Insurable interest and the allocation of risk in international sales contract: a focus on certain incoterms

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ABSTRACT

An integral part for the development of countries is international trade. It establishes relationships between countries and provides a fertile environment for economic growth and sustainability. The value of the traded goods is, in general, substantial. When goods are bought and sold internationally, various factors comes to light, including but not limited to the packaging of the goods, methods of payment, customs and excise as well as the method of transportation. However, international trade is a risky business. For protection against the risks faced in international trade, the buyer and the seller would normally obtain insurance.

Not only must an insurance contract comply with the general requirements of a valid contract, it should also comply with the essentials of an insurance contract. These include the transference of the risk, the payment of a premium, indemnification, period of insurance and the existence of an insurable interest.

The existence of insurable interest on the part of the insured is crucial if he wishes to claim from the insurer. Insurable interest as a requirement has in recent years attracted much criticism. However, according to case law, it remains a requirement as such. A satisfactory definition of insurable interest has not been established in South African law. In this study, insurable interest was considered in relation to incoterms. The incoterms that formed the focus of this research, are "delivery duty paid", "carriage and insurance paid to" as well as "free carrier".

Various issues were investigated but the main concern of the study was the following question: When does the insurer escape liability for damage or loss due to a lack of insurable interest of the insured with reference to certain incoterms in an international sales contract of goods transported by sea?

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LIST OF ABBREVIATIONS

Anon	Anonymous
CFR	Cost and Freight
CIF	Cost Insurance Freight
CILSA	Comparative and International Law Journal of Southern African
CIP	Carriage and Insurance Paid to
CPT	Carriage Paid to
DAP	Delivered at Place
DAT	Delivered at Terminal
DDP	Delivery Duty Paid
EXW	Ex Works
FAS	Free Alongside Ship
FCA	Free Carrier
FOB	Free on Board
ICC	International Chamber of Commerce
S	Section
SALJ	South African Law Journal
SA Merc LJ	South African Mercantile Law Journal
THRHR	Tydskrif vir die Hedendaagse Romeins-Hollandse Reg
TSAR	Tydskrif vir die Suid Afrikaanse Reg

Chapter 1 Introduction

1.1 Problem statement

According to van Niekerk,[1] international trade can be defined as:

> (t)hat part of the law which is concerned with international commercial transactions between nationals - legal or natural persons - of one state and those of another

thus "the exchange of goods or services between countries".[2] It is a global phenomenon without which many countries would have collapsed economically. International trade is *inter alia* a method for countries to obtain goods that are not produced within their own borders. It allows businesses to grow, profits to be made and it is also a political tool.[3] The importance of international trade cannot be emphasized enough. Therefore, export is a characteristic of a land with a healthy and growing economy. It serves as proof for innovation, progress, stability as well as sustainability.[4]

There are, however, risks attached to the export of goods. The following is a good example: A (importer) concludes a contract with B (exporter) in which A buys cars from B. A is a car dealership in South Africa and B is a car manufacturer in England. Although various issues could arise from this example, the focus of this study was on the transport and insurance contract concluded. The reason is that many perils are faced and many dangers exist when transporting goods from England to South Africa. If the goods are transported by sea, there is the possibility (some element of uncertainty exists) that the goods can be damaged or lost due to, but not limited to, heavy weather (storms and unexpected winds), fire or explosions, piracy, theft, jettison, collisions, etc.[5] Some kind of a method of protection is required. One of the most important and most common

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1 Van Niekerk and Schulze *The South African law of international trade: selected topics* 2.

2 Heakal 2018 https://www.investopedia.com/insights/what-is-international-trade/.

3 Vijayasri 2013 *International Journal of Marketing, Financial services and Management Research* 111-117. See also Sharma 2014 https://www.quora.com/What-is-the-importance-of-international-trade; Pettinger 2017 https://www.economicshelp.org/blog/58802/trade/the-importance-of-international-trade/.

4 Vijayasri 2013 *International Journal of Marketing, Financial services and Management Research* 111-117.

5 Hare *Shipping law and admiralty jurisdiction in South Africa* 921-930. See also Van Niekerk and Schulze *The South African law of international trade: selected topics* 228-230; Getz, Davies and Gordon *South African law of insurance* 378-381; Bennet *The Law of Marine Insurance* 355-359.

methods is insurance. Another dimension to the ordinary taking out of insurance is however involved, as far as import and export are concerned. The type of sales contract concluded between the parties may certainly have an effect on the insurance and it places the risk of the loss on one of the parties.[6]

This study considered not only South African law, but English law as well. In the very famous *Oudtshoorn*-case,[7] Joubert JA emphasised the great influence that English law has had on South Africa's insurance law. Although the common law of South Africa is the Roman-Dutch law, the English law is authoritative due to its inextricable ties with South Africa's history and the development thereof.[8]

Insurance, although not as we know it today but rather in its eldest form, can be dated back as far as the 3rd millennium BC, known as a maritime load which was developed by the Babylonians.[9] A more modern and familiar form of insurance can be dated back to the development of the *lex mercatoria*. It developed during the fifteenth century due to international trade by sea around Italy. The merchants either shared the risk or paid the premium to an insurer to provide cover for loss or damage.[10] The common denominator of the history was the fact that the insurance that developed originally, was marine insurance. Therefore, marine insurance is the topic of this study. Marine insurance is an

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6 Hare *Shipping law and admiralty jurisdiction in South Africa* 580, 582-583. Van Niekerk and Schulze *The South African law of international trade: selected topics* 73-81. This fact causes a necessary distinction between ownership and the bearing of the risk of loss. In some instances the risk may have been transferred from one party to the other, however, ownership has not. This creates an issue to establish the influence it might have on insurance and the conclusion of insurance contract because on the face of it both parties could have an insurable interest.

7 *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality* 1985 1 SA 419 (A) 430-431.

8 *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality* 1985 1 SA 419 (A) 430-431. See also Van Niekerk and Schulze *The South African law of international trade: selected topics* 197; Hare *Shipping law and admiralty jurisdiction in South Africa* 829-830; Getz, Davies and Gordon *South African law of insurance* 6.

9 Hare *Shipping law and admiralty jurisdiction in South Africa* 822-825. See also Reinecke, van Niekerk and Nienaber *South African Insurance law* 19; Bennet *The Law of Marine Insurance* 14-15; Lowry, Rawlings and Merkin *Insurance Law Doctrines and Principles* 1.

10 Hare *Shipping law and admiralty jurisdiction in South Africa* 822-825. See also Reinecke, van Niekerk and Nienaber *South African Insurance law* 19; Bennet *The Law of Marine Insurance* 14-15; Lowry, Rawlings and Merkin *Insurance Law Doctrines and Principles* 1.

example of indemnity insurance since it is patrimonial of nature. Marine insurance is defined in section 1 of the English *Marine Insurance Act* 1906[11] as:

> A contract of marine insurance is a contract whereby the insurer undertakes to indemnify the assured, in manner and to the extent thereby agreed, against marine losses, that is to say, the losses incident to marine adventure.[12]

As explained above various dangers and risks are attached to the import and export of goods. When transporting goods, the buyer and the seller face the risk of the goods being damaged or even total loss of the goods which could mean in most cases non-payment.[13] To minimise the risk and the burden of the parties being in dire straits, a marine insurance policy should be taken out. If the goods are lost or damaged, the insurer should cover the loss or damage as agreed upon in the insurance contract.[14] Therefore, it is important to answer the question: When does the insurer escape liability for damage or loss due to a lack of insurable interest of the insured with reference to certain incoterms in an international sales contract of goods transported by sea?

The research question cannot be answered properly, before a theoretical foundation has been laid down. In Chapter 2, an insurance contract is explained as well as what the essentials of an insurance contract are. Chapter 3 provides a discussion on insurable interest to determine liability, for it is taught that an insurer would only be held liable if the insurer had an insurable interest. Once the essentials of an insurance contract have been introduced to the reader, the inclusion of incoterms is discussed. Incoterms and the influence thereof on the insurable interest of the insured are deliberated in Chapter 4. Chapter 5 provides an overview of the research and a conclusion is presented to explain the answer to the research question. In the next paragraph, the general principles are

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11 This act is regarded internationally as the "mother" of marine insurance. Most countries marine insurance legislation is based on this act. Huybrechts, van Hooydonk and Dieryck *Marine Insurance at the turn of the Millennium* 9-12.

12 Section 1 of the *Marine Insurance Act* 1906. As the investigation progresses the similarities between South Africa's insurance law, with its Roman-Dutch law as the common law, and England's insurance law would become prominent. See also Bennet *The Law of Marine Insurance* 22.

13 Hare *Shipping law and admiralty jurisdiction in South Africa* 921-930. See also Van Niekerk and Schulze *The South African law of international trade: selected topics* 228-230; Getz, Davies and Gordon *South African law of insurance* 378-381; Bennet *The Law of Marine Insurance* 355-359.

14 Hare *Shipping law and admiralty jurisdiction in South Africa* 854. See also Getz, Davies and Gordon *South African law of insurance* 77-79.

referred to, to introduce the reader to some of the important concepts of this investigation.

1.2 General Principles

The validity of any contract, also an insurance contract, requires *consensus*, legal capacity to act, legally enforceable, possibility and certainty as well as formalities if required. The parties to the contract must reach an agreement and their intention with regard to the agreement should be in unison. It is important that both parties must have the legal capacity to act and the agreement they concluded must be enforceable in law (it must not be *contra bonos mores*). If applicable, the contract must comply with certain formalities and the performance must be possible as well as certain (it must be ascertainable or ascertained with certainty).[15]

An insurance contract must not only comply with the requirements of the validity of any general contract but also with certain *essentialia*,[16] because it is an insurance contract. These are the transfer of risk, the payment of a premium, indemnification, the period of insurance and the existence of an insurable interest.[17] It was not the aim of this study to focus on a detailed discussion of these essential elements of an insurance contract. Therefore, only a brief discussion with regard to the *essentialia* follows in Chapter 2. It is sufficient to refer briefly to these elements for the sake of a better understanding of the scope of this investigation.

As indicated earlier, the predominant reason for concluding a marine insurance contract is the high risk attached to the import and export business. Another description of risk is known to be the "possibility of harm"[18] and the insurer could only be held liable if the risk

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15 Van Niekerk and Schulze *The South African law of international trade: selected topics* 201. See also Reinecke, van Niekerk and Nienaber *South African Insurance law* 111; Van Huyssteen, Lubbe and Reinecke *Contract General Principles* 8; Van Niekerk 2009 *SA Merc LJ* 126.

16 *Essentialia* can be desribed as "Things which are of the essence of a contract are those without which such contract cannot subsist, and for want of which there is either no contract, or a contract of a different kind" see Bradfield and Christie *Christie's law of contract in South Africa* 186.

17 Van Niekerk and Schulze *The South African law of international trade: selected topics* 201-202.See also Hare *Shipping law and admiralty jurisdiction in South Africa* 843, 854, 862, 893; Bennett *The Law of Marine Insurance* 67, 217, 331; Rose *Marine Insurance Law and Practice* 29, 135, 185, 257.

18 Reinecke, van Niekerk and Nienaber *South African Insurance law* 234. See also Hare *Shipping law and admiralty jurisdiction in South Africa* 709; Getz, Davies and Gordon *South African law of insurance* 166; Stander and Kruger 2010 *SA Merc LJ* 485-486.

has materialised. There must be some element of uncertainty. In the insurance contract, the risk shifts or transfers from the insured to the insurer. Commonly confused is the object of risk (which is the physical thing which is insured) and object of insurance (which is the interest in the thing insured, thus the insurable interest).[19] In this study, the focus was on marine risks, namely hull, freight and cargo.[20]

In insurance law, the question arises whether there is a compulsory duty to disclose information and it is accepted to be so if there is a trust relationship.[21] This evolves into another question of good faith or utmost good faith, which is discussed below.[22]

Premium is defined as

> any direct or indirect, or partially or fully subsidised, consideration given or to be given in return for an undertaking to meet insurance obligations.[23]

In other words, the insurer agrees to indemnify the insured and the insured agrees to pay the premium. A premium is paid because the insurer assumes the risk of loss and is immediately liable when the risk originates. When a premium is payable, will be determined with reference to the contract.[24] The insurer is responsible to indemnify the insured. Indemnification links up with the period of the insurance which is usually

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19 Reinecke, van Niekerk and Nienaber *South African Insurance law* 26, 233, 234, 238 and 239. See also Hare *Shipping law and admiralty jurisdiction in South Africa* 891-897; Lowry, Rawlings and Merkin *Insurance Law Doctrines and Principles* 4; Van Niekerk and Schulze *The South African law of international trade: selected topics* 202; Bennett *The Law of Marine Insurance* 331; Van Niekerk 2009 *SA Merc LJ* 126; van Niekerk 1998 *SA Merc LJ* 123-124.

20 Van Niekerk and Schulze *The South African law of international trade: selected topics* 228. See also Hare *Shipping law and admiralty jurisdiction in South Africa* 891-897; Bennett *The Law of Marine Insurance* 331.

21 Reinecke, van Niekerk and Nienaber *South African Insurance law* 136-141. See also Getz, Davies and Gordon *South African law of insurance* 106-110; Hare *Shipping law and admiralty jurisdiction in South Africa* 875-879; Bennett *The Law of Marine Insurance* 102-103; Rose *Marine Insurance Law and Practice* 65-93.

22 Reinecke, van Niekerk and Nienaber *South African Insurance law* 136-141. See also Getz, Davies and Gordon *South African law of insurance* 106-110; Hare *Shipping law and admiralty jurisdiction in South Africa* 875-879; Bennett *The Law of Marine Insurance* 102-103; Rose *Marine Insurance Law and Practice* 65-93.

23 Section 1 of the *Insurance Act* 18 of 2017.

24 Reinecke, van Niekerk and Nienaber *South African Insurance law* 275-277. See also Hare *Shipping law and admiralty jurisdiction in South Africa* 843-844; Getz, Davies and Gordon *South African law of insurance* 181-183; Schulze 2005 *TSAR* 621; Schulze 2011 *SA Merc LJ* 66; Bennett *The Law of Marine Insurance* 217-221; Rose *Marine Insurance Law and Practice* 135.

determined by means of calculations. Numerous methods exist to calculate the period of cover.[25]

Insurable interest is a concept entrenched in South-African law of insurance which has been adopted from English law. Initially, some uncertainty remained about whether insurable interest could be regarded as an *essentialium* of an insurance contract, but it has since been accepted that, without the insured's insurable interest, no claim would be paid.[26] According to South African law, insurable interest is defined as follows:

> If the insured can show that he stands to lose something of an appreciable commercial value by the destruction of the thing insured, then even though he has neither a jus in re nor a jus ad rem to the thing insured his interest will be an insurable one.[27]

South-Africa has a rich history in case law with regard to the nature of insurable interest, which is considered in Chapter 3. In English law, insurable interest is not only a legally accepted term, but also required by legislation. It is required in terms of section 4 and section 6 of the *Marine Insurance Act* 1906[28] which determines when the insurable interest must exist. Section 5 of this act[29] defines insurable interest as:

> (1) Subject to the provisions of this Act, every person has an insurable interest who is interested in a marine adventure. (2) In particular a person is interested in a marine adventure where he stands in any legal or equitable relation to the adventure or to any insurable property at risk therein, in consequence of which he may benefit by the safety

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25 Reinecke, van Niekerk and Nienaber *South African Insurance law* 82-84. See also Hare *Shipping law and admiralty jurisdiction in South Africa* 854-859; Getz, Davies and Gordon *South African law of insurance* 234-239; Bennett *The Law of Marine Insurance* 496-500; Rose *Marine Insurance Law and Practice* 185-186.

