.

²⁰³ C Forsyth "Impact of the Domestic on the International: Some Crucial Deficiencies in the South African Law of Jurisdiction with Their Regional and International Consequences". (2006) 1 *S. Afr. Mercantile LJ* 18, para 2.

on commercial transactions to these situations may work to the consumer's disadvantage. With regard to choice of law, the need for protection becomes even more pronounced.²⁰⁴

On this analysis, when the insurance is a form of consumer contract, the insured, as the consumer, is regarded as being in need of protection whereas the insurer has specialised industry knowledge and is in a superior bargaining position.²⁰⁵ In this regard, the insured would be contracting from an inferior position, due to his lack of specialised knowledge, and would then benefit from the protection afforded by the mandatory rules of the forum. However, if the contract was international in character, should the same protection be afforded to the insured?

Van Niekerk states that:

‘... [p]arties to a contract with some or other international element have the freedom to choose the legal system that will govern their contract. Such a choice may be made expressly or even tacitly. However, it is generally accepted in most legal systems that there are limits to this broad rule of party autonomy. This is true also of marine insurance contracts, often international in nature and operation’.²⁰⁶

While recognising that the party autonomy principle can be limited even in international contracts, Van Niekerk contrasts a marine insurance policy to an ordinary domestic policy, arguing that in the marine insurance context the parties are usually on an equal footing.²⁰⁷ This notion will be expanded on later in this chapter.

The tension between an approach grounded in an analysis of whether the STIA is mandatory legislation and an approach based on an interpretation of section 6 of the AJRA will be examined further in chapter four. In the present chapter, the concept of mandatory domestic legislation, and whether it can be excluded in totality as a result of the parties’ choice of a foreign legal system will be discussed.

²⁰⁴ MRH de Villiers. "Limitations on Party Autonomy in the Context of Cross-Border Consumer Contracts: The South African Position." 2013.3 (2013) *TSAR* 478–490.

²⁰⁵ De Villiers (above) does not specifically refer to insurance, but rather refers to ‘consumers’ in general which would imply that reference is also made to contracts of sale.

²⁰⁶ Van Niekerk note 32 166.

²⁰⁷ *Ibid* 161. See further Forsyth note 199 op cit 301.

3.2 The Approach to a Conflict of Laws

In terms of South African private international law; when tasked with determining the applicable legal system when there is a conflict of laws, it is the proper law of the contract which should be upheld.²⁰⁸ South African law has a three-stage enquiry to determine the proper law.²⁰⁹ Firstly, effect must be given to any choice of law clause contained in the contract.²¹⁰ Secondly, in the absence of such a clause, the court is required to determine if a tacit choice of law can be established based on the terms of the contract.²¹¹ Lastly, in the absence of either an express or tacit choice, the court is required to ascribe an intention to the parties regarding which law should govern the dispute.²¹²

In the *Mieke* case, the insurer's defence²¹³ was based on provisions of the English Marine Insurance Act, that being the proper law of the contract in terms of an expressed choice of law clause in the policy. However, the insured was afforded protection in terms of sections 53 and 54 of the Short-Term Insurance Act respectively.²¹⁴ In terms of the doctrine of party autonomy, English law was applicable. However, when the matter was heard in the Supreme Court of Appeal, it was held that the aforementioned provisions of the Short-Term Insurance Act were mandatory rules of the forum and therefore could not be superseded by a choice of law clause.²¹⁵

Dolinger²¹⁶ provided an analysis of the distinction²¹⁶ between procedural and substantive aspects relating to a conflict of laws:²¹⁷

²⁰⁸ AB Edwards 'Conflict of Laws' in WA Joubert (founding ed) *The Law of South Africa* (LAWSA) Vol. 2(2) First Reissue (1999) para 328.

²⁰⁹ J Mitchell "To Override, and When? A Comparative Evaluation of the Doctrine of Mandatory Rules in South African Private International Law" (2013) 130 *S African LJ* 757.

²¹⁰ Forsyth note 199 op cit.

²¹¹ *Ibid.*

²¹² *Ibid.*

²¹³ *Lloyd's* note 150 above, para [20].

²¹⁴ 53 of 1998.

²¹⁵ *Lloyd's* note 150 above, para [21], [26] and [47].

²¹⁶ J Dolinger & C Tiburcio. "The Forum Law Rule in International Litigation--Which Procedural Law Governs Proceedings to Be Performed in Foreign Jurisdictions: *Lex Fori* or *Lex Diligentiae*" (1998) 33 *Tex. Int'l LJ*, 425 428.

²¹⁷ "Conflict of laws" is defined as the problem of selecting which system of law is to be applied in a dispute which involves some foreign element and in which two or more legal systems may be involved; see also Sharrock note 35 op cit 36, para 5.

‘Traditionally the laws of the forum where the suit was commenced regulates all aspects related to the exercise of jurisdiction... as it provides the power to apply existing law to concrete matter. . . In cases that have foreign elements ... the judicial authority of the forum will abide by its conflict of laws rules to determine the application of foreign law to the substantive aspects of the dispute’

The quote above emphasises the point that, while both contracting parties are free to agree to the application of a foreign law in terms of the law of contract, a conflict of laws is a matter which is decided by the procedural law of the forum.²¹⁸ Moreover, a determination must be made as to which elements of foreign law are applicable to the substantive merits of the matter. In this instance, the chosen law shall be given effect to and shall be valid, to the extent that it is not inconsistent with the peremptory law or *ius cogens* of the forum.²¹⁹ The extent to which it is legally valid remains to be determined by the law of the forum.²²⁰ The Supreme Court of Appeal endorsed these views and held that party autonomy cannot be absolute.²²¹ The court held that absolute party autonomy is impermissible when an action is brought in terms of the peremptory provisions of the forum.

‘The general rule is that the choice by parties to a contract of the governing law – the proper law of the contract – is valid. However, legality is a question to be determined by the *lex fori*. The *ius cogens* (peremptory law) of the forum cannot be excluded. ... And it must be that peremptory (mandatory) rules of the forum – especially legislative provisions – apply. Absolute party autonomy cannot prevail over the peremptory provisions of a statute, especially where the action is brought in terms of the statute (as in this case). The Short-Term Insurance Act is applicable to marine insurance by virtue of the definitions of a short-term policy and transportation policy, which expressly include insurance of a vessel.’²²²

The Supreme Court of Appeal held that, in matters involving a conflict of laws, the peremptory laws of the forum cannot be excluded, and in such instances, complete party autonomy will need to be limited so as to give effect to the statutory provisions, and in so doing, act in accordance with the public policy of the forum.

²¹⁸ *Lloyd's* note 150 above, para [21].

²¹⁹ Van Niekerk note 32 op cit 161.

²²⁰ *Lloyd's* note 150 above, para 21.

²²¹ *Ibid*, para 22.

²²² *Ibid*, note 150 above, para [21].

