Admiralty jurisdiction and party autonomy in the marine insurance practice in South Africa

by

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Submitted in partial fulfilment of the requirements for the degree *Magister Legum* in Import and Export Law at the North-West University (Potchefstroom Campus)

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December 2013

NORTH-WEST UNIVERSITY ®
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Abstract

Admiralty jurisdiction and party autonomy in the marine insurance practice in South Africa

An increase in international trade has resulted in an increase in the carriage of goods by sea, which has also promoted the business of marine insurance on a very huge scale. Marine insurance contracts fall within both the admiralty jurisdiction where admiralty laws apply and special contract law where the rules and principles of contract law apply. In certain circumstance this has left the courts with a dilemma in deciding in particular cases which law should apply; whether maritime law, contract law or marine insurance law.

There are certain principles under the law of contract that are said to be profound and cannot be ousted easily by substantive law. The principle of party autonomy is one of these principles and it has gained international recognition through a number of cases. However, to date, courts are faced with difficulties in deciding whether to uphold the choice of law on jurisdiction and governing law exercised by parties or resort to substantive law, either by virtue of admiralty law or any other statutes in a country, which provisions may be contrary to the clause on choice of law under the contract. In South Africa practice has shown that courts are always reluctant to apply the clause on choice of law if they believe such application is against the public policy and interest in South Africa. This begs the question as to the precise meaning and effect of "public policy and interest" and how this principle influences the long-standing and well-established principle of party autonomy in admiralty jurisdiction.

This dissertation is aimed at providing a legal response to this problem by analysing case law and the different viewpoints of various writers. It is imperative to investigate if their decisions and views answer all the uncertainties with regard to the meaning and the effect of the concept of "public policy and interest" on the principle of party autonomy.

Keywords: Admiralty Jurisdiction Regulation Act (*AJRA*), Admiralty Court, admiralty jurisdiction, choice of law, Carriage of Goods by Sea Act (*COGSA*), exclusive jurisdiction, party autonomy, and public policy and interest.

OPSOMMING

Admiraliteitsjurisdiksie en party-outonomie in die gebruik van marineversekering in Suid-Afrika

’n Toename in internasionale handel het ’n toename in die vervoer van goedere op see tot gevolg gehad, wat ook op baie groot skaal die bedryf van marineversekering bevorder het. Marineversekeringskontrakte ressorteer binne die perke van beide die admiraliteitsjurisdiksie, waar admiraliteitsregte van toepassing is, en spesiale kontrakreg, waar die reëls en beginsels van kontrakreg van toepassing is. In sekere gevalle het dit die howe met ’n dilemma gelaat: om in spesifieke gevalle te besluit watter reg van toepassing behoort te wees – maritieme reg, kontrakreg of marineversekeringsreg.

Daar is sekere beginsels ingevolge kontrakreg wat sommige glo grondig is en nie maklik deur materiële reg uitgesluit kan word nie. Die beginsel van party-outonomie is een van hierdie beginsels en geniet internasionale erkenning deur etlike gevalle. Tot op hede word die howe egter gekonfronteer met die probleem om te besluit of die keuse om die reg op jurisdiksie en heersende wet soos uitgeoefen deur partye te handhaaf, of om gebruik te maak van materiële reg, óf uit hoofde van admiraliteitsreg of enige ander statute in ’n land en waarvan die bepalings moontlik teenstrydig mag wees met die klousule oor keuse van reg ingevolge die kontrak. In Suid-Afrika het die praktyk getoon dat die howe altyd huiwerig is om die klousule oor keuse van reg toe te pas as hulle van mening is dat sodanige toepassing teenstrydig is met die openbare beleid en belang in Suid-Afrika. Dit ontwyk die vraag van wat die juiste betekenis en uitwerking is van ‘openbare beleid en belang’, en hoe hierdie beginsel die lank bestaande en goed gevestigde beginsel van party-outonomie in admiraliteitsjurisdiksie beïnvloed.

Hierdie verhandeling poog om ’n regsgeldige antwoord op hierdie vraag te verskaf deur gevallereg en die verskillende standpunte van verskeie skrywers te ontleed. Dit is noodsaaklik om ondersoek in te stel of hul besluite en sieninge antwoorde verskaf op al die onsekerhede ten opsigte van die betekenis en uitwerking van die konsep ‘openbare beleid en belang’ op die beginsel van party-outoriteit.

Sleutelwoorde: Wet op die Reëling van Admiraliteitsjurisdiksie, Admiraliteitshof, admiraliteitsjurisdiksie, keuse van reg, Wet op die Vervoer van Goedere ter See, ekslusiewe jurisdiksie, party-outonomie, openbare beleid en belang.

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Abbreviations

AJRA	*Admiralty Jurisdiction Regulations Act*
ALR	*Adelaide Law Review*
ALR	*Akron Law Review*
Am J Comp L	*American Journal of Comparative Law*
Annual Survey	*Annual Survey of South African Law*
CC	Constitutional Court
CCAA	*Colonial Court of Admiralty Act*
COGSA	*Carriage of Goods by Sea Act*
CLR	*Columbia Law Review*
Int'l Bus Law	*International Business Lawyer*
H J Int'l L	*Houston Journal of International Law*
J Mar L& Com	*Journal of Maritime and Commerce*
MBL	*Modern Business Law*
NY Law Ref	*New York Law Reform*
SA Merc LJ	*South African Mercantile Law Journal*
SALJ	*South African Law Journal*
SAMSA	South Africa Maritime Safety Authority
SCA	Supreme Court of Appeal
SIA	*Short-Term Insurance Act*
TCBL MarL and ConL	*Transaction of the Centre for Business Law: Maritime Lien and Conflict of Law*
Tul Mar LJ	*Tulane Maritime Law Journal*
U Kan L R	*University of Kansas Law Review*
USF Mar LJ	*University of San Francisco Maritime Law Journal*

Chapter 1

Introduction

Insurance is one of the strategies used to reduce risks and loss caused by accidents and misfortunes.[1] According to many sources, marine insurance is the oldest form of insurance from which other types of insurance developed.[2] A "marine insurance contract" may broadly be defined as "an agreement involving an equitable transfer of the risk of loss from one entity to another in exchange for the payment of specific premiums, thus creating the liability to pay the first-mentioned party's damages upon the risk materialising".[3] Owing to the nature of the risk covered under marine insurance, a marine insurance contract is regarded as a contract *sui generis*.[4] In South Africa, marine insurance contracts are governed by the law of contract and are therefore interpreted by the general principles of contract law, regulated by insurance regulations under the *Short-term Insurance Act*[5] and, because of the nature thereof, fall within admiralty jurisdiction.[6]

"Admiralty jurisdiction" refers to the authority of the courts to hear cases arising from actions that occur on the high seas.[7] Until 1983 Admiralty Courts in South Africa were governed by an English statute, the *Colonial Courts of Admiralty Act*, 1890.[8] Before 1890 the Vice-Admiralty Courts seated in Natal (Durban) and the Cape (Cape Town) were established to exercise the jurisdiction exercised by the English High Court of the Admiralty.[9] These Vice-Admiralty Courts had concurrent jurisdiction

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1 Van der Merwe *General Principles in* Insurance 164.
2 See Hare Shipping Law 378; Hofmeyr *Admiralty Jurisdiction* 4, Bradfield "Shipping" 3–65; Reinecke *et al General Principles* 25; van Niekerk 2005 SA Merc LJ 150; van der Merwe *General Principles in Insurance* 164; Shaw *Admiralty Jurisdiction and Practice in South Africa* 151; Reinecke *et al General Principles* 3–220.
3 Van Niekerk *South Africa Maritime Law* 103.
4 Sui generis means a contract of its own, unique kind.
5 53 of 1998 (hereinafter referred to as 'the *SIA*').
6 Popham, Mitchell and Vo Chau 1998–1999 *USF Mar LJ* 100. In this article the writers discuss the federal and state law in marine insurance contracts.
7 Black 1950 *CLR* 259. In this article possible suggestions are made on the current critique raised in admiralty jurisdiction.
8 Shaw *Admiralty Jurisdiction and Practice in South Africa* 151. The Colonial Courts of Admiralty Act of 1890 (hereinafter referred to as 'the *CCAA*').
9 Hofmeyr *Admiralty Jurisdiction* 4.

authority with Municipal courts.[10] This practice of having two different jurisdictions dealing with maritime claims allowed the plaintiff to choose to litigate either in the Vice-Admiralty Court or the Municipal Court.[11] On 25 July 1890 the Vice-Admiralty Courts were abolished and the *CCAA*[12] was passed. The *CCAA* came into force on 1 July 1891. The provisions of section 2 of the *CCAA* bestowed admiralty jurisdiction on the Natal and Cape Colonial courts. Section 2(1) of the *CCAA* stated the following:

> Every Court of law in a British possession, which is for the time being declared in pursuance of this Act to be a court of admiralty, or which, if no such declaration is in force in the possession, has therein original unlimited civil jurisdiction, shall be a court of admiralty, with the jurisdiction in this Act mentioned, and any for the purpose of that jurisdiction exercise all the powers which it possesses for the purpose of its other civil jurisdiction, and such court in reference to the jurisdiction conferred by this Act is in this Act referred to as a Colonial Court of Admiralty. Where in a British possession the Governor is the sole judicial authority, the expression 'court of law' for the purposes of this section includes such Governor.

The Cape and Natal Supreme courts had unlimited civil jurisdiction, and by virtue of the aforementioned section became the Colonial Courts of Admiralty in South Africa. Moreover, the *CCAA*[13] provided that the jurisdiction of Colonial Courts of Admiralty would exist in a like manner and to as full an extent as the jurisdiction of the High Court in England as it existed at the time when the *CCAA* was passed.[14] It is not surprising that the duality in jurisdiction on maritime matters[15] applicable to the same subject matter but applying two different laws[16] was viewed as unsatisfactory and out of date. Therefore, a call for reform was necessary.[17] This led to the enactment of the *Admiralty Jurisdiction Regulation Act.*[18] The *AJRA* repealed the *CCAA*, and was enacted with the purpose of providing the provincial and local divisions of the Supreme (now High) Court of the Republic of South Africa with the powers of

10 Booysen 1984 *MBL* 76. The Municipal courts had the power to hear certain maritime claims such as charter party claims.
11 Hare *Shipping Law* 15.
12 Hofmeyr *Admiralty Jurisdiction* 5.
13 S 2(2) of the *CCAA*.
14 Van Niekerk 1994 *SA Merc LJ* 27. In this article van Niekerk discusses the history of maritime claims in Admiralty courts in South Africa.
15 The Colonial Courts of Admiralty and the Municipal Courts.
16 The Colonial Courts of Admiralty applied English law, whereas the Municipal Courts applied Roman-Dutch Law.
17 Hofmeyr *Admiralty Jurisdiction* 13.
18 105 of 1983 (hereinafter referred to as 'the *AJRA*').

Admiralty Courts of South Africa to adjudicate all maritime disputes.[19] It aimed at eliminating the problem of concurrent jurisdiction in South Africa. Although this broad jurisdiction reflected the unlimited jurisdiction of the High Court to hear all maritime claims, the *AJRA* carried over part of the *CCAA* under the provisions of section 6.[20] This section[21] allowed the application of English law in maritime disputes where the cause of action arose before the enactment of the *AJRA*, that is, before November 1983. With caution, the *AJRA* made it very clear that application of English law could only be allowed if the maritime claim in dispute was not covered by the *AJRA* and in the absence of any specific clause in the parties' contract with regard to the law governing the contract.[22] This clearly shows that although the *AJRA* was aimed at giving the High Court exclusive jurisdiction to apply Roman-Dutch law in all maritime claims, the provisions of section 6 of the *AJRA* suggest that English law may still be applicable.

Apart from the *AJRA*, there is another statute in South Africa that gives the High Court exclusive jurisdiction to hear all maritime claims that arise within the territorial waters of South Africa. Section 3 of the *Carriage of Goods by Sea Act*[23] permits any person carrying on business in South Africa and the consignee under, or holder of, any bill of lading or similar document for carriage of goods to a destination in South Africa to bring an action relating to its business in the Admiralty Courts in South Africa. The *COGSA* gives a party the liberty to bring an action in South Africa despite any jurisdiction ouster clause that may exist in the parties' contract. Although these two statutes advocate that a party should have the freedom to bring an action in South Africa despite the jurisdiction ouster clauses in the parties' contract, the court has the discretion to decline to exercise jurisdiction if it believes that any other court,

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19 Preamble of the *AJRA*, which states that the *AJRA* was enacted in order to provide for the vesting of the powers of the Admiralty courts of the Republic of South Africa in the provincial and local divisions of the Supreme Court of South Africa. The preamble goes on to state that the *AJRA* repeals the Colonial Courts of Admiralty Act, 1890 of the United Kingdom, in so far as its application in South Africa and for incidental matters.

20 This section shall be discussed in Chapter 3 of this research.

21 S 6 of the *AJRA* provides for the law applicable under this act, and the rules of procedure and evidence to be applied by an Admiralty Court in case of any dispute arising between parties. s 6(1) and (2) allows the applicability of English law in specified circumstances and s 6(5) provides for the applicability of a foreign legal system if parties had chosen a foreign law in their contract.

22 Hare *Shipping Law* 16.

23 1 of 1986 (hereinafter referred to as 'the *COGSA*'). This section shall be discussed briefly in Chapter 3 of this research.

arbitrator, tribunal or body elsewhere is more appropriate to hear and decide the action.[24]

An important principle of the law of contract is that parties to a contract may agree in an exclusive clause on the choice of law to govern their contract, irrespective of where the contract is concluded, where the cause of action arose or where the parties are domiciled.[25] When this clause is incorporated into a marine insurance contract, courts are expected to respect the autonomy of the parties and accordingly, apply the governing law chosen by the parties to a marine insurance contract to the maritime dispute before them. There is, however, a view that the issue of party autonomy may be limited by either the application of admiralty law or certain peremptory Statues in South Africa.[26] This view begs for an investigation into, and if correct, how the courts can strike a balance between the autonomy of parties and statutory limitations on the choice of law.

As stated earlier, marine insurance contracts are governed by the *SIA*. It is therefore important for courts to make reference to the *SIA* before deciding on the appropriate law applicable to a maritime dispute before it.[27] If the application of the parties' choice of law is contrary to a peremptory provision of the *SIA* and public policy and interest in South Africa, the question will be: what law will the court be forced to apply?[28] This calls for an investigation into how the concept of "public policy and interest" has been interpreted by the courts, different writers' views on the concept and its influence on the principle of party autonomy in admiralty jurisdiction in South Africa. The investigation on public policy will assist this research in finding put how certain Statutes in South Africa are framed to limit parties choice of law where issues of public policy arise.

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24 S 7 of the *AJRA*.

25 Hare *Shipping Law* 146.

26 Black 1950 *CLR* 259.

27 See, for example, *Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd* 1986 (3) SA 509 (D) 529 where Mr Justice Boosey discussed the distinction between the choice of the governing law clause and the incorporation of some rules from a particular legal system.

28 In the case of *South African Co-operative Citrus Exchange Ltd v Director-General: Trade and Industry and Another* 1997 (3) SA 236 (SCA) the Supreme Court of Appeal (hereinafter referred to as 'the SCA') held that the court in South Africa shall not uphold any clause to a contract where parties had renounced certain statutory provisions, if the court was of the opinion that such clause was contrary public policy and interest.

The combination of three areas of law, namely (1) maritime law, (2) contract law and (3) insurance law in a single dispute[29] (which is often the case), calls for an examination of marine contracts in order to determine whether the South African legal system can regulate the principle of party autonomy in public common interest while pursuing socio-economic tasks, thereby restricting a party's freedom in terms of either the law governing the contract or the specific jurisdiction where a peremptory statute exists that states explicitly the law applicable and jurisdiction on a specific dispute. This research is an attempt to answer the question of how the concept of "public policy and interest" influences the principle of 'party autonomy' (with regard to the legal system to govern a marine insurance contract) where the chosen legal system overrides a peremptory provision of a South African statute.

In Chapter 2 of this study the important principle in insurance contracts, namely the 'principle of choice of law' will be analysed. Chapter 3 is devoted to a discussion on the practice of admiralty law in South Africa. The discussion in Chapter 4 focuses on the *SIA* and the circumstances under which the court might decline the application of an exclusive clause in the contract on the choice of the governing law and jurisdiction to which parties wish to subject their disputes, on the basis that such clause is contrary to the South African public policy and interests. A conclusion and recommendations follow in Chapter 5.

29 Black 1950 *CLR* 259.

Chapter 2

Exclusive jurisdiction and choice of law in international law

2.1 Introduction

The general principle is that every international contract[30] has a governing law, called the 'proper law of the contract', in terms of which disputes arising from the contract are mainly and exclusively decided.[31] The parties' freedom to choose the proper law of the contract is known as 'party autonomy'.[32] Parties to an international contract have the autonomy to select the law determining the existence and validity of their rights and obligations arising from the contract;[33] the law governing that choice itself;[34] the nature of the law and/or laws that may be chosen;[35] and the impact of the so-called mandatory laws on that choice.[36] The parties agree to it that this freedom is not merely a party's right to displace the dispositive rules of any legal system, which, in the absence of choice of law would possibly have been the governing law, but rather the freedom to contract in a manner that will bring certainty to parties. It is also economically efficient in that the costs of concluding a voluntary transaction is normally low.[37]

The autonomy of parties is also regarded as a broader power in international transactions to select not only the law, but also the forum that will resolve the disputes arising from such transactions.[38] This means that the choice of the parties on the law applicable to the contract should be determinative to confer and deny

30 An international contract is a cross-border agreement, that is, a contract between parties from different countries.
31 Kiggundu *Private International Law in Botswana* 259. See also Forsyth *Private International Law* 316 where he states that "(t)he law, which creates and governs the contract, is usually termed 'the proper law of the contract'. It may either be the law chosen by the parties, or if they do not so choose, the law with which the contract is most closely connected."
32 Mason 2004 *ALR* 166.
33 Forsyth *Private International Law* 318.
34 Kiggundu *Private International Law in Botswana* 259.
35 Forsyth *Private International Law* 317.
36 Nygh *Autonomy in International Contracts* 1.
37 Kiggundu *Private International Law in Botswana* 259. See also Forsyth *Private International Law* 67 and Posner *Economic Analysis of Law* 252.
38 Seatzu *Insurance in Private International Law* 82. Every legal system has such dispositive rules that define the time when risk or implied warranties pass from one party to another, but which may be displaced by the express agreement of the parties.

jurisdiction. Levingston[39] comments that the selection of the legal system and jurisdiction affects the governing law; forum; practice and procedural rules; operation of arbitration clauses; and enforcement of the foreign judgment or arbitral award. He goes on to say that a clear choice of law clause can assist the court in determining the validity and enforceability of the contract; its terms; and the extent of the rights and obligations that are not expressly set out.[40] This makes the principle of choice of law a very important principle in the law of contract.

Even though choice of law and choice of forum are closely related, they are two separate issues. In a single contract a party may choose a different legal system to govern the contract and also choose a different jurisdiction (forum) to subject any disputes arising out of the contract. Seatzu[41] is of the opinion that the decision to select a jurisdiction may arise from a party's desire to have the litigation conducted in one language or having judges from a particular court who are experienced and familiar with the issues surrounding the case. Another reason may be that the key witnesses in the case can easily be reached in the chosen jurisdiction.[42] Tetley[43] states that the selection of the jurisdiction is of major importance in maritime law, because of the mobility of ships (which usually constitutes the defendant) and the fact that in international trade the contract of carriage by sea usually involves more than one jurisdiction. Although this research focus will be on the legal system governing the marine insurance contract, it will contain a brief discussion on exclusive jurisdiction.

A decision to select a particular legal system to govern the agreement between the parties[44] normally arises from either the parties' choice to exercise their autonomy under the law of contract or the parties' desire to avert uncertainties and inefficiency that may come from subjecting themselves to a different law.[45] The clause selecting

39 Levingston "Choice of law, jurisdiction and ADR clauses" 2.
40 Levingston "Choice of law, jurisdiction and ADR clauses" 4. Van Niekerk in *South African Maritime Law* 109 stated that parties were free to choose any legal system they wished to govern their contract as long as the said legal system was *bona fide,* legal and not contrary to South African public policy and interest.
41 Seatzu Insurance in *Private International Law* 80.
42 Forsyth *Private International Law* 185.
43 Tetley 2005 *http://www.mcgill.ca/files/maritimelaw/jurisdiction.pdf*.
44 The appropriate legal system governing an international contract is also known as 'proper law'.
45 Nygh *Autonomy in International Contracts* 2.

the legal system and specific jurisdiction are more important than an afterthought or *pro forma* usage. This is so because the subject matter of commercial contracts regularly expands beyond domestic intra-state activities, and into inter-state and international trade and commerce.[46]

Logically speaking, before selecting the legal system to govern the agreement between the parties, the question of to which court a litigant would bring the dispute should first be determined. Levingston[47] comments that where there is a conflict of law applicable to a particular dispute, a party has to approach the court first and only then will the court decide on the applicable law. Therefore, the issue of jurisdiction comes first because the court will first have to decide whether it has jurisdiction to hear the maritime claim and thereafter decide on which legal system to apply. Forsyth[48] comments that the rule that the local courts use to determine the selected legal system to govern the dispute forms the central topic dealt with in private international law; for example, a case may arise before a South African court where the application of the court's own law (the *lex fori*) would be both inappropriate and unjust. In such cases the only just way to deal with the situation would be to follow the choice of law rule. A case may also arise where there is a particular statute in South Africa that overrides the choice of law rule, especially where the application of the foreign law may lead to results that are against public policy in South Africa. This chapter will examine the role of exclusive jurisdiction and choice of governing law in private international law, and how this role affects the marine insurance industry.

