Investigating the insurable interest of the buyer and seller in the import and export business

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LLB *cum laude*

Mini-Dissertation submitted in *partial* fulfillment of the requirements for the degree *Magister Legum* in Import and Export Law at the Potchefstroom Campus of the North-West University

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September 2014
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ACKNOWLEDGEMENTS

I would like to thank my Heavenly Father for blessing me, and giving me the capacity and drive to reach great heights in my life. He has never failed me.

I extend my heartfelt gratitude to my supervisor, Professor Leonie Stander; her sage advice, constructive criticism and generosity have helped me greatly. She has patiently assisted me in many ways, from the time this research was just an idea until its completion.

Furthermore, I would like to thank my lecturers, Professors Steven de la Harpe, Sandra Chetty, Rolien Roos and Willem Van Ge Nugten for motivating me by instilling enough fear and courage in me to keep me from relaxing and to propel me through the writing of this research.

Finally, I thank North-West University for the lifelong education with which it has equipped me and for the merit bursaries awarded me that have enabled me to fund my studies.
### ABBREVIATIONS

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tbody>
<tr>
<td>CIF</td>
<td>cost insurance and freight</td>
</tr>
<tr>
<td>DAF</td>
<td>delivered at frontier</td>
</tr>
<tr>
<td>EXW</td>
<td>ex works or ex warehouse or ex store</td>
</tr>
<tr>
<td>FOB</td>
<td>free on board</td>
</tr>
<tr>
<td>ICC</td>
<td>international chamber of commerce</td>
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<td>LAWSA</td>
<td><em>the Law of South Africa</em> (encyclopaedia)</td>
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### GLOSSARY

<table>
<thead>
<tr>
<th>Term</th>
<th>Description</th>
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<tr>
<td>Incoterm</td>
<td>International Commerce Terms</td>
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ABSTRACT

In the import and export business, once a buyer and a seller have agreed on the product and price, they also have to agree on special terms that will ensure that the parties’ different obligations are fulfilled. The seller has an interest in the payment he\textsuperscript{1} receives for the goods and the buyer has an interest in the actual goods. Both parties therefore have to agree on an insurance policy that will protect the goods from harm, from the time they are at the seller’s warehouse to the time that they reach the buyer’s warehouse. Depending on the type of contract they agree on, the risk of loss, damage or destruction in respect of the goods will be transferred from the seller to the buyer at different crucial stages of the voyage. If the parties contract according to the cost insurance and freight\textsuperscript{2} terms, then the seller has the responsibility to procure insurance for the goods. If the parties contract on the terms of the free on board\textsuperscript{3} contract, then it is the buyer’s responsibility to procure insurance for the goods from the time that the seller delivers them past the ship’s rail. Finally, if the parties trade according to the ex works\textsuperscript{4} contractual terms, then the buyer’s obligation is more burdensome because he has to insure the goods already when they are on the premises of the seller, from where he has to collect such goods. In international sales contracts, all such issues are covered, some with great flexibility and others with great misunderstanding. All these matters are dealt with in the present research in an attempt to investigate which party to an international trade contract has an insurable interest in the goods and at what stage during the execution of each party’s duties in terms of the sales contract.

\textsuperscript{1} The masculine is referred to only for ease of reference and for the sake of uniformity.
\textsuperscript{2} This is “CIF”.
\textsuperscript{3} This is “FOB”.
\textsuperscript{4} This is “EXW”.

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CHAPTER 1: INTRODUCTION

Marine insurance is an integral part of the import and export business, and has been so for centuries. Whenever a commercial voyage is undertaken, the ship, cargo and profits are put at risk. One method that can be used to protect against marine risks and the resulting loss or damage is through procuring a marine insurance policy.\(^5\) Insurance cannot prevent the occurrence of a particular peril to which the insured is exposed, but it can provide compensation if and when such peril occurs and causes loss to the insured.\(^6\)

The “thing” that the insured seeks to have covered under an insurance policy is called the ”object of insurance”.\(^7\) This “thing” must be distinguished from the object of the risk, which, in the import and export business, usually refers to the cargo or goods sold. Sometimes this “thing” is referred to as ”the subject matter of the insurance policy – the interest which the insured wishes to protect against a certain peril”.\(^8\)

The concepts of ‘loss’, ‘peril’ and ‘risk’ are central to marine insurance. Maritime perils put property at risk and the insurer agrees to indemnify the assured against loss caused by these perils. Thus, the peril is at sea but the risk is with the insurer. It is necessary for the insurance contract to specify not only which maritime perils are, and sometimes even which are not, insured against, but also when and for how long the insurer accepts the risk of loss from those perils.\(^9\) However, it is, first of all, important to determine whether the insured has an insurable interest in the subject matter of the risk in order to claim for the resulting loss or damage.

Conflict in marine insurance usually arises in issues where liability is at issue because a party cannot prove that he has an insurable interest in the risk object, he did not ascertain the time period when the risk attached or when it was terminated.

\(^{5}\) Davies and Dickies Shipping Law 310.  
\(^{6}\) Prudential Insurance Co v Inland Revenue Commissioners [1904] 2 KB 658 663.  
\(^{7}\) Reinecke et al South African Insurance Law 25.  
\(^{9}\) Van Niekerk and Schulze The South African Law of International Trade: Selected Topics 148.
Sometimes the terms would not be clear as to what perils were insured against and which ones were not covered.\textsuperscript{10}

Furthermore, it is disturbing that the insurer often denies liability to indemnify the insured by claiming that the insured does not have an insurable interest in the risk object involved, despite the fact that the insured faithfully paid the premiums. In a sense, in the import and export environment the problem is understandable because the different types of sales contracts available in this kind of business make it difficult to determine who actually bears the risk of loss at a specific moment and thus has an insurable interest. For example, the Delivered at Frontier\textsuperscript{11} International Commerce Terms\textsuperscript{12} impose on the seller the burden of risk, by requiring delivery to the buyer at the country of destination. If the ship carrying the goods is, for example, held hostage by pirates at the frontier of the buyer’s country waters, it would be hard to determine whether, at that point, the risk had passed on to the buyer or whether it was still borne by the seller and therefore who would be able to claim from the insurer.

It may also happen that one of the parties bears the risk of loss according to the contract between them, but is not the owner of the goods. If the goods are damaged and the owner wants to claim in terms of his insurance policy, the insurer may deny liability because, although still the owner, he does not bear the risk of loss.

Consequently, it is essential to critically analyse the different contractual clauses that are most popular in the business of importing and exporting goods by sea. It is vital to be able to ascertain which party has an insurable interest in the subject matter of the sales contract to insure against certain risks and, consequently, be able to claim in terms of the insurance contract in the event of loss or damage to the cargo or freight during the voyage.

The research question therefore is when does each party to a contract of import and export of goods by sea have an insurable interest in the subject matter of the

\textsuperscript{10} Cosco Bulk Carrier Co Ltd v Team-Up Owning Co Ltd 2010 EWC 1340 (Comm).
\textsuperscript{11} This is “DAF”.
\textsuperscript{12} This is “Incoterms”.

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contract sufficient to hold the insurer liable for loss or damage to the cargo, freight or profits during the voyage?

This research will attempt to investigate the insurable interest of the buyer and the seller in the import and export business with particular reference to the marine insurance contract. This will be done in three comprehensive chapters.

Chapter 1 introduces the topic and discusses the problem statement. In Chapter 2, the essentialia of a marine insurance contract is discussed briefly in order to give some background. These essentialia include the duration of the insurance cover, the risk element in a marine cargo insurance contract, payment of the premium, loss and indemnity. However, the main focus is on a discussion of the insurable interest as an essentialium of an insurance contract. Chapter 3 is devoted to three different types of sales contracts and their application to the determination of an insurable interest, risk and liability. The contracts that will be investigated are the CIF contract, the FOB contract and the EXW contract. Finally, recommendations and suggestions are made in Chapter 4.
Chapter 2: THE ESSENTIALIA OF A MARINE INSURANCE CONTRACT

2.1 “Requirements” vis-à-vis “essentialia”

In order for any contract to be valid and enforceable in law, it has to comply with certain standard (general) requirements. These requirements apply to all contracts of all kinds and entail that the parties must have the capacity to act, and their contract must be lawful and possible to perform. Furthermore, it is requirement that parties’ obligations must be ascertainable and that their minds should be ad idem. The final general requirement is that if there are any prescribed formalities, they must be complied with.

If a contract does not comply with any of these requirements, such contract will be null and void.

In addition to these general requirements, each contract has certain specific elements that distinguish it from other contracts. These special characteristics that distinguish one contract from another are called the ‘essentialia’ of that type of contract.

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13 Reinecke et al General Principles of Insurance Law 93; Christie and Bradfield Christie’s The Law of Contract In South Africa 8–11.
14 A party to any contract is required to have the contractual capacity in order for him, her or it to be able to conclude juristic acts. This entails, for example, that such a party should not be insolvent, mentally disturbed, or an unassisted minor (Skead v Colonial Banking & Trust Co Ltd 1924 TPD 497; Minister of Safety and Security v Lupacchini and Others (A217/2008) [2009] ZAFSHC 82).
15 Briefly, this means that if a contract is prohibited by common law or by legislation, then it is unlawful or illegal and therefore null and void. Contracts that are against public policy or good morals are also considered unlawful under the common law. However, there are some contracts that are unlawful but not necessarily invalid. The legislature usually makes the conclusion of such contracts a punishable offence and this serves as the only sanction (Pottie v Kotze 1954 (3) SA 719 (A); Swart v Smurts 1971 (1) SA 819 (A); City of Johannesburg Metropolitan Municipality v International Parking Management (Pty) Ltd and Others (10548/2010) [2011] ZAGPJHC 5).
16 The parties to a contract have to undertake to perform possible tasks, for example, paying a sum of money and not, for example, cycling to the planet Pluto.
17 The general principles of the law of contract require that the obligations undertaken by the parties must be certain or, at least, ascertainable (Southgate v Blue IQ Investment Holdings (J 1788) [2012] ZALCJHB 39).
18 Mahdi et al Enforceable Contracts: Intention to Create Legal Relations 1194.
19 Formalities may either be imposed by law (eg, in the contract for the alienation of land such contract has to be in writing and signed by both the buyer and the seller) or they may be agreed on by the parties (eg, in the contract of purchase and sale the parties may agree to put their contract in writing in the form of a receipt).
20 Reinecke et al General Principles of Insurance Law 93; Christie and Bradfield Christie’s The law of contract in South Africa 8–11; Furmston and Tolhurst Contract Formation: Law and Practise 507–509.
contract. For example, the contract of suretyship is characterised by the undertaking of a third party to cover the debt of someone in case the latter ends up in arrears, whereas the contract of lease is characterised by the renting of premises by the lessee in exchange for a payment of rent to the lessor. These essential characteristics are distinct in each and every contract, and do not apply across the board as do the requirements.

The *essentialia* of a contract should be distinguished from the natural consequences of a contract which are imposed by the law, such as the parties’ rights and duties in a contract (the *naturalia*), and also from the additional terms on which the parties may agree (the *incidentalia*).