What becomes problematic is determining whether a particular law is a mandatory law:²²³

‘But as Forsyth states, the distinction between prohibitory provisions and others is not easy to draw. He suggests that where the *lex fori* is designed to protect the weaker party in contractual negotiations the chosen law, if it is inconsistent, should not prevail...’²²⁴

The peremptory norms or *ius cogens* are rules which are specific to a particular jurisdiction. These rules are political in nature and are used as a mechanism to ensure proper statutory regulation of private relationships.²²⁵ Another definition of a peremptory norm has been offered by Orakhelashvili, in which he describes peremptory norms as non-derogable norms.²²⁶ Essentially, these norms are meant to safeguard the well-being of all those who are bound by them and as such they cannot be waived or excluded.

While there is no precise definition of a mandatory rule, Mayer attempted to rectify this by providing his own definition:

‘Mandatory rules of law are a matter of public policy and moreover reflect a public policy so commanding that they must be applied even if the general body of law to which they belong is not competent by application of the relevant rule of conflict of laws.’²²⁷

Mandatory rules are a set of laws of a particular country which are ‘strictly positive, and imperative in nature’.²²⁸ While not relevant to the *Mieke* case, the Rome I Regulation²²⁹ did provide a definition of such an overriding mandatory rule in Article 9(1), which reads verbatim:

²²³ Van Niekerk note 32 op cit 167.

²²⁴ The *Mieke* case (SCA) para 22.

²²⁵ M Martinek ‘Codification of Private International Law – A Comparative Analysis of the German and Swiss Experience’ 2002 *TSAR* p 234, pp 248ff.

²²⁶ A Orakhelashvili. *Peremptory Norms in International Law* (2006) 1.

²²⁷ P Mayer “Mandatory Rules of Law in International Arbitration”. (1986) 2(4) *Arbitration International*, 274–293.

²²⁸ Mitchell note 209 op cit 760, citing Von Savigny. The same passage is quoted with approval in the *Mieke* case (SCA) at para 25.

²²⁹ Regulation (EC) No 593/2008 of the European Parliament on the Convention on the Law Applicable to Contractual Obligations, 2008.

‘Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation’.²³⁰

In the Supreme Court of Appeal, the court often used the words ‘mandatory’ and ‘peremptory’ interchangeably.²³¹ However, whether both words possess the same meaning is debatable. Mandatory rules were first defined by Von Savigny as laws which are strictly positive and imperative.²³² This was further broken down into mandatory rules and peremptory (municipal) rules.²³³ As defined by Von Savigny, peremptory rules could not be excluded by agreement however they could be substituted by a foreign *lex causae*.²³⁴ On the other hand, mandatory rules would supersede a foreign *lex causae*, as those rules were created to protect the public interests, according to Von Savigny.²³⁵

In contrast, Van Niekerk states that there is no fundamental difference between mandatory and peremptory laws,²³⁶ but what should be determined is how one classifies a rule as mandatory.²³⁷ While mandatory laws may supersede the effects of a choice of law clause, the courts still have the task of determining which laws are mandatory. In this regard the Supreme Court of Appeal held that there are three possible approaches that a court may exercise when deciding the mandatory nature of a statute.²³⁸

²³⁰ “It is important to note the distinction drawn between ‘Overriding Mandatory Provisions and Mandatory Provisions’ which are made by Jan-Jaap Kuipers in *EU Law and Private International Law* (2011) 71. ‘The latter refers to municipal statutes that may not, as a matter of municipal law, be derogated from by contract. In the private international law context, a mandatory provision of the *lex fori* will apply, regardless of the intention of the parties, if the *lex causae* of the contract is the *lex fori*. Thus a mandatory provision is synonymous with a peremptory municipal statute’. ... An overriding mandatory provision, on the other hand, will be applied to supersede the conflict process entirely.” See also European Contracts Convention “Article 7(1): Codifying the Practice of Applying Foreign Mandatory Rules”. (2001) (Jun.) 114(8) *Harvard LR*, 2462–2477, 2462.

²³¹ The *Mieke* case (SCA) para 29. The court refers to ‘mandatory’ provisions of South African Statute in the summary but refers in para 21 to ‘peremptory (mandatory) rules of the forum’. The judgment refers again to ‘mandatory interventions’ in para 25 but refers elsewhere to ‘*ius cogens* (peremptory law)’ [para 21] and ‘Peremptory South African law [para 29]’.

²³² PE Nygh. *Autonomy in International Contracts* (1999) 199.

²³³ *Ibid.*

²³⁴ Mitchell note 209 op cit 760. See further De Villiers note 204 op cit 478.

²³⁵ *Ibid.* See further Wojewoda, M. “Mandatory Rules in Private International Law”. (2000) 7 *Maasricht J. Eur. & Comp. L.*, 183 185.

²³⁶ Van Niekerk note 32 op cit 167.

²³⁷ *Ibid.*

²³⁸ *Lloyds* note 150 above, 22–24.

3.2.1 *Prohibitory and Dispositive Statutes*

The first approach requires a distinction to be drawn between prohibitory and dispositive statutes.²³⁹ Accordingly, Van Niekerk makes the distinction between prohibitory and dispositive statutes, with the latter capable of being excluded by a choice of law clause, but the former cannot.²⁴⁰ In the *Mieke* case, the court held that the relevant sections of the Short-Term Insurance Act were not prohibitory.²⁴¹ This would imply that the relevant sections were in fact dispositive and as a result could be excluded from application by a choice of law clause.

The court held further, with reference to Forsyth, that in drawing a distinction between prohibitory and dispositive statutes, one should first consider the purpose for the legislation. If its purpose is to provide protection to weaker parties, then the foreign law in terms of the choice of law clause cannot be applied.²⁴²

Forsyth states further that the situation is dissimilar in international trade, as both parties are considered to be on an equal footing.²⁴³ While this was acknowledged by the SCA, the judgment indicates that this reasoning was not followed:²⁴⁴

‘Sections 53 and 54 of the Short-Term Insurance Act are at issue in this matter. Section 53 deals with the effect of non-disclosures and misrepresentations on an insurance policy, and section 54 with the effect of a contravention of a law on a policy. Section 53 is designed to protect insured parties who are ignorant, careless or uneducated from unscrupulous insurers who attempt to escape liability on the basis of the common law that has evolved in relation to misrepresentation or non-disclosure.’²⁴⁵

²³⁹ *Lloyd's* note 150 above, 22.

²⁴⁰ *Ibid.*

²⁴¹ *Lloyd's* note 150 above, para [22].

²⁴² *Ibid.*

²⁴³ The *Mieke* case (SCA) para 22. See further Edwards note 208 op cit 328ff; Forsyth note 199 op cit 294ff; J Hare note 41 op cit 143.

²⁴⁴ *Ibid.*

²⁴⁵ The *Mieke* case (SCA) [24].