26 *Lorcom Thirteen (Pty) Ltd v Zurich Insurance Co South Africa Ltd* 2013 5 SA 42 (WCC) (henceforth referred to as the *Lorcom Thirteen*-case). Reinecke, van Niekerk and Nienaber *South African Insurance law* 81. See also Van Niekerk and Schulze *The South African law of international trade: selected topics* 208-211; Getz, Davies and Gordon *South African law of insurance* 91; Hare *Shipping law and admiralty jurisdiction in South Africa* 864; Reinecke 2013 *TSAR* 817; Botes and Kloppers 2018 *African Journal of International and Comparative Law* 137-141; Bennett *The Law of Marine Insurance* 67; Murray, Holloway and Timson-Hunt *Schmithoff's The law and practice of international trade* 419.

27 *Littlejohn v Norwich Union Fire Insurance Society* 1905 TH 374, 380 (henceforth referred to as the *Littlejohn*-case). See also Reinecke, van Niekerk and Nienaber *South African Insurance law* 27; Getz, Davies and Gordon *South African law of insurance* 94; Hare *Shipping law and admiralty jurisdiction in South Africa* 864.

28 Section 4 and s 6 of the *Marine Insurance Act* 1906. See also Bennett *The Law of Marine Insurance* 69-72; Rose *Marine Insurance Law and Practice* 29-30.

29 *Marine Insurance Act* 1906.

or due arrival of insurable property, or may be prejudiced by its loss, or by damage thereto, or by the detention thereof, or may incur liability in respect thereof.[30]

The insured must have an insurable interest or at least some expectation of acquiring such interest at the conclusion of the contract and must have an insurable interest at the time of loss.[31] It is important to distinguish between an insurance contract and a wagering contract. According to English law, a wagering contract is null and void, but South Africa follows a different approach. A contract is a wager if the insurer has no insurable interest or has no expectation to acquire an insurable interest.[32]

In conclusion of this brief summary, it is reiterated that an insurance contract must comply with the same requirements which a general contract should comply with, to be valid. However, it should also include and comply with the *essentialia* of an insurance contract. Since this has been established, in the next paragraph, a discussion follows to determine the impact of incoterms on the liability of the insurer (due to a lack of insurable interest).

1.3 International sales contract and incoterms

The International Chamber of Commerce developed incoterms to provide a uniform set of international trade terms.[33] The parties (exporter and importer) determine which incoterm they are going to include in their sales contract. The importance of incoterms, especially with regard to insurable interest, lies in the fact that the specific type of incoterm determines when the risk of loss passes from one of the parties to the other

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30 Section 5 of the *Marine Insurance Act* 1906. Uncertainty still remains about what insurable interest truly means, see Bennett *The Law of Marine Insurance 74;* Hodges *Law of Marine Insurance* 15-16.

31 Issues occur when the insured, at the time of loss, does not have an insurable interest, because the insured thing has already been destroyed. In such instance the insured could insure the goods "lost or not lost". Reinecke, van Niekerk and Nienaber *South African Insurance law* 38-39. See also Getz, Davies and Gordon *South African law of insurance* 94-95; Bennett *The Law of Marine Insurance* 71-72; Rose *Marine Insurance Law and Practice* 34.

32 This regulated by the *National Gambling Act* 7 of 2004. See also Reinecke, van Niekerk and Nienaber *South African Insurance law* 125; Getz, Davies and Gordon *South African law of insurance* 90-91; Hare *Shipping law and admiralty jurisdiction in South Africa* 164-165; Reinecke 2013 *TSAR* 819; section 4 of the *Marine Insurance Act* 1906; Rose *Marine Insurance Law and Practice* 29-30; Bennett *The Law of Marine Insurance* 78-80.

33 Hare *Shipping law and admiralty jurisdiction in South Africa* 580-581. See also Van Niekerk and Schulze *The South African law of international trade: selected topics* 73; Murray, Holloway and Timson-Hunt *Schmithoff's The law and practice of international trade* 7-11; Coetzee 2012 *Stellenbosch Law Review* 564.

and it also highlights the responsibilities of the parties.[34] This study considered the following incoterms due to its popularity in research and in practice: delivery duty paid (hereafter DDP); carriage and insurance paid to (hereafter CIP) and free carrier (FCA).[35]

DDP places the highest obligation upon the seller. The seller carries all the responsibility and the goods are deemed delivered when the seller has placed the goods at the buyer's disposal. This means that the seller places the goods on the ship and the ship arrives at the place agreed upon, reading for unloading as well as obtained all documents of authorisation and carried out all formalities. According to DDP, the seller must also pay all duties and other costs.[36] With regard to CIP, the seller must ensure that the goods are delivered to a carrier at the agreed destination (if such agreement exists) and the seller is also required to take out insurance. The insurance is acquired for the benefit of the buyer.[37] Two types of FCA incoterms exist, namely either FCA seller's premises or FCA other place. FCA entails that the goods are delivered either on the collecting vehicle or when the goods are placed on the transportation ready for unloading.[38] This situation, as it is dictated by the specific incoterm that the parties agreed on, leads to the question: when does the insurer escape liability for damage or loss due to a lack of insurable interest of the insured with reference to certain incoterms in an international sales contract of goods transported by sea?

Therefore, it is important to determine the nature of the incoterms that the parties have agreed on. If this has been established, it can be determined which party has an insurable interest. Once it has been established which party has an insurable interest, the liability of the insurer can be established. In the next chapter, a brief discussion follows with regard to the requirements of a contract and the essentials of an insurance contract.

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34 Hare *Shipping law and admiralty jurisdiction in South Africa* 580-581. See also Van Niekerk and Schulze *The South African law of international trade: selected topics* 81-92; Murray, Holloway and Timson-Hunt *Schmithoff's The law and practice of international trade* 419; Kaufmann 2014 *De Rebus* 48.

35 Ndlovu 2011 *CILSA* 219-220.

36 Malfliet *Incoterms 2010 and the mode of transport: how to choose the right term* 165-168.

37 Malfliet *Incoterms 2010 and the mode of transport: how to choose the right term* 165-168.

38 Malfliet *Incoterms 2010 and the mode of transport: how to choose the right term* 165.

Chapter 2 Nature of the insurance contract

2.1 Essentialia

In this chapter, the requirements for a general valid contract will not be discussed in detail. The focus is on the essentials of a valid insurance contract. Suffice it to mention that, before any contract is concluded, there must be an offer and an acceptance of the offer.[39] An insurance contract still remains a contract. This entails that, as indicated in the introduction, it must comply with the requirements of a contract to be valid. If no valid contract exists between the parties, none of them can be held liable. Therefore, it is important that the insurance contract must comply with the following: *consensus*, legal capacity to act, legally enforceable, the possibility and certainty of performance as well as compliance with formalities if required.[40]

According to Reinecke,[41] the common law requires that the basis for any liability with regard to a contract is *consensus*. *Consensus* entails that the parties must be in agreement about the identities of the parties and the performance.[42] The performance must be possible.[43] Therefore, for example, the insured must be able to pay the premium and the insurer must be able to assume the risk. The performance must be certain or ascertainable.[44] If the parties did not agree on a set amount payable as the premium, there should be a formula to determine the amount.[45] Any person concluding a legally

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39 Reinecke defines an offer as "a declaration of intention stating the terms upon which the person making it (the offeror) is prepared to contract with the person to whom he has addressed his offer (the offeree)." See Reinecke, van Niekerk and Nienaber *South African Insurance law* 96, 102. See also Bradfield and Christie *Christie's law of contract in South Africa* 28-120; Van Huyssteen, Lubbe and Reinecke *Contract General Principles* 51.

40 Bradfield and Christie *Christie's law of contract in South Africa* 29, 30, 123, 265, 266, 391, 467, 468. See also Van Huyssteen, Lubbe and Reinecke *Contract General Principles* 8.

41 Reinecke, van Niekerk and Nienaber *South African Insurance law* 112.

42 Reinecke, van Niekerk and Nienaber *South African Insurance law* 112. See also Van Huyssteen, Lubbe and Reinecke *Contract General Principles* 94.

43 Bradfield and Christie *Christie's law of contract in South Africa* 468; 475-477. See also Van Huyssteen, Lubbe and Reinecke *Contract General Principles* 181-185.

44 Bradfield and Christie *Christie's law of contract in South Africa* 468; 475-477. See also Reinecke, van Niekerk and Nienaber *South African Insurance law* 130-132; Van Huyssteen, Lubbe and Reinecke *Contract General Principles* 181-185.

45 Reinecke, van Niekerk and Nienaber *South African Insurance law* 130-132. See also Van Huyssteen, Lubbe and Reinecke *Contract General Principles* 181-185.

enforceable contract should have the legal capacity to act.[46] A contract is legally enforceable if it is not *contra bonos mores*.[47] If the parties chooses to include certain formalities, those formalities should be complied with.[48] The *Insurance Act*[49] requires certain formalities as wel,l however, the contract is not required to be in writing.[50]

Once it has been established that the insurance contract complies with all the requirements for a valid contract, it must be determined whether it is indeed an insurance contract. This can be done by considering the *essentialia* of an insurance contract. The *essentialia* of a contract refers to the essential characteristics of the contract which makes a general contract a specific contract, such as insurance.[51] As discussed in Chapter 1 of this study, the *essentialia* includes the transfer of risk, payment of a premium, indemnification, the period of insurance and the existence of an insurable interest.[52] The transfer of risk, premium, indemnification and the period thereof are discussed in the following paragraph. However, insurable interest as the focus of the research question is discussed in Chapter 3.

2.1.1 Risk

(a) Description

As mentioned earlier, risk, according to Reinecke,[53] is described as the "possibility of harm". Uncertainty is a key component of risk. Risk is uncertain due to the fact that it is

46 For a discussion on this aspect see Christie *The Law of Contract in South Africa* 227.
47 Christie *The Law of Contract in South Africa* 14-15.
48 Christie *The Law of Contract in South Africa* 109.
49 18 of 2017.
50 For a discussion on the formalities included by the parties and legislation, see Reinecke, van Niekerk and Nienaber *South African Insurance law* 96, 118-120. See also See also Van Huyssteen, Lubbe and Reinecke *Contract General Principles* 146.
51 Reinecke, van Niekerk and Nienaber *South African Insurance law* 75. See also Van Niekerk and Schulze *The South African law of international trade: selected topics* 201-202; Hare *Shipping law and admiralty jurisdiction in South Africa* 843, 854, 862, 893.
52 Van Niekerk and Schulze *The South African law of international trade: selected topics* 201-202.See also Hare *Shipping law and admiralty jurisdiction in South Africa* 843, 854, 862, 893; Reinecke, van Niekerk and Nienaber *South African Insurance law* 75,81; Bennett *The Law of Marine Insurance* 67, 217, 331.
53 Reinecke, van Niekerk and Nienaber *South African Insurance law* 234. See also; van Niekerk 1998 *SA Merc LJ* 123.

uncertain whether the unwanted change would take place.[54] Risk is also a possibility in the sense that it is uncertain when a harmful change would take place.[55] The risk is transferred from the insured to the insurer. Thus, the insurer assumes the risk. Once the risk has materialised, the insurer is liable.[56]

In *Kent v South African National Life Assurance Company*[57] Broome AJP confirmed that

> any contract of insurance postulates that a sum of money will be paid by the insurer to the insured upon the happening of a specified uncertain event. The possibility of the happening of that event is the risk. If the happening of the event is a certainty, there is not a possibility but a certainty of harm and therefore there is no risk.[58]

The scope of the risk which the insurer assumes is determined with reference to the insurance contract. Therefore, it is important that the risk insured against, must be described with great sufficiency.[59] Certain limitations may be included in the contract by the parties to circumvent the liability of the insurer, because the insurer will only be held liable for the risk as described by the parties in the contract. The description of risk in the contract is an indication of the intentions of the parties. Therefore, the description is very important. It is trite that the insurer would not be held liable for any loss or damage caused by inherent vice, wear and tear as well as the insured's own intentional conduct due to the fact that these events are certain.[60]

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54 Indemnity and non-indemnity are the two forms of insurance which developed over time. A distinction must be drawn between indemnity and non-indemnity insurance on the basis of patrimonial loss. On the one hand indemnity insurance provides cover for loss suffered, which is of a patrimonial nature. An example is loss suffered due to damage to a vehicle. On the other hand, non-indemnity insurance provides cover for loss which is of a non-patrimonial nature. An example is a life policy. Thus, marine insurance would be a form of indemnity insurance. The uncertainty remains largely if the uncertain event takes place as opposed to when it would take place as in the case of a life policy. Reinecke, van Niekerk and Nienaber *South African Insurance law* 57, 59-60, 63-64.

55 Reinecke, van Niekerk and Nienaber *South African Insurance law* 233. See also Hare *Shipping law and admiralty jurisdiction in South Africa* 891-892; van Niekerk 1998 *SA Merc LJ* 123-124.

56 Reinecke, van Niekerk and Nienaber *South African Insurance law* 238-239.

57 *Kent v South African National Life Assurance Company* 1997 2 SA 808 (D).

58 *Kent v South African National Life Assurance Company* 1997 2 SA 808 (D) 813.

59 Hare *Shipping law and admiralty jurisdiction in South Africa* 892. See also Reinecke, van Niekerk and Nienaber *South African Insurance law* 238. To determine liability and the extent of risk covered, the entire contract must be considered in the context of the particular situation. See *Oosthuizen v Castro and Another* 2018 2 SA 529 (FB) for the interpretation 522.

60 For a discussion on the liability of the carrier see the *Carriage of Goods by Sea Act* 1 of 1986. Hare *Shipping law and admiralty jurisdiction in South Africa* 892-894. See also Reinecke, van Niekerk and Nienaber *South African Insurance law* 245.

The risk faced by the insured is increased in international trade due to the large amount of perils faced by the exporter or importer. A number of perils[61] are faced at sea including, but not limited to, heavy weather (storms and unexpected winds and waves), fire or explosions, piracy, theft, jettison, collisions, deviation and delay, pollution, changes in exchange rates, non-payment, civil wars, rotting of products, damaged caused at the dock/harbour, crew negligence, etcetera.[62] Every one of these perils can cause harm or loss.