2.2 Exclusive jurisdiction

Where there is an international conflict of maritime law,[49] the principle is that matters of procedure are governed by the law of the forum.[50] Although the word 'jurisdiction' has many meanings, reference will be made to the definition of acting appeal judge

46 Levingston "Choice of law, jurisdiction and ADR clauses" 6.
47 Levingston "Choice of law, jurisdiction and ADR clauses" 6.
48 Forsyth *Private International Law* 3.
49 Tetley 2000 *Tul Mar LJ* 775. Tetley defined 'international conflict of maritime law' as "the collection of rules used to resolve disputes as to choice of law, choice of jurisdiction and recognition of foreign judgments between private parties subject to the laws of different states".
50 Jacobs 2011 *TCBL MarL and ConL* 525.

Nienaber in the case of *Ewing McDonald & Co Ltd v M & M Products Co.*[51] In this decision he defined 'jurisdiction' as "the power vested in the court by law to adjudicate upon, determine and dispose of a matter". This definition suggests that the jurisdiction of a court is based on the powers of the court to hear the matter. The exclusive jurisdiction of a court is regulated by an exclusive choice exercised by parties in their contract, primary and secondary legislation or by common law.[52] Parties to an insurance contract,[53] like any other party to an international trade contract, have the freedom to choose a specific jurisdiction in which they wish to adjudicate any dispute arising between them. However, owing to a lack of complete harmonisation of substantive insurance law, and the selection of applicable law and jurisdiction, this has resulted in most parties to insurance contracts including an exclusive clause on jurisdiction in their insurance contracts.[54] Tetley[55] is of the view that uniformity in maritime law has the advantage of the same procedural rules applying in different countries and avoids issues of international maritime conflict law to a large extent.

There are two important laws that may totally afftect performance of a marine insurance contract. First, the law of the country where the underwriter of a marine insurance policy resides and the law of a country where the marine insurance policy is performed. These laws have a direct effect of limiting the autonomy of parties. Therefore if there is an international instrument regulating these laws, then there will be a uniform application of the law of the issue of party autonomy. I strongly agree with this opinion: having a harmonised system on the selection of law will largely result in a just and fair decision being reached. This will ensure that the issue of a forum in which a maritime dispute should be decided to be very clear, the procedures to be followed in court will be uniform and, furthermore, due to the clarity on the procedure and law to be applied, the outcome of the case is predictable and thus promotes certainty.

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51 1991 (2) SA 252 (A) at 256G.
52 Dendy "Jurisdiction" par 525-581.
53 Focus will be on insurance contracts because a marine insurance contract forms part of the central theme of this research.
54 Seatzu *Insurance in Private International Law* 82.
55 Tetley 2000 *Tul Mar LJ* 782.

Sometimes the jurisdiction clause will favour one party to the contract more than the other. In order to ensure that the selection of the jurisdiction is well observed and protects the interests of both parties, especially the weaker party, courts have always looked at whether the parties had factually agreed to the jurisdiction clause and whether the factual agreement was binding in law or was affected by mistake, duress, fraud or the like.[56] Kruger[57] opines that conflict of law is based on the concept of justice and, therefore, one should not be deprived of a substantive right because of the mere fact that the remedy to be enforced must be pursued in a state other than the one in which the right was created. He goes on to say that in order for justice to be achieved, the law chosen by the parties must be subjected to the jurisdiction where the morals and the values of the society are upheld. I agree with this opinion, in that the court should be careful when observing the forum selected by the parties because sometimes parties can decide under duress, for example, parties can decide to subject their dispute to a foreign jurisdiction, knowing that the applicable law in that jurisdiction is against public policy in South Africa.[58] This is especially the case where one party concludes a contract with a big company and this party is in a much weaker bargaining position *vis-à-vis* the big and powerful company.

Taking into consideration the fact that most of the claims related to insurance contracts are claims involving money, the decision by parties to a contract to include a specific clause explicitly stating the forum to be used in case of disputes arising between them becomes vitally important. However, before determining the selected jurisdiction, it is important to find a causal link, namely whether the plaintiff or defendant is an *incola*[59] or a *peregrinus*[60] or whether or not a certain cause of action arose within the jurisdiction of the court.[61] The general common law rule is that the

56 Nygh *Autonomy in International Contracts* 82.
57 Kruger 2011 *SALJ* 738 where he discusses the role of public policy in the law of contract. See van Niekerk *South African Maritime Law* 109.
58 Forsyth *Private International Law* 9.
59 An *incola* is a person who is either domiciled or resident within the court's jurisdiction (Forsyth *Private International Law* 3)
60 A *peregrinus* is an alien or foreigner (Forsyth *Private International Law* 3).
61 Reinecke, van Niekerk and Nienaber "Insurance" 340. For example, no High Court will adjudicate on a dispute between a *peregrinus* plaintiff and a *peregrinus* defendant in respect of a breach of contract if the transaction was not a local transaction and the cause of action arose outside South Africa. But if the defendant is an *incola,* then the court will hear the dispute even if it arose beyond South Africa.

exercise of jurisdiction depends on the service of originating court process.[62] Since service can only be effected on a party who is actually present in the jurisdiction or parties who have willingly submitted to the jurisdiction,[63] it will be easy to avoid issues involving jurisdiction if the parties can state in their contract that they wish to be bound by the jurisdiction of a certain court.

According to Tetley,[64] the Admiralty Court hearing a maritime claim has to consider five points when deciding on the issue of jurisdiction. First, the court has to decide whether it has jurisdiction to decide on a maritime claim by looking at the statute that created the Admiralty Courts. In the case of South Africa the High Court will have to decide the matter of jurisdiction by referring to the *AJRA*.

Second, the court must decide whether the balance of convenience favours the parties' jurisdictional choice. Jurisdiction on this ground is also referred to as *forum non conveniens.*[65] Under the doctrine of *forum non conveniens* the defendant pleads that it is more convenient to have the dispute heard before another court by reason that the defendant finds it difficult to access evidence; the availability of process for compelling attendance of unwilling witnesses; the cost of obtaining witnesses; and practical problems such as foreign procedures, language and law in the present court.[66] This doctrine will thus force a court to decline jurisdiction when an action can be more appropriately heard elsewhere.[67] In South Africa this doctrine is now supported by the provisions of section 7 of the *AJRA*. This section is divided into two parts. The first part regulates the powers of courts to decline jurisdiction and the second regulates the power of courts to stay proceedings on jurisdictional grounds. The first part is covered by section 7(1)(a) of the *AJRA*, which provides the following:

62 John Russell and Co Ltd v Cayzer, Irvine & Co Ltd [1916] 2 AC 298 at 302.
63 *Emmanuel v Simon* [1908] 1 KB 302 at 308.
64 Tetley 2000 *Tul Mar LJ* 775.
65 *Forum non conveniens* is the forum or court of convenience because there is another forum or court that is more convenient. It arises when a court of competent jurisdiction declines to exercise its jurisdiction and convenience is a factor that determines that a court that otherwise lacks jurisdiction, may acquire jurisdiction (Hofmeyr *Admiralty Jurisdiction* 68).
66 Schulze 2001 *SALJ* 812.
67 Forsyth *Private International Law* 184 states that the defendant may allege that a just determination on the matter before court requires that a case be heard by another court with similar jurisdiction as the current court. By doing so, the freedom accorded a plaintiff (as *dominus litis*) to choose a forum is thus limited by the doctrine of *forum (non) conveniens*. Although this doctrine has not been adopted by most continental legal systems, it has gained popularity in England, Scotland, the United States of America and Canada.

> A court may decline to exercise its admiralty jurisdiction in any proceedings instituted, if it is of the opinion that any other court in the Republic or any other court or any arbitrator, tribunal or body elsewhere will exercise jurisdiction in respect of the said proceedings and that it is more appropriate that the proceedings be adjudicated upon by any such other court or by such arbitrator, tribunal or body.[68]

Although this section does not specifically state how the court should decline exercising its jurisdiction, the language used in these provisions states that the literal meaning of the words is used, that is to say, where a party (plaintiff) brings a maritime claim before a court in South Africa in terms of section 2(1)[69] of the *AJRA* and the parties have in terms of an agreement between them chosen a specific foreign court to adjudicate on their disputes, the plaintiff will have to state in his or her pleadings why the South African court should have jurisdiction in hearing the matter.[70]

The case of *MV Spartan-Runner v Jotun-Henry Clark Ltd*[71] concluded that where parties had reached an agreement on the law governing the contract and exclusive jurisdiction, these facts become material in case of any dispute arising between the parties. In this case the parties chose the English courts and English law as medium for the resolution of their dispute. The *onus* of proof rested on the plaintiff in South Africa to show cause why a South African court should not stay proceedings before it, so as to give effect to the parties' autonomy. Judge Shearer said that the issue was not whether the parties intended that the English courts should have exclusive jurisdiction, but rather whether the English law at the time of the litigation provided

68 From this section it is not clear whether the court can decline to exercise its jurisdiction *mero motu* (on its own). The section does not expressly state that there should be an application by one of the parties to the contract.

69 Section 2(1) of the *AJRA* provides that a party can institute proceedings in an Admiralty Court in South Africa for any maritime claim irrespective of the place where it arose, place of registration of the ship concerned, or domicile or nationality of its owners.

70 See *Rosenberg and Another v Mbanga and Others (Azaminle Liquor (Pty) Ltd Intervening*) 1992 (4) SA 331 (C) where judge van Resburg held that in cases of an *attachment ad confirmandam jurisdictionem*, where there is consent to jurisdiction by a foreign *peregrinus* before an order of attachment has been granted, a court will not grant an order because jurisdiction is already secured. If submission to jurisdiction comes after the respondent has become aware of the application and before the attachment order has been granted, that submission will have same effect as if it had come before the application was launched.

71 1991 (3) SA 803 (N).

for the exclusive jurisdiction of the courts.[72] The court held that because the plaintiff in the court *a quo* (respondent in appeal) failed to discharge the *onus* on why the South African court should not stay the proceedings, the appeal succeeded with costs. The court's interpretation suggests, and I accordingly submit, that although the matter of jurisdiction is already determined, the court cannot *mero motu* invoke section 7(1) of the *AJRA* unless the plaintiff does not discharge the *onus* as to why a South African court should not decline to hear the dispute before it in terms of section 7(1) of the *AJRA*.

As much as this doctrine of party autonomy originates in English law, it was adopted in South Africa in the case of *Great River Shipping Inc v Sunnyance* (The *Great Eagle* case).[73] In this case Judge Berman expressly adopted the ruling of Lord Goff in *Spiliada Maritime Corp v Cansulex Ltd* (The *Spiliada*).[74] In the *Great Eagle* case, Sunnyface was issued with a warrant to arrest the ship *MV Great Eagle* lying at Saldanha Bay in the Cape Province in July 1991. In September 1991 Great River Shipping made an application to rescind the arrest on the ground that the *AJRA* did not permit an arrest *in rem* to be maintained where it and prior arrests were directed at the applicant's (Sunnyface) own vessel. As a result, therefore, the court should decline jurisdiction in terms of section 7(1) of the *AJRA*. The learned judge Berman said that before a court could decline jurisdiction it had to take all relevant surrounding factors into consideration. The judge adopted the English law and decided that the legal position as it appeared from the *Spiliada* case should be applied in South Africa:

> (a) The basic principle is that a stay will only be granted (or a warrant of arrest set aside) on the ground of *forum non conveniens* where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, the other available forum must be one which is more appropriate for the resolution of the parties' dispute rather than one which is merely competent or despite the wording of the label applied to the principle convenient.
>
> (b) An initial general *onus* rests on the party seeking the stay of proceedings (or, as here, the setting aside of the warrant of arrest of the

72 See the decision of Judge Shearer in *MV Spartan-Runner v Jotun-Henry Clark Ltd* 1991(3) SA 803 at 808 par E.

73 1992 (4) SA 313 (C) (hereinfter referred to as the *Great Eagle* case).

74 [1987] AC 460 (hereinafter referred to as the *Spiliada* case)

vessel) to persuade the Court to exercise its discretion to grant the stay (or to set aside the arrest).[75]

(c) Once that party succeeds in discharging that *onus, viz* of satisfying the Court that there is another forum available for the resolution of the dispute which *prima facie* is a more appropriate one, then the *onus* will be shifted[76] to the other party, i.e., the party relying on the arrest of the vessel to establish the Court's jurisdiction, to show that special circumstances exist which warrant the dispute being resolved in this forum.

(d) In deciding whether such special circumstances exist, the Court will have regard to what 'connecting factors' (as they have been called) are present which point towards another forum as that with which the action has the most real and substantial connection, for example, the availability of witnesses; the place(s) where the parties reside or where they carry on business; the extent of expenses and costs which will be incurred; the law governing the situation; the likelihood (or otherwise) of the arresting party obtaining justice in that other forum all this does not purport to be exhaustive of these connecting factors, for the Court will indeed have regard to all relevant circumstances.

(e) The *onus* of establishing the existence of these special circumstances resting on the party contesting the application for a stay of proceeding (the setting aside of the arrest) is dischargeable on a preponderance of probabilities, although and, more particularly, because of its relevance to the present case where it is contended by that party that it will not obtain justice in the foreign jurisdiction, positive and cogent evidence to support this contention will have to be adduced, for the *onus* in this regard has been authoritatively described in this country in *The Thalassini*[77] as a "heavy" one.

The court in this instance refused the application for a decline of jurisdiction by Sunnyface because Sunnyface had failed to discharge the *onus* showing the existence of special circumstances that warranted a finding that a court in the People's Republic of China was not a more appropriate forum to entertain the action which Sunnyface sought to institute against *Great River Shipping*.

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75 An inference that can be drawn from this statement is that the court cannot *mero motu* decline to exercise its admiralty jurisdiction. There has to be an application by a party seeking to stay the proceedings. However, this is only an inference. One should remember that the court did not specifically address the point under discussion.

76 Hofmeyr *Admiralty Jurisdiction* 180. Hofmeyr is of the opinion that in South Africa the onus of proof never shifts to another party. What actually shifts is the evidential burden. If the case involves more than one onus, then each issue will have its own onus of proof. Hofmeyr goes further to state that once the applicant satisfies the requirements for security arrest, the applicant is entitled to an order of arrest unless there are countervailing materials of sufficient weight placed before court by the respondent to persuade the court not to grant an order. I tend to agree with Hofmeyr's opinion because it agrees with the general principle of law that he who alleges must prove the allegations. The *onus* is therefore on the person who alleges, and what shifts is the evidential burden to agree or rebut the allegations.

77 1989 (3) SA 820 (SCA).

Third, the court must properly investigate the bill of lading (if any), its terms and specific wording, and carefully decide on incorporated terms by way of reference and notice of such incorporation. The court must consider the validity of such incorporation and see if there is any jurisdictional clause therein.

Fourth, if the action before court brought *in rem* is for the arrest of a ship, the consideration of the court will be affected by this action because normally where a ship is arrested, the jurisdiction is in the place of arrest. The Admiralty Courts may not share the same sentiments of the common law rules, because a choice of jurisdiction may be irrelevant in actions *in personam* or *in rem.* The Admiralty Court's *in rem* jurisdiction is found if the *res* (ship or other property) is within the jurisdiction.[78] *In personam* jurisdiction is obtained by service of a court process on the defendant who appears in the jurisdiction (usually to defend the *in rem* claim against the *res*).[79] This means that in Admiralty Courts contractual law and jurisdiction clauses will be overridden by the presence of the *res*.

Fifth, the court will stay proceedings if the choice of forum is deemed to be proper in the circumstances surrounding the case. In South Africa a stay of proceedings is provided for under the second part of section 7(1) of the *AJRA*. This section 7(1)(b) provides that

> (a) court may stay any proceedings in terms of this Act if it is agreed by the parties concerned that the matter in dispute be referred to arbitration in the Republic or elsewhere, or if for any other sufficient reason the court is of the opinion that the proceedings should be stayed.

This subsection empowers the court to issue an order for a stay of proceedings pending the determination of a claim elsewhere. This issue was dealt with in the case of *MV Achilleus v Thai United Insurance Co Ltd & Others*.[80] Judge Kriek refused to stay a claim upon a bill of lading that contained an exclusive jurisdiction clause submitting disputes to the Greek court. He based his finding on the ground

78 See Chapter 3 of this research.
79 Hofmeyr *Admiralty Jurisdiction* 86. See also Hare *Shipping Law* 75 and Bradfield "Shipping" 3-65.
80 1992 (1) SA 324 (N).

that the South African Admiralty Courts was the most appropriate and convenient court for the issues before court.[81] In the case of *MV Iran Dastghayb Islamic Republic of Iran Shipping Lines v Terra-Marine SA*[82] the court was faced with a dispute where the contract between the parties provided that disputes should be submitted "for arbitration in London to be adjudicated under the provisions of English laws". The Appeal Court judge Ponnan said that because the prevailing circumstances in the apparent case[83] clearly favoured the granting of a stay of the *in rem* action in terms of section 7(1)(b) of the *AJRA* and due to the fact that the respondent had failed to show cause why the court should not exercise its discretion on granting a stay of proceedings, the High Court was wrong in refusing an action to stay the proceedings. The court upheld the appeal with costs.

Hare[84] suggests that in future the courts should not enslave themselves by either the decline of jurisdiction or the stay of proceeding because these remedies overlapped in their evidentiary requirement. He explains that the stay of proceedings in terms of section 7(1)(b) of the *AJRA* is an alternate response to an application to decline jurisdiction in terms of section 7(1)(a) of the *AJRA*. The Admiralty Court should, therefore, assess all available relevant evidence in order to assist it in forming its own opinion either to stay the proceedings or decline the jurisdiction. He goes on to state that if an alternate tribunal is suggested and the court could not decline jurisdiction due to insufficient grounds to alternate, the court can make a decision to stay the proceedings.[85] I tend to disagree with this finding because it suggests that the court can *mero motu* decide on a stay of proceedings. Section 7 gives a party an option to approach the court either on declining jurisdiction or the stay of proceedings. This means that the court can only deal with either of these issues if there is an application by the party who seeks to enforce the exclusive choice of jurisdiction clause before it or if the party specifically stated in its pleadings why a court in South Africa cannot stay the proceedings.[86] Nowhere in the cases quoted

81 See the facts and ruling of the case in chapter 3.
82 2010 (6) SA 493 (SCA).
83 That the result of the arbitration proceedings would be determinative of the *in rem* proceedings instituted by the respondent, that the respondent's contention on stay of proceedings was speculative and that the court should uphold the party autonomy to refer cases for private arbitration.
84 Hare *Shipping Law* 145. See also Hofmeyr *Admiralty Jurisdiction* 69.
85 Hare *Shipping Law* 145.
86 *MV Spartan-Runner v Jotun-Henry Clark Ltd* 1991 (3) SA 803 (N).

above in which section 7 of the *AJRA* is interpreted did the court suggest that it can decide *mero motu* to stay the proceedings or decline jurisdiction due to insufficient grounds.

2.3 Choice of law

Once a court has taken jurisdiction over a case involving foreign element, it must decide on what law should be applied to the issues raised in the pleadings and in adjudicating the matter.[87] Edwards[88] observed that in recent years courts had used an expression "proper law of the contract" to indicate the appropriate legal system that was used to govern an international contract or a particular issue raised by parties to a contract. Just as in general contract law, the issue of choice of law is very much present in insurance contracts. The concern is normally over the proper law, governing law or applicable law of such insurance contracts. The proper law of an insurance contract governs almost all issues relating to the essential validity of the contract, interpretation of the terms of the policy and liability of the insurer to honour the insured claim, among others.[89] Reinecke, van Niekerk and Nienaber[90] are of the view that in order to determine the law governing an insurance contract with one or more international elements, there has to be three possibilities: (1) an express choice of law clause, (2) an implied choice of law and (3) an assigned law. Apart from these three possibilities, these writers mentioned tacit choice of law as another possibility.[91] Accordingly, each of these possibilities, including tacit choice of law, shall be discussed.