In the above quote, the court apparently overlooks the fact that the insurance contract in the case was an international contract. The SCA on appeal held that section 53 was designed to protect the insured against the ‘unscrupulous insurer’, which would imply that the court opined that both parties were not operating on equal footing when the contract was concluded. As such, the statute should be applied as the insured should be regarded as the ‘weaker’ party.²⁴⁶

De Villiers, from the perspective of a consumer contract, goes on further to state that, to all intents and purposes, the supplier is regarded as someone acting within his trade or profession, whereas the consumer is regarded as a person acting outside his trade or profession.²⁴⁷ On the other hand, it is submitted by Van Niekerk²⁴⁸ that in contracts which possess an international character, both parties are ordinarily in an equal bargaining position²⁴⁹ and accordingly, it would be permissible to contract out of statutory measures forming part of the *lex fori*.²⁵⁰ While this distinction was acknowledged by the Supreme Court of Appeal, it was not upheld. The Supreme Court of Appeal in adopting this reasoning for limiting party autonomy did not explore the notion that there are laws which are domestically mandatory and laws which are internationally mandatory.²⁵¹ De Villiers states that where a statute expressly prohibits the waiver of its provisions, it should be considered to be domestically mandatory.²⁵² However, where the statute states that its provisions are applicable regardless of the proper law, it must be construed to be internationally mandatory.²⁵³

The SCA states further that the relevant subsections of the Short-Term Insurance Act are not prohibitory as they deal with the effects of misrepresentation and non-disclosure.²⁵⁴ Additionally, the court held further that the preferred approach is not whether the provisions are prohibitory or dispositive, but rather, whether the application of the provision can be waived.²⁵⁵ Consequently, the SCA did not address this distinction and there was no definitive answer given regarding whether section 53 and 54 are prohibitory or dispositive.

²⁴⁶ The *Mieke* case (SCA) [22].

²⁴⁷ De Villiers note 204 op cit 479.

²⁴⁸ Van Niekerk note 32 op cit 167,

²⁴⁹ *Ibid*.

²⁵⁰ *Ibid*. See further Mitchell note 209 op cit 761.

²⁵¹ De Villiers note 204 op cit 478, 487.

²⁵² De Villiers note 204 op cit 486.

²⁵³ MJ Basedow “An EU Law for Cross-Border Sales Only – Its Meaning and Implications in Open Markets” in J Bonell et al (eds) *Liber Amicorum Ole Lando* (2012) 24 29.

²⁵⁴ *Ibid*.

²⁵⁵ *Lloyd’s* note 150 above, para [23].

3.2.2 *Public Policy*

The second approach requires a consideration of public policy.²⁵⁶ Public policy is difficult to define. At its broadest it is referring to norms or generally accepted principles which apply across a number of areas of law. However, it is submitted that we cannot apply a general definition of public policy but must pay regard to the principles developed in the specific context of the specialised field under consideration.²⁵⁷

Public policy is relevant in instances of marine insurance in relation to the exclusion of mandatory rules. Public policy relates to the economic standing and professional expertise of the insurer and insured, specifically relating to the maritime industry and marine insurance.²⁵⁸ This represents a mechanism which has been developed to maintain a status quo among the insurer and insured in contracts of marine insurance so as to prevent either being prejudiced.²⁵⁹ This approach is referred to as the ‘vulnerability enquiry’, and while it may have legal credence in other areas of the law, in terms of marine insurance, the enquiry is ineffective, as these are specialised contracts between insurance companies and ship owners, both of whom have adequate knowledge of the marine insurance industry, thus negating the notion of protecting a ‘weaker’ party²⁶⁰. Mitchell J in his works, provides the following analysis of the vulnerability enquiry:

‘First, it lacks an authoritative basis, either in the jurisprudence of our courts or in academic writing ... the vulnerability test does not require any degree of proximity or factual connection between the statute in question and the parties and their contractual relationship.’²⁶¹

²⁵⁶ *Ibid.*

²⁵⁷ Forsyth note 199 op cit 320.

²⁵⁸ Mitchell note 209 op cit 577.

²⁵⁹ Hare note 41 op cit 115–145.

²⁶⁰ See the discussion on ‘economic vulnerability’ in Mitchell note 209 op cit 766. I find it necessary to note here that the SCA appeared to abandon the vulnerability enquiry. See para 22–23.

²⁶¹ *Ibid.*

3.2.3 *Mandatory Rules*

The third approach outlined by Lewis JA was whether the statute was of a ‘positive imperative nature’²⁶² or whether it was simply a general rule of private law.²⁶³ Martinek refers to these rules and ‘mandatory intervention norms’,²⁶⁴ which he defines as: ‘norms employed by the state to regulate private relationships in the public common interest while pursuing socio-economic tasks, thereby restricting the individual freedom of private persons’.²⁶⁵ Lewis JA goes on to liken these ‘mandatory interventions’ to the Constitution of the Republic of South African (‘Constitution’) ²⁶⁶ because of the direct application of both sets of laws and the fact that one cannot contract out of the protection afforded by the Constitution. However, she then goes further to state that the protection afforded by the Short-Term Insurance Act, much like that of the Constitution, cannot be avoided.²⁶⁷ It is submitted that the comparison made by the Supreme Court of Appeal does not bear up to scrutiny. The remark was unsupported by any quoted authority or explored further in the reasoning of the judgment. The Short-Term Insurance Act can protect only those parties who have entered into an insurance contract with another party. The same statute cannot afford any other person protection, unlike the Constitution, which serves as the supreme law of the land, binding and governing the relationships between all persons in South Africa.²⁶⁸

²⁶² *Lloyd’s* note 150 above, para 25. See M Martinek "Codification of Private International Law – A Comparative Analysis of the German and Swiss Experience". (2002) *JS Afr. L.*, 234. Martinek goes on to say that statutory law is ‘imperative’ if the law is political or police related, or whether it simply relates to economic character. This could imply that the relevant statutory law is deemed to be imperative, if its purpose is to regulate interactions between parties, so as to provide protection in line with the political and financial convictions of the forum. It would appear that this would be closely related to an enquiry into public policy; however, it may also be linked to the first enquiry, in so far as the relevant legislation cannot be avoided on the grounds that it provides fundamental protection to those who are bound by it.

²⁶³ *Ibid.* Lewis JA goes on to say that these general principles of private law are not confined to the law of the forum and may be decided based on a consideration of foreign law.

²⁶⁴ Martinek note 225 op cit 249.

²⁶⁵ *Ibid.*

²⁶⁶ 1996.

²⁶⁷ *Lloyd’s* note 150 above, para 25.

²⁶⁸ Constitution of the Republic of South Africa section 2 read with section 8.

