

The liability of the insurer with reference to South African aviation insurance

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Chapter 1 Introduction

How can regulatory measures provide legal certainty with regards to the liability of the insurer in the insurance contract, with specific reference to aviation insurance? To determine the said liability the focus of this research will be a discussion of the developments in case law in terms of insurance liability, interpretation of the insurance contract and, most importantly, existing regulatory measures that affect the liability of the insurer, with particular reference to aviation insurance. In the discussion it will also be establish if these measures indeed do regulate the liability of the insurer and whether the legislation will have to be aligned to better create certainty in South African insurance law.

Insurance is one of the biggest industries in South Africa, and in the world. As a result its value to the economy makes it an industry exerting a huge amount of legal influence. It is a global industry that silences the voice at the back of one's mind, saying "what if" regarding the safe keeping of one's possessions at ease. However in recent years the rise in cases of litigation between the insurer and the insured has sparked concern that the insurance policy one enters into is not always "what you see is what you get". This on the other hand is not a one sided battle, with the insured always being the victim, but more a struggle to protect an object against a potential risk that may materialise where the insurer may not be able to provide cover for every instance that is a potential risk to insured object. To illustrate the issue that exists, the following scenario is provided.

Mr Smith looks at the departures board at OR Tambo airport to ensure he has the correct boarding time for his connecting flight to Cape Town. He is flying from England to visit his family in Cape Town and he has already checked in his luggage and himself. With ticket in hand he boards the plane. Upon arrival and waiting for his luggage to appear he notices that his suitcase has been opened and some of his belongings have been taken out, stolen it would seem. He walks to the air transport provider and asks them to please assist him in claiming for the stolen items. If there is insurance involved, the question will be, from whom Mr Smith will claim. This is where the liability of the insurer will come into play. But before Mr Smith claims against the insurance company, the party at fault must be identified. Where did his

loss and damage occur? The airport terminal at OR Tambo, on the transport for loading baggage, the loading itself or the terminal at Cape Town? And then against which insurance company does one institute the claim, insurer X or Y? And ultimately, will the insurer be liable? The answer will be discussed in the chapters that follow.

In looking at everyday insurance, the basic concept has not changed much since the idea of insurance first arose.¹ Facing the risk of loss or damage is a reality always present and in most cases is the main motivation for the insurance cover obtained. The newly appointed insurer now has the duty to protect the insured against the risk and in so doing, accepts liability to compensate the insured if a loss materialises due to the predetermined risk the insurance covers. Part of the insurance process is the agreement between the parties. The insurance contract can be defined as:

A contract between an insurer and an insured, whereby the insurer undertakes in return for payment of a price or premium to render to the insured a sum of money, or its equivalent, on the happening of a specified uncertain event in which the insured has some interest.²

The insurance contract is a unique form of contract as it has particular requirements it must adhere to. Otherwise the contract cannot be classified as being one of insurance.³ Thus, the insurance contract forms the basis of the insurance to which the parties agree and states the terms and conditions of the agreement in relation to the cover given by the insurer. Each contract is therefore unique to each case and its particulars are written to express the terms and conditions agreed upon when the insurer agreed to provide cover to the insured. This means that the risk the insured is faced with and the liability of the insurer will play a central role in the whole insurance process.

The reason is that the liability of the insurer to pay will depend on the fact that the risk may materialise and the insured will consequently claim from the insurer for the loss. In the end the basic concept still applies: the insurer is paid to cover the insured against the risk while the insured wants compensation if the risk occurs.

1 *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality* 1985 1 SA 428.

2 Reinecke *et al General Principles of Insurance Law* 3.

3 Reinecke *et al General Principles of Insurance Law* 93.

Unfortunately this is not always the case as the insurer can question its own liability due to the wording of the insurance contract. In order to understand this said liability upcoming chapters will provide a better understanding and recommendation as to what needs to be changed to regulate the liability.

Firstly, historically insurance has to be put in context in order to truly understand why the developments in South Africa have occurred as they have. The influences of other legal systems on our own insurance law are evident at many stages; and investigating this process may well provide better recommendations for regulatory measures to address liability.

Secondly, in South Africa the legislation dealing with everyday insurance comprises of the *Short Term Insurance Act 53 of 1998* and the *Long Term Insurance Act 52 of 1998* (hereafter referred to as *STIA* and *LTIA*). This legislation defines the insurance contract as we know it today. However as will become clear later in the dissertation the regulatory measures provided in the *STIA* in particular does not, at face value, always deal with the issues that insurance is faced with. But in recent years the legislator has introduced new legislation that might provide a better outline for the regulation of the insurer and insured insurance contract. This can be seen in the *Short Term Policyholder Protection Rules 2004* and the *Consumer Protection Act 68 of 2008*.

Thirdly, in any business and legal environment it is always the preferred option to put everything on paper. The insurance contract gives the parties the legal protection when entering into an agreement of this nature. But as all contracts are different so may the interpretations of the meaning of the words or clauses in the contract differ.⁴ More importantly the wording of the contract in relation to the liability of the insurer can cause the parties to adopt different perspectives on the true nature of the cover. Many disputes have seen their way into courtrooms because the insurer claims it is not liable to pay the claim lodged by the insured. The court in the case of these disputes must resort to measures of interpretation in order to better understand the contract and what the parties intended when entering into the legal relationship with

4 Fletcher 2008 *Without Prejudice* 18.

one another. In this regard much emphasis has been placed on what the facts are of each case and how the circumstances might have affected the insurance cover provided.

And lastly, as a practical example, for the purpose of aviation insurance, the main objective is to protect possessions, oneself and the goods against a risk that can occur on an aircraft inside or outside South African borders.⁵ As commonly used as it is, aviation insurance is not defined by the *Short Term Insurance Act 53 of 1998*, but forms part of transport insurance as a whole. This entails that the Act does not specifically deal with any unique particulars relating to aviation insurance. As a member of the International Civil Aviation Organisation, South Africa is required to address the lack of proper particulars on aviation insurance. In this regard it will investigate and determine whether, in recent times, passengers travelling in an aircraft have been protected against loss by the travel insurance they obtained or whether the insurance coverage is of such a nature that the goods are truly insured under the particulars of the policy, to name just a few aspects.⁶ In addition the aviation insurance provisions under the English legislation and legislation from other countries will be discussed provide insight into improved regulation and better management of the aviation insurance principles in South Africa.

This relationship, between the insured and the insurer, although the above is very basic to insurance law, is complicated by the principles involved in insurance in relation to the legislation and case law as well as by the terms and conditions of each insurance contract which indeed will affect the liability of the insurer. The contract outlines the liability the insurer has to the insured. The main theme with regard to this dissertation will therefore focus on the liability of the insurer with specific reference to the wording of the insurance contract and also, practically speaking, to the basis of aviation insurance.

5 Reinecke *et al General Principles of Insurance Law* 426.

6 This topic is discussed under Chapter 5.

The fundamental principles in upcoming chapters will be to provide certainty about the nature of the insurer's liability to pay for the damages suffered by the insured and to investigate how the insurance contract by means of its terms and conditions influences this liability. In addition the regulatory framework governing the liability of the insurer will be explored in terms of these principles.

Chapter 2 The legal framework

2.1 Introduction

2.1.1 A brief overview of the history and the sources regulating the insurance law.

Before discussing the regulatory measures for the insurance contract it is essential to provide a brief overview of the historical development of insurance as it is today. The most relevant case in South African case law regarding the sources and the impact of the different legal systems on insurance law⁷ was *Mutual and Federal Insurance Co Ltd v Municipality Oudtshoorn*⁸ (hereafter referred to as the *M&F*-case). The main issue before court was the use of certain legal principles in dealing with a dispute regarding insurance; the theme throughout the case concerned the correct regulatory measures and whether the court *a quo* had given suitable judgment regarding the dispute between the parties and the future impact it would have in South African insurance law disputes.

Insurance law in South Africa derives its origin from more than one source.⁹ In South Africa the “Roman-Dutch law” underlies the “common law”.¹⁰ The Roman-Dutch development of insurance law has been influenced by more than one source from other European countries, for example Italy.¹¹ The first type of insurance known to the world was “marine insurance”, originating in the “medieval Merchant Law or *lex Mecatoria*”.¹² In the *M&F*-case Judge Joubert referred to Dillion and Van Niekerk, *The South African Maritime Law and Marine Insurance Selected Topics*, to ascertain how writers such as *Voet* and *Grotius* “extensively” dealt with maritime insurance under Roman-Dutch law.¹³ These writers also commented that “legislative measures and Dutch theses dating from this period may still prove to be valuable

7 Reinecke *et al* *General Principles of Insurance Law* 11.

8 1985 1 SA 485.

9 Reinecke *et al* *General Principles of Insurance Law* 11.

10 Pistorius *International insurance Law and Regulations* SAF 1.

11 *M&F*- case 427.

12 *M&F*- case 427.

13 1985 1 SA 429.

assistance in the study of the Roman-Dutch law of marine insurance”.¹⁴ The Honourable Court quoted the following by the abovementioned writers:

It has been pointed out furthermore, that our common law is not what is usually regarded in the strict sense, as Roman-Dutch law...as it had developed at the end of the eighteenth century, but rather a European *ius commune* of this period here would in principle, therefore, not appear to be any obstacle in the way of consulting as our Courts have done in the past, the work of jurist such as *Pothier, Emerigon, Straccha, Roccus, Santerna* and others on the law of marine insurance.

Put differently, insurance has been influence by many different sources and in solving disputes between parties, South African insurance law will include solutions that will not always reflect the South African legal framework but will now be included by way of precedent. The importance of developing the insurance aspect of the common law will benefit practices used in insurance law as it continues to develop the field of law and the regulatory measures that accompany it. On the other hand the fact is that although the Courts will take into consideration the principles of other countries on insurance law, the “Roman-Dutch law” will still be dominant in any case.¹⁵ These sources may well provide a fundamental understanding of the liability of the insurer.¹⁶ As in the *M&F*-case the court had to understand the “materiality” of the fact that was in dispute. To determine this, the court was required to gain a more comprehensive understanding of the use of the other legal systems to address these disputes. By doing so the court provided certainty on the use of the relevant legal principles in future in our insurance law.

In dealing with insurance law in general, one has to realize the motive for obtaining the insurance law in order to understand the insurer’s liability. More importantly, when the potential insured approaches the insurer it will have a clear objective of

14 1985 1 SA 429.

15 Reinecke MFB *General Principles of Insurance Law* 11.

16 Further discussed in Chapters 3 and 4.

what it wants from the insurer. Grasping the reason for its development, one can more fully comprehend the insurer's liability and therefore understand the spike in insurance litigation.

Now the addressing these sources, it is necessary to look back at even further into history. Marine insurance dealt with the risks involved in trading, goods and transport by sea (mainly); hence the insurer would usually provide for these types of risks in the insurance agreement. In DM Kriel the "16th Century Insurance Policy"¹⁷ the author provided a translated copy of a 16th century insurance policy drafted by *Straccha*. The basis of this insurance contract is similar to that in recent times. The risk, premium, object and obligation were even, in earlier periods, part of the policy.¹⁸ The most relevant part on the other hand is the liability of the insurer and the regulation thereof in the policy. If there was a claim in terms of the policy and the insurer "denied" that it was liable the insurer was first obliged to pay out the claim; thereafter it would be able to go to court.¹⁹ As a result the principle of "pay first, litigate later" did apply. This inclusion regulates liability even if it is just for the sake of the impending litigation. Also if no message had been received from the ship within 12 months after its departure the policy was required compensate in terms of "no legal exception".²⁰ This clause, very relevant for the circumstances (in the absence of technology) is distinctly innovative because the liability cannot be questioned. Unfortunately the simplicity of insurance has become a complex legal "web" of clauses, terms and conditions and obligations that must be adhered to in order for the insurance cover obtained to materialize. These factors are part of the framework of case law and legislation.

2.2 Legislation in South Africa

2.2.1 The Short Term Insurance Act: a brief summary

17 Kriel 2002 *Fundamina: A Journal of Legal History* 133.
18 Kriel 2002 *Fundamina: A Journal of Legal History* 133.
19 Kriel 2002 *Fundamina: A Journal of Legal History* 134.
20 Kriel 2002 *Fundamina: A Journal of Legal History* 134.

The insurance contract, as it is used today, has been the centre of many matters finding their way not only into South African courts, but also courts all over the world. Frequently the insurer has denied liability under the insurance policy, while the insured has been of the opinion that the insurer is indeed liable for paying the claim instituted. Whatever the facts may be, the parties will most certainly refer to the insurance contract, being the source of the obligation between the parties. This obligation is a “right and a duty” that gives the party the “right” under the contract to “enforce” the “duty arising” from the “contractual obligation”.²¹

The legal aspect of insurance is for the most part regulated by the LTIA and the STIA.²² The STIA states in its definitions that an insurance policy (whether it is an accident or health or transport) “means 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...” in terms of the object of the “risk” occurs. These “benefits” refer to “sums of money, services or other benefits”. In other words, according to the STIA definition the insurer will compensate the “person” or “policyholder” if the risk occurs as the cover of the contract sets out. Therefore as part of the insurance contract the insurer will clearly set out what the risk is and if it will provide cover. The “risk” or “event” spoken of in the STIA will be the basis of the insurance contract and the reason for any person or company obtaining it, but the actual regulatory measures, stating when the insurer will be liable, must be derived from the contract itself.