The following could serve as examples or possible perils when transporting goods by sea. A very popular peril (although it relates to the transportation of passengers and not necessarily goods) is the sinking of the Titanic. The Titanic crashed into an iceberg which was hidden under the water level of the sea. If vaccines are not properly refrigerated and kept at the correct temperature, it could lead to the vaccines being ineffective. The refrigerator could break, leading to an entire container's worth or vaccines being ineffective. Similarly, if certain foods, for example chicken, were to be transported and the cooling system failed, the goods would be spoiled and money would be lost. When transporting goods at sea, the chances that the goods are exposed to water are very high, especially if it is not packed correctly. Therefore, if refined sugar for example should be exposed to sea water, it would no longer be able to serve its purpose as refined sugar. A storm could suddenly appear. To avoid the storm, the captain might have to take a different route to reach the agreed destination, resulting in the goods being late. The parties might have agreed that a certain exchange rate applied to the contract but the economy of that country might have crashed, resulting in the exchange rate being much lower than what the parties agreed on. Thus, the seller could suffer a huge loss in this regard.

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61 Where risk refers to the "possibility of harm", a peril refers to the origin or the cause of this loss or harm that could take place. See van Niekerk 1998 *SA Merc LJ* 123-124; Getz, Davies and Gordon *South African law of insurance* 166.

62 Hare *Shipping law and admiralty jurisdiction in South Africa* 921-930. See also Van Niekerk and Schulze *The South African law of international trade: selected topics* 228-230; Getz, Davies and Gordon *South African law of insurance* 378-381; Bennet *The Law of Marine Insurance* 355-359; Rose *Marine Insurance Law and Practice* 269-280; Anon 2018 http://howtoexportimport.com/Types-of-risks-in-International-Trade-4433.aspx.

To protect against these, the importer/exporter must take out a marine insurance policy. Most common in marine insurance and in cargo insurance, are the Lloyds policies (the Institute Cargo clauses). Especially the three types of Institute Cargo clauses, namely Clause A, B and C are very popular.[63] Although many other insurance companies exists in the import and export business, the primary insurance company in the South African trade business is Lloyd's.[64]

(b) The Lloyd's policies

Lloyd's policies are discussed briefly. The policies are discussed due to the wide acceptance and usage of the policies in insurance contracts in the import and export practice. It further includes a list of perils (possible uncertain events typical of the carriage of goods by sea) which could be insured against, depending on which clause the parties agreed on. Clause A refers to the all-risk clause. This entails that cover is provided, as stated in the name, for all risks. However, the term is misleading. Clause A is subject to some exclusions[65] and reads as follows:

> This insurance covers all risks of loss of or damage to the subject-matter insured except as excluded by the provisions of Clauses 4, 5, 6 and 7 below.[66]

The indemnification provided by Clause B could be interpreted to be narrower than Clause A and Clause C even more so. The cover provided by Clauses B and C are for perils specifically listed, as opposed to Clause A. Clauses B and C are also subject to a list of exclusions.[67] Separate other clauses exist which could be taken out by the insured to

63 Van Niekerk and Schulze *The South African law of international trade: selected topics* 224. See also Bennett *The Law of Marine Insurance* 361; Rose *Marine Insurance Law and Practice* 265-266.

64 Section 6 and s 7 of the *Insurance Act* 18 of 2017. See also Stander 2010 *SA Merc LJ* 491-492.

65 Van Niekerk and Schulze *The South African law of international trade: selected topics* 228-230. See also Hare *Shipping law and admiralty jurisdiction in South Africa* 892; Bennett *The Law of Marine Insurance* 362; Rose *Marine Insurance Law and Practice* 65-269; Stander and Smit 2007 *THRHR* 24; Stander and Smit 2007 *THRHR* 176.

66 Clause A of the Lloyd's Institute Cargo Clauses 2009.

67 Van Niekerk and Schulze *The South African law of international trade: selected topics* 228-232. See also Bennett *The Law of Marine Insurance* 368-364; Rose *Marine Insurance Law and Practice* 265-269.

obtain cover where the Institute Cargo Clauses A, B or C do not provide for it, such as war clauses and strikes clauses.[68]

(c) Causation

Before the insured can claim from the insurer, there risk must materialise and there must be a loss or damage.[69] This loss or damage must be caused by the peril. To determine whether this is indeed so, the proximate cause test is used. The proximate cause test determines whether there has been a causal nexus or link between the loss suffered and the peril. If there has been no causal nexus, the insurer cannot be held liable. The peril would be the proximate cause if it

> can be described by terms such as dominant, direct, real, actual, effective, determining, operative, predominant, or efficient.[70]

The test does not require immediacy in terms of time but in terms of cause.[71] The parties to the contract may exclude the proximate cause test or change the working of it. However, if they exclude it, there must be some form of link.[72]

The concept of risk has now been established. To conclude, the risk element is paramount to the insurer's liability. If no such risk exists, no liability could be attached. In the next paragraph, premium is discussed as one of the essentials of an insurance contract.

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68 Van Niekerk and Schulze *The South African law of international trade: selected topics* 232-234. See also Bennett *The Law of Marine Insurance* 404-404; Stander and Kruger 2010 *SA Merc LJ* 493.

69 Getz, Davies and Gordon *South African law of insurance* 168.

70 Reinecke, van Niekerk and Nienaber *South African Insurance law* 250. For a discussion on the proximate cause-test see also Getz, Davies and Gordon *South African law of insurance* 172-173; Hare *Shipping law and admiralty jurisdiction in South Africa* 897-890; Bennett *The Law of Marine Insurance* 301.

71 Reinecke gives an example of a court case where the cargo was damaged by sea water, because rats damaged pipes and the sea water entered the ship through those pipes. It was held that the damage was caused by the sea water and not the rats. Thus, the question should be what was the effective cause or trigger for the loss? See Reinecke, van Niekerk and Nienaber *South African Insurance law* 250. See also Hare *Shipping law and admiralty jurisdiction in South Africa* 921-930; Rycroft 1987 *SALJ* 261.

72 Reinecke, van Niekerk and Nienaber *South African Insurance law* 251. See also Hare *Shipping law and admiralty jurisdiction in South Africa* 921-930.

2.1.2 Premium

The insured must make some undertaking to pay a premium, although the actual payment of a premium is not an *essentialium*.[73] Premium is defined as "any direct or indirect, or partially or fully subsidised, consideration given or to be given in return for an undertaking to meet insurance obligations".[74] If the insured does not pay the agreed on premium, the insurer is not required to perform in accordance with the contract. Therefore, the assumption of the risk by the insurer is contingent to the payment of the premium. [75] However, if the risk has not yet been attached, the insured could require the insurer to pay the premium back, or at least a part thereof.[76]

The premium usually refers to a set amount payable to the insurer, whether monthly or in accordance with the agreement. It must be certain or ascertainable.[77] The parties should contractually specify the time of payment of the premium as well as the manner of payment. If the insured pays the premium in cash, the insurer must provide a receipt as proof of payment.[78] If the insurance contract is found to be void *ab initio*, the premium

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73 Reinecke, van Niekerk and Nienaber *South African Insurance law* 275-277. See also Hare *Shipping law and admiralty jurisdiction in South Africa* 843-844; Getz, Davies and Gordon *South African law of insurance* 181-183; Schulze 2005 *TSAR* 621; Schulze 2011 *SA Merc LJ* 66; Bennett *The Law of Marine Insurance* 217-221; Rose *Marine Insurance Law and Practice* 135; Schulze 2005 *TSAR* 621.

74 Section 1 of the *Insurance Act* 18 of 2017. Premium was defined as the "consideration given or to be given in return for an undertaking to provide policy benefits" in section 1 *Short Term Insurance Act* 53 of 1998 and section 1 of the *Long Term Insurance Act* 52 of 1998 which was repealed by section 1 of the *Insurance Act* 18 of 2017.

75 Reinecke, van Niekerk and Nienaber *South African Insurance law* 275-277. See also Hare *Shipping law and admiralty jurisdiction in South Africa* 843-844; Getz, Davies and Gordon *South African law of insurance* 181-183; Schulze 2005 *TSAR* 621; Schulze 2011 *SA Merc LJ* 66; Van Niekerk and Schulze *The South African law of international trade: selected topics* 243; Bennett *The Law of Marine Insurance* 217-221; Rose *Marine Insurance Law and Practice* 135.

76 Hare *Shipping law and admiralty jurisdiction in South Africa* 843-844; Van Niekerk and Schulze *The South African law of international trade: selected topics* 243; Bennett *The Law of Marine Insurance* 217-221.

77 Reinecke, van Niekerk and Nienaber *South African Insurance law* 277, 282. See also Schulze 2005 *TSAR* 621; Bennett *The Law of Marine Insurance* 217-221; Rose *Marine Insurance Law and Practice* 135-146. For an in-depth discussion of the various methods of payment see Schulze 2011 *SA Merc LJ.*

78 Reinecke, van Niekerk and Nienaber *South African Insurance law* 277, 282. See also Schulze 2005 *TSAR* 621; Bennett *The Law of Marine Insurance* 217-221; Rose *Marine Insurance Law and Practice* 135-146. For an in-depth discussion of the various methods of payment see Schulze 2011 *SA Merc LJ.*

paid should be returned. It is trite that if no contract exists, the insurer has not incurred any risk, therefore no premium is owed.[79]

Thus, risk and the payment of the premium are linked. If no premium is paid, the insurer will not assume the risk of the insured. In the next paragraph, the indemnification as well as the duration of the insurance follow.

2.1.3 Indemnification and the period of insurance

Risk has been identified as the possibility of harm. "Harm" is calculated with reference to damage and the measure of indemnification of such damage. The effect is that the insurer is obliged to indemnify the insured for the loss or damage suffered due to the materialisation of the risk.[80]

There are two types of insurance policies, namely a valued-policy and an unvalued-policy (or open cargo policy). A valued-policy entails that the insurer and the insured agree on a specified amount of coverage in the insurance contact, regardless the actual value of the loss suffered. Therefore, they agree on the value of the goods and with reference to such value, the premium is determined.[81] The value in a valued-policy usually includes the value of the goods when the risk commences, freight as well as other expenses and profits. With regards to an unvalued-policy, the value of the goods must be proved, which is usually done with reference to the market value of the goods insured.[82]

The period of indemnification[83] is subject to the insurance contract concluded between the parties. If no contract regulates the duration of cover, the principles of the Roman-Dutch law would prevail.[84] There are primarily two types of methods to determine the

79 Hare *Shipping law and admiralty jurisdiction in South Africa* 843-844. See also Van Niekerk and Schulze *The South African law of international trade: selected topics* 243; Rose *Marine Insurance Law and Practice* 147-148.

80 Hare *Shipping law and admiralty jurisdiction in South Africa* 854. See also Van Niekerk and Schulze *The South African law of international trade: selected topics* 234-235.

81 Hare *Shipping law and admiralty jurisdiction in South Africa* 854. See also Bennett *The Law of Marine Insurance* 244.

82 Van Niekerk and Schulze *The South African law of international trade: selected topics* 235. See also Bennett *The Law of Marine Insurance* 244-245.

83 The time frame in which cover is provided.

84 Van Niekerk and Schulze *The South African law of international trade: selected topics* 223-224.

period of indemnification. This include both a time policy and a voyage policy and a possibility of a mixed time and voyage policy.[85]

A time policy specifically sets out the time period of which cover will be provided. It indicates the date of when the cover would start and the date the cover would come to an end.[86] Hare[87] indicates that this time frame in South African law could be unlimited.[88]

A voyage policy provides cover from a specified place to another specified place.[89] With regard to cargo insurance, the cover could be extended with warehouse to warehouse cover[90] which is a usual practice. This entails that the cargo is insured from deliverance of the cargo at one warehouse to the time the goods are stored at the warehouse of destination.[91] According to section 1 of the *Short Term Insurance Act* 53 of 1998, a transportation policy is

> 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.[92]

According to Hare,[93] the above-mentioned definition of a transportation policy is wide enough to include the warehouse to warehouse cover. This is not only the position in the South African legal system, but the English legal system follows the same approach. The

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85 Hare *Shipping law and admiralty jurisdiction in South Africa* 894-895. See also Van Niekerk and Schulze *The South African law of international trade: selected topics* 223-224.

86 Hare *Shipping law and admiralty jurisdiction in South Africa* 894-895. See also Davis *Bareboat charters* 386-387.

87 Hare *Shipping law and admiralty jurisdiction in South Africa* 895.

88 Hare *Shipping law and admiralty jurisdiction in South Africa* 894-895.

89 Gilman et al *Arnould's Law of Marine Insurance and Average* 422. See also section 25 of the *Marine Insurance Act* 1906.

90 Which is incorporated under the Lloyds Institute Cargo clauses A, B and C in the transit clause. See Van Niekerk and Schulze *The South African law of international trade: selected topics* 224. According to Bennett the duration of the indemnification depends on the transit clause included in the Institute Cargo clauses A, B and C. See Bennett *The Law of Marine Insurance* 496-497.

91 Clause 8.1 of the Transit clause. Bennett *The Law of Marine Insurance* 496-497. Hare *Shipping law and admiralty jurisdiction in South Africa* 895. See also Van Niekerk and Schulze *The South African law of international trade: selected topics* 223-224.

92 Section 1 of the *Short Term Insurance Act* 53 of 1998.

93 Hare *Shipping law and admiralty jurisdiction in South Africa* 895.

English *Marine Insurance Act* 1906 incorporates both policies and specifically distinguishes between the two policies.

Section 25(1) states:

> Where the contract is to insure the subject-matter "at and from," or from one place to another or others, the policy is called a "voyage policy," and where the contract is to insure the subject-matter for a definite period of time the policy is called a "time policy." A contract for both voyage and time may be included in the same policy.[94]

From this definition, it can be deduced that the parties could also agree on a hybrid policy. This includes both the time policy and a voyage policy.[95] Usually, the cover commences for a specified voyage, where after it continues for a specified time period.[96]

2.2 Summary

It is clear that the same requirements for a valid contract exist for an insurance contract, namely *consensus*, legal capacity to act, legally enforceable, possibility and certainty as well as formalities, if required.[97] However, different essentials exist for different types of contracts. In the case of insurance, these are transfer of risk, the payment of a premium, indemnification, the period of insurance and the existence of an insurable interest.[98]

More important with reference to the focus of this study, is the essential element of insurable interest. This is subsequently discussed in the chapter to follow.

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94 Section 25(1) of the *Marine Insurance Act* 1906.
95 See also Rose *Marine Insurance Law and Practice* 187.
96 Rose *Marine Insurance Law and Practice* 187.
97 Reinecke, van Niekerk and Nienaber *South African Insurance law* 111. See also Van Huyssteen, Lubbe and Reinecke *Contract General Principles* 8; Van Niekerk and Schulze *The South African law of international trade: selected topics* 201; Van Niekerk 2009 *SA Merc LJ* 126.
98 Van Niekerk and Schulze *The South African law of international trade: selected topics* 201-202. See also Hare *Shipping law and admiralty jurisdiction in South Africa* 843, 854, 862, 893; Reinecke, van Niekerk and Nienaber *South African Insurance law* 75, 81; Bennett *The Law of Marine Insurance* 67, 217, 331.