3.3 Mandatory Laws and Public Policy of the Forum

The SCA, in determining whether the Short-Term Insurance Act²⁶⁹ is a mandatory provision, held that one needs to take into consideration the effect that failing to apply such laws would have on public policy.²⁷⁰

Whitney in his works makes the following statement regarding party autonomy:

‘As a rule the law does not interfere with the freedom of persons to enter into contract or make any sort of contract they please. But to result in a contract, an agreement must create a legal obligation. Where the object of the contract is opposed to public policy ... no legal obligation results.’²⁷¹

Similarly, the court has a discretion in deciding whether to adhere to the proper law of the contract or to apply its domestic law,²⁷² and this is achieved by relying on the public policy considerations of the forum.²⁷³ In this regard, the court will not allow for absolute party autonomy, if to do so would be against public policy.

Forsyth describes the role of the court in these instances as follows:

‘Frequently there will be a tension between justice in the individual case and uniformity with foreign legal systems. Frequently there will be a tension between justice in the individual case and the public policy of the forum. The task of a judge deciding a conflict of laws case is difficult. But it is not that difficult: where arguments are evenly balanced, uniformity of decision is the makeweight indicating which way the balance tips; and, when he has doubt about the result reached uniformity of decision is his indicator of whether he has done his job properly.’²⁷⁴

It is proposed that this quote is particularly apposite to this particular case as the court was required to balance party autonomy and public policy considerations. In this case an insured who appeared to have a legitimate claim was going to be defeated on a technical ground. As such, the sympathies of the court lay with the insured, and rather than rigidly applying the

²⁶⁹ 53 of 1998.

²⁷⁰ *Lloyd's* note 150 above, para [25]. See further the critique in Van Niekerk “Choice of English Law and Practice in a ‘South African Short-Term Policy’ of Marine Insurance: Jurisdiction and Applicable Law (. (2010) 3 *TSAR*, 590–608).

²⁷¹ 1 FA Whitney *The Law of Contracts* 6th ed. (1958). See also HF Goodrich “Public Policy in the Law of Conflicts”. (1929) 36 *W. Va. LQ*, 156.

²⁷² Mitchell note 209 op cit 757.

²⁷³ Jan-Jaap Kuipers note 230 op cit 71.

²⁷⁴ Forsyth note 199 op cit 67.

applicable legal rules, the court appears to have used its discretion so as to reach a decision which was not only correct, but also just in the circumstances. That is where the *Mieke* case is similar to the quote above, as it gave rise to a tension between the proper law, which favoured the insurer, and the law of the forum, which favoured the insured. The notion of sympathising with the hypothetical weaker party has been supported by Van Niekerk. He states that where a rule or provision is designed to protect the weaker party, the provisions of the statute should be applied regardless of any choice of law clause.²⁷⁵

In essence, what is required is a factual analysis of the case, in which one may determine the need or necessity for the application of a particular statute. The SCA reasoned in the *Mieke* case that the question which should be answered is not whether the statutory provision is ‘prohibitory’ or dispositive,²⁷⁶ but rather whether the application of the provisions of the statute may be waived.²⁷⁷ This ‘waivability test’²⁷⁸ has been criticised because in doing so the court is then circumventing party autonomy.²⁷⁹ Therefore, it has been said that the court needs to find a balance between protecting the public policy of the forum and adhering to the concept of party autonomy.²⁸⁰

In the SCA, reference was made to the Short-Term Insurance Act, serving as a means to protect the ignorant insured from the unscrupulous insurer.²⁸¹ Therefore, it was held, it would be contrary to public policy to exclude such a statute, where to do so would prejudice those whom it aims to protect, in this case, the insured.

The SCA relied on case law dealing with waiver of domestic statutes. Mitchell notes that there was no precedent for applying the concept of waiver to a conflict of laws scenario. The cases concerned waiver in a purely domestic context.²⁸²

²⁷⁵ Van Niekerk note 32 op cit 161. See further Schafer *Application of Mandatory Rules in the Private International Law of Contracts: A Critical Analysis of Approaches in Selected Continental and Common Law Jurisdictions, with a View to the Development of South African Law* (2010) 26.

²⁷⁶ The *Mieke* case (SCA) above para [23]; See further De Villiers, M.R.H. “Limitations on Party Autonomy in the Context of Cross-Border Consumer Contracts: The South African Position.” JS Afr. L. (2013): 486. See also Van Niekerk “Choice of foreign law in a South African marine insurance policy: An unjustified limitation of party autonomy?” 2011 TSAR 159 167.

²⁷⁷ Ibid note 272.

²⁷⁸ Van Niekerk note 32 op cit 167.

²⁷⁹ Van Niekerk note 32 op cit 166–167.

²⁸⁰ Nygh note 232 op cit.

²⁸¹ The *Mieke* case (SCA) para [20].

²⁸² Mitchell note 209 op cit 767.

In the case of *SA Co-Op Citrus Exchange v Director-General: Trade & Industry*,²⁸³ a dispute arose between an exporter (SA Co-Op Citrus Exchange) ('Citrus Exchange') and the local authority (the Director-General for Trade and Industry) ('the Director'). As a means of promoting trade in South Africa, the Department of Trade and Industry launched an export incentive scheme, later called the General Export Incentive Scheme (GEIS), which was a performance-based incentive scheme that rewarded large-scale exports.²⁸⁴ Citrus Exchange was registered and approved as an exporter under the GEIS.

The dispute arose when Citrus Exchange lodged a claim for the period ending 31 January 1993. The claim was submitted only on 28 May 1993 as a result of delays which occurred that were beyond their control. The claim was rejected by the Director on the basis that it was lodged out of time. The Director reasoned that the claim had been rejected as he had no discretion to condone the failure to lodge claims in good time; he was bound to reject all late claims.²⁸⁵ At trial Citrus Exchange argued inter alia that, unless a procedural statutory provision was introduced in the interests of the public, it might be renounced by the party for whose benefit it was intended, in this case, the Director-General. The principle outlined here by Harms JA was first formulated by Innes CJ in *Ritch and Bhyat v Union Government*,²⁸⁶ where the court held:

'But the question remains whether this is a transaction in which waiver can properly operate. The maxim of the Civil Law (*C 2, 3, 29*), that every man is able to renounce a right conferred by law for his own benefit, was fully recognised by the law of Holland. But it was subject to certain exceptions, of which one was that no one could renounce a right contrary to law, or a right introduced not only for his own benefit, but in the interests of the public as well.'²⁸⁷

Ultimately, Harms JA based his judgment on this question of public policy and in so doing, he had to determine whether the time limits introduced in terms of paragraph 4 of the GEIS were solely for the benefit of the Director General or for the benefit of the public as a whole. Citrus Exchange argued that the time limits did not bind the Director-General and merely acted as guidelines. As such, he/she would be allowed to exercise their discretion when administering such a claim, which falls outside the parameters. It was further argued that these rules did not

²⁸³ 1997 (3) SA 236 (SCA).

²⁸⁴ *SA Co-Op Citrus* note 284 above 239.