Policies are dealt with under Chapter 7 of the STIA. Firstly, describing section 51, it deals with the voidness of certain provisions of agreements relating to short-term policies. The section provides that, for example, an agreement will be void if a “person” or “insured” waives a right it is entitled to under the Act”.²³

Although this protects the insured from signing a contract that is not in its best interest, the section does specifically state the measures against which the voidness of certain provisions can be measured. The same can be said for section 54 of the

21 Maxwell “Interpretation of Contracts” Hutchison D and Pretorius C (eds) *The Law of Contract in South Africa* 232.

22 The writer will, in researching this paper, only focus on the STIA.

23 Section 51(d) of the STIA.

STIA, which deals with the validity of the contract. It only states the criteria for this, for instance the insurer being “prohibited from” entering into such a policy”,²⁴ but does not deal with acceptable contractual practices.

This leaves one with the sense of expecting the legislation to be more comprehensive, not just “scratching the surface” of the problem.

Another important aspect created by Chapter 7 is the policyholder protection. The STIA in this regard provides for the rules that may take shape and regulate certain provisions in terms of such protection. These rules came into existence in 2004.

2.2.2 The Policyholder Protection Rules

The Policyholder Protection Rules (hereafter the PPR) have as their “objective” to:

Ensure that policies as defined by Rule 1 are entered into, executed and enforced in accordance with sound insurance principles and practice in the interests of the parties and public interest.²⁵

The PPR is the attempt by the legislator to provide legislative measures for protecting the policyholder in the acquirement of insurance against practices that result in more and more litigation and disputes. In reading the rules it is evident that the relationship between the insurer and the insured must be regulated to provide certainty in law. The rules deal with such factors as the business practices of the “direct marketer”, “the formation of the policy” and the “agreement” itself. As a result the insurance agreement/contract is now subject to rules and regulations in dealing with policy and the formation thereof.²⁶

2.3 The insurance contract and the consumer

24 Section 54(2) of the STIA.

25 Rule 2 of the PPR.

26 Chapter 4 deals with the PPR in more detail as well as with the critique these rules are encountering.

After the promulgation of the *Consumer Protection Act* 68 of 2008 (hereafter referred to as the CPA) consumers have welcomed protection from providers of “products” and “services” setting out “norms” and “standards” regulating “fair market and business practices”.²⁷ The CPA is a so-called “game changer”, meaning the consumers cannot be misled by promises and great deals without at some stage being well informed of all terms and conditions. The impact it will have on insurance is evident,²⁸ and is not just on the insurance industry, but on the “law of contract” as a whole.²⁹

2.3.1 *The application of the CPA to insurance*

The CPA was introduced into South African legislation during October 2010,³⁰ but only came into force on the 31st of March 2011.³¹ The CPA regulates the relationship between the provider and the consumer in such a way as to protect the consumer from “practices” that might be to its disadvantage.³² As the insurer is a service provider in the sense that it provides insurance against the risk, it is important to examine the CPA’s definition of “services”. The CPA states that the Act will apply to services such as “work or undertaking performed by one person for direct or indirect benefit of another” but when it comes to “services” that are regulated by the LTIA or STIA it will not apply. In other words, the CPA’s consumer protection regulations do not apply to insurance, which creates the impression at a first glance that the insured as a consumer is being disadvantaged because these provisions would indeed create a “sunder” relationship between the insurer and the insured. But all is not “said and done”.³³ Schedule 2 of the CPA under item 10 provides the following:

The exclusion of the Short Term Insurance Act, 1998 (Act No.53 of 1998), and the Long Term Insurance Act, 1998 (Act No. 52 of 1998), is subject to those sector laws being aligned with the consumer protection measures

27 As per the Preamble of the Act.

28 Costa A 2009 www.fanews.co.za.

29 Du Plessis *et al* “The Law of Contract in South Africa” Hutchison D and Pretorius C (eds) Oxford University 2010.

30 Dinnie D 2009 www.insurancegateway.co.za.

31 GN 917 in *Government Gazette* 33581. Sharrock RD “Judicial Control of Unfair Contract Terms: The Implications of the Consumer Protection Act” 2010 *South African Mercantile Law Journal* 297.

32 Costa A 2009 www.fanews.co.za.

33 Dinnie D 2009 www.insurancegateway.co.za.

provided for in this Act within a period of 18 months from the commencement of this Act, failing which, the provisions of this Act will apply.

Thus from the day of commencement it would be 18 months before the CPA provisions would be applicable unless the provisions are aligned.³⁴ By late 2012 the alignment had to be in place and the CPA and STIA (also LTIA) had to be in line with one another, meaning the “review of provisions” and if “amendments” had to be undertaken; the CPA would apply.³⁵ The effect of the latter will influence the insurance law as it is, to the extent that normal practices will have to be reviewed in order to adhere to the new regulations provided by the CPA.

2.4 Insurance case law

The courts have, for decades, had the unpalatable task of giving judgment in insurance disputes where there are no clear regulatory measures as to how the dispute should be dealt with. Instances of case law where courts must decide liability, that the insurer must pay, are numerous. As part of the legal framework case law plays an important role in developing the law of insurance as a whole due to the fact that many judgments have included provisions that could be of assistance when dealing with future disputes.

For instance in the *M&F*-case the court was faced with the question of non-disclosure being “material” and how the common law (Roman-Dutch law) or English law would impact on the eventual conclusion the court could derive from this fact. In the matter of *Mutual and Federal Insurance Co Ltd v Ingram NO & others* 2009 6 SA 53 (EC) the wording of an exception clause came under fire when the insurer relied on this clause as a reason for its not compensating the insured.³⁶ The wording of the insurance exception stated that the insurance policy would not provide cover in the event of certain “perils” occurring that created a loss for the insurer.³⁷ Although the Honourable Court took into consideration numerous factors to decide liability, it mainly examined the origin of the dispute, the contract. In *African Products (Pty) Ltd*

34 Jacobs, Stoop & Van Niekerk 2010 *PER/PELJ* 15.

35 Dinnie D 2009 www.insurancegateway.co.za.

36 Van Niekerk 2009 *Annual Survey of SA Law* 645.

37 Van Niekerk 2009 *Annual Survey of SA Law* 645.

v AIG South Africa Ltd 2009 3 SA 473 (SCA) the phrase “unforeseen and sudden physical damage” was being interpreted with respect to its meaning as it forms part of the policy.

2.5 Conclusion

Consequently, although the insurer relies on the contract to stipulate its liability, attention falls again to this question: why the confusion about the liability? The answer is derived from the interpretation of these contracts by the insurer and the insured. The courts are now obliged to decide the correctness of the interpretation, when it would be a lot easier if there were a clear indication as to the liability of the insurer and the measures it is subjected to. Furthermore the lack of certainty in legislation might cause further unnecessary litigation to determine what is meant by the provisions and how their interpretation must be conducted.

CHAPTER 3 Wording of the insurance contract and the true nature of the cover

3.1 *Understanding the insurance contract*

There is no bigger problem in the field of insurance as between the insurer and the insured than the question of liability and the realization of the insured that the insurer will deny its liability. The business of insurance is all about the “transfer and distribution of risk”.³⁸ When the parties have decided to “transfer and distribute the risk” they do so in the form of a “contract”.³⁹ Once the parties have in principle agreed to enter into a contract, the insurance policy will set out the legal terms and conditions. In most cases, the parties will refer to the insurance contract to outline their expectations of each other in order to define what insurance is needed and what is provided. Thus, as in any type of contract the parties will express their “intention” to each other by way of a contract which they agree upon.⁴⁰ What seems to be a reoccurring dispute regarding the insurance contract is whether the insurance contract affirms that the insurer is indeed liable, when the insurer repudiates its liability. The insurance contract has been the topic for many legal professionals arguing the liability debate in court and authors writing about the interpretation of words, terms or clauses that influence the aspect of liability as a whole based on the findings in case law and other academic literature. In understanding the insurance contract in this respect there are a few key elements that have surfaced as problems. These issues will be the centre point of discussion in this Chapter in order to grasp why the insurance contract is formulated as it is and to consider the inclusion of terms and conditions that will affect the success of a claim. Most

38 Davis Gordon & Getz *The South African Law of Insurance* 79.

39 “The risk is transferred contractually because the insurance contract determines that the insurer will compensate or indemnify an insured if a risk defined in the contract occurs. In exchange for the transfer of the risk, the insured must pay an amount to the insurer, which is called a premium and which must also be established in the insurance contract.” Sutherland and Van der Bijl “The Law of Insurance” Scott (ed) *The Law of Commerce* 281.

40 The insurance policy will now contain the “basis of the relationship between them.” Sutherland and Van der Bijl “The Law of Insurance” Scott (ed) *The Law of Commerce* 282.

importantly, the focus will fall on whether there is a way to address the problem and provide measures to create more certainty and fewer legal debates about recurring problems.

3.1.1 *The interpretation: the impact the interpretation of the insurance contract has on the meaning of the words*

Whatever the reason for the insurer not compensating the insured for the damage it suffered, the contract will provide the grounds for seeking to interpret the term, word or clause, in dispute. The interpretation of the insurance contract is one of the fundamental elements in deciding the liability of the insurer under the insurance cover. Although the courts consider all the factors involved in the case it has to decide which the best way to interpret the insurance contract is, one must focus on the available measures and how their use affects legislation in South Africa.⁴¹

It is no surprise that interpretation plays such a major role when the dispute between the insurer and the insured is subject to the conditions, terms or even words in the insurance contract. It would be ideal to take the contract and interpret it so that “it means what it says”.⁴² In most cases this is the objective the Court has in mind, but evidently the process might not always come to a conclusion that is ideal to either of the parties.⁴³ Therefore to provide a suitable solution it is important to note the methods in dealing with it. The main focus thus is how best to interpret the contract in the light of all the factors surrounding it.

As part of interpretation it would be helpful to understand the influence the Constitution, legislation and even the “law of contract”⁴⁴ exert on the insurance contract. In addition, the methods used and discussed in case law and literature should contribute to the understanding of the insurance contract.

41 Why interpretation plays such a major role is best said by Reinecke *et al*: Given that “there is no ‘lawyer’s paradise’ in which all words have fixed and precisely ascertained meaning”, the interpretation of the insurance contract is a vexed issue, often giving rise to litigation.

42 Fletcher 2008 *Without Prejudice* 18.

43 Wallis 2010 *South African Law Journal* 675.

44 Kopel *Guide to Business Law* 265.

3.1.1.1 The interpretation rules

In any dispute over liability it is important to take into consideration the “rules of interpretation” in order to determine the range of the “cover”.⁴⁵ Although most of the literature refers to the interpretation of the insurance contract and the contract in general it is important to refer to these rules and their impact on the understanding of the insurance contract.

First of all, when interpreting the contract one must consider the reason for the parties entering into it by taking into account the “surrounding circumstances”.⁴⁶ For instance example where the one party is concerned that he may be involved in an accident because he frequently travels by car, making the acquisition of insurance a necessity, he will want the insurance to reflect his intent while the other party providing an insurance service to the motor vehicle owner may stipulate strict provisions because of the high risk involved. Thus, if an accident does occur and the parties are in dispute, interpretation can play a major role in deciding liability. In *Coopers & Lybrand v Bryant* 1995 (3) SA 761 (A) the court held that the one must look at the “context of the words or phrase”, the reason why the parties entered into the agreement in the first place, and the reason for the inclusion of a word or phrase when they are “ambiguous”.⁴⁷

The general rule of interpretation is referred to as the “golden rule” of interpretation and holds that the “intention of the parties” must be followed if the “meaning of the contracting parties” comes clearly across from the “contract itself”.⁴⁸ In determining the intention of the parties this will most likely be reflected by the “wording of the insurance contract”, meaning the courts follow “plain, ordinary popular and grammatical meaning”⁴⁹ in order to derive the intention for the words’ inclusion in the contract. The South Gauteng High Court judgment was delivered in the *Hypercheck*

45 Sutherland and Van der Bijl “The Law of Insurance” Scott (ed) *The Law of Commerce* 294.

46 Maxwell “Interpretation of Contracts” Hutchison and Pretorius (eds) *The Law of Contract in South Africa* 253.

47 Wallis 2010 *South African Law Journal* 674.

48 *Joubert v Enslin* 1910 AD 6; *Lombard Insurance Co Ltd v City of Cape Town* 2008 2 SA 423 (SCA) , *Sasria Ltd v Slabbert Burger Transport (Pty) Ltd* 2008 5 SA 270 (SCA); *Scottish Union & National Insurance Co Ltd v Native Recruiting Corporation Ltd* 1934 AD 458.