The first step in determining the proper law is to examine the insurance policy in order to establish whether there are any express terms in the parties' contract stating their agreed intention to a particular system of law to govern their contract.[92] A term in the policy specifying a legal system to govern the contract is known as an "express choice of law." Where there is an express choice of law, normally the courts will simply apply the chosen law as long as it is not inconsistent with the local legal

87 Forsyth *Private International Law* 195.
88 Edwards "Conflicts of Law" par 328-329.
89 Legh-Jones, Birds and Owen *MacGillivray on Insurance Law* 316.
90 Reinecke, van Niekerk and Nienaber "General Insurance Law" 6-340.
91 See also Forsyth *Private International Law* 325.
92 Legh-Jones, Birds and Owen *MacGillivray on Insurance Law* 316.

system.[93] The procedure followed by the court is that, first, the court will look for the express choice of law and thereafter at the substantive laws in a state to see if there is any statutory provision governing the issue or limiting application of the parties' selection.[94] In South Africa, however, the express choice of law rule can be limited by a statute and therefore exclusively oust the application of parties' choice of law.[95]
Sometimes parties to a contract do not explicitly state their intention to be governed by a certain legal system in the contract but their conduct tacitly expresses their intention to be bound by a foreign legal system.[96] Pretorius opines that the tacit choice of law is inferred from the legal system which is closely related or forms the most real connection to the parties' transaction.[97]

In the case of *Incorporated General Insurances Ltd v Shooter t/a Shooter's Fisheries*[98] the plaintiff was the owner of a motor fishing vessel, The *Morning Star*. The ship had been confiscated by the authorities of the People's Republic of Mozambique while trawling along the Mozambique coast on 12 April 1983. The owner instituted an action against the defendant insurance company for the sum for which the vessel had been insured under two marine insurance policies. Judgment was granted in favour of the plaintiff (owner) and the defendant (insurer) appealed. One of the issues to be decided by the court was the applicable law. Since the parties had not expressly stated the law governing their contract, the court had to resort to the closest connection between the transaction and the legal system which

93 Rosenberg and Another v Mbanga and Others (Azaminle Liquor (Pty) Ltd Intervening) 1992 (4) SA 313 (C) at 337 (E).
94 Forsyth Private International Law 10-13.
95 For example, s 47 of the *Electronic Communications and Transactions Act* (ECTA) 25 of 2002 provides that "the protection provided to consumers in [Chapter 7 of the act], applies irrespective of the legal system applicable to the agreement in question." Another example is found in s 306 of the *Merchant Shipping Act* 57 of 1951 which provides that Chapter VII of the act (dealing with salvage and incidental matters) shall apply in all cases determined in the Republic of South Africa irrespective of where the salvage service at issue was rendered. These two examples suggest that even though there is no general legislation in South Africa on exemption clauses in the South African law of contract, some statutes may contain provisions that specifically oust the application of foreign legal systems.
96 It must be noted that certain commercial contracts have established a rule that may point out an inferred or implied choice of law, for example, an arbitration clause in a contract has a strong belief that the domestic law of the chosen arbitrator shall apply as proper law. In the case of *The Industrie* [1894] 58 it was said that the use of technical terms of one legal system may be regarded as a tacit choice of law. In that case the contract contained the following phrases: "the Queen's enemies" and "an Act of God." It was inferred that the English law would apply because the nature of the words reflected Queen's language.
97 Pretorius 2010 *Obiter* 519.
98 1987 (1) SA 842 (A).

could apply and thereby apply the tacit choice of law principle in order to determine the applicable law. The court found that by their conduct, the parties had intended to use Roman-Dutch law as the governing law, and English law as the law to demonstrate, define and explain the legal terms in the contract. This point of view will surely resolve issues involving tacit choice of law being interpreted by courts. The issue of applicable law and exclusive jurisdiction will be crystal clear to the Admiralty Court. Dunt[99] is of the view that this decision led to most of the South African underwriters and brokers amending their insurance policies by explicitly stating that the entire policy was subject to English law, while reserving the right to litigate through the South African courts.

In the case of *Guggenheim v Rosenbaum (2)*[100] judge Trollip had the following to say with reference to a tacit choice of law:

> There are indications that the parties intended that our law should govern their contract. Defendant was domiciled in South Africa. His business was located here too. When he entered into the contract he was merely on a short visit to New York and intended returning to South Africa. They agreed that she should follow him here as soon as she could. It was intended that such a move was to be permanent and her home was to be in future in South Africa . . .

This *dictum* shows that the conduct of parties during the course of the contract can be used to show the parties' intention with regard to the system that would govern their agreement.

If there is no express or tacit choice of law in the contract between the parties, the second step to be considered when determining the choice of law is whether the conduct of parties suggests that parties impliedly agreed that their contract should be governed by a certain legal system.[101] Van Niekerk[102] believes that the proper law of the contract can be implied by the common intention of parties viewed from the nature of the contract, its terms, and surrounding circumstances such as the choice of forum and the place where the contract is concluded, to mention a few. Thus, the

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99 Dunt *International Cargo Insurance* 470.
100 1961 (4) SA 21 (W) 31.
101 Forsyth *Private International Law* 327.
102 Van Niekerk 1984 *MBL* 89. In this article van Niererk discussed in detail the proper law of a marine insurance contract.

legal system with which the contract has its closest and most real connection has been regarded as the most preferable test used by the courts when determining implied choice of law.[103]

The case of *Amin Rasheed Shipping Corporation v Kuwait Insurance Co* (the *Al Wahab)*[104] stands as the authority used to indicate the connecting factors that the court normally uses when determining the implied choice of law. In that case the Amin Rasheed Shipping Corporation, a Libyan company, owned Al Wahab, a small cargo vessel employed in trading in the Arabian Gulf. Al Wahab was insured against marine and war risks with the Kuwait Insurance Company. On entering Saudi Arabia, the vessel was confiscated by Saudi Arabian authorities for allegations of smuggling oil from Saudi Arabia to the Arab Emirates. Amin Rasheed Shipping Corporation tendered notice of abandonment of Al Wahab to the Kuwait Insurance Company on two occasions, and lodged a claim under its insurance policy. The insurance company rejected the insurance claims on both occasions. The shipping corporation sought to litigate in an English commercial court. One of the issues to be decided by the court was the issue of the proper law of the contract. The court laid down factors that needed to be taken into account when looking for the **closest and most real connection** between the transaction and the legal system to be applied.[105]

Firstly, the court has to take into account the nationality of the parties and their respective place of business. If parties are of the same nationality and conduct their business in the same state, it may be implied that these parties intended to be bound by the legal system of their nationality. Secondly, the court has to consider the currency used by parties as the mode of exchange in a commercial transaction. It is said that in an international commercial contract parties tend to adopt an international currency such as pounds sterling or US dollars rather than the national currency.[106] This can therefore suggest that parties intended that their contract

103 *Bonython v Commonwealth of Australia* [1951] AC 201, *Amin Sheed Shipping Co v Kuwait Insurance Co* [1984] AC 224 and *Ex Parte Spinnaze and Another NNO* 1985 (3) SA 650 (A).

104 [1984] AC 50 (HC) (hereinafter referred to as (the *Al Wahab* case).

105 *Amin Sheed Shipping Co v Kuwait Insurance Co* [1984] AC 224. See also *Ex Parte Spinnaze and Another NNO* 1985 (3) SA 650 (A) where judge Corbett said "a tacit choice of South African law, or at any rate, as showing South African law was the system with which the contract has its closest and more real connection" (at 665H).

106 See also van Niekerk 1984 *MBL* 90.

should be governed by the legal system of the currency agreed upon. This is more of a commercial and economics reason.

Thirdly, the court has to consider the place where the contract will be performed. Where parties to a contract undertake to perform the contract in a place other than the place where the contract was concluded, then parties would have impliedly chosen the law of that place to be the law governing their contract.[107] Generally, it would be reasonable to conclude that the law of the place of performance is the law that the parties intend to apply to their mutual performance. Fourthly, the court will have to consider the purpose for which the contract was concluded. Fifthly, the place where the contract was concluded, also known as *lex loci contractus* needs to be determined. As a general rule, *lex loci contractus* will determine the proper law unless the place of performance is not the place of execution of the contract.[108]

Finally, the assigned choice of law refers to the legal system that parties have subjected themselves to by looking at the casual link between the contract between the parties and the possible legal system to be applied.[109] In the English common law jurisdiction, Lord Wright's dictum in *Vita Food Products Inc v Unus Shipping Co Ltd*[110] has been precedence for the principle that contracting parties are free to select as the applicable law a system with which their contract has no any factual connection, on condition that the choice of law is *bona fide*, legal and does not contravene the public policy. It is my submission that the same holds true for South Africa.

Forsyth[111] is of the view that the choice of law clause in a contract may either be a replacement of all or part of the *ius dispositivium*,[112] which would govern with the

107 See also Nygh *Autonomy in International Contracts* 114.
108 See also Davids *Gordon & Gets* 111.
109 For example, where parties incorporated a certain portion of an Australian statute into their contract, then the statutory rules become terms of the agreement and must be interpreted as that they existed at the date of the incorporation.
110 1939 AC 277 (PC). Lewis JA in *Van der Westhuizen v Arnold* 2002 (6) SA 453 (SCA) 496E-G held that "In the absence of legislation regulating unfair contract terms, and where a provision does not offend public policy or considerations of good faith, a careful construction of the contract itself should ensure the protection of the party whose rights have been limited, but also give effect to the principle that the other party should be able to protect himself or herself against liability in so far as it is legally permissible." See also *Cape Group (Pty) Ltd t/a Forbes Waterproofing v Government of the United Kingdom* 2003 (5) SA 180 (SCA).
111 Forsyth *Private International Law* 317.

rules of some foreign system or an indication by parties of the legal system they wish to govern their entire contract. This statement connotes that the choice of law by parties to a contract can effectively avoid the *ius cogens*[113] norms of a legal system. As a matter of public policy, the English courts have treated the issue of *ius cogens* differently in that they have accepted that parties to a contract cannot agree to perform an act that is against public policy or a crime under the legislation prevailing in the place where the act is to be performed.[114] Forsyth is of the opinion that parties to an international contract should be exercising their party autonomy cautiously in order to avoid falling foul of the rules of other legal systems that could render their contract ineffective.[115]

Although the world advocates the autonomy of parties in choosing the law to govern their contracts and in forum shopping, this issue still presents many problems in international contracts.[116] Efforts have been made by the international community to harmonise private international law, but as long as the members to various conventions have not ratified these conventions into their domestic laws, the international arena will still be faced with issues of conflicts of law, which issues will still have to be decided according to the rules of private international law. Furthermore, where there are *ius cogens* statutes, the principles of private international law seem to be overridden by those statutes that are *ius cogens*. It is established above that marine insurance contracts are special contracts and the issue of choice of law in the said contracts have become very important after the introduction of the *AJRA*. It is, therefore, relevant to investigate the historical development of admiralty jurisdiction after the enactment of the *AJRA*. An investigation into the current status of the law and interpretation of certain provisions of the *AJRA* could tell much more about admiralty jurisdiction and the doctrine of party autonomy in South Africa.

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112 The *ius dispositivum* consists of rules that the parties to a contract may freely alter by agreement, eg, the warranty against latent defects in sales governed by Roman-Dutch law forms part of the *ius dispositivum*. Birds *Osborn's Concise Law Dictionary* 250.

113 The *ius cogens* consists of those imperative provisions that the parties cannot set aside by agreement. Birds *Osborn's Concise Law Dictionary* 250.

114 Forsyth *Private International Law* 324.

115 Forsyth *Private International Law* 324.

116 Forsyth *Private International Law* 362-365.

Chapter 3

Admiralty jurisdiction: An overview

3.1 Introduction

In this chapter the nature and the relevant principles regarding admiralty jurisdiction will be discussed briefly in the light of the South African *AJRA*.[117] The primary focus will be on the jurisdiction of the courts to adjudicate on maritime claims in circumstances where parties have exercised their autonomy under the law of contract. It is thus necessary to discuss parties' autonomy in the legal system and forum because it is essential to investigate whether there are any provisions of the *AJRA* that have an effect on party autonomy.

Jurisdiction is a core issue at the start of any proceedings and, once established, it continues until proceedings are determined, notwithstanding that the grounds of jurisdiction thereafter cease to exist.[118] Jurisdiction in maritime claims is known as "admiralty jurisdiction."[119] In South Africa the High Court has been given powers to hear and determine any "maritime claim" irrespective of where the claim arose; the place of registration of any ship concerned; or of the residence, domicile or nationality of its owner.[120] Although admiralty jurisdiction is said to be based on the nature of the claim in dispute without regard to the grounds on which the courts generally exercise the civil jurisdiction, Hare[121] points out that the scope of admiralty jurisdiction must not be allowed to be so wide that claims that do not properly fall within the purview of the admiralty proceedings in terms of the *AJRA* are entertained. Rather, in terms of section 7(1) of the act, the court must determine whether the claim is a maritime claim as defined by the *AJRA* and decide whether or not to exercise its discretion in admiralty jurisdiction.[122] I am of the opinion that where the parties to a maritime contract have specifically chosen a different jurisdiction, their

117 As stated in Chapter 1 of this research, the *AJRA* intends to improve the admiralty jurisdiction in South Africa.
118 Hofmeyr *Admiralty Jurisdiction* 20.
119 Shepstone & Wylie http://www.wylie.co.za/FileHandler.ashx%3D09a6397c.
120 S 2(1) *AJRA*.
121 Hare *Shipping Law* 17. See also Hofmeyr *Admiralty Jurisdiction* 92.
122 S 7(1) of the *AJRA*.

autonomy should be taken into account. Accordingly, a discussion shall follow on how the *AJRA* affects the principle of party autonomy.

3.2 The Admiralty Jurisdiction Regulations Act

The *AJRA* governs disputes arising from maritime claims in the Republic of South Africa. This act came into operation on 1 November 1983. The *AJRA* was enacted in order to repeal the *Colonial Courts of Admiralty Act,* 1890 of the United Kingdom in so far as it applied in the Republic of South Africa.[123] The principle objective of the *AJRA* is to give powers and jurisdiction of Admiralty Courts to the provincial and local divisions of the Supreme Courts in South Africa.[124] The Act is thus primarily and essentially concerned with the extension of admiralty powers to jurisdictional and procedural issues on any maritime claim brought before a court in South Africa.[125] The *AJRA* extended the jurisdiction of the (then) Supreme Court in admiralty to all maritime disputes.[126] This broad jurisdiction reflects the unlimited jurisdiction of the High Court and the constitutional right[127] of everyone in South Africa, *incola* or *peregrinus,* to have their maritime claims heard in a court of law.[128] According to Friedman,[129] the *AJRA* sought to resolve real maritime problems of real people in the shipping world with the objective of achieving a radical modernisation of different aspects of admiralty law and practice in South Africa. Hofmeyr[130] said that one of the objectives of the act was to develop the Roman-Dutch law as a modern system of maritime law.

The secondary concern of the *AJRA* is to provide a scope within which maritime disputes are brought to court, decided and fully satisfied.[131] Hofmeyr[132] points out that the *AJRA* did not attempt to define distinguishing features of admiralty law, namely

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123 Preamble, *AJRA*.
124 Hare *Shipping Law* 16.
125 Friedman 1986 *SALJ* 679.
126 S 2 of the *AJRA* sets the parameters of this jurisdiction.
127 S 34 of The *South African Constitution*, 1996 provides that everyone has a right to have any dispute resolved in a court or another independent and impartial tribunal or forum in South Africa.
128 Hare *Shipping Law* 17.
129 Friedman 1986 *SALJ* 679.
130 Hofmeyr *Admiralty Jurisdiction* 13.
131 The Act provides substantive law for resolving maritime disputes. See *Euromarine International of Mauren v The ShipBerg and Others* 1986 (2) SA 700 (A) 713 F-H.
132 Hofmeyr *Admiralty Jurisdiction* 14.

the maritime lien and the action *in rem*, but it served the essential nature of the action *in rem* by extending the arrest of the ship to include the right to arrest an associated ship and to obtain security in respect of proceedings either in South Africa or elsewhere. This is the case as long as the person making the arrest has a claim enforceable *in personam* against the owner of such property. The Act has, however, extended the scope of the action *in personam* by incorporating the common law attachment where a *peregrinus* can attach property in admiralty proceedings.[133] The Act has also given powers to the Admiralty Court to order security for costs and claims, examination, testing and inspection of ships, cargo, documents or for taking evidence of any person in order to determine any maritime claim or defence thereto.[134]

By extending jurisdiction regarding all maritime claims to the High Court, the act is said to be doing away with anomalous situations which may allow litigants to exercise their freedom of choice of law in the legal system **or a particular court** to adjudicate on disputes that may arise between them.[135] Hofmeyr[136] is of the opinion that before parties to the marine contract exercise their choice of law by including a jurisdiction clause in their contract, they should consider four preliminary aspects. First, parties have to decide on whether or not they intend to refer their disputes **exclusively** to the contractually chosen forum. This means that by putting a jurisdiction clause in the contract, parties will limit themselves to the contractually chosen forum only **regardless** of any circumstances surrounding the case. The second aspect is that the jurisdiction clause may allow proceedings to be brought in a forum other than the contractually chosen forum for security reasons only and none other (even compelling) reason;[137] for example, where the cause of action arose in a different jurisdiction and all the key witnesses in the case are in that jurisdiction, it will be more secure for proceedings to be brought in a forum other than the contractually chosen forum. This will be cost-effective, more convenient and the language of the court will be familiar to the witnesses. It thus follows that justice can best be achieved if the court of that forum as opposed to the chosen forum hears the

133 S 4(4) of the *AJRA*.
134 S 5(2) of the *AJRA*.
135 Staniland 2003 *Annual Survey* 856.
136 Hofmeyr *Admiralty Jurisdiction* 71. See also Hare *Shipping Law* 143.
137 Hofmeyr *Admiralty Jurisdiction* 71. See also Staniland *Acta Juridica* 1-33.

case. The third aspect is that the jurisdiction clause gives a very strong indication that the parties intend the law of the contractually chosen jurisdiction to govern their contract but, at the same time, they will invariably not exclude recourse to the proper law, which may in certain circumstances be an unsatisfactory situation.[138]

The fourth and final aspect is that the jurisdiction clause is rendered worthless by section 3 of the *COGSA*. This section specifically provides that as long as an event occurs that gives rise to a maritime claim within the territorial waters of South Africa, the High Court of South Africa shall have the admiralty jurisdiction in hearing the matter. It must be noted that this section covers the matter of jurisdiction only and not the applicable law.

Friedler[139] describes party autonomy as a practice used by parties to a contract (in this instance, marine insurance contracts) to exercise their freedom of choice of law they wish to govern their contract in case of any disputes arise from it. The contractual choice of law, autonomy and mutuality constitutes part of the contract by which parties will be bound and, at the same time, provides the legal basis (the applicable law) to the forum court or adjudicating court for the settlement of possible disputes.[140] The contractual choice of law may subject the contract, as well as the parties, to a legal system under which the rights and obligations of the parties will be determined.[141] However, even though parties to a contract may exercise their autonomy on the choice of law and subject themselves to a specific legal system or court of law to adjudicate in any dispute arising between them, when it comes to maritime claims in South Africa, the High Court has the last say on deciding on whether to exercise its admiralty jurisdiction under the *AJRA* or to allow the contractual party autonomy precept.[142] This chapter will investigate the relevant sections under the *AJRA* that may override the principle of choice of law under the law of contract.

138 Yntema 1953 *Am J Comp L* 51.
139 Friedler 1988-1989 *U Kan LR* 472.
140 Woodward 2001 *SMULR* 702.
141 Zhang 2008 *ALR* 133. See also Forsyth *Private International Law* 185.
142 S 7 of the *AJRA*.

3.3 Sections 1 and 2 of the Admiralty Jurisdiction Regulations Act

All the relevant definitions and scope of maritime claims covered by the *AJRA* are found in section 1. 'Admiralty action' has been defined as a "proceeding brought before the provincial or the local division of the Supreme Court (now the High Court) of South Africa for the enforcement of maritime claims, whether such proceeding is by way of action or any other competent procedure".[143] The admiralty action under the *AJRA* includes any ancillary or procedural measure whether by way of application or otherwise. Since the South African courts' admiralty jurisdiction is essentially based on the nature of the claim in dispute, the features of a "maritime claim" are extremely important in determining whether a court may exercise admiralty jurisdiction or not.[144]

Section 1 of the *AJRA* contains a list of all the maritime claims covered under the act. This list is considered to be a closed list of claims consignable in admiralty, but the fact that the court still has powers of joinder[145] and consideration of ancillary matters[146] means that the reach of the courts' admiralty jurisdiction is wide. Where the issue of whether or not a claim is a "maritime claim" arises in the course of proceedings, the High Court is expected to deal with the matter immediately.[147] If it reaches the conclusion that the issue is a maritime claim then a court competent to exercise admiralty jurisdiction must adjudicate on the matter. If the High Court, however, decides that the claim is not a maritime claim, the action must proceed to a court that has competent jurisdiction in respect of the matter.[148]

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143 S 1 of the *AJRA*.

144 Bradfield "Shipping" 3-65.

145 Section 5(1) of the AJRA. In *MY Summit One: Fareocean Marine (Pty) Ltd v Malacca Holdings Ltd* 2005 (1) SA 428 (SCA) the court held that an applicant for leave to join a third party either where the claim against the third party was not a maritime claim, or that party was not otherwise amenable to the court's jurisdiction, must generally make out a *prima facie* claim against such party.

146 S 5(2)(a).

147 For example, in *The Guzin S (No 1)* 2002 (6) SA 113 (D) the claim was based on a loan agreement secured by a mortgage on a ship. The issue was whether or not that was a maritime claim. The court held that a mortgage was an accessory to an obligation, and it could not exist on its own. Because of the interdependence between the loan agreement and security provided by the mortgage, the claim on a loan agreement constituted a maritime claim. Hofmeyr *Admiralty Jurisdiction* 29 submits that a maritime claim exists even where the mortgage on a ship intends to secure an advance for a non-maritime purpose. Hare *Shipping Law* 39 makes a similar submission.

148 Bradfield "Shipping" 3-65.

In the case of *Minesa Energy (Pty) Ltd v Stinnes International AG*[149] the applicant sold coal to the respondent. The coal was shipped to Spain. The respondent did not pay the full purchase price, alleging that it was entitled to set off certain claims for demurrage and damages arising out of the delay in loading the ships and transporting the coal. The issue was whether the applicant's claim for payment of the full purchase price constituted a maritime claim. Judge Bristowe[150] held that

> (t)he claim itself does not, as I see it, 'arise out of any agreement for or relating to the carriage of goods in a ship'. See s 1(1)(ii)*(h)*. None of the other definitions seem to be remotely relevant, including subpara *(z)*. In regard to the latter there was no suggestion advanced by either counsel that the present claim would have fallen within the old admiralty jurisdiction, nor am I aware of any basis upon which it could have done so. The claim arises out of an agreement which, it is true, refers to the carriage of the coal by sea, but that is not, it seems to me, enough to make it a maritime claim. I cannot believe that the mere claim for the purchase price of goods, which happen to be delivered by sea, can constitute a maritime claim. It must surely be a claim at least touching the carriage by sea in order to fall within subpara *(h)*, and here it is not the claim but the probable defence which touches the carriage by sea. To put it somewhat more fully, the applicant's claim does not arise out of an agreement for the carriage of goods in a ship. The purpose of the contract was sale, not carriage.