Chapter 3 Insurable interest

3.1 Introduction to insurable interest

Insurable interest has an interesting development and rich history in case law which become apparent during this study. The study considered the historical development of insurable interest and whether insurable interest is a separate requirement for a valid insurance contract. Furthermore, the nature of insurable interest was also considered and the time insurable interest should exist. Insurable interest was considered with regards to indemnity insurance because, as established earlier, a marine insurance contract is an indemnity insurance contract.

The principle of insurable interest has developed from the *lex mercatoria*. The Italian writer De Casaregis[99] was the first to write about the principle of insurable interest. He was of the opinion that an insurer would only be held liable if the insured had an interest in the object insured. The value of the claim was also linked to the value of the insurable interest.[100] The same approach was followed by the Roman-Dutch authorities.[101] In 1783, the insurance contract was linked to a contract of wager and would only be regarded as a valid contract if it could not be linked to "dishonesty, fraud or surprise".[102] The importance of insurable interest in English law is founded in the distinction between an insurance contract and a wagering contract, since a wagering contract is void.[103] In a modern English law perspective, insurable interest is seen as the reason for concluding the insurance contract. Although it seems that South Africa has accepted this argument,

99 Reinecke, van Niekerk and Nienaber *South African Insurance law* 77-78.

100 Reinecke, van Niekerk and Nienaber *South African Insurance law* 80. See also Van Niekerk and Schulze *The South African law of international trade: selected topics* 209 in which it is indicated that insurable interest serves as a method to determine the value of the indemnity. For a discussion on the history from an English perspective see Bennett *The Law of Marine Insurance* 68-69.

101 Reinecke, van Niekerk and Nienaber *South African Insurance law* 80.

102 Hare *Shipping law and admiralty jurisdiction in South Africa* 861.

103 Bennett *The Law of Marine Insurance* 72-74 and 78-80. See also Rose *Marine Insurance Law and Practice* 29-32; Lowry, Rawlings and Merkin *Insurance Law Doctrines and Principles* 177-180; Hare *Shipping law and admiralty jurisdiction in South Africa* 861.

a wager is not void in South Africa's law.[104] Legislation such as the *National Gambling Act*[105] recognises such contracts as far as it falls within the ambit of the act.[106]

The "object of risk" must be distinguished from the "object of insurance". When reference is made to the object of risk, it generally is an indication of the thing insured. But when reference is made to the insurable interest, reference is made to the interest in that object.[107] For example, in the marine insurance context, the object of risk would be the cargo insured and the importer/exporter's interest in the cargo would be the insurable interest.

The concept of insurable interest in South Africa developed from the English law principles governing insurance.[108] In England, it is a statutory requirement that an insurable interest should exist. Section 5 of the *Marine Insurance Act*[109] defines insurable interest as follows:

> (1) Subject to the provisions of this Act, every person has an insurable interest who is interested in a marine adventure.
>
> (2) In particular a person is interested in a marine adventure where he stands in any legal or equitable relation to the adventure or to any insurable property at risk therein, inconsequence of which he may benefit by the safety or due arrival of insurable property, or may be prejudiced by its loss, or by damage thereto, or by the detention thereof, or may incur liability in respect thereof.[110]

Section 4 of the *Marine Insurance Act*[111] states the following:

> (1) Every contract of marine insurance by way of gaming or wagering is void.

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104 Bradfield and Christie *Christie's law of contract in South Africa* 28-120.

105 Section 16 of the *National Gambling Act* 7 of 2004.

106 Initially Roman-Dutch law declared a contract of wager to be contrary to public policy. Van Niekerk and Schulze *The South African law of international trade: selected topics* 209. See also Hare *Shipping law and admiralty jurisdiction in South Africa* 861; Getz, Davies and Gordon *South African law of insurance* 90-91. For a discussion see Schlemmer 1999 *TSAR* 721-733.

107 Reinecke, van Niekerk and Nienaber *South African Insurance law* 26. See also Van Niekerk and Schulze *The South African law of international trade: selected topics* 208; Bennett *The Law of Marine Insurance* 331; Lowry, Rawlings and Merkin *Insurance Law Doctrines and Principles* 4; Van Niekerk 2009 *SA Merc LJ* 126; van Niekerk 1998 *SA Merc LJ* 123-124.

108 Reinecke, van Niekerk and Nienaber *South African Insurance law* 25. Hare *Shipping law and admiralty jurisdiction in South Africa* 862-863; Van Niekerk and Schulze *The South African law of international trade: selected topics* 209.

109 Of 1906.

110 Section 5 of the *Marine Insurance Act* of 1906. See also Bennett *The Law of Marine Insurance* 69-72; Rose *Marine Insurance Law and Practice* 29-30.

111 Of 1906. See also Bennett *The Law of Marine Insurance* 69-72; Rose *Marine Insurance Law and Practice* 29-30.

(2) A contract of marine insurance is deemed to be a gaming or wagering contract —

(a) Where the assured has not an insurable interest as defined by this Act, and the contract is entered into with no expectation of acquiring such an interest; or

(b) Where the policy is made "interest or no interest," or "without further proof of interest than the policy itself," or "without benefit of salvage to the insurer," or subject to any other like term:

Provided that, where there is no possibility of salvage, a policy may be effected without benefit of salvage to the insurer.[112]

An accepted definition of insurable interest in South Africa seems to be

(i)f the insured can show that he stands to lose something of an appreciable commercial value by the destruction of the thing insured, then even though he has neither a jus in re nor a jus ad rem to the thing insured his interest will be an insurable one.[113]

However, according to Reinecke,[114] the definition mentioned is not descriptive enough. It does however cover the financial aspect attached to insurable interest. This definition only provides cover for tangible objects. It does not indicate when a loss is indeed a loss and lastly the definition is more focused on indemnity insurance.[115]

An investigation of resources[116] made it clear that various opinions and criticism exist about insurable interest which created uncertainty about the existence of insurable interest as an *essentialium* of an insurance contract. In the next paragraph, insurable interest as a separate requirement is briefly discussed.

112 Section 4 of the *Marine Insurance Act* 1906.

113 *Littlejohn*-case 374, 380. See also Reinecke, van Niekerk and Nienaber *South African Insurance law* 27; Getz, Davies and Gordon *South African law of insurance* 94; Hare *Shipping law and admiralty jurisdiction in South Africa* 864; Van Niekerk and Schulze *The South African law of international trade: selected topics* 209; Tee 1986 *De Rebus* 151-152.

114 Reinecke, van Niekerk and Nienaber *South African Insurance law* 28.

115 Reinecke provides a solution namely that the interest must be described with regard to the non-occurrence of an event. This entail that insurable interest is not regarded as being an interest in e certain object of risk, but rather an interest in the fact that the event insured against (the risk) should not take place. See Reinecke, van Niekerk and Nienaber *South African Insurance law* 28.

116 Van Niekerk and Schulze *The South African law of international trade: selected topics* 209. See also Reinecke, van Niekerk and Nienaber *South African Insurance law* 81; Tee 1986 *De Rebus* 151-152; Botes and Kloppers 2018 *African Journal of International and Comparative Law* 130; van der Merwe 1970 *CILSA* 154.

3.1.1 A separate requirement

A lack of insurable interest is way too often used as a method to escape liability, opening a gateway for various arguments about the question of if insurable interest is a separate requirement for a valid insurance contract.[117] A brief discussion about this uncertainty follows next. In English insurance law, no such uncertainty exists due to the codification thereof in the *Marine Insurance Act*.[118]

Arguments are made that the distinguishing feature of an insurance contract should not lie with insurable interest, but should rather be principles of indemnity.[119] Reinecke supports this argument and indicates as follows:

> (T)he idea of insurable interest as an essential of an insurance contract has been criticised and even abolished in some jurisdictions to make room for the principles of indemnity as the distinguishing factor.[120]

Kuschke[121] argues that insurable interest does not form a separate requirement of an insurance contract. The determining factor should be the intentions of the parties and not whether an insurable interest exists or not. It should therefore, depend on what the parties intended should be insured or not.[122]

In *Phillips v General Accident Insurance Co (SA) Ltd*[123] the court remarked that

> I am of the view that the author places too much emphasis on the insurable interest, and loses sight of what the real inquiry is, namely whether the contract, having regard to all the surrounding circumstances and especially the intention of the parties, amounts to a betting or wagering agreement. … I concede that one of the factors to be taken into

117 Hare *Shipping law and admiralty jurisdiction in South Africa* 864.
118 Section 4 and section 6 of the *Marine Insurance Act* 1906. If South Africa can create legislation defining the concept of insurable interest and making this concept a requirement for a valid insurance contract, any uncertainty that may still exist will be removed. See Botes and Kloppers 2018 *African Journal of International and Comparative Law* 130. It has also been incorporated in the Institute Clauses requiring the existence of an insurable interest. See Lloyd's Institute Cargo Clauses 2009.
119 Reinecke, van Niekerk and Nienaber *South African Insurance law* 282. See also van der Merwe 1970 *CILSA* 154.
120 Reinecke, van Niekerk and Nienaber *South African Insurance law* 82.
121 Millard *Modern Insurance Law in South Africa* 82.
122 Millard *Modern Insurance Law in South Africa* 82.
123 *Phillips v General Accident Insurance Co (SA) Ltd* 1983 4 SA 652 (W) (henceforth referred to as the *Phillips*-case).

consideration in deciding whether the agreement amounts to a wager or not is whether the husband has an insurable interest in the article insured.[124]

The *Phillips-case*[125] was, in my opinion, the beginning of this movement away from the stringent insurable interest as a separate requirement for a valid insurance contract.[126] Although arguments are still raised against the concept of insurable interest as a separate requirement,[127] it remains a separate requirement for a valid insurance contract and for the purpose of this research, should be accepted as such. A discussion about the nature of insurable interest and the time which the insurable interest should exist will follow. From this discussion, it becomes apparent that the courts consider the concept of insurable interest a separate requirement for a valid insurance contract.

Hare[128] indicates that insurable interest is a requirement for a valid insurance contract. However, according to Hare,[129] the strict application of insurable interest is being moved away from towards an approach which is more flexible.[130] The insurable interest essential is important, especially with regards to marine insurance, due to the strong influence of English legislation.[131]

Despite the above-mentioned criticism, South African insurance law has accepted that insurable interest is a separate requirement for a valid insurance contract. Thus, at the time of the study, it did form a part of the essentials of an insurance contract.[132] However, light is also shed on the uncertainty in this regard. This view is supported by other

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124 *Phillips*-case 659. The author referred to are Gordon and Getz. This approach was, after this case, also followed in *Steyn v AA Onderling Assuransie Assosiasie Bpk* 1985 4 SA 7 (T). See also Botes and Kloppers 2018 *African Journal of International and Comparative Law* 130.

125 *Phillips*-case.

126 *Phillips*-case 659. The authors referred to are Gordon and Getz. This approach was, after this case, also followed in *Steyn v AA Onderling Assuransie Assosiasie Bpk* 1985 4 SA 7 (T). See also Botes and Kloppers 2018 *African Journal of International and Comparative Law* 130.

127 Reinecke, van Niekerk and Nienaber *South African Insurance law* 82. See also Millard *Modern Insurance Law in South Africa* 82.

128 Hare *Shipping law and admiralty jurisdiction in South Africa* 864. This view is supported by Tee 1986 *De Rebus* 151-152.

129 Hare *Shipping law and admiralty jurisdiction in South Africa* 864.

130 The flexibility with regard to insurable interest would become clear in the next paragraph due to the approach followed by the courts.

131 Hare *Shipping law and admiralty jurisdiction in South Africa* 864.

132 Reinecke, van Niekerk and Nienaber *South African Insurance law* 81. See also Reinecke 1971 *CILSA* 193-223. This view is supported by Tee 1986 *De Rebus* 151-152.

authors, such as van Niekerk and Schulze[133] who agrees that South Africa has adopted the approach followed by English law in that insurable interest is an essential of an insurance contract.

Gordon, Getz and Davies[134] argues that

> (a)n insurable interest is required for all contracts of insurance, whether indemnity or non-indemnity.[135]

The view expressed in *Lorcom Thirteen (Pty) Ltd v Zurich Insurance Co South Africa Ltd*[136] is that the insurable interest of the insured is what distinguished the insurance contract from a wager. Therefore, it is accepted that insurable interest must be an essential of an insurance contract according to this court.

3.2 Liability and insurable interest

The nature of insurable interest was investigated with reference to the relevant and applicable case law. This investigation included reference to the flexibility of the concept of insurable interest and how the definition, as stated above, had been elaborated on by case law. A brief discussion about the time when the insurable interest must exist, follows next. According to Reinecke,[137] two problems can be attached to insurable interest. Firstly, whether such insurable interest does exist and secondly how does one quantify such insurable interest. However, with regard to marine insurance, the second issue does not arise as much. This is due to the fact that "valued-policies" have been developed in marine insurance and codified in the *Marine Insurance Act.*[138] This particular policy entails that the parties to contract agree on the value of the valuation of the subject matter.[139]

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133 Van Niekerk and Schulze *The South African law of international trade: selected topics* 209. This view is supported by Tee 1986 *De Rebus* 151-152.

134 Getz, Davies and Gordon *South African law of insurance* 89.

135 Getz, Davies and Gordon *South African law of insurance* 89. This view is supported by Tee 1986 *De Rebus* 151-152.

136 *Lorcom Thirteen*-case 48. See also Reinecke 2013 *TSAR* 816-824.This view is supported by Tee 1986 *De Rebus* 151-152.

137 Reinecke 2013 *TSAR* 817.

138 Section 27(2) and (3) of the *Marine Insurance Act* 1906.

139 The insured is, by using prior valuation, not required to prove the extent of his loss. Reinecke, van Niekerk and Nienaber *South African Insurance law* 60. See also Reinecke 2013 *TSAR* 817; Hare *Shipping law and admiralty jurisdiction in South Africa* 854; Bennett *The Law of Marine Insurance* 244-245; Thomas *The Modern law of Marine Insurance* 18-22; Hill *O'May on Marine Insurance* 64. An unvalued policy is one in which the value of the subject-matter is not specified. Hodges *Law of Marine*

However, in South African insurance law, where the *Marine Insurance Act*[140] does not apply, the policy can either be "valued" or "unvalued".[141] Nevertheless, in the marine insurance practice, the valued policy is the most common.[142]

3.2.1 Nature of insurable interest

The first court case which was considered was *Littlejohn v Norwich Union Fire Insurance Society*,[143] widely accepted as the *locus classicus* on the requirement of insurable interest.[144] As established in the introduction of insurable interest in this study, this case provided an established definition for insurable interest, but was criticised as not comprehensive enough.[145]

The business property controlled by the husband (the insured) and owned by his wife burned down due to a fire. The insured managed the business and they made a living from the profits of the business. He insured the trading assets of his wife and when the building burned down, destroying everything, he claimed for the loss of the building, these assets as well as the full value based on his expectation of a future income. He was compensated for the actual loss suffered (as the position is in English law). According to South African law, an "expectation of monetary gain" would constitute an insurable interest in the loss of those goods.[146] The actual loss suffered was the loss of the building and the goods therein. He had a claim in this regard because he had control over the building and the goods therein. However, a claim for an "expectation of monetary gain" was based on the fact that he had an expectancy to receive income (in the future) from

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Insurance 80.The words mentioned in this policy is done merely to limit the amount for the premium payable.