49 Davis Gordon & Getz *The South African Law of Insurance* 239.

(Pty) Ltd v Mutual and Federal Insurance Company Ltd (2010/2695) 2012 ZAGPJHC⁵⁰ (hereafter referred to as the *Hypercheck*-case) and the Honourable Court looked at the following basic principles:

The general principle and rule relating to the interpretation of contracts, which are relevant in the sphere of insurance contracts can be summarised as follows: *As with all other contracts it is well-established that if the language which the parties have themselves used in the insurance contract...There is no room for a more reasonable interpretation than the plain meaning of the words themselves convey, particularly so if there is no ambiguity.* (own indent used)

This should provide the court with an indication as to the meaning of the inclusion of the words (or terms) in the contract, but in some instances this is not the case.⁵¹ In giving judgment courts sometimes have to deal with a more tenuous interpretation and must refer to other methods of interpretation if it is not clear from the intention or meaning of the words themselves what is intended by them.⁵²

These methods include but are by no means limited to the *expression unius est exclusion alterius*,⁵³ *Eiusdem generis*,⁵⁴ *ut res magis valet quam pereat*⁵⁵ but most importantly the *contra preferentem* rule. The *contra preferentem* rule is addressed also by Judge Mayat in the *Hypercheck*-case which held that in applying the statement made in *Kliptown Clothing Industries (Pty) Ltd v Marine and Trade Insurance Co of SA Ltd* 1961 1 SA 103 (AD) at 108C and *Fedgen Insurance Ltd v Leyds* 1995 3 SA 33 (AD) at 38 D-E one has to take note of the agreement and who “drafted” it taking into consideration that:

50 One of the most recent cases stating the rule of interpretation and how it is implemented in each case. There are however many other cases that state the same interpretation rule.

51 The case when plain language is not used or the interpretation does not make sense if seen in the normal sense of the words. In some instances the words or terms used are taken out of context and the court interprets the contract by using methods of interpretation discussed below.

52 Pistorius *International insurance Law and Regulations* SAF 25.

53 Briefly means the exclusion of all “things not expressed”. Plaut date unknown www.hannaplaut.com/publications/interpre.pdf.

54 If “words” or “terms” are used in connection with “specific words or terms” they should be interpreted in the “same class”. Reinecke *et al General Principles of Insurance Law* 167. The same can be said for the *nositur a sociis*. Davis Gordon & Getz *The South African Law of Insurance* 245.

55 The court leans toward “validity” rather than “forfeiture”. Pistorius *International insurance Law and Regulations* SAF 25.

“Any provision which purports to place a limitation upon a clearly expressed obligation to indemnify must be restrictively interpreted...for it is the insurer’s duty to make clear what particular risks it wishes to exclude.... A policy normally evidences the contract and an insured’s obligation, and the extent to which an insurer’s liability is limited, must be plainly spelt out. In the event of a real ambiguity the contra proferentem rule, which requires a written document to be construed against the person who drew it...

In drawing from the above, the courts will now focus on the insured and interpret the meaning of the word or phrase so that in most instances this benefits the insured. Thus if the wording is ambiguous it must be interpreted by other means such as the *contra proferentem* since liability can be affected and the insurer might be “liable” when its “intended” not to be.⁵⁶

In *Hollard Life Assurance Company Limited v Van der Merwe* 2006 4 All SA 333 (SCA) the court had to interpret the wording of an insurance policy, its effect on the liability of the insurer and whether the “injury” or “self-inflicted injury” fell within the scope of the exception. The initial finding by Judge Prinsloo was that in using the *contra proferentem* rule the words of the exclusion clause would be “*contra bonos mores*” and this would “attempt to avoid liability by going to the preposterous extreme”.⁵⁷ The Honourable Judge Van Heerden did not agree and stated that the clause did include the injury the deceased suffered.⁵⁸ In this regard the Supreme Court followed the ordinary meaning of the words and, as Honourable Judge Van Heerden said, the “court below exceeds the bounds of interpretation of the contract”.⁵⁹ In both judgments there are elements with which one has to agree with. The researcher concurs with Judge Prinsloo when he said the avoidance of liability was preposterous. The insurer did go to the utmost extreme in order to avoid liability. One is left with the feeling that while accidents do happen, the insurance does not cover most of them in this regard.⁶⁰ On the other hand the insurer did plainly state that it excluded cover in the case of “self-inflicting injury” no matter if it was “intended or not”. This, as the Judge said, is what it means: although “unusual”, the “insurer”

56 *Sassoon Confirming Acceptance Co (Pty) Ltd v Barclays National Bank Ltd* 1974 1 SA 641 (A). Fletcher 2008 *Without prejudice* 19.

57 Paragraph 10.

58 Paragraph 17.

59 Paragraph 17.

60 Judge Prinsloo referred to a person falling into an uncovered manhole or eating a contaminated can of sardines. The wording of the policy according to Judge Prinsloo is “unenforceable”. Paragraph 9-10.

has the right to decide what it wants to form part of the cover and thereafter decide on the amount of the “premium accordingly” as outlined by *Fedgen Insurance Ltd v Leyds* 1995 3 SA 33 (SCA). In this light the insurer had the full right to deny liability as it clearly intended for any injury to the deceased to be excluded from cover, which was the reason for the appeal succeeding in Holland’s favour.

The understanding one derives from these cases is that each contract is different and no case can be the same. The wording of most insurance contracts are standard and contain standard clauses stating the insurer’s liability but the interpretation will surely be subjected to each case’s facts. The general understanding in terms of the dispute and the interpretation is that only basic provisions in the law of contract apply and there is not much effort towards devising regulatory measures that state what is acceptable and not.⁶¹

3.1.1.2 The law of contract: The influence on insurance interpretation

The field that insurance law consists of has been influenced by many other areas in law such as the law that of contract.⁶² As the contract of insurance will comprise all the *essentialia* under the law of contract, it contains its own set of “essential elements” to make it one of insurance.⁶³ As soon as all these elements are combined the insurance contract is born.⁶⁴ As any contract and its essential element the insurance contract is based on these elements for it to be subjected to the rules of insurance.⁶⁵ The central element of any contract is that it must truly reflect the parties’ intention to arrive at a contractual agreement between themselves, which is the reason for “*consensus*” being the “basis” of all contracts.⁶⁶ Although a contract

61 Although this is the case initially, the Constitution under heading 3.2.2.1 and the CPA discussed in Chapter 4 might give a better outline of the acceptability of these instances.

62 The “law of contract” regulates the contractual element of insurance; thus it is subject to the rules regulating the particulars of the law of contract. Reinecke *et al General Principles of Insurance Law* 13.

63 Such as “object, risk, premium” etc. Kopel *Guide to Business Law* 265.

64 The formation of the insurance contract is indeed also subject to dispute and if it indeed is one of insurance. The end result is again that of looking at the true nature of the contract and even other surrounding factors. *British Oak Insurance Co Ltd v Atmore* 1939 TPD 9, *Department of Trade and Industry v St Christopher Motorist Association Ltd* 1974 All ER 395 (the criteria for whether a firm is indeed performing insurance business), Kopel *Guide to Business Law* 265, *Mutual Life Insurance Co of New York v Hotz* 1911 AD 556.

65 Reinecke *et al General Principles of Insurance Law* 80.

66 Van der Merwe *et al Kontraktereg* 19.

must adhere to other essential elements, all the more so one of insurance, the basic principle is still the parties' intention to create a legal relationship between them.

In the quest for more fully understanding the insurance contract and the reason for its consistency, establishing the reasons for its wording is most important. Before the said interpretation rules will apply the words have to be put in the contract itself, and as it has been stated the intention for their inclusion has become a part of insurance as the law of contract itself is.

The principle of "offer and acceptance" also then applies to the insurance contract.⁶⁷

3.1.1.2.1 The offer and acceptance stage

The offer and acceptance principle is based on the "insured" making the "offer" to the "insurer"; not, as it might be perceived, as the insurer making the offer.⁶⁸

As soon as the insured presents its "risk" or "object for insurance" to the insurer, the latter will then, based on all the circumstances of the "proposal", decide if it will cover the insured with the insurance requested in the initial "offer"; this "acceptance" then gives way to the "insurance" agreement between the insurer and insured.⁶⁹ Thus if the insurer presents the offer and the insured accepts it the parties have the *intention* to be in the binding relationship of insurance. This part of the formulation of the contract process can describe the initial intention at the entry level giving the parties at this stage a clear understanding of what they want from the relationship.⁷⁰ Therefore the bases onto which offer and acceptance function make for a basic intention to have contractual consequences derived from the offer and then ultimately, the acceptance. When looking at intention for interpretation the first stage will be the offer and acceptance between the parties and the contract that follows.

3.1.1.2.2 The contracting phase

67 Reinecke *et al General Principles of Insurance* 81.

68 Davis Gordon & Getz *The South African Law of Insurance* 134.

69 Sutherland and Van der Bijl "The Law of Insurance" Scott (ed) *The Law of Commerce* 290.

70 Insurance for the risk in turn for a premium. The basic principle of insurance.

The offer and acceptance are followed by the parties legally binding themselves. When the parties have agreed on the terms the policy will outline the conditions of the contract.⁷¹ As in any contract the parties are subject to what the contract states. When the insurer agrees to insure the insured against a potential risk, for a premium, the former will subject this cover to terms and conditions that will affirm its liability in scenarios where the insured might find him, or will define to what extent the insurer is liable. The obligations under the contract are based on the agreement between the parties and the nature of the insurance, in other words the obligation to “perform” on the part of the insurer when the risk occurs⁷² and, on the part of the insured, not purposefully subjecting the object of the insurance to risk. The insurer will always use the insurance contract to summarise its obligations to the insured⁷³ and make the insured aware of its obligations. Consequently when interpreting the contract it has to be said that (regardless of the debate) the “intention” will have a major effect on the meaning.⁷⁴ But the court will surely refer to the meaning of the words in the contract as well. Although “surrounding circumstances”⁷⁵ might also affect interpretation, it will depend on the court in each case to determine if these factors will play a role.⁷⁶

However, as the contract of insurance adheres to the law of contract’s essential elements, and based on the assumption that the contract of insurance did indeed adhere to these formalities, the question regarding the interpretation of the insurance contract is whether the wording will indeed be congruent with the essential elements of contract law and the principles it is based upon

3.1.1.2.3 The impact of public policy on the interpretation of terms or words of a contract

71 Davis Gordon & Getz *The South African Law of Insurance* 134.

72 Reinecke *et al General Principle of Insurance law* 173.

73 As in the case of liability, cover, compensation in the form of the premium and so on.

74 *Joubert v Enslin* 1910 AD 6.

75 Which in some cases include the “negotiations and correspondence”. Maxwell C “Interpretation of Contracts” Hutchison D and Pretorius C (eds) *The Law of Contract in South Africa* 260.

76 Maxwell “Interpretation of Contracts” Hutchison D and Pretorius C (eds) *The Law of Contract in South Africa* 260.

The common law states that a contract must be “lawful” in terms of the regulatory provisions (“legislative or common law”) for it to be a legally binding document.⁷⁷ Thus, if the contract is against “public policy” and “good faith” the contract will be regarded as invalid.⁷⁸ Therefore, when formulating a contract, the “drafter” must be very cautious not to draft a document that is against the principle of public policy. The constitutionality of interpreting the contract is based on this principle⁷⁹ and on determining how the part that is in question is either against public policy or not, and therefore opposed to the basic principles of the Constitution, namely “human dignity, equality, and freedom”. As soon as “a term in a contract is contrary to public policy” the contract becomes “unenforceable”.⁸⁰ A ground breaking case in this regard is *Barkhuizen v Napier* 2007 5 SA 323 (SCA) (hereafter the *Barkhuizen*-case). Here the court had to decide whether a “time-clause” in an insurance policy was in opposition to Section 34⁸¹ of the *Constitution of the Republic of South Africa* 108 of 1996 (hereafter referred to as the Constitution) if the constitution did apply “directly” to a “contractual term”⁸² and consequently whether the term was against public policy.⁸³

As was founded by the Honourable Court one has to be careful not to intervene with the principle of autonomy of each party so that each has the right to include in the contract what they agreed upon.⁸⁴ This boiled down to the finding that as long as the parties agree on the term the intervention of the Constitution should come down to the public policy principle and whether the term is in conjunction with the latter.