Section 2 of the *AJRA* states the following:

> (1) Subject to the provisions of this Act each provincial and local division, including a circuit local division, of the Supreme Court of South Africa shall have jurisdiction (hereinafter referred to as admiralty jurisdiction) to hear and determine any maritime claim (including, in the case of salvage, claims in respect of ships, cargo or goods found on land), irrespective of the place where it arose, of the place of registration of the ship concerned or of the residence, domicile or nationality of its owner.
>
> (2) For the purposes of this Act the area of jurisdiction of a court referred to in subsection (1) shall be deemed to include that portion of the territorial waters of the Republic adjacent to the coastline of its area of jurisdiction.

Because of this provision, the Admiralty Courts in South Africa have been exercising their discretion to entertain maritime claims listed under the Act even when parties to a contract have exclusively chosen a foreign legal system to govern their contract. In

149 1988 (3) SA 903 (D).
150 1988 (3) SA 903 (D) 906-907.

the case of *MV Achilleus v Thai United Insurance Co Ltd & Others*[151] Mr Justice Kriek exercised his discretion under the *AJRA* and refused a stay of proceeding with regard to a claim upon a bill of lading where an exclusive jurisdiction clause existed, stating that any dispute arising between the parties shall be submitted to a Greek court. The court dismissed the application for the stay holding and stated that the matter before it was a maritime claim under the provisions of the *AJRA*. The cause of action had arisen in South Africa, the majority of potential witnesses in the case were in South Africa and it would be unreasonable to have the matter heard in Greece.

This decision suggests that courts in South Africa can exercise their discretion under the *AJRA* and override an important principle of party autonomy in the law of contract. The next issue to be discussed is whether, in the event of an agreement by parties on the law applicable, the Admiralty Court in South Africa is expected to apply the foreign legal system to the exclusion of the Roman-Dutch law applicable in the Republic of South Africa. In order to answer this question, a brief discussion of sections 3 and 6 is essential.

3.4 Section 3 of the Admiralty Jurisdiction Regulations Act

Section 3(1) of the *AJRA* formulates the principle that subject to the provisions of the Act any maritime claim may be enforced by an action *in personam*.

Enforcement of maritime claims before Admiralty Courts can be done by bringing proceedings by way of action or application or any other competent procedure otherwise required.[152] Such proceedings are governed by the *AJRA* and the Admiralty Rules. The provisions of section 3 of the *AJRA* lay down the procedures for bringing proceedings by way of action. Proceedings can be brought by way of an action *in rem* or an action *in personam* or both.[153] The action *in rem* is linked to an arrest *in rem* of maritime property.[154] A claimant may enforce a maritime claim *in rem* if he or she has a maritime lien over the property to be arrested or if the owner of the property to be arrested would be liable to the claimant in an action *in personam* in

151 1992 (1) SA 324 (N).
152 Bradfield "Shipping" 3-65.
153 S 3(1), 3 (4) and 3(5) of the *AJRA*.
154 Bradfield "Shipping" 3-65. See also Hofmeyr *Admiralty Jurisdiction* 3. Hare *Shipping Law* 80.

respect of the cause of action concerned.[155] These two situations are complemented by the additional "stand-alone" remedy of proceeding against an "associated ship".[156] The procedures for bringing an action *in rem* start by the plaintiff issuing a writ of summons as prescribed in Form 1 of the Admiralty Rules, followed by an application to the Registrar of the High Court for issuing of an arrest warrant, supported by a Rule 4(3) certificate signed by the applicant or his or her practitioner.[157] If the claimant has "arrest security" lodged to prevent an arrest, the Registrar shall refer the matter to the judge who is then likely to issue a rule *nisi* with an arrest operating as an interim measure pending the return day of the rule.[158] The arrest warrant shall then be served on the defendant. Such service shall confirm the jurisdiction of the court, as expressed in the writ of summons.[159]

The action *in personam* is essentially the civil enforcement remedy entertained by South African courts in the exercise of their general, or ordinary, civil jurisdiction.[160] Therefore, in contrast, the procedures for bringing an action *in personam* start by bringing an action (in the inland courts having jurisdiction) limited to ownership, for attachment of maritime property arising from delivery and possession or disputes relating to a container or to dock or similar charges, and charter party and marine insurance disputes regarding the claim that arises from an agreement concluded within that inland jurisdiction.[161] In this regard, inland courts in an action *in rem* can arrest maritime property without restriction, whereas in an action *in personam* the inland courts are restricted to maritime claims arising from the agreement concluded within the inland jurisdiction. It is important that the action *in rem* and the action *in personam* and their *nexus* with the principle of party autonomy in admiralty jurisdiction in South Africa be discussed briefly.

3.4.1 The procedure for the attachment in personam: Section 3(2) of the AJRA

Section 3(2) of the *AJRA* provides the following:

155 Hare *Shipping Law* 80.
156 Hare *Shipping Law* 81. See also Hofmeyr *Admiralty Jurisdiction* 207.
157 Admiralty Rules 2 and 4.
158 Admiralty Rule 4(2)(c).
159 Hare *Shipping Law* 83. See also Hofmeyr *Admiralty Jurisdiction* 207.
160 Bradfield "Shipping" 3-65.
161 Hare *Shipping Law* 71.

An action *in personam* may only be instituted against a person—

(a) resident or carrying on business at any place in the Republic;

(b) whose property within the court's area of jurisdiction has been attached by the plaintiff or applicant, to found or to confirm jurisdiction;

(c) who has consented or submitted to the jurisdiction of the court;[162]

(d) in respect of whom any court in the Republic has jurisdiction in terms of Chapter IV of the Insurance Act, 1943 (Act 27 of 1943);[163]

(e) in the case of a company, if the company has a registered office in the Republic.

It thus follows that if any of the above scenarios occurs, an action *in personam* can be brought in any inland or coastal court in the Republic of South Africa. Thus, where a defendant is a *peregrinus* and is required by law to subject himself or herself to the jurisdiction of a South African court in maritime claims, an action *in personam* may be instituted against that person by his or her concession or submission to the jurisdiction of the court.[164] Attachment *in personam* to found or confirm jurisdiction in admiralty differs from such attachment in the courts' exercise of their general civil jurisdiction in that it does not require the presence of any other recognised ground of jurisdiction.[165] With limited exceptions, any property belonging to the defendant may be attached *in personam* to found or confirm jurisdiction. In addition, an associated ship may be so attached *in personam*, if that ship would have been an associated ship if the action concerned had been an action *in rem*.[166] Submission that is referred to under this Act can therefore be done expressly through contractual terms or impliedly by the conduct of the parties.

In the case of *Transnet Ltd v Owner of the MV "Alinal"*[167] the defendant's conduct of entering an appearance to defend was regarded as a submission to South African jurisdiction. In this case an *ex parte* application was brought by Transnet for an attachment of the vessel *Alinal* with a view to starting an action *in personam* against the owner of the vessel. The owner opposed the action on the ground that there had been abuse of the court process. On appeal, appeal judge Wallis examined the

162 See *Devonia Shipping Ltd v MV Luis (Yeoman Shipping Co Ltd Intervening)* 1994 (2) SA 363 (C) where judge Rose Innes said that for an action *in personam* to be brought in South Africa, the court had to establish that a defendant had consented or submitted to the jurisdiction of the court.

163 This subsection should now be read to refer to Chapter VIII of the *SIA*.

164 Hare *Shipping Law* 75. See also Hofmeyr *Admiralty Jurisdiction* 207.

165 Hofmeyr *Admiralty Jurisdiction* 207

166 Bradfield "Shipping" 3-65. See also Wallis *et al The Associated Ship* 378-9 and Hofmeyr *Admiralty Jurisdiction* 75- 6.

167 2011 (6) SA 206 (SCA) 224.

fundamental principle of jurisdiction in terms of South African law and came to the conclusion that the conduct of the owner in entering an appearance to defend proclaimed its willingness to submit to a South African court on a claim raised by Transnet. The appeal judge said that when a maritime claim was brought before a court, determination of whether the defendant had subjected himself or herself to the admiralty jurisdiction under the *AJRA* can be judged from, first, determining whether the matter before the court was a maritime claim[168] and, second, by taking into consideration the defendant's action of entering an appearance to defend.[169] The existence of these two elements suggests that the Admiralty Court will have jurisdiction to adjudicate on the maritime claim even where the parties have exercised their autonomy on choice of law regarding the marine contract, that is, the existence of the two elements will disregard the parties' reliance on the jurisdiction clause in their underlying marine contract.

3.4.2 The procedure for the arrest in rem: Section 3(4) and (5) of the Admiralty Jurisdiction Regulation Act

It is imperative to discuss the procedure of instituting an action *in rem* in order to determine the exact time when instituting an action *in rem,* because it may affect the choice of law under the underlying contract. The procedures for arrests *in rem* are dealt with under section 3(4) and (5) of the *AJRA*. A claimant may enforce a maritime claim *in rem* on two grounds set out by section 3(4) of the *AJRA*. This section states the following:

> (4) Without prejudice to any other remedy that may be available to a claimant or the rules relating to the joinder of causes of action a maritime claim may be enforced by an action *in rem*
> (a) if the claimant has a maritime lien over the property to be arrested; or
> (b) if the owner of the property to be arrested would be liable to the claimant in an action *in personam* in respect of the cause of action concerned.
>
> (5) An action *in rem* shall be instituted by the arrest within the area of jurisdiction of the court concerned of property of one or more of the following categories against or in respect of which the claim lies:
> (a) The ship, with or without its equipment, furniture, stores or bunkers;

168 In terms of s 1 of the *AJRA*.
169 If the owner did not want to submit to South Africa jurisdiction, he should not have continued filing any further pleadings in the action against him. That way the plaintiff would only enforce the lien on the *res*.

(b) the whole or any part of the equipment, furniture, stores or bunkers;
(c) the whole or any part of the cargo;
(d) the freight;
(e) any container, if the claim arises out of or relates to the use of that container in or on a ship or the carnage of goods by sea or by water otherwise in that container;
(f) a fund.

In order for an action *in rem* to take place, the claimant must, on a balance of probabilities, prove first of all that the claim is a "maritime claim" as defined by the act.[170] Secondly the claimant must prove that the court has jurisdiction to try the merits of the claim.[171] Furthermore, it is essential that it be proven that the property to be arrested is maritime property amenable to arrest in terms of section 3(5) of the act. The claimant must prove that the said property is already situated in, or is likely to come within, the jurisdiction of the court.[172] Lastly, the claimant must prove that the property to be arrested is the property against which the claim lies.[173] Admiralty Rule 4 prescribes the procedure for bringing an action *in rem* and for the release of property.[174] The rule provides that an arrest is effected by the service of a warrant of arrest in accordance with the Admiralty Rules or by giving security in terms of section 3(10) of the *AJRA*.

In an action *in rem* the choice of jurisdiction in the contract may be disregarded by the conduct of parties.[175] Mr Justice Van Heerden in *Mediterranean Shipping Co v Speedwell Shipping Co Ltd*[176] said that if the conduct of a party was unilaterally consistent with the alleged submission, then it would be concluded that a party submitted to the jurisdiction of a certain court. Hofmeyr[177] opines that a party who invokes the act and obtains an order is taken to have submitted to the jurisdiction by conduct. Investigation into the advantages and disadvantages of proceeding by

170 S 1 of *AJRA*.
171 Hofmeyr *Admiralty Jurisdiction* 121.
172 See *MT Argun v Master and Crew of the MT Agrun and Others* 2004 (1) SA 1 (SCA) where the appeal judge Farlam held that the property to be arrested in an action *in rem* should be within the jurisdiction of the court. It was held, however, that an admiralty action *in rem* did not fall away when the arrest by which it was instituted fell away.
173 Hare *Shipping Law* 84. See also Bradfield "Shipping" 3-65.
174 Hofmeyr *Admiralty Jurisdiction* 156. See also Bradfield "Shipping" 3-65.
175 See *The Alina II case* 2011 (6) SA (SCA) 224. Refer to the discussion on p 33 of this research.
176 1986 (4) SA 329 (D) 333 (F).
177 Hofmeyr *Admiralty Jurisdiction* 187; eg, a party who approaches the court for an order of attachment is impliedly taken to have submitted to the jurisdiction of that court and the court will have jurisdiction to hear a counterclaim against that party in terms of s 5(4) of the *AJRA*.

action *in rem* will lead to a proper understanding of how the choice of law is influenced by the provisions of the *AJRA*.

3.4.3 Advantages and disadvantages of proceeding by action in rem

Bringing an action *in rem* as a separate action has a number of advantages. The first advantage is the fact that the creditor under an action *in rem* is allowed to sue the *res* without having to be concerned with the identity of the owner of the *res*.[178]The second advantage is with regard to jurisdiction. When bringing an action *in rem*, the claimant need not consider jurisdictional issues, that is, the action is not limited to inland divisions. The jurisdiction is extended to maritime divisions.[179]

The third advantage is the fact that the creditor obtains security for the claim that is not affected by the occurrence of events before judgment which would otherwise defeat the claim.[180] The case of *MV Jute Express v Laden on Board the MV Jute Express*[181] gives an illustration of this advantage. The plaintiff sued by way of an action *in rem* for damages for "delivery in a damaged condition" and "short delivery" of cargo carried by the defendant from Santos to Durban. The defendant furnished security for the plaintiff's claim. The issue before the Appeal Court was whether in terms of the *AJRA* an admiralty action was started by the arrest or by the issuing of summons. The court held that where credit had been tendered, there was no need for summons to be issued and, therefore, the arrest could be made before issuing summons in an action *in rem*. Once an action *in rem* is instituted and the *res* arrested, the claim will be unaffected by the occurrence of events before the judgment, except in the rare situations where other creditors may prove their claims against the defendant and enjoy preferential ranking in terms of the *AJRA*.[182] The fourth advantage is that while the property of an *incola* cannot be attached in an action *in personam*, such property can be attached in an action *in rem*.[183]

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178 Hofmeyr *Admiralty Jurisdiction* 51.
179 S 3(3) of the *AJRA*, courts of which the jurisdiction area is adjacent to the territorial waters of the Republic of South Africa.
180 *The Jute Express* 1992 (3) SA 9 (A) 17J-18A.
181 1992 (3) SA 9 (A).
182 Hare *Shipping Law* 79. See also Bradfield "Shipping" 3-65.
183 Hofmeyr *Admiralty Jurisdiction* 51. See also Bradfield "Shipping" 3-65. See also Hare *Shipping Law* 79.

As much as these advantages contribute towards making an action *in rem* more preferable as opposed to an action *in personam*, one major disadvantage to bringing an action *in rem* is the fact that once the property is arrested, the defendant will be obliged to furnish security on the value of the *res* or the claim, whichever is lesser, in order to release the property attached in an action *in rem*.[184] This is regarded as a disadvantage because in an action *in personam* the defendant can make an application to release the property attached *in personam* when security is put to the value of the claim and not the value of the *res*. Another disadvantage to proceeding with an action *in rem* is the fact that execution of the property in an action *in rem* is limited to the specific *res* attached, whereas execution of property *in personam* can be on any property belonging to the owner and is not limited to the property attached.[185] Although having a provision on the choice of law for a specific contract may expedite an action *in rem*, section 6 of the *AJRA* provides for the law applicable to the resolution of maritime disputes. A discussion of the provisions of section 6 and its relevance to the principle of choice of law will follow.

3.5 Section 6(1) of the Admiralty Jurisdiction Regulations Act

The law applicable to the resolution of disputed claims in admiralty is to be determined by the provisions of section 6 of the *AJRA*. The first and most important aspect to be determined is whether there is a statute or statutory provision applicable to the claim in dispute and, if there is, then generally, that statute will apply.[186] If there is no statute or statutory provision applicable to the specific situation, the court will generally give effect to the provisions of the underlying contract between the parties as to the law applicable.[187] Statutory provisions, however, tend to restrict the parties' autonomy to choose the law to govern their contract. Where there is no statutory provision applicable and parties to the dispute have not agreed on the applicable law, section 6(1) of the *AJRA* shall apply.[188]

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184 Admiralty Rule 5(4).
185 Hofmeyr *Admiralty Jurisdiction* 52.
186 Bradfield "Shipping" 15-33.
187 Hofmeyr *Admiralty Jurisdiction* 71.
188 Bradfield "Shipping" 9-33.

This section differentiates between maritime claims over which South African courts exercised admiralty jurisdiction before the commencement of the *AJRA* and claims that were added by the Act as new heads of jurisdiction.[189] The Act draws a distinction between matters in respect of which local Admiralty Courts had jurisdiction before the introduction of the *AJRA* where English law applied, and maritime claims as introduced by the Act where Admiralty Courts have to apply the Roman-Dutch law.[190] The introduction of the *AJRA* raises the question as to what law should be applied in the Admiralty Court with regard to marine insurance contracts in terms of section 6(1) of the *AJRA*: is Roman-Dutch law to be or not to be applied? This question will be answered after examining the provisions of section 6 of *AJRA*.

Section 6 (1) reads:

> 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[191] 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,[192] apply the Roman-Dutch law applicable in the Republic.

According to the above provisions, it is clear that the *AJRA* allows for the application of either Roman-Dutch or English law depending on the subject matter and nature of the maritime claim involved. As mentioned in Chapter 1 of this study,[193] before the introduction of the *AJRA*, the *English Colonial Courts of Admiralty Act*, 1890 was applied in South Africa. Section 6(1)(a) of the *AJRA* was therefore introduced to modernise the admiralty law of South Africa.[194] The English law applicable under this

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189 *Brady-Hamilton Stevedore Co v MV Kalantiao* 1987 (4) SA 250 (D) 253D.
190 S 6(1) of the *AJRA*.
191 For example, claims related to salvage, damage, bottomry and *respondentia* bonds, seamen's wages, master's wages and disbursements, towage, pilotage, and cargo; Hare *Shipping Law* 38.
192 For example, the ownership of a ship or a share in a ship, the possession, delivery, employment or earnings of a ship, agreement of sale of a ship, damage caused by or to a ship, carriage of goods in a ship or any agreement relating to such carriage; Hofmeyr *Admiralty Jurisdiction* 26.
193 Chapter 1 of this research.
194 Bradfield "Shipping" 7-33.

section is the English maritime law as it existed in 1983. According to Hare,[195] the effect of this section was to strike a compromise between the English law pragmatists and the Roman-Dutch purists, during the early years of the *AJRA*. Waring[196] states that the usefulness of Roman-Dutch law with reference to maritime law has been seriously doubted and English law can probably be heavily relied upon in instances where the selfsame clauses in a contract of marine insurance to be interpreted by a South African Admiralty Court have already been construed in an English judgment. Roman-Dutch law is said to be authoritative in general principles of contract such as marine insurance contracts but not in adjudicating maritime claims *per se*.[197]

The first problem with the above approach relates to the exact date relevant in determining the jurisdiction of the Colonial Court of Admiralty. Is it the date when the *Colonial Court of Admiralty Act* of 1890 was passed by Parliament on the 25th July 1890, or the date when it was enforced in South Africa, which was the 1st of July 1891.[198] In *The Shipping Corporation of India Ltd v Evdomon Corporation & Another* (the *Voilabhbai Patel* case)[199] Chief Justice Corbett held that the date to be applied was the date when the act was passed by the British Parliament on 25 July 1890.

In the case of *MV Stella Tingas: Owners of the The MV Stella Tingas v MV Atlantica and Another*[200] a collision took place while MV Stella Tingas was lying alongside a berth in Durban while loading. The MV Atlantica, a bulk carrier of 224 metres long and some 65 000 tonnes, entered the port of Durban under compulsory pilotage of Transnet (that means the pilot in charge of the vessel at the time of the collision was a pilot from the port of Durban). The MV Atlantica collided with the MV Stella Tingas and damaged her. A maritime claim within the jurisdiction of the Admiralty Court was brought against the MV Atlantica. The claim was partly based on gross negligence on the part of the pilot for whose negligence the owner of MV Atlantica instituted court proceedings. The issue that arose was whether English law or Roman-Dutch

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195 Hare *Shipping Law* 25. Hofmeyr *Admiralty Jurisdiction* 91 opines that this section was intended to supplement the Roman-Dutch law.
196 Waring *Charterparties* 5.
197 Bradfield "Shipping" 9-33.
198 Stiebel 2001 *SA Merc LJ* 238.
199 1994 (1) SA 550 (A) 560B.
200 2003 (2) SA 473 (SCA)

law was applicable. The Court of Appeal held that because pilotage and damage caused by a ship were matters over which the colonial court of admiralty had jurisdiction in 1890, English law was to apply in the absence of an overriding South African statute. However, in this case, there was a specific statute[201] in South Africa dealing with the matter and therefore the provisions of sections 6(2) of the *AJRA* had to be taken into account.