140 *Marine Insurance Act* 1906.

141 Reinecke 2013 *TSAR* 817. See also Hare *Shipping law and admiralty jurisdiction in South Africa* 854; Bennett *The Law of Marine Insurance* 244-245; Thomas *The Modern law of Marine Insurance* 18-22; Hill *O'May on Marine Insurance* 64. An unvalued policy is one in which the value of the subject-matter is not specified. See also Hodges Law of Marine Insurance 80. The words and amount such mentioned in policy is merely to calculate the amount for the premium payable. See also Getz, Davies and Gordon *South African law of insurance* 248.

142 Reinecke, van Niekerk and Nienaber *South African Insurance law* 60.

143 *Littlejohn*-case.

144 *Littlejohn*-case. See also Hare *Shipping law and admiralty jurisdiction in South Africa* 862; Reinecke, van Niekerk and Nienaber *South African Insurance law* 34; Getz, Davies and Gordon *South African law of insurance* 94.

145 See above footnote 101.

146 Reinecke 2013 *TSAR* 822.

the running of the business. The spouses made a living from the profits of the business and the husband was almost completely in control of the property. It was found that the husband was in a worse position than what he found himself to be in before the property burned down. He could prove that he stood to lose something of an appreciable commercial value.[147]

In 1983, the court in the *Phillips*-case[148] made reference to the fact that insurable interest should only be considered when distinguishing an insurance contract from a wager contract. The court also indicated that, if any uncertainty existed as to whether the contract was one of insurance or one of wagering, benefit should be given to the insured.[149] A husband (the insured) claimed for the loss of an engagement ring he bought for his wife, worth R10 000.[150] The decision of the court was based on the husband's moral obligation to replace the ring once it's lost.[151] This was a strange decision as one would generally deduce that the claim should rise out of the financial loss incurred and not the moral obligation to replace the ring.[152] It must be noted that Judge De Villiers referred to the fact that

> it seems to me that a practice has grown up that a husband has an insurable interest in his wife's jewellery.[153]

A further factor that the court considered in its decision was that the husband and wife could be put in the situation where it would be necessary to sell the ring. With this the court concluded that the husband definitely had an insurable interest in the ring.[154] This case could be scrutinised for its decision.[155] It is clear that the court attempted to aid the insured and provide some form of protection to prevent that the insured paid the premiums all those years without being able to claim from the insurer. This however

147 Reinecke, van Niekerk and Nienaber *South African Insurance law* 34; 48-49.
148 *Phillips*-case 659. See also Hare *Shipping law and admiralty jurisdiction in South Africa* 862-863; Reinecke, van Niekerk and Nienaber *South African Insurance law* 34.
149 *Phillips*-case 653. See also Manamela 2003 *SA Merc LJ* 479; Botes and Kloppers 2018 *African Journal of International and Comparative Law* 138-139.
150 *Phillips*-case 653.
151 *Phillips*-case 659-660.
152 Reinecke 2013 *TSAR* 822.
153 *Phillips*-case 661.
154 *Phillips*-case 661.
155 Reinecke indicates that the court went out of its way to construe an insurable interest on unpersuasive grounds at Reinecke 2013 *TSAR* 822.

unfortunately resulted in the court using a strange motivation to establish an insurable interest.

The next case to consider was *Refrigerated Trucking (Pty) Ltd v Zive NO*.[156] This was another approach taken by a court which could be scrutinised for adopting an approach to insurable interest which, is arguably, too wide.[157] The facts of the case were as follows. A collision occurred between the owner (plaintiff) of a truck and a vehicle (PPG 790T) driven by the deceased.[158] The deceased was an authorised driver of the vehicle. The defendant was the executor of the deceased's estate. Any liability of authorised drivers of the insured vehicle was covered by an extension clause in the motor vehicle policy.[159] The court took the view that the insured had a "clear economic interest in the contingent liability of the driver".[160] Reinecke[161] argues that Judge Hartzenberg "denied any legal basis" for its conclusion and based its finding on matters of convenience. Once again it seemed that, in an attempt to aid and protect the insured, the court unconvincingly attempted to circumvent the accepted definition of insurable interest.

The appellant (the insured) in *Pienaar v Guardian National Insurance Co Ltd*[162] bought a vehicle from Wesbank by means of a written instalment sale agreement. Returning to Cape Town International Airport, where he (the insured) parked the vehicle, he noticed that the vehicle was stolen.[163] One of the defences which was raised in this case was that the insured did not have an insurable interest in the vehicle. The court indicated that the buyer, under an instalment sales agreement, does enjoy an insurable interest. An insured under such agreement stood to lose something. He stood to lose "something of an appreciable commercial value" namely the possession of the object in question. The insured should however be a *bona fide possessor* of the object of insurance. Thus, the

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156 *Refrigerated Trucking (Pty) Ltd v Zive NO* 1996 2 SA 361 (T) (henceforth referred to as the *Refrigerated Trucking*-case). See also Botes and Kloppers 2018 *African Journal of International and Comparative Law* 135-136; Reinecke, van Niekerk and Nienaber *South African Insurance law* 34.
157 Reinecke 2013 *TSAR* 822.
158 *Refrigerated Trucking*-case 364.
159 *Refrigerated Trucking*-case 362.
160 *Refrigerated Trucking*-case 373.
161 Reinecke 2013 *TSAR* 822.
162 *Pienaar v Guardian National Insurance Co Ltd* 2002 3 SA 640 (C) (henceforth referred to as *Pienaar*-case). For a case analysis of the *Pienaar*-case see Manamela 2003 *SA Merc LJ*.
163 *Pienaar*-case 641-642.

insured should not be aware (know or suspect) of the fact that the object, in this case the vehicle, has been stolen. It was held that the insured (a *bona fide possessor*) does have an insurable interest in the stolen vehicle. Therefore, the insured was able to claim from the insurer and the insurer was required to pay and indemnify the insured.[164]

Once again, an economic interest in the object of insurance has been confirmed to be enough to satisfy insurable interest in the object of insurance.[165] In the *Lynco Plant Hire*-case, the court confirmed that insurable interest is a separate requirement for a valid insurance contract.[166]

The plaintiff, a close corporation, was the owner of two vehicles. The close corporation consisted of three members. One of the members (Lindeque) obtained insurance, but in accordance with the advice of the insurance company, obtained the insurance in his personal capacity. Lindeque and the plaintiff had an agreement and in terms of this agreement, Lindeque was liable for any damages which was payable to the plaintiff. After both vehicles were stolen, the insured instituted a claim against the insurer.[167] Judge Claassen followed the approach adopted by the court in the *Littlejohn*-case. The definition as confirmed in that case, was accepted and applied by this court.[168] It was held that the insured did have an insurable interest in the property of the corporation and that he had a contingent liability to pay damages.[169]

Another decisive case on insurable interest was *Lorcom Thirteen (Pty) Ltd v Zurich Insurance Co South Africa Ltd*.[170] The facts of the case were as follows. Lorcom held the shares of the company Gansbaai Fishing Wholesalers (hereafter GFW). GFW was the owner of the ship, the Buccaneer, which was insured by Lorcom. Lorcom had a fishing permit and the ship was made available to Lorcom for fishing purposes. However, on one

164 *Pienaar*-case 646-647.
165 *Lynco Plant Hire & Sales BK v Univem Versekeringsmakelaars BK* 2002 5 SA 85 (T) 88 (henceforth referred to as *Lynco Plant Hire*-case). See also Reinecke, van Niekerk and Nienaber *South African Insurance law* 34.
166 *Lynco Plant Hire*-case 88.
167 *Lynco Plant Hire*-case 87.
168 *Lynco Plant Hire*-case 85.
169 *Lynco Plant Hire*-case 91. See also Reinecke, van Niekerk and Nienaber *South African Insurance law* 34-35; Botes and Kloppers 2018 *African Journal of International and Comparative Law* 138.
170 *Lorcom*-case. For a case analysis of the *Lorcom*-case see Reinecke 2013 *TSAR*.

occasion the ship was lost at sea. It should be noted that Lorcom did have the expectancy to become the owner of the Buccaneer. When the claim was brought for the loss of the ship, the defence was raised that Lorcom did not have an insurable interest.[171]

A reference was made to the *Littlejohn*-case, in which it was indicated that an expectancy of a monetary gain (of income) would be sufficient to constitute an insurable interest.[172] The court confirmed that Lorcom had an expectancy to become the owner of the Buccaneer. Until such time, Lorcom enjoyed the use of the Buccaneer and this consideration, taken together with the fact that Lorcom held a hundred per cent of shares in GFW was an indication that Lorcom had an insurable interest in the Buccaneer.[173]

Some wide descriptions of insurable interest have been accepted as well as some rather narrow descriptions. However, from the brief discussion of the above-mentioned case law, it has become apparent that insurable interest is a requirement for a valid insurance contract. Now that this has been established, one should consider the time when such insurable interest must exist. Thus, in the following paragraph, a very brief discussion of the time when insurable interest must exist follows.

3.2.2 Time when insurable interest must exist (indemnity insurance)

It is important to determine the time when the insurable interest should exist. The time of the existence of the insurable interest could render the insured without claim. With regard to indemnity insurance, the insurable interest must exist at the time the event (the peril) insured against, takes place.[174]

The court held in (the very historical decision of) *Petreas & Co Appellants v London Guarantee and Accident Co Ltd Respondents*[175] that

171 *Lorcom*-case 44-47.
172 *Lorcom*-case 56.
173 *Lorcom*-case 61.
174 Reinecke, van Niekerk and Nienaber *South African Insurance law* 38. See also Van Niekerk and Schulze *The South African law of international trade: selected topics* 209; Getz, Davies and Gordon *South African law of insurance* 94.
175 *Petreas & Co Appellants v London Guarantee and Accident Co Ltd Respondents* 1925 AD 371 (henceforth referred to as the *Petreas*-case).

> (w)hether the plaintiffs will have to prove that they had an insurable interest in the tobacco destroyed at the time when the insurance was effected may be left an open question. In order to succeed they will at least have to prove that they had an insurable interest in the tobacco at the time when it was destroyed, and the extent of such interest at that date. But that question is not raised by the exception.[176]

The decision of *Petreas & Co Appellants v London Guarantee and Accident Co Ltd Respondents*[177] was confirmed in *Oelrich v General Accident Fire and Life Assurance Corporation Ltd*.[178] The court held that there had to be an allegation and proof that the insured had an insurable interest at the time when the loss occurred.[179]

In the *Pienaar*-case, the court remarked as follows:

> An insurable interest must be shown to have existed at the time of the loss, for, if there is no interest, then no loss will have been suffered by the insured and he will not be entitled to be indemnified.[180]

Section 6 of the *Marine Insurance Act*[181] indicates when insurable interest should exist:

> (1) The assured must be interested in the subject-matter insured at the time of the loss though he need not be interested when the insurance is effected:
>
> Provided that where the subject-matter is insured "lost or not lost," the assured may recover although he may not have acquired his interest until after the loss, unless at the time of effecting the contract of insurance the assured was aware of the loss, and the insurer was not.
>
> (2) Where the assured has no interest at the time of the loss, he cannot acquire interest by any act or election after he is aware of the loss.[182]

The time the insurable interest should exist has also been included in the Institute Clauses which states as follows:

> Insurable Interest

176 *Petreas*-case 371 376.
177 *Petreas*-case 371.
178 *Oelrich v General Accident Fire and Life Assurance Corporation, Ltd* 1928 OPD 105 (henceforth referred to as the *Oelrich*-case).
179 *Oelrich*-case 105 106.
180 *Pienaar*-case 645.
181 *Marine Insurance Act* 1906. As indicated in the chapter 2 English law has persuasive authority in South Africa and it influenced a large part of the development of insurance law in South Africa.
182 Section 6 of the *Marine Insurance Act* 1906. See also Bennett *The Law of Marine Insurance* 71-72; Hill *O'May on Marine Insurance* 48;

> 11. 11.1 In order to recover under this insurance the Assured must have an insurable interest in the subject matter insured at the time of the loss.
>
> 11.2 Subject to Clause 11.1 above, the Assured shall be entitled to recover for insured loss occurring during the period covered by this insurance, notwithstanding that the loss occurred before the contract of insurance was concluded, unless the Assured were aware of the loss and the Insurers were not.[183]

Therefore, to conclude, on the happening of the materialisation risk the insured must stand to prove that he had an insurable interest in the object of risk to succeed in an insurance claim.

3.3 Conclusion

Insurable interest is a concept that has come a long way with a rich history. South Africa adopted the concept from English insurance law.[184] It can be dated back and finds its origin in the *lex mercatoria*.[185] The object of insurance is the insured's insurable interest.[186] An insurance contract is distinguishable from a wager due to the presence of an insurable interest. This distinction has immensely contributed to the development of insurable interest.[187]

This concept has been codified in the English *Marine insurance Act*,[188] but unfortunately this certainty has not developed in South Africa's marine insurance. Case law does however provide a comprehensive discussion about the parameters of insurable interest.

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183 Lloyd's Institute Cargo Clauses 2009. See also Bennett *The Law of Marine Insurance* 71-72; Van Niekerk and Schulze *The South African law of international trade: selected topics* 209.

184 Reinecke, van Niekerk and Nienaber *South African Insurance law* 25. Hare *Shipping law and admiralty jurisdiction in South Africa* 862-863; Van Niekerk and Schulze *The South African law of international trade: selected topics* 209.

185 Reinecke, van Niekerk and Nienaber *South African Insurance law* 77-78. See also Van Niekerk and Schulze *The South African law of international trade: selected topics* 209 in which it is indicated that insurable interest serves as a method to determine the value of the indemnity. For a discussion on the history from an English perspective see Bennett *The Law of Marine Insurance* 68-69.

186 Reinecke, van Niekerk and Nienaber *South African Insurance law* 26. See also Van Niekerk and Schulze *The South African law of international trade: selected topics* 208; Bennett *The Law of Marine Insurance* 331; Lowry, Rawlings and Merkin *Insurance Law Doctrines and Principles* 4; Van Niekerk 2009 *SA Merc LJ* 126; van Niekerk 1998 *SA Merc LJ* 123-124.

187 Bennett *The Law of Marine Insurance* 72-74 and 78-80. See also Rose *Marine Insurance Law and Practice* 29-32; Lowry, Rawlings and Merkin *Insurance Law Doctrines and Principles* 177-180; Hare *Shipping law and admiralty jurisdiction in South Africa* 861.