²⁸⁵ *Ibid* 240–243.

²⁸⁶ 1912 AD 719.

²⁸⁷ *Ritch and Bhyat* note 289 above 734.

concern the jurisdiction of the Director-General, but rather set out the procedure to be followed.²⁸⁸

In response to those arguments, Harms JA held that the time constraints prescribed in paragraph 4.3.1 of the GEIS had not been drafted solely for the Director-General, but rather that the objective of the time constraints was to protect the financial interests of the country:

‘Inherent in the time limit in para 4.3.1 is the protection of State funds and the impartial and identical treatment of the public. To endow the Director-General with the ability to waive this non-discretionary right would, in my view, thwart these objectives and be contrary to public policy and interest.’²⁸⁹

The principle was ‘affirmed’ in *De Jager en andere v Absa Bank Bpk*²⁹⁰ (a case concerning prescription), although it is evident that the court in that case did not need to apply the principle there to reach its decision. The principle has been referred to and approved in a number of subsequent cases²⁹¹, but as Mitchell argues, none of these cases involved the private international law problem of a conflict of laws.²⁹²

The Supreme Court of Appeal cited the *SA Co-Op Citrus* case to reinforce the finding that the Short-Term Insurance Act is a mandatory rule. However, both cases differ substantially with regard to context and subject matter. For instance, the *Mieke* case was concerned with issues of marine insurance, whereas *SA Co-Op Citrus* was arguably a purely administrative issue with regard to the application of procedural elements of governmental rules and regulations.²⁹³ In applying the principles established by Harms JA in *SA Co-Op Citrus* to the *Mieke* case, it is submitted that the question is not simply whether the STIA was enacted for the benefit of an insurer and insured, but rather whether it was a matter in which the public have an interest. The wording of section 53 makes reference to the insurer and insured. Moreover, it is difficult to see how a matter relating to marine insurance could detrimentally effect public policy, as the

²⁸⁸ See *Bezuidenhout v AA Mutual Insurance Association Ltd* 1978 (1) SA 703 (A) 710, which deals with the waiver of procedural provisions of statutes and states that even if legislation is mandatory, it may be renounced by the party for whose benefit it was introduced. It is necessary to understand that the dispute in this case related to third party claims arising from motor vehicle accidents.

²⁸⁹ *SA Co-Op Citrus* note 284 245.

²⁹⁰ 2001 (3) SA 537 para 17.

²⁹¹ See *Mahomed v President of the Republic of South Africa* 2001 (3) SA 893 (CC) para [61], concerning non-waivability of a constitutional right; *Bafana Finance Mabopane v Makwakwa* 2006 (4) SA 581 (SCA) para [9] – [11]; *Meepo v Kotze* 2008 (1) SA 104 (NC) para [42]; and *South African Maritime Safety Authority v McKenzie* 2010 (3) SA 601 (SCA) para [14].

²⁹² Mitchell note 209 op cit 767.

²⁹³ *SA Co-Op Citrus* note 284 44–245.

effects of any decision would affect only the parties concerned, In contrast to the decision in *SA Co-Op Citrus*, it was decided that the effects of paying the claim after all deadlines had expired would have a financial impact on government funds, It is respectfully submitted that these different spheres (a private contract and a national state-funded scheme) are not comparable.

3.4 Conclusion

There would appear to be tension within the realm of private international law, as on one hand one has to consider all elements of public policy; and on the other, one needs to make one's own determination with regard to the issue that is before the court, based on the merits of a particular case. According to Forsyth, a matter involving a conflict of laws will always be a difficult one. However, the uniformity of decisions provide the guidelines on which a judgment should be based.²⁹⁴ Therefore, it is not incorrect for one to limit the application of a choice of law provided that the reasoning behind such a decision can be justified by reference to public policy. Consequently, the Supreme Court of Appeal, in limiting the application of the proper law of the contract, did so on the basis that the Short-Term Insurance Act was a mandatory rule. However, having analysed the rationale of the judgment and the cases cited by the court, one may conclude that the position remains unclear.

Chapter four will now consider whether section 6 of the AJRA provides a clearer solution.

²⁹⁴ Forsyth note 203 op cit 68.

CHAPTER 4: CRITICAL ANALYSIS OF SECTION 6 OF THE ADMIRALTY JURISDICTION REGULATION ACT

4.1 Introduction

The Admiralty Jurisdiction Regulation Act sets out in section 6 how one determines the law applicable to a maritime claim.²⁹⁵ In the absence of a choice of laws, a marine insurance claim would be decided by Roman Dutch law in terms of section 6(1)(b). However, local insurance statutes would apply in terms of section 6(2). The late Shaw,²⁹⁶ in his seminal work on the AJRA, states in this regard that:

‘... paragraph (r) of Section 1(1) which refers to claims relating to marine insurance is a new jurisdictional head. As such, it may be inferred that marine insurance was not within the jurisdiction of the Colonial Court of Admiralty. Therefore, the law applicable is the South African law applicable to marine insurance, and by virtue of this, Roman-Dutch law is applicable in terms of Section 6(1)(b)’.²⁹⁷

However, the situation is different in instances when the parties agree upon the application of a foreign legal system to the contract and any legal disputes which may arise, as is permitted by section 6(5) of the AJRA. Section 6 has been criticised and its limitations are excellently summed up by Stiebel as follows:

‘Section 6 was a jurisdictional nursemaid, necessary perhaps in the early years of the Admiralty Jurisdiction Regulation Act to effect a compromise between the English law pragmatists (clearly more prevalent in an international field like shipping law) and the Roman-Dutch purists. In the decades since the Act came into force, South African law has been much changed by statute, and the courts have shown a continued willingness to have recourse to appropriate foreign decisions in expanding notions of shipping law.’²⁹⁸

²⁹⁵ Marine insurance is a maritime claim in terms of section 1(1)(u). The *Mieke* case was decided in admiralty jurisdiction by virtue of section 3(1) read with 3(2)(d) of the AJRA, which permits an action in personam against Lloyds of London without any attachment of property to found jurisdiction. The reference in section 3(2)(d) of AJRA to chapter IV of the Insurance Act 27 of 1943 must be read as referring to Part VIII of the STIA. The whole of Part VIII of the STIA, comprising sections 56–63, is repealed by the Insurance Act 18 of 2017, with effect 18 months from the effective date of the Insurance Act. By GN (639) (GG) 27 June 2018 the Insurance Act commences on 1 July 2018.

²⁹⁶ DJ Shaw *Admiralty Jurisdiction and Practice in South Africa* (1987) 20.

²⁹⁷ *Ibid.*

²⁹⁸ M Stiebel “Section 6 of the Admiralty Jurisdiction Regulation Act 105 of 1983 – An Analysis, Comparison and Examination of the Case Law: Part 1. (2001) 13 *S. Afr. Mercantile LJ*, 226 259 para 1.