As a result when interpreting a clause (or term or word) based on constitutional values and principles, the *Barkhuizen*-case stated that in addressing the constitutionality of “contractual terms” it must be determined whether the term is against “public policy”; this means that the “doctrine of *pacta sunt servanda*”

77 Reinecke *et al* “Lawfulness” Joubert WA and Scott TJ (eds) *The Law of South Africa: Insurance* 1988 54-58.

78 Reinecke *et al* “Lawfulness” Joubert WA and Scott TJ (eds) *The Law of South Africa: Insurance* 1988 54-58.

79 De Vos 2008 www.thecourt.ca.

80 *Barkhuizen v Napier* 2007 5 SA 323 (SCA).

81 “Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court.” Page 334.

82 Floyd “Legality” Hutchison and Pretorius (eds) *The Law of Contract in South Africa* 176.

83 Rautenbach 2009 TSAR 613.

84 Rautenbach 2009 TSAR 625.

functions within the law of contract but the Constitution can intervene when the term is in “conflict with the constitutional value”.⁸⁵ Thus in terms of interpretation the Constitution values must “shine” through in order for the term in the contract not to be considered “unenforceable”.⁸⁶

The question one is now faced with is to what extent the wording of a contract can be pushed before it will conflict with public policy and in what way, practically, the Constitution will not now apply to these clauses. De Vos⁸⁷ made the observation that due to the findings by the Constitutional Court, one has to prove that “compliance” is both “impossible and unreasonable” for a party not to be bound to the enforcement. But what is also evident is the way in which this can affect the “individuals” who do not always possess the means to pursue the so-called “unfair” inclusion in the contract.⁸⁸ What the principle of public policy also entails, as was the position in the *Sasfin (Pty) Ltd v Beukes* 1989 SA 1(A), is that although there might be a claim that the term is against public policy this is not a conclusion that must be taken up lightly. Merely because it *appears* as if the relevant part is not fair, this does not mean that it is unfair and consequently against public policy.⁸⁹

In *Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd* 2012 3 SA 531 the court had to decide, amongst other legal questions, the legality of a termination clause in a lease agreement on which the respondent relied in terminating the lease

85 At page 334 paragraph 30.

86 Sutherland and Van der Bijl “The Law of Insurance” Scott (ed) *The Law of Commerce* 291.

87 De Vos 2008 www.thecourt.ca.

88 “A close look at the judgment of the supreme court of appeal and the constitutional court in the *Barkhuizen* case shows that indirect application by means of “the infusion of the constitutional values into private law concepts”, simply provides too many opportunities to ignore aspects of the nation’s social and economic wellbeing which need urgent attention. The direct application of the rights and limitation clauses leaves less room for dodging the issues. Direct application could be the tool we need to reveal both the reality of the injustice to which ordinary individuals are exposed in the so-called “free market of autonomous, equal operators” and the weakness of certain aspects of the law of contract in dealing with this reality.” Rautenbach IM 2009 “Constitution and contract – exploring “the possibility that certain right may apply directly to contractual terms or the common law that underlies them” *TSAR* 637. Also see De Vos 2008 www.thecourt.ca.

89 Barnard and Nagel 2010 *PER/PERJ* 454. In *Jordan v Faber* (1352/09) [2009] ZANHC 81 the courts had to consider the validity of the contract and the conduct of the attorney. The principle in this case was that the court should look at consider the surrounding circumstances to decide if whether infringement of public policy did occur. The court did indeed reach this conclusion but the circumstances surrounding the reason that it did made the difference. The attorney did not just go against the principle of public policy in the agreement but also against the ethical provisions.

between himself and the applicants.⁹⁰ For the sake of relevance to the question of interpreting the contract in line with the values of the Constitution, the focus should be placed on the finding the court made in terms of the public policy being infringed by the respondent in the minority judgment. Judge Zondo considered the *Barkhuizen*-case and the provision applicable to the contractual terms. The court referred to the freedom of the parties to enter into an agreement as the basis for finding that the contract was not against public policy as the parties had entered into it “voluntarily”.⁹¹ Again the court relied on the freedom of contract to reach the conclusion as to why the clause was not opposed to the provisions of the Constitution. This leaves one with a “catch 22” situation.

One has the feeling that if the court is to determine that a clause, for instance, is against public policy the values of the constitution must shown to have been infringed, and as De Vos pointed out, if the true nature of the clause was “impossible and unreasonable”, the court would most likely rely on the freedom of the parties to enter into a contract, which they did voluntarily. The question that arises is therefore: if the parties encounter difficulty with the clause when indeed it becomes applicable, why did they not raise this with the insurer before entering into the agreement?

3.2.2.2 The standard form contract

It is common knowledge that if parties intend to bind themselves to a contract whether they agree to it orally, or sign a written contract or even intend to be bound, afterwards much can be said about the contract: the fact is that parties do not always read what they sign, or more problematically do not understand what they sign. It is very common trade that industries such as banks and insurance companies will most likely have “standard-form” contracts. These contracts usually already comprise terms and conditions to which the agreement is subject. In the *Barkhuizen*-case, Judge Sachs also referred to these “standard-form contracts” and held that these contracts are usually on a “take-it-or-leave-it basis”; the insured in this regard will seldom (if ever) consult with an attorney but simply agree to the terms and conditions

90 “The narrow question in the case is when a landlord may cancel a lease and evict its tenants. Behind this lies the impact of the protection the Constitution affords against eviction.” Paragraph 1.

91 Paragraph 126.

as they just want the insurance.⁹² Thus as the Honourable Judge held, the individuals who do have the means to obtain insurance are usually placed in such a position that they do not always fully comprehend the implications of the cover they have acquired. Thus when a particular part in the contract does take effect and a dispute arises, the court is once again left with the difficult task of deciding the correct interpretation or whether the clause is lawful.

In this regard and in terms of understanding the insurance contract the inclusion of some of these clause or terms or words does have an effect on the feeling of “fairness” so much discussed in the *Barkhuizen*-case. The true nature of the cover lies in knowing exactly what one signs and how the cover can be affected by the contract. For this reason there are numerous factors that affect the insured when signing and also factors that may be used to claim that the agreement is indeed not reflective of what was agreed upon.

3.2 True nature of the cover

From the above discussion it is clear that the insurer and the insured need to play a more interactive role in the agreement they make with one another. When signing the contract the parties should be aware of what they are signing, and by being aware they understand the contract and what it provisions entails.⁹³ The question one is now faced with is: does the agreement the parties have concluded truly reflect their intention? The insurer will send the insured a policy to outline the cover and more importantly there will be a contract that states the terms and conditions

92 Paragraph 135 to 136 states: “Standard-form contracts are contracts that are drafted in advance by the supplier of goods or services and presented to the consumer on a take-it-or-leave-it basis, thus eliminating opportunity for arm’s length negotiations. They contain a common stock of contract terms that tend to be weighted heavily in favour of the supplier and to operate to limit or exclude the consumer’s normal contractual rights and the supplier’s normal contractual obligations and liabilities. Not only is the consumer frequently unable to resist the terms in a standard-form contract, but he or she is often unaware of their existence or unable to appreciate their import. Onerous terms are often couched in obscure legalese and incorporated as part of the “fine print” of the contract . As it is impracticable for ordinary people in their daily commercial activities to enlist the advice of a lawyer, most consumers simply sign or accept the contract without knowing the full implications of their act. The task of endlessly shopping around and wading through endless small print in endless standard forms would be beyond expectations that could be held of any ordinary person who simply wished to get his or her car insured...”

93 See Costa 2011 *Without Prejudice* 22.

between the parties and also includes their obligations, meaning the insurer will most likely provide cover for the insured based on the risk, but on its own terms. The simpler way to address this would be for the insurer to use plain, easy to understand language in the insurance contract, especially in the terms and conditions of the exception clauses, in order to clearly state what it is including and excluding from the cover. But most times the insurer uses language that is very broadly phrased⁹⁴ which may cause interpretation problems. This might then lead to the court referring to the *contra preferentem* rule that indeed counts in favour of the insured. It would thus be in the best interests of the insurer not to use “ambiguous” language in order to impose exceptions on most scenarios, and rather tell the insured to what extent it will be liable.

Bargaining power also plays a role. If it is found that this is indeed unequal and it does infringe the principle of public policy this can affect the enforcement of a contract.⁹⁵ It is clear to the researcher that an insurer will be in a stronger bargaining position because it has what the insured needs in this regard, insurance against a potential risk. The insured will in this respect rather opt for cover, although subject to standard terms and conditions,⁹⁶ than go with the option of not having any insurance at all. However, although this seems like a disadvantage the insured always has the option of going to another insurer. It is possible for the insured to opt for another insurance company and rather agree to their terms although the contract will be standard in most cases too.⁹⁷

What is most interesting in the debate of knowing what one is signing and the impact it can have on the outcome of the insurance, is the principle of *iustus error*.⁹⁸ The true extent of the *consensus* can be questioned as the insured, for instance, can opt for stating that the contract does not truly reflect what he signed for.⁹⁹ A valid point

94 Marx and Govindjee 2007 *OBITER* 631.

95 Barnard J and Nagel C 2010 *PER/PERJ* 452. In *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA) the court held that in the in the case of bargaining power this will be a factor as regards public policy.

96 Judge Sachs refers to it as “fine-print”.

97 Sharrock 2010 *South African Mercantile Law Journal* 296.

98 Discussed in Chapter 4.

99 *Martin Johnson Properties CC v Mutual & Federal Insurance Co Ltd* 2010 1 All SA 495 (KZD).

in the case of *Bushby v Guardian Assurance Co* 1915 WLD 65 was made by Judge Bristowe when he gave judgment on the use of the *iustus error*. He observed that the insured knows that the “policy” will contain “clauses” that will influence the liability of the insurer. But the insurer signs or agrees to the terms and conditions of the policy regardless.

3.3 To conclude

In assembling the above into a constructive perceptive on the insurance contract one can very well refer to Judge Sachs’ comment about the “take-it or leave-it” principle or to what Judge Bristowe remarked, “he put it aside assuming that it was “unobjectionable”; the insured in most cases does not understand the contract. It is only important to the insured that it has cover, if according to the insurer, it is not excluded. But as part of the offer and acceptance and the conclusion of the contract between the parties, the expectation must indeed be between the parties that the contract will reflect what was agreed upon. Interpretation is therefore more often used if the intention is not clear. The disadvantage of standard-form contracts is that these will provide terms and conditions which suit the insurer and influence the reflection of what the parties want from the contract. It can be said that the insured plays a very passive role in the agreement phase and that the insurer concludes the contract. But although the interpretation of the contract will affect the insurance contract the liability of the insurer does also depend on other factors, such as clauses and legislation, and even on the conduct of the insured.

CHAPTER 4 Liability of the insurer

4. Liability: An excuse or defence?

In recent years it has become evident that the debates regarding liability are more frequent and the literature more extensive in this respect.

The insurance contract, as it is, will be one to insure the object or “insurable risk” against a potential “peril”.¹⁰⁰ When the risk occurs the insurer must now compensate the insured against the “loss or damage”.¹⁰¹ The nature of the damage or circumstances surrounding the claim will in most cases determine to what extent the insurer will be liable.

As part of the liability of the insurer and the impact it has on the claim, the insurer outlines this in clauses and warranties in the terms and conditions.¹⁰² To regulate the provision one has to take into consideration legislation, interpretation and public policy, as was already discussed, as well as the impact of surrounding circumstances. Derived from these factors, the liability cannot always be set in stone.

In the discussion of liability, it is important to explore the intention by the insurer to repudiate the claim, and to examine why liability is such an issue when it is in dispute.

4.1 *The insurance contract affecting liability*

When an insured claims under the relevant policy for “loss or damage” it must prove¹⁰³ that the claim falls under the so-called “four corners”¹⁰⁴ of the policy. If it indeed proves this, the insured will have a claim.

100 Reinecke *et al* *General Principle of Insurance Law* 42.

101 Reinecke *et al* *General Principle of Insurance Law* 216.

102 Reinecke *et al* “Lawfulness” Joubert and Scott (eds) *The Law of South Africa: Insurance* 152.

103 Costa 2010 *Without Prejudice* 38.

104 In *Eagle Star Insurance Co Ltd v Willey* 1956 1 SA 330 (A) the court referred to the “rules” in *Munro, Brice & Co v War Risks Association* 1918 2 KB 78; taking these rules into consideration this will boil down to the insured being required to “prove” that he/she/it has a “*prima facie*” case and if there is an “exception” making it possible to claim then the insurer will have to create the case for exclusion, taking the insurance contract into consideration and

It has been observed that most insurance contracts are “standard-form” contracts containing terms and conditions to describe liability, in general and specifically, and these “pre-formulated, non-negotiated contract terms” usually “minimize” the risk and exclude the “liability as much as possible”.¹⁰⁵ But in all fairness the inclusion of these terms, words, clauses, and warranties is intended to protect the insurer to the extent it is willing to accept the distribution of the risk onto itself, and it cannot be expected that the insurer will be liable for every single risk the insurable interest might be subjected to.¹⁰⁶ The insurer would then be protected against “exploitation” if it did not protect itself in the contract.