Bradfield[202] is of the opinion that where a maritime claim would, before the *AJRA* had come into force, have fallen within the jurisdiction of a South African court sitting as a court of admiralty, English law was applicable. However, he goes on to state that the application of English law in the twenty-first century would suggest that the South African Admiralty Courts lacked either capacity or the ability to develop South African maritime law;[203] in other words, in a common case there is now nothing that prevents the application of South African law. To my mind, this is the correct interpretation of the legal position.

This clearly shows that the application of section 6(1)(a) of the *AJRA* for maritime claims where the cause of action arose before the *AJRA* came into force was appropriate at the early introduction of the *AJRA*. According to Staniland,[204] section 6(1)(a) no longer serves a purpose in the twenty-first century, especially when there is a statute in South Africa that covers the maritime claim in question. Hare[205] submits that this section was a "jurisdictional nursemaid" that might have been useful during the early introduction of the *AJRA* to strike a balance between the English law and Roman-Dutch law. Stiebel[206] said that it was hailed as a great compromise between the English law and Roman-Dutch law and had been ignored in all but a handful of reported admiralty judgements. Friedman[207] submits that section 6 created more problems than it has resolved. I strongly agree with these writers because the main idea of carrying over the applicability of English law into the *AJRA* was to ensure that the few maritime claims that were either not covered by the *AJRA* or

201 *Legal Succession Act* 9 of 1989.
202 Bradfiled "Shipping" 11-33.
203 Bradfield "Shipping" 33.
204 Staniland 2003 *Annual Survey* 865.
205 Hare *Shipping Law* 24.
206 Stiebel 2001 *SA Merc LJ* 241.
207 Friedman 1986 *SALJ* 678.

where the cause of action that arose before the introduction of the *AJRA* were properly dealt with. The *AJRA* has been in operation for three decades now, and with a few amendments to it and a number of court cases to establish precedent, the law has developed enough to stand on its own without making reference to English law, except in very rare situations where there is no authority available such as decided cases. In these circumstances the English law can still act as a highly persuasive authority.

Bradfield[208] states that the meaning of section 6(1) depends, at the outset, on the proper definition of the particular maritime claim and the absence of South African legislation dealing with it. However, where a maritime claim is neither provided under the *AJRA* nor the English law before 1983, Roman-Dutch law shall apply and therefore section 6(1)(b) of the *AJRA*.[209] Hofmeyr[210] submits that English law will apply in any of the following circumstances: firstly, where there is no South African statute governing the maritime claim in dispute; secondly, where the statute is silent on a particular maritime claim; or, thirdly, because expressions and the ordinary meaning of the maritime claim cannot be found under the provisions of the *AJRA*.

Section 6(1)(b) establishes the fact that in all other matters that could not be dealt with by the Colonial Courts of Admiralty in 1890 Roman-Dutch law prevailed. In the case of *Shooter t/a Shooter's Fisheries v Incorporated General Insurance Ltd*[211] the plaintiff was the owner of a motor fishing vessel *The Morning Star*. The vessel had been confiscated by the authorities of the People's Republic of Mozambique while trawling along the Mozambican coast on 12 April 1983. The owner instituted an action against the defendant insurance company for the sum for which the vessel had been insured under two marine insurance policies. The action was brought pursuant to the provisions of the *AJRA*. Judge Friedman interpreted the provisions of section 6(1)(b) by stating that the court had admiralty jurisdiction in respect of a "maritime claim" in terms of section 1 of the *AJRA*. Consequently, the action had to be decided by means of the application of the principles of the Roman-Dutch law.

208 Bradfield "Shipping" 30-33.
209 Girdwood 1995 *SA Merc LJ* 330.
210 Hofmeyr *Admiralty Jurisdiction* 89.
211 1984 (4) SA 269 (D) 272 (I).

In trying to avoid the dilemma between applying Roman-Dutch law and English law, some judges have ignored interpreting the provisions of section 6(1) in their judgments even when the section was relevant in the proceedings. Stiebel,[212] in discussing the case of *The Wave Dancer: Nel v Thoron Screen Corporation (Pty) Ltd & Another*,[213] said that if parties to a marine dispute did not raise the question of jurisdiction before the Admiralty Court, the court was not precluded from exercising its ordinary civil jurisdiction. The Admiralty Court is given powers in both civil jurisdiction and admiralty jurisdiction. Even though the court is clothed with both ordinary civil jurisdiction and admiralty jurisdiction, certain academic writers began to ask the question: what is the true intention of the legislature when enacting the *AJRA*? Did the legislature intend to provide the court with options on whether to apply civil or admiralty law or did it intend to give the Admiralty Court exclusive jurisdiction over maritime claims?

These questions were answered by judge Page in *Peros v Rose*[214] where he held that the intention of the legislature in matters that fell within the ambit of section 6(1) of the Act was to confer upon the Supreme Court (now High Court) exclusive jurisdiction to adjudicate on maritime claims. That means any claim brought under the Act must be of a maritime nature. Hofmeyr[215] believes that though the series of amendments to the Act expanded the boundaries of admiralty jurisdiction other than the original intended scope of the legislature, such extensions must not be allowed to include claims that do not properly fall within the purview of admiralty proceedings. Mr Justice Louw in *MV Navigator and Another v Wellness International Network Ltd*[216] said that section 2(1) of *AJRA* gave an Admiralty Court jurisdiction of hearing and determining maritime claims. However, if that court gave an order of leave to appeal to the Supreme Court of appeal, all matters referred to appeal, including ancillary claims such as security for cost would be decided by the Supreme Court.[217]

When the above opinions and submissions of different writers are considered, it is evident that the application of section 6(1) can only hold water where there is no

212 Stiebel 2001 *SA Merc LJ* 249.
213 1996 (4) SA 1167 (A) 1188H.
214 1990 (1) SA 420 (N) 424.
215 Hofmeyr *Admiralty Jurisdiction* 21.
216 2004 (5) SA 29 (C) 37.
217 That means the admiralty court cannot retain jurisdiction after granting leave to appeal.

statute governing the maritime claim before the Admiralty Court as provided for under section 6(2). This suggests that making reference to English law is no longer necessary in South African admiralty practice, except in rare cases where there is no statutory provision on the maritime claim or, I submit, case law on a specific point of law. I therefore submit that even though it is clear that section 6 does not touch on the issue of jurisdiction, but rather the issue of the legal system to be applied in resolving a maritime dispute, South African Admiralty Courts may well consider international developments in admiralty law from other legal systems such as Australia, the United States of America and Canada[218] in order to develop South African admiralty law. Therefore, I submit that, perhaps the original work of section 6 of the *AJRA* under the *Admiralty Jurisdiction Regulations Bill,* where regard and consideration of foreign maritime legal systems had to be had, should have been reserved.[219]

3.6 Section 6(2) of the Admiralty Jurisdiction Regulations Act

Section 6(2) provides 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.

The purpose of this section is to subject both the English law and the Roman-Dutch law to any local statute relevant to the matter under consideration.[220] Bradfield[221] correctly states the implication is then that cognisance must be taken of the fact that the application of English law under the provisions of section 6(1) cannot be taken to have impliedly repealed all South African statutes dealing with maritime claims so as to allow the application of English statutes.

The Supreme Court of Appeal in the case of *Transnet Ltd t/a Portnet v Owners of the MV Stella Tingas*[222] explained the relationship that existed between sections 6(1) and

218 All these systems are based on the English law.
219 GN 258 of 1982 GG 8168 of 23 April 1982.
220 Hofmeyr *Admiralty Jurisdiction* 86.
221 Bradfield "Shipping" 30.
222 2003 (2) SA 473 (SCA) 479.

section 6(2) of the *AJRA*. As discussed above, the *MV Stella Tinga* was lying alongside a berth in the port of Durban while loading cargo when the *MV Atlantica* collided with and damaged her. A maritime claim within the jurisdiction of the Admiralty Court was brought against *MV Atlantica.* The claim was partly based on an allegation of gross negligence on the part of the pilot of *MV Atlantica* by reason of section 35 of the *United Kingdom Pilotage Act*, 1983 which, it was argued, was applicable by virtue of section 6(1) of the *AJRA*. In the High Court Mr Justice Booysen held that the pilot was liable for gross negligence and *MV Atlantica* was liable for the negligence of the pilot, accordingly liable in damage. When this matter was taken to the Supreme Court of Appeal to decide on whether the *United Kingdom Pilotage Act*, 1983 applied or the *South African Legal Succession Act,*[223] appeal judge Scott held that the *Legal Succession Act* would apply. The judge held that section 6(1) of the *AJRA* was subject to the provisions of section 6(2). Therefore, since there was a South African statute governing the claim, the provisions of sections 6(2) of the *AJRA* would prevail.

The above discussion suggests that the application of section 6(1) depends on the existence or non-existence of a local statute under the provisions of section 6(2). In this regard, section 6(2) is simply declaratory of the position that applied before the commencement of the *AJRA* that an Admiralty Court, although applying English admiralty law, was always obliged to give effect to the local statutory provisions in South Africa relating to matters that came before it.[224] It is, therefore, essential to determine the impact of these subsections of section 6 on the choice of law and jurisdiction. In order to show that the *AJRA* still advocates the principle of choice of law, an investigation into subsection 6(5) becomes relevant.

3.7 Section 6(5) of the Admiralty Jurisdiction Regulations Act

Section 6(5) of the AJRA stipulates that

> (t)he provisions of subsection (1) shall not supersede any agreement relating to the legal system of law to be applied in the event of a dispute.

223 9 of 1989.
224 Hofmeyr *Admiralty Jurisdiction* 86.

This is a very important subsection. With this provision the *AJRA* acknowledges an agreement reached between parties in respect of a choice of legal system to oust the statutory mechanism introduced by the act. The intention of section 6(5) is to reserve the right of the parties to agree on the law to be applied; whether the English law or the Roman-Dutch law or any other legal system.[225] Most shipping claims involve contracts and these contracts provide for a choice of law clause in addition to the choice of forum. It is submitted, however, that despite the fact that the *AJRA* upholds the principle of choice of law under the provisions of section 6(5), in few cases where the court had the option of applying the chosen legal system it employed it as a rather persuasive law rather than applicable law.[226] In the case of *MV Spartan-Runner v John-Henry Clark Ltd*[227] judge Shearer said that "(t)he parties have, in terms of an agreement between them, chosen specified foreign courts and foreign law . . . for the resolution of their disputes" such a fact is important in determining jurisdictional issues. The court in this case made reference to English law when establishing the applicable, and the dispute was referred to the foreign tribunal as agreed by parties but nothing about section 6(5) was mentioned and how it ought to have been applied.

Moreover, it is submitted that there is a limitation on the general right given to the parties under section 6(5) to reach a consensus on the legal system to be applied in the event of a dispute.[228] According to Hofmeyr,[229] this limitation plays a role where there is a specific peremptory provision in a statute to be applied to a particular maritime claim or where the local statute regulates the public policy, interest or a right. This means that regardless of the choice of law, in South Africa, if there is a peremptory statute that governs a particular maritime claim, the underlying contract between the parties will be not to override the peremptory statute.

225 Bradfield "Shipping" 31.
226 Stiebel 2001 *SA Merc LJ* 253.
227 1991 (3) SA 803 (N) 803. See also *Dias Compania Naviera SA v MV Al Kaziemah & Others* 1994 (1) SA 570 (D) where the court applied Greek law to many of the issues because it was the law agreed to by the parties. However, no mention was made of the fact that the court can only uphold such an agreement on choice of law in terms of the provisions of section 6(5) of the *AJRA*.
228 Bradfield "Shipping" 31-33.
229 Hofmeyr *Admiralty Jurisdiction* 87.

Generally, the power of parties' autonomy to choose a foreign legal system to govern their contract is not significantly limited in South African law. There is virtually an unlimited choice of law.[230] This can create the impression that parties' autonomy will only be limited or ignored if made in *fraudem legis* and with the intent to avoid a peremptory, non-renounceable provision (ie, a *ius cogens* rule, as opposed to a *ius dispositivum* rule) of the local applicable legal system.[231] It means that parties cannot choose a foreign legal system in order to make an illegal contract legal, or to give one or both of them a right specifically and on the grounds of public policy denied by the South African legal system. Van Niekerk[232] has listed recognised limitations of parties' choice of foreign law to govern their contractual relationships:

(i) A choice that is meaningless or practically incapable of implementation (for example, a choice of different or alternative legal systems to govern different aspects of or claims under the contract, or of a supra- or non-national "system of law" such as the international law merchant or equitable principles);

(ii) a prohibition on the exclusion of either the mandatory rules of the system that would have applied in the absence of the parties' choice, or the mandatory rules of the law of the forum, or the mandatory rules of the law of the state in which the risk is situated or which imposes the obligation to take out the insurance in question;[233]

(iii) the fact that certain matters such as the parties' capacity to contract, or the formalities of the particular type of contract, or the validity including the legality of the contract, fall outside the scope of a choice of proper law;[234] and

(iv) a choice of foreign law not made in good faith but with the (fraudulent) intention to evade mandatory rules – usually involving a financial or fiscal duty on one of the parties – of the otherwise applicable system.[235]

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230 Forsyth *Private International Law* 295.

231 Van Niekerk 2010 *SA Merc LJ* 603-604 where he talks about choice of law in marine insurance contract in South Africa.

232 Van Niekerk 2011 *SA Merc LJ* 166 where he talks about the unjustified choice of law in marine insurance contracts in South Africa.

233 For example, in the case of *Henry v Branfield* 1996 (1) SA 244 (D) where the contract of sale was governed by Zimbabwean dollars in return for South African rands. Judge Levensohn held that such a contract was illegal because it contravened the South African foreign exchange regulations. The contract was also a nullity in Zimbabwe because it would breach the Zimbabwean foreign exchange regulation. The court concluded it would be against public policy to enforce such a contract.

234 For example, a well-known agent in a marine contract concludes a contract on behalf of the principal. When the principal is sued and claims incapacity due to the fact that in terms of the chosen law, the agent would not be allowed to enter into such a contract without the written consent of the principal, the court can decline the application of foreign law in such cases.

235 For example, if the choice of law is evasive, was made in order to avoid the provisions of any statute in South Africa and is not *bona fide*, its application will not be allowed in the Republic of South Africa (Forsyth *Private International Law* 325).

The effect is that even if the spirit of the law supports the doctrine of party autonomy, if it is concluded so that one or more of the above-mentioned limitations exist, it is very unlikely for a court in South Africa to allow such choice of law to override the peremptory provisions of the local statute.

Hofmeyr[236] opines that it must be accepted that, where the court exercises its admiralty jurisdiction, section 6 of the *AJRA* is, apart from regard to public policy, the governing provision. Further, the statues in the South Africa will override the provisions of the parties' autonomy where there is conflict and where the provisions of the local statute are *ius cogens.*[237] This suggests that the general practice of the court applying the law of the forum (*lex fori*),[238] as expressed by the parties in their contract, can still fall on Admiralty Courts if proven that the said *lex fori* is contrary to certain statutory provisions in South Africa. The power of the Admiralty Courts to override the autonomy of parties under certain exclusive circumstances is thus stronger than the principle of part autonomy under the law of contract. With the rapid development of South African marine law, there is a need to give full effect to this very important principle and to ensure that peremptory provisions in South African statutes are not ignored or side-stepped by simply choosing a legal system that does not accord respect to South African public policy to govern a marine or marine insurance contract.

In allowing the Admiralty Courts to develop the law in accordance with the modern trends, the South African Maritime Law Association (SAMSA) is currently considering a proposal to amend the provisions of section 6 of the *AJRA* to provide that neither subsection 6(1) nor subsection 6(2) supersedes the parties' choice of law and the limitations imposed by the courts in their application of subsection 6(5) be made subject to limits of party autonomy in the general law.[239] According to Hofmeyr,[240] however, there is no way in which the autonomy of the parties can override the peremptory statute. He seriously contends that courts must always consider the

236 Hofmeyr *Admiralty Jurisdiction* 87.
237 Forsyth *Private International Law* 321.
238 The law of jurisdiction in which the action is brought.
239 Hofmeyr *Admiralty Jurisdiction* 88.
240 Hofmeyr *Admiralty Jurisdiction* 88.

issue of public policy and interest when applying section 6 of the AJRA. Even though the amendments to this law will develop admiralty law further, I am of the view that while parties are waiting for amendments to the AJRA, they should be allowed to exercise their autonomy on choice of law under the law of contract as long as that said law is not against public policy and interest in South Africa. The interpretation of public policy and interest in this regard, is therefore essential.

3.8 Section 3 of the South African Carriage of Goods by Sea Act[241]

Apart from the *AJRA* there is another statute in South African that may have an impact on the rights of the parties to choice of law and jurisdiction. Section 3 of the *COGSA* provides that

> (1) (n)otwithstanding any purported ouster of jurisdiction, exclusive jurisdiction clause or agreement to refer any dispute to arbitration, and notwithstanding the provisions of the Arbitration Act, 1965 (Act 42 of 1965), and of section 7(1) (b) of the Admiralty Jurisdiction Regulation Act, 1983 (Act 105 of 1983), any person carrying on business in the Republic[242] and the consignee under, or holder of, any bill of lading, waybill or like document for the carriage of goods to a destination in the Republic or to any port in the Republic, whether for final discharge or for discharge or for discharge for further carriage, may bring any action relating to the carriage of the said goods or any such bill of lading, waybill or document in a competent court in the Republic.[243]
>
> (2) The provisions of subsection (1) of this section shall not apply to arbitration proceedings to be held in the Republic which are subject to the provisions of the Arbitration Act, 1965.

The effect of this provision is that as long as a party is conducting business in South Africa or has any cargo or holds any bill of lading for carriage of goods to a destination in the Republic of South Africa or within the territorial waters of South Africa, that party is entitled to bring an action with the admiralty jurisdiction of the

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241 The *COGSA* under the provisions of s 3 gives a party freedom to approach the Admiralty Court in South Africa for any dispute arising within South African territorial waters and ports.

242 Within the territorial waters of South Africa either to, or in, the ports of the country.

243 For example, a ship carrying goods from the port of Mombasa in Kenya to the port of Rotterdam in the Netherlands passes through the port of Durban to discharge or load cargo for a businessman in South Africa. The parties (the Dutch buyer and Kenyan seller) have agreed that in case of any dispute, the Kenyan High Court shall be the proper forum. When about to leave the Durban port, the ship catches fire and part of the cargo is destroyed. The seller is allowed under the *COGSA* to bring the action in South Africa.

High Court of South Africa.[244] This entitlement exists even where the carriage agreement contains a jurisdiction clause purporting to confer exclusive jurisdiction on some other country's court.[245] Furthermore, this entitlement exists where there is a contract to refer any dispute under the carriage contract to arbitration elsewhere other than in South Africa, but it does not override an agreement to refer any dispute to arbitration where the arbitration proceedings are to be held in the Republic of South Africa and are subject to the provisions of the *Arbitration Act*.[246] The entitlement under the *COGSA* overrides the South African courts' power when exercising their admiralty jurisdiction to stay proceedings.[247]

It is submitted that section 3 of the *COGSA* opens a gateway to hear the matter within the admiralty jurisdiction in South Africa with no mention of the applicable law,[248] that is, this provision of the *COGSA* puts emphasis on the issue of jurisdiction without touching on the law applicable in resolving the dispute. Holloway[249] opines that after the maritime claim has been lodged at the court in terms of section 3 of the *COGSA*, the court shall first look at the underlying contract if the parties included a clause on the choice of law governing their contractual relationships. In the absence of that, the court shall forthwith apply the provisions of section 6 of the *AJRA* with regard to the law applicable.

It is, therefore, submitted that while reforming the provisions of the *AJRA* on the issue of exclusive jurisdiction clause and choice of law, regard has to be had to section 3 of the *COGSA*. In South Africa the Admiralty Court has the final say on deciding whether to entertain a maritime claim or stay of the proceedings.[250] However, because parties to a marine contract normally obtain a marine insurance contract that is governed by the *SIA*, it is important to investigate if there are any peremptory provisions under the *SIA* that could limit parties' choice of law under a

244 For example, a bill of lading provides that the voyage shall be from Beira passing Cape Town to discharge some of the cargo in Walvis Bay. If any claim of a maritime nature occurs within the territorial waters of South Africa, a party is allowed under the *COGSA* to bring an action in South Africa despite the choice of jurisdiction that may exist in the underlying contract.
245 Bradfield "Shipping" 31-33.
246 42 of 1965.
247 S 7(1)(b) *AJRA*.
248 Hare *Shipping Law* 611.
249 Holloway 1999 *http://web.uct.ac.za/depts/shiplaw/holloway.htm*.
250 Hofmeyr *Admiralty Jurisdiction* 73.

marine insurance contract. Such investigation shall follow in the following chapter of this research.

Chapter 4

Choice of law in South African marine insurance

4.1 Introduction

In the words of Hare,[251] "marine insurance is the mother of all insurance which was developed by the early merchants in the very earliest maritime trading". These merchants realised the need to minimise risks to which their goods were subjected by entering into an insurance contract.[252] Reinecke[253] defines 'marine insurance' as an agreement in terms of which one party (known as the "insurer" or "underwriter"), in return for an undertaking by the insured to pay a premium, undertakes to indemnify the insured against loss or damage resulting from the occurrence of an uncertain event or in connection with a sea voyage. In South Africa this contract is regulated by the *SIA*. Even though the *SIA* makes no specific mention of marine insurance, it deals with technicalities, formalities and insurance practice that relate to marine insurance. This is evident from the definitions in section 1(1) of the *SIA*. In terms of this section a short-term policy

> (m)eans an engineering policy, guarantee policy, liability policy, miscellaneous policy, motor policy, accident and health policy, property policy or transportation policy or a contract comprising a combination of any of those policies; and includes a contract whereby any such contract is renewed or varied:

This definition should be read together with the definition of "transportation policy" Transportation policy

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251 Hare *Shipping Law* 822. See also Reinecke, van Nierkerk and Nienaber *General Principles of Insurance Law* 379, Davis *Gordon & Getz* 380 and van Niekerk and Schulze *The South African Law of International Trade* 208.