With South African admiralty law having its roots embedded in English admiralty law principles, what the AJRA tries to accomplish is to establish a mechanism which maintains the substantive law applied to maritime matters pre- and post-1983.²⁹⁹

Section 6³⁰⁰ reads as follows:

‘(1) Notwithstanding anything to the contrary in any law or the common law contained a court in the exercise of its admiralty jurisdiction shall–

- (a) with regard to any matter in respect of which a court of admiralty of the Republic referred to in the Colonial Courts of Admiralty Act, 1890, of the United Kingdom, had jurisdiction immediately before the commencement of this Act, apply the law which the High Court of Justice of the United Kingdom in the exercise of its admiralty jurisdiction would have applied with regard to such a matter at such commencement, in so far as that law can be applied;
- (b) with regard to any other matter, apply the Roman-Dutch law applicable in the Republic.

(2) The provisions of subsection (1) shall not derogate from the provisions of any law of the Republic applicable to any of the matters contemplated in paragraph (a) or (b) of that subsection.

...

(5) The provisions of subsection (1) shall not supersede any agreement relating to the system of law to be applied in the event of a dispute.³⁰¹

When one considers the wording of section 6(1), it is evident that there must be a determination made regarding which legal system would be applicable.³⁰² The necessity arose because it is undesirable to have two different legal systems being applicable to a claim heard by a court exercising its admiralty jurisdiction.³⁰³

²⁹⁹ In all maritime matters being heard by the High Court exercising its admiralty jurisdiction in which the heads of jurisdiction are the same as those that would have been heard by the Colonial Court of Admiralty, English admiralty law as at 1 November 1983 shall be applied and in all other matters, Roman-Dutch Law will be the applicable law. See H Staniland “What is the Law to Be Applied to a Contract of Marine Insurance in Terms of Section 6(1) of the Admiralty Jurisdiction Regulation Act 105 of 1983?” (1994) 6 *S. Afr. Mercantile LJ*, 16 17 para 3.

³⁰⁰ Above, note 292.

³⁰¹ Above, note 293.

³⁰² *The Shipping Corporation of India Ltd v Erdonon Corporation & Another (The Vallabhbhai Patel)* 1994 (I) SA 550 (A) 559 C–D. See further *Transol Bunker BV v MV Andrico Unity & Others; Grecian-Mar SRL v Andrico Unity & Others* (30/89) [1989] ZASCA 30; 1989 (4) SA 325 (A) 334H–335A. See also G Girdwood “An Analysis of the Law Applicable to Charter Party Disputes in terms of Section 6(1) of the Admiralty Jurisdiction Regulation Act”. (1995) 7 *S. Afr. Mercantile LJ* 7 (1995): 301.

³⁰³ *Report on the Review of the Law of Admiralty*, Project 32 (1982) 10.

In the *Mieke* case, the court held that a choice of law clause could not oust mandatory legislation of the forum, if it would adversely impact on public policy.³⁰⁴ However, the court held further that, rather than deciding the matter on a determination of whether the Short-Term Insurance Act is a mandatory provision, it is better suited to deciding the matter based on an analysis of AJRA.³⁰⁵

‘...[T]he definitive answer, in my view, is to be found in the Admiralty Jurisdiction Regulation Act 105 of 1983. The Admiralty Act governs not only jurisdiction but also the substantive law to be enforced in South African high courts, all of which are given jurisdiction for the hearing of any admiralty action for the enforcement of a maritime claim’³⁰⁶

While deciding the matter based on an analysis of section 6 may appear to be the desirable approach, the manner in which the interpretation was executed has raised a few questions and as this analysis will attempt to demonstrate, section 6 does not provide the ‘definitive answer’. In each case, one needs to consider whether or not a particular statute is preemptory.

To understand the complex and somewhat controversial case of the *Representative of Lloyds & Others v Classic Sailing Adventures (Pty) Ltd*, one must first appreciate that, as with all written sources of information, the meaning of a statutory provision is dependent upon the interpretation given to it in light of the current state of affairs. Therefore, to understand a statutory rule or principle properly, one would require an open-minded attitude which allowed one to analyse every possible outcome from a seemingly rigid statutory framework, provided, however, that the interpretation arrived at could be said to be ‘proper’ in the circumstances.

A similar sentiment was expressed by Wallis JA, in the matter of *Natal Joint Municipal Pension Fund v Endumeni Municipality*,³⁰⁷ where the learned judge held that ‘from the outset one considers the context and the language together’.³⁰⁸ Moreover, one should refrain from

³⁰⁴ The *Mieke* case (SCA) para 24. See also, Hofmeyr note 20, op cit 86, para II.5. See also M Wallis. *The Associated Ship & SA Admiralty Jurisdiction* (2016) 2.

³⁰⁵ The *Mieke* case (SCA) para [27].

³⁰⁶ Ibid note 312.

³⁰⁷ [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA).

³⁰⁸ *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13, para [19]. Contrast this with para [17] and [20] where the court sets out the ‘old’ approach to interpretation that the court is criticising. For further illuminating discussion by Spigelman, see “From Text to Context: ‘Contemporary Contractual Interpretation’”, an address to the Risky Business Conference in Sydney, 21 March 2007 ((2010) 84(12) *Aus LJ*. 822–832). Also published in J J Spigelman *Speeches of a Chief Justice 1998-2008* 239, 240.

making unnecessary assumptions regarding what is reasonable in the circumstances. The SCA held that

‘[j]udges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cause the divide between interpretation and legislation’.³⁰⁹

The process begins with an attempt to find the meaning of the words actually used, without any inferences being drawn, based on personal opinion of ‘what it would have been sensible for others to say’.³¹⁰ Moreover, the words should be read in the context of the document as a whole and in the light of all relevant circumstances’, as this is the way in which an ordinary person would read it. It therefore stands to reason that courts should adopt the same approach.³¹¹

4.2 Critique of the SCA Judgment

In its analysis of section 6 the court held in para 29:

‘Subsection (5) thus does allow parties to make a choice as to the legal system they wish to govern their contract. But this cannot mean that they can contract out of legislative provisions that amount to *ius cogens*. One cannot read subsections (2) and (5) in isolation. Subsection (5) must be subject to subsection (2). Read together, as they must be, the subsections mean that while the parties may choose a non-South African system of law to govern their contract, they may not do so where the provisions of the other system are inconsistent with peremptory South African law.’

This is not in fact the ‘definitive answer’ referred to by the SCA in para 27 as it conflates two separate scenarios.

Section 1 is intended to cater for a determination of what South African admiralty law is. In other words, if the law governing the dispute is South African admiralty law, then the content of that law must be determined by applying section 6(1).³¹²

³⁰⁹ Ibid at para [18].

³¹⁰ Ibid at para [24].