A complete and valid marine insurance contract is characterised by five essential elements. The most important of these is the requirement that the insured must have an insurable interest in the subject matter of the contract. This is the *essentialium* which is pivotal to the present research and will be discussed at length. The other four *essentialia* are (i) the duration of the marine insurance contract, (ii) the risks covered by the insurer, (iii) the premium to be paid by the insured, and (iv) the indemnity provided by the insurer. These aspects will be discussed briefly to provide the necessary basis and background.

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21 Reinecke et al *General Principles of Insurance Law* 59; Rutherford Smith 2010 *SA Public Law* 716; Vanzo 2010 *Kant-Studien* 152.
22 Scott et al *The Law of Commerce in South Africa* 60.
23 South African insurance law is not only derived from, and regulated by, legislation. In fact, much of it was inherited from other legal systems such as the English law. Therefore, reference will be made to these authorities as long as they are still binding in South Africa and have not been repealed or altered (Scott et al *The Law of Commerce in South Africa* 283; LAWSA vol 8, part 1 111–112; Concor Holdings (Pty) Ltd v Minister of Water Affairs and Forestry and Another (16947/2001) [2006] ZAGPHC 138; Reinecke et al *General Principles of Insurance Law* 16); See Hare *Shipping Law* 822–832 for a full discussion of the origins of South African Marine Insurance law and the law applicable to marine insurance in South Africa.
2.2 **Insurable interest**

2.2.1 **Introduction**

Characteristic of every insurance contract are the requirements that the insured will pay premiums to the insurer while the latter compensates such insured when the insured suffers loss which is caused by an unforeseen event (the risk). According to Millard, there is always a *nexus* between the loss and the interest that one has in the object of loss (the object of the risk) or in a non-patrimonial element such as his life. This interest is legally termed an ‘insurable interest’.

Kuschke holds the dissenting view that an insurable interest is not an essential characteristic of an insurance contract. Reinecke supports this view by making reference to the *Lorcom Thirteen (Pty) v Co South Africa Ltd* decision. The learned scholar states that whether or not an agreement is an insurance contract depends on the terms of such contract and not on the insurable interest. This form of contract is compared with a wager agreement in which the people making the bet are looking forward to an uncertain event taking place in order for them to receive payment, whereas in an insurance contract, the parties do not wish for such event to take place. Therefore, the difference between an insurance contract and a wager agreement in this case is the desirability or the peril, and not the insurable interest. I also agree with these scholars. In my mind it is the intention of the parties that the insured must be indemnified when he suffers loss with the happening of an uncertain event (the peril) that forms the distinguishing event. Furthermore, it can be argued that an insurable interest does not distinguish an insurance contract from a wager agreement because in both cases the object of interest does not have to be in existence at the conclusion of the contract but at the time that damage occurs to

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25 Millard *Modern Insurance Law in South Africa* 82.
27 Kuschke “South Africa: insurance law and regulation in the Rainbow Nation” 769–795; Song supports Kuschke’s view that an insurable interest is not a prerequisite for the conclusion of an insurance contract because the intentions of the parties are sufficient in determining whether an agreement is an insurance contract or just a wager agreement (Song 2011 *Southampton Student Law Review* 1, 75).
29 2013 (5) SA 42 WCC.
such object. Hare confirms this criticism by adding that the entire concept of an insurable interest may have outlived its usefulness because requiring the existence of an insurable interest at the time of loss does not discourage a fraudulent intention.\textsuperscript{30} Kuschke, Reinecke and Hare therefore advocate the abolition of the insurable interest as an essential element of an insurance contract because they suggest that an insurance contract is not affected by the existence or non-existence of an insurable interest. It is therefore not surprising that several jurisdictions have questioned, and even eliminated, the requirement of an insurable interest as an essentialium of an insurance contract.\textsuperscript{31}

Kuschke’s, Reinecke’s and Hare’s postulations are very interesting and probably debatable, but they will have scholarly persuasion only until such a time as they are validated by the South African Supreme Court of Appeal. However, as the law stands, an insurable interest is a valid requirement for the conclusion of an insurable interest and shall be examined in that vein.\textsuperscript{32}

In South Africa, the following has been suggested as an acceptable definition of "insurable interest":

Where the assured is so situated that the happening of the event on which the insurance money is to become payable would, as a proximate cause, involve the assured in the loss or diminution of any right recognized by law or in any legal liability there is an insurable interest in the happening of that event to the extent of the possible loss or liability.\textsuperscript{33}

MacGillivray and Parkington\textsuperscript{34} indicate that every person who has an interest in a marine adventure also has insurable interest in it. They further explain, and I fully agree, that a person who is interested in a marine venture is one who has a \textbf{legal or}

\textsuperscript{30} Hare \textit{Shipping Law & Admiralty Jurisdiction in South Africa} 864.
\textsuperscript{31} Australia \textit{Insurance Contracts Act} 1980, s 16 (Australia replaced insurable interest with the ordinary principles of loss or damage in indemnity insurance); Merkin \textit{et al Colinaux’s Law of Insurance} paras 4.025–4.027 and Lowry \textit{et al Insurance Law: Doctrines and Principles} par 4.3 (The British and Scottish Law Commissions in their issue paper on insurable interest in 2008 also criticised the requirement of insurable interest for insurance contracts.)
\textsuperscript{32} Hare \textit{Shipping Law & Admiralty Jurisdiction in South Africa} 864; Scott \textit{et al The Law of Commerce in South Africa} 296.
\textsuperscript{33} MacGillivray and Parkington \textit{On Insurance Law} par 45.
\textsuperscript{34} MacGillivray and Parkington \textit{On Insurance Law} par 45
other equivalent association to the venture or any insurable property exposed to risk in that adventure. According to these scholars, this association may be proved by the fact that a person may benefit from the safety or due arrival of the insurable property or suffer prejudice by any loss or damage caused to him.

Gordon and Getz\(^{35}\) postulate that an insurable interest is required for all contracts of insurance, whether indemnity or non-indemnity. This requirement emanates from the common law which considers all contracts in which the parties do not have an insurable interest as illegal.\(^{36}\) Roman-Dutch writers regarded the marine insurance contract as being a wagering agreement, and it was only during the development of trade that it was recognised as a legitimate and legal contract.\(^{37}\) The insurable interest differentiated between the insurance contract and the wagering agreement.

English law also recognises an insurable interest as being the distinguishing factor between a valid and enforceable insurance contract and an invalid and unenforceable wagering agreement.\(^{38}\) As stated above, at the moment, South African holds the same position.\(^{39}\) The only difference is that in South Africa wagering agreements are governed by section 18 of the *National Gambling Act*,\(^{40}\) and can now be validated and enforced, provided they are within the ambit of the Act.

2.2.2 Historical development of the concept of insurable interest

The concept of an ‘insurable interest’ dates back to the time when modern forms of insurance had not yet come into existence. In the past, one was considered to have

\(^{35}\) Gordon and Getz *The South African Law of Insurance* 92.

\(^{36}\) Wessels *The Law of Contract in South Africa* para 571.

\(^{37}\) Vance *Handbook on the Law of Insurance* 156. In Grotius’ time a life insurance contract was not enforceable in law.


\(^{39}\) Although, as explained in par 2.2.1, there are scholars who criticise this position and suggest that the concept of an insurable interest has outlived its usefulness (Kuschke “South Africa: insurance law and regulation in the Rainbow Nation” 769–795; Reinecke et al *South African Insurance Law* 81–82; Lorcom Thirteen (Pty) v Co South Africa Ltd 2013 (5) SA 42 WCC; Hare *Shipping Law & Admiralty Jurisdiction in South Africa* 864).

\(^{40}\) 33 of 1996.
an insurable interest in a corporeal object only if one owned it. Therefore, in a way, ownership of a corporeal object was considered an insurable interest. However, as insurance trends evolved, it became accepted that it is possible for a person to have an interest in a non-corporeal object; and not only that, but one that did not belong to that person.

2.2.3 Flexibility of insurable interest

The first attempt to describe insurable interest in South Africa was in 1905 in the case of *Littlejohn v Norwich Union Fire Insurance Society* where a man was found to have an insurable interest in stock in a trade that belonged to his wife with whom he was married out of community of property. The court found that the man had an insurable interest in the stock because he had derived profit from its sales. Therefore, even if he did not have a *ius in re* or a *ius ad rem* in the object, it was enough that he had a commercial interest in it. This case shows the liberalisation of insurable interest in that neither a legal right nor a liability is required in order for a person to be considered to have an insurable interest.

The *Littlejohn* decision was met with much scrutiny because of the fact that it did not require insurable interest to have a legal basis as in English law. However, the courts continued drifting further away from the legal basis requirement. In *Steyn v Malmesbury Board* a landlord was found to have an insurable interest in the chaff produced by his tenant’s crops. It was found that the insurable interest derived from the fact that after the tenant had left the premises, the chaff would remain as fertilizer on the land. In *Phillips v General Accident Insurance Company* the court found that a husband had an insurable interest in his wife’s engagement ring because he

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41 See Reinecke et al South African Insurance Law 93.
42 Lucena v Craufurd (1806) 2 Bos & PNR 269 (HL) 302.
43 1905 TH 374.
44 Hare *Shipping Law & Admiralty Jurisdiction in South Africa* 686 considers that even if the man were allowed to have an insurable interest in the stock, that interest should only have been equivalent to the profit to which he was entitled. However, in this case, the court allowed the man to have an insurable interest in the entire stock. It is submitted that Hare’s view is the correct view and that the court erred in this regard. However, this old case was the beginning of a better understanding of what an insurable interest is.
45 Lucena v Craufurd (1806) 2 Bos & PNR 269 HL.
47 1921 CPD 96.
derived pleasure from seeing her wearing it, he felt an obligation to replace it when it went missing and also because if they ever became bankrupt, she would have to sell it to buy household necessities. The court made the very important remark that too much weight was being placed on the need for an insurable interest whereas it should have been placed on whether the contract was a valid insurance contract or a wager agreement.49

To date, this wide interpretation and application of insurable interest have been accepted in South Africa as they have been in Australia and New Zealand.50 The last-mentioned two countries have compelled the legislature to liberate insurable interest from its legal basis.51

In South Africa, Messrs Justices Rogers, Kruger and Daffue reiterated the precedent description of ‘insurable interest’ as being the element that differentiated an insurance contract from a wager agreement.52 The judges affirmed (although obiter dictum) the position that a person has an insurable interest in an object (corporeal or incorporeal) when he stands to gain an advantage from the preservation of such object; or stands at a disadvantage when such object is lost, damaged or destroyed.53 The learned judges accepted that an insurable interest was still a pivotal part of South African law.

2.2.4 Time

In this section, the element of time will be discussed with reference to indemnity insurance because it is the only type of insurance that deals with compensation for measurable loss, as opposed to non-indemnity insurance, which deals with the kind of loss that cannot be correlated with an actual replacement value.54 Furthermore,

50 Kelly and Ball Principles of Insurance Law in Australia and New Zealand 45.
51 Insurance Contracts Act of 1984 (Australia), s17.
52 See also Lorcom Thirteen (Pty) Ltd v Zurich Insurance Company South Africa Ltd 2013 (5) SA 42 (WCC); Liberty Group Ltd v Jordaan (A289/11) [2012] ZAFSHC 168.
53 See par 2.2.3 above.
for purposes of the import and export business, the relevant type of insurance is indemnity insurance. Therefore, the time element for the two types of insurance is treated differently.