252 Hare *Shipping Law* 822. See also van Niekerk and Schulze *The South African Law of International Trade* 192.

253 Reinecke *et al General Principles* 379. Davis *Gordon & Getz* 382 expanded the definition of 'marine insurance' by stating that the insured takes cover against loss arising from certain perils or sea risks to which the insured's ship, merchandise or other interests may be exposed during a certain voyage or a certain period. That means it is possible for an insured person to take out cover for a specific voyage, in that the cover shall be available for the duration of that voyage only.

> (m)eans a contract in terms of which a person, in return for a premium, undertakes to provide policy benefits if an event, contemplated in the contract as a risk relating to the possession, use or ownership of a vessel, aircraft or other craft or for the conveyance of persons or goods by air, space, land or water, or to the storage, treatment or handling of goods so conveyed or to be so conveyed, occurs; and includes a reinsurance policy in respect of such a policy;

Apart from statutory source, South African marine insurance can also be sourced from precedents concerned both with the general principles of insurance law and with marine insurance matters.[254]

Parties to a marine insurance contract are, as a rule, free to agree, either expressly or tacitly, on a system of law other than South African law to govern their relationship.[255] It must be noted that marine insurance practice in South Africa is closely modelled on the English legal system regarding insurance law and this has led to many local marine insurers to employ marine insurance contracts resembling those in use in England.[256] The question arises as to what extent may the choice of parties to use an English marine insurance policy be regarded as a choice of the English law to apply as the governing law. That is to say, where parties used an English marine policy, does it imply that parties wished to use English law as the governing law and if so, to what extent a South African court would be bound by relevant English jurisprudence in interpreting that specific marine insurance contract?

In this chapter, certain provisions of the *SIA*[257] that may limit the principle of choice of law under the law of contract due to their nature amounting to *ius cogens* (peremptory) will be discussed.

254 Reinecke *et al General Principles* 381. See also van Niekerk *South African Maritime Law* 103 which lists the sources of the South African law of marine insurance as legislation, judicial decisions, Roman-Dutch law and English law. It is worth noting, however, that maritime law and marine insurance law in South Africa have developed substantially in the past decades. A number of writers have developed an interest in these areas of law and, as a result, therefore, there are a number of articles and textbooks touching on maritime law and marine insurance law in South Africa.

255 Reinecke *et al General Principles* 3-220. See also van Niekerk 2010 *Annual Survey* 718 where he said that, generally, party autonomy should be allowed and restricted in exceptional circumstances where the choice is not in good faith or is contrary to public policy and principles.

256 Reinecke *et al General Principles* 383.

257 S 53 and 54.

4.2 Good faith (bona fides)

Before an analysis can be made of laws that may have an impact on the principle of "choice of law," it is essential to refer to the role of *bona fides* in an insurance contract. Initially, it was assumed that the principle of *ubberrima fides* applied in South African insurance law. The principle was developed in English insurance law where the insured was expected to act in the utmost good faith *(uberrima fides)* and failure to do so would render the contract void.[258] The position is different under the South African common law, the Roman-Dutch law, where both parties to an insurance contract have the duty to act in good faith (*bonae fidei*).[259] All insurance contracts are thus contracts *bonae fidei.* The next relevant aspect in this regard involves the duty to disclose in insurance law.

4.3 Duty to disclose

Joubert and Faris[260] opine that good faith operates at two stages in insurance contracts and therefore also marine insurance contracts: (1) it operates at the pre-contractual stage during negotiations and (2) after the contract has been concluded, at the renewal stage. According to Reinecke,[261] the pre-contractual duty to disclose is the most relevant stage used in identifying whether a party has made a proper disclosure or not. This is because in exercising the autonomy of parties under the law of contract, a party needs to disclose certain facts which will be relevant in selection of the law and jurisdiction. The duty to disclose is also used to determine the issue of misrepresentation in an insurance contract.[262] Van Niekerk[263] comments that a breach of the duty to disclose amounts to a misrepresentation and renders the

258 Joubert and Faris (eds) *Laws of South Africa* 150.
259 *Mutual & Federal Insurance Co Ltd v Oudtshoorn* Municipality 1985 (1) SA 419 (A) 433.
260 Joubert and Faris (eds) *Laws of South Africa* 151.
261 Reinecke et al General Principles 112.
262 A misrepresentation that leads to the conclusion of an insurance contract will normally occur at the negotiation stage before the conclusion of the contract or its amendments or renewal. Van Nierkerk 2005 *SA Merc LJ* 333 opines that the pre-contractual duty to disclose no longer arises where there is a fiduciary relationship between parties. Where one party (mostly the insurer) relies on the other party (mostly the insured) to give full disclosure of all the relevant material facts, the insurer is expected to put all the questions it requires to be answered on the proposal form in order to get the information it needs from the insured. Other than the proposal form, the insurer can use other techniques to inform itself of the facts it needs in order to assess the risk, such as the Internet or employing an expert to assess risk. Both parties are expected to act in good faith and disclose all the material facts relevant to the risk and assessment of premiums.
263 Van Niekerk 2005 *SA Merc LJ* 333.

insurance contract voidable at the option of the insurer induced by it to conclude an insurance contract.[264] It is thus important to look at the issue of misrepresentation under insurance contracts.

4.4 Misrepresentation

Joubert and Faris[265] define misrepresentation as a false statement that may mislead someone to conclude an insurance contract. Under South African insurance law, misrepresentation can either be positive (*commissio*) or negative (*omissio*). Reinecke[266] defines a positive misrepresentation, also known as a "misrepresentation *per commissionem*," as a positive act or statement made by the proposer to the question in the proposal form at the negotiation stage of an insurance contract. This act must induce the other party to the insurance contract to agree to the terms of the insurance contract, contrary to what would have occurred had he/she not been misled.[267] Positive misrepresentations may be committed innocently, intentionally or negligently.[268]

Joubert and Faris[269] define a negative representation, also known as a "misrepresentation *per omissionem*" as a wrongful failure by a party to an insurance contract to disclose material facts within his or her knowledge during the negotiation time before concluding an insurance contract. The nature of the conduct or act must create a wrongful impression to the other party who, if he or she (the other party) was aware of the true facts, would not have concluded an insurance contract.[270]

Although the duty to disclose is regarded as a legal principle of the law of insurance, South African law supports the view that the duty to disclose is simply a duty to

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264 Van Niekerk 2005 *SA Merc LJ* 150.
265 Joubert and Faris (eds) *Laws of South Africa* 142.
266 Reinecke *et al General Principles* 120. See also Joubert and Faris (eds) *Laws of South Africa* 158.
267 To be wrongful, a positive misrepresentation must be false or inaccurate or misleading in its totality standing as *prima facie* evidence that a wrong has been committed; Joubert and Faris (eds) *Laws of South Africa* 159).
268 Van Niekerk 2009 *SA Merc LJ* 387.
269 Joubert and Faris (eds) *Laws of South Africa* 164. See also Reinecke *et al General Principles* 126.
270 Reinecke *et al General Principles* 126.

disclose **material facts** within one's actual knowledge.[271] Since the issue of material facts differs from one jurisdiction to another, where parties have exercised their autonomy on jurisdiction which treats the issue of material facts different from South African practice then the test used in determining materiality becomes an issue. Because of this proposition, it is important to investigate the materiality test used by courts in South Africa in determining the non-disclosure and misrepresentation of facts that led to the conclusion of insurance contracts.

4.5 Materiality test

Joubert and Faris[272] state that a misrepresentation is actionable only if it is wrongful. Reinecke[273] submits that it does not matter whether the act or statement is false or misleading. The law in South Africa requires that such facts should be material. Van Niekerk[274] states that the *onus* of proof of the wrongful conduct or non-disclosure of material facts rests on the person relying on that fact, usually the insurer. This means that in South African insurance law, a party to an insurance contract is obligated to disclose material facts only. It is thus essential to determine whether a particular fact or conduct is material in insurance law. Do the courts use a subjective test or an objective test to determine materiality? In principle, the test for materiality is an objective test,[275] that is, the court will consider the position of a reasonable person in the position of an insured or insurer, in order to determine whether the act or statement (*ommisio or commisio)* of the party at fault induced the other party to conclude an insurance contract.[276] This test was applied in the decision in *Mutual & Federal Insurance Co Ltd v Oudtshoorn Municipality.*[277]

In this case[278] a claim arose from an accident in which a light aircraft collided with a pole carrying electric power lines. The owner of the aircraft sued Oudtshoorn municipality for damages. Oudtshoorn municipality was a holder of a public liability

271 Reinecke *et al General Principles* 128.
272 Joubert and Faris (eds) *Laws of South Africa* 177.
273 Reinecke *et al General Principles* 131.
274 Van Nierkerk 1999 *SA Merc LJ* 183.
275 Reinecke *et al General Principles* 133.
276 Joubert and Faris (eds) *Laws of South Africa* 178.
277 1985 (1) SA 419 (A) 435.
278 *Mutual & Federal Insurance Co Ltd v Oudtshoorn* Municipality 1985 (1) SA 419 (A) 435.

policy with Mutual & Federal Insurance Ltd. It thus claimed damages for which it was liable to the owner of the aircraft from its insurance company. Mutual & Federal Insurance Ltd successfully defended the case by stating that the Oudtshoorn municipality had failed to disclose certain material facts[279] before concluding the insurance contract. In determining the test of materiality, appeal judge Joubert had regard to the fact that the undisclosed facts in this case were relative to the risk and assessment of the premium. The appeal judge held that the question to be asked was not whether a diligent prudent person would regard the undisclosed information as material, but rather, whether in the opinion of a diligent prudent person (reasonable person) the information could influence the decision of the insurer to accept the risk and calculate the premiums.[280] The issue arises where the parties to an insurance contract have chosen the English Law as a law to govern their insurance contract but the matter is brought up before a South African court and the court insists on applying the test of a prudent person instead of the general materiality test under English law. This may limit the autonomy of parties.

4.6 Warranties

Insurers not only rely on their right to avoid an insurance contract for misrepresentation or duty to disclose but also on "warranties."[281] In order to protect themselves, insurers follow the following strategy: they simply state in the policy form that the answers given by the insured were guaranteed (constituting warrantees) and formed the basis of the contract.[282] By doing so, it is not necessary to prove that the statement represented by the insured at the negotiation stage and during the renewal of an insurance contract is a material misrepresentation. If there is no total fulfilment of the statement or if a warranty is not exactly complied with, the insurer

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279 It failed to show that the close proximity of the overhead line on the borders of the municipality constituted a hazard to night-flying aircraft.

280 This approach was affirmed in the decision of *Trust Bank van Afrika Bpk v President Versekeringsmaatskappy Bpk* 1998 (1) SA 546 (W) where Mr Justice van Zyl held that the reasonable test represented a man with average intelligence and insight into the issues in question.

281 A warranty is a statement about the exact performance or truth on which the validity of the insurance contract depends; in other words the insured's right to recover is dependent on the truthfulness of the warranty.

282 Joubert and Faris (eds) *Laws of South Africa* 148.

could deny liability that the insured's right to recover exists,[283] that is, avoidance of an insurance contract will be accepted **without any consideration of whether the representation was material or immaterial to the assessment of the risk insured**.[284] This is the position in English law. The same position was applied in South Africa until the judgment of *Jordan v New Zealand Insurance Co Ltd.*[285]

This situation caused the South African Parliament to reform the insurance law as it then was, by inserting section 63(3)[286] into the *Insurance Act.*[287] Section 63(3) eliminated the trap for the unwary insured who signed documents (proposal or insurance contract) **warranting the correctness of presentations made** by him or her which may lead to failure of many claims as a result of minor inaccuracies.[288] This section protected the insured[289] by making it clear that a claim could only fail if the incorrectness or statement by the insured was material to the risk covered.

However, with regard to warranties, the Appellate Division in the decision in *Qilingele v SA Mutual Life Assurance Society*[290] departed from the objective test and applied a

283 Davis *Gordon & Getz* 214.

284 Reinecke *et al General Principles* 269.

285 1968 (2) SA 238 (EC) 242-3. In this case the plaintiff signed an insurance proposal form (that formed the basis of the insurance contract) to the effect that on his next birthday he would be 22 years old instead of 23. During the period covered by the insurance he was involved in a car accident. His car was written off and the injured persons in the accident claimed compensation (for the injuries they had sustained) from him. The insurance company repudiated the claim. Upholding the repudiation, judge Munnik said that he had "a great deal of sympathy with the plaintiff but one cannot allow hard cases to make bad law." The judge held that the insured party had breached the warranty and therefore the insurer was right to repudiate the claim.

286 This section was added to the 1943 *Insurance Act* by s 19 of the *Insurance Amendment Act* 39 of 1969 stating that

> [n]otwithstanding 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 owners thereof shall not be increased, on account of any representation made to the insurer which is not true, whether or not 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 of issue or any reinstatement or renewal thereof

with a view to protecting insured persons from avoidance of insurance contracts by insurers due to inaccuracy, incorrectness and untrue statements warranted by the insured, *but* such statements or acts are immaterial in the risk and assessment of premiums. This section introduced the materiality test.

287 27 of 1943.

288 Davids *Gordon & Getz* 235.

289 A party with weaker bargaining power compared to the insurer.

290 1993 (1) SA 69 (A) 73. The court held that the material test was a subjective test and that the reasonable test as set out in *Mutual & Federal Insurance Co Ltd v Oudtshoorn Municipality* applied only where the ground of avoidance of an insurance contract was a failure of the common law duty to disclose material facts.

subjective test. The brief facts of the case are the following: the appellant was a nominated beneficiary under the insured life insurance policy. A week after the inception date, the insured died of multiple wounds. The appellant's claim for payment of supplementary benefits from the respondent was repudiated. The appellant instituted an action demanding payments from the respondent. The favour of the insurance company and the decision was appealed.

Mr Justice Kriegler, in handing down the decision of the Appellate Division, said that the reasonable test as used in *Mutual & Federal Insurance Co Ltd v Oudtshoorn Municipality*[291] only applied in cases where the ground for repudiation was a failure of a common law duty to disclose material facts. Such test could not apply in "a straight forward case of misrepresentation, where the insured expressly vouched for the truth (thus a warranty) of his representations[292] founding the contract of insurance and moreover did so by way of warranty."[293] The insurance company avoided the contract on the basis that the insured gave false information that was material in determining the risk and assessment of the premium by the insurer. The court said that the materiality test to be applied by the court had to determine whether the falsehood of the misrepresentation in the suit had an effect on the assessment of the risk undertaken by a particular insurer. Havenga[294] said that the court in *Qilingele v SA Mutual Life Assurance Society*[295] noted that the material test did not involve the concept of the 'reasonable insurer', the 'reasonable insured' or 'reasonable man' but the representation was material to the assessment of risk and whether the insurer concerned would have assessed the risk differently if he or she was aware of the undisclosed fact.

291 1985 (1) SA 419 (A) 435.

292 The beginning of the proposal form contained the following statement: "As the statements in this application constitute warranties, complete and accurate information must be given." The insured answered the following question in the negative: "Is any other application for insurance on your life now pending or contemplated? (If "yes", please state below names of insurers, amounts and whether such application is to be proceeded with if Old Mutual accepts this application." The insured then appended his signature warranting that all the information given in the application was true and complete, and further that any misstatement or omission therein may lead to any contract made being declared void by Old Mutual, and that in such event all monies paid in respect thereof shall be forfeited.

293 1993 (1) SA 69 (A) 74.

294 Havenga 1995 *SA Merc LJ* 92.

295 1993 (1) SA 69 (A) 73. The court held that the material test was a subjective test and that the reasonable test as set out in *Mutual & Federal Insurance Co Ltd v Oudtshoorn Municipality* applied only where the ground of avoidance of an insurance contract was a failure of the common law duty to disclose material facts.

Although the legislator adopted section 63(3) of the *Insurance Act*[296] verbally in the SIA,[297] the materiality test in section 53(1) and the judgment of *Qilingele v SA Mutual Life Assurance Society*[298] continued to receive many criticisms from different judges and writers in South Africa.[299] Eventually, in 2003 the South African Parliament amended section 53(1) of the *SIA* by means of the *Insurance Amendment Act*[300] and established that the test to be used by the courts in issues of misrepresentation or non-disclosure of material facts was the "reasonable man test".[301]

4.7 Section 53 and the amendment in 2003

Van Niekerk[302] stated that the intention of the legislature in enacting section 53(1) of the SIA (the then section 63(3)) was "to protect an honest, but perhaps careless, ignorant or uneducated insured from an unscrupulous insurer who might attempt to take advantage of a non-material error in the proposal". This aim cannot be achieved if the courts apply the subjective test when dealing with issues of warranties, misrepresentation and duty to disclose. The correct test to be applied is an objective test. Thus the amendments to section 53(1) of the *SIA* in 2003 dealt with the subjective test introduced by the Appellate Division in *Qilingele v SA Mutual Life Assurance Society.*[303] Section 53(1) of the *SIA* as amended in 2003 provides that:

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296 27 of 1943.

297 53 of 1998 under section 53 (1).

298 1993 (1) SA 69 (A) 73. The court held that the material test was a subjective test and that the reasonable test as set out in *Mutual & Federal Insurance Co Ltd v Oudtshoorn Municipality* applied only where the ground of avoidance of an insurance contract is a failure of the common law duty to disclose material facts.

299 The appeal judge Schutz criticised the decision in *Qilingele's* case in *Clifford v Commercial Union Insurance Co of SA Ltd* 1998 (4) SA 150 (SCA) 156-159. Sutherland 2003 *ASSAL* 629 said that the subjective test established in *Qilingele's* case no longer applied in South Africa. Van Niekerk in 2005 *SA Merc LJ* 150 said that the subjective test propounded in *Qilingele's* case was not good in law, the test established by s 53 (1) of the SIA as amended in 2003 is the materiality test to be used by courts.

300 17 of 2003.

301 The decision of judge Boruchowitz in *Mahadeo v Dial Direct Insurance Ltd* 2008 (4) SA 80 (W) 85 applied the provisions of s 53(1)(b) as amended and affirmed that the material test on positive misrepresentation is that of a reasonable person. The judge said the test of the reasonable person was more reliable because the insured completed the proposal form according to the questions asked by the insurer and this may lead the insured person to believe that certain facts were not material to the insurer. Therefore, in order to determine whether the insured failed to disclose the information with *mala fide* intentions, the court should use a reasonable man test.

302 Van Niekerk 2008 *SA Merc LJ* 374.

303 1993 (1) SA 69 (A) 73. As stated above, the court held that the material test was a subjective test and that the reasonable test as set out in *Mutual & Federal Insurance Co Ltd v Oudtshoorn*

(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 has been 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.

The intention of the legislature in enacting section 53 of the SIA can be derived from the judgment of judge Kuny in *Joubert v Absa Life Ltd.*[304] The learned judge said that section 59 of the *Long-Term Insurance Act*[305] was designed to protect the ignorant insured from unscrupulous insurers who intended to escape liability on the basis of misrepresentation and non-disclosure. In that case the plaintiff was suing the defendant for payment of an amount of R145 000 in terms of a written life and disability insurance policy issued to him by the defendant in 1996. The defendant repudiated liability under the policy on the basis that the plaintiff had failed to disclose to the defendant certain material information.[306] The court held that the plaintiff's failure to present material information could have affected the assessment of risk by the defendant at the proposal time. In interpreting the intention of the legislature in

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Municipality applied only where the ground of avoidance of an insurance contract was a failure of the common law duty to disclose material facts.

304 2001 (2) SA 322 (W). This case deals with s 59(1) of the *Long-Term Insurance Act* which is similar to the provisions of s 53(1) of the *Short-Term Insurance Act*. The two sections replaced section 63 of the South African *Insurance Act* 27 of 1943.

305 Similar to section 53 of the *SIA*.

306 The plaintiff answered the following questions on the proposal form which formed the basis of the insurance contract in the negative: Whether he had ever suffered from *"senu- of geestesiekte"* (nervous or mental illness) and whether he had ever been hospitalised for more than five days. These facts were material in determining the premium to be charged by the insurer.

enacting the then section 63(3) of the *Long-Term Insurance Act*[307] Mr Justice Kuny said that

> (t)he legislature must have had in mind the protection of an honest, but perhaps careless, ignorant or uneducated insured from an unscrupulous insurer who might attempt to take advantage of a non-material error in the proposal. It certainly did not provide protection for a person such as the plaintiff who, if he were allowed to recover in this matter, would be benefiting from his own dishonesty.[308]

This section implies that the insurer has a right to avoid an insurance contract not only if the proposer has misrepresented a material fact, but also if he or she has failed to disclose a material fact.[309] Joubert and Faris[310] put it better by stating that the insurer who wished to rely on a misrepresentation in order to avoid an insurance contract had to show that the representation was material to the risk. In order to determine the misrepresentation and its materiality, therefore, it was important to investigate how those aspects of insurance law developed through the years.