4.1.1 *The clauses*

A “term” in the contract usually sets out the “obligations” of the parties, and consequently their “intention” will be made clear when reading these terms.¹⁰⁷ Clauses form part of the contract and may be, for instance, exception clauses,¹⁰⁸ time clauses,¹⁰⁹ “average clauses”¹¹⁰ and many more. These clauses are designed to outline liability, which is unfortunately easier said than done as was discussed in Chapter 3, so that one still needs interpretation rules and public policy to understand them.

In the *Fedgen*-case the court had to interpret a clause to determine liability. It held that “it is the insurer’s duty to make clear what particular risks it wishes to exclude”.¹¹¹ As a result it is the duty of the insurer to exclude what it does not want to include as part of the policy.

the expression of the contract itself Davis *Gordon & Getz The South African Law of Insurance* 179-180.

105 Sharrock 2010 *South African Mercantile Law Journal* 296.

106 The reason for the insured sending the “offer” in the form of a “proposal” in order for the “acceptance” to be subjected to the terms of the insurer. Davis *Gordon & Getz The South African Law of Insurance* 134-136.

107 Van Huyssteen *et al Contract Law in South Africa* 136.

108 *Fedgen Insurance Ltd v Leyds* 1995 3 SA 33 (A), *Scottish Union & National Insurance Co Ltd v Native Recruiting Corporation Ltd*, *Guardrisk Insurance Company Limited v Napier NO* [2007] ZAGPHC 123.

109 *Barkhuizen v Napier* 2007 5 SA 323 (SCA), *Dealernet (Pty) Ltd v Mamahlodi* 2009 6 SA 259 (NGP).

110 *Kopel Guide to Business Law* 274.

111 Page 9.

But because interpretation might be different from case to case, person to person, can clever drafting exclude liability without the insured even being aware of this at the conclusion of the contract? The answer is not as obvious as one might think. What is clear is that the insurer manipulates these clauses to repudiate the claim on a frequent basis.

In *Walker v Santam Limited and Others* 2009 6 SA 225 (SCA) the insurer repudiated a claim by the applicant based on “certain clauses in the policy”.¹¹² The Court held that the insured had to prove that he had done everything to “minimize the damage”, thus demonstrating that he had a legitimate claim under the policy.¹¹³ If he indeed did (as the applicant did) the *onus* falls on the insurer to prove that it was not liable.¹¹⁴

What has been pointed out is that the insured discards the meaning of the language in the policy and then simply agrees to the terms of the policy. In *African Products (Pty) Ltd v AIG South Africa Ltd* 2009 3 SA 473 (SCA) the court held that the clause “unforeseen and sudden damage to the machinery” stated clearly that the clause exempted the insurer from liability as part of the insurance contract.¹¹⁵

Another popular clause is the “reasonable precautions” clause. The courts will most likely not uphold the exclusion of the liability of the insurer in this regard, as it is not clear what the obligations or precautions are.¹¹⁶ It is evident that these types of clause will make it difficult to lodge the claim under the four corners of the policy, which makes it easy for the insurer to deny liability. Although in this particular case the insurer was not successful in repudiating the claim, there are many instances where the insurer was successful.

A further factor that plays a role in liability is the public policy element of clauses. In *Drifters Adventure Tours CC v Hircock* 2007 2 SA 83 (SCA) an exemption clause

112 Paragraph 6.

113 Paragraph 20.

114 *Costa* 2010 *Without Prejudice* 38.

115 Paragraph 22 of the case. *Chanetsa* 2009 *Without Prejudice* 46.

116 *Davidow and Ramalekana* 2008 *Without Prejudice* 31.

was in dispute as the language was not clear; in other words the interpretation rules had to be applied. The insurer was held liable due to risk not forming part of the exclusion.

Whatever the case may be the liability will depend on the facts of the case and what brought about the repudiation, as well as on how the court will interpret the clause if need be. Therefore as the interpretation might be different from case to case, person to person, it will also be different from judge to judge.

4.1.2 Warranties

Warranties form part of the “conditions” of the insurance policy¹¹⁷ to which the insured must “adhere”; otherwise the insurer can state it is not liable for the claim.¹¹⁸ The warranty must be strictly complied with and in most cases will clearly establish what the obligation of the insured is, while “non-compliance” with the provisions may lead to the insurer “avoiding” the claim.¹¹⁹ If the warranty is breached the way is open for the breach of contract remedies to apply.¹²⁰ The inclusion of most warranties is intended to protect the insurer against “misrepresentation” for instance and not needing to establish the ground for the “misrepresentation” first.¹²¹

In the case *Martin Johnson Properties CC v Mutual & Federal Insurance Co Ltd* 2010 1 All SA 495 (KZD), a dispute arose from the inclusion of warranties in an insurance policy and from the reason for the repudiation by the insurer after the insured suffered damage due to a fire.¹²² Though the warranties had clearly stipulated the exclusion if they were not strictly complied with, the plaintiff stated that the parties did not agree to their inclusion in the contract. In the first place the court held that the warranty must form part of the “material term” of the contract, in order to justify the avoidance when the breach occurs.¹²³ Secondly the court also made the

117 Reinecke *et al* “Conditions” Joubert WA and Scott TJ (eds) *The Law of South Africa: Insurance* 152.

118 Kopel *Guide to Business Law* 273.

119 Davis Gordon & Getz *The South African Law of Insurance* 218.

120 Reinecke *et al* “Warranties” Joubert WA and Scott TJ (eds) *The Law of South Africa: Insurance* 159.

121 Davis Gordon & Getz *The South African Law of Insurance* 215.

122 Paragraph 9.

123 Paragraph 170.

very important observation that each case must be “determined” on the “basis” of its “own facts and merit”.¹²⁴ It appears from the judgment that Judge Ndlovu relied heavily on the circumstances. The insured in this regard was successful in arguments presented to exclude the warranties on the basis of circumstance. Under normal circumstances it would appear that the warranties would have gotten the upper hand as they did state the suitable and provisional environment of the insurable interest.

Since case law will play a major role in the determining of the liability of the insurer in the case of clauses and warranties, it is also in the interest of developing regulatory measures to investigate legislation that already exists in insurance law and deals with this matter.

4.2 *Legislation deciding on liability*

As was noted in Chapter 2 the CPA will apply to short term insurance if the STIA is not amended and “in line” with the CPA as regards “consumer protection”.¹²⁵ Before the provisions of the CPA are discussed, the existing provisions in the STIA will be outlined in order to address the amendments to the insurance law, which the CPA will provide in the future.

4.2.1 *The Short-Term Insurance Act*

In terms of liability, Chapter 7 deals with policies and hence liability will be affected by its principles.¹²⁶ Although the Chapter discusses policies it has to be observed that this does not deal with the nature of the cover or many other issues with which courts are faced in solving the dispute, having to opt for other means such as relying on previous judgments. Section 51 addresses the voidness of the agreement but as was remarked in Chapter 2 it is very broad and unspecific. Section 53 deals with

124 Paragraph 173. Paragraph 174 also states that if the signature is placed on the document the signatory “assents” to what is in the document, but this was not the case here as this was a renewal and neither signed the document.

125 Packman 2009 www.insurancegateway.co.za.

126 Although registration and other provisions in the STIA will also affect liability, for the purpose of this dissertation and relevance Chapter 7 will be of more importance in providing regulatory measures to determine liability in the insurance contract (or policy).

misrepresentation, a common occurrence in the insurance industry. Section 53(1) clearly states the fact that is alleged to have given way to misrepresentation must “have materially affected the assessment of the risk”.¹²⁷ If the materiality is proven the policy will be invalidated, while obligations can be excluded or limited,¹²⁸ making it possible for the insurer to repudiate, or to limit, its liability. This section clearly provides for dealing with misrepresentation. Addressing the problem could leave the way open for future improvements.

Section 54 deals with the validity of the contract, as regards liability, only stating acceptable scenarios for entering into a contract in very basic and brief circumstances. The Section does not mention any interpretation or public policy which will affect the validity of the contract.

But as part of the STIA the Policyholder Protection Rules do apply to situations that might provide for better regulation of the contracts. Section 55 makes provision for these rules under the STIA and for their inclusion in our legislation.

4.2.1.1 The Policyholder Protection Rules

As their name states they are there to protect the insured or the “policyholder”. For the purpose of the dissertation the Short Term Policyholder Rules will be discussed as these are relevant to the aviation insurance that will be under review in Chapter 5. The PPR are not commonly known and therefore it is important to consider them as their regulatory measures can be of much value when deciding liability, especially in the future. In Chapter 2 the researcher introduced the PPR and explained their objectives.

First for the convenience of the reader certain key definitions must be briefly named. The “direct marketer” is the “insurer” that goes about its “normal course of business”

127 See *Martin Johnson Properties CC v Mutual & Federal Insurance Co Ltd* 2010 1 All SA 495 (KZD).

128 Section 53(1)(a-b).

but does not include its part as a “financial services provider”.¹²⁹ Then in turn “direct marketing” of a policy is the “marketing” and “entering thereof” by the chosen form and excludes advertising.¹³⁰ The “policy” is defined as a “short-term policy” covering a “natural person” and its “business”. Hence the PPR is only applicable in these circumstances.

Under Rule 4 of the PPR the basic rules governing the “direct marketer” are outlined. One gains the sense from this part of the PPR that the legislator is very clear as to the insurer’s conduct when dealing with the insured. Rule 4.1 states that a “direct marketer” when providing a “service” must be “honest, fair” and do so with “due skill, care and diligence”. This principle must form the foundation of the insurance contract. When this rule is indeed implemented at the drafting of such a contract it should make the terms and conditions of the contract clear and ensure that the public policy was indeed not infringed. In the “dealing” and concluding the policy the direct marketer has the obligation to be “honourable, professional and have due regard to the convenience” of the policyholder.¹³¹ In practical terms this leads to good business practices. Rule 4.1 continues, stating that the “representation to the policyholder” must be “factual”, employ “plain language” so as not to “create confusion and be misleading”, and even take into account the “knowledge” of the “policyholder”.¹³² For concluding the contract and interpreting it, the insurer has the duty to explain the policy to the insured in order for the latter to understand it. In other words, under the PPR the insurer has the duty to make sure the insured understands what he signs by taking into consideration that the latter will in most cases not understand all the provisions of an insurance contract, especially the clauses and warranties. Rule 4.3 holds that the policyholder must, within 30 days, be given the policy, in writing which must describe among other things, the “nature and extent of the benefits”, state “details on special terms and conditions, exclusions, waiting periods, loadings, penalties, excesses, restrictions, or other circumstances in which benefits will not be provided” and explain how claims must be instituted.

129 It is the understanding of the researcher that the *FIAS* Act regulates the financial services provider aspect of the insurer.

130 “Advertising” in insurance is mainly to attract potential clients. In the offer and acceptance stage the offer is only when the insured approach the insurer (*Reinecke et al General Principle of Insurance*), usually when seeing the advert by the insurer.

131 Rule 4.1(b)(i).

132 Rule 4.1(c).

Reflecting on this provision the insurer is obliged to explain the contract and explain these provisions above to the insured as well, under the rules of the PPR.

Rule 7.1 deals with the agreement itself. The PPR does not discuss the practical inclusion of provisions in the agreement, but rather deal with more circumstantial provisions of the agreement. In the sense of liability in the insurance contract Rule 7.3 creates the obligation that if the termination of the policy is sought, it must be done within 30 days, in the form of a notice, meaning that under the PPR the insurer will have the right to terminate. More importantly Rule 7.4 outlines the procedure for the “rejection of a claim”. In *Dealernet (Pty) Ltd v Mamahlodi* 2009 6 SA 259 (NGP) discussed in Van Niekerk *Insurance Law* the obligation under Rule 7.4 was in dispute. The insurer provided insurance to the insured for his “motor vehicle”. The dispute arose when the insurer rejected the insured’s claim; the time-bar clause stated that the insured was required to institute legal action within 90 days, otherwise the insurer would no longer be liable.¹³³

Rule 7.4 states that if the claim is rejected or the “quantum” is in “dispute”, the “policyholder” must be informed in “writing”, to which a “policyholder” may give “representation” within “90 days”, but *this* period may not be included in a “time-bar” provision in the policy for the “institution of legal action”. Briefly considering the judgment, the court held that the PPR is for the “protection of the policyholder”.¹³⁴ The insurer relied on the inclusion of the 90 days in its policy but did not take into account the effect this would have on its own liability. The court dismissed the insurer’s appeal based on a very detailed outline of the exact wording of Rule 7.4 and the obligations it entails for the insurer.¹³⁵ The outcome of the interpretation of Rule 7.4 by the court held that the PPR did not intend the 90 days limit to apply to the policyholder and thus this period should be allowed in addition. The said Rules must be, therefore, interpreted to protect the policyholder, making their application in favour of the insured and the liability of the insurer almost inevitable, especially if he does not fully comply with them.