The assured is not required to have an insurable interest at the time that the insurance contract is concluded, but the insured is required to have an insurable interest at the time when the subject matter is lost;\(^55\) in other words, an actual interest is not a requirement, but a reasonable expectation of acquiring one is.\(^56\) For example, in a CIF contract for the sale of goods,\(^57\) prior to the transfer of the bill of lading\(^58\) from the seller to the buyer, the seller has an insurable interest and the buyer has none. However, if the cargo gets lost or is damaged after the transfer of the bill of lading, then the buyer will be entitled to claim from the insurer, despite the fact that he did not have an insurable interest in the subject matter of the cargo at the time that the insurance contract was concluded. This is confirmed by the "Insurable interest clause" in the Institute Cargo Clauses which reads: "to recover under the insurance, the [insured] must have an insurable interest in the subject-matter insured \textbf{at the time of the loss}."\(^59\)

Therefore, in principle, the object of insurance must be in existence at the time when the peril that has been insured against occurs. This means that if the insured has no insurable interest at the time when the peril occurs, then he has not suffered any loss and can therefore not claim from the insurer.

\(\underline{55}\) Scott \textit{et al} \textit{The Law of Commerce in South Africa} 297; Hare \textit{Shipping Law & Admiralty Jurisdiction in South Africa} 864; Reinecke \textit{et al} \textit{General Principles of Insurance Law} 79–80; For the English position, See S 12 (1) of the \textit{Marine Insurance Act} 1909 (Cth).

\(\underline{56}\) See also Davies and Dickies \textit{Shipping Law} 312.

\(\underline{57}\) A CIF contract is one in which the buyer pays a price that represents the cargo, insurance and freight (CIF). The seller organises the transportation of the cargo to the buyer, insures it and then includes the costs of both in the price that is to be paid by the buyer.

\(\underline{58}\) A bill of lading is a contractual document that is used in international sales contracts. It is often used as a receipt for the goods shipped, evidence of the contract of purchase and sale between the buyer and the seller, and also as a document of title for the cargo shipped.

\(\underline{59}\) Clause 11.
2.2.5 The nature of insurable interest

Van Niekerk and Schulze are of the opinion that the nature of the insurable interest that is required for insurance contracts is that there has to be an object (the subject matter such as the cargo) that will be exposed to maritime perils (therefore, the object of the risk) and the insured should be in a position in which he will suffer pecuniary loss if such object is damaged, lost or destroyed.\(^{61}\)

In the 2013 case of *Lorcom Thirteen (Pty) Ltd v Zurich Insurance Company South Africa Ltd*\(^{62}\) emphasis is placed on the fact that the loss suffered by the insured (in an indemnity insurance contract) has to be pecuniary. The honourable judge, Rogers, states that in indemnity insurance the concept of insurable interest is concerned with the financial loss that the insured will suffer upon destruction, loss or damage in respect of the object of the risk.\(^{63}\) "Pecuniary loss" is defined according to the South African law of delict and contract as "the reduction in the value of one's estate".\(^{64}\)

*Reinecke et al*\(^{65}\) state that traditionally, the object of insurance was expressed in terms of the insured’s insurable interest. They refer to *Castellain v Preston*\(^{66}\) where it was held that "an insured’s insurable interest is the object of insurance" and that for a person to be able to recover from an insurance contract, he had to have an insurable interest.\(^{67}\) The court in this case also added that in situations where the insured sought cover from the insurer, such insured person would only be granted cover that was equivalent to the amount to which his insurable interest had been impaired.\(^{68}\)

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\(^{60}\) Gilman and Mustill *Arnold’s Law of Marine Insurance and General Average* vol 1 331.


\(^{62}\) 2013 (5) SA 42 (WCC).

\(^{63}\) At par 34; Havenga 2006 SA Mercantile Law Journal 259.

\(^{64}\) Reinecke *et al* *The Law of South Africa* 59.

\(^{65}\) Reinecke *et al General Principles of Insurance Law* 31.

\(^{66}\) (1883) 11 QBD 380 (CA).

\(^{67}\) At 397.

\(^{68}\) Gilman and Mustill *Arnold’s Law of Marine Insurance and General Average* vol 1 421.
Thus even in this old case, and also in newer cases such as *Lorcom Thirteen (Pty) Ltd v Zurich Insurance Company South Africa Ltd*[^69] and *Samancor Ltd v Mutual & Federal Co Ltd and Others*,[^70] it has been recognised that strain would be placed on the insured’s financial loss when the object of the risk was lost, damaged or destroyed. It is my opinion that there may therefore be a variety of insurable interests, depending on the type of strains on a person’s financial position.

Although the owner of the object has the most obvious interest in the object (as was explained above,[^71] in history a person had to be the owner of a corporeal object in order for him to have an insurable interest in it), it is possible for other people to have different interests in the same object and this will depend on the question of whether a financial liability accrues on the occurrence of the insured event. Thus a person may stand to be financially deprived even when he is not the owner of the object of the risk, as long as he can prove that he has a vested interest in such object. For example, the owner of a ship may have an interest in the actual vessel, the crew on the ship may have an interest in the work that they have to do on the ship in order for them to earn a salary, and the charterer has an interest in the size and safety of the ship that will transport his goods. In addition, a person may have an insurable interest in a house that he rents because, in terms of the lease contract, that person carries an obligation: if the house is, for example, burnt down because of his negligence, then such person would have the financial obligation to compensate the owner.

According to English insurance law, the fact that the goods may be damaged during the voyage and may, as a result, be rejected by the buyer is irrelevant for the reason that a defeasible interest is also insurable and the insurer will, nevertheless, be required to indemnify the insured.[^72] For instance in the English case of *Effort Shipping Co Ltd v Linden Management SA, The Giannis NK*[^73] the ship owner had loaded two kinds of cargo at two different ports. The first load was a consignment of

[^69]: 2013 (5) SA 42 (WCC).
[^71]: See para 2.2.2 above.
[^72]: Noussia 2008 *Journal of Maritime Law & Commerce* 91. To my mind, the point is that there will be financial loss and therefore an insurable interest.
wheat and the second load was a batch of ground nuts. Unknown to the shipper, the latter cargo was infested with khapra beetles. There was no risk of the infestation spreading to the wheat cargo, but the infestation restricted the vessel and its cargo (including the wheat) from entering the countries where the cargo had to be delivered. The vessel was therefore delayed by two-and-a-half months, resulting in the buyer of the cargo claiming damages for loss caused by the delay because time was of the essence in the contract. The House of Lords held that the buyer was entitled to be indemnified under Article IV rule 6 of the Hague Rules because it had an insurable interest in the goods even though they had become damaged. It is my submission that the same holds true for South Africa by virtue of the country being a signatory to the Hague Rules.74

For the purposes of marine insurance contracts, the insurable objects are mainly and usually the hull, the cargo and the freight.

(a) **Hull**75

The ship’s hull and machinery are usually insured by the ship owner because he has the greatest interest in them. However, as was held in *Ebsworth v Alliance Marine Insurance Co*,76 a charterer77 or a trustee who has rights vested in the ship may also insure its hull and machinery. It is submitted that the position is similar in South Africa where a person is entitled to insure any object which, if damaged, destroyed or lost, will cause him to suffer economic loss.78

(b) **Cargo**79

The cargo may be insured to its full value by its owner, as well as by anyone who has a lien or a charge over it.80 Hence, for example, the buyer who pays for the

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74 Section 1 Carriage of Goods by Sea Act 1 of 1986.
75 The hull is the main body of the vessel.
76 (1871) LR 8 CP 596 at 638.
77 One who hires the ship to transport goods.
78 MacGillivray & Parkington on Insurance Law para 45.
79 Gilman and Mustill Arnold’s Law of Marine Insurance and General Average vol 1 421.
80 Sutherland v Pratt (1843) 12 M & W 16; 152 ER 1092.
goods before receipt of them has a lien or a charge over such goods to the extent of the payment he made, and thus has an insurable interest to that extent.  

(c) **Freight**

For the ship owner or the charterer to have an insurable interest in the freight, he must possess more than a mere expectation that some freight will be earned by the ship at some unspecified time in the future. In the case of *L & M Electrics Pty Ltd v SGIO (Qld)* [1985] 2 Qd R 370 Connolly held:

> The party who insures freight must have an inchoate right to it, in order to entitle him to insure . . . [H]e must be in such a position with regard to the expected freight that in the ordinary course, nothing would prevent him from ultimately having a perfect right to it but the intervention of the perils insured against.

Increasingly in the modern business of shipping, charter parties are using a clause which demands that the freight be paid in advance as opposed to it being payable on discharge. If therefore the ship or the cargo is lost or damaged, then the person who paid for the advance freight will have an insurable interest in it because he will bear the loss.

The above three are not the only objects upon which a person may have an insurable interest, but they are the main ones relevant for this research. Secondary to these are, for example, the ship’s crew’s insurable interest in their wages or the lender of money in respect of a loan.

### 2.2.6 Conclusion

Therefore, in summary, there are various views on whether an insurable interest should still be treated as an *essentialium* for the insurance contract. While many authors are of the view that the parties’ intention to conclude an insurance contract is enough and hence that the insurable interest has become obsolete, it is also true

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81 Davies and Dickies *Shipping Law* 313.
82 Gilman and Mustill *Arnold's Law of Marine Insurance and General Average vol 1* 421.
83 [1985] 2 Qd R 370.
84 At par 374-375. This is the English position but it is the same in South Africa.
that South African law still recognises an insurable interest as an *essentialium* and therefore it will continue to be treated as such until it has been repealed by the Supreme Court of Appeal. The nature of an insurable interest is such that a party to an insurance contract has an insurable interest if he stands to gain from the preservation of the object of the risk (whether or not he has a legal right to such object); if he stands to suffer pecuniary loss from the destruction, loss or damage of such object; or if he incurs a liability in terms of a contract and that liability has the effect that money has to be expended from him. Pecuniary loss can be identified as the reduction in the worth of the party’s estate. A person also has an insurable interest in the object of insurance if he has the obligation to compensate another for loss, damage or destruction to the object because, in such a case, the compensator has to deduct such compensation from his own estate.

The following sections will briefly examine the other four *essentialia* of an insurance contract. It should be noted that these elements do not form the focal part of this research but are, nevertheless, mentioned to provide a background.

### 2.3 Duration of the insurance cover

The duration of a marine insurance contract has to be determined in order to establish the exact moment when the risk will attach and when it will terminate. The terms of the duration are determined expressly by the parties to the contract. Failure on their part to do so will leave the determination of the duration to the principles of the common law.