188 Section 4 and 5 of the *Marine Insurance Act* 1906.

The oldest definition for insurable interest in the South African Insurance law is that

> if the insured can show that he stands to lose something of an appreciable commercial value by the destruction of the thing insured, then even though he has neither a jus in re nor a jus ad rem to the thing insured his interest will be an insurable one.[189]

A question which is debated academically is whether insurable interest is a separate requirement for a valid insurance contract. Although still debated, it can be accepted that South Africa's courts have confirmed that the insured must have an insurable interest.[190] If the insured does not prove the existence of an insurable interest, the insurer escapes liability. Thus, in the context of marine insurance, the insured must prove that he has an insurable interest in the cargo insured. The requirement of insurable interest has also been incorporated in the Lloyd's Institute Cargo Clauses. In English Insurance law, no uncertainty existed in this regard.[191]

An analysis of case law indicated that an "expectation of monetary gain" (an expectation of income thus) would suffice to constitute and insurable interest.[192] A court also indicated that, whenever a moral obligation exist to replace something once it has been lost, would be sufficient to constitute an insurable interest.[193] An insurable interest would also exist if it is proven that the insured had an interest in contingent liability.[194] Any insured who is a *bona fide possessor* of a thing would have an insurable interest in that thing, whenever the loss of the possession of the thing would affect the insured's economic interest.[195] Thus, an economic interest, even if in the property of a corporation, could be sufficient to constitute an insurable interest.[196] It would constitute an insurable interest if the insured had an expectancy to become the owner of the thing insured. However, it

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189 *Littlejohn*-case 374, 380. See also Reinecke, van Niekerk and Nienaber *South African Insurance law* 27; Getz, Davies and Gordon *South African law of insurance* 94; Hare *Shipping law and admiralty jurisdiction in South Africa* 864; Van Niekerk and Schulze *The South African law of international trade: selected topics* 209; Tee 1986 *De Rebus* 151-152.

190 *Lorcom Thirteen*-case 48. See also Reinecke 2013 *TSAR* 816-824.This view is supported by Tee 1986 *De Rebus* 151-152.

191 Section 4 and 5 of the *Marine Insurance Act* 1906.

192 *Littlejohn*-case. See also Hare *Shipping law and admiralty jurisdiction in South Africa* 862; Reinecke, van Niekerk and Nienaber *South African Insurance law* 34; Getz, Davies and Gordon *South African law of insurance* 94; Reinecke 2013 *TSAR* 822.

193 Reinecke 2013 *TSAR* 822.

194 *Refrigerated Trucking*-case 373.

195 *Pienaar*-case 646-647.

196 *Lynco Plant Hire*-case 85.

must be considered with reference to other circumstances as well.[197] The writer is of the opinion that for one, he must have a "valid" economic interest.

The description ascribed to insurable interest according to case law is very wide. A wide description is preferred above a narrow description, because insurers abuse the concept of insurable interest. This is seen in the case law discussed above. It is clear that courts attempt to protect the insured against these unfair practices which sometimes result in very strange reasons for their decisions. Although many definitions and characteristics of insurable interest have been discussed in case law, no attempt has been made to define insurable interest in legislation in South Africa. The writer of the opinion that, if no suitable definition for insurable interest can be found, the insurance industry should rather move away from this concept to avoid any further unfair practices and abuse of the law and rather include the principle of indemnity in the insurance policy.

Insurable interest must exist at the time when the insured suffers the loss. This it not only the stance adopted in South Africa's case law but it has also been codified in English law.[198] Further, it has been included in the Lloyd's Institute Cargo Clauses.[199]

The concept of insurable interest has been established. The focus of this study now shifts to incoterms, specifically DDP; CIP and FCA. DDP; CIP and FCA are briefly investigated and explained. Further, when the insurer escapes liability because the insured does not have an insurable interest if the three last-mentioned incoterms have been included in the international sales contract was a concern to be addressed.

197 *Lorcom Thirteen*-case 61.
198 *Pienaar*-case 645. See also Section 6 of the *Marine Insurance Act* 1906.
199 Lloyd's Institute Cargo Clauses 2009.

Chapter 4 Incoterms and insurable interest

4.1 Incoterms

A contract of sale can be defined as

> a contract in which one person promises to deliver a thing to another, who on his part promises to pay a certain price.[200]

It can also be defined according to the *Sale of Goods Act* of 1979 as

> A contract by which the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration called the price.[201]

An international contract of sale differs from a general contract of sale because it usually includes certain terms, namely international commercial terms (hereafter incoterms).[202] A method to create uniformity and to harmonise international sales was needed, therefore, incoterms were created. Incoterms were introduced by the International Chamber of Commerce in 1936.[203] Many versions of incoterms exist but the latest version of incoterms was introduced in 2009 and came into force in 2010.[204]

If the parties include these terms in their contract of sale, it is accepted by the courts[205] that it was their intention that the agreement had to be regulated by these terms.[206] The

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200 *Treasurer General v Lippert* 1883 2 SC 172.

201 Section 2(1) of the *Sale of Goods Act* 1979. I am of the opinion that the description of a contract of sale in the *Sale of Goods Act* 1979 provides a comprehensive explanation and would be sufficient to be used as a description of a contract of sale in South Africa.

202 Coetzee 2012 *Stellenbosch Law Review* 564. See also Hare *Shipping law and admiralty jurisdiction in South Africa* 580-581; Van Niekerk and Schulze *The South African law of international trade: selected topics* 73; Murray, Holloway and Timson-Hunt *Schmithoff's The law and practice of international trade* 7-11.

203 Coetzee 2012 *Stellenbosch Law Review* 564. See also Hare *Shipping law and admiralty jurisdiction in South Africa* 580-581; Van Niekerk and Schulze *The South African law of international trade: selected topics* 73; Murray, Holloway and Timson-Hunt *Schmithoff's The law and practice of international trade* 7-11.

204 Incoterms have been revised in 1953, 1967, 1976, 1980, 1990, 2000 and 2009. For a discussion on the history of incoterms see Ramberg *ICC Guide to Incoterms® 2010 Understanding and Practical Use* 8-10.

205 South African courts follows the same approach.

206 Chuah *Law of International Trade* 105. For a summary and discussion on the rules of incoterms see Anon Date Unknown https://www.tnt.com/express/en_za/site/how-to/understand-incoterms.html; Anon Date Unknown https://www.incotermsexplained.com/the-incoterms-rules/the-logic-of-the-rules/; Anon Date Unknown https://schoolofshipping.co.za/short-courses/classroom-and-inhouse/incoterms-training-course/; ICC Date Unknown https://iccwbo.org/resources-for-

different rights and responsibilities of the seller (exporter) and the buyer (importer) are governed by incoterms. Kaufmann voiced that it is paramount that the seller and buyer agree on the appropriate incoterm, otherwise only confusion and difficulty will be the result.[207] To facilitate the interpretation of incoterms, the ICC have made available certain guidelines.[208]

There are currently eleven incoterms that can be divided into four categories. These categories are the E-terms, F-terms, C-terms and D-terms. Incoterms are categorised as E-terms because "the goods are placed at the disposal of the buyer at the seller's premises";[209] F-terms because "the buyer is responsible for the cost and risk of the main international carriage";[210] C-terms because "the seller pays for the main international carriage, but does not bear the risks thereof"[211] and D-terms because "the seller bears all costs and risks up to the delivery point in the country of destination".[212] The eleven incoterms are EXW, FCA, FAS, FOB, CPT, CIP, CFR, CIF, DAT, DAP and DDP.[213]

Usually, at the point of delivery, the risk and costs would pass from the seller to the buyer. With regard to the categories E- and F-terms, the focus is on the departure of the

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business/incoterms-rules/incoterms-rules-2010/; Anon Date Unknown https://www.freightos.com/freight-resources/incoterms-plain-english-freight-shipping-guide/; Ramberg, O'Brian and Collyer Date Unknown http://www.coastlinesolutions.com/incoterms.htm.

207 Kaufmann 2014 *De Rebus* 48. See also Hare *Shipping law and admiralty jurisdiction in South Africa* 580-581; Van Niekerk and Schulze *The South African law of international trade: selected topics* 81-92; Murray, Holloway and Timson-Hunt *Schmithoff's The law and practice of international trade* 419; Malfliet *Incoterms 2010 and the mode of transport: how to choose the right term* 163-164; Ramberg *ICC Guide to Incoterms® 2010 Understanding and Practical Use* 27.

208 ICC Guide on Transport and the Incoterms® 2010 Rules.

209 Malfliet *Incoterms 2010 and the mode of transport: how to choose the right term* 164. See also Ramberg *ICC Guide to Incoterms® 2010 Understanding and Practical Use* 48-49; Kaufmann 2014 *De Rebus* 48.

210 Malfliet *Incoterms 2010 and the mode of transport: how to choose the right term* 164. See also Ramberg *ICC Guide to Incoterms® 2010 Understanding and Practical Use* 48-49; Kaufmann 2014 *De Rebus* 48.

211 Malfliet *Incoterms 2010 and the mode of transport: how to choose the right term* 164. See also Ramberg *ICC Guide to Incoterms® 2010 Understanding and Practical Use* 48-49; Kaufmann 2014 *De Rebus* 48.

212 Malfliet *Incoterms 2010 and the mode of transport: how to choose the right term* 165. See also Ramberg *ICC Guide to Incoterms® 2010 Understanding and Practical Use* 48-49; Kaufmann 2014 *De Rebus* 48.

213 See the list of abbreviations at the beginning of this investigation. Malfliet *Incoterms 2010 and the mode of transport: how to choose the right term* 165. See also Ramberg *ICC Guide to Incoterms® 2010 Understanding and Practical Use* 8-10.

goods as opposed to the categories C- and D-terms where the focus is on the arrival of the goods.[214]

This study focussed on the following incoterms: delivered duty paid (hereafter DDP), carriage and insurance paid to (hereafter CIP) and free carrier (FCA) because these are popular in the international trade practice. Each of these incoterms is discussed briefly and its effect on the insurable interest of the insured is investigated to answer the research question. The first incoterm to be discussed in the next paragraph is DDP.

4.2 Delivered duty paid (DDP)

DDP incorporates DAP (delivered at place) but it extends further. DAP is a new incoterm introduced in 2010.[215] It does not require that a specific mode of transport is used and it also does not matter whether more than one mode of transport are used.[216] DAP includes the DAF, DDU and DES of the 2000 incoterms.[217] It is therefore a hybrid of sorts.[218] It can be described as a contract where

> (t)he seller delivers the goods when the goods are placed at the disposal of the buyer, cleared for import on the arriving means of transport ready for unloading at the named place of destination.[219]

The seller has the following obligations:[220]

- to give a commercial invoice;[221]

214 Malfliet *Incoterms 2010 and the mode of transport: how to choose the right term* 165.
215 Malfliet *Incoterms 2010 and the mode of transport: how to choose the right term* 166-167.
216 Ramberg *ICC Guide to Incoterms® 2010 Understanding and Practical Use* 149.
217 See the list of abbreviations at the beginning of this investigation. Malfliet *Incoterms 2010 and the mode of transport: how to choose the right term* 165. See also Ramberg *ICC Guide to Incoterms® 2010 Understanding and Practical Use* 8-10.
218 Malfliet *Incoterms 2010 and the mode of transport: how to choose the right term* 166-167.
219 Ramberg *ICC Guide to Incoterms® 2010 Understanding and Practical Use* 149.
220 Ramberg *ICC Guide to Incoterms® 2010 Understanding and Practical Use* 150-154. See also Murray, Holloway and Timson-Hunt *Schmitthoff's The Law and Practice of International Trade* 54.
221 As I understand it, the seller is required to give a commercial invoice to the buyer and any other evidence which, in terms of the agreement, is required from the seller to be given to the buyer. A commercial invoice, also known as a trade invoice, specifies all the information relating to the transaction between the buyer and the seller (Murray, Holloway and Timson-Hunt *Schmitthoff's The Law and Practice of International Trade* 144).

- to ensure that the goods are properly imported and exported;[222]
- contract for the carriage of the goods;[223]
- to deliver the goods;[224]
- to transfer the risk;[225]
- to pay the costs until the goods are delivered;[226]
- to give the necessary notices;[227]
- to give the buyer the document which allows the buyer to take the delivery of the goods;[228]
- to check packaging marking;[229] and
- to assist the buyer in obtaining information and costs.[230]

The buyer has the following obligations:[231]

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222 I am of the opinion that in terms of this obligation the seller is required to ensure that the goods which they agreed upon must be imported properly, complying with all the necessary formalities and requirements.

223 This obligation, as I understand it, requires the seller to arrange and ensure for the proper carriage of the goods until the goods have been delivered to the buyer. I can think that proper carriage would include the proper packaging for the chosen mode of transport.

224 According to my understanding of this obligation, it requires the seller to ensure that the goods have been delivered to the buyer - it has been "handed over" to the buyer in accordance with or as provided for by the agreement between them. This does not necessarily mean that the goods are in the hands of the buyer. There are different forms of delivery and "control". See footnote 219 above.

225 In my view this requirement entails that the seller is required to transfer the risk to the buyer at the time the goods have been delivered.

226 I am of the opinion that this places an obligation on the seller to pay all costs (as required by the DDP) until the goods have been delivered to the buyer including but not limited to carriage of the goods, insurance, packaging and so forth.

227 In my view this obligation requires the seller to give sufficient notice to the buyer relating to aspects of the transaction which the buyer is required to take notice of. For example where to take delivery of the goods and when.

228 I am of the opinion that this obligation requires the seller to hand over the Bill of Lading to the buyer, or if the means of carriage is not by sea, any other document which allows the buyer to take delivery of the goods.

229 This obligation, as I understand it, requires the seller to ensure and check that the packages of the goods reflects the correct marks.

230 According to my understanding of this obligation, it requires the seller to assist the buyer in obtaining any information which the buyer wishes to be obtained. The seller should also assist the buyer with costs in accordance with the agreement. See also Ramberg *ICC Guide to Incoterms® 2010 Understanding and Practical Use* 150-154; Murray, Holloway and Timson-Hunt *Schmitthoff's The Law and Practice of International Trade* 54.

231 Ramberg *ICC Guide to Incoterms® 2010 Understanding and Practical Use* 155-158.

- to pay the seller for the goods;[232]
- to take delivery for the goods;[233]
- to accept the transference of the risk;[234]
- to pay the costs required;[235]
- to give the necessary notice;[236]
- to accept proof of delivery;[237] and
- to assist the seller with information and costs.[238]

Malfiet indicates that DDP is strenuous for the seller (it places the maximum obligation on the seller) because the seller is required not only to deliver the goods[239] but to ensure that all duties and taxes have been paid, all formalities have been complied with and that all the necessary authorisations have been obtained.[240] The seller must also arrange for the carriage of the goods and is responsible for ensuring that the goods are properly

232 I am of the opinion that this obligation requires the buyer to pay the seller the agreed amount and according to the method of payment they agreed upon.

233 This obligation, as I understand it, requires the buyer to take delivery of the goods as per the agreement between the buyer and the seller.

234 I am of the opinion that this obligation requires the buyer to accept the transference of risk at the time when he takes the delivery of the goods.

235 This obligation, in my view, requires the buyer to pay the necessary costs after he has accepted the delivery of the goods.