133 Van Niekerk 2009 *Annual Survey of SA Law* 679.

134 Van Niekerk 2009 *Annual Survey of SA Law* 679.

135 See Van Niekerk 2009 *Annual Survey of SA Law* 678-684.

Rule 7.5 stipulates that the “policyholder” will have “15 days” of “grace” to pay a premium that is overdue. This will make it difficult for the insurer to repudiate and cancel the policy within 15 days, if the insured defaults on its payment of the premium. This “grace period” will in future, according to the researcher, probably come under fire as the insurer has to provide cover for an additional 15 days without rightfully receiving compensation for it. This seems unfair to the insurer. Whether the insurer can indeed claim the premium from the insured if the former is held liable for the claim is unfortunately not dealt with in the PPR.¹³⁶

Rule 8 leads to the principle of “waiver of rights”. The Rule states that no party will have the right to “waive any right or benefit under the Rules”. This Rule can be interpreted in such a way that one derives the principle that the insurer’s use of clauses and warranties will be limited, especially when these create obligations; it might not be clearly understandable at first glance that they waive a right or benefit. What the researcher did note was that this Rule does not state anything about the limitation of Rules, merely the waiver of them. It has been said that the parties have a contractual autonomy when it comes to the contract but to the mind of the researcher the Rule leaves a back door open for limitations that could be cleverly drafted and thus might not infringe on any Rule but can borderline it.

As summarized above the PPR contains many general rules to protect the policyholder in its dealings with the “direct marketer” or insurer. Van Niekerk in the article “Insurance Law” made the observation “that Rule 7.4, like so many of its counterparts in the PPR, is not an example of elegant legislative drafting” and that the Rules “were drafted without any clear appreciation of the underlying legal principles”.¹³⁷ Taking the author’s findings into context, his observation is accurate. Although these rules represent a welcome relief in legislation, their true meaning and intention and penultimately the goal the rules try to achieve is not always clear from reading them.

136 The researcher recommends the legislator make use of the CPA provisions in this regard and protect the insurer providing the service more as one cannot just provide a service without due compensations.

137 Van Niekerk 2009 *Annual Survey of SA Law* 685.

Consequently the researcher concurs with Van Niekerk's critique of the PPR. The latter does lack the practical element that one would expect from this type of legislation. The researcher will on the other hand make the observation that as the PPR becomes more commonly known its disadvantages (as with all new legislation) can be corrected so that it indeed does provide a better entrance into dealing with the policyholder's protection.

Even as the PPR protects the policyholder there has recently been a new development on the legislative front regulating the relationship between the parties, the so-called *Consumer Protection Act*.

4.2.2 *The Consumer Protection Act*

As was said before, the CPA officially came into operation on "31 March 2011".¹³⁸ In other words, taking the 18 months of Schedule 2 into consideration the CPA would start applying to the insurance industry and its statutory provisions from the end of September, or the beginning of October, 2012.

For the sake of argument and, if the CPA applies, the following provisions will have a drastic effect on the insurance industry as we know it; but unfortunately there is not much literature available dealing with the impact. The researcher has thus taken the applicable Section and interpreted them in the light of her understanding.

It is important to note that the CPA is written in such a way that its application and scope is applicable to more than one industry in more than one sector of that particular industry. Hence, in the terms of this dissertation and how the CPA will affect the insurance industry, one should discuss the sections of the act that will regulate liability which originates from the insurance contract itself. In other words, the CPA sections will be discussed in relation to their being applicable to insurance.¹³⁹

138 Sharrock 2010 *South African Mercantile Law Journal* 297.

139 In terms of the purpose and application of the CPA that will be discussed later in more detail.

Section 8, the “protection against discriminatory marketing”, is infused with the values of section 9 of the Constitution and gives guidelines to determine when discrimination against the consumer occurs and what it consists of. Section 8 provides a list that outlines the discrimination and what will constitute unfair.¹⁴⁰ For instance, to exclude a “person or category” from a “service” might be deemed to be unfair. In the case of insurance the “adrenaline junkie” might be denied the life insurance cover he or she wants or it will be much more expensive than that of a normal person with a normal insurance portfolio; will this not be deemed unfair? Furthermore the insurance companies that provide a service to one gender only must also be regarded as discriminatory under section 8. Although this might seem to be the case, section 8 is subject to section 9. Under section 9 (2) a supplier (or insurer) may discriminate against gender, *if* it is reasonable. To determine reasonableness, in the opinion of the researcher the circumstances will play a major role. The fact of the matter is that although discrimination is not allowed, the provision is limited. The liability of the insurer may depend greatly on the issue of discrimination as it may provide a particular service to one person but a different service to another.

Section 16 regulates cooling-off after direct marketing.¹⁴¹ The section does not allow the parties to “rescind a transaction agreement that exists under law between the

140 Section 8(1):(a) exclude any person or category of persons from accessing any goods or services offered by the supplier;
(b) grant any person or category of persons exclusive access to any goods or services offered by the supplier;
(c) assign priority of supply of any goods or services offered by the supplier to any person or category of persons;
(d) supply a different quality of goods or services to any person or category of persons;
(e) charge different prices for any goods or services to any persons or category of persons;
(f) target particular communities, districts, populations or market segments for exclusive, priority or preferential supply of any goods or services; or
(g) exclude a particular community, district, population or market segment from the supply of any goods or services offered by the supplier.

141 In terms of the CPA “direct marketing” means “to approach a person, either in person or by mail or electronic communication, for the direct or indirect purpose of—
(a) promoting or offering to supply, in the ordinary course of business, any goods or services to the person; or
(b) requesting the person to make a donation of any kind for any reason;”

supplier and consumer”¹⁴² but does allow the consumer a “cooling-off “period to change its mind. Many insurance companies promote the establishment of insurance policies over the telephone or internet; this provision should make them aware of the fact that these policies are now subject to cancellation within 5 days without reason being given.¹⁴³

Section 19 sets out the consumer’s right to have the service delivered. This makes the insurer liable to “perform the service” or pay the claim, in insurance terms. This is not a new term as it forms part of the objective of insurance. However, what is interesting to the researcher is that the section only deals with the delivery of the service and the “time and date” of delivery, not so much whether delivery of the service does not take place. What if the delivery only takes place in part, for instance in the case of insurance, that the insured is obliged to pay the excess? These provisions need to be addressed as they remain a real problem in the industry. Furthermore, if the agreement does not state when delivery must take place it must not be at an “unreasonable time”.¹⁴⁴ If the insurer then does not repudiate it must not pay the claim at it time that constitute unreasonableness.¹⁴⁵

Plain and understandable language is the subject of section 22 which promotes the use of language in such a way that a “class of person” with “average literacy skill and minimal experience” must understand what is meant by the provision in the contract.¹⁴⁶ The use of plain and understandable language has also been discussed in the PPR and case law as part of interpretation and now appears in the CPA, making its importance clear. From the stress that is placed on plain and understandable language it is evident that there is very often confusion to what words, terms or conditions mean. In the previous Chapter it was argued that clever drafting can provide a “double edged” sword: the impression is given that cover is provided but in fact it is circumstantial. The intention is that the CPA will in most cases prevent this from happening, but this is yet to be seen.

142 Section 16(2) of the CPA.

143 Section 16(3) of the CPA.

144 Section 19(3) of the CPA.

145 If the insurer doesn’t deliver the service it is paid for, by for instance, denying liability, it would go against the principles of the CPA.

146 Section 22(2) of the CPA.

Section 29 deals with ‘standard to the marketing of services’: taking the conditions into consideration the insurer cannot, for example, market one thing but actually mean another. This will considerably affect the industry as it will govern a portion of the intention of the parties when it comes to the insured approaching the insurer in the first place. The insurer must be aware that marketing its product will be subject to Section 19; careful marketing will need to be done if the insurer does not want to be in an undesirable situation. The same applies to Section 30, which mentions “drawing in the consumer”; if the service is different to what was advertised the insurer may be liable. Making the offer and acceptance stage regulated by the provision and the intention of the parties being more exposed.

As part of Part F and the “Right to fair and honest dealing” the insurer must not make, under Section 41, any “misleading or false representation” that is a “material fact” to the consumer or insured.¹⁴⁷ This is in line with what has been said about “clever drafting”; the regulatory measure will hold the insurer liable even if he did not really intend to be. The clauses and warranties that are in the insurance contract are now being subjected to Section 41 in that they must “mean what they say”. Thus the insurer will have to adhere to this provision as soon as possible.¹⁴⁸ But as part of this Section the material fact plays a reverse role and the insurer must not make itself guilty of the same offence.

Properly the most important part of the CPA for insurance contracts and contracts in general is Section 48. This determines that the supplier (or insurer) must not include terms that are unfair, unreasonable or unjust, or for instance compel the consumer to “waive any rights, assume obligations or waive any liability of the supplier”.¹⁴⁹ The insurer will have difficulty justifying its exemption or exclusion clauses¹⁵⁰ under this section as its provisions are precise and consequently give a very detailed description of what is not allowed as is outlined by Section 48(2).¹⁵¹ However the

147 Section 41(1)(a) of the CPA.

148 Bracher P 2011 www.mondaq.com.

149 Section 48(1)(c) of the CPA.

150 Letzler 2012 *De Rebus* 24.

151 Section 48(2): “Without limiting the generality of subsection (1), a transaction or agreement, a term or condition of a transaction or agreement, or a notice to which a term or condition is purportedly subject, is unfair, unreasonable or unjust if:

Act does not stop there. Section 49 also states that if there is, for example, a “limit in any way” to the “risk or liability of the supplier” the insurer must draw the “attention” of the insured to these provisions.¹⁵² The injunction to “read the fine print” will become redundant under section 49 as the “fine print” will most likely be brought to one’s attention and may lead to a transparent agreement, for the first time in the history of insurance. On top of this section 51 prohibits a “transaction, agreement, term or condition that defeats the purpose of the act”. Read together with sections 48 and 49, the legislator undoubtedly had, according to the researcher, the intention to regulate the contract in order to obtain a more unified regulatory framework for the supplier and consumer. But by no means must one think the Act is one sided and only protects the consumer against the “evil supplier”. Certainly it is designed to protect the consumer but also provides the basis as how this protection must be achieved.

The CPA only provides measure to regulate the use of clauses, terms or conditions in an effective manner. Section 52 also lays down the court process in establishing the “fair and just conduct, terms and conditions” and the “interpretation process that must be followed”.¹⁵³ For instance the provision of “plain language” will be taken into account to determine whether a “term or agreement is unfair”.¹⁵⁴ This criterion may assist the insurer, when bring its provision in line with the CPA, to know what is allowed and what is not.

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- (a) it is excessively one-sided in favour of any person other than the consumer or other person to whom goods or services are to be supplied;
 - (b) the terms of the transaction or agreement are so adverse to the consumer as to be inequitable;
 - (c) the consumer relied upon a false, misleading or deceptive representation, as contemplated in section 41 or a statement of opinion provided by or on behalf of the supplier, to the detriment of the consumer; or
 - (d) the transaction or agreement was subject to a term or condition, or a notice to a consumer contemplated in section 49 (1), and—
 - (i) the term, condition or notice is unfair, unreasonable, unjust or unconscionable; or
 - (ii) the fact, nature and effect of that term, condition or notice was not drawn to the attention of the consumer in a manner that satisfied the applicable requirements of section 49.”

152 Section 49(1) of the CPA.

153 Jacobs W, Stoop PN and Van Niekerk R 2010 *PER/PELJ* 59-60.

154 Naude T “The Consumer Protection Act 68 of 2008” 2nd Hutchinson *et al* (eds) *The Law of Contract* (Oxford Press 2012).

4.2.2.1 Does the Consumer Protection Act apply?

The CPA applies to services by the supplier and therefore to insurance in this regard but it is yet to be seen if the provisions of the CPA will indeed apply to the Insurance Acts and the insurance industry.

The focus first of all will have to be drawn to the word used by the legislator, namely “aligned”. This is unfortunately not defined by the CPA and hence one has to look in context at the legislator’s intent in using the term “align” in item 10 of Schedule 2. When considering the provisions of the STIA, as they stand, the intention behind the use of word “align” will take effect in the sense that the STIA does not contain provisions “aligned” to those of the CPA. As part of the interpretation of item 10, “align” as it is written can either be used in its “plain meaning” or by the use of interpretation rules.¹⁵⁵ But under section 55 the STIA has “promulgated” the PPR¹⁵⁶ in order to apply directly to the relationship between the insurer and the insured. The PPR lays down similar provisions to those of the CPA, with regard to plain language.¹⁵⁷ Dinnie commented that the PPR is not “necessarily aligned” with the CPA. This having been said, the overview of the PPR and the CPA indicates that their objective is similar, to protect the policyholder and the consumer respectively.