4.8 Materiality test under sections 53 (1) of the SIA

The test of materiality as provided for under section 53(1) of the *SIA* as amended in 2003 was applied in the case of *Potocnik v Mutual and Federal Insurance Co.*[311] In this case the plaintiff, who is the owner of a certain vessel, claimed from the insurer the amount of R1 million, being the sum insured for the loss of the vessel. The vessel ran aground and was damaged beyond repair. The insurer denied liability on the grounds that the insurer had failed to disclose in the proposal form, which form formed the basis of the insurance policy, some material information.[312] The insurer claimed that such information would have assisted it in determining whether to take the risk or not. The court applied the objective test in determining the materiality of the evidence before it. Judge Sandi looked at the fact that the insured had knowledge

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307 27 of 1943, which has now been replaced with s 59 of the *Long-Term Insurance Act* 52 of 1998.

308 This position was confirmed by the court in the decision of *Bruwer v Nova Risk Partners Ltd* 2011 (1) SA 234 (GSJ) 236 308 where judge Claassen held that the purpose of s 53 of the *SIA* was to protect the insured against claims rejection by the insurer based on negligible or trivial non-disclosure.

309 Davids *Gordon & Getz* 111.

310 Joubert and Faris (eds) *Laws of South Africa* 183.

311 2003 (6) SA 559 (SE).

312 That the insured was in financial difficulty.

of his financial state and decided to withhold such information from the insurer. The judge considered all the evidence tendered and applied the objective test to whether a reasonable man would have considered that fact material. The judge concluded that the fact was indeed material because it would have assisted the insurer in determining whether to take up the risk or not and, if so, at what premium.

Van Niekerk[313] opines that the test of materiality is not a subjective test, but rather an objective one. He goes further to state that this test is not that of a reasonable insurer or insured, but a reasonable person test. However, in one of his articles[314] he suggests that the information to be disclosed can best be obtained from the insured by clarifying the proposal form issued by the insurer. He goes on to state that an insurer is an expert who has in-depth knowledge of risk assessment and evaluation. When an insurer is about to cover a certain risk, he or she already knows what he or she is looking for, how to obtain the information, the assessment thereof and evaluation in the final determination of the premium.[315]

In most cases the insured is just a lay person who has little knowledge of the facts that are material to the risk and assessment thereof in the final determination of premiums to be paid. The insured is normally guided by the insurer in disclosing material factors. I submit that expecting the insured person to disclose all material facts is, in most cases, tantamount to unfair business practice because the insured is normally a lay person. He or she is not an expert in every aspect of the insurance business. Nevertheless, the insured is subject to disclosing the information as led by the broker.[316] I am of the opinion that insurers should try by all means to ensure that their proposal forms or insurance contracts are framed in very clear language, are less ambiguous and not vexatious in order to allow the insured to disclose all the relevant information that may affect the risk and assessment of premiums. I, therefore, agree fully with van Niekerk's submission in this regard.

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313 Van Niekerk 2004 *SA Merc LJ* 113.
314 Van Nierkerk 2005 *SA Merc LJ* 339.
315 Joubert and Faris (eds) *Laws of South Africa* 176-185.
316 Although the broker is seen as an agent of the insured, it is true that this fact, in the ordinary, common case, does not help the insured. He is still responsible for every representation.

From an analysis of the historical background to section 53(1) of the *SIA* and its application in court from time to time, it would seem that section 53(1) is aimed at protecting a party with less bargaining power in an insurance contract (more often than not this party is the insured). If the *SIA* aims to protect the weaker party in an insurance contract, the question is: how will the court treat a case where parties have consensually agreed to have a foreign legal system govern their insurance contract. Will a South African court be forced to interpret the duty of misrepresentation or non-disclosure in terms of the *SIA* or of the legal system selected by the parties? Will the parties' choice oust the statutory provisions under section 53(1) of the *SIA*? If the English law is applicable, the insured is unprotected in the same way than if he or she had made a misrepresentation and the statement was warranted: the insurer may avoid liability even though the misrepresentation was not material. If the South African law is applicable, the misrepresentation must be material, the insurer carried the burden to prove that the test of section 53(1)(b) of the *SIA* applies.

4.9 Section 54 of the Short-Term Insurance Act

After disclosing all the material facts as required on the proposal form, an insurance contract will be concluded. This contract may contain either expressly[317] or tacitly[318] a clause on the choice of law and exclusion jurisdiction. Van Niekerk[319] states that parties may exercise their autonomy under the law of contract to choose the legal system they wish as long as their choice is *bona fide,* legal and not against public policy. By choosing a foreign legal system to govern parties' contractual relationships, the parties will be taken to have waived reliance on the domestic law.[320] As a general principle, a contract is said to be unlawful or illegal when it is prohibited by the common law or legislation.[321] All contracts that are contrary to public policy and interest or good morals are regarded as illegal contracts under common law.[322] In South Africa the validity of a short-term insurance contract is provided for under section 54 of the SIA.

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317 By putting a special clause in the contract about the legal system applicable and exclusive jurisdiction in case of disputes.
318 By the conduct of parties and phrases used in the contract, see Chapter 2 of this research.
319 Van Niekerk *South African Maritime Law* 109.
320 Van Niekerk 2011 *SA Merc LJ* 166.
321 Reinecke *et al General Principles* 3-149.
322 Davids *Gordon & Getz* 211.

Section 54(1) of the SIA states the following:

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.

In terms of the provisions of section 54(1) of the SIA it is clear that the insurer cannot easily avoid a policy just because the insured has contravened the law or did not comply with the provisions of the SIA. Although the law in South Africa allows parties to the contract to waive their rights under this section by choosing a foreign legal system to govern their contract, the applicability of such foreign law will depend on its validity and contravention of South African public policy and interest.[323] Rienecke[324] points out that the provisions of section 54 of the SIA will *prima facie* declare an insurance policy valid despite it being in conflict with the provisions of SIA but this will depend on its contravention of the law and public policy.[325]

Kruger[326] comments that public policy has long been recognised as a basis upon which a court may refuse to enforce the terms of a particular contract despite the existence of freely and voluntarily agreed terms by the parties to that contract. Van Nierkerk[327] suggests that statutory provisions (such as section 54 of the SIA) may be renounced by the party for whose benefit they were enacted,[328] but they cannot be waived where public policy or interest would be prejudiced by so doing. All these writers advocate the protection of a party against the party who wants to avoid liability under an insurance contract, basing his or her argument on the legal system or factor that is regarded as being *contra bonos mores*[329] in South Africa.

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323 Van Niekerk 2010 *SA Merc LJ* 601.

324 Rienecke *et al General Principles* 102.

325 This section thus made it possible for insurers to put a term in the contract, choosing the English law to govern the contract, because in that way s 53 would not be applicable; the insurer need not prove material misrepresentation. Parties could simply reply on a breach of warranty under the English law.

326 Kruger 2011 *SALJ* 712.

327 Van Niekerk 2010 *ASSAL* 718.

328 Section 54 is aimed at protecting the insured from the insurers who want to avoid the insurance contract on the ground that the insured had contravened the law. However, when parties to the contract have waived their rights under this provision, such a waiver will succeed only if it is not contrary to South African public policy and interest.

329 Contrary to public policy and interests.

However, the legal question is on the criteria the courts use in determining whether a certain foreign law chosen by parties to a contract is contrary to South African public policy and interests. Kruger[330] is of the opinion that even though it has been suggested that there is no structured process to be constructed or check-list to be marked off by a judge in the early stage of the case as to what will be contrary to public policy, the court can apply the objective test to the objective terms of the contract and bargaining position of the party to the contract, in order to determine whether or not the law is against South African public policy and interest. These tests were applied by the Constitutional Court in South Africa.[331]

In the case of *Barkhuizen v Napier*[332] the issue before the Constitutional Court was whether time limitation clauses in insurance contracts were against public policy and unconstitutional. The insured (Barkhuizen) entered into a motor vehicle insurance contract with the underwriter at Lloyd's agent in South Africa (Napier). The insurance contract contained a time limitation clause which required the insured to institute legal actions against the insurer by serving summons within a period of 90 (ninety) days after it had received notification of the rejection of an insurance claim. The insured was involved in a car accident on 24 November 1999. He lodged a claim on 2 December 1999. The claim was rejected on 7 January 2000 and the insured instituted an action against the insurer on 8 January 2002. Upon raising a special plea of prescription, the insured alleged that the time limitation clause in the insurance contract was against public policy because it limited a party's constitutionally protected right to seek judicial redress.[333] The Constitutional Court held that the time limitation clause could be said to be unconstitutional if it did not give a party enough time to exercise his or her right to approach the court of law. However, in this case the insured was given sufficient time to make such an application. The assured was aware of the insurer's address of service, knew the cause of action and the amount to be claimed was certain. The court concluded that the time limitation clause in this case did not violate public policy and it was not unconstitutional.

330 Kruger 2011 *SALJ* 714-6.
331 *Barkhuizen v Napier* 2007 (5) SA 323 (CC).
332 2007 (5) SA 323 (CC).
333 It is thus in contravention of the provisions of the SIA, and hence unenforceable. Furthermore, it contravenes section 34 of the *Constitution of South Africa* of 1996.

In this case Constitutional Court Justice Ngcobo (as he then was) established the test to be used in determining whether a contract or a clause in a contract was against public policy and interest. The first test to be applied is whether on its face the clause of a contract or the contract itself is **unreasonable**.[334] The justice considered the objective terms of the contract in order to determine whether the limitation clause was reasonable or unreasonable. If the conclusion is that the clause is reasonable, the next issue to be taken into consideration is whether the clause or the contract should be enforced in the light of the **circumstances that limit or prevent compliance therewith**.[335] Kruger,[336] explaining this point, stated that the court should look at the *bargaining position of the parties* to the contract that may render the contract contrary to public policy and interest.

The crucial question is whether section 54 of *SIA* limits the freedom of choice of law in insurance contracts.[337] Van Niekerk[338] suggests that where the rule in question is designed to protect the weaker party, for example, the consumer, it should apply regardless of a choice of law clause.[339] De Villiers[340] states that parties to a contract are normally allowed to waive the statutory provisions while exercising their autonomy under the law of contract. However, such a waiver is not possible if public policy and interest will be undermined, and where the waived statutory provisions are regarded as being peremptory provisions. Because marine insurance contracts are normally cross-border contracts in nature, the issue of choice of law is unavoidable. At this stage it is still my opinion that it is not exactly certain when a provision or term in a contract will be declared unreasonable or contrary to public policy and interest. Therefore, it is necessary to look at the recent Supreme Court of Appeal decision

334 2007 (5) SA 323 (CC) 339.
335 *Barkhuizen v Napier* 2007 (5) SA 323 (CC) 340. To my mind it is not clear, and the court gave no indication, of when such a clause will be seen as unreasonable. The court did not give a "yardstick" to measure unreasonableness. There is no benchmark data to test for unreasonableness.
336 Kruger 2011 *SALJ* 717-9.
337 Whether provisions of s 54 of the *SIA* regulates the freedom of parties to select a legal system to govern their contract.
338 Van Niekerk 2011 *SA Merc LJ* 161.
339 I agree with this suggestion, especially when the law in question is peremptory law that is the law which application cannot be excluded by contractual choice of law, especially if the whole intention of enacting that law was to protect the party (insured) who has less bargaining power.
340 2013 *SA Merc LJ* 486.

and see how the court declared the clause in a contract as being contrary to South African public policy and interest.

4.10 Representatives of Lloyd v Classic Sailing Adventures (Pty) Ltd[341]

The court of appeal in this case was faced with the situation where three areas of law, namely (1) maritime law, (2) contract law and (3) insurance law were combined in a single dispute. Moreover, the parties to the contract had exercised their autonomy of choice of law. The question arose as to which law should apply to the contract and whether the principle of party autonomy could override the provisions of the local statute.[342]

4.10.1 The facts of the case

A vessel named *Mieke* was designed and built in 1997 by the respondent's company as a small sea-going vessel with both sail and turbo-charged marine engines.[343] She was intended for long-line ocean fishing. However, when fishing turned out to be unprofitable in 2003, the controlling person and the owner of the company (Viljoen) and her skipper (Hennop) decided to convert her into a luxury charter yacht. She was then transferred to a new owning company (Classic Sailing Adventures) of which Viljoen was the controlling director and majority shareholder. In 2005 *Mieke* sailed from Vilanculos off the Mozambican coast with crew members on board.[344] The yacht sank southeast of Angoshe off the coast of Mozambique. The crew and the skipper reached the shore on a rubber duck. *Mieke* was insured by underwriters at Lloyd in terms of a marine insurance contract.

A cover note issued by Lloyd's brokers in South Africa (Thebe Risk Service Ltd) contained the usual choice of "English law and practice clause" found in policies issued by underwriters at Lloyd. It was common cause therefore that the contract shall be governed by the *English Marine Insurance Act*, 1906.[345] When the

341 2010 (5) SA 90 (SCA).
342 The local statute referred to in this case is the *Short-Term Insurance Act* 53 of 1998.
343 2010 (5) SA 90 (SCA) 93.
344 2010 (5) SA 90 (SCA) 92.
345 2010 (5) SA 90 (SCA) 92.

respondent lodged a marine insurance claim for the loss of *Mieke*, Lloyd declined liability to pay Classic Sailing. The respondent instituted an action for payment in the Western Cape High Court, exercising its admiralty jurisdiction.[346] In its plea, Lloyd alleged that the sinking was caused by a risk not insured against[347] and other special defences of non-disclosure by the Classic Sailing skipper to SAMSA, as well as misrepresentation.[348]

4.10.2 Jurisdiction

The first issue to consider is the jurisdiction of the court and why the parties decided to bring the action in the Western Cape High Court instead of the court in England where the underwriter originates.[349] Reference is made to section 2 of the *AJRA* in terms of which each division of the High Court is given jurisdiction to hear and determine any maritime claims "irrespective of the place where it arose" or the place where the ship concerned is registered or of the residence, domicile or nationality of its owner. This section clearly shows that the Western Cape High Court had full admiralty powers to entertain this maritime dispute.[350]

4.10.3 Peremptory provisions vis-à-vis party autonomy

The second and probably the **main issue** before the court was finding a balance between the peremptory provisions and the principle of party autonomy. The court of appeal had to decide on the legal system applicable to the case. The specific questions were whether the provisions of *the English Marine Insurance Act,* 1906 – particularly sections 41 and 18 – could apply or should the provisions of the South

346 2010 (5) SA 90 (SCA) 92.

347 This risk regards the cover of a sewage tank. The peril insured against included "loss or damage to the subject matter caused by perils of the seas, rivers, lakes or navigable waters and loss or damage to the subject matter caused by . . . bursting of boilers, breakage of shafts or any latent defect in machinery or hull . . . provided such loss or damage has not resulted from want of due diligence by the assured owners or managers".

348 That Classic Sailing Adventures (Pty) Ltd did not disclose that its skipper Mr Hennop was not certified as a skipper and, further, that the stability information on board was inaccurate, not in the prescribed form and, furthermore, not approved by the South African Maritime Safety Authority (SAMSA). As a result of these alleged misrepresentations, Lloyd's alleged that they were entitled to avoid the insurance policy.

349 2010 (5) SA 90 (SCA) 98.

350 See a detailed discussion of admiralty jurisdiction on all maritime claims in South Africa in Chapter 3 of this research.

African statute, *the SIA*, and – particularly sections 53 and 54 – apply.[351] The court of appeal held that the definite answer to this issue was to be found in section 6 of the *AJRA*. Section 6(2) of the *AJRA* permits the application of English law in certain circumstances as discussed in Chapter 3 above. Section 6(5) acknowledges the principle of party autonomy and provides for the governing law of the contract.[352] However, there are specific provisions in the *SIA* in place and these provisions carry peremptory principles of law. The issue before the Court of Appeal was whether the autonomy of parties overrode those peremptory provisions of the *SIA*. Judge Lewis interpreted the relationship between the provisions of section 6(1), 6(2), 6(5) of the *AJRA* and sections 53 and 54 of the SIA, and the learned judge remarked:[353]

> 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 ss (2) and (5) in isolation. Subsection (5) must be subject to ss (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. The effect of ss (2) is that ss 53 and 54 of the Short term Insurance Act apply to the contract. And to the extent that the English Marine Insurance Act is inconsistent with peremptory statutory provisions it is not applicable.

The above quote suggests that the provisions of section 6(5) of the AJRA can still be superseded by certain statutory provisions if it is proven that in applying the legal system chosen by the parties to the contract will be contrary to certain peremptory provisions in a South African statute. Commenting on this case Hofmeyr[354] said that it must be accepted that where the court exercises its admiralty jurisdiction, section 6 of the AJRA was the governing provision. But if there was a statute in the Republic of South Africa that was *ius cogens*, then the provisions of that statue shall override the provisions of the section 6(5) of the AJRA which refers to party autonomy.

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351 The important fact is that parties chose the English law as a governing law in order to avoid the materiality test as required by South African law under the *SIA*. Under English law, parties base their contract on breach of warranty. See a detailed discussion on misrepresentation under common law and under the *SIA* in paragraph 4.2 of this research.

352 See Chapter 3 of this research.

353 2010 (5) SA 90 (SCA)100.

354 Hofmeyr *Admiralty Jurisdiction* 87.

Van Nierkerk,[355] commenting on the issue of choice of law, said that in South Africa a party was free to exercise his or her freedom of choice of law under the law of contract. However, such freedom would be limited or ignored if made **with the intent to avoid** a mandatory, non-renounceable, provision of the otherwise applicable legal system. This comment seems to agree with the decision of the Supreme Court of Appeal in the present case on the issue of choice of applicable law. On deciding whether to apply the English law or the provisions of the SIA, the court held that sections 53 and 54 of the SIA were peremptory statutory provisions. These sections created peremptory law whose application could not be overridden by the legal system selected by parties in their contract. The peremptory provisions were there to protect the insured in an insurance contract. Therefore, where parties had chosen a foreign legal system to govern their contract, thereby waiving the peremptory provisions, such waivability would not be allowed if it overrode the peremptory provisions. The applicable law in this case was, therefore, the South African law.

The decision of the Supreme Court on this issue suggests that as much as South African law adheres to one of the most important principles under the law of contract, namely the principle of party autonomy, the application of this principle in marine contract law will be allowed only if it does not contradict any other statute in South Africa which is *ius cogens*. De Villiers,[356] commenting on peremptory provisions,[357] said that the principal aim of using peremptory provisions was to protect consumers' participation in cross-border contracts,[358] especially in cases where parties to the contract had different bargaining positions. He goes on to state that peremptory provisions were also important in the absence of important and necessary information regarding consumers in different countries.

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355 Van Niekerk 2010 *JSL* 601. See also van Niekerk and Schulz *The South African Law of International Trade* 198 where they suggest that the parties to a contract cannot by their choice of foreign legal system exclude application of what is referred to as 'peremptory provisions' of the law of contract (*lex fori*). This reasoning was applied by Mr Justice Lewis in the case of *Representatives of Lloyd v Classic Sailing Adventures (Pty) Ltd* 2010 (5) SA 90 (SCA) 96-7.

356 De Villiers 2013 *SA Merc LJ* 478 where he talked of mandatory rule as one of the methods used by different states in order to limit party autonomy in cross-border business transactions.

357 In the article 'peremptory provisions' are referred to as "mandatory rules".

358 Marine insurance contracts are generally cross-border contracts that involve carriage of goods by sea. More often than not (as it was in this case) the consumer is not provided with an opportunity to choose the legal system to govern the contract. Consumers are normally given standard insurance contracts to conclude. Even where consumers are given an opportunity to make the choice of law, it is very rare that one finds a consumer who is well vested with the information containing the consequences of his or her decision. Therefore, consumers hardly make an informed decision in choosing the law applicable.

Furthermore, the court held that the selected legal system would be allowed only if it was not contrary to the public policy and interest in South Africa. The court declared that it was impossible to contract out the peremptory provisions of section 54(1) of the SIA. Van Niekerk[359] opines that since section 54(1) is aimed at protecting the weaker party to an insurance contract, any contract concluded **with an intention to contravene** this section will be taken to be against public policy and, therefore, unenforceable. The court used the waivability test in order to determine whether one could avoid the application of a statute containing peremptory provisions on the ground that parties had chosen a different legal system to govern their contract and by doing so, had waived their rights of protection under section 54(1).[360]

This decision stands as precedence in South Africa where three different laws were involved in one dispute and despite the issue of choice of law governing the contract. It was held that the peremptory statute overrides the choice of law clause in a contract. I submit that the peremptory statute in this instance protected the insured who signed a standard insurance contract without realising the fact that in case of any disputes between the parties concerning non-disclosure and misrepresentation[361] the materiality test under the English law would be favouring the insurer more than the materiality test under the SIA.[362] However, as much as this test is said to protect the insured person who is said to have a weaker bargaining power, this is not always the case; for instance, in this case the insured person was not a lay person, he was aware of the language used on the proposal form and was a director of a company that was involved in marine business and had entered into many marine insurance contracts. I therefore submit that the South African legal position on choice of law versus peremptory statutes in marine insurance should be revisited.

This decision also stands as the current law on the limitation of choice of law in contravention of South African public policy and interest. Judge Lewis used the waivability test in order to determine whether a party could waive his or her statutory

359 Van Niekerk 2011 *SA Merc LJ* 161-166

360 De Villiers 2013 *SA Merc LJ* 486 said that if a statutory provision could not be waived then it was regarded as mandatory law and could not be excluded by the choice of applicable law.