³¹¹ Ibid 24. See also JJ Spigelman “The Intolerable Wrestle: Developments in Statutory Interpretation” (2010) 84(12) *Aus LJ* 822 826,. In which he goes on to discuss the importance of reading words, whether as part of a contract or statutory principle, in the context of the relevant document.

³¹² Hofmeyr note 20 op cit 85.

Any reference to ‘any law of the Republic’ in subsection 2, as the SCA notes, refers to statutory law.³¹³ The plain meaning of this section is that any applicable statutory law is applied *when the law governing the dispute is South African law*. There does not need to be any enquiry into whether the statutory provisions ‘amount to ius cogens’ or ‘peremptory law’, in the sense in which those terms are used in relation to a conflict of laws scenario.

When the governing law is South African admiralty law, local statutory law must be applied when it is relevant to the dispute. Put differently, the common law determined in accordance with section 6(1) does not exclude relevant local statutes. This is why the wording of section 6(2) plainly states that ‘*the provisions of subsection (1) shall not derogate from the provisions of any law of the Republic applicable to any of the matters contemplated*’. The subsection clearly makes no reference to subsection (5), and by reading in a reference to subsection (5), the SCA has gone beyond the meaning of the statute.

The reason that subsection 6(2) makes no reference to subsection 6(5) is clear. Subsection (5) deals with a completely different scenario – one in which the dispute is *not* governed by South African admiralty law because, through a choice of law, it is subject to a foreign system of law. Subsection (5) was clearly intended to uphold choice of law provisions and is in keeping with the principle of party autonomy discussed in the previous chapter.

Taken without caution, the finding of the SCA could be read as meaning that all South African statutes are peremptory and accordingly always, automatically, apply when in conflict with the provisions of a chosen foreign law. Such a finding, while providing a simple solution, would be completely at odds with the principle of party autonomy.

In fact, the only way in which the SCA judgment can be read is that subsection (5) remains subject to the overriding public policy requirement that a foreign law will not be enforced in South African courts when it is contrary to ius cogens. This means that if there is a South African statute, and it is determined that the provisions of that statute are peremptory (in the sense in which that term is used in relation to a conflict of laws scenario discussed in the previous chapter) then the statute would override the chosen foreign law, to the extent of the inconsistency.

³¹³ Footnote 15 in the SCA judgment, referring to *R v Detody* 1926 AD 198 201, where Innes CJ said: “The word ‘laws’ means statutes.”

Hofmeyr outlines a similar argument and indicates that ‘section 6(2) is simply declaratory of the position that applied before the commencement of the Act: that although the court in the exercise of its admiralty jurisdiction applied admiralty law, that law remained subject to local statutes’.³¹⁴ This ‘is all section 6(2) was intended to provide for’.³¹⁵

Hofmeyr, in discussing this section, explains that similarly, when the English Admiralty court heard matters subject to English admiralty law, it was also required ‘to give effect to municipal statutory provision’.³¹⁶ This recognises that in its early days the English Admiralty Court was a separate court from the common law courts of England, and that English Admiralty law was a separate system of law with its origins in the law merchant rather than English common law.³¹⁷

Hofmeyr refers to two earlier South African decisions in which this principle had been applied. In *Crooks & Co v Agricultural Co-operative Union Ltd*,³¹⁸ the court was concerned with a claim by the appellants for a balance due for services rendered and materials supplied in the conversion of the vessel into a cargo boat. The issue which arose was whether the appellants were entitled to a tacit hypothec over the ship.³¹⁹ It held that there is a distinction between those who supply necessaries by way of a sale and that of a builder or repairer. According to South African law, only the latter would have a tacit hypothec over the vessel. The court held further that the court sat as an Admiralty court which derives its jurisdiction from the Colonial Court of Admiralty Act of 1890. As such, English maritime law was to be used to decide the matter.³²⁰

In the later decision of *Petjalis Engineering Works (Pty) Ltd v SA Transport Services*,³²¹ it was held that an Admiralty court, although applying English admiralty law, was obliged to give effect to municipal statutes, and this is the effect of section 6(2) of the AJRA. Moreover, the apparent contradiction arising from the use of the words ‘any law’ in section 6(1) and (2) can be reconciled on the basis that those words in section 6(1) refer to statutory provisions

³¹⁴ Hofmeyr note 20 op cit 87.

³¹⁵ Hofmeyr note 20 op cit 86.

³¹⁶ Ibid.

³¹⁷ Hofmeyr note 20 op cit 3–4.

³¹⁸ 1922 AD 423 424.

³¹⁹ Ibid.

³²⁰ Ibid. English law did not recognise a maritime lien for repairs to a vessel. As such, the courts could not grant the appellant the preference he sought over other creditors. The appellant could have been granted the preference if the matter had been decided by Roman-Dutch law, which would have acknowledged the existence of the maritime lien.

³²¹ 1988 (1) SA 103 (C) 112D–E.

determining the legal system applicable, whereas section 6(2) refers to statutory provisions which concern the subject-matter of the dispute.

Furthermore, *National Iranian Oil Co. v Banque Paribus (Suisse) SA & Another*³²² held further that the application of English admiralty law is of course subject to South African statutory law on the subject.

Hofmeyr states that ‘section 6(5) is an overriding provision qualifying section 6(1) read with section 6(2)’.³²³ In fact, the wording of section 6(5) does not refer to both section 6(1) and 6(2). It states: ‘The provisions of *subsection (1) shall not supersede any agreement relating to the system of law to be applied.*’ There is no provision in section 6(5) expressly saying that it qualifies section 6(2).

However, this does not mean that a statute (any law in terms of section 6(2)) will always supersede a choice of law clause. As Hofmeyr explains, section 6(5) did not purport to set out the limits of party autonomy at common law, which continue to govern the limitations upon the enforcement of any foreign legal system chosen by the parties.³²⁴

In essence, as Hofmeyr argues, section 6 does no more than set out the position discussed in the previous chapter. Parties are free to choose a foreign system of law, but it will not be applied when a local statute expressly or by necessary implication states that its provisions cannot be derogated from or when the local statute is *ius cogens* (regulating matters of public policy, interest or a right which cannot be waived).³²⁵

In the *Mieke* case, the application of subsection (2) was extended to the provisions of subsection (5).³²⁶ Thus it was held that the relevant subsections should not be read in isolation but should rather be read together to provide a unitary framework in which to apply the rules relating to party autonomy.³²⁷ The effect of this is that in the judgment of the SCA, when there is a choice of law clause, this does not serve to oust any laws of the forum which are referred to in subsection (2).³²⁸ In the opinion of Hofmeyr, this view cannot be met with approval, because subsection (2) merely acts as a qualification to subsection (1), so as to safeguard the application

³²² 1993 (4) SA 1 (A) 8B–C.

³²³ Hofmeyr note 20 op cit 87.

³²⁴ Ibid.

³²⁵ Ibid. See also ibid note 22 and 23.

³²⁶ The *Mieke* case (SCA) para [29].