While every insurance contract has to address the time aspect, there are further specifications to this. The insured may take out a *time policy*. This is a definite period during which the insured will be covered. The time policy is subject to specific dates (e.g., from 1 January 2015 until 30 January 2015). If something

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85 See par 2.2.1 above.
86 See par 2.2.5 above.
87 Gilman and Mustill *Arnold's Law of Marine Insurance and General Average* vol 1 521.
88 See Reinecke *et al* *South African Insurance Law* 268–269 for these principles: In *Mutual and Federal Insurance Company Ltd v Municipality of Oudtshoom* 1985 (1) SA 324 (A), the court of appeal decided that the Roman-Dutch law was the common law.
89 Reinecke *et al* *South African Insurance Law* 267ff; Rose *Marine Insurance Law and Practice* 217.
happens to the insured objects outside the specified days, then the insured will not be compensated for such loss. Furthermore, the time policy does not take account of any delays that may lead to the ship still being out at sea after the termination date. It also does not take into consideration the location of the ship in order to determine the period of cover. Regardless of whether or not the ship is within South African territory, on 30 January 2015 the time policy will automatically terminate.\(^90\)

The insured may also procure a **voyage policy**. This is a policy that provides cover during one trip.\(^91\) It usually covers the goods only and not the ship.\(^92\) The dates are not specific under this policy, but the length of the voyage will determine the period of cover. The voyage policy usually states that the goods will be insured from Port A, throughout route B, until they reach Port C. It therefore goes without saying that the insured ship (and/or the cargo) insured will be covered from the moment they are at Port A. As one port can have more than one docking bay, the parties may specify which docking bay number the ship should be at, in order for the policy to cover it, but it also suffices if the ship is at any docking bay, as long as it is at the agreed port. When the ship leaves such port, it has to follow the agreed route and if it deviates from such route, then the insurer will only be liable for the period before the deviation occurred and no further.\(^93\) The parties to a voyage may also agree that the ship is covered until it reaches the destination physically secure. This definition takes into account the condition of the ship: if the ship arrives at its destination damaged, the insurer will be liable.

Parties to a contract may also agree on an **open cover policy** in which the insurer agrees to provide blanket cover against loss, damage or destruction in respect of all the goods during a specific period. This type of policy is usually capped to a limited amount of cover in case of loss, damage or destruction in respect of the object of

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\(^90\) In a voyage policy there is a requirement that the ship should, in the first place, be seaworthy. However, this is not the case with a time policy. Under the time policy, if any loss should result because of the unworthiness of the ship, the insurer shall not be liable ([*Marina Offshore Pte Ltd v China Insurance (Singapore)Co Pte Ltd*](https://www.marinehelp.com/ship-law/contract-of-insurance) 2006 SGCA 28).


insurance. During this time, the insured should periodically update the insurer about the description, quantity and quality of the goods.⁹⁴

Another specification of the duration of the insurance cover is the floating policy. A floating policy is an agreement on the type of goods insured and the general terms of the insurance contract.⁹⁵ It does not specify all the other details such as the vessel or the carrier because they can be added through subsequent declaration.⁹⁶ Floating policies are usually started at a specific amount which is consumed at different intervals. For example, if the policy is limited to R1 000 000 and covers goods from point A to B throughout a period of 24 months, then each time such trip is made, R100 000 will be deducted for each leg. This means that the floating policy in this case will cover ten trips before it automatically terminates by depletion.

Finally, parties can agree to a mixed policy, which includes a combination of both a time policy and a voyage policy.⁹⁷ The advantage of a mixed policy is that the insured may rely on the time policy at first but if any delays related to the ship occur, then he may fall back on the voyage policy to ensure that his object of insurance is completely covered, no matter the possible variations during the voyage.

Under the Lloyd’s SG form of policy⁹⁸ goods were initially insured only from "shore to shore". They were then later insured from "loading thereof" until they had "safely landed". This meant that the goods were not covered for any damage that could occur to them while they were waiting in the warehouse to be taken to the port; while they were actually being driven to the port; while waiting at the port to be loaded; or while actually being loaded from the shore to the ship. The same was true of goods that had reached the port of destination but had not yet reached the premises of the buyer. However, progressively, parties began to extend the duration clause to include pre- and post-shipment risks, until eventually cover was provided.

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⁹⁵ Gilman and Mustill Arnold’s Law of Marine Insurance and General Average vol 1 271.
⁹⁶ Section 29 English Marine Insurance Act 1906.
⁹⁷ Rose Marine Insurance Law and Practice 216.
⁹⁸ This was the forerunner of cargo insurance which was adopted in 1779 by Lloyd’s of London, the centre of a great insurance market which attracted business from all over the globe, including South Africa. It was the first modern origin of marine insurance law. [Lloyd’s 2014 http://www.lloyds.com/lloyds/about-us/what-is-lloyds].
"from warehouse to warehouse".99

Today, the "Transit Clause" in the Institute Cargo Clauses100 (A), (B) and (C) as amended in 2010 includes the "warehouse to warehouse" extension of cover which covers the goods from the moment they leave the consignor's101 premises until they reach the consignee's102 premises. Therefore, goods that are carried from Lesotho via South Africa to Madagascar may be insured in a single marine cargo policy, even though their conveyance was multi-modal.103

Furthermore, the "Insurable Interest Clause" in the Institute Cargo Clauses adds that subject to the requirement that the insured has to have an insurable interest in the subject matter of the contract at the time of loss, the insured will be entitled to recover for an insured loss that occurred during the period of cover even if such loss occurred before the insurance contract had been concluded, provided the insured was not aware of such loss.104

2.4 Risk

Risk is the uncertainty of loss; the possibility of harm.105 When parties enter into an insurance contract, they have to agree which perils will be covered by the insurer and which ones will be excluded (or excepted).106 These perils are the potential source of undesirable change. Reinecke and van der Merwe107 define ‘perils’ as "facts which, when regarded prognostically, already contain the possibility of harm which is the risk"; in other words, a peril is the "source of potential loss".108

100 In the nineteenth century, Lloyd's and the Institute of Underwriters (a group of London company insurers) developed standard clauses called ‘Institute Clauses’ for the purpose of marine insurance. These clauses have been retained ever since. They were named after the institute that paid for the cost of their publication.  
101 This is the seller.  
102 This is the buyer.  
104 Clause 11 of the Institute Cargo Clauses.  
105 Reinecke et al General Principles of insurance law paras 125 and 261–262.  
106 Lourens v Colonial Mutual Life Assurance Society Ltd 1986 (3) SA 373 (A) 384E; South African Insurance Law 233.  
107 Reinecke and van der Merwe General Principles of Insurance 170.  
Reinecke et al explain ‘risk’ as being the possibility of harm, and such harm is caused by factors called ‘perils’; in other words, the insured is covered against the risk (ie, an uncertain event such as a thunderstorm) that a peril (eg, lightning) may cause harm (ie, destruction, loss or damage) to the object of insurance. This uncertain event must be an external, fortuitous event.

The parties to an insurance contract may agree to insure against several risks but there are, nevertheless, some limitations, depending on each contract. These limitations are called ‘exceptions’. The "Risk Clause" in the Institute Cargo Clauses cites a number of perils that may be excepted. These perils include destruction caused by fire or explosion; the stranding, grounding, submerging or capsizing of the vessel; the overturn of the transport vehicle; and the collision or contact of the ship. Risk is limited or excepted in order to confine it by qualifying and specifying what it entails and what it does not entail. The difference is paramount because it affects the burden of proof.

The same Risk Clause also states some excepted perils, such as damage, loss or destruction caused by the insured’s wilful wrongdoing, normal wear and tear of the insured goods, and the natural deterioration of the goods.

In Kiener v Waters it was held that in order for the insured to recover from the insurance policy, he must prove that the loss occurred as a result of a peril that was insured against and that such loss occurred within the period of cover of the contract. Once the insured has made a prima facie case that proves this, the insurer may attempt to escape liability by proving that the loss was actually caused by a peril that was excluded by the contract.

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109 Reinecke et al General Principles of insurance law paras 125 and 261–262.
110 Van Niekerk Insurance Law 50.
111 There are exceptions even in an all-risk policy: such as wear and tear, defective packaging, inherent vice and spontaneous combustion. These perils are certainties and not uncertainties. Reinecke et al South African Insurance Law 241; Gordon and Getz on the South African Law of Insurance 166; Gilman and Mustill Arnold’s Law of Marine Insurance and General Average vol 2 761.
112 Clause 1 of the Institute Cargo Clause (B).
114 For an in depth discussion of the onus of proof in this regard, see Scott et al The Law of Commerce in South Africa 295.
115 (1836) 3 Menzies 363.
A good example of this is the case of *Bethlehem Export Co (Pty) Ltd v Incorporated General Insurances Ltd*.

In this case a fresh vegetable, asparagus, was insured from Johannesburg International Airport in South Africa to Frankfurt Airport in Germany. On arrival, the goods were found to have been damaged. The insured then had to prove that the deterioration had been caused by an accident (which is an external fortuitous event), in order for his claim to succeed. By contrast, the insurer had to prove the opposite, namely that the goods had been damaged because of their natural deterioration (an excluded risk), in order to escape liability. The insured failed to discharge his burden of proof and the insurer escaped liability.

A more recent example is the case of *Concor Holdings (Pty) Ltd v Minister of Water Affairs and Forestry and Another* where a bridge which was being built over the Ngwaritsane River in Mpumalanga Province collapsed and a dispute arose over the liability for its collapse. The insured made a *prima facie* case proving that the risk was covered by the insurance contract. However, despite the insurer’s claim that it was not liable because the loss had been caused by an excepted risk (i.e., the design or instructions of the defendant), it was not able to prove this exclusion and was, as a result, ordered to pay for the loss.

There are cases where there may be more than one peril that may have contributed to the loss of the insured goods, for example, if the ship were to catch fire and then went on to sink. In this case, the proximate cause test is used to determine which peril was the main cause of the loss. The proximate cause is the "direct, dominant, operative, and efficient cause", and it must be singled out.

### 2.5 Indemnity

The insurer has the duty to indemnify the assured in case of loss as described in the policy of the insured goods. ‘Indemnity’ is defined as “the sum that the assured may

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116 1984 (3) SA 449 (W).
recover in respect of a loss.” 119 In the case of *Parham v Royal Exchange Assurance* 120 it was found that the purpose of indemnity was to restore the assured to a financial position that was similar to that which he had occupied before the event insured against took place.

An important point of consideration with regard to the indemnity principle is that the insured may not benefit or make a profit through indemnity in the event of loss or damage to his goods. 121 This means that in the event of loss, the insured will be covered for the exact amount that he had lost as a result of the insured event and no more. The insurer(s) are liable for the proportion of loss for which they are liable. The insured will be liable for any uninsured balance and must bear his proportion of the measure of indemnity.

The amount of the indemnity is usually limited by the insurer to the effect that the insured can recover only up to a certain amount in the event of loss. If the value of the insured’s ship is R800 000, for instance, but he insures it for R1 million, then the insured is said to be over-insured. 122 In the event of loss, the insured cannot recover more than the value of the actual loss just because he is over-insured. 123

Conversely, an insured can be underinsured 124 if, say, his ship is worth R800 000 but he insures it for only R400 000. In this case, should the insurer seek to be indemnified for loss amounting to R200 000, he will not be able to recover such amount if the general average principle applies. 125 This principle states that in the case of underinsurance, the insured will be indemnified proportionately to the extent to which he is underinsured. 126 Thus, since the insured is covered for only half of the

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120 1943 SR 49 52.
121 Davies and Dickies Shipping Law 337–338; Van Niekerk and Schulze The South African Law of International Trade: Selected Topics 190.
122 Reinecke et al South African Insurance Law 489.
123 Lorcom Thirteen (Pty) Ltd v Zurich Insurance Company South Africa Ltd 2013 (5) SA 42 (WCC); Van Niekerk Insurance Law 63–64.
125 In marine insurance the principle of general average finds automatic application. See Reinecke et al South African Insurance Law 247ff; Reinecke et al General Principles of Insurance Law 501; Hare Shipping Law and Admiralty Jurisdiction in South Africa 857.
126 Davies and Dickies Shipping Law 337–338; Van Niekerk Insurance Law 64; Reinecke et al South African Insurance Law 501.
value of the ship, he will be indemnified for half the value of the loss, which is R100 000.