236 According to my understanding of this obligation, the buyer is required to give the seller any necessary notices once he has accepted the delivery of the goods. For example when payment will be done and so forth.

237 This obligation, as I understand it, requires the buyer to accept the proof of delivery given to him by the seller.

238 I am of the opinion that if the buyer requests information from the seller, he must aid the seller in obtaining such information and also aid the seller with costs. Ramberg *ICC Guide to Incoterms® 2010 Understanding and Practical Use* 155-158.

239 There are two types of delivery of movable goods namely actual and constructive delivery. Constructive delivery includes the following *traditio longa manu*, *traditio brevi manu*, *traditio symbolica*, *constitutum possessorum* and *attornment* (Van der Walt and Pienaar *Introduction to the Law of Property* 145-154). I am of the opinion that delivery in this regard would take place via one of these types of delivery, because the goods are of such nature that the seller cannot hand the goods over directly into the hands of the buyer. Unless the carrier acts as an agent of the buyer in terms of the contract. In this instance the goods could be delivered via actual delivery.

240 Malfliet *Incoterms 2010 and the mode of transport: how to choose the right term* 166-167. See also Murray, Holloway and Timson-Hunt *Schmitthoff's The Law and Practice of International Trade* 54.

imported and exported. However, no obligation is placed on neither the seller nor the buyer to procure insurance.[241]

Therefore, the seller carries the risk until the goods have been delivered to the buyer, as mentioned above. It should be noted that the transference of risk is not necessarily the transference of ownership and it also does not entitle him to possession, use or the enjoyment of the goods.[242] However, the party who carries the risk is liable for damages to the goods. The risk passes to the buyer once the goods have been delivered. Thus, the seller has an insurable interest in the goods which passes over to the buyer once the goods have been delivered and duties have been paid.[243] If the seller has procured insurance, the insurer would be held liable until the seller has delivered the goods to the buyer at the agreed place, ready for unloading. On the other hand, if the buyer has procured insurance, the insurer would be held liable once the buyer has taken delivery of the goods.

The next incoterm to be discussed is CIP.

4.3 Carriage and insurance paid to (CIP)

The inclusion of a CIP incoterm is not dependant on the use of any particular mode of transport and it does not matter whether multimodal transport is used.[244] It can be described as a contract where

> (t)he seller delivers the goods to the carrier or another person nominated by the seller at an agreed place (if any such place is agreed between the parties) and that the seller

241 ICC Guide on Transport and the Incoterms® 2010 Rules. See also Ramberg *ICC Guide to Incoterms® 2010 Understanding and Practical Use* 149.

242 Ownership could be defined as "an abstract legal relationship, which implies that: a legal relationship exists between the owner and a thing (object) in terms of which the owner acquires certain entitlements, and a relationship exists between the owner and other legal subjects in terms of which the owner can require that others respect his entitlements regarding the object. The relationship: consists of indeterminate entitlements in that they vary from time to time regarding the same relationship or regarding different relationships, and is limited by statutory measures, limited real rights, creditor's rights of third parties and the interest of the community" (Van der Walt and Pienaar *Inleiding tot die Sakereg* 51).

243 ICC Guide on Transport and the Incoterms® 2010 Rules.

244 Ramberg *ICC Guide to Incoterms® 2010 Understanding and Practical Use* 123.

must contract for and pay the costs of carriage necessary to bring the goods to the named place of destination.[245]

The seller has the following obligations:[246]

- delivery of the goods;
- clearing the goods for exportation;[247]
- division of functions, costs and risks;[248]
- obtaining insurance;[249]
- transferring the risk to the buyer;
- taking the necessary security measures;[250]
- giving notice when the goods have been delivered;[251]
- providing proof of delivery;[252] and
- ensuring the pre-shipment inspection.[253]

The buyer has the following obligations:[254]

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245 Ramberg *ICC Guide to Incoterms® 2010 Understanding and Practical Use* 123.

246 Ramberg *ICC Guide to Incoterms® 2010 Understanding and Practical Use* 64-82; 123-124. See also Murray, Holloway and Timson-Hunt *Schmitthoff's The Law and Practice of International Trade* 52. Certain aspects of the obligations has already been explained above. My view of what these duties entail, will briefly be repeated here.

247 Again, I am of the opinion that this obligation entails that the seller is obliged to ensure that the goods are cleared for export and thus complying with all the necessary formalities and payment of costs. However the seller is not obliged to clear the goods for importation.

248 What I understand from this obligation is that the seller and buyer could agree on a division of functions, costs and risk and therefore, the seller should perform in accordance with these provisions in the agreement.

249 According to my understanding of this obligation, the seller is obliged to obtain insurance on the goods in terms of the agreement between the buyer and the seller.

250 The seller, as I understand in terms of this obligation, is required to ensure that the necessary security measures have been taken for example to ensure that the goods have been properly packaged.

251 I am of the opinion that the seller is obliged to give the buyer the required notices when the goods have been delivered to the carrier.

252 In terms of this obligation, as I understand it, the seller is obliged to provide the buyer with the necessary proof that the goods have been delivered to the buyer.

253 I my view, this obligation requires the seller (depending on the agreement between the buyer and the seller) to ensure that a pre-shipment inspection of the goods had taken place. Ramberg *ICC Guide to Incoterms® 2010 Understanding and Practical Use* 64-82; 123-124. See also Murray, Holloway and Timson-Hunt *Schmitthoff's The Law and Practice of International Trade* 52.

254 Ramberg *ICC Guide to Incoterms® 2010 Understanding and Practical Use* 64-82; 123-124. Certain aspects of the obligations has already been explained above. My view of what these duties entail, will briefly be repeated here.

- to pay for the goods;
- to clear the goods for import;[255]
- taking necessary security measures;[256]
- ensuring the pre-shipment inspection;[257]
- taking delivery of the goods;
- transference of the risk;
- giving notices; and
- the division of costs.[258]

The risk, as the general rule applicable when incorporating CIF into the contract of sale, passes when the seller has delivered the goods to the buyer. This however results in two key aspects. Firstly, there is a difference in time with regard to the passing of the risk. Secondly, there is a difference in time with regard to the obligation of the payment of costs.[259] Therefore, it is of great importance that the parties should specify in the contract of sale when the goods have been delivered, from the seller to the buyer.[260] If the parties do not specify when the goods have been delivered the first indication of delivery of the goods would be the default. The parties should also specify in the contract of sale when the obligation to pay costs has been transferred.[261]

No obligation is imposed on the seller to organise the importation of the goods.[262] The risk passes from the seller to the buyer when the goods have been delivered to the first

255 I am of the opinion that this obligation entail that the buyer is obliged to ensure that the goods are cleared for import and thus complying with all the necessary formalities and payment of costs.
256 The buyer, as I understand in terms of this obligation, is required to ensure that the necessary security measures have been taken (once he has taken delivery of the goods) for example to ensure that a trustworthy carrier is used.
257 I am of the opinion that this obligation requires the buyer (depending on the agreement between the buyer and the seller) to ensure that a pre-shipment inspection of the goods had taken place.
258 What I understand from this obligation is that the seller and buyer could agree on a division of functions, costs and risk and therefore, the buyer should perform in accordance with these provisions in the agreement. Ramberg *ICC Guide to Incoterms® 2010 Understanding and Practical Use* 64-82; 123-124.
259 Ramberg *ICC Guide to Incoterms® 2010 Understanding and Practical Use* 123.
260 Ramberg *ICC Guide to Incoterms® 2010 Understanding and Practical Use* 123.
261 Ramberg *ICC Guide to Incoterms® 2010 Understanding and Practical Use* 123.
262 CIP is the same as carriage paid to except CIP requires the seller to obtain insurance (Ramberg *ICC Guide to Incoterms® 2010 Understanding and Practical Use* 123).

carrier. Therefore, the seller is required to pay for the carriage (until the goods are delivered at the agreed place to the first carrier) but it occurs at the risk of the buyer.[263] However, the buyer is covered because the seller is obliged to take out insurance for the benefit of the buyer.[264]

The obligation imposed on the seller that requires the seller to procure cargo insurance should at least cover the risks mentioned in the Institute Cargo Clauses C from a reputable insurance company or underwriter. Furthermore, if the buyer requires the seller to procure insurance cover that provides more cover, the seller should do so.[265] The insurance procured by the seller is comprehensive because it must provide cover from the moment the buyer bears the risk until the time the goods have reached the agreed place (its final destination).[266]

It has already been established that the rule in insurance law requires that the person who takes out the insurance should have an insurable interest if he wishes the insurer to pay out in terms of the policy. Here the following questions arise: what gives rise to the insurable interest of the seller; or who is the insured in this case? Is this a stipulation in an insurance contract for the benefit of a third party;[267] or is it the terms of the specific contract[268] between the seller and the buyer which now give rise to an insurable interest; or is it the fact that the seller would suffer damages if he does not procure insurance – thus the existence of an obligation to indemnify? These questions are relevant because the buyer or any other person who has an insurable interest in the goods may claim directly from the insurer.[269]

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263 Malfliet *Incoterms 2010 and the mode of transport: how to choose the right term* 166.
264 CIP is the same as carriage paid to except CIP requires the seller to obtain insurance (Ramberg *ICC Guide to Incoterms® 2010 Understanding and Practical Use* 123).
265 Malfliet *Incoterms 2010 and the mode of transport: how to choose the right term* 166.
266 Malfliet *Incoterms 2010 and the mode of transport: how to choose the right term* 166. See also Ramberg *ICC Guide to Incoterms® 2010 Understanding and Practical Use* 124-125.
267 Hereafter referred to as a *stipulatio alteri*. See Bradfield and Christie *Christie's law of contract in South Africa* 261.
268 More specifically, the incoterms included in the contract of sale between the buyer and the seller.
269 ICC Guide on Transport and the Incoterms® 2010 Rules.

The purpose of a *stipulatio alteri* is to create a right for a third party who is not party to the contract itself.[270] Three parties are involved in such a contract, namely the *stipulans* (also known as the promisee), *promittens* (also known as the promisor) and the beneficiary. A *stipulatio alteri* could be described as the entering of the *stipulans* into a contract with the *promittens* in terms of which the *promittens* undertakes to perform for the benefit of a beneficiary (the third party).[271] For example, when the seller[272] enters into a contract with the insurer[273] for the benefit of the buyer[274] in terms of which the insurer undertakes to indemnify the buyer. The buyer therefore acquires rights in terms of the contract, although he is not initially a party to the contract. Uncertainty exists with regard to the requirements of a *stipulatio alteri*.[275] However, it has been established that

> (t)he mere conferring of a benefit is therefore not enough: what is required is an intention on the part of the parties to a contract that a third person can, by adopting the benefit, become a party to the contract.[276]

The beneficiary must accept the benefit conferred upon him and notify the *promittens* of this acceptance, either expressly or tacitly.[277] In *Unitrans Freight (Pty) Ltd v Santam Ltd*,[278] it was indicated that the intention (of the *stipulans* and the *promittens*) that rights would be conferred to the beneficiary, if the beneficiary accepted the benefit, would be enforceable against the insurer (*promittens*). This intention is the "very heart of the *stipulatio alteri*".[279]

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270 Van Huyssteen, Lubbe and Reinecke *Kontraktereg Algemene Beginsels* 253. See also Bradfield and Christie *Christie's law of contract in South Africa* 263-270.
271 Van Huyssteen, Lubbe and Reinecke *Kontraktereg Algemene Beginsels* 253. See also Bradfield and Christie *Christie's law of contract in South Africa* 263-270.
272 The *stipulans*.
273 The *promittens*.
274 The beneficiary.
275 Van Huyssteen, Lubbe and Reinecke *Kontraktereg Algemene Beginsels* 253. See also Bradfield and Christie *Christie's law of contract in South Africa* 263-270.
276 *Total SA (Pty) Ltd v Bekker NO* 1992 1 SA 617 (A) 625. See also Van Huyssteen, Lubbe and Reinecke *Kontraktereg Algemene Beginsels* 254.
277 Van Huyssteen, Lubbe and Reinecke *Kontraktereg Algemene Beginsels* 255. See also Bradfield and Christie *Christie's law of contract in South Africa* 263-270.
278 2004 JOL 12568 (SCA) (hereafter referred to as the *Unitrans*-case).
279 *Unitrans*-case 7. See also Van Huyssteen, Lubbe and Reinecke *Kontraktereg Algemene Beginsels* 254.

The facts are that the buyer, once the risk has been transferred to the buyer, would suffer damages if the goods have been damaged or lost. This would entitle the buyer to, in terms of the CIP contract, claim from the insurer.

If the insurance contract is a *stipulatio alteri*, the buyer must expressly accept the benefit conferred upon him and the insurer must be notified of the *stipulatio alteri*, either tacitly or expressly. The buyer would be entitled to claim from the insured in terms of the *stipulatio alteri* for the loss or damage of the goods if he carries the risk.

But is the seller not the insured? It is possible to argue that the contract of sale concluded between the buyer and the seller creates an insurable interest on the part of the seller. If the seller does not procure insurance and the risk on the part of the buyer for loss or damage thereto materialises, the buyer would be able to claim from the seller for his loss. Therefore, the seller must insure the goods and if the risk materialises, the buyer would then be able to claim from the insurer.

Furthermore, could it be argued that the absence of insurable interest would not result in the insurance contract being invalid, because the insurance policy (via the relevant incoterm used) contains an indemnity clause? This could not be because, according to case law, insurable interest as a rule is a requirement for a valid insurance contract.

In this case, the seller has an obligation to procure insurance and the risk passed to the buyer. The buyer would then be indemnified. Thus, the seller does not per se have an insurable interest in the goods themselves but the insurer would still be held liable. The seller does not have a right concerning the goods, such as ownership, possession, use or the enjoyment of the goods, because the goods have been delivered to the buyer. When the goods have been delivered to the buyer, the risk has passed from the seller to the buyer. Thus, ordinarily, the seller is not subject to carry the loss if an uncertain harmful event should occur which damages the goods. *However*, due to the incoterm and the insurance procured by the seller, which indemnify the buyer as well, the buyer is able to claim indemnification.

It could be argued that the buyer has a right to the proceeds of the insurance policy because the seller concluded a *stipulatio alteri*. This argument supports the situation

which occurs in an international sales contract.[280] However, it is questionable whether the parties to a *stipulatio alteri* always comply with the requirements thereof, in legal practice. It is trite that the CIP incoterm in the sales contract between the parties requires the seller to procure the insurance cover. Therefore, the writer is of the opinion that the seller's insurable interest arises from the incoterm included in the contract of sale. This argument is not without challenges. One such challenge is faced in the confusion created by the description of insurable interest. How should the insurable interest of the seller then be defined? As mentioned, the seller does not have an *ius in re* nor does he have an *ius ad rem* with regard to the goods sold. It is the opinion of the writer that the indemnity principle would therefore be crucial in this regard.

The next incoterm to be investigated is FCA.