361 Most of the disputes in insurance law involve the issue of non-disclosure and misrepresentation.

362 See paragraph 4.2 of this research.

rights of protection if the chosen law in the parties' contract was contrary to South African public policy and interest. It would seem that the court can apply this test only when it intends to protect a party with a weaker bargaining power. However, if the court has to decide that the provisions of a statute in South Africa are peremptory by implication, as was the case in this matter, the waivability test can bring about complications. The Court of Appeal failed to establish the test used in determining that a statute was peremptory by implication and therefore not waived if its provisions were contrary to the public policy and interests. I am of the opinion that the waivability test can rightfully apply where the statute in South Africa has express peremptory provisions prohibiting parties to contract out of that statute but, to my mind, it is still not clear whether the waivability test will uniformly apply where the provisions are peremptory by implication. The court did not provide a strict rule to be applied in determining the peremptory provisions by implication.

4.10.4 Non-disclosure and misrepresentation

The third issue before the court were the matters of non-disclosure[363] and misrepresentation.[364] In order to determine whether there was indeed non-disclosure of a material fact to the contract, the court had to look at which test to apply. The court of appeal established that the materiality test for non-disclosure and misrepresentation under South African marine insurance contract differed from the test of materiality under the English marine law.[365] The test of materiality under English insurance law was that of a **prudent insurer**,[366] whereas the test of materiality under section 53(1) of the SIA (thus for any non-disclosure or

363 Lloyd's alleged that the stability book on board the *Mieke* at the time when the insurance policy was issued had not been approved by SAMSA, therefore, it was contrary to s 18 of the *English Marine Insurance Act*, 1906.

364 Lloyd's contended that there was a misrepresentation as to Hennop's (the skipper) certification.

365 2010 (5) SA 90 (SCA) 100. Under English law the warranty is relied on and if there is a breach, the contract will voided objectively. Under Roman Dutch law (the SIA) the facts disclosed should be material to the risk and assessment of risk, and calculation of the premium as viewed by a reasonable man. The South African law introduced the materiality test where English law, as it was then, referred to the breach of warranty.

366 2010 (5) SA 90 (SCA) 100. The test is whether the reasonable insurer would not have considered concludin an insurance contract if he or she was unaware of the undisclosed or misrepresented facts. It does not matter whether the fact is material or immaterial.

misrepresentation or not) is that of a **reasonable prudent person**.[367] The applicant relied on section 18 of the *English Marine Insurance Act,* 1906 and contended that non-disclosure of the stability book on board the *Mieke* at the time when the insurance policy was issued had not been approved by SAMSA and was inaccurate. The test, as formulated by the court, was as follows:[368]

> 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, given that the purpose of the stability book information is to guide the master in loading and ballasting the ship. SAMSA itself was not concerned about the stability of the *Mieke.* It has allowed her to sail from Cape Town to Port Elizabeth and to Mozambique and back . . . Accordingly, I find that there was no failure to disclose by Classic Sailing that would have invalidated the policy or exempted Lloyd's.[369]

This decision clearly shows that in order for the defence of non-disclosure of material facts to succeed under South African law, the undisclosed information that the defendant relies on should be material and objectively have an effect on the assessment of the risk by the insurer under the insurance policy. The test is how the "reasonable prudent person" would evaluate this undisclosed information. Would the reasonable prudent person see that the undisclosed information has an effect on the risk and assessment of the premium by the insured or would he or she regard the information as immaterial for such an assessment? That means that an insurer cannot easily repudiate a contract unless he or she is able to prove to the court that any reasonable prudent person would regard the undisclosed information as material in order to assess the risk and determine the premiums payable as *quid pro quo*.

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367 2010 (5) SA 90 (SCA) 100. Also referred to as a 'reasonable person' or a '*diligens paterfamilias*' or 'average prudent person'. The statement under s 53 (1) of the SIA is whether a reasonable person would have found the *commissio* material.

368 Appeal judge Lewis applied the materiality test as viewed by the s 53(1)(b) of the SIA (2010 (5) SA 90 (SCA) 101).

369 Although the information was to be disclosed to SAMSA, Lloyd's alleged that the information on the stability book had a bearing on deciding whether or not to conclude an insurance contract and at what premium. Therefore, inaccuracy on the stability book which had an effect on the weight loaded onto the *Mieke* renders the insurance contract voidable under s 18 of the English Marine Insurance Act, 1906. However, the counsel representing Lloyd's failed during trial to put it to the witnesses of Classic Sailing Adventures when testifying what the load on the ballast was. Moreover, the SAMSA expert provided evidence that concluded that the 2004 stability book was mathematically correct and acceptable 'in essence'. This evidence was also not challenged, and was, therefore, admissible.

The materiality test as stated in this case[370] was a prudent reasonable person, which is different from the materiality test applied in *Qilingele v SA Mutual Life Assurance Society*[371] which was the subjective test. In the latter decision the court said that the issue of a reasonable insured, insurer or reasonable person did not come into the picture when determining material facts under the contract. The subjective test in *Qilingele v SA Mutual Life Assurance Society*[372] involved the probable reaction of a particular insurer, as opposed to that of a reasonable insurer and also as opposed to the probable reaction of the reasonable insured or an average prudent person in the position of the proposer for insurance.[373] The position of the law regarding the materiality test under section 53(1) of the SIA is now very clear after the amendments made to the act in 2003.[374]

The decision of *Representatives of Lloyd v Classic Sailing Adventures (Pty) Ltd*[375] has also developed the law on the issue of the materiality test in South Africa. In this case the court set out the tests for determining whether a misrepresentation vitiated a contract as follows: "There must be a statement of fact, present or past, or opinion, the said statement must be untrue, material to the insurer's appraisal of the risk and it must have induced the insurer into concluding an insurance contract." These principles of law, though very important under the law of contract, once parties to a marine insurance contract are dealing with a dispute in South Africa, the autonomy of parties on any claim will be guided by the SIA and not the law in which parties have chosen to govern their contract.

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370 *Representatives of Lloyd v Classic Sailing Adventures (Pty) Ltd* 2010 (5) SA 90 (SCA) 101.

371 1993 (1) SA 69 (A) 73.

372 1993 (1) SA 69 (A) 73.

373 Reinecke et el General Principles 275.

374 Van Niekerk and Schulz in *The South African Law of International Trade* 218 said that the materiality test was not whether a reasonable prudent person would have disclosed the fact but whether a reasonable prudent person would have considered that the information should have been disclosed to the insurer. The effect of the most recent amendments to s 53 of the SIA is to bring the law with regard to positive representation into line with the law on non-disclosures. The subjective test propounded in *Qilingele v South African Mutual Life Assurance Society* 1993 (1) SA 69 (A) 86G-87A would appear to no longer apply. Thus, the test in respect of *omissio* and *commissio* is not whether the reasonable person would have disclosed the fact in question, but whether the reasonable person would have considered that fact reasonably relevant to the risk and its assessment by an insurer. See the judgment of judge Boruchowitz in *Mahadeo v Dial Direct Insurance Ltd* 2008 (4) SA 80 (W) 86

375 2010 (5) SA 90 (SCA) 97-101. Mr Justice Lewis said that s 53 was designed to protect the insured parties who were ignorant, careless or uneducated from unscrupulous insurers who intended to escape liability on the basis of the common law that had evolved in relation to misrepresentation or non-disclosure. The judge held that the materiality test to be used on misrepresentation and non-disclosure was that of the "reasonable prudent person".

4.10.5 Illegality

The court was also faced with the issue of illegality. The insurers in this case raised a defence of illegality in that *Mieke* sailed on an illegal voyage, contrary to the provisions of the South African *Merchant Shipping Act*[376] as regards the certification of her skipper, and the presence of the required and accurate stability information on board. They argued that Classic Sailing Adventures had breached the implied warranty of lawfulness. The insurer used section 41 of the *English Marine Insurance Act*, 1906 to back up his argument. Section 41 of *English Marine Insurance Act* provides that

> (t)here 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.

The court reasoned[377] that section 54(1) of the SIA was not consonant with the provisions of section 41(1) of the *Marine Insurance Act*, 1906. Since the provisions of section 54(1) of the SIA are said to be prohibitory, it is impossible to contract out of section 54(1) of the SIA. The court went further to state the importance of section 54(1) of the SIA. Mr Justice Lewis said that an insurance policy would not be declared invalid because of the mere fact that the provisions of a certain act in South Africa had been contravened. The contravention that could render a policy void must not be collateral to the claim and must be related to the cause of loss. Looking at the facts of this case, the contraventions of the *Merchant Shipping Act*, 1906[378] raised by the insurer in defence of a claim were not related to the cause of loss. The information on the stability book had no effect on the cause of the loss. It acted as guideline to the master of the vessel in loading and ballasting the ship. On the issue of the implied warranty it was clear that the insured had not given any warranty on the certificates of the skipper. Lastly, section 54(1) precluded the insurer from relying on any breach of implied warranty.

376 57 of 1951.
377 2010 (5) SA 90 (SCA) 104-105.
378 57 of 1951.

Van Niekerk,[379] commenting on this case,[380] said that there was no material inconsistency between the provisions of section 41 of the *English Marine Insurance Act*, 1906 and the provisions of section 54(1) of the SIA. According to him, the two provisions dealt with different topics. He said that section 41 of the *English Marine Insurance* Act, 1906 dealt with the implications of a warranty by the insured on the legality in performing a marine adventure under a marine insurance contract. Section 54(1) of the SIA concerns the (and alters the common law) consequences of illegality in an insurance contract. This proposition suggests that perhaps there was no serious inconsistency between the chosen foreign law and the SIA which inconsistency may be against the public policy in South Africa. However, the Supreme Court of Appeal has spoken and its decision stands as precedence in South Africa.

However, the court ought to have gone further and defined inconsistency against peremptory provisions narrowly and its meaning against public policy. De Villiers[381] also commented on this case by saying that the provisions of section 54(1) were peremptory for purposes of protecting consumers in South Africa from unscrupulous parties in cross-border business transactions. He goes further to state that the section was used as one way of limiting the contractual privilege given to parties on the choice of law. The issue of illegality becomes a very important issue under marine insurance contracts because if the issue is statutory provided for, then autonomy of parties is definitely limited by the statutory provision. Both writers suggest that the peremptory provisions in the SIA are there for the purpose of protecting weaker contracting parties in insurance contracts. I submit that given the fact that marine insurance contracts are generally cross-border contracts there is a likelihood that the parties with more bargaining power would use that power to their advantage to avoid liability under insurance contracts whenever they are faced with a claim by the weaker party. This, to my mind, is against public policy. The exploitation of the weaker party (if indeed that party is a "weaker" party), is unreasonable.

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379 Van Niekerk 2010 *SA Merc LJ* 607.
380 *Representatives of Lloyd v Classic Sailing Adventures (Pty) Ltd* 2010 (5) SA 90 (SCA) 104-106.
381 De Villiers 2013 *SA Merc LJ* 486.

Chapter 5

General conclusion and recommendations

5.1 General conclusion

This research focused on the problems that are experienced by the Admiralty Courts in South Africa when the concept of "public policy and interest" is said to influence the principle of party autonomy with regard to the legal system to govern a marine insurance contract, where the chosen legal system overrides a peremptory provision of a South African statute. One may concur with researcher that it is not easy to decide on which legal system is be applied in a maritime dispute when parties have exercised their freedom under the law of contract of choosing the law and forum to which their disputes should subjected. After careful investigation it was established that one of the general principles governing a marine insurance policy is the principle of public policy and interest. The research investigated how this principle should be considered when the parties have exercised their autonomy in the choice of law and jurisdiction. Furthermore, the research gave an exposition of sections 53 and 54 of the SIA as peremptory statutory provisions in South Africa insurance law, and how the so-called peremptory provisions can limit the autonomy of parties.

The research determined that, generally, the courts in South Africa will respect a clause on exclusive jurisdiction in the parties' contract.[382] However, because the law in South Africa allows parties faced with any maritime disputes within the territorial waters of South Africa to approach the High Court in South Africa, the jurisdictional choice by parties may be limited statutorily.[383] The research showed that a party may also decide to oust the selected jurisdiction if he or she realises that the laws in South Africa may favour his or her claim more that the laws in the chosen jurisdiction. As discussed in Chapter 2 of this research, the Admiralty Courts in South Africa have, nonetheless, the discretion to entertain the maritime claim before them,

382 See Chapter 2 of this research.
383 S 3 of the *COGSA*.

decline jurisdiction or stay proceedings.[384] This, however, cannot be done *mero motu*, but by an application made by one of the parties seeking to implement the exclusive jurisdiction clause.[385]

The research indicated that after deciding on the issue of jurisdiction, the next issue that the court needs to decide on is the issue of the applicable law. Marine insurance law in South Africa originates in the English law and, therefore, the English law still has much influence on South African marine insurance law. Nonetheless, it was shown[386] that the introduction of the AJRA was aimed at having the High courts in South Africa applying Roman-Dutch law while hearing all maritime claims in South Africa.[387] Although the AJRA still allowed the application of English law in limited cases,[388] the development of maritime law in South Africa should permit Roman-Dutch law to stand on its own without any further reference to English law. The issue of applicable law is very important because it determines the execution of the judgment or order in South Africa, the issue of public policy and principles, and respect for peremptory statutes in South Africa.

An evaluation of the research has shown that the chosen legal system will apply seamlessly in South Africa if it is not contrary to public policy and interest in South Africa, and if it does not override the peremptory statutes in South Africa.[389] It was established in Chapter 4 that where it is believed that the application of the selected legal system will be contrary to South African public policy and interest or the acts of the parties will be rendered illegal in terms of any statute in South Africa, then a court in South Africa will not apply the selected legal system. This suggests that party autonomy can also be limited statutorily in South Africa.

Where there is a statute that specifically governs a certain maritime dispute, which statute is *ius cogens*, then the rules of interpretation as provided by that statute will apply as opposed to the rules of the selected legal system. In Chapter 4 of this

384 S 7 of the *AJRA*. See paragraph 2.2 above.
385 See paragraph 2.2 of this research.
386 Refer to Chapter 3 of this research.
387 S 2 of the *AJRA*. See paragraph of this research.
388 S 6 of the *AJRA*. See paragraph 3.4 of this research.
389 See the discussion on the decision of *Representatives of Lloyd v Classic Sailing Adventures (Pty) Ltd* 2010 (5) SA 90 (SCA) 90-95 in Chapter 4 of this research.

research it was seen that the rule to be used by a court normally is not contrary to the governing law. However, when the governing law is English law, the rule to be applied in the case of misrepresentation will favour the insurer and he or she will be able to deny liability. This is because under English law, the insurer will rely on the warranty provision in the insurance contract to stand as a guarantee that the information provided by the insured is true and correct, and anything contrary to it permits the insurer to avoid the insurance contract.

Consequently, it is submitted that the extent to which an Admiralty Court in South Africa may decide on a maritime claim, largely depends on the issue of public policy and interest, the existence of a peremptory statute and very little on the parties' choice of law. As was seen in this research, the issue of choice of law cannot override the peremptory statutes in South Africa. Admiralty Courts in South Africa, although vested with the powers to stay proceedings, have limited power where the chosen legal system is contrary to the public policy and interest in South Africa, and is aimed at overriding the peremptory statutes in South Africa. The court in *Representatives of Lloyd v Classic Sailing Adventures (Pty) Ltd,*[390] could have used the opportunity to clarify the test to be used to determine public policy, especially when provisions are peremptory by implication. However, it is still unclear and I recommend that it would be against public policy if the chosen legal system overrides the peremptory provisions of a statute in South Africa which operates to protect the weaker party to an insurance contract.

5.2 Recommendations

This research, having investigated the current marine insurance law practice in South Africa as practised by the Admiralty Courts in South Africa found some weaknesses inherent in the court practice. The following recommendations may assist South Africa in transforming its marine insurance law:

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390 2010 (5) SA 90 (SCA).

5.2.1 Limitations of party autonomy

Choice of law is regarded as one of the most important principles to be observed in international trade. Marine insurance contracts are commonly used in the transportation of goods in international trade. The question may be asked whether parties should be deprived of a choice of law all together in order to optimise the legal certainty of the marine insurance contract.[391] Given the importance of freedom to contract as discussed in Chapter 2 of this research, it is recommended that South African courts should recognise the doctrine of party autonomy with certain limitations. The limitation of party autonomy should strictly aim at protecting an insured from an unscrupulous insurer who intends to subject a weak insured to a legal system where the weaker insured cannot make a rational decision or a legal system that would be against public policy and interests in terms of South African insurance law.[392]

As shown in Chapter 2 of this research, the court cannot *mero motu* decide on the issues of choice of law and exclusive jurisdiction. There has to be an application before court which seeks to enforce the exclusive jurisdiction clause. However, this can be avoided by having a codified system in South Africa which will explicitly state the approach to be followed by the courts and parties to a marine insurance contract while applying the principle of party autonomy.

According to de Villiers,[393] the first method recommended in order to limit party autonomy is having a specific piece of legislation in South Africa providing for the law applicable to contractual obligations, including the applicability of a foreign legal system. South Africa can borrow the provisions of the *Rome Convention on the Law Applicable to Contractual Obligations* of 1980[394] on the law applicable to contractual obligations. De Villiers[395] refers to article 3 of the *Rome Convention* which provides

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391 De Villiers 2013 *SA Merc LJ* 482.

392 Put differently, limitation of party autonomy should be supported purely when the chosen legal system is suppressing a party with weak bargaining powers under a contract. Only when it is vividly clear that there was unfair contractual negotiations and the weaker party would have been protected by the law, had the party not subjected the contract to a foreign legal system.

393 De Villiers 2013 *SA Merc LJ* 483.

394 Rome Convention on the Law Applicable to Contractual Obligations of 1980 (hereinafter referred to as the Rome Convention).

395 De Villiers 2013 *SA Merc LJ* 483.

that parties are free to exercise their freedom to contract as long as their freedom does not take their transaction from protections provided by peremptory provisions of the otherwise applicable law. This limitation protects parties from choosing laws that will supersede the peremptory rules and exploit weaker contracting parties.

The second method recommended is limiting parties' choice of law to the country where the underwriter of the marine insurance policy resides or the place where the contract is performed.[396] This may appear to be a narrow choice of law which could amount to no choice of law at all. However, it has a way of somehow protecting parties to a marine insurance contract, because both parties to the contract will be familiar with the legal system where the contract is performed and the laws where the underwriter is based.

I suggest that South Africa should adopt the *Rome Convention* of 1980 because it is internationally recognised and, therefore, the parties involved in cross-border contracts are protected. Furthermore, it is aimed at protecting parties from choosing laws that will supersede the peremptory provisions and, therefore, exploit weaker contracting parties. Contravention of South African public policy and interest by having a foreign legal system that overrides peremptory provisions of certain South Africa states will thus be avoided.

5.2.2 Codification of the marine insurance laws in South Africa

It is a general principal of law that where there is statutory law in a country, before making reference to any other source of law such as case law, one has to refer to the statutory provisions first.[397] Basic to this argument on this general principle, van Nierkerk[398] suggests, is the necessity of codifying marine insurance laws in South Africa. I agree that at the moment there is no specific statute in South Africa dealing with marine insurance laws; courts normally refer to the provisions of the SIA when dealing with marine insurance law disputes.[399]

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396 De Villiers 2013 *SA Merc LJ* 486.

397 Sources of South African marine insurance law are judicial decisions, Roman-Dutch law and English law (van Niekerk *South African Maritime Law* 103).

398 Van Nierkerk 2010 *SA Merc LJ* 596.

399 Van Niekerk 2010 *SA Merc LJ* 607.

The recommendation is, therefore, that there should be a specific piece of legislation governing marine insurance law in South Africa, which statute will specifically state what test should be used in matters of non-disclosure and/or misrepresentation when there is a selected foreign legal system to apply in a contract. A draft of a *Marine Insurance Act* was presented to the South Africa Maritime Law Association Board and other bodies dealing with marine insurance in 1997.[400] Since then, nothing has been done on the draft bill. There have been new developments in the maritime law since the first draft was issued in 1997. There is, therefore, a need for a new draft bill that will codify all these new developments in South African maritime law and come up with proper law that can be used by courts and referred to by parties to a marine insurance contract. This is necessary because certain principles such as the principle of "public policy and interest" would be defined so that there is no uncertainty when determining whether a choice of law clause in a marine insurance contract overrides the peremptory provisions of a certain South African statute, and is therefore contrary to public policy and interests.

5.2.3 Reforming the Admiralty Jurisdiction Regulations Act

The discussion in Chapter 3 of this research has shown that section 6 of the AJRA provides for the application of English law either whether the maritime dispute before the court occurred prior to the enactment of the AJRA or in circumstances where the maritime claim is not listed on the maritime claims list under section 1 of the AJRA. On 1 November 2013 the AJRA will be celebrating its 30th anniversary since its enactment. This clearly shows that the purpose of the application of English law as intended by the legislature has served its purpose and should no longer be relevant,[401] as the application of South African and Roman-Dutch law principles should provide sufficient solution to the problem because, in my view, sufficient development has taken place.

A call for reform is accordingly recommended where Roman-Dutch maritime law can be recognised statutorily and further developments.

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400 Ndlovu 2008 *Obiter* 77.
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5.2.4 Reform of the SIA

Despite the amendments that have been made so far to the SIA since its enactment, with all the developments that have taken place in the marine insurance industry, it is my opinion that there is still room for reform. Just like the SIA was amended to cover the materiality test in issues of misrepresentations and non-disclosure, I recommend that certain important principles such as the principle of "public policy and interest" should be addressed by the SIA. In that way there would be no doubt in the application of the principle of "public policy and interest" to a clause in a marine insurance contract that has chosen a foreign law to apply to the contract and that foreign law is said to override the peremptory provisions of a South African statute.

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