A varying situation is where the insured has enlisted the services of more than one insurer to provide cover for the same object. In this case the insured is said to be double insured and, in the event of loss, all the insurers involved are jointly and severally liable for the amount of the loss and therefore are all required to make a contribution.\textsuperscript{127}

It thus follows that the insurer agrees to indemnify the insured up to an ascertained amount, but the actual amount that the insurer pays can only be calculated after the loss has, in fact, occurred. Therefore, the starting point to measuring indemnity is by comparing the actual monetary value of the insured goods before and after the occurrence of the event.\textsuperscript{128}

\textbf{2.6 Payment of a premium}\textsuperscript{129}

The insured has the principal obligation of paying monthly or yearly premiums to the insurer in return for the promise that the insurer will indemnify the former in case of loss caused by an insured peril.\textsuperscript{130} The amount of the premium has to be certain or ascertainable, and the parties usually agree to pay it in advance. If the parties do not agree on when the insurance premiums should be paid, then the premium is due, at the latest, after the expiry period of the insurance, even though the cover commences at the time that the contract is concluded.\textsuperscript{131}

\begin{footnotesize}
\begin{enumerate}
\item[127] The contribution principle; van Niekerk \textit{Insurance Law} 68. An in-depth discussion of this type falls outside the scope of this research.
\item[128] Reinecke and van der Merwe \textit{General Principles of Insurance} 193.
\item[129] \textit{Penderis} and \textit{Gutman NNO} v \textit{Liquidators Short-Term Business AA Mutual Insurance Association Ltd} 1992 (4) SA 836 (AD); \textit{SA Eagle Versekeringsmaatskappy Bpk} v \textit{Steyn} 1991 (4) SA 841 (A) 849; \textit{Homeplus Investments (Pty) Ltd} v \textit{Kantharia Insurance Brokers (Pvt) Ltd}, unreported (ZHC), (2009) 12 Juta's \textit{Insurance L Bul} 49 (the dispute was about whether the parties had agreed to pay the premium in one lump sum, or in monthly instalments); Reinecke \textit{et al South African Insurance Law} 275ff.
\item[130] Van Niekerk and Schulze \textit{The South African Law of International Trade: Selected Topics} 198.
\item[131] In \textit{Hollet v Nisbet and Dickson} (1829) 1 Menzies 391 it was confirmed that the insurer's liability was attached at the conclusion of the insurance contract. In \textit{SA Eagle Versekeringsmaatskappy Bpk} v \textit{Steyn} 1991 (4) SA 841 (A) 841 the common law position to this effect was confirmed. See also \textit{Kahn v African Life Assurance Society Ltd} 1932 WLD 160 163; Reinecke \textit{et al South African Insurance Law} 282–283.
\end{enumerate}
\end{footnotesize}
This requirement is concerned more about the undertaking (by the insured) to pay the premium than it is about the actual payment of such premium. Members of an insurance society (e.g., the residents of a neighbourhood) may agree to pay premiums upon the occurrence of a certain event, for example, if any one of the residents has a wedding or a birth. Therefore, as long as there is an express or tacit undertaking to pay premiums, then there is an insurance contract.

In *Con-Stan Industries (Aust.) Pty Ltd v Norwich Winterthur Insurance (Aust) Pty Ltd* it was found that if a broker acts as an agent between the insurer and the insured, then the broker is directly responsible to the insurer for the premium. The same is true in South African insurance law.

In the event of the premium having to be paid back to the insured, the insurer has to pay back such premium directly to the insured. However, if the insured consents to such premium repayment being paid to him via his broker, then the insurer will be said to have paid the insured.

The previous section provided an exposition of the essential elements of an insurance contract, with special focus on the aspect of insurable interest. The research will now move on to an examination of three types of international sales contracts, namely (i) the CIF, (ii) FOB and (iii) EXW contracts, and their relationship with marine insurance.

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133 *Mulin (Pty) Ltd v Benade* 1952 (1) SA 211 A.
135 Reinecke *et al* *South African Insurance Law* 287. In *DF Projects v H Savy Insurance Co Ltd* unreported (T) (2008) 11 JILB 132 there were several parties who had been named as the insured in the insurance policy and it was held that, according to the merits of the particular case and the intention of the parties, the one who was liable to pay the premiums was the one who had applied for the cover.
137 Welford and Otter-Barry *The Law Relating to Fire Insurance* 76.
Chapter 3: Different types of sales contracts and insurable interest

3.1 Introduction

In this discussion, the focus will be on the CIF, FOB, and EXW contracts because they are popular forms in international trade. In any international commercial transaction, it is the contract of sale that determines who is liable and who bears the risk of damage or loss in respect of the cargo at any stage during its journey from the seller’s premises to that of the buyer. One of the legal problems that merchants continue to face when concluding international contracts is the fact that their respective national legal systems sometimes come into conflict with one another when principles of commercial law need to be applied. Sometimes the contracting parties may have similar commercial principles, which make their transactions smooth, for example, the doctrine of strict compliance (which states that documents should conform strictly to those stipulated by the applicant in the application form and explained in the letter of credit)\(^{138}\) is enforced in many jurisdictions, such as England and the United States of America. This doctrine was applied in South Africa in the case of Delfs v Kuehne and Nagel.\(^{139}\)

However, international transactions mostly portray specific characteristics and apply under such precise conditions as to render these transactions particularly delicate. Van Niekerk and Schulze\(^{140}\) support this point by giving the example of parties concerned usually being in different countries and goods having to be transported from one country to another by a form of transportation such as by air or by sea. If anything happens to the goods it would have to be determined who bears the risk, what money has to be paid by one party to the other from one currency to another and so forth.

It is for this reason that the International Chamber of Commerce\(^{141}\) first introduced the International Commerce Terms\(^{142}\) in 1936.\(^{143}\) These are a set of international

\(^{138}\) Bertrams Bank Guarantees in International Trade 140–143.

\(^{139}\) 1990 1 SA 822 (A) 830 A–C.

\(^{140}\) Van Niekerk and Schulze The South African Law of International Trade: Selected Topics 34.

\(^{141}\) Hereinafter ICC.

\(^{142}\) Hereinafter Incoterm.
uniform rules and trade terms that traders understand to mean the same thing across the world. These rules have seen six revisions since 1936, in order to keep up with the pace of the dynamic trade industry.

Bergami confirms that there are 13 Incoterms which have been divided into four groups, namely groups E, F, C and D. Group E are the departure terms, where the seller makes the goods available to the buyer on the seller’s own premises. Group F are the shipment terms where the main carriage is unpaid. In this group the seller has the obligation to deliver the goods to a named carrier at a named port, and such seller is not liable for the costs of the main carriage of the goods. Group C are also shipment terms where the seller has to deliver the goods to a named carrier at a named port, but in this case, the main carriage is paid by the seller and liability for the goods is passed to the buyer upon delivery at such port. The Group D terms impose the greatest burden on the seller as they require him to deliver the goods to the buyer in the country of delivery. Thereupon, the risk is passed to the buyer. Figure 3.1 aptly illustrates the application of these terms.

Figure 3.1: Application of Incoterms

144 Hare Shipping Law & Admiralty Jurisdiction in South Africa 448.
146 Bergami 2006 Journal of Business Systems, Governance and Ethics volume 1 number 4 51.
In this investigation, three different kinds of Incoterms, namely (i) CIF, (ii) FOB and (iii) EXW, will be discussed in order to investigate the rights, duties, obligations and responsibilities on the trading parties, and therefore to determine when each party to a contract of import and export of goods by sea has an insurable interest in the subject matter of the contract sufficient to hold the insurer liable for loss or damage to the cargo, freight, or profits during the voyage. These three types of contract have been selected because of their popularity in international sales contracts. However, because of the international nature of these contracts, many international law sources will be heavily relied on.

3.2 Cost insurance and freight

The CIF term means that the seller has the duty to pay for the costs, insurance and freight necessary to bring the goods to the named port of delivery from which the goods will be shipped to the buyer. In Yangtsze Insurance Association v Lukmanjee, this concept was described in the following terms:

The seller has to cause delivery to be made to the buyer from a ship which has arrived at the port of delivery and has reached a place therein which is usual for the delivery of goods of the kind in question.

Upon arrival at such port of delivery, the risk for any damage to, or loss of, the goods is passed on from the seller to the buyer as soon as the goods have passed the ship’s rail, because legal delivery in this case and according to the contract between the parties occurs when the goods pass the ship’s rail.
In the CIF contract, risk can be transferred from the seller to the buyer either upon delivery of the goods past the ship's rail (as is the case in a destination contract), or it can be transferred from the seller to the buyer when documents are tendered to the buyer in exchange for the purchase price.\textsuperscript{154}

The CIF contract is best described by the famous and ever-echoed words of Lord Wright in \textit{Smyth & Co Ltd v Bailey Son & Co Ltd}:\textsuperscript{155}

\begin{quote}
The initials ‘CIF’ indicate that the price is to include cost, insurance and freight. It is a type of contract which is more widely and more frequently in use than any other contract used for the purposes of sea-borne commerce. An enormous number of transactions, in value amounting to untold sums, are carried out every year under CIF contracts. The essential characteristics of this contract have often been described. The seller has to ship or acquire after that shipment the contract goods, as to which, if unascertained, he is generally required to give a notice of appropriation. On or after shipment, he has to obtain proper bills of lading and proper policies of insurance. He fulfils his contract by transferring the bills of lading and the policies to the buyer. As a general rule, he does so only against payment of the price, less the freight, which the buyer has to pay. In the invoice, which accompanies the tender of the documents on the 'prompt' – that is, the date fixed for payment – the freight is deducted, for this reason. In this course of business, the general property remains in the seller until he transfers the bill of lading . . . By mercantile law, the bills of lading are the symbols of the goods. The general property in the goods must be in the seller if he is to be able to pledge them. The system of commercial credit depends upon the seller’s ability to give a charge on the goods and the policies of insurance.
\end{quote}

At first glance it is clear from the legal point of view that a CIF transaction is complicated as it entails elements of three different types of contracts, namely (i) contract of carriage of goods by sea, (ii) contract of purchase and sale, and (iii) insurance contract.\textsuperscript{156} The CIF contract is further complicated by the fact that risk can be transferred from the seller to the buyer either upon delivery if the goods passed the ship’s rail (as is the case in a destination contract) or it can be transferred


\textsuperscript{155} 1940 3 All ER 60.