4.4 Free carrier (FCA)

When the FCA incoterm is included in the contract, again, it does not matter which mode of transport is used and it does not matter whether the parties made use of multimodal transport or not. However, it is usually used when goods have been transported by a container.[281] It can be described as a contract where

> (t)he seller delivers the goods to the carrier or another person nominated by the buyer at the seller's premises or another named place.[282]

The seller has the following obligations:[283]

- to hand over the goods and provide the buyer with a commercial invoice;
- to clear the goods for export;
- delivery of the goods;[284]

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280 Which has been discussed in this investigation.
281 Murray, Holloway and Timson-Hunt *Schmitthoff's The Law and Practice of International Trade* 12.
282 Ramberg *ICC Guide to Incoterms® 2010 Understanding and Practical Use* 97.
283 Ramberg *ICC Guide to Incoterms® 2010 Understanding and Practical Use* 98-104. See also Murray, Holloway and Timson-Hunt *Schmitthoff's The Law and Practice of International Trade* 12-13. Certain aspects of the obligations has already been explained above. My view of what these duties entail, will briefly be repeated here.
284 This obligation, as I understand it, requires the seller to deliver the goods to the carrier or another person which has been named in the agreement at a certain place.

- to transfer the risk to the buyer;
- to pay the costs;[285]
- to give proper notices;
- to provide the buyer with delivery document;
- to check packaging markings; and
- to provide information.[286]

The buyer has the following obligations:[287]

- payment;
- transit formalities;[288]
- clearing the goods for import;
- to contract for carriage;[289]
- to take delivery;
- to accept transfer of risk;
- to pay necessary costs;
- to give proper notices;
- to accept proof of delivery;
- to pay costs for inspections;[290] and
- to assist with information.[291]

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285 The seller, in my view, is required to pay the costs as per the agreement between the buyer and the seller.

286 Ramberg *ICC Guide to Incoterms® 2010 Understanding and Practical Use* 98-104. See also Murray, Holloway and Timson-Hunt *Schmitthoff's The Law and Practice of International Trade* 12-13.

287 Certain aspects of the obligations have been explained above. Ramberg *ICC Guide to Incoterms® 2010 Understanding and Practical Use* 105-109. See also Murray, Holloway and Timson-Hunt *Schmitthoff's The Law and Practice of International Trade* 12-13.

288 According to my understanding, this obligation requires the buyer to ensure that the transit formalities has been complied with for example that the proper documentation has been filled out correctly and submitted.

289 According to my understanding of this obligation the buyer is obliged to contract for the carriage of the goods.

290 In my opinion this obligation requires the buyer to pay the costs for the inspections of the goods.

291 Ramberg *ICC Guide to Incoterms® 2010 Understanding and Practical Use* 105-109. See also Murray, Holloway and Timson-Hunt *Schmitthoff's The Law and Practice of International Trade* 12-13.

The risk is passed at a point when the goods have been delivered. Therefore, it is necessary that they must indicate what that point specifically is.[292] The seller must ensure that the goods are properly exported but has no obligation with regard to the importation of the goods in the destination country.[293]

No obligation is placed on either parties to obtain insurance. Therefore, if the seller carries the risk of loss he would be held liable and if the buyer carries the risk he would be liable for damages. The risk passes from the seller to the buyer when the goods have been delivered to the carrier or another nominated person at the place the parties agreed on. When the seller carries the risk, the seller has an insurable interest because the seller would suffer the loss when the goods are damaged. Once the risk has been transferred to the buyer, the buyer has an insurable interest in the goods because the buyer would suffer the loss when the goods are damaged. Therefore, if the seller has taken out insurance, the insurer would be held liable until the risk passes from the seller to the buyer. If the goods have been delivered the insurer cannot be held liable because the seller does not have an insurable interest anymore. However, if the buyer has taken out insurance, the buyer's insurer would be held liable when the buyer has accepted the delivery of the goods. A conclusion of this study is to follow. With this conclusion, the research question is addressed and answered.

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292 Murray, Holloway and Timson-Hunt *Schmitthoff's The Law and Practice of International Trade* 12.
293 Ramberg *ICC Guide to Incoterms® 2010 Understanding and Practical Use* 97.

Chapter 5 Conclusion

To answer the question "when does the insurer escape liability for damage or loss due to a lack of insurable interest on the part of the insured with reference to certain incoterms in an international sales contract of goods transported by sea?", it is necessary to establish what the importance of an insurance contract for the import or export business is and what it is. When goods are transported internationally, many risks are faced by both parties. International trade is a risky business and the value of the goods being transported is enormous.[294]

To answer the above-mentioned question, the following aspects were considered. Emphasis was placed on the requirements for a valid contract because an insurance policy is a contract as any other. It requires certain aspects to exist before the contract can be considered to be a valid contract. Firstly, both parties to the insurance contract should have reached *consensus* with regard to the agreement. Secondly, both parties should have the legal capacity to act. Thirdly, the contract between them should be legally enforceable. Fourthly, the performance should be possible and certain and lastly, if it is so required, the contract must comply with certain formalities.[295]

As have been indicated that not only should the policy contract comply with what was stated, it also has specific *essentialia*. What distinguishes an insurance contract from any other contract is the *essentialia* and the *essentialia* of an insurance contract are as follow: it requires the transfer of risk, a premium should be paid, the insurer should indemnify the insured, the period of insurance and the insured should have an insurable interest in the object of insurance.[296]

The focus of this investigation was on the insurable interest of the insured in the object of insurance. Insurable interest is described in the *Littlejohn* – case:[297]

294 See paragraph 1.1 above for the resources have been cited there.
295 See paragraph 1.2 above for the resources have been cited there.
296 See paragraph 2.1 above for the resources have been cited there.
297 See paragraph 3.1 above for the resources have been cited there.

> If the insured can show that he stands to lose something of an appreciable commercial value by the destruction of the thing insured, then even though he has neither a jus in re nor a jus ad rem to the thing insured his interest will be an insurable one.[298]

However, insurable interest should not be confused with "risk" which is also an essential of an insurance contract. Risk could be described as the "possibility of harm".[299]

The concept of insurable interest has been heavily criticised. It is argued by Reinecke[300] that insurable interest should not be the distinguishing characteristic of an insurance contract. The indemnification of the insured should be used to replace insurable interest as a requirement. Although insurable interest have been scrutinised by academics, South African courts still emphasise the importance of insurable interest in an insurance contract. It is the opinion of the author that, due to the stance taken by the courts, insurable interest still has not been described with sufficient certainty. Therefore, it can be accepted that insurable interest forms a separate requirement for a valid insurance contract. If no such insurable interest exists, the insurer would have grounds to refuse to provide indemnification. Thus, the insured must have an insurable interest in the thing insured.[301]

Various decisions have been made to establish the nature of insurable interest. From the case law discussed in Chapter 3, it is clear that the courts constantly attempt to aid the insured and protect the insured against unfair practices. For example, the insured has duly paid his premium and the moment he claims in terms of his policy, the insurer denies liability. Because courts have attempted to aid the insured, strange decisions have been made. Insurable interest has been described and discussed to such an extent that it led to insurable interest having a wide and strange description.[302] Insurable interest is not the same as ownership, although sometimes confused. One of the parties may still remain the owner of the goods, however, he does not carry the risk of the loss of the goods. The party may also still enjoy the goods, remain in possession of the goods or use the

298 See paragraph 3.1 above for the resources have been cited there.
299 See paragraph 3.1 and 2.1.1 above for the resources have been cited there.
300 See paragraph 3.1.1 above for the resources have been cited there.
301 See paragraph 3.1.1 above for the resources have been cited there.
302 See paragraph 3.2.1 above for the resources have been cited there.

goods.[303] He may even have another type of right or interest in the goods and will then be able to insure. The question remains, when must this right or interest exist?

The court, in the *Pienaar*-case, held that

> (a)n insurable interest must be shown to have existed at the time of the loss, for, if there is no interest, then no loss will have been suffered by the insured and he will not be entitled to be indemnified.[304]

To answer the research question, three incoterms were investigated. Incoterms were introduced as a method to harmonise international sales by the Chamber of Commerce in 1936. Incoterms function as a method to regulate the relationship between the importer and exporter. These terms describe the rights and responsibilities of both the importer and exporter. Therefore, it regulates when the risk passes from the importer to the exporter and *vice versa*. The party who carries the risk, is the person who can be regarded as having an insurable interest in the goods. However, the incoterm included in the contract of sale between the buyer and the seller could provide an exception.[305]

This investigation focusses on three incoterms, namely DDP, CIP and FCA. The reason why these incoterms were chosen is because they are used in practice and discussed in research.

DDP is defined as a contract where

> (t)he seller delivers the goods when the goods are placed at the disposal of the buyer, cleared for import on the arriving means of transport ready for unloading at the named place of destination.[306]

Since the maximum obligation is placed on the seller with this incoterm, the seller carries the risk of loss until the goods are delivered to the buyer. Because the seller carries the risk, the seller would be liable for any loss or damage to the goods up to that stage. Therefore, the seller has an insurable interest in the goods created by the terms of the contract until it has been delivered to the buyer. This means that the seller would be able to claim from his insurer until the point when the goods have been delivered to the buyer. Insurable interest is therefore not determined by the ownership, enjoyment, use or

303 See paragraph 4.2 above for the resources have been cited there.
304 See paragraph 3.2.2 above for the resources have been cited there.
305 See paragraph 4.1 above for the resources have been cited there.
306 See paragraph 4.2 above for the resources have been cited there.

possession of the goods. It is rather determined by "loss". The person who is going to suffer a loss or who will be liable in the instance of a loss at the time of the materialisation of the risk, has a sufficient interest to procure insurance.[307]

CIP is defined as a contract where

> (t)he seller delivers the goods to the carrier or another person nominated by the seller at an agreed place (if any such place is agreed between the parties) and that the seller must contract for and pay the costs of carriage necessary to bring the goods to the named place of destination.[308]

With reference to the CIP incoterm, the seller carries the risk until the goods have been delivered to the carrier. Thus, the seller would suffer the loss when the goods are damaged or destroyed until it has been delivered. The buyer carries the risk when the goods have been delivered to the carrier at the agreed place. The buyer would therefore suffer the loss when the goods are damaged or destroyed after delivery, as stipulated in the contract.[309]

However, an obligation is also imposed on the seller to procure insurance for the benefit of the buyer which provides coverage when the buyer bears the risk as well. Once again, it should be noted that insurable interest is not the same as the ownership, enjoyment, use or possession of the goods. In light of this, the question should be asked whether the seller has an insurable interest in the goods. The insurance should be procured by the seller, also for the benefit of the buyer.[310] Who then is the insured and is there an insurable interest?

It could be argued that the seller concluded a *stipulatio alteri* for the benefit of the buyer. The buyer should expressly accept the benefit conferred upon him and the insurer must also have been made aware of the *stipulatio alteri*. However, these requirements are not always complied with in practice. It is the inclusion of the incoterm in the contract of sale which require the seller to procure insurance for the benefit of the buyer. If the seller does not obtain insurance cover for the benefit of the buyer, the seller will suffer the loss if the goods are damaged or destroyed. The buyer would be able to hold the seller liable.

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307 See paragraph 4.2 above for the resources have been cited there.
308 See paragraph 4.3 above for the resources have been cited there.
309 See paragraph 4.3 above for the resources have been cited there.
310 See paragraph 4.3 above for the resources have been cited there.

However, insurable interest remains a requirement for a valid insurance contract.[311] The author is of the opinion that the insurable interest of the seller and/or the buyer is created by the inclusion of CIP in the contract of sale.[312]

The FCA incoterms is defined as

> (t)he seller delivers the goods to the carrier or another person nominated by the buyer at the seller's premises or another named place.[313]

With regard to the FCA incoterm, the risk of loss passes when the goods are delivered. The parties must agree on the point when the goods are regarded as having been delivered. Thus, the seller would have an insurable interest until the point when the goods have been delivered and the buyer will have an insurable interest when he accepted the delivery thereof. The seller has an insurable interest when he carries the risk of loss. The buyer would, once the goods have been delivered, have an insurable interest in the goods because he carries the risk of loss and he would therefore still be liable to pay for the goods even if the goods are thereafter destroyed.[314]

After consideration of this study it is clear that the insured must have an insurable interest in the goods. If the insured does not have an insurable interest, he would not have a claim against the insurer. Ascribing a definition to insurable interest has posed a lot of difficulty. The judges in the *Littlejohn*-case and *Phillips*-case could not completely and successfully define the concept of insurable interest. Difficulty was faced when attempting to describe the various range of interests of insureds. Insurable interest does not mean that the insured has ownership of the goods, enjoy the goods, use the goods or are in possession of the goods. However, many interests could be involved in the concept of insurable interest and the insured should have such an interest.

The author is of the opinion that, if the insured suffers a financial loss when the goods have been lost, destroyed or damaged, he has a sufficient interest in the goods entitling him to claim from the insurer. The only question (in the author's opinion) that remains, is to test whether this interest of the insured is lawful.

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311 See paragraph 4.3 above for the resources have been cited there.
312 See paragraph 4.3 above for the resources have been cited there.
313 See paragraph 4.4 above for the resources have been cited there.
314 See paragraph 4.4 above for the resources have been cited there.

It seems as though the principle of indemnification should be considered with-, and in the context of-, insurable interest. Combined, these concepts would simplify the consideration and determination of this matter. The test for indemnity should be if the insured suffered a financial loss, even if an obligation is imposed on the insured – due to the contract concluded between the parties – which places a financial burden on the insured. If the insured suffered a financial loss, it could be accepted that he has a sufficient interest in the goods, but this interest must be lawful, such as created by the incoterms.

The inclusion of incoterms in the contract of sale, more specifically the CIP incoterms, requires the seller to obtain insurance.[315] With regard to determining whether the insured has an insurable interest or not, different options thus exist.

Firstly, the parties could conclude a *stipulatio alteri*. Three parties are involved, namely the seller, the insurer and the buyer. The buyer must accept the rights or the benefit conferred upon him in the *stipulatio alteri*. It is also required that the insurer should be notified of the acceptance of the benefits.[316] If the buyer refuses to accept the benefit, or the insurer is not notified properly, some problems would arise. The creation of a trade practice could be a possible solution. A trade practice could have been created because the parties in international trade transactions have, over the years, employed incoterms in terms of which the insurer was not notified about the benefit being conferred upon the buyer/beneficiary.

Secondly, it would be possible to establish that the inclusion of incoterms in the contract of sale creates the insurable interest. But why is the buyer then entitled to claim directly from the insured? A possible solution could be that a trade practice was created in terms of which the parties in international trade transactions employed incoterms in such a manner which required the insurer to pay directly to the buyer.

It is thus evident that the party who carries the risk of loss or who is liable to remunerate (in terms of the contract) for the damage or loss of the goods, would be entitled to

315 See paragraph 4.3 above for the resources have been cited there.
316 See paragraph 4.3 above for the resources have been cited there.

procure insurance. Therefore, the view expressed by Reinecke, that insurable interest should not find a place in South African law but rather be replaced with the indemnity principle, does not sound far-fetched.

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