Whatever the meaning, there are also a few other factors to consider. Section 5 deals with the application of the CPA. Although the CPA does not state that insurance is included (it is merely excluded only by item 10), the application is focused on the actual application rather than the exclusion. Thus if the CPA applies after the 18 months, it will only apply to the natural persons and juristic persons of which the turnover or assets are less than R2 million, because section 3 states that the purpose of the act is to create a “legal framework” and a “fair business market” to the “benefit of the consumer”.

155 Botha C *Wetsuitleg* 48.

156 Van Niekerk JP “Insurance Law” 2011 678.

157 Dinnie D 2009 www.insurancegateway.co.za.

To the best of the researcher's understanding the legislator clearly intended to state that the CPA would apply after 18 months, and she is aware that there have been no amendments to the STIA of late, making it clear that on that ground the CPA must apply. But in the end, whether the PPR is aligned to the CPA or not the legislator has to specifically state that the Insurance Acts are now subjected to the provisions of the CPA or the courts will determine this when the dispute enters the courtroom.

4.3 Other factors that affect liability

In all fairness insurers have been faced with factors that result from wrongful doing on the part of the insured, and will affect their liability, as in the case of misrepresentation and non-disclosure. The insurer also has the right to fair contractual conduct on the side of the insured and the insured must be very cautious not to make the error of not informing the insurer of facts that may affect its claim. The test in terms of Section 53 of the STIA is that, in order to determine misrepresentation, the fact which is relied upon must be "material".¹⁵⁸ The court will then look at the issue of the "reasonable person" and the "importance thereof for the contract" and its conclusion.¹⁵⁹ In order for the insurer to rely on the material fact it must prove its materiality to the contract and if the reasonable person or insurer would have based the contract on this fact the former can repudiate the claim.¹⁶⁰

4.4 Conclusion

Taking into account the factors discussed it would seem that in the near future the insurance industry might have to consider the possibility that the CPA will apply, so that the standard-form contract will not adhere to all the provisions to which the CPA clearly subjects the supplier and consumer relationship. What is apparent to the researcher is that in promulgating the CPA the legislator did take heed of the appeal

158 Section 53(1)(c) of the CPA.

159 Nortje M 2010 *TSAR* 468.

160 Van Niekerk 2008 *Mercantile Law Journal* 119.

for assistance in the business market where the disadvantaged consumer experienced difficulty with the conduct of the supplier. In referring to the word “aligned” and what the meaning is in “plain language”, the dictionary defines it as “to place or arrange into a straight line” or “into correct or appropriate relative positions”.¹⁶¹ In plain language the word “aligned” will signify that the Acts must be in a “straight line with one another” or “appropriate relative positions”. The researcher suggests that in using the word aligned the legislator intended to make the provisions parallel to one another. The PPR is indeed similar to the CPA but it certainly does not deal with all the provisions relevant to insurance as the CPA does. How the courts will interpret the provisions of the CPA has not yet been tested as they might even refer to other legislation or the *Interpretation Act* 33 of 1957.

Consequently, if the “tables have been turned”, the supplier might be in a more disadvantaged predicament at present but this will only become clear in future case law. As to whether the CPA will have an effect on the insurance industry, this is left for future researchers as it is too difficult to predict. It is the hope of the researcher that the CPA will apply but in a controlled environment.

The liability of the insurer obviously affects all the different types of insurance. In the case of aviation insurance; while many liability issues have arisen not so much can be said as regards the development of this field of insurance. This is the subject of the following chapter.

161 Author unknown date unknown “Oxford Dictionaries” www.oxforddictionaries.com.

CHAPTER 5 Liability of the insurer in relation to an aviation insurance contract

5.1 Liability in terms of aviation insurance

Aviation insurance is widely dealt with in legislation and literature. Owing to the continually widening concept of globalisation, the global traveller and carrier, more specifically the air carrier, must be aware of the insurance aspects. Aviation insurance contains particular provisions that relate to aviation and the circumstances it is faced with.¹⁶²

In terms of the STIA, such aviation insurance constitutes part of the definition of “transport policy”.¹⁶³ As part of the latter, insurance of this kind deals with the “possession, use or ownership of the aircraft” on “land and water”. Since aviation insurance forms part of the field of aviation law, legislation has made provision for it. The *Civil Aviation Act* 13 of 2009 states that the “owner” will be held liable for the “material loss of or damage” relating to the carriage caused by “flight, take off, or

162 Reinecke *et al General Principle of Insurance law* 426.

163 Definition of transport policy: means 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;

landing”¹⁶⁴, clearly stating the liability of the carrier in this regard. In addition, under Chapter 14 Regulations, Section 155 states that insurance is essential in order to cover the liability. If the loss or damage does occur and a dispute arises under the insurance contract the “principles of insurance law” will still apply;¹⁶⁵ hence under the Act the carrier will be liable but the insurance policy will still be subjected to the normal terms and conditions discussed in previous chapters.

The *Carriage of Air Act* 17 of 1946, will apply domestically. For international purposes, the Warsaw Convention has been incorporated into South African legislation¹⁶⁶ which in turn considers carriage by the aircraft. In terms of the international application of insurance it is wise for the insured to be aware of certain provisions as these can and will affect the liability of the insurer.

In terms of the Warsaw Convention “carriage” will determine liability of the “carrier” with respect to the “passenger, baggage and cargo”.¹⁶⁷ Article 3 of the Convention discusses “passenger tickets”. Article 3(2) states that the “contract of carriage” will be concluded in terms of the “passenger ticket”. The “passenger ticket” then constitutes a contract between the carrier and the passenger, as do the “baggage check”¹⁶⁸ and “waybill”.¹⁶⁹ For international purposes the Warsaw Convention provides guidelines to determine the liability of the carrier¹⁷⁰. Therefore when the contract is in existence the liability factor will automatically be in question. Consequently, when the carrier is liable under the regulations of Warsaw, the *Carriage by Air Act* or the *Civil Aviation Act* it must take out insurance for the liability that it faces. The researcher suggests that the “carrier’s” liability might, even then, be the reason for the claim against the insurer.

164 Davies, Singh and Hills date unknown [www.webberwentzel](http://www.webberwentzel.com) 239.

165 Reinecke *et al General Principle of Insurance law* 427.

166 Margo *et al* “Aviation and Air Transport” Harms LTC, Pienaar and Rabie (eds) *Law of South Africa* 1993 372.

167 Article 1 of the Warsaw Convention.

168 Article 4 of the Warsaw Convention.

169 Article 11 of the Warsaw Convention.

170 Davies, Singh and Hills date unknown www.webberwentzel.com 237.

With regard to the insurance contract the “Warsaw Convention” might even form part of the inclusion of the “warranties” to which the insured must adhere, relating to “air navigation” and “airworthiness”.¹⁷¹ In the same fashion as all insurance contracts will contain special terms and conditions, aviation insurance will also stipulate particular specifications that deal with the risk facing the aviation object. In *Aviation Insurance Company of Africa Ltd v Smit* 1984 ZASCA 143 the court had to determine if the claim’s repudiation on the grounds of a “warranty”¹⁷² and “general condition” was indeed justified.¹⁷³ In the judgment much emphasis was put on the fact that the circumstances in this case played a very big role. The pilot was forced to make an emergency landing, during which his experience was in his favour. What is worth noting is that the insurer repudiated the claim. The emergency the pilot was faced with could not be denied, while emergencies are not the fault of the insured. The fact that this case ended in the Supreme Court is actually not justified. In *Aviation Insurance v Burton Construction (Pty) Ltd* 1976 4 SA 769 (A) (hereafter the *Burton-case*) the debate around the same warranty was put to the court for interpretation in terms of what it said and the circumstances of the case.¹⁷⁴ In *Bates & Lloyd Aviation (Pty) Ltd and Another v Aviation Insurance Company* 1985 2 SA 428 the court referred to the principles of the *Burton-case* and made the observation that when a “warranty” for instance says that “reasonable steps” must be taken, the interpretation of this phrase by the insured will differ from that of the agent.¹⁷⁵ As indicated, there are unique provisions that will apply only in the case of aviation insurance.

5.2 Travel insurance

Travel insurance does not necessarily form part of aviation insurance but as a component of the “transportation policy” it will for instance protect the “traveller” from loss or damage.¹⁷⁶ One can acquire travel insurance either by buying it from a travel

171 Pistorius *International insurance Law and Regulations* SAF 45.

172 Dealing with airworthiness and air navigation.

173 The general conditions number 3 read as follows: “The insured shall use due diligence and concur in doing everything reasonably practicable to avoid or diminish any loss hereon...”

174 Pistorius *International insurance Law and Regulations* SAF 45.

175 Paragraph 22.

176 Pistorius *International insurance Law and Regulations* SAF 41.

agent as a sort of “policy” or by its inclusion in the method chosen to purchase a ticket, for instance by a credit card.¹⁷⁷ Such insurance is obtained to protect the traveller if the unthinkable happens.

5.2.1 Aviation or travel insurance: the appropriate insurer to claim under

To return to the hypothetical case: Mr Smith suffered damage when his items were stolen out of his suitcase. Against whom should he claim? Mr Smith, for the purpose of the practical example, would have acquired travel insurance. In terms of the Warsaw Convention the “carriage contract” was concluded, and thus the liability of the carrier now comes into existence. But as the liability for loss under the *Civil Aviation Act* falls on the “owner” and thus he must take out insurance, which insurer will Mr Smith claim from? Will the insurer X not dispute its liability and argue that insurer Y is liable? In the opinion of the researcher, the resolution would depend on the circumstances. But what if the owner and travel insurance claim the airport terminal is liable? Will its insurer be liable? For Mr Smith determining liability could be a nightmare as the effort and legal costs may be substantial.

5.3 Conclusion

It will depend on Mr Smith’s decision against which of the insurance companies he wants to institute a claim. If the one repudiates it, due to other reasons than the liability of the other insurer, Mr Smith will most likely have to go the normal route of litigation to receive the payment from the insurer. But where does insurer X’s liability start and insurer Y’s end? In the case of aviation many references are made to “strict liability” and to the fact that the “registered owner” will be held liable for any “material loss” in relation to the aircraft.¹⁷⁸ To determine if the aircraft’s insurer, insurer X, is liable these will be definite factors to consider as the Act emphasises that insurance is essential. To give an opinion might offer a technical challenge as it could depend

177 Jones 2005 *Moneyweb’s Personal Finance* 15.

178 Davies H, Singh N and Hills K date unknown www.webberwentzel.com 239.

on the circumstances, the carriage contract, even the insurance contract. The best solution is to be informed on the extent of the cover.

CHAPTER 6 Aviation insurance in other legal systems

6.1 Aviation as part of a global industry

In terms of the *M&F*-case it was observed that the Roman-Dutch law is the “law” that “governs our common law”.¹⁷⁹ It was also stated that the “marine insurance” is the “oldest” form of insurance¹⁸⁰, making the principles of such insurance still relevant today. The English law of insurance or American law of insurance does not necessarily regulate the South African law of insurance but as the *M&F*-case has pointed out the English law of insurance has surely influenced South African insurance law as it stands today. It would be unwise not to look at other legal systems and the way they address insurance problems. Insurance has been developed by these very legal systems and to just refer to one might even imply the other.

Since it would be, unfortunately, impossible to refer to all the principles of insurance law relevant to the insurance contract, the researcher will only refer to the principles of these legal systems of insurance regulating the liability of the insurer from the particulars of the insurance contract, specifically, in this regard, referring to aviation insurance.¹⁸¹

179 Davis Gordon & Getz *The South African Law of Insurance* 5.

180 *M&F*-case page 5.

181 The researcher in this Chapter in some instances refer to marine insurance to outline valuable principles.

6.1.1 Aviation insurance law principles

English law as an “integral part” of the South African law¹⁸² deals with aviation insurance, in general, in much the same way as the latter. The field of aviation insurance in English law has been said to develop from the first offering thereof by Lloyd’s insurance.¹⁸³ In its earlier stages aviation insurance covered scenarios such as “fire or theft” on board the aircraft. In those times the need was already addressed under the insurance policy.¹⁸⁴ South African aviation law most certainly provides for these scenarios but it is the opinion of the researcher that the problem stemming from the theft of belongings and the liability for the loss or damage are not always dealt with in detail. Also provided for in English law is the difference between the liability for the sake of the passenger and that of the “owner” of the aircraft.¹⁸⁵ It is important to note that “aviation insurance contracts” create quite a “broad” degree of cover and must be seen in terms of the cover they provide.¹⁸⁶ Under English insurance law the so-called “hull policies” deal with the matter of the loss or damage to regarding the object.¹⁸⁷ These policies will most likely outline the cover of the insurance and to what extent liability will be affected.