³²⁷ Ibid.

³²⁸ *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13, para 26. In fact, on one reading the judgment suggests that all statutory law is mandatory.

of the domestic statutory law of the forum.³²⁹ He goes on to provide a detailed analysis of subsection (5) and the exercise of party autonomy, in which the following is stated:

‘Section 6(2) does not qualify s 6(5), which deals with something entirely different and separate, namely, the recognition of party autonomy. ... It is submitted that s 6(5) is an overriding provision qualifying s 6(1) read with s 6(2), and that s 6 was not intended to provide the limits of party autonomy where the court exercises its admiralty jurisdiction. These limits are prescribed by general law. ... Party autonomy is subject to two fundamental limitations, namely where the local statute in question provides, either expressly or by necessary implication, that its provisions cannot be ousted, or where the local statute regulates matters of public policy, interest or a right.’³³⁰

4.3 Conclusion

The application of South African statutory law to a matter in which English law was applicable by choice may be viewed as an unnecessary limitation on party autonomy. However, the correct view, in my opinion, is to view it rather as one which is necessary in this case on the principles which apply in the realm of private international law. Section 6(5) clearly cannot mean that a choice of foreign law must always be upheld, as it would be undesirable to allow foreign law to override or prejudice the public policy of the forum.

While the outcome of the judgment is, in my opinion, correct, the interpretation of section 6 appears to be flawed in respect of the proposed limitation of section 6(5) by section 6(2), which clearly and unambiguously states that the limitation is imposed on section 6(1) alone. Lewis JA reasoned that one cannot read the sections in isolation and if read together, it is clear that section 6(5) will be limited by 6(2).³³¹ It is my opinion that the matter could be decided without reading any such limitation into the relevant sections of the Act.

By virtue of section 6(1), Roman-Dutch law would be applicable and as a result, the Short-Term Insurance Act would automatically apply, without any need to prove that it is a mandatory rule.

³²⁹ Ibid note 377.

³³⁰ *Natal Joint Municipal Pension Fund* note 308 para 19.

³³¹ *The Mieke* case (SCA) para 29–30.

CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

5.1 Summary of Findings

A comparison of the South African and English approach to the pre-contractual duty of disclosure and the approach to the implied warranty of legality, in the context of marine insurance and the *Mieke* case, was conducted in Chapter 2. The findings revealed that English and South African law differ greatly with regard to the test for materiality. In English law, the standard of the prudent insurer has the effect of placing a duty of disclosure on the insured which is arguably too far reaching in its application. In South African law it has been accepted that the applicable test for materiality should be that of the reasonable person. The duty placed on the insured is therefore limited, as it requires one to disclose only information that a reasonable person would regard to be material to the assessment of the risk. In terms of the South African approach to the implied warranty of legality section 54(1) of the Short-Term Insurance Act, states that a contract should not be regarded as void simply based on a breach of law. The question is whether the illegality has the effect of invalidating the contract in general.

Lastly, the manner in which the court a quo and the Supreme Court of Appeal dealt with the issue of a conflict of laws differed. The rationale of the court a quo was impliedly based on the wording of section 6(5) of the Admiralty Jurisdiction Regulation Act and the notion of party autonomy. Therefore, English law was applied, being the law chosen in the contract. The Supreme Court of Appeal, however, read section 6(2) of the AJRA as a limitation to section 6(5); the provisions of the South African STIA were therefore held to be applicable.

In determining whether a choice of law clause excludes the application of the law of the forum, an assessment of the merits of the case must be conducted. In Chapter 3, the Supreme Court of Appeal affirmed that one cannot contract out of mandatory legislation by means of a choice of law clause, if the effect of such is contrary to public policy. This consideration of public policy is based on the underlying premise that even in an international contract there may be a superior and inferior contracting party. Therefore, legislation which aims to place both parties on a level playing field, so as to negate the leverage held by one party, cannot be avoided. This was the reasoning of Lewis JA for the application of the law of the forum rather than the proper law of contract. In this chapter a determination had to be made regarding which legislation in South Africa is deemed to be mandatory in nature. It was found that in order for any legislation to be regarded as mandatory there must be an element of protection granted for the individual. This

protection should be one that cannot be waived because to do so would mean that the individual would be at the mercy of a foreign law. Statutes that are enacted for the sole reason of safeguarding the interests of those who are bound by its application, such as the STIA, would be regarded as mandatory. Thus, it was held that all choice of law clauses are subservient to the mandatory laws of the forum.

In chapter 4, the dissertation explored the workings of section 6 of the AJRA. Emphasis was placed on the interpretation of the section 6(2) and whether it had the effect of limiting section 6(5). According to the Supreme Court of Appeal it was found that the limitation imposed by section 6(2) should be applicable to section 6(5). Essentially this was seen as a statutory limitation on party autonomy and by extension offered an opening for the application of South African statutory law. It was reasoned that when it is necessary to limit the effects of party autonomy, the court has the authority to do so, if it is in line with public policy considerations as a public policy imperative is still required.

The enquiry into what is mandatory legislation was unnecessary, according to the SCA, as the matter could be decided using section 6 of the AJRA. However, in Chapter 4 it was shown that a simplistic interpretation of the abovementioned subsection, making a choice of law clause always subject to the mandatory laws of the forum, was not a correct interpretation of the AJRA, as per the SCA judgment.

5.2 Conclusion and Recommendations

It has been illustrated in this dissertation that despite the fact that our law allows for the application of foreign law through contractual agreement, it is still subject to the mandatory legislation of the country exercising jurisdiction. It is based on the premise that the legislature acts in accordance with the best interests of the public, and this is reflected in the form of legislation. It is clear from an analysis of this dissertation that a consideration of public policy will be sufficient, to override a foreign choice of law.

In light of the uncertainty caused by the judgment in *The Representatives of Lloyds & Other's v Classic Sailing Adventures (Pty) Ltd*, regarding the approach taken to a conflict of laws, I propose:

1. That in each case judges must carefully conduct a 'contractual equity' assessment. This would be an enquiry into the business acumen and insurance knowledge of the prospective insured. Public policy considerations should not be involved if the

evidence establishes that the insurer and insured were on equal footing. In such instances the limitation of the parties' choice of law on the public policy ground that one party was in a weaker bargaining position is not warranted.

2. If the courts adopt the approach recommended in paragraph 1 and the interpretation of the *Mieke* case set out in this dissertation insofar as section 6 is concerned, that would address any concerns arising from the judgment. However, to put the matter beyond doubt, the Maritime Law Association may wish to consider, as part of a future amendment of section 6 of the AJRA, incorporating a proviso to section 6(5) reading:

'Notwithstanding the provisions of subsections (1) and (2), any agreement relating to the system of law to be applied in the event of a dispute shall be applied subject to the public policy of the Republic of South Africa.'

[Researcher's suggested insertions italicised.]

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