\textsuperscript{156} Schmitthoff \textit{Schmitthoff’s Export Trade The Law and Practice of International Trade} 27.
from the seller to the buyer when documents are tendered to the buyer in exchange for the purchase price.\textsuperscript{157}

Lord Summer\textsuperscript{158} described the duties of the seller under the CIF contract in accordance with the Incoterms as follows:

(a) To ship goods which are conforming to those described in the contract of sale, at the port of shipment.

(b) To enter into a contract (at the seller’s expense) with the carrier who will carry the goods in his sea going vessel and deliver them at the contemplated port of destination.

(c) To procure cargo insurance (at the seller’s own risk) for the benefit of the buyer or the seller (depending on which one of them has an insurable interest at the time of loss, damage or destruction), in such a way that such party will be able to claim directly from the insurer if need arises.\textsuperscript{159} The seller also has to deliver such insurance documents to the buyer upon transfer of risk from the seller to the buyer.\textsuperscript{160}

(d) To make out a commercial invoice which conforms to the contractual description of the goods.

(e) To tender the bill of lading, the commercial invoice, the insurance policy and the other documents required by the contract such as the certificate of quality or the certificate of origin, et cetera.

The duties of the buyer in contrast are defined by the Incoterms as follows:\textsuperscript{161}

(aa) To accept the documents which are tendered to him by the seller, if they conform to the terms of the contract.


\textsuperscript{158} Biddell Brothers v E Clemens Horst Co [1911] 1 KB 214, 220.

\textsuperscript{159} The seller has an insurable interest in the goods before they pass the ship’s rail because apart from the fact that he is at that moment still the owner, he will first have to deliver the goods safely past the ship’s rail in order for him to be entitled to receive the purchase price. He will also be able to pay damages to the buyer if the buyer suffers loss because of the fact that delivery could not be effected. The buyer has an insurable interest in the goods from the moment they have passed the ship’s rail because he stands to benefit from their safe arrival and also stands to be prejudiced from their destruction, loss or damage that could occur from such moment. Even before passing the ship’s rail the buyer may, in my opinion, have an insurable interest because (after the conclusion of the contract) the buyer may suffer financial loss if the contract, or rather performance, cannot be delivered.

\textsuperscript{160} Cover must be in the amount of the purchase price as stated in the sales contract, plus 10% (ie, 110% in total) (Hare Shipping Law & Admiralty Jurisdiction in South Africa, 588).

\textsuperscript{161} In South Africa the common law duties of the parties under a CIF contract are the same, as stated in Frank Wright (Pty) Ltd v Corticas ‘BCM’ Ltd 1948 (4) SA 456 (C).
(bb) To pay the purchase price for the goods and to bear the costs and charges which may have been incurred in respect of the goods during their transit from the port where they are loaded to the port where they are unloaded (with the exception of freight and marine insurance costs).

(cc) To take delivery of the goods when they are handed over the ship's rail to him by the carrier, at the port of destination.

(dd) To obtain any import licences or permits which may be required.

(ee) To pay all customs duties and any taxes incidental to the importation of the goods at the port of entry.

(ff) To bear the risk of loss or damage in respect of the goods as soon as they are delivered past the ship's rail at the port of destination.

The honourable judge McCardie\textsuperscript{162} held that in order for the seller to discharge himself from liability and be entitled to receive the purchase price, such seller had an obligation to deliver the documents to the buyer. McCardie emphasised that it was "the obligation of the vendor . . . to deliver documents rather than goods – to transfer symbols rather than physical property represented thereby". If the parties have not agreed on a place where the shipping documents should be delivered, then they should be delivered at the buyer's place of business.\textsuperscript{163} Thus it is understood that the party that is in possession of the documents is always the party who has the insurable interest over the goods represented by such documents.

Carr and Stone\textsuperscript{164} concur with McCardie when they state that "(a) CIF contract . . . is not a contract that goods shall arrive, but a contract to supply goods that comply with the contract of sale".

Chuah\textsuperscript{165} postulates that "(the) presumed intention of the parties is invariably a question of fact and construction of the contract". However, although it may be a matter of fact and construction of the contract, it may be submitted that trade practice indicates that the traders intend for the ownership of the goods to pass from the seller to the buyer when the documents are tendered by the seller to the buyer in exchange for the payment of the purchase price by the latter.\textsuperscript{166} After all, the bill of

\textsuperscript{162} Manibre Saccharine Co Ltd v ComProducts Co Ltd [1919] 1 KB 198.

\textsuperscript{163} Frank Wright (Pty) Ltd v Corticas 'BCM' Ltd 1948 (4) SA 456 (C); Chattanooga Tuffers Supply Co v Chenille Corporation of South Africa (Pty) Ltd 1974 (2) SA 10 (E).

\textsuperscript{164} Carr and Stone International Trade Law 6–9.

\textsuperscript{165} Chuah Law of International Trade 163.

\textsuperscript{166} Comptoir d’Achat et de Vente Du Boerenbond Belge S/A v Luis de Ridder Limitada, The Julia
Lading represents the title of the goods. Therefore, the transfer of the bill should naturally represent the transfer of ownership of the goods.\textsuperscript{167} This was confirmed in \textit{Mitsui \& Co Ltd v Flota Mercante Gran colombiana SA}\textsuperscript{168} where the court held that where the international contract of sale involves the transfer of documents, then ownership of the property will pass when the documents are tendered in exchange for the payment price.

However, it must also be kept in mind that if it is a destination contract,\textsuperscript{169} then the risk of loss or damage will only pass from the seller to the buyer upon delivery of such goods to the buyer,\textsuperscript{170} or until the goods are at the buyer's disposal.\textsuperscript{171}

If a certain time was specified in the CIF contract at which the goods should be delivered, then such time is of the essence and the seller must adhere to it otherwise the buyer will be entitled to resile from and cancel the contract.\textsuperscript{172}

Under the South African auspices of the application of the CIF transaction, the difference between when the "risk" is transferred from the seller to the buyer, and when "ownership"\textsuperscript{173} is transferred between the two must be noted. In order to determine which party has an insurable interest, the "risk" is the more important consideration and not necessarily ownership.\textsuperscript{174}

As has been explained above,\textsuperscript{175} the marine insurance that is procured in accordance with the CIF contract is meant to benefit either the buyer or the seller at

\begin{itemize}
\item \textsuperscript{167} Chuah \textit{Law of International Trade} 163.
\item \textsuperscript{168} 1989 1 All E.R 951.
\item \textsuperscript{169} This is a CIF contract whereby the seller has to deliver the goods to the named port of delivery (see par 3.2 above).
\item \textsuperscript{170} Van Niekerk and Schulze \textit{The South African Law of International Trade: Selected Topics} 168–169.
\item \textsuperscript{171} Lookofsky \textit{Understanding the CISG} 102.
\item \textsuperscript{172} Berman \& Berzack \textit{v Finlay Holt \& Co Ltd} 1932 TPD 142. It is my view that the general principles regarding breach of contract and cancellation will then apply, also to the CIF contract.
\item \textsuperscript{173} The ownership of the goods passes from the seller to the buyer when the documents are tendered by the seller to the buyer in exchange for the payment of the purchase price by the latter (\textit{Mitsui \& Co Ltd v Flota Mercante Gran colombiana SA} 1989 1 All ER 951). The same is true in English Law. See \textit{Comptoir d'Achat et de Vente Du Boerenbond Belge SA v Luis de Ridder Limitada, The Julia} House of Lords [1949] AC 293.
\item \textsuperscript{174} Van Niekerk and Schulze \textit{The South African Law of International Trade: Selected Topics} 59.
\item \textsuperscript{175} See paragraph 3.2 above.
\end{itemize}
any point during the execution of the contract. If this is the case, then by inference, it
may be agreed that the risk will be borne by the party who will be the beneficiary of
the marine insurance at the time that the loss or damage in respect of the goods
occurs. It is thus not uncommon for the marine insurance policy to be drafted for
the benefit of "whom it may concern." The insurer does not need to know the
name of the actual beneficiary at the time when the insurance contract is concluded
because, in any case, the party who will ultimately claim from the insurer will have to
prove his insurable interest in the goods at the time of loss, destruction or
damage.

If the buyer has received the documents and paid for the goods before such goods
have been delivered past the ship’s rail, he is entitled to them and, no doubt, has a
valid insurable interest in praesenti. In this case this would not be a destination
contract because the risk passes to such buyer for all loss or deterioration that may
occur after such exchange of documents and purchase price instead of the risk
passing after the delivery of the goods past the ship’s rail. For example, in
*Thomas & Co Ltd v Whyte & Co Ltd* the seller was under a CIF obligation to ship
flour to Durban. The warranty stated that the flour should not be musty. However,
when the flour arrived at the Durban port it was found to be musty. The court held
that the seller had discharged his obligation to ship must-free flour. He was not under
any further obligation to deliver at the Durban port flour that was free from mustiness.
The difference to be noted here is that the seller had an obligation to load flour which
was free from mustiness onto the ship, not to ensure that it would stay must-free
during the voyage. As long as at the time when the risk was shifted to the buyer the
flour was must-free, the seller had fulfilled his obligation under the contract.
Whatever happened after that which caused the flour to become musty was not the
seller’s responsibility, fault or risk.

There is American authority for the view that in the destination contract, if the buyer
only intends to pay for the goods after they have reached the port of destination,

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177 Atlas Reduction Co V New Zealand Ins Co 138 Fed 497 504 (8th Cir 1905).
178 *Hooper v Robinson* 98 US 528, 532, 536–538 (1878).
180 (1923) 44 NLR 413.
then the buyer merely has a "reasonable expectation of acquiring such an interest" which becomes complete only after such buyer has received such goods.\textsuperscript{181} Therefore, the insurer only acts in the name of the person (either the seller or the buyer) who has an (insurable) interest in the safety of the goods on board the vessel as they are the subject matter of the insurance contract. The insurer may also act in the name of the person who has a "reasonable expectation of acquiring such an interest".\textsuperscript{182}

In conclusion, it is important to remember that, according to South African law, ownership passes when the contract becomes \textit{perfecta}.\textsuperscript{183} Risk, however, passes when the goods are delivered.\textsuperscript{184} Therefore, it is not uncommon for the risk to pass to the buyer long before he sees the goods physically. At any point, the party who may claim from the insurer is the party who has an insurable interest and this is the party who bears the risk – not necessarily the party who is entitled to ownership. The contract between the parties creates the duty to insure. Furthermore, it puts the risk of loss or damage on a specific party at a specific moment, thereby threatening such party’s financial position. In my mind, this financial threat creates an insurable interest sufficient enough to allow such party to claim from the insurance policy.

\section*{3.3 Free on board\textsuperscript{185}}

The term ‘free on board’ means "free on board".\textsuperscript{186} Performance in terms of the FOB contract is effected when goods are delivered on board a specified ship.\textsuperscript{187} Risk of loss, damage and destruction in respect of the goods in FOB contracts may pass from the seller to the buyer when goods are delivered on board the ship.\textsuperscript{188} When the risk passes, the buyer acquires an insurable interest in the goods and is entitled

\textsuperscript{181} \textit{Cundil v AW Millhauser Corp}, 257 NY 416, 178 NE 680 (1931).
\textsuperscript{182} Vukowich 1971 Willamette Law Journal 1.
\textsuperscript{183} This is soon as the agreement of sale is concluded and before delivery of the goods or payment of the purchase price (\textit{Rood’s Trustees v Scott and De Villiers} 1910 TPD 47; \textit{BC Plant Hire CC t/a BC Carriers v Grenco (SA) (Pty) Ltd} 2004 (4) SA 550 (C) 563; \textit{Southern Era Resources Ltd v Farndell NO} 2010 (4) SA 200 (SCA) para 9).
\textsuperscript{184} Van Niekerk and Schulze \textit{The South African Law of International Trade: Selected Topics} 59. "Deliver" here means delivery as stipulated in the contract.
\textsuperscript{185} Hereinafter FOB.
\textsuperscript{186} Murray 1991 University of Miami Inter-American Law Review 103–104.
\textsuperscript{187} Bamford \textit{The Law of Shipping} 97.
\textsuperscript{188} \textit{Reliant Insurance Brokers (Pty) Ltd v Independent Freight Services} (39092/09) [2013] ZAGPJHC 264; Bamford \textit{The Law of Shipping} 97.
to ensure that interest; in other words, when there is an FOB contract, the seller is responsible for packing the goods and transporting them to the port where the goods will be loaded onto the ship that the buyer has identified.\textsuperscript{189} The following extract gives an apt description of the obligations of the seller:

Delivery "free on board" only means:

The price shall be that which we stipulate for and you shall not have to pay for the wagons or carts necessary to carry the clay from the place where it is dug; we will bear all those charges and put it free on board the ship, the name of which you are to furnish.\textsuperscript{190}

All the costs incurred up to and including the loading of the goods onto the vessel are borne by the seller. As soon as the goods have been loaded onto the vessel, the buyer then incurs all the subsequent costs such as stowage of the goods on board the vessel, marine insurance, and import duties and all other costs that are incidental to the safe delivery of the goods to the port of destination.\textsuperscript{191}

It must be noted, however, that even though the risk passes when the goods are delivered to the buyer’s agent, the carrier, ownership will not pass unless the goods are to the specific description and specifications. This was clarified in \textit{Lendalease Finance Ltd v Corp De Mercadio Agricola}\textsuperscript{192} where it was stated that "since the contract provided for delivery FOB and the price has been paid, the goods would have become the property of the buyer when delivered onto the ship if the goods where in accordance with the contract".\textsuperscript{193}

As in many other types of contract, there are duties imposed on the parties when a contract is made FOB. The duties of the seller are to:

i) Supply goods and documents that conform to the contract;

ii) Deliver the goods at the ship designated by the buyer, which delivery is only considered complete when the goods pass the ship’s rail;

\textsuperscript{189} It is to be noted that the FOB contract does not apply only to the carriage of goods by sea, but also to the carriage of goods by air, road and rail (Chuah \textit{Law of International Trade} 95).

\textsuperscript{190} \textit{Poort Sugar Planters v Umfolozi Sugar Planters} 1960 (3) SA 585 (A) 597.

\textsuperscript{191} INCO Terms 2010, FOB B6.

\textsuperscript{192} 1976 (4) SA 464 (A).

\textsuperscript{193} At 492.
iii) Load goods in the specified manner and arrangement as agreed with the buyer;
iv) Pay the costs that are associated with such delivery of the goods; and
v) In the event that there are export requirements with regard to the goods, obtain all the required documents or certificates to satisfy customs requirements.

Conversely, the buyer has obligations too. The buyer acquires an insurable interest in the goods as soon as the risk for the loss, destruction and damage in respect of such goods is transferred to him upon delivery. Even though such buyer may not be the owner of these goods as yet, he has an insurable interest in them because he stands to gain when he receives them in good condition; and if they are lost, damaged or destroyed before he receives them, then he will be prejudiced in that he will have to use up his resources to find other goods to replace them. The buyer’s obligations are to:

i) Pay for the goods;

ii) Notify the seller of the time and location of the delivery, and also name the ship or carrier to transport the goods;

iii) Pay any costs associated with the importation of the goods;

iv) Bear the risk in the goods from the moment they are on board;

v) If there are any import requirements in the buyers country, acquire those documents, licences or authorisations; and

vi) Acquire insurance for the goods from the time they are loaded onto the vessel.

Despite the defined duties of the parties in the FOB contract, their obligations are not strict or unchallengeable. The FOB contract is a very flexible contract which allows the parties to vary its terms and obligations;194 for example, the buyer may agree to assist the seller in delivering the goods over the ship’s rail, or the seller may arrange for the insurance of the goods on behalf of the buyer. Chuah states that it is this

element of flexibility that makes the FOB contract more user-friendly and thus popular.\textsuperscript{195}

Depending on the intentions of the parties, the FOB contract may be categorised as being "classic", "with additional services" or "simple". In all three types the buyer is the one who has ultimately to bear the costs of the insurance. The three varieties of FOB contracts were identified in \textit{Pyrene v Scindia}\textsuperscript{196} as:

i) The seller concludes the contract of carriage with the shipper, but the purchaser nominates the vessel (classic).

ii) The seller concludes the contract of carriage with the shipper and also nominates the vessel (with additional duties).

iii) The buyer concludes the contract of carriage with the shipper and also nominates the vessel (simple).

The "classic" FOB contract is the one in which the buyer has to nominate the vessel that will carry the goods and he has also to acquire insurance for them.\textsuperscript{197} The seller, in turn, has to pack the goods and load them onto the designated vessel.\textsuperscript{198} The seller also has to enter into a contract of carriage with the shipper or carrier on behalf of the buyer. When the seller receives the bill of lading, he transfers it to the buyer.\textsuperscript{199}

The FOB contract "with additional services" relieves the buyer from many responsibilities while burdening the seller with more of them. The additional services usually require the seller to procure the insurance and also nominate the vessel on behalf of the buyer.\textsuperscript{200} This is in addition to the seller's classic responsibilities of having to pack the goods, load them onto the ship and enter into a contract of carriage with the carrier or shipper on behalf of the buyer. As in the classic FOB

\textsuperscript{195} Chuah \textit{Law of International Trade} 97.
\textsuperscript{196} Queen's Bench Division [1954] 2 QB 198.
\textsuperscript{197} \textit{Wimble & Sons v Rosenberg & Sons} 1913 3 KB 743.
\textsuperscript{198} \textit{Commissioner for the South African Revenue Service v Trend Finance (Pty) 2007 (6) SA 117} (SCA).
\textsuperscript{199} \textit{Golden Meats and Seafood Supplies CC v Best Seafood Import CC and Another} 2011 (2) SA 491 (KZD).
\textsuperscript{200} \textit{EBN Trading (Pty) Ltd v Commissioner for Customs and Excise and Another} [2001] 3 All SA 117 (A).
agreement, the seller has to transfer the bill of lading to the buyer.\textsuperscript{201} In this instance, the seller may be allowed to charge commission for all the additional services he provides.\textsuperscript{202}

In the "simple" FOB contract, the buyer enters into a carriage contract through his agent, usually a freight forwarder and also nominates the vessel that will be used to ship the goods. The seller then only has to make sure the goods reach the vessel and are safely loaded thereon.\textsuperscript{203} This type of FOB contract seems to be the least convenient because the seller is the party who conducts his business at the location where the goods will be dispatched and is therefore in a better position to arrange the logistics of selecting the vessel and procuring insurance.

In a situation where the seller has to arrange the carriage contract and the buyer is unaware of some of the circumstances such as the fact that he (the buyer) should procure insurance for such goods, then the seller has to inform such buyer to enable him (the buyer) to insure the goods. If the seller fails to do so, then he will bear the risk of the goods should they be damaged, destroyed or lost during the voyage.\textsuperscript{204} The rationale for this clause is that since the buyer bears the risk for the goods from the time they cross the ship’s rail, then he is entitled to know when such risk is transferred to him.

The flexibility of the FOB contract makes it possible for risk to transfer from one party to another at various stages. The party who bears the risk at any time is the party who has the insurable interest in the goods and therefore may claim from the insurer if any loss, damage or destruction should come upon the goods. In case of the FOB contract with additional terms, if the seller acts as an agent of the buyer by procuring insurance and nominating the ship, this does not mean that such seller will retain any of the risk when the goods pass the ship’s rail because he would not be acting in his own capacity.

\textsuperscript{201} Murray, Holloway and Timson-Hunt \textit{Schmitthoff's Export Trade The Law and Practice of International Trade} 20.
\textsuperscript{202} Murray, Holloway and Timson-Hunt \textit{Schmitthoff's Export Trade The Law and Practice of International Trade} 23.
\textsuperscript{203} Neels 2006 \textit{SA Mercantile Law Journal} 68.
\textsuperscript{204} \textit{Sale of Goods Act} 1979 s 32(3).
3.4 Ex works

An EXW contract requires the seller to fulfil his obligation to deliver the goods by making them available for the buyer on the former's premises. Once the goods are placed at the buyer's disposal in the seller's shop or factory, it then becomes the buyer's responsibility to collect the goods, bear the risk of loss, damage or destruction and pay for all the transportation costs from such venue to the place of final destination of the goods. Chuah suggests that this type of feature may imply that the EXW contract is more akin to domestic sales rather than international ones because the point of delivery is at the seller's premises. If Chuah's suggestion is held to be true, then the EXW contract will not qualify as an international sales contract according to the Unfair Contract Terms Act of 1977. According to section 26(4) of the Unfair Contract Terms Act, an agreement has to meet any of the following requirements in order for it to qualify as an international supply contract:

(a) The goods in question are, at the time of the conclusion of the contract, in the course of carriage, or will be carried, from the territory of one State to the territory of another; or
(b) The acts constituting an offer and an acceptance have been done in territories of different States; or
(c) The contract provides for the goods to be delivered to the territory of a State other than that within whose territory those acts were done.

The probability that an EXW contract may not be considered to be an international sales contract is great because, for the purposes of the Act, the contract must have been made with the intention of taking the goods outside the country of sale. It is not enough that the seller was aware of this intention, the contract must, in fact,

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205 Also known as 'ex factory', 'ex warehouse' or 'ex store'.
206 Hereinafter EXW.
207 The terms 'ex factory, ex warehouse or ex store (see footnote 162 above) are used synonymously and infer that the delivery has to be made from premises that are on land and not, for example, a lighter which is a floating vessel used to store goods on the sea. The reason for this is the fact that when goods are delivered from a floating premise, they represent a marine risk, whereas if the goods are delivered from a premise on land, then such goods represent a land risk (Murray, Holloway and Timson-Hunt Schmitthoff's Export Trade The Law and Practice of International Trade 11).
208 Hare Shipping Law & Admiralty Jurisdiction in South Africa 450. From this statement it is quite clear why the buyer will have an insurable interest, even though he is not yet the owner of the goods.
209 Chuah Law of International Trade 92.
objectively reflect that.\textsuperscript{210} Either way, whether an EXW contract is considered local or international, this would not materially affect the determination of which party has an insurable interest at the time of loss because, essentially, risk is always passed as soon as the goods have been placed at the disposal of the buyer on the agreed premises and date.\textsuperscript{211}

The duties of the parties under the EXW contract are clear-cut. The seller has the duty to:

i) Provide the goods, pack them and issue an invoice for them;
ii) Place the goods at the disposal of the buyer at such seller’s premises of business, on an agreed date;\textsuperscript{212}
iii) Bear the risk of any loss, damage or destruction which may fall upon the goods until the time that they have been placed at the buyer’s disposal;
iv) Give the buyer notice of when the goods have become available to the buyer; and
v) Assist the buyer (at such buyer’s request) in getting any documents that are issued in the seller’s country which the buyer will need for the purposes of exporting the goods.

In the above case the seller has an insurable interest in the goods until the risk of their loss, destruction and damage is passed on to the buyer at the time that such goods are placed at such buyer’s disposal. Such insurable interest is brought about by the indemnity element which obliges the seller to put his hand into his pocket and compensate the buyer for any loss or damage to the goods that may occur before the risk is passed to the buyer. Ownership does not necessarily play a role because even if in the EXW contract risk and ownership may pass simultaneously, the party who had an insurable interest at the time of loss and, thus, the party who will be able to claim from the insurance policy, will be the party who bore the risk of loss, destruction or damage to the goods at the time that such loss, destruction or damage in respect of the goods occurred.

\textsuperscript{210} Ramberg 2011 *ICC International Chamber of Commerce* 86–88.
\textsuperscript{212} The *Vienna Convention*, art 31(c) confirms that placing the goods at the disposal of the buyer, on the seller’s premises, is considered effective “delivery”, as required by art 30.
The buyer has the duty to:

i) Pay the purchase price;

ii) Take delivery of the goods at the time when they are placed at his disposal, at which moment the risk of loss or damage to the goods will be transferred to him;\(^{213}\)

iii) Pay all the costs that accrue from the time he takes delivery, including costs of not taking such delivery, tax, customs duty and insurance; and

iv) Provide the seller with proof that he has taken delivery by means of an invoice or other electronic document.

Ramberg states that these duties of the parties are also not as static as they may seem.\(^ {214}\) He goes on to say that the parties to an EXW contract may specify the terms of the contract by, for example, adding the word "loaded" after the word "ex works". In this case it would mean that the seller has to deliver the goods by loading them onto the purchaser's collecting vehicle. Although this may denote some form of flexibility, it does raise questions such as: Who has an insurable interest in the goods at the time that the goods are being carried from the warehouse to the collecting vehicle? Is it the buyer because he has to deliver the goods in the condition specified in the contract (without any damage)? If so, should the seller continue to bear the risk if the buyer's vehicle arrives late? Or is it the seller because he seeks to take delivery of the goods that are in good condition? This would therefore mean that the parties would have to agree on each and every possibility that may arise. It is suggested that the parties may in such instances add terms such as "loaded at the buyer's risk" in order to cover all the grey areas.

If such terms have not been added to cover the grey areas contemplated above where the goods are damaged during loading onto the buyer's vehicle by the seller, then it is suggested that the risk should be borne by such buyer because it appears as though in loading the goods on behalf of the buyer, the seller does not act in his capacity as a seller but acts as the buyer's agent and thus, all the risk is vicariously

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\(^{213}\) The Vienna Convention, art 53 affirms that the buyer should take delivery and pay the purchase price.

borne by the buyer. In the hypothetical situation where the buyer’s vehicle arrives late, it is suggested that the risk bearer should be determined according to the merits of each case. For example, if such goods are perishable and, thus, time is of the essence in the contract, then the risk should be borne by the buyer because the risk was transferred to him at the time that such goods were placed at his disposal and he failed to execute his obligation of taking delivery on time. However, if such goods are destroyed or damaged by the seller’s intentional or negligent act or omission, then it is suggested that such seller should be the bearer of the risk and will therefore have an insurable interest in the goods because he will have to compensate the buyer for such loss, damage or destruction he caused in respect of the goods.

Now that these three contracts have been examined and all the possibilities of risk attachment and risk transfer according to who has an insurable interest have been considered, the closing remarks, summary and recommendations will be looked into.
Chapter 4: Summary, recommendations and conclusion

The aim of this research has been to investigate the insurable interest of the buyer and the seller in terms of certain specific contracts in the import and export business. In order to do this, it was necessary to investigate the *essentialia* of insurable interest in detail. Although there are voices who advocate that insurable interest should not be viewed as an essential element for the insurance contract, and that the intention to indemnify is the distinctive element and therefore that the insurable interest has become obsolete, it is also true that South African law still recognises an insurable interest as an *essentialium* and therefore it will continue to be treated as such until the Supreme Court of Appeal repeals it.\(^{215}\) The nature of an insurable interest is such that a party to an insurance contract has an insurable interest if he stands to gain from the preservation of the object of insurance (whether or not he has a legal right to such object) or if he stands to suffer pecuniary loss from the destruction, loss or damage in respect of such object. A person also has an insurable interest in the object of insurance if he has the obligation to compensate another for loss, damage or destruction to the object because in such a case the compensator has to deduct such compensation from his own estate – his financial position deteriorates or is diminished.\(^{216}\)

In the preceding chapters it was found that during the life of an international sales contract (from the time it is concluded until the time the parties have each completed their respective duties), there is always a risk that the goods that are the objects of the contract may be damaged, lost or destroyed.\(^{217}\) This will inevitably lead to one party experiencing financial loss and therefore such party will have an insurable interest. The parties to the sales contract have to evaluate the different stages of the execution of the contract in order to determine which of them carries the risk and therefore has an insurable interest. Such party would then be able to insure and thus, hold the insurer liable for loss or damage to the cargo, freight or profits during the voyage.

\(^{215}\) See paragraph 2.2.1 above.
\(^{216}\) See paragraph 2.2.5 above.
\(^{217}\) See paragraph 1 above; Davies and Dickies *Shipping Law* 310.
Merchants can easily confuse the transfer of the risk with the transfer of ownership. Risk may be transferred by the specific terms of the contract between the parties even before ownership passes and the designated party carries the financial burden when the goods are lost or damaged during the specified periods. Ownership is the right to the title of the goods.\textsuperscript{218} For the purposes of determining which party had an insurable interest sufficient to procure insurance, the risk is of paramount importance, and not necessarily the ownership. This may seem a little confusing considering that sometimes the risk may pass before ownership passes to the buyer, for example, when the buyer does not take delivery at the agreed place and time.

The different types of contracts that are most popular in the business of importing and exporting goods by sea, namely the CIF, the FOB and the EXW contracts each has its own unique terms that assign different duties to the respective parties. For each of these contracts there are different points in the performance of the duties involved in which the risk is transferred from the seller to the buyer. The common element in these three contracts is that before delivery at a certain moment or specific stage, the seller is the one with an insurable interest in the goods and thus has to procure insurance for them. Upon delivery, at that specific place, incidence or time, the risk of loss or damage, together with the insurable interest, are inherited by the buyer.\textsuperscript{219} In this flow of events, the three cardinal points of relevance are (i) the seller’s warehouse, (ii) the vessel on which the goods will be shipped and (iii) the final destination (which may be the port of unloading or the buyer’s premises).

In Figure 4.1\textsuperscript{220} these three cardinal points are illustrated to show that under the CIF and FOB contracts, the risk transfers from the seller to the buyer upon loading of the goods and as soon as the goods have been delivered "over the ship’s rail".\textsuperscript{221} In contrast, under the EXW contract, risk is transferred on the premises of the seller, from where the seller takes delivery of them. The points where risk is transferred are also the points where the insurable interest is transferred along with it:

\textsuperscript{218} See paragraph 2.4 above (\textit{Air-Kel (Edms) Bpk h/a Merkel Motors v Bodenstein} 1980 (3) SA 917 (A) 922F).

\textsuperscript{219} See paragraph 1 above (\textit{Carr International Trade Law} 81).

\textsuperscript{220} Ramberg 2011 ICC International Chamber of Commerce 23.

\textsuperscript{221} See paragraphs 3.2 and 3.3 above (\textit{Sale of Goods Act} 1979 s 2(1)).
Despite the fact that the CIF, FOB and the EXW contracts all work systematically in such a way that the goods are completely covered at the three cardinal points, there are times when the person who procured the policy will not be entitled to be paid from the proceeds of the policy for any loss, damage or destruction to the goods. In such a case, the investigation into who had an insurable interest during the materialisation of the risk would serve to identify which party will bear the costs of the loss and not which party will be entitled to insurance cover. An example of such circumstance is when the loss or damage was caused by an excepted risk such as the inherent vice of the goods, inadequate packaging or delay. In such instances, the party who carries the risk in the case of exceptions (eg, inherent vice) cannot obtain protection from the insurer and has to finance the loss from his own pocket.

It is also possible for the insurable interest to transmit from the seller to the buyer prematurely. This can happen when the buyer makes it impossible for the seller to deliver the goods, for example, in the CIF and FOB contracts, when the buyer does not make the vessel available for the seller to upload the goods or when such buyer

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222 See paragraph 2.4 above. According to clause A9 of the CIF, the seller has the responsibility to diligently take care of all the preliminary stages prior to delivery, such as weighing, packing, measuring and counting.

223 See paragraph 2.4 above (Ramberg 2011 ICC International Chamber of Commerce 35).
fails to take delivery of the goods. In the case of EXW contracts, premature transmission may occur if such buyer does not show up to collect the goods at the given place and time.\textsuperscript{224} In such circumstances, it is recommended that the seller’s risk should be considered to be present only up to the point when the supervening impossibility is stumbled upon. Thereafter, the buyer should then be considered the liable party.

In conclusion, international trade law may be described as that branch of law that deals with commercial transactions between parties from different nations.\textsuperscript{225} It is unlikely that there is a single country in the world that is completely self-sufficient. All nations are inter-dependent and many of them actually specialise in producing certain goods and services for other nations, while purchasing other goods and services from the countries that produce them. Therefore, international trade law may, in lay terms, be described as the exchange of goods between different countries, an activity commonly referred to as import and export.

Few of us find it rational to grow all our own food, produce all our own clothes, build our own shelter, do our own plumbing, perform our own medical services, act as our own lawyers, do our own dental work, etc . . . It is irrational for us to try to grow our own pineapples if we can import them from Honduras more cheaply. In turn, it makes no sense for Honduras to try to modernize its own telephone system or for China to build its own hydro electric generators if we can supply them with superior equipment at lower cost.\textsuperscript{226}

By its very nature, international trade law is wide and all-encompassing, taking into its length and breadth international, national and municipal laws, as well as both public and private law. Although each case is to be judged on its own merits, it is common practice in import and export law for the object of such contracts always to be protected by the party who has an insurable interest over such object.

Therefore, the research question “when does each party to a contract of import and export of goods by sea have an insurable interest in the subject matter of the contract sufficient to hold the insurer liable for loss or damage to the cargo, freight, or

\textsuperscript{224} See paragraph 3.4 above (\textit{Van der Merwe v Viljoen} 1953 (1) SA 60 (A)).

\textsuperscript{225} Van Niekerk and Schulze \textit{The South African Law of International Trade} 2.

\textsuperscript{226} Trebilcock \textit{The Case for Free Trade} 17–28.
profits during the voyage", which was posed in the first chapter, has been answered as it has been found that an insurable interest can always be determined by establishing by which type of contract the parties are bound, whether CIF, FOB, EXW or any other, and then analysing which of the parties bore the risk at the time that the loss, destruction or damage in respect of the goods occurred.
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