For example the policies might also contain the provision for “airworthiness and air navigation” rules that must be complied with, much as the South African warranty discussed in Chapter 5. But as pointed out, in some instances these provisions do not exclude liability because the interpretation might even state that these clauses make the insurance cover redundant.¹⁸⁸ In *Lloyds of London Underwriters*

182 Davis Gordon & Getz *The South African Law of Insurance* 5.

183 Crowdus 1931 www.heinonline.org 176.

184 Crowdus 1931 www.heinonline.org 180.

185 Crowdus 1931 www.heinonline.org.

186 Jericho 1978-1979 www.heinonline.org.

187 Clark 1997 www.navlaw.com.

188 As part of the American case law this was established to make the use of the provision redundant since all scenarios in the case of airworthiness and the air navigations rules would be subjected to the exclusion. The authors referred to English law in this regard as well because it deals with the matter in the same instance. Kalis PJ, Reiter TM and Segedahl JR *Policyholder’s Guide to Law of Insurance Cover* (2008 Aspen Publishers USA) 18-8.

Syndicates 969,48,1183 and 2183 v Skilya Property Investments (Pty) Ltd 2004 1 All SA 386(SCA) the court examined the exclusion warranties under the insurance policy and the “illegal” dispute to which the aircraft was subjected. If one considers the judgment, the warranties and terms and conditions of the insurer Lloyd clearly stated the provisions its liability would be subjected to, and in the end the court did uphold the claim by the insurer that it was not liable. The court did observe that “general exclusions” would leave the “owner vulnerable”,¹⁸⁹ making the use thereof, in the researcher’s view, the opposite of what the insurer would want from its insurance: cover for the vulnerability. In considering insurance cover under an aviation insurance policy American courts have instead opted for the interpretation that these clauses make the very foundation the insurance is based on “illusory in effect”.¹⁹⁰ The researcher has to agree. The very basis of insurance depends on the insurer providing the assurance

that if a risk materializes the insurance will cover the damages. It is understandable that illegal dealings with the aircraft must be excluded but to rely on the exclusion for many other disputes is simply not fair. But as the aviation industry is globalised its rules and regulations must become more subjected to circumstances and organizations and unions have also developed legislation governing their members to the extent of aviation and its particulars. This very statement by the Honourable Judge above summarizes the essence of the legal question of this dissertation and makes the inclusion of these provisions in the policy the very reason for the insurance absolute.

6.1.2 The European Union and aviation insurance

Due to the 9/11 terrorist attacks and the Iceland volcanic eruption, and after the effect of these global disasters on aviation, in recent years it has become the focus

189 Paragraph 7.

190 See *Ranger Insurance Company v Phillips* 544 P.2d 250 (Ariz App). Kalis PJ, Reiter TM and Segedahl JR *Policyholder’s Guide*

of organizations and unions to provide clearer regulations for insurance and the liability issue.¹⁹¹ As far as regulatory measures are concerned in recent years the European Union (hereafter referred to as the EU) has adopted new regulations that deal with aviation insurance.¹⁹² This Regulation 785/2004 of the European Parliament and of Council of 21 April 2004 clearly provides that the carriers and operators must take out insurance for the passengers, baggage, cargo and third parties which will include, for example, acts of war.¹⁹³ These regulations and the liability so clearly outlined were the result of these unfortunate events that made the world (and in particular the insurer) aware of rules and legislation that govern one's every move in terms of liability. Owing to the incorporation of conventions such as Warsaw into South African legislation and because South Africa forms part of the International Civil Aviation Organisation (referred to as the ICAO) the EU has been wise to more clearly outline the need for aviation insurance policies to cover the hazards associated with insurance.

6.2 To Summarize

Most of the world's countries have devised very strict aviation rules after the terrorists' attack on America. The airlines and passengers are required to adhere to a great many rules and regulations in terms of aviation law and it has become important to the traveler to understand these in order to know his/her rights and what is expected. If Mr. Smith had been in a different country his loss would be the fault of the airline and they would compensate him for it. But in South Africa it would be difficult under the insurance legislation to determine whether the risk was covered by the insurer. The airport baggage loading company might also be regarded as liable because the theft could have happened in the airport. In the end one might see the insurers pointing fingers at one another and claiming they are not liable. It may also be a factor that Mr. Smith is from England and his insurance does not cover his travelling domestically in South Africa. Then the question will be whether he can

claim from the air carrier's insurance. It might be difficult to prove but the researcher regards this as possible.

Chapter 7 – Recommendations

7.1 Recommended changes and solutions

After all is said and done, in terms of the findings by the Honourable South African Judges and the literature on the liability of the insurer, it would be in the first place be sensible to begin with the intention of the parties. The insurance contract must reflect this intention to understand why it was compiled as it was. In standard-form contracts the intention is not always reflected. The researcher recommends the “personalization” of these contracts. It would not be possible for the insurer to draft a new contract each time but the insurer and insured should make their intentions known to each other regarding what they want from the contract.

By the inclusion of more and more terms and conditions into the contract, it has become evident that the very reason the insured acquires the insurance has become redundant. The insurer can repudiate a claim merely by asserting it is exempt from the obligation to compensate under a clause in the contract. The American court above has addressed this issue under the aviation warranty so commonly used. But does this not count for all the insurance fields in law? The researcher would hope so. One has to wait and see whether the CPA will address this problem, as its provisions surely make provision for it in the sense that the legislation utilizes the word “unfair”. The inclusions of some of these clauses are indubitably unfair. But the insured

needing the insurance opts to ignore their inclusion. The CPA provides that these inclusions cannot be part of the contract, but whether this provision will be reflected in the contracts, is left to the courts. The researcher expresses the hope when the court gives judgment on the provisions of the CPA it will address their practicality for future use and will furnish guidelines and describe how to implement these in the most suitable manner.

As to the liability of the insurer under the contract and what must be outlined, the researcher suggests the amendment of the PPR. These rules are not in such a state that they cannot be used now and in the future; the legislator should, simply, more carefully address scenarios that are common occurrences in the insurance industry. If these rules are to be better understood and more clearly outlined their use cannot be emphasized enough as they deal with insurance specifically, whereas the CPA only concerns service and goods in general. The provision of particular guidelines as to what the agreement between the parties must reflect and the obligations of these parties could offer a solution to the litigation in the South African Courts. As was done in terms of aviation insurance by the Warsaw Convention or the Regulations of the EU, the insurance relationship as a whole must be regulated by principles that will better address the problems by means of general provisions.

The insurance contract with all its terms and conditions must be taken under review. The courts opt for the interpretation of the part in dispute under the contract, but the researcher suggests that the court when interpreting a clause, for instance, must refer not to the fact that the insurer expressed its repudiation of the said clause, but to why the insurer did so. The impression the researcher has gained is that insurers repudiate claims in some instances just for the sake of doing so. Basic repudiation by the insurer leaves it with the *onus* to prove why, but if it can merely state it is due to the exception created by a clause, there is nothing really to prove as the courts will have to determine if the clause is valid. The researcher recommends that the legislation include clearer guidelines for repudiation or that an Honourable Judge

create a “precedent” in his or her judgment. To use the guidelines of the CPA in this regard may help to solve the problem, maybe in part as the insurer or supplier cannot just, not compensate, because it “might feel like it”.

As regards the application of the CPA the researcher would be in favour thereof because it can better protect the insured. It will address the liability of the insurer in the insurance contract on a different level and its strict provisions will cause the regulation of the insurance contract to be more structured. The insurer cannot draft contracts that do not incorporate the intention of the CPA in all its particulars. Thus, due to lack of proper legislation to deal with all the issues in terms of the liability of the insurer, the researcher would recommend the CPA to be applicable to insurance law in South Africa regarding how to regulate the liability of the insurer and create legal certainty in terms of the insurance contract.

To assist Mr Smith the researcher recommends that he uses travel insurance, and lodge a claim with insurer Y. If for instance he was injured on board the plane the carrier’s insurance would most likely have to compensate his claim as the liability is on the part of the carrier. To handle the repudiation of the claim by one or both of the insurers, Mr. Smith should rather refer to the CPA for assistance if he opts to litigate in South Africa. Mr. Smith as a consumer might achieve greater success under the provisions of this Act than by following the traditional route of litigation.

Chapter 8 - Conclusion

How can regulatory measures provide legal certainty with regards to the liability of the insurer in the insurance contract, with specific reference to aviation insurance? In the discussion of the PPR and the CPA, the terms and obligations will clearly provide for legal certainty concerning the liability of the insurer with regard to the insurance contract. Although there is no specific reference to the liability of the insurer in legislation, the disputes in case law have undeniably seen many different approaches and conclusions. What is apparent to the researcher is the use of the interpretation rules to obtain a suitable answer is has created the manner to deal with the liability issue. The insurer will almost always rely on a provision in the insurance contract to repudiate: hence the legal certainty needed from incorporating the CPA and the PPR as well as the provisions that state that the contract or policy must be explained to the party and in such a way that he understands. To the researcher this would remove the fundamental principle of interpretation because the insurer must have been aware of what is meant by the inclusion of the clause since it had to be explained to him. In the researcher's mind this will in itself provide legal certainty because the "fine-print" so commonly referred to will have to be explained. The insured will also then clearly know its obligations and rights under the contract, making the insured aware of the liability of the insurer. Making the use of interpretation in this case not as useful as it was in the past. The insurance contract now must truly "mean what it says".

As regards the freedom of contract enjoyed by the parties, if the contract and the inclusion of provisions that can affect the outcome of the service are clearly provided, the bases of the freedom of contract will be much more strongly emphasised. The insured will thus be given the opportunity to take part in the contracting phase because the standard-form contract, in the view of the researcher, has no place under the provisions of the CPA. It cannot just include terms and conditions as part of its standard business practices. Thus to Mr. Smith who has lost his valuables due to theft, under the CPA it will most likely be the carrier that is liable for his damage due to the fact that he had used its services. Hence insurer X will in most cases now have to compensate.

Although amendments to the PPR, even STIA, can provide better legal certainty in not only aviation insurance but also insurance in general, the question remains whether the CPA will apply to insurance, as it will provide the certainty undoubtedly longed for in insurance litigation. This question has not yet been answered by the courts. The researcher has made the observation that if the CPA does apply it will change the insurance industry drastically, and there might be a noticeable increase in litigation, not the desired solution she has been attempting to provide to the reader. Thus with every solution discussed in this dissertation the solution comes with a sacrifice, as the law will invariably have a “double edged” effect on all principles. The researcher trusts that the legislator will amend the PPR to align it with the CPA, as the CPA’s effect on insurance might alter the industry in a way that no one can foresee.

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SAMEVATTING

Hoe kan regulerende maatreëls regsekerheid verskaf in terme van die versekeraar in die versekeringskontrak met spesifieke verwysing na lugvaartversekering? Om te bepaal wat die aanspreeklikheid van die versekeraar is, is gefokus op bestaande regulerende maatreëls uit regspraak en wetgewing. Uit regspraak en ander akademiese literatuur verwys die navorser na die rol van die interpretasie reëls en hoe die interpretasie van sekere terme of woorde in die versekeringskontrak die aanspreeklikheid van die kontrak kan beïnvloed.

Dit het wel na vore gekom dat die *Wet op Verbruikersbeskerming 69 van 2008* die aanspreeklikheid van die versekeraar gaan beïnvloed aangesien dit nou eers op versekering van toepassing gaan wees. Die aanspreeklikheid alhoewel dit tans deur die “Policyholder Protection Rules” gereguleer word, en die feit dat die *Korttermyn Versekerings Wet 53 van 1998* nie aangepas is om die regulasies van die *Wet op Verbruikersbeskerming 69 van 2008* te weerspieël nie, veranderinge ondergaan en regspraak sodoende ook verder beïnvloed. Met verwysing na lugvaartversekering het die navorser bepaal dat die area in die versekeringsreg nie altyd regsekerheid verskaf in terme van wie aanspreeklikheid van die versekeraar nie, maar wel baie streng regulasies het waaraan dit moet voldoen.

Na aanleiding van die interpretasieëls en die wetgewing wat regulerende maatreëls verskaf en die feit dat die toepassing van die *Wet op Verbruikersbeskerming 69 van 2008* nie vasgestel is nie, sal die “Policyholder Protection Rules” moet aangepas word aangesien dit van meer waarde is vir die versekeringsbedryf is om die regulerende maatreëls te ontwikkel vir aanspreeklikheid van die versekeraar.

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ABBREVIATION LIST

CPA	-	<i>The Consumer Protection Act 68 of 2008</i>
EU	-	European Union
FIAS	-	<i>Financial Advisory and Intermediary Service Act 37 of 2002</i>
ICAO	-	International Civil Aviation Organisation
LTIA	-	<i>Long Term Insurance Act 52 of 1998</i>
PPR	-	Policyholder Protection Rules
STIA	-	<i>Short Term Insurance Act 53 of 1